



Australian  
Competition &  
Consumer  
Commission

## **Co-operative Bulk Handling Limited**

### **Port Terminal Services Access Undertaking**

**Decision to Accept**

**29 September 2009**



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## Glossary

<b>ABB</b>	<b>ABB Grain Ltd</b>
ACCC	Australian Competition and Consumer Commission
AGEA	Australian Grain Exporters Association
AWE	accredited wheat exporters
BHA	<i>Bulk Handling Act 1967 (WA)</i>
BHC	bulk handling company
CBH	Cooperative Bulk Handling Ltd
Draft Decision	ACCC Draft Decision (6 August 2009)
ETA	estimated time of arrival
GrainCorp	GrainCorp Operations Ltd
GTA	Grain Trade Australia
Issues Paper	ACCC Issues Paper (29 April 2009)
MGC	Metro Grain Centre (CBH)
mt	million tonnes
NCC	National Competition Council
PGA	Pastoralists and Graziers Association of WA (Inc)
PTR	Port Terminal Rules
TPA	<i>Trade Practices Act 1974 (Cth)</i>
WEA	Wheat Exports Australia
WEMA	<i>Wheat Export Marketing Act</i>



	2008 (Cth)
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# 1 Executive summary

On 29 September 2009 the ACCC made a decision pursuant to section 44ZZA(3) of Division 6 of Part IIIA of the *Trade Practices Act 1974* (Cth) (**TPA**) to accept an undertaking lodged by Cooperative Bulk Handling Ltd (**CBH**) on 24 September 2009 (**September Undertaking**). The reasons for the ACCC's decision to accept CBH's September Undertaking are set out in this document.

Acceptance of CBH's September Undertaking follows extensive consultation by the ACCC on an earlier undertaking lodged by CBH with the ACCC (on 14 April 2009). This undertaking (referred to in this document as the **April Undertaking**) was withdrawn by CBH at the same time as its September Undertaking was lodged. This re-lodgement by CBH followed publication by the ACCC on 23 September of the second of two draft decisions proposing to reject CBH's April Undertaking in its proposed form. The second draft decision (referred to in this document as the **Further Draft Decision**) set out the ACCC's final views on the particular type of wheat port access undertakings that the ACCC would be likely to accept pursuant to section 44ZZA(3) of the TPA. These recommendations were comprehensive and provided CBH with detailed feedback about revisions that would be necessary in order for a revised undertaking to be accepted by the ACCC.

After publication of the ACCC's Further Draft Decision on 23 September 2009, CBH moved quickly to lodge its revised undertaking with the ACCC. Given that CBH is obliged to have access arrangements in place by 1 October 2009 in order for its trading operation to retain accreditation to export bulk wheat under the WEMA, the ACCC has assessed CBH's September Undertaking as quickly as it has been able to.

This has been possible because the ACCC's task since receiving CBH's September Undertaking has been a relatively straightforward one. That is, the ACCC has assessed the September Undertaking on the basis of whether it has adopted all of the recommendations set out in the ACCC's Further Draft Decision. That is, it was not necessary for the ACCC to recommence a full analysis of the September Undertaking, given that the substantive matters in relation to CBH's wheat port access undertaking have already been assessed by the ACCC throughout the process outlined above. In this regard, the ACCC relied on its views set out the Further Draft Decision.

The ACCC is of the view, for the reasons set out in this document, that CBH's September Undertaking does indeed adopt all of the recommendations set out in the ACCC's Further Draft Decision. Therefore, the ACCC is of the view that it is appropriate to accept the September Undertaking having regard to the matters in section 44ZZA(3) of the TPA.

## Features of the September Undertaking

CBH's September Undertaking, a copy of which is attached at **Annexure A**, 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;

The obligations in the September Undertaking are not highly prescriptive. They will allow CBH the flexibility to operate its supply chain efficiently in an environment which has transitioned from a single desk to 23 accredited wheat exporters within twelve months. But they will also ensure that other wheat exporters have fair access to the grain ports to export their own wheat.

The key features of the September Undertaking are:

- Robust prohibitions against CBH anti-competitively discriminating in favour of its affiliated wheat trading business or hindering access to its port terminal services, with the ability for the ACCC to order independent audits of CBH's compliance with such anti-discrimination obligations;
- Clear and transparent port loading protocols that CBH is obliged to follow in managing demand for the port terminal services, for example in making decisions about the allocation of shipping slots;
- Obligations on CBH to negotiate in good faith with eligible wheat exporters around price and non-price offers of access to port terminal services;
- If negotiation fails, the ability of wheat exporters to seek mediation or binding arbitration on price and non-price terms of access to CBH's port terminal services;
- For those wheat exporters who wish to take a standard offer, a set of clear and certain minimum non-price terms and conditions of access to port terminal services, and an obligation on CBH to publish its standard prices for port terminal services at least one month prior to commencement of each new wheat exporting season; and
- Obligations on CBH to publish certain port terminal information to provide greater transparency over its operations.

### **Enforcement of the undertaking**

The power of the ACCC to enforce the various obligations in the undertaking is set out in section 44ZZJ of the TPA. This provision gives the ACCC the ability, if it thinks CBH has breached any of the terms of its undertaking, to apply to the Federal Court for an order:

- directing CBH to comply with that term of the undertaking;
- directing CBH to compensate any other person who has suffered loss or damage as a result of the breach; or
- any other order that the Court thinks appropriate.

The inclusion in the Undertaking of the audit provision is to assist the ACCC in monitoring whether there has been any anti-competitive discriminatory conduct in the provision of port terminal services (including in relation to decisions about the allocation of shipping slots) and to assist it in deciding whether to institute proceedings under section 44ZZJ for any potential breaches.

Wheat exporters themselves will have recourse to binding arbitration in relation to any disputes relating to the terms and conditions upon which port terminal services will be provided. Wheat exporters will also have recourse to dispute resolution mechanisms under their contracts with CBH once contracts have been executed and private contractual rights to enforce those contracts.

The port terminal rules will include a robust dispute resolution process requiring the port operator to resolve disputes swiftly and issue reasons for decisions in certain circumstances. While a number of parties called for an independent dispute resolution mechanism to be included in the port terminal rules, the ACCC had some concerns that such a requirement may inappropriately affect the legitimate business interests of CBH in being able to run its port terminal facilities with a sufficient degree of flexibility so as to maintain an efficient supply chain and may also impose significant costs on both CBH and access seekers. It is important to note, however, that wheat exporters will have private contractual rights to enforce breaches of the port loading protocols given that one of the standard terms to be offered to wheat exporters obliges CBH to comply with the port loading protocols. Further, the ACCC will monitor any complaints it receives alleging breaches of the port terminal rules and will consider whether independent arbitration of disputes under the port terminal rules could be appropriate in any future undertaking submitted by CBH.

### **Term of the undertaking**

In light of the transitional state of the industry, the September Undertaking has been approved for a duration of two years – commencing on 1 October 2009 and expiring on 30 September 2011. The relatively short duration of the undertaking will ensure that future regulatory arrangements can adapt to any changes to the industry environment.

### **Scope of the undertaking**

The September Undertaking does not extend to ‘up-country’ supply chains given that the WEMA makes it clear that the current process is intended to provide for access to port terminal services only. The ACCC notes that the Government has indicated that it will be monitoring the situation up-country. The reasons for the ACCC’s decision on this issue are elaborated below.

### **Relevance of the context in which the proposed Undertaking has been assessed**

The September Undertaking has been assessed having regard to the matters specified under section 44ZZA(3) of the TPA, taking into account the wider context within which CBH has submitted the September Undertaking (which, as discussed in the Legislative Framework chapter, fall for consideration within the scope of the matters set out in section 44ZZA(3)).

In particular, the ACCC considers that following matters (amongst others) to be relevant to the assessment of the September Undertaking:

- the objective of Part IIIA of the TPA of promoting the economically efficient operation of, use of and investment in facilities by which port terminal services are provided – thereby promoting competition in the wheat export industry and the overall supply chain;
- the objectives of the ‘Access Test’ embodied in the WEMA, and in particular, the objective of ensuring that vertically integrated bulk handling companies provide fair and transparent access to their facilities to other accredited exporters;
- the transitional state of the wheat export industry, having moved from a single wheat exporter to 23 accredited wheat exporters in 12 months;
- the legitimate business interests of CBH in being able to run its port terminal facilities with a sufficient degree of flexibility and without unduly prescriptive regulation so as to maintain an efficient supply chain;
- the interests of access seekers such that CBH should provide access to port terminal services in a fair and non-discriminatory manner
  - noting also that the pricing principles in section 44ZZCA of the TPA provide that access price structures should not allow a vertically integrated 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;
- whether the September Undertaking provides for sufficient certainty and clarity in its terms, effect and operation so that access seekers are able to understand and enforce their rights;
- the risk and undesirability of imposing regulation that is not appropriate at a time when the industry is newly liberalised and in transition;
- CBH’s incentive to run its operations in a fair and transparent manner arising from the threat of potentially more prescriptive regulation in two years time (that is, in future access undertakings) if required; and
- the object of Part IIIA to provide a framework and guiding principles to encourage a consistent approach to access regulation in each industry.

It is noted that certain of the factors listed above are not the actual ‘matters’ listed under section 44ZZA(3) of the TPA,<sup>1</sup> but rather fall for consideration within the scope of the relevant matters under section 44ZZA(3).

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<sup>1</sup> Other than the first two matters, which the ACCC considers are relevant pursuant to section 44ZZA(3)(e) of the TPA.

In having regard to the objectives of the WEMA, the ACCC specifically acknowledges Parliament's recognition that the promotion of competition 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.

In having regard to the WEMA, the ACCC has not conducted a comprehensive market analysis in relation to each of the ports that will be subject to the September Undertaking to assess whether they should be subject to access regulation. Rather, the role of the ACCC in this context is to decide whether the September Undertaking proposed by CBH is appropriate. The ACCC considers that Parliament has expressed a clear intention to require port terminal operators to provide access undertakings to mitigate the potential for anti-competitive harm, and it is in that context that the ACCC must consider the appropriateness of those undertakings as provided.

The ACCC recognises that, as CBH has submitted, it is clear that the intention of the WEMA is that the September Undertaking should apply only to services offered at port.

In this regard, the ACCC notes that the Explanatory Memorandum to the WEMA dismissed calls to extend the access test to cover up-country services, stating that:

Up-country facilities do not display natural monopoly characteristics as they have low barriers to entry and there are already a number of competitors in the industry who provide up-country storage services.<sup>2</sup>

The Explanatory Memorandum goes on to note that an extension of the access arrangements to up-country storage facilities would 'impose an excessive regulatory burden'.<sup>3</sup> Further, the Second Reading Speech of the WEMA provides:

The Senate inquiry also identified concerns in relation to the potential for bulk-handling companies to restrict access to up-country storage facilities in a similar manner to concerns in relation to port facilities.

It is unclear from the evidence presented to the Senate inquiry whether the problem would necessarily arise, and if so, the extent of legislation that would be required to correct it.

If the highest level of regulation were to be imposed on the more than 500 up-country facilities, there is no doubt that this would create increased compliance costs which would almost certainly be directly passed back to growers.

The government will, therefore, continue to monitor the ability of exporters to access up-country storage facilities.

Let me say here, if any problems are identified then the government will take steps to remedy the situation including, if necessary, the development of a code of conduct.<sup>4</sup>

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<sup>2</sup> Explanatory Memorandum, *Wheat Export Marketing Bill 2008* (Cth), p. 13.

<sup>3</sup> Explanatory Memorandum, *Wheat Export Marketing Bill 2008* (Cth), p. 14.

Nevertheless, the ACCC is cognisant of the submissions made calling for the Undertaking to be extended to include services offered at CBH's up-country storage and handling facilities. Many of these submissions stated that it was artificial to draw a distinction between services offered at port and those offered up country.

However, the ACCC, in this process, has not formed any views on the competitiveness of the supply of up-country storage and handling services. As set out in the Legislative Framework chapter, the ACCC does not consider that its role in this process was to conduct a thorough assessment of the state of competition in the entire bulk wheat export supply chain.

It is the ACCC's view that, given the clear express intention of the WEMA, and having regard to the risk and undesirability of imposing regulation that is not appropriate at a time when the industry is newly liberalised and in transition, the ACCC considers that it is appropriate pursuant to section 44ZZA(3) of the TPA that the scope of the September Undertaking be limited to services at port. The ACCC notes that the question of whether the access test should be extended up-country is a question of policy for government and notes, as set out above, that the Federal Government has stated that it will monitor developments in the up-country stages of the grain supply chain.

The ACCC notes, however, that providing access at the port creates incentives for other parts of the supply chain to be as efficient as possible, as access to the port would facilitate dissatisfied customers taking the option of bypassing CBH's upcountry facilities.

### **General approach to pricing and other terms and conditions**

Given the circumstances in which CBH has submitted the September Undertaking, the ACCC is of the view that a prescriptive regulatory approach including ex ante price setting is not warranted at this time, and that a less prescriptive publish-negotiate-arbitrate approach is appropriate.

However, in order for the publish-negotiate-arbitrate framework to be appropriate, the ACCC is of the view that it needs to be underpinned by a robust set of mechanisms giving effect to the publication, negotiation and arbitration procedures. Clarity about the terms and conditions for access that are on offer by CBH is an important consideration in this respect. Further, given that CBH is vertically integrated, adequate non-discrimination obligations and appropriate transparency measures are also appropriate. The ACCC's notes that CBH's September Undertaking adopts this approach.

The ACCC is of the view that appropriate non-discrimination measures should prohibit CBH discriminating in favour of itself except to the extent that the cost of providing access to other operators is genuinely and verifiably higher, as per section 44ZZCA of the TPA. The ACCC notes that CBH's September Undertaking adopts this approach. As a transparency measure to support this, appropriate measures would require CBH to publish a single set of prices for port terminal services, which may

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<sup>4</sup> House of Representatives, *Votes and Proceedings, Hansard*, Thursday 29 May 2009, pp. 76–77.

include differentiated prices for different circumstances (i.e. for different processes for testing of grain depending on where it has been stored – but only where these processes are justifiable with regard to hygiene, quality or associated factors), provided those circumstances are transparently stated and the pricing differences are justified on the basis of different costs.

The ACCC is of the view that these underpinning measures will allow access seekers to commercially negotiate with CBH in a framework where both parties know that prices, terms and conditions may be subject to arbitration by the ACCC or a private arbitrator, applying the pricing principles in section 44ZZCA of the TPA and general non-discrimination requirements.

It is also relevant to note that CBH's September Undertaking is for a limited duration, and should the publish-negotiate-arbitrate framework prove not to be effective, the ACCC may adopt a more prescriptive method in any future access undertaking assessments.

The ACCC also notes the Port Terminal Rules, which are not terms of access but rather general procedures for operational management of the ports, including how capacity allocation/nomination of shipping slots occurs. The ACCC is of the view that it is in the legitimate business interests of CBH, and indeed in the interests of efficiency in the overall supply chain, that CBH has sufficient flexibility to run its day-to-day operations without unduly prescriptive oversight. The ACCC also notes that it is in the interests of the access seekers, and of competition in related markets, that these operations 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. It is therefore the ACCC's view that it is appropriate that any changes to the Port Terminal Rules occur with adequate notice and consultation – but not necessarily be subject to the variation procedures in section 44ZZA(7) of the TPA. The ACCC notes that should such processes prove unsatisfactory, the port terminal protocols may in future need to be the subject of more prescriptive processes.

In relation to ring-fencing, the ACCC notes that CBH is already subject to ring-fencing arrangements arising from the ACCC's decision not to revoke a 'notification' from CBH relating to a component of its Grain Express product in 2008. CBH's ring-fencing rules in its April Undertaking differed in some respects from the ring-fencing arrangements which form part of CBH's Grain Express exclusive dealing notification. For instance, the Grain Express ring-fencing policy provides for a more robust complaints handling/resolutions process than the process provided in its April Undertaking.

The ACCC is of the view that the ring-fencing rules in CBH's April Undertaking would not, in their current form, have served as an effective safeguard against anti-competitive discrimination in the provision of port terminal services.

However, ring-fencing is just one tool that can be used to protect against anti-competitive discrimination.

Given that CBH's September Undertaking contains robust non-discrimination and no hindering access clauses, fair and transparent port terminal protocols and an indicative



access agreement (as well as measures to deal with potential for information about port terminal services to be used to the advantage of CBH's wheat exporting division – such as the publication measures described in the Publication of Information chapter), then, in the circumstances, it is not necessary for CBH to include ring-fencing measures in its undertaking at this particular point in time.

In forming this view, the ACCC has taken into account the transitional state of the industry and the possibility that any ring-fencing measures that were implemented at this point in time may need to be revised in the medium term in accordance with any regulatory changes (either to extend or reduce the regulation to which CBH is subject). The ACCC considers that this would be an undesirable outcome in that it could impose unnecessary regulatory costs during a time of industry transition.

The ACCC has also taken into account the short duration of CBH's September Undertaking and will closely monitor the effectiveness of its undertaking in protecting against anti-competitive discrimination during its operation.

The ACCC 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.

It is important to note that the ACCC's approach taken to ring-fencing in assessing this particular access undertaking is not indicative of the approach to ring-fencing that the ACCC would be likely to take in relation to other regulated industries. The approach taken on this occasion reflects the factors outlined above, and in particular, that the industry is still transitioning from having a single desk responsible for the export of wheat in mid-2008 to the current situation of having 23 wheat exporters accredited to export wheat from Australia, and that the arrangements can be revisited in two years.

Finally, it is also important to note that the ACCC's approach to CBH's ring-fencing measures in this decision has no bearing on the need for CBH to continue compliance with the ring-fencing arrangements it agreed to adhere to in conjunction with the ACCC's decision not to revoke the 'notification' relating to a component of the Grain Express product.

CBH's agreement to comply with these ring-fencing measures formed an important part of the ACCC's decision not to revoke the notification. Accordingly, the ACCC does not accept CBH's position that ring-fencing measures provided to the ACCC in conjunction with the current access undertaking assessment can apply in substitution for those arrangements referred to in CBH's Grain Express notification to the ACCC.

The ACCC therefore notes that, overall, its views and recommendations about the appropriateness of the measures in the September Undertaking are less prescriptive than they might otherwise be in relation to longer term undertakings in other industries.

## **Decision**

The ACCC's view is that, having regard to the matters listed in section 44ZZA(3) of the TPA, it is appropriate to accept the September Undertaking.

As a result, the ACCC's decision is to accept the September Undertaking.

### **Structure of the reasons in this decision**

In order to comprehensively set out the reasons for the ACCC's decision to accept the September Undertaking it has been necessary to set out in this document, in considerable detail:

- the substance of CBH's April Undertaking;
- submissions by CBH and interested parties on CBH's April Undertakings;
- the ACCC's views on CBH's April Undertaking which were set out in the ACCC's Draft and Further Draft Decisions; and
- the ACCC's views on CBH's September Undertaking (ie. whether it addresses all of the concerns raised by the ACCC in relation to CBH's April Undertaking).

For the assistance of readers who have recently reviewed the ACCC's Further Draft Decision, the key differences between the reasons in this decision and the reasons in the Further Draft Decision are set out in this Executive Summary chapter, the Procedural Overview chapter and the summaries of each other chapter of this decision.

This assessment has been broken down into nine chapters – each of which assess a particular part of the undertaking. The chapters are:

- Background, Objectives, Structure;
- Term and variation;
- Scope;
- Publish, negotiate, arbitrate;
- Indicative Access Agreement;
- Non-discrimination;
- Ring-fencing (note that while CBH's September Undertaking does not include ring-fencing measures its April Undertaking did include a number of ring-fencing measures – accordingly the ACCC's views on this issue are relevant to its overall assessment of CBH's September Undertaking);
- Capacity management; and
- Publication of Information.

## 2 Procedural overview

Publication of this decision follows:

- Lodgement of CBH's April Undertaking for consideration under Division 6 of Part IIIA of the TPA and consultation on that Undertaking (including stakeholder meetings with wheat farmers, exporters and industry bodies around the country);
- Release of a Draft Decision by the ACCC on 6 August 2009 not to accept the April Undertaking in its proposed form and consultation on the ACCC's views set out in its Draft Decision;
- Consultation on a proposed indicative access agreement and proposed port terminal rules submitted by CBH to the ACCC;
- Release of a Further Draft Decision by the ACCC on 23 September 2009 setting out the ACCC's final views on the type of wheat port access undertakings that would be likely to be accepted by the ACCC pursuant to section 44ZZA(3) of the TPA;
- Withdrawal of CBH's April Undertaking on 24 September 2009 and lodgement on the same day of its September Undertaking; and
- Assessment by the ACCC of whether CBH's September Undertaking adopts all of the recommendations set out in the ACCC's Further Draft Decision.

### 2.1 CBH's proposed undertakings

Under Division 6 of Part IIIA of the TPA, the Australian Competition and Consumer Commission (ACCC) may accept an undertaking from a person who is, or expects to be, the provider of a service, in connection with the provision of access to that service.

The ACCC has received two proposed undertakings from CBH in 2009 in relation to access to port terminal services for consideration under Division 6 of Part IIIA. Both undertakings have related to the provision of access to services for the export of bulk wheat at grain terminals operated by CBH in Western Australia.

Both undertakings were submitted in accordance with legislative requirements under the WEMA, further details of which are set out below in the Legislative Framework chapter. Two other parties, Ausbulk Limited (**Ausbulk**) and GrainCorp Operations Ltd (**GrainCorp**), have also submitted access undertakings to the ACCC and the ACCC has also published Final Decisions in respect of those applications.

The first undertaking (referred to in this document as the **April Undertaking**) was submitted by CBH on 14 April 2009.

The April Undertaking provided for, amongst other matters:

- a publish/negotiate/arbitrate model in relation to price and non-price terms (rather than including prices or a detailed pricing methodology in the undertaking);
- obligations regarding non-discrimination in the provision of port terminal services;
- obligations regarding port terminal capacity management, including the shipping stem, and
- ring-fencing obligations setting out restrictions on information flows.

It is important to note that CBH's April Undertaking was only intended to apply to those customers who wish to acquire port terminal services on a stand alone basis - i.e. it was not intended to apply to those customers who acquire port terminal services as part of a bundled service. This is discussed in the Scope chapter of this decision.

The April Undertaking was withdrawn by CBH on 24 September 2009 and a new undertaking (the **September Undertaking**) was re-lodged on the same day.

The key features of the September Undertaking are:

- Robust prohibitions against CBH anti-competitively discriminating in favour of its affiliated wheat trading business or hindering access to its port terminal services; and the ability for the ACCC to order independent audits of CBH's compliance with the anti-discrimination obligations;
- Clear and transparent port loading protocols that CBH's is obliged to follow in managing demand for the port terminal services, for example in making decisions about the allocation of shipping slots;
- Obligations on CBH to negotiate in good faith with eligible wheat exporters around price and non-price offers of access to port terminal services;
- If negotiation fails, the ability of wheat exporters to seek mediation or binding arbitration on price and non-price terms of access to CBH's port terminal services;
- For those wheat exporters who wish to take a standard offer, a set of clear and certain minimum non-price terms and conditions of access to port terminal services, and an obligation on CBH to publish its standard prices for port terminal services at least one month prior to commencement of each new wheat exporting season; and
- Obligations on CBH to publish certain port terminal information to provide greater transparency over its operations.

### **2.1.1 Submissions from CBH**

During the current process, in addition to the initial supporting submission provided by CBH on 14 April 2009 in conjunction with its then proposed Undertaking, the ACCC sought and received further information from CBH as follows:

- On 19 May 2009 CBH provided the ACCC with its proposed 2009/10 shipping capacity allocation plan.
- On 2 June 2009 the ACCC requested further information from CBH in relation to various matters raised in CBH's initial supporting submission, and in relation to various clauses of the proposed Undertaking.
- On 29 June 2009 CBH provided a response to the ACCC's information request, the ACCC's Issues Paper and third party submissions made during the public consultation.
- On 31 July 2009 CBH provided a revised version of its Port Terminal Rules.
- On 4 August 2009 CBH provided a revised version of its 2009–10 Port Terminal Services Agreement.
- On 20, 24, 25, 27 and 31 August and on 1 September 2009 CBH provided additional submissions in response to issues raised in the ACCC's Draft Decision.
- On 24 September 2009 CBH withdrew its April Undertaking submitted the September Undertaking.

## **2.2 Public consultation process to date**

The TPA provides that the ACCC may invite public submissions on an access undertaking application.<sup>5</sup>

The ACCC published an Issues Paper on 29 April 2009 inviting submissions on the April Undertaking, as well as on the proposed ABB and GrainCorp Undertakings. The ACCC directly advised approximately 80 stakeholders, including accredited wheat exporters, grain growers, farming organisations and state regulatory bodies of the public consultation process.

As part of the public consultation process the ACCC also held meetings in several capital cities during May 2009 to allow interested parties the opportunity to discuss relevant matters with the ACCC in person. Meetings were held as follows:

- 7 & 8 May 2009: Brisbane
- 11 & 12 May 2009: Sydney
- 18 & 19 May 2009: Adelaide

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<sup>5</sup> *Trade Practices Act 1974* (Cth) s 44ZZBD(1).

- 25 & 26 May 2009: Perth
- 22 & 28 May 2009: Melbourne

The ACCC published a Draft Decision on 6 August 2009 not to accept the April Undertaking in its proposed form and consulted on the ACCC's views set out in its Draft Decision. At the same time the ACCC also consulted on a proposed indicative access agreement and proposed port terminal rules submitted by CBH to the ACCC.

The last phase of consultation was carried out because one of the ACCC's views set out in the ACCC's Draft Decision was that CBH should include an indicative access agreement and port terminal rules as part of its undertaking.<sup>6</sup>

Upon request by the ACCC, CBH provided a draft copy of its proposed 2009/10 Season Port Terminal Services Agreement on 4 August 2009. This document was published on the ACCC's website. This document was not originally provided to the ACCC as part of CBH's April 14 Undertaking. The ACCC annexed this document to its Draft Decision and sought submissions on whether it would form an appropriate basis for an indicative access agreement. This document is therefore referred to as the "August Indicative Access Agreement".

The ACCC published a Further Draft Decision on 23 September 2009 taking into account submissions received on the Draft Decision which confirmed the position set out in the Draft Decision that it would not accept the April Undertaking in its proposed form. The Further Draft Decision set out the ACCC's final views on the type of wheat port access arrangements that would be likely to be accepted by the ACCC pursuant to section 44ZZA(3) of the TPA. It also set out:

- the ACCC's final views on whether CBH's proposed indicative access agreement circulated to interested parties for comment in August 2009 would likely form an appropriate Indicative Access Agreement if annexed to a revised undertaking submitted by CBH; and
- the ACCC's final views on whether CBH's proposed PTRs circulated to interested parties for comment in August 2009 would likely form appropriate PTRs if annexed to a revised undertaking submitted by CBH.

On 24 September 2009 CBH withdrew its April Undertaking and lodged its September Undertaking.

Publication of this decision on CBH's September Undertaking follows assessment by the ACCC of whether the September Undertaking adopts all of the recommendations set out in the ACCC's Further Draft Decision.

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<sup>6</sup> It is noted that CBH did include PTRs alongside its April Undertaking, but that these rules were 'outdated' by the release of the ACCC's Draft Decision on CBH's proposed Undertaking. It is noted that CBH has revised its PTRs and the ACCC commenced consultation on the revised PTRs (received on 31 July 2009) on 6 August 2009.

## **Submissions received**

The ACCC received public submissions from the following parties in relation to CBH's April Undertaking:

### **Australian Grain Exporters Association (AGEA) – submissions received 11, 18, 29 May and 3 September 2009**

AGEA is a representative body of exporters of Australian grain, formed in 1980 to promote their philosophy that competition, represented by open and contestable markets, is the most effective and efficient means of delivering the maximum benefits to the grains industry, and the community as a whole.

Members of the AGEA are active participants in both domestic and export grain markets, with a particular focus on providing efficient access to international markets. Members of AGEA are Bunge Global Markets Australia Pty Ltd, Cargill Australia Limited, Louis Dreyfus Australia Pty Ltd, Glencore Grain Pty Ltd, Noble Grain Australia Pty Ltd and AC Toepfer International (Australia) Pty Ltd.<sup>7</sup>

### **Albany Port Authority – submission received 19 May 2009**

The Albany Port Authority is a WA owned port authority, established under the *Port Authorities Act 1999* (WA).

### **Department of Agriculture and Food, WA – submission received 25 May 2009**

The Department is part of the Western Australian government and is responsible for matters involving agriculture and food.

### **SGS Agricultural Services (SGS) – submission received 27 May and 7 September 2009**

SGS provides inspection, testing, certification and verification services to ensure that products, services and systems across a range of industries meet quality, safety and performance standards and specifications.<sup>8</sup>

### **Intertek – submission received 29 May 2009**

Intertek is a commodities and products testing company, carrying on a wide range of testing, inspection and certification services across a number of different industries.<sup>9</sup>

### **Riverina (Australia) Pty Ltd – submission received 29 May 2009**

Riverina is an accredited wheat exporter under the WEMA.

### **Western Australian Farmers Federation (Inc) (WAFarmers) – submission received 29 May 2009**

WAFarmers is the Western Australia's largest rural lobby group. WAFarmers represents its more than 4,000 members in relation to issues affecting wool, meat, dairy, grains, horticulture, pastoral and bees.<sup>10</sup>

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<sup>7</sup> <http://www.agea.com.au/default.asp?ID=223>.

<sup>8</sup> [http://www.au.sgs.com/agriculture\\_au?lobId=17163](http://www.au.sgs.com/agriculture_au?lobId=17163).

<sup>9</sup> Intertek, *Submission in relation to proposed access undertakings*, 29 May 2009, p. 6.

**Pastoralists and Graziers Association of WA (Inc) (PGA) – submission received 2 June and 3 September 2009**

The PGA is a non-profit industry organisation established in 1907 that represents primary producers in the pastoral and agricultural regions of Western Australia. The PGA states that it represents around 1200 progressive grain growers who believe in the benefits of competition and the reduction of government regulation within the industry.<sup>11</sup>

**Grain Industry Association of Victoria (GIAV) – submission received 4 June 2009**

The GIAV is the representative body for key participants in the grain industry supply chain in Victoria. Its membership includes grain marketers and trades, grain brokers, end-user processors such as millers, maltsters and stockfeed manufacturers, as well as bulk handling companies, seed specialists, grain transport operators and container packers.<sup>12</sup>

**New South Wales Farmers Association – 10 June 2009**

The NSW Farmers Association represents the interests of the majority of commercial farming operations throughout New South Wales. It states that through its commercial, policy and apolitical lobbying activities it provides a link between farmers, government and the general public.<sup>13</sup>

**Grain Trade Australia (GTA) – submission received 25 August 2009**

GTA, through its Committee system, develop and publish Trade Rules for grain contracts. In conjunction with other industry organisations, GTA develop and publish grain standards yearly.

GTA also provides an arbitration service for the resolution of contractual disputes, based on the GTA Trade Rules and the Dispute Resolution Rules.

**Port of Portland (POPL) – submission received 3 September 2009**

POPL owns the Port of Portland (a regional port in South-West Victoria), which is located between the capital city ports of Melbourne and Adelaide.

**Victorian Farmers Federation (VFF) – submission received 3 September 2009**

The VFF is a federation made up of seven commodity groups representing Victorian farmers in the dairy, grains, livestock, horticulture, chicken meat, eggs and pig industries.<sup>14</sup>

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<sup>10</sup> <http://www.waff.org.au/>

<sup>11</sup> Pastoralists and Graziers Association, *Submission in relation to proposed CBH access undertaking*, 29 May 2009, para 1.1, p. 1.

<sup>12</sup> Grain Industry Association of Victoria, *Submission in relation to proposed access undertakings*, 1 June 2009, p. 1.

<sup>13</sup> NSW Farmers Association, *Submission in relation to proposed access undertakings*, June 2009, p. 3.

<sup>14</sup> [http://www.vff.org.au/main/index.php?option=com\\_content&task=view&id=22&Itemid=68](http://www.vff.org.au/main/index.php?option=com_content&task=view&id=22&Itemid=68).



## **The Grain and Feed Trade Association (Gafta) – submission received 7 September 2009**

Gafta is an international body representing the trade in grain, pulses and feed materials transacted worldwide. Gafta has around 1200 members in 85 countries.

## **Glencore Grain Pty Ltd (Glencore) – submissions received 3 September 2009**

Glencore is a 100% owned subsidiary of Glencore International AG, which is one of the world's largest suppliers of commodities to industrial consumers. Glencore operates across all states of Australia and services Australia's domestic market and grain exports. It processes and markets commodities globally, including wheat, corn, barley, oilseeds, meals, edible oils and rice.<sup>15</sup>

### ***Submissions alleging anti-competitive conduct***

The ACCC notes that several submissions made allegations that CBH has engaged in conduct that may raise issues under the prohibitions on anti-competitive conduct under Part IV of the TPA. In the context of the current Part IIIA assessment, the ACCC has not formed any views on the legitimacy or otherwise of these allegations. To the extent that claims have raised allegations relating to anti-competitive conduct under Part IV of the TPA, these matters are being assessed by the ACCC's Enforcement and Compliance Division.

## **2.3 Confidential submissions**

The ACCC notes that it received some confidential submissions as part of its consultation, from both CBH and from third parties. 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.<sup>16</sup> In the current context, however, limited weight was given to confidential submissions made in this process. The ACCC notes that the information provided to it on a confidential basis did not raise any new relevant issues that had not already been raised in public submissions to the ACCC.

## **2.4 Further information**

CBH's accepted September Undertaking together with its now withdrawn April Undertaking, including supporting submissions from CBH and public submissions by interested parties, are available on the ACCC's website at [www.accc.gov.au](http://www.accc.gov.au) by following the links to 'For regulated industries' and 'Wheat Export,' or via the following link:

<http://www.accc.gov.au/content/index.phtml/itemId/868799>

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

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<sup>15</sup> <http://www.glencoregrain.com.au/content.asp?page=58>

<sup>16</sup> *Trade Practices Act 1974* (Cth) s 44ZZBD(5).

General Manager  
Transport & General Prices Oversight  
Australian Competition & Consumer Commission  
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### 3 Legislative Framework

#### Summary

In assessing the appropriateness of CBH's September Undertaking, the ACCC has had regard to the matters specified under s44ZZA(3) of the TPA. In particular, the ACCC has considered:

- the objectives of the 'access test' embodied in the *Wheat Export Marketing Act 2008* and, in particular, the objective of ensuring that vertically integrated bulk handling companies provide fair and transparent access to their facilities to other accredited exporters;
- whether the September Undertaking provides for sufficient certainty and clarity in its terms, effect and operation;
- the legitimate business interests of CBH in being able to run its port terminal facilities with a sufficient degree of flexibility and without unduly prescriptive regulation so as to maintain an efficient supply chain;
- the objective of promoting competition in the wheat export industry;
- the desirability of having consistent bulk wheat port access regulation arrangements across Australia;
- the risk and undesirability of imposing regulation that is not appropriate at a time when the industry is newly liberalised and in transition;
- the need to balance the legitimate business interests of CBH with the interests of access seekers; and
- that price discrimination in favour of CBH's trading operations should not occur except to the extent that the cost of providing access by CBH to other users is higher than provision of the service to itself.<sup>17</sup>

It is noted that the factors listed above are not the actual "matters" listed under section 44ZZA(3) of the TPA,<sup>18</sup> but rather fall for consideration within the scope of the relevant matters under section 44ZZA(3) of the TPA.

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<sup>17</sup> NB. This factor, explained below at 1.8, is consistent with the pricing principles in section 44ZZCA of the *Trade Practices Act*. These pricing principles must be taken into account by the ACCC in deciding whether or not to accept an access undertaking under Division 6 in accordance with s 44ZZA(3)(ab).

<sup>18</sup> Other than the first two matters, which the ACCC considers are relevant pursuant to section 44ZZA(3)(e) of the *Trade Practices Act*.

## **3.1 Part IIIA of the Trade Practices Act**

The legislative framework for the ACCC's consideration of the proposed Undertaking is set out in Part IIIA of the TPA.

Part IIIA was inserted into the TPA in 1995 by the *Competition Policy Reform Act 1995* (Cth) and provides three main mechanisms to facilitate access to services provided by means of infrastructure:

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

### **3.1.1 Access undertakings**

Division 6 of Part IIIA provides that 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 having regard to the matters set out in section 44ZZA(3). If the ACCC accepts the undertaking, the provider is required to offer third party access in accordance with the undertaking. An access undertaking is binding on the access provider and can be enforced in the Federal Court upon application by the ACCC.

## **3.2 Matters in section 44ZZA**

Section 44ZZA(3) provides that the ACCC may accept an access undertaking, if it thinks it appropriate to do so, having regard to the following matters:

- the objects of the Part IIIA of the TPA;
- the pricing principles specified in section 44ZZCA of the TPA;
- 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.<sup>19</sup>

This part of the document discusses in a general sense how the ACCC proposes to have regard to these matters in making its decision under section 44ZZA(3) in relation to the September Undertaking. The discussion in this chapter is general in the sense that it largely does not refer to specific clauses of the September Undertaking, but rather constitutes a consideration of the wider context within which the September Undertaking exists, and which underpin the more specific analysis of particular clauses. Subsequent chapters consider specific clauses of the September Undertaking by reference to this foundational discussion, and refer again to matters in section 44ZZA(3) as relevant.

The discussion in this chapter does not consider each of the matters listed in section 44ZZA(3) in the same order as those matters are listed in that section. Instead, the matters are listed in the following order:

1. any other matters that the ACCC thinks are relevant;
2. the objects of Part IIIA;
3. the public interest, including the interest in having competition in markets (whether or not in Australia);
4. the legitimate business interests of the provider (that is, CBH);
5. the interests of access seekers;
6. the pricing principles in section 44ZZCA; and
7. whether the undertaking is in accordance with an access code that applies to the service.

This re-ordering is simply designed to make the discussion easier to follow; it should not be interpreted as the ACCC placing a particular weight on a matter by virtue of its position in the discussion.

The ACCC notes as a general comment that section 44ZZA(3) describes matters to which the ACCC is required to have regard, not criteria of which the ACCC must be satisfied. The ACCC therefore does not consider that ‘satisfaction’ of a particular ‘criterion’ under section 44ZZA(3) leads to a conclusion that a proposed access undertaking should be accepted. The test under section 44ZZA(3) is whether the Commission considers it “appropriate” to accept the undertaking, having regard to the matters in section 44ZZA(3).

### **3.3 Any other matters the ACCC thinks are relevant**

Section 44ZZA(3)(e) of the TPA provides that, in deciding whether to accept an undertaking, the ACCC may have regard to any other matters it thinks are relevant.

For the reasons outlined below, the ACCC thinks it appropriate for it to have regard to the following matters:

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<sup>19</sup> *Trade Practices Act 1974* (Cth) s 44ZZA(3).

- the *Wheat Export Marketing Act 2008* (Cth) (**the WEMA**), and the intention of Parliament in enacting that legislation; and
- the extent to which the September Undertaking is clear and certain.

The ACCC acknowledges that subsection (e) comes at the end of the list of matters to which the ACCC has regard in deciding whether to accept an undertaking. However, the matters arising under subsection (e) are discussed here as it covers the WEMA, which provides context to the ACCC's consideration as a whole.

### **3.3.1 The Wheat Export Marketing Act**

The WEMA came into effect on 1 July 2008. Section 24 of that Act relevantly requires that, for the period after 1 October 2009, in order for a person that provides port terminal services to also hold or maintain accreditation to export bulk wheat, there must be in operation, under Division 6 of Part IIIA of the TPA, an access undertaking relating to the provision of access to port terminal services for purposes relating to the export of wheat. It is therefore pursuant to section 24 of the WEMA that CBH has proffered the proposed Undertaking to the ACCC.

#### **3.3.1.1 Regulatory scheme established by the WEMA**

Section 3 of the WEMA states that the objects of the Act are to promote the development of a bulk wheat export marketing industry that is efficient, competitive and advances the needs of wheat growers, and to provide a regulatory framework in relation to participants in the bulk wheat export marketing industry.

In relation to the second objective, the WEMA sets up a system for the regulation of Australian bulk wheat exports, establishing an accreditation scheme for exporters and a regulatory body, Wheat Exports Australia (**WEA**), to administer the scheme. Under the WEMA, parties without WEA accreditation are prohibited from exporting wheat in bulk from Australia, and parties seeking accreditation as bulk wheat exporters must be determined by the WEA to be 'fit and proper' having regard to certain criteria.

The WEMA therefore replaces the previous 'single desk' marketing arrangements for bulk wheat exports with a system that allows multiple accredited firms to export bulk wheat from Australia. As stated in the Explanatory Memorandum:

'The [WEMA] will introduce competition into the bulk wheat export industry. Rather than forcing growers to sell their wheat through a single exporter they will be able to choose from a number of accredited exporters as well as domestic outlets.'<sup>20</sup>

#### **3.3.1.2 The 'access test' in the WEMA**

The WEMA further provides that parties seeking bulk wheat export accreditation that also provide 'port terminal services' must satisfy an 'access test.'

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<sup>20</sup> Explanatory Memorandum, *Wheat Export Marketing Bill 2008* (Cth), p. 3.

A 'port terminal service' is defined to mean a service (within the meaning of Part IIIA of the TPA) provided by means of a port terminal facility, and includes the use of a port terminal facility.<sup>21</sup> A 'port terminal facility' is defined as:

'...a ship loader that is:

- (a) at a port; and
- (b) capable of handling wheat in bulk;

and includes any of the following facilities:

- (c) an intake/receival facility;
- (d) a grain storage facility;
- (e) a weighing facility;
- (f) a shipping belt;

that is:

- (g) at the port; and
- (h) associated with the ship loader; and
- (i) capable of dealing with wheat in bulk.<sup>22</sup>

The 'access test' is outlined in section 24 of the WEMA and, in summary, provides that:

- *for the period between 1 July 2008 and 30 September 2009*: accredited exporters who operate bulk wheat terminals at ports are required to publish a statement on their website outlining the terms and conditions on which they will allow other accredited exporters access to their port terminal facilities (unless, at the relevant time, there is in force a decision under Part IIIA of the Act 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); and
- *for the period on or after 1 October 2009*: exporters that provide port terminal services will be required to have a formal access undertaking pursuant to Part IIIA of the TPA accepted by the ACCC (or that there be in force a decision under Part IIIA of the TPA 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 subsection 24(4) of the WEMA. In summary, the continuous disclosure rules require the provider of port terminal services to publish on their website:

- their policies and procedures for managing demand for port terminal services (commonly termed 'Port Loading Protocols' or 'Port Terminal Rules'); and
- a statement, updated daily, setting out, amongst other things, the name of each ship scheduled to load grain using port terminal services, the estimated date on

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<sup>21</sup> *Wheat Export Marketing Act 2008* (Cth) s 5.

<sup>22</sup> *Wheat Export Marketing Act 2008* (Cth) s 5.

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').

### **3.3.1.3 The rationale for accreditation of bulk wheat exporters and the 'access test'**

The Explanatory Memorandum to the WEMA compares the options of retaining the single desk for bulk wheat exports (option A) and introducing a scheme for accreditation of bulk wheat exporters (option B). It was considered that option B would:

- significantly increase the marketing options for growers;
- mean that more buyers will be competing for wheat, thereby helping growers get a price that reflects market forces;
- force marketers to improve the services they provide to growers to secure supplies of wheat;
- create the opportunity for potential exporters to compete in the export wheat market, which would be likely to drive innovation in marketing, research and development;
- more effectively manage the risk of market lock out; and
- as a result of increased competition, drive supply chain efficiencies in grain marketing.<sup>23</sup>

It was acknowledged, however, that under option B the benefits of the reform may be mitigated if '...bulk handling companies (and potential exporters) deny other potential exporters reasonable access to critical handling and storage infrastructure.'<sup>24</sup> The Report of the Senate Standing Committee on Rural and Regional Affairs and Transport on the exposure draft of the WEMA includes discussion of these concerns:

'It was argued that bulk handling and storage facilities throughout Australia are owned and controlled by a limited number of companies. Concerns were raised that, in the event that some or all of these companies became accredited exporters under the proposed legislation, they may be in a position to limit access to these facilities by other exporters.'<sup>25</sup>

The Committee also considered the extent to which such concerns could be dealt with under provisions of the TPA, noting that views from witnesses and submitters on the

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<sup>23</sup> Explanatory Memorandum, *Wheat Export Marketing Bill 2008* (Cth), p. 12-13.

<sup>24</sup> Explanatory Memorandum, *Wheat Export Marketing Bill 2008* (Cth), p. 8.

<sup>25</sup> Parliament of Australia, Senate Standing Committee on Rural and Regional Affairs and Transport, *Report on the Wheat Export Marketing Bill 2008 Exposure Draft*, para 3.93.



effectiveness of existing powers under the TPA ‘varied greatly.’<sup>26</sup> In providing its view on the issue, the Committee said:

‘While the committee notes that provisions exist under the TPA to address anti-competitive practices, careful consideration needs to be given to the extent to which these provisions offer practical remedies to the concerns raised during this inquiry.’<sup>27</sup>

In the Explanatory Memorandum to the WEMA, it was noted that, under option B, a potential exporter having difficulty gaining access to port terminal services could apply to the National Competition Council (NCC) for a declaration that the port terminal facility was essential infrastructure as a means of obtaining access. It was noted, however, that this could involve long timeframes.<sup>28</sup>

It was therefore considered that an ‘option C’, involving the introduction of a scheme of accreditation for wheat exports, plus a mechanism for allowing access to port terminal facilities, would be appropriate.<sup>29</sup>

The Explanatory Memorandum notes that while the lodgement of an access undertaking will involve costs to the port terminal operator, it will ensure access to port facilities, which will in turn allow marketers to participate effectively in the export of bulk wheat and provide increased choice to growers in their marketing options.<sup>30</sup>

#### **3.3.1.4 ACCC’s views**

The ACCC therefore considers that the regulatory scheme established by the WEMA, and the rationale for the inclusion of the access test in the statute are, under section 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; and
- 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

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<sup>26</sup> Parliament of Australia, Senate Standing Committee on Rural and Regional Affairs and Transport, *Report on the Wheat Export Marketing Bill 2008 Exposure Draft*, para 3.127.

<sup>27</sup> Parliament of Australia, Senate Standing Committee on Rural and Regional Affairs and Transport, *Report on the Wheat Export Marketing Bill 2008 Exposure Draft*, para 3.144.

<sup>28</sup> Explanatory Memorandum, *Wheat Export Marketing Bill 2008* (Cth), p. 8 & 13.

<sup>29</sup> Explanatory Memorandum, *Wheat Export Marketing Bill 2008* (Cth), p. 8.

<sup>30</sup> Explanatory Memorandum, *Wheat Export Marketing Bill 2008* (Cth), p. 13.

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 notes the intention of Parliament in including the access test in the WEMA:

‘This clause [that is, containing the access test] is 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. All accredited exporters should have access to these facilities while allowing the operators of the facilities to function in a commercial environment.’<sup>31</sup>

The ACCC therefore considers it relevant, and consistent with the intentions of Parliament, to have regard to the extent to which the proposed Undertaking provides for ‘fair’ access to port terminal services. The ACCC considers that in the current context, ‘fair access’ ought largely to be equated with non-discriminatory access, reflecting the desirability of ensuring that access to port terminal services is, on the whole, provided on a non-discriminatory basis except where there is a legitimate reason for differential treatment.

The ACCC also considers it relevant, and consistent with the intentions of Parliament, to have regard to the extent to which the proposed Undertaking provides for transparency in relation to the provision of access to port terminal services. That said, the ACCC notes as a general statement that the desirability of transparency ought to be balanced against the desirability of protecting commercially sensitive or otherwise confidential information.

The ACCC notes that CBH recognised these concepts of fairness and transparency in its supporting submissions to its April Undertaking:

‘**Non-discrimination:** CBH must provide access in accordance with price and non-price terms that include efficiency, fairness and transparency as central elements.’<sup>32</sup>

‘Non-discriminatory access is a key feature of the Undertaking.’<sup>33</sup>

### 3.3.2 Other matters

The ACCC also considers it relevant that the September Undertaking provide for sufficient certainty and clarity in its terms, effect and operation, so as to:

- enable the access provider and access seekers to be sufficiently aware of their respective rights and obligations, and thereby avoid unnecessary costs, monetary or otherwise, when utilising the processes set by the Undertaking;

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<sup>31</sup> Explanatory Memorandum, *Wheat Export Marketing Bill 2008* (Cth), p. 31, emphasis added.

<sup>32</sup> Co-operative Bulk Handling Limited, *Submission to the ACCC*, 14 April 2009, para 1.6(b), p. 3, emphasis in original.

<sup>33</sup> Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, para 27.2, p. 53.

- enable the mediator and/or arbitrator appointed pursuant to the Undertaking to quickly and effectively resolve any dispute that may arise between an access seeker and the access provider; and
- enable the ACCC to quickly and effectively resolve any potential enforcement concerns that may arise regarding potential non-compliance with the Undertaking by CBH.

CBH acknowledges the desirability for certainty in its supporting submission to its April Undertaking:

‘Access seekers want certainty – certainty of terms, certainty of price fairness, certainty of non-discrimination and the certainty of disciplined processes for negotiation and dispute resolution.’<sup>34</sup>

The ACCC notes that CBH’s accepted September Undertaking provides for such certainty and clarity in its terms, effect and operation.

### 3.4 The objects of Part IIIA

The objects of Part IIIA 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.<sup>35</sup>

#### 3.4.1 CBH’s submissions in support of its April Undertaking

CBH submits that:

‘...the access arrangements (as already exist and now expanded and more fully documented in the Undertaking) promote the economically efficient use of, and investment in, bulk wheat export terminals, and also promote competition in upstream and downstream markets by giving industry confidence that the transition to deregulation will not be hindered by port access issues arising from anti-competitive behaviour;’<sup>36</sup>

CBH also submits that:

‘To the extent that Port Terminal Facilities cannot be economically duplicated, an undertaking to provide access to services from those facilities on transparent and non-discriminatory terms would promote the economically efficient use of those facilities and promote competition in vertically related markets, thereby promoting the objects of Part IIIA.

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<sup>34</sup> Co-operative Bulk Handling Limited, *Submission to the ACCC*, 14 April 2009, para 6.5, pp. 40-41.

<sup>35</sup> *Trade Practices Act 1974* (Cth) s 44AA.

<sup>36</sup> Co-operative Bulk Handling Limited, *Submission to the ACCC*, 14 April 2009, para 1.7(a), p. 5.

However, the assumption that Port Terminal Facilities cannot be economically duplicated has not been fully established although an assumption to that effect appears to underlie the inclusion of the access test in the WEMA.

CBH considers that there is scope for new entry, and there is some potential for inter-port competition. Given that CBH has historically provided access to its services in the absence of a formal access undertaking, the Commission should accept an undertaking that requires CBH to publish reference prices for a set of standard services without those forming part of the undertaking. This approach would protect investment incentives and promote economically efficient investments in Port Terminal Facilities.<sup>37</sup>

### **3.4.2 Objects of Part IIIA – promotion of efficiency and competition**

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.

The ACCC notes that its present role is to decide whether or not it is appropriate to accept the proposed Undertaking having regard to the matters in section 44ZZA(3) of the TPA.

It is not the ACCC's role in the current context to re-evaluate the policy considerations of government that led to the removal of the single desk, nor to assess the rationale of the access test. As outlined above, the ACCC acknowledges the objects of the WEMA to promote the development of a bulk wheat marketing industry that is efficient, competitive and advances the needs of wheat growers, and the rationale for including the access test as a measure against the potential for port facility operators to frustrate the competitiveness of that industry. The ACCC is therefore not assessing the *need* for an undertaking in the first place but rather the appropriateness of the proposed Undertaking, having regard to the matters in section 44ZZA(3).

There is no requirement in Division 6 of Part IIIA that requires the ACCC to be satisfied, prior to accepting an access undertaking proffered pursuant to that Division, that it is uneconomical to duplicate the facility by means of which the service the

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<sup>37</sup> Co-operative Bulk Handling Limited, *Submission to the ACCC*, 14 April 2009, para 6.1, p. 39.

subject of the undertaking is provided.<sup>38</sup> In particular, the matters listed in section 44ZZA(3) of Division 6 do not require the ACCC to have regard to whether or not it is uneconomical to duplicate the particular facility. Therefore, even absent the existence of the WEMA, the ACCC considers it is not its role in assessing an undertaking provided under Division 6 of Part IIIA to determine whether the facility to which the undertaking relates is uneconomical to duplicate, nor whether the facility would otherwise meet the requirements for declaration under Division 2.

The ACCC therefore does not consider that its role in the current context is to thoroughly assess the state of competition in the bulk wheat export industry and evaluate whether access undertakings are justified (such as by reason of the port terminal facilities being uneconomical to duplicate). Instead, the ACCC considers that Parliament has expressed a clear intention to require port terminal operators to provide access undertakings to mitigate the potential for anti-competitive harm, and it is in that context that the ACCC must consider the appropriateness of those undertakings as provided.

The ACCC nonetheless considers it appropriate, in having regard to the matters in section 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, section 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 section 44ZZA(3)(b) refers to the public interest, including the public interest in having competition in markets (whether or not in Australia).

### **3.4.3 Objects of Part IIIA – a consistent approach to access regulation**

Section 44AA(3)(b) of the TPA states that an object of Part IIIA is to provide a framework and guiding principles to encourage a consistent approach to access regulation in each industry.

In this particular instance, the ACCC notes that the undertaking provided by CBH is one of three undertakings that have been proposed by three bulk handling companies that, taken together, cover services provided by means of facilities at seventeen grain export terminals around Australia. Further, the undertakings have been proffered to the ACCC pursuant to a Commonwealth scheme designed to introduce competition into the bulk wheat export industry.

In this context, the ACCC acknowledges differences in the circumstances of each bulk handler, including differences in the services provided by means of a particular facility, and the extent to which such differences may influence the ACCC's consideration of the appropriateness of the undertaking proposed by that bulk handler.

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<sup>38</sup> This concept is relevant to Division 2 of Part IIIA of the TPA which sets out a mechanism by which parties may seek to have certain services declared. Section 44G(2) of the TPA provides that the NCC cannot recommend to the Minister that a service be declared unless it is satisfied of various matters, including '...that it would be uneconomical for anyone to develop another facility to provide the service.'

The ACCC also acknowledges, however, the desirability of encouraging a consistent approach to access regulation, as recognised in section 44AA(3)(b) of the TPA, and considers that, to the extent possible and appropriate the undertakings proposed by the three bulk handlers should be consistent.

In this regard, the ACCC notes that, while the undertakings lodged in September by CBH, GrainCorp and AusBulk have a number of differences (including one significant difference relating to the manner of managing port terminal capacity allocation), they all contain broadly similar obligations. This reflects that the ACCC, in its Further Draft Decisions on each of the bulk handling company's April Undertakings, made similar recommendations to each bulk handler about the amendments that would be needed to be made in order for them to be accepted by the ACCC.

### **3.5 The public interest**

Section 44ZZA(3)(b) requires the ACCC to have regard to the public interest, including the public interest in having competition in markets (whether or not in Australia).

#### **3.5.1 CBH's submissions in support of its April Undertaking**

CBH submits that:

'...the public interest and the interests of access seekers is served by CBH continuing to provide access to Port Terminal Services to accredited wheat exporters but under more fully documented arrangements which ensure certainty, transparency and non-discrimination such that the public and access seekers can be confident of a successful transition from a single desk to competition in the export of bulk wheat.'<sup>39</sup>

CBH also submits that:

'The public interest is served by a prudent approach to regulation that:

- appropriately considers the practicalities of prescriptive regulation, the burden of compliance on export industries and the risk of regulatory error;
- promotes the economically efficient investment in Port Terminal Services;
- incorporates measures that are reasonably proportionate to the competition concerns giving rise to regulation.

In this case, regulation arises not from a declaration process, a contravention of Part IV of the TPA or a Productivity Commission (PC) review. Regulation arises prior to a PC review in an environment of sweeping industry change and in an export industry that is important to the national interest. In these circumstances, the risk of detriment from regulatory error or disproportionate compliance costs is clear and present.

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<sup>39</sup> Co-operative Bulk Handling Limited, *Submission to the ACCC*, 14 April 2009, para 1.7(d), pp. 5-6.

In the circumstances, and given that more extensive regulation may be adopted at the option of the Commonwealth, CBH submits that the Undertaking represents a prudent approach.<sup>40</sup>

### 3.5.2 ACCC's views

Section 44ZZA(3)(b) reflects the reference in the Part IIIA objects to the promotion of effective competition in upstream and downstream markets, as discussed above. Therefore, in having regard to this matter, the ACCC again notes the previous discussion regarding the rationales for the WEMA and the access test. However, the public interest also encompasses broader considerations.

Relevantly, the ACCC also considers it appropriate to have regard to the transitional state of the bulk wheat export industry. In addition to the comments above, CBH submits that:

‘The industry is in transition – the relatively short term of the Undertaking means that the ACCC retains the option of imposing more intrusive regulation in the future in the unlikely event that it should be necessary.’<sup>41</sup>

The ACCC recognises that the replacement of the single desk for bulk wheat exports with multiple accredited exporters is a significant change to Australia’s bulk wheat export industry. Experience in dealing with multiple exporters competing in the high volume bulk wheat industry is currently limited to a single season only. To the extent that parties have commented on problems within the industry in the first season following deregulation, the ACCC recognises that certain of those comments likely derive from teething problems as the industry adapts to the changes.

In this context the ACCC recognises the risk and undesirability of imposing regulation that is not appropriate at a time when the industry is newly deregulated and in transition, and the associated risk of distorting the effective development of competition and efficiency in that industry. The ACCC considers it would not be in the public interest for such an outcome to occur. The ACCC notes, in this regard, that CBH’s proposed Undertaking has a short term of three years.

## 3.6 The legitimate business interests of the provider

Section 44ZZA(3)(a) requires the ACCC to have regard to the legitimate business interests of the provider, in this case CBH.

### 3.6.1 CBH’s submissions in support of its April Undertaking

CBH submits that:

‘...the access arrangements will promote CBH’s legitimate business interest in providing access on price and non-price terms and conditions that ensure that it receives at least a return on investment that is commensurate with risk.’<sup>42</sup>

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<sup>40</sup> Co-operative Bulk Handling Limited, *Submission to the ACCC*, 14 April 2009, para 6.4, p. 40.

<sup>41</sup> Co-operative Bulk Handling Limited, *Submission to the ACCC*, 14 April 2009, para 1.4, p. 3.

<sup>42</sup> Co-operative Bulk Handling Limited, *Submission to the ACCC*, 14 April 2009, para 1.7(c), p. 5.

CBH submits that it has the following legitimate business interests:

- ‘CBH should be subject to regulatory compliance measures and costs that appropriately reflect the nature and size of its business and the seriousness of competition concerns giving rise to its regulation;
- CBH should not be required to subsidise the Port Terminal Service with efficiencies generated by its other business activities;
- CBH should be entitled to impose appropriate measures to address risks and costs flowing from the provision of the regulated service; and
- CBH should be able to maintain operational flexibility in order to respond to changing circumstances for the purpose of efficiency.’<sup>43</sup>

### **3.6.2 ACCC’s views on the April Undertaking**

When having regard to the legitimate business interests of the access provider the ACCC considers whether particular terms and conditions in the proposed Undertaking are sufficient and necessary to maintain those interests. The ACCC agrees with CBH’s propositions about its legitimate business interests.

Potentially relevant to this criterion, is that, if the ACCC had not accepted CBH’s September Undertaking by 1 October 2009, the marketing arm of CBH would have been likely to lose accreditation under the WEMA to export bulk wheat.

While acknowledging that loss of accreditation would have been likely to have adverse commercial consequences for CBH, the ACCC did not consider that such an adverse consequence necessarily outweighs other matters to which the ACCC is having regard in deciding whether it is appropriate to accept the proposed Undertaking. For example, the ACCC did not consider that the loss of accreditation would be likely to justify the ACCC accepting the September Undertaking where the ACCC took the view that the September Undertaking did not appropriately give effect to the objectives of the WEMA.

That said, the ACCC made every effort to ensure its assessment of CBH’s Undertaking was carried out in a timely manner to alleviate the extent to which the consequences of failing to meet the 1 October 2009 deadline may have needed to be taken into account by the ACCC. The ACCC notes that, given it has been able to assess CBH’s September Undertaking prior to 1 October 2009 it has not needed to take such consequences into account.

## **3.7 The interests of access seekers**

Section 44ZZA(3)(c) requires the ACCC to have regard to the interests of persons who might want access to the service.

### **3.7.1 CBH submission in support of its April Undertaking**

CBH submits that:

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<sup>43</sup> Co-operative Bulk Handling Limited, *Submission to the ACCC*, 14 April 2009, para 6.3, pp. 39-40.



‘Under the Undertaking, CBH will continue to provide access to Port Terminal Services to any accredited wheat exporter that meets reasonable prudential requirements. Such users are adequately protected by the requirement to publish pricing for standard services, the obligations not to discriminate and the detailed negotiate/arbitrate mechanisms.

Access seekers want certainty – certainty of terms, certainty of price fairness, certainty of non-discrimination and the certainty of disciplined processes for negotiation and dispute resolution. The Undertaking provides all of these elements.’<sup>44</sup>

### 3.7.2 ACCC’s views

This criterion is counterpoised to the ‘legitimate business interests of the provider’ criterion. While the two criteria may appear to be in conflict with each other, over the long term any conflict is likely to be ameliorated. That is, it is in access seekers’ long-term interest that prices and returns are sufficient to provide the incentives needed to induce the access provider to invest in and adequately maintain services.

To assess the interests of access seekers the ACCC has conducted a public consultation process on the proposed Undertaking, during which the ACCC sought and received comments from a range of participants in the bulk wheat export industry. The ACCC considers that submissions made during the public consultation by actual and potential access seekers are relevant in having regard to section 44ZZA(3)(c). Public submissions provided by interested parties are available on the ACCC’s website.

In summary, the ACCC notes that a number of common matters raised by third parties in submissions concerned:

- the degree of transparency around allocation of shipping capacity, including the criteria used to determine positions on the shipping stem, and the ability of exporters to obtain a shipping slot;
- the acceptance of grain at port that has not come from the port operators’ own storage and handling network;
- the possibility of effectively bypassing the port operators’ up-country storage and handling facilities;
- the availability of information on grain stocks; and
- the reasonableness of terms and conditions of access to supply chain services.

The ACCC notes that this list is a high level summary only of matters raised during the public consultation.

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<sup>44</sup> Co-operative Bulk Handling Limited, *Submission to the ACCC*, 14 April 2009, para 6.5, pp. 40-41.

### 3.8 The pricing principles in section 44ZZCA

The ACCC is required to have regard to the pricing principles specified in section 44ZZCA of the TPA, which provides as follows:

‘The pricing principles relating to the price of access to a service are:

- (a) that regulated access prices should
  - (i) be set so as to generate expected revenue for a regulated service or services that is at least sufficient to meet the efficient costs of providing access to the regulated service or services; and
  - (ii) include a return on investment commensurate with the regulatory and commercial risks involved; and
- (b) that the access price structures should:
  - (i) allow multi-part pricing and price discrimination when it aids efficiency; and
  - (ii) 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
- (c) that access pricing regimes should provide incentives to reduce costs or otherwise improve productivity.<sup>45</sup>

#### 3.8.1 ACCC’s views

The pricing principles are intended to assist in the achievement of the objects of Part IIIA by ‘providing effective market signals for the efficient use of existing resources and for future investment in infrastructure’.<sup>46</sup>

##### *Pricing principle (a): Recovery of efficient costs*

Part IIIA does not prescribe a particular methodology for setting an access price. Rather, pricing principle (a) aims to address the motive for regulating access prices (monopoly pricing) whilst not deterring investment.<sup>47</sup>

The explanatory memorandum states that the ‘starting point to achieving efficient use of infrastructure’ is for the price of access to equal the cost of providing an additional unit of the service.

##### *Pricing principle (b): Pricing structure*

Part IIIA does not prescribe a particular access price structure that must be used in an undertaking. However, pricing principle (b) refers to two specific price structures: multi-part pricing and price discrimination.

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<sup>45</sup> *Trade Practices Act 1974* (Cth) s 44ZZCA.

<sup>46</sup> Revised Explanatory Memorandum, *Trade Practices Amendment (National Access Regime) Bill 2006* (Cth), p. 64.

<sup>47</sup> Revised Explanatory Memorandum, *Trade Practices Amendment (National Access Regime) Bill 2006* (Cth), p. 65.

Multi-part pricing typically involves an up-front price to access the network, plus a per-unit or usage price. Price discrimination occurs where, for instance, individual access users are charged a different price for the same service.

Pricing principle (b) provides that a price structure should allow multi-part pricing and price discrimination but only when it aids efficiency.

In particular, where an access provider is vertically integrated, price discrimination in favour of the access provider's own operations should not occur (except when the cost of provision by the provider to other users is higher than provision of the service to itself).

#### *Pricing principle (c): Productivity*

Pricing principle (c) refers to the desirability for access pricing regimes to provide incentives for infrastructure providers to make productivity gains without prescribing the specific mechanisms.<sup>48</sup>

The ACCC notes that the proposed Undertaking submitted by CBH does not propose ex ante pricing regulation, and instead proposes a 'publish-negotiate-arbitrate' approach, under which CBH is obliged to publish prices at a certain time.

Accordingly, the ACCC is not, in this context, assessing the appropriateness of pricing for port terminal services.

However, the ACCC considers that the pricing principles are nonetheless relevant in the sense that they provide guidance on the appropriateness of any pricing discrimination envisaged by the proposed Undertaking. It is the ACCC's view that, in accordance with pricing principle (b), price discrimination in favour of CBH's own operations should not occur except when the cost of provision by CBH to other users is higher than provision of the service to itself.

### **3.9 Whether the undertaking is in accordance with an access code**

Section 44ZZAA of the TPA provides that an industry body may give a written code to the ACCC setting out rules for access to a service.<sup>49</sup> The ACCC may accept the code, if it thinks it appropriate to do so having regard to matters set out in section 44ZZAA(3).<sup>50</sup> An 'industry body' means a body or association (including a body or association established by a law of a State or Territory) prescribed by the regulations for the purposes of section 44ZZAA.<sup>51</sup>

In having regard to this matter in the current context, the ACCC notes that there is currently no access code in place that applies to the service that is the subject of the September Undertaking.

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<sup>48</sup> Revised Explanatory Memorandum, *Trade Practices Amendment (National Access Regime) Bill 2006* (Cth), p. 67.

<sup>49</sup> *Trade Practices Act 1974* (Cth) s 44ZZAA(1).

<sup>50</sup> *Trade Practices Act 1974* (Cth) s 44ZZAA(3).

<sup>51</sup> *Trade Practices Act 1974* (Cth) s 44ZZAA(8).

## 4 Industry Background

### Summary

This chapter sets out an overview of the grains industry in Western Australia.

### 4.1 Cooperative Bulk Handling Ltd

CBH is a bulk handling company that was founded in 1933 as a grower owned cooperative. It currently has approximately 5150 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 subsidiaries, Grain Pool Pty Ltd (Grain Pool) and AgraCorp Pty Ltd (AgraCorp). 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 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.<sup>52</sup>

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

### 4.2 Structure of the wheat industry in Western Australia

There are approximately 4800 growers in Western Australia. Those growers generally transport their grain (generally by road) from the point of production to country storage and handling facilities owned by CBH.<sup>53</sup>

Western Australia is the largest grain producing state in Australia, accounting for approximately 35 per cent of total Australian grain production and between 45 and 74 per cent of Australian wheat exports.<sup>54</sup> The grain industry contributed approximately 45 per cent of Western Australia's gross value of agricultural production in 2004-05, which is approximately 14 per cent of the total gross value of

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<sup>52</sup> Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 7.

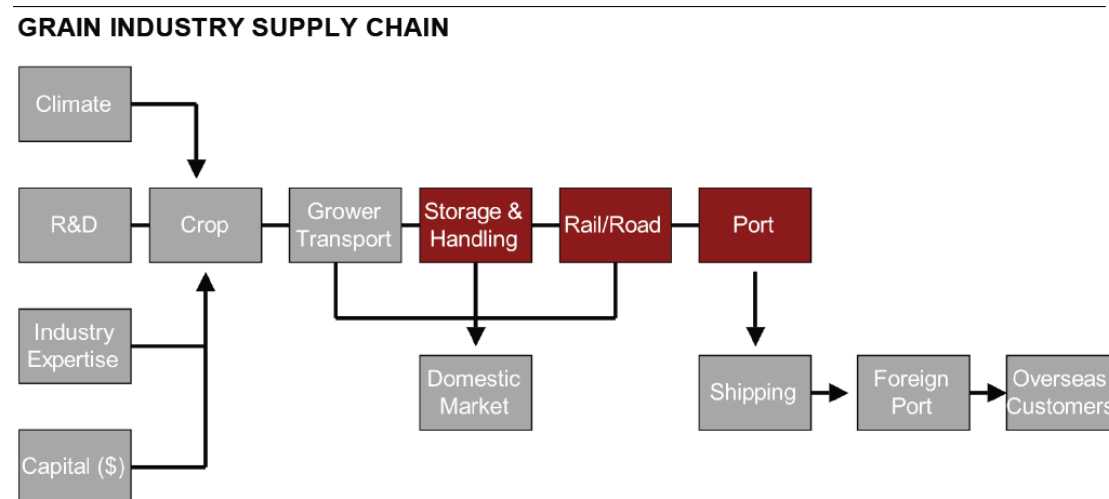
<sup>53</sup> Co-operative Bulk Handling Limited, *Submission to the ACCC*, 14 April 2009, para 2.2(a), p. 8.

<sup>54</sup> Allen Consulting Group (2008) *Competition in the Export Grain Supply Chain*, March, p. 64.

agriculture production across Australia.<sup>55</sup> Over the period 2005-06, grains represented approximately 54 per cent of the total value of Western Australian agricultural and fishery exports.<sup>56</sup>

Figure 1.2.1 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.<sup>57</sup>

**Figure 1.2.1: Grain industry supply chain**



Source: Ernst & Young (2008)

Ernst & Young (2008), in Allen (2008).

The following sections expand on some of the key segments of the supply chain.

#### 4.2.1 Grain production

Western Australian grain growers are, on average, three times larger in terms of land under crop than their eastern state counterparts. The PGA estimates that CBH receives 50 per cent of its wheat from less than 500 growers, or less than 10 per cent of all Western Australian wheat growers.<sup>58</sup>

Western Australia produces around 41 per cent of wheat in Australia, which accounted for roughly 68 per cent of total state production on average in the five years to 2007-08.<sup>59</sup> The area planted to wheat in Western Australia in 2008-09 is estimated at around 4.9 million hectares. Total wheat production is estimated at about 8.9 mt for 2008-09, around 3 mt more than what was produced in the previous season.<sup>60</sup>

<sup>55</sup> ABS, *2004-05—Value of Agricultural Commodities Produced*, 2006, p. 7.

<sup>56</sup> Department of Agriculture and Food WA, *Western Australia's Agri-Food and Fibre Industry Outlook*, 2007, p. 26.

<sup>57</sup> Allen Consulting Group, *Competition in the Export Grain Supply Chain*, March 2008, p. 11.

<sup>58</sup> Pastoralists and Graziers Association, *Submission to Senate Inquiry into Wheat Marketing Legislation*, April 2008, p. 4.

<sup>59</sup> ABARE, *Australian Crop Report*, report no. 150, June 2009.

<sup>60</sup> ABARE, *Australian Crop Report*, report no. 150, June 2009.

The Western Australian grain industry is dominated by wheat (74 per cent), barley (21 per cent) and oats (5 per cent of total grain production).<sup>61</sup> The major grain production areas in Western Australia are Kwinana (50 per cent), Geraldton (27 per cent), Albany (14 per cent) and Esperance (9 per cent).<sup>62</sup>

Approximately 81 per cent of the Western Australian grain crop is exported.<sup>63</sup> This is in contrast with the eastern states, where around 50 per cent of the grain crop is exported. This high dependence on exports is, in the case of wheat for example, a result of the relatively small domestic market in Western Australia and ‘strong overseas demand’.<sup>64</sup>

The Western Australian grain belt can be divided into the following four distinct zones, each served by a port.

- Geraldton zone comprises the area surrounding the Geraldton port and includes the regional centres of Mingenew, Mullewa and Morawa.
- Kwinana zone comprises the largest area of the Western Australian grain belt, stretching from Kwinana in the west to Southern Cross in the east, and from Narrogin in the south to Wubin in the north. It is served by the Kwinana port to the south of Perth.
- Albany zone covers the south-west corner of Western Australia from Hyden an
- Newdegate in the north-east to Albany in the south and Bunbury in the west. This zone includes the regional centres of Katanning, Lake Grace and Albany.
- Esperance zone comprises the south-east grain belt, the area north of Esperance and surrounding Salmon Gums.<sup>65</sup>

Figure 1.2.2 shows the location of CBH’s storage network and ports in Western Australia.

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<sup>61</sup> Allen Consulting Group, *Competition in the Export Grain Supply Chain*, March 2008, p. 64.

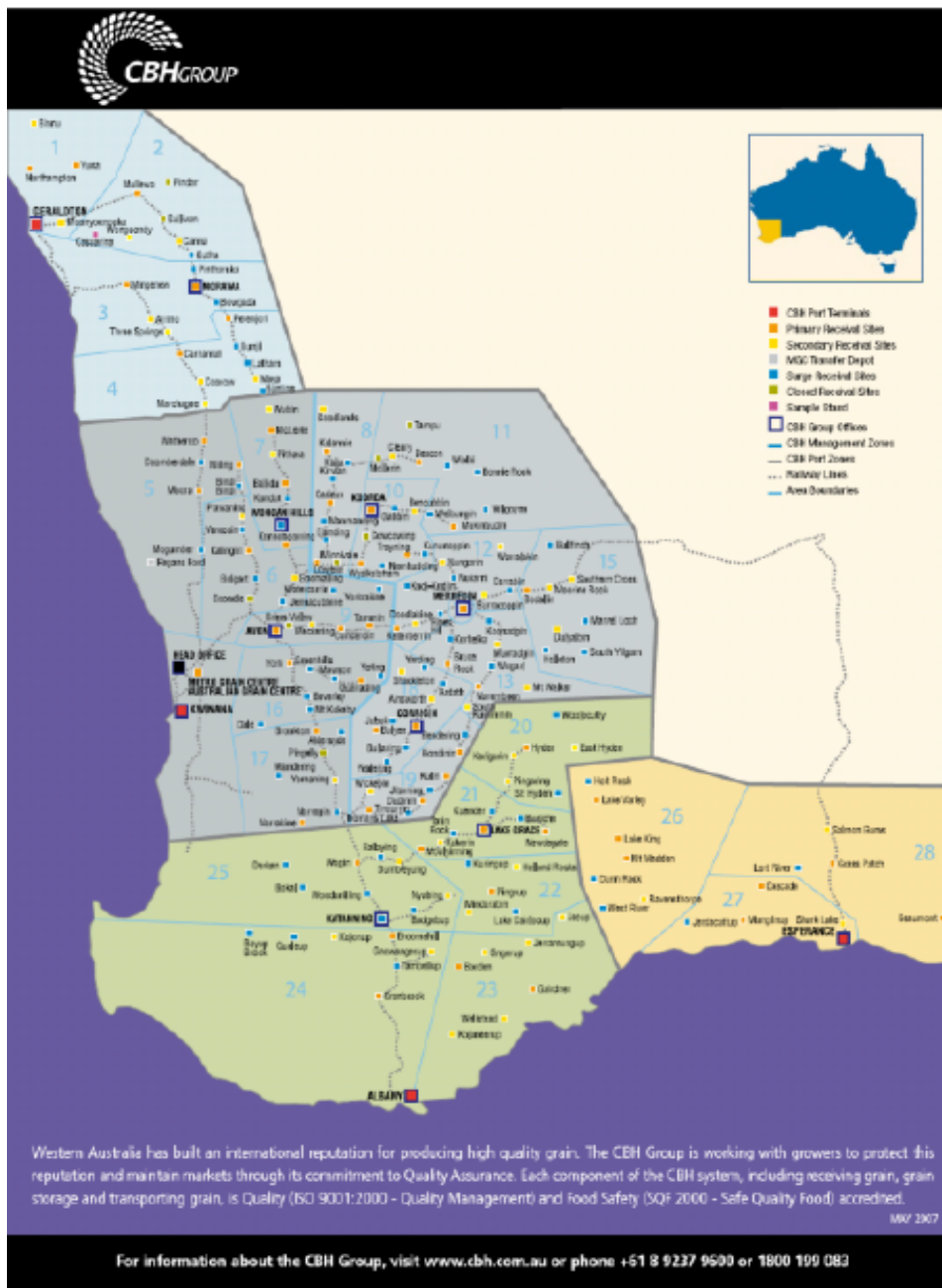
<sup>62</sup> Allen Consulting Group, *Competition in the Export Grain Supply Chain*, March 2008, p. 64.

<sup>63</sup> Co-operative Bulk Handling Limited, *Submission to the ACCC*, 14 April 2009, para 2.2(a), p. 9.

<sup>64</sup> Department of Agriculture and Food WA, *Western Australia’s Agri-Food and Fibre Industry Outlook*, 2007, pp. 31-33.

<sup>65</sup> Co-operative Bulk Handling Limited, *Submission to the ACCC*, 14 April 2009, para 2.2(b), pp. 9-10.

Figure 1.2.2: Western Australia storage network and ports



Source: CBH (2009).

For each of the major grain production areas in Western Australia, the Kwinana region accounts for approximately 50 per cent of total grain production, while the Geraldton region produces 27 per cent, the Albany region 14 per cent, and Esperance region 9 per cent.<sup>66</sup>

#### 4.2.2 Up-country storage and handling

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

<sup>66</sup> Allen Consulting Group, *Competition in the Export Grain Supply Chain*, March 2008, p. 64.

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.<sup>67</sup> 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.<sup>68</sup> 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 receival points served by road and narrow gauge rail (satellite and secondary sites)
- 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.

#### **4.2.3 Transportation**

The market for grain transport involves competition between two modes of transport, road and rail. The average haul distance for Western Australian grain on rail is 290 km, 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 Western Australian grain transport task over the past ten years and this is predicted to continue in the medium term.<sup>69</sup>

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 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 the port of harvest. Only 14 per cent of grain harvested

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<sup>67</sup> CBH Notification N93439, *Supporting Submission*, 2008, p. 23.

<sup>68</sup> IBIS World Industry Report, *Grain Storage in Australia: I6701*, 18 October 2007, p. 19.

<sup>69</sup> CBH Notification N93439, *Supporting Submission*, 2008, p. 63.



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.

#### **4.2.3.1 Rail**

Rail transports 65 per cent of the export grain task in Western Australia.<sup>70</sup> The percentage of rail's share differs between the four grain growing 'zones'.

In Western Australia, the above-rail (rolling-stock) components of the rail network are 100 per cent owned by ARG. 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.<sup>71</sup>

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.<sup>72</sup>

#### **4.2.3.2 Road**

Approximately 35 per cent of export grain in Western Australia is transported by road.<sup>73</sup> 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.<sup>74</sup> 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.

CBH has commented that a substantial proportion of growers that are within 100 km of one of the four ports deliver grain direct to port by road. The Western Australian Strategic Grain Infrastructure Study estimates that farm to port deliveries comprise 19 per cent of receivals at port. In poor or average seasons, the incidence of direct to port deliveries generally increases. Approximately 30 receival sites in Western Australia are designated 'road to rail' sites under the pre-Grain Express freight agreement. Grain received at these sites is transported by road to the nearest rail link by the rail operator.

#### **4.2.4 Port terminals**

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

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<sup>70</sup> Single Vision Grains Australia, *Transport Infrastructure Issues Paper Two*, January 2007, p. 8.

<sup>71</sup> Department of Planning and Infrastructure WA, *Submission to the NTC Rail Productivity Review Issues Paper (August 2008)*, October 2008, p. 7.

<sup>72</sup> Grain Infrastructure Group, *Western Australia's Grain Freight Network Review*, March 2008, p. 9.

<sup>73</sup> Single Vision Grains Australia, *Transport Infrastructure Issues Paper Two*, January 2007, p. 8.

<sup>74</sup> Department of Planning and Infrastructure WA, *Submission to the NTC Rail Productivity Review Issues Paper (August 2008)*, October 2008, p. 7.

The Kwinana Grain Terminal is Western Australia's primary grain export facility, shipping more than half of the WA'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.<sup>75</sup>

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.

### **4.3 Grain Express – notification to the ACCC**

The ACCC notes that last year the ACCC was asked to consider elements of CBH's grain storage, handling and transportation arrangements between its up-country receival sites and its ports – known as 'Grain Express'.

The ACCC was involved because elements of the Grain Express system potentially raise concerns under the exclusive dealing provisions of the Trade Practices Act.

The interaction between the Grain Express notification and this access undertaking process is discussed in the Scope chapter of this decision.

### **4.4 Industry structure—CBH's submissions**

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.<sup>76</sup>

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<sup>75</sup> All the following statistical data on WA ports is derived from the CBH Group's website at <http://www.cbhoperations.com.au/grainopsindex.html>.

<sup>76</sup> Co-operative Bulk Handling Limited, *Submission to the ACCC*, 14 April 2009, para 4, p. 20.

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.

***To what extent are bulk wheat Exporters able to switch between different ports at different locations around Australia, including between different States?***

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.

***Are there any limitations that prevent bulk wheat Exporters from switching between ports (such as different grain types, infrastructure constraints, freight differentials?)***

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.

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.

***What is the likelihood of a new entrant establishing a new port terminal to compete with the Port Operators? What would be the likely timing and cost of such a new terminal? What factors would limit the establishment of a new terminal?***

It is also clear in Western Australia that 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.<sup>77</sup>

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<sup>77</sup> Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, pp. 35-37.

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;
- 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.<sup>78</sup>

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;

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<sup>78</sup> Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 4.

- 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;
- 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.<sup>79</sup>

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.

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<sup>79</sup> Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, pp. 5-6.

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 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.<sup>80</sup>

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 outturned at the nominated destination site upon request.

Commingled stacks of grain are self-evidently essential to the efficiency of the supply chain because, 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

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<sup>80</sup> Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, pp. 5-6.

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.<sup>81</sup>

CBH explains the rationale for “Grain Express” in the following way:

Grain Express is a complete and coordinated transport, storage and handling solution offered to grain Growers and Exporters, both for the domestic and export markets in relation to wheat and coarse grains.

The purpose of Grain Express was to facilitate coordination of grain movements to enhance efficiency in the system as a whole. Individual grain exporters, which previously arranged transport for themselves, used their control of transport to prevent or hinder CBH from:

- moving grain away from country sites to keep sites open;
- moving grain in efficient unit trains;
- moving grain for the efficiency of the supply chain as a whole, rather than in the interest of a particular Exporter; and
- Outturning grain of equivalent grade to satisfy a warrant holder’s entitlement rather than attempting to deliver the actual grain delivered by the Grower.

Grain Express addressed these problems by placing CBH in control of grain movements. This could only occur if CBH became the contracting party for transport between country storage and port.

The key elements of Grain Express are:

- open access to the CBH storage and handling network;
- a centrally coordinated structure for freight agreements;
- a bundled receipt, storage, handling, logistics and transport service;

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<sup>81</sup> Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, pp. 9-10.

- flexible and effective receival conditions;
- efficient Outturning of grain at defined Destination Sites, including ports;
- transparent freight, storage and handling fees for Growers and Exporters;
- transparent queuing and shipping arrangements;
- clarified grain entitlements of Growers and Exporters;
- quality management services to derive value from information; and
- an extensive Grower services call centre.

Under Grain Express, CBH negotiated agreements to acquire bulk grain haulage services from ARG and road haulage carriers. CBH use the freight services it acquires to move grain in its system between the Receival Point and, depending upon the requirements of the Grower and Exporter:

- one of 10 larger grain storage and loading facilities, where grain may be Outturned by the Grower or Exporter (Destination Sites);
- the MGC (which is also an Destination Site), where grain may be loaded into containers or Outturned for domestic supply;
- one of the four port storage and loading facilities (which are also Destination Sites).

CBH provides grain receival, storage and handling services to Growers and Exporters on the condition that, CBH will arrange for haulage of that grain to the point where it is Outturned from CBH's custody, which may be done at any of the 5 Destination Sites selected by Growers or Exporters.

This condition is implemented in CBH's contracts with both Growers (who acquire receival and storage services from CBH) and Exporters (which acquire storage and handling services) under Grain Express.

Under Grain Express, Growers are not required to make a nomination immediately at the Receival Point. Rather, grain will be received by CBH and the Grower will subsequently nominate its chosen acquirer and marketing arrangement at the time of its choice.

That choice is usually made electronically, via CBH's LoadNet® system, which lists each of the marketing options offered by the various grain Exporters. The various marketing options will include different estimates of transport costs and marketing returns for grain, depending upon the point at which the Exporter expects to Outturn grain or load it onto a vessel for export. For example, a marketing option may be offered for grain at the nearest Destination Site, or at the relevant downstream port.

Under Grain Express, transfer of grain entitlement to Exporters does not necessarily occur at the moment grain is delivered at the Receival Point. Instead, each marketing choice on LoadNet® provides for a specific point at which the Exporter will Outturn the grain. When the Grower nominates a choice of marketing option and Outturn point, the Exporter becomes entitled to Outturn grain at the nominated Destination Site at that time.

There are 5 export Destination Sites (including the 4 port terminals and the MGC). While Growers are able to Outturn grain from a Receival Point where they have warehoused grain, Exporters are only be able to Outturn their grain entitlements at a Destination Site. Domestic Users will be able to outturn at



relevant up-country receival sites after harvest and CBH will rebate 100% of the freight differential between the nomination site and the outturn site (except in the case of movements from MGC to Kwinana where the exporter will still bear the costs of transport between MGC and Kwinana).

Under Grain Express, once a Grower has nominated a marketing option, CBH arranges transport to the nominated Destination Site and invoices the Grower for its services (including a distinct and transparent freight charge) to that point. CBH does not add a profit margin to freight costs. The Exporter is charged storage and handling fees for the grain in relation to the Destination Site where it is Outturned.

CBH performs a range of tests of grain at the Receival Point and at other stages in the Supply Chain. The information obtained through the testing process is valuable in understanding the quality and other attributes of grain in CBH's system. Testing of grain at the Receival Point provides Growers with a detailed record of the grain they have delivered and also provides Exporters with a quality profile of:

- quality profile of their grain entitlement; and
- the total quality profile of all stocks of grain acquired.

The value provided from grain quality information is an important matter for Growers, CBH and Exporters. Exporters seek to match quality and specification of grain with particular markets.

CBH has a significant investment in quality management by establishing:

- the Australian Grain Centre in 2003 which is a nationally accredited testing laboratory; and
- a farm integrated quality program, which is an on-farm quality assurance program built to meet the internationally recognised SQF code, and is fully HACCP compliant.

CBH recognises that Exporters want site level quality information for marketing purposes. However, it does not necessarily follow that it is appropriate for an Exporter to assert control over specific grain parcels or to "mine" co-mingled stacks in order to obtain a greater share of high quality grain than the Exporter has paid for.

To effectively manage the stack access and quality issues and balance logistics efficiency with marketing value derivation, an important component of Grain Express is a quality management plan with the following elements:

Exporters will be provided with:

- full quality (as tested at receival), grade and quantity information for each parcel of grain delivered to their entitlement;
- weighted average quality of that Exporter's stock by grain and grade at each Destination Site, that will be adjusted based on all transactions in and out of Destination Sites.

Stakeholders are provided with total tonnes received (on a zone and whole-State basis) by grain and grade and its weighted average quality profile.

Exporters may request further testing data (not tested at receipt), subject to payment of a fee and CBH's information flow policy, which prohibits CBH from disclosing Exporters' confidential stock information.

Under Grain Express, CBH delivers at the nominated Destination Site (most commonly, at port) grain to a specification nominated by an Exporter, provided that the Exporter has sufficient stock of equivalent grain and provided sufficient time before the Outturn is required. In order to achieve this, CBH maintains a rolling profile of the Exporter's grain entitlement, updating the profile as grain is acquired by that Exporter and Outturned to that Exporter's specification. Unless it does so under the reservation policy referred to below, Exporters will not generally be able to request the movement of particular parcels of grain under Grain Express. However, they will be able to use information about the quality profile of their grain entitlements to derive value in niche markets.

Exporters are able to request the movement of particular qualities of grain if engaging in the quality management plan process under Grain Express. Exporters may request CBH to provide a particular quality of grain which will result in CBH reserving internally a stack of grain in order to meet the quality requirements of an Exporter. This ensures that the grain in the reserve stack is then delivered to that Exporter at the Destination Site.

CBH endeavours to meet quality requests in accordance with Exporters' pro rata entitlement to grain of that quality.

To ensure that the right balance is struck between Supply Chain efficiency and niche marketing requirements, CBH as part of its Grain Express service:

- has appointed a logistics quality manager, who is responsible for meeting quality specifications; and
- works with Exporters to develop quality management plans.

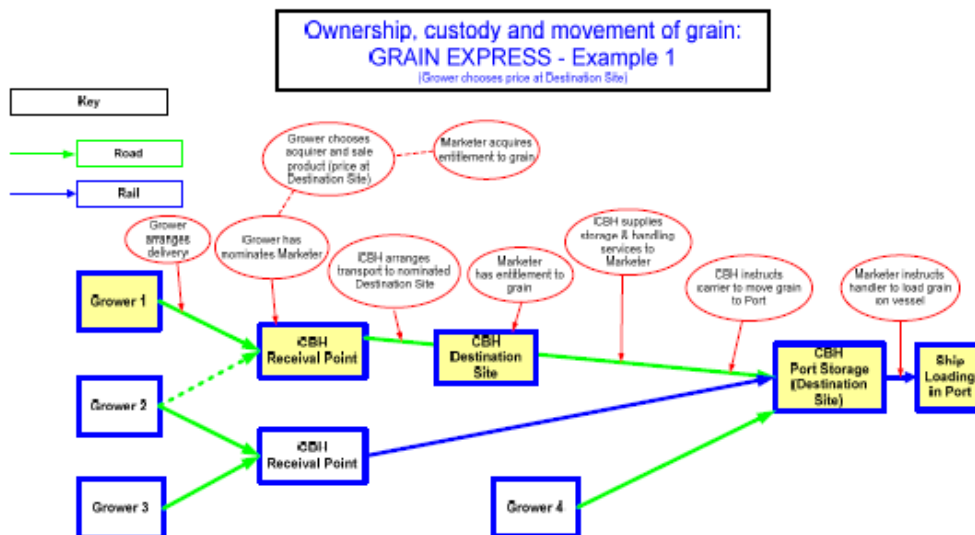
Under Grain Express, CBH is the head contractor for transport services required to transport grain in CBH's custody from country storage to port and between CBH sites. From the carriers' perspective, this provides a simplified contractual position and the path of instructions and information. Instead of dealing with several parties (and potentially in excess of 20 accredited Exporters following the revocation of AWB's monopoly position), carriers only need to negotiate with CBH.<sup>82</sup>

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

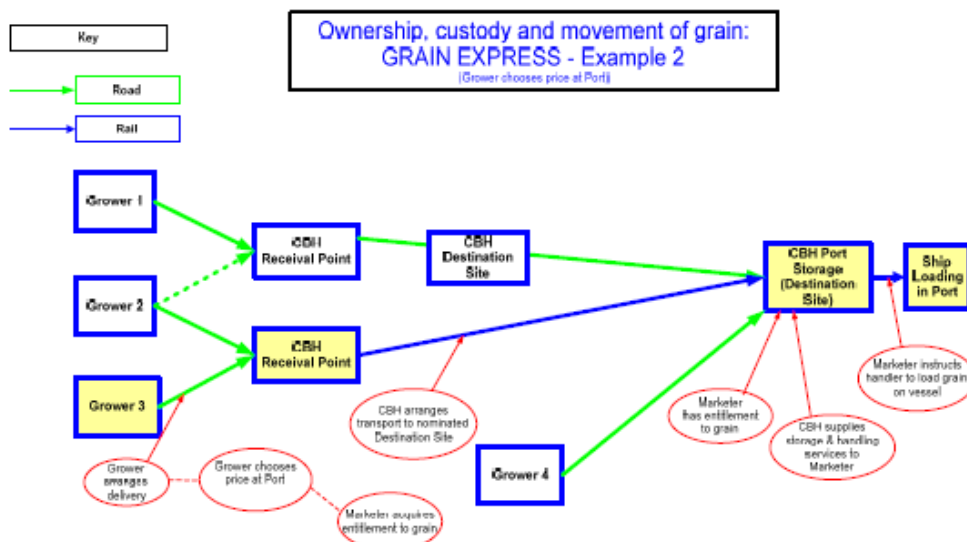
**Figure 1. - Ownership, custody and movement in Grain Express: Example 1 –** Grower chooses price at Destination Site

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<sup>82</sup> Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, pp. 10-15.



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



## 4.5 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 summarised below:<sup>83</sup>

- CBH must receive all grain tendered to it that meets the requisite standards: Bulk Handling Act, section 42, and Bulk Handling Regulations, regulation 13

<sup>83</sup> Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, pp. 7-8.

- 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 receival 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.

Sections 35A(b), (c) and (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 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.

## 5 Background, Objectives and Structure

### Summary

#### *Background section*

It is not necessary for the ACCC to form a view on the appropriateness of the background section of the September Undertaking pursuant to section 44ZZA(3) given that it is merely descriptive and places no obligations on CBH.

#### *Objectives*

The objectives section, critical to the operation of CBH's September Undertaking, is appropriate given that it has addressed the ACCC's concerns with the objectives section of CBH's April Undertaking. These were concerns with the following particular objectives:

- “The recovery of all reasonable costs associated with the granting of access to the Port Terminal Services” (clause 2.2(e)(i)(A)); and
- “The Port Operator’s ability to meet its own or its Trading Division’s reasonably anticipated requirements for Port Terminal Services” (clause 2.2(e)(i)(D)).

#### *Structure*

The structure section of the September Undertaking is appropriate given that it has addressed the ACCC's concerns with the structure section of CBH's April Undertaking. These concerns were:

- The reference to specific terms and conditions being set out in the Port Schedules (clause 3.1(b)(ii)); and
- The reference to using ‘reasonable endeavours’ to procure (clause 3.3).

### 5.1 CBH's April Undertaking

#### 5.1.1 Background section of the April Undertaking

CBH's April Undertaking includes the following background section:

- A The Port Operator operates the Port Terminal Facilities.
- B The Port Terminal Facilities provide services relating to the export of Bulk Wheat and other commodities.
- C The Port Operator has historically provided access to services provided by the Port Terminal Facilities to third parties under open access policies.

- D The Port Operator or its Related Body Corporate has applied to become an Accredited Wheat Exporter under the *Wheat Export Marketing Act 2008* (Cth).
- E Under section 24 of the WEMA, a person who is also the provider of one or more port terminal services (as defined under that Act) must satisfy the ‘access test’ to be eligible for accreditation to export bulk wheat.
- F The ‘access test’ under the WEMA requires:
  - (a) the person to comply with the Continuous Disclosure Rules in relation to a port terminal service; and
  - (b) either there is:
    - i. an access undertaking in operation (under Division 6 Part IIIA of the Trade Practices Act 1974) relating to the provision to Accredited Wheat Exporters of access to the port terminal service for purposes relating to export of Bulk Wheat; or
    - ii. a decision in force that a regime established by a State or Territory for access to the port terminal service is an effective access regime (under Division 2A Part IIIA of the TPA) and under that regime Accredited Wheat Exporters have access to the port terminal service for purposes relating to the export of Bulk Wheat.
- G The Port Operator has submitted this Undertaking to the ACCC for approval under Part IIIA of the TPA for the purpose of satisfying the ‘access test’.<sup>84</sup>

### 5.1.2 Objectives of the April Undertaking

At clause 2 CBH states that the April Undertaking has the following objectives:

- a. providing a framework to manage negotiations with Applicants for access to services provided by certain facilities at the Port Terminal Facilities in relation to export of Bulk Wheat;
- b. establishing a workable, transparent, non-discriminatory and efficient process for lodging and processing Access Applications;
- c. providing a non-discriminatory approach to pricing under which the Port Operator publishes reference prices and terms and conditions for the provision of certain standard services annually;
- d. operating consistently with the objectives and principles in Part IIIA of the TPA and the Competition Principles Agreement;
- e. reaching an appropriate balance between:
  - i. the legitimate business interests of the Port Operator, including:
    - A. the recovery of all reasonable costs associated with the granting of access to the Port Terminal Services;

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<sup>84</sup> Co-operative Bulk Handling Limited, *Port Terminal Services Access Undertaking*, 14 April 2009, p. 1.

- B. a fair and reasonable return on the Port Operator's investment in the Port Terminal Facility commensurate with its commercial risk;
  - C. the Port Operator's business interests relating to the export of grain other than Bulk Wheat and to the export of non-grain commodities using the Port Terminal Facilities; and
  - D. the Port Operator's ability to meet its own or its Trading Business' reasonably anticipated requirements for Port Terminal Services;
- ii. the interest of the public, including:
    - A. ensuring efficient use of resources; and
    - B. the promotion of economically efficient investment, use and operation of the Port Terminal Facilities; and
  - iii. the interests of Applicants wanting access to the Port Terminal Services, including providing access to the Port Terminal Services:
    - A. on non-discriminatory price and non-price terms; and
    - B. in a transparent, open, efficient and non-discriminatory manner;
- f. providing an efficient, effective and binding resolution process in the event that the Port Operator and the Applicant are unable to negotiate a mutually acceptable Access Agreement; and
  - g. in accordance with the objective in s44AA(b) of the TPA, providing for a uniform approach to access to the Port Terminal Services at the different Port Terminal Facilities to the extent practicable having regard to the different characteristics of the Port Terminal Facilities.

### 5.1.3 Structure of the April Undertaking

The structure section of CBH's April Undertaking is set out at clause 3 as follows:

#### 3.1 Components

- (a) This Undertaking applies in relation to access to Port Terminal Services provided by means of Port Terminal Facilities at the Ports. The Port Terminal Facilities are geographically separate and have different physical and operating characteristics and modes of operation.
- (b) Accordingly, this Undertaking comprises:
  - i. these General Terms (and schedules) which apply to Port Terminal Services provided by means of each Port Terminal Facility; and
  - ii. the specific Port Schedules which describe:
    - A. the Port Terminal Services provided by means of a Port Terminal Facility; and



- B. any specific terms and conditions on which access will be offered to the Port Terminal Services provided by means of that Port Terminal Facility,

and apply only to Port Terminal Services provided by means of that particular Port Terminal Facility.

### **3.2 Priority**

The terms of a Port Schedule will prevail over the General Terms to the extent of any inconsistency between them.

### **3.3 Obligation to procure**

If the performance of an obligation under this Undertaking requires a Related Body Corporate of the Port Operator to take some action or refrain from taking some action, the Port Operator must use reasonable endeavours to procure that Related Body Corporate to take that action or refrain from taking that action.

## **5.2 CBH's submissions in support of its April Undertaking**

CBH submits that that the objectives to its April Undertaking are largely derived from the TPA and the WEMA.<sup>85</sup>

## **5.3 Submissions from interested parties in response to ACCC's Issues Paper**

### **5.3.1 Australian Grain Exporters Association (AGEA)**

AGEA states that the objectives clause is 'a mere statement of intent', highlights the BHCs' 'inevitable conflict of interest' and 'may be used to condone discriminatory behaviours by the BHCs'.<sup>86</sup> AGEA submits that this point is demonstrated at clauses 2(e)(i)(A) and (D) which refer to the legitimate business interests of the BHCs, including 'recovery of reasonable costs' and their ability 'to meet its own or its Trading Divisions' reasonably anticipated requirement for Port Terminal Services'.<sup>87</sup>

AGEA submits that the objectives clause defines the objectives of the proposed access undertakings using nebulous concepts like "operating consistently with", "reaching an appropriate balance", "fair and reasonable return ... commensurate with ... commercial risk", "the interest of the public" and so on. AGEA submits that there is no tangible basis upon which to assess actual compliance.<sup>88</sup>

AGEA states that it is impossible to assess the appropriateness of the structure of the April Undertaking because it does not contain or refer to the prices or terms and

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<sup>85</sup> Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 44.

<sup>86</sup> Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, p. 16.

<sup>87</sup> Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, p. 16.

<sup>88</sup> Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, p. 16.

conditions on which access will be provided. On this basis, AGEA states ‘it is impossible to say whether specific terms and conditions relating to a particular Port Facility should be permitted to override General Terms’.<sup>89</sup>

AGEA submits that clause 3.3 is unsatisfactory in that it enables CBH, or its related entities to avoid their obligations under the April Undertaking. AGEA states:

If a related entity is required to take or refrain from taking some action under the proposed access undertaking, the related entity should be a party to the undertaking or the BHCs should be obliged to procure the related entity to take or refrain from taking action. A ‘reasonable endeavours’ obligation is not sufficient. There should also be an obligation for the BHCs to indemnify any party that suffers loss or damage as a result of the breach.<sup>90</sup>

### 5.3.2 Riverina

Riverina submits that clause 2.2(e)(i)(D) should be deleted as it encourages:

- (i) the consideration of the Trading Division as something other than another user of Port Terminals and Port Terminal Services; and
- (ii) discriminatory treatment between other Users of Port Terminals and Port Terminal Services and [CBH’s] Trading Division.<sup>91</sup>

Further, Riverina submits that the body of the April Undertaking should prevail over the Schedules and be the primary reference point for understanding the terms of the Undertaking offered which will be binding once finalised.<sup>92</sup>

In relation to clause 3.3, Riverina submits that if a body corporate of CBH is required to do something pursuant to the April Undertaking then it should be a party to the April Undertaking.<sup>93</sup>

## 5.4 CBH’s submissions in response to ACCC’s Draft Decision

CBH did not make any submissions in response to the ACCC’s Draft Decision regarding the ACCC’s views on Background, Objectives or Structure.

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<sup>89</sup> Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, p. 17.

<sup>90</sup> Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, p. 17.

<sup>91</sup> Riverina (Australia) Pty Ltd, *Submission in relation to proposed GrainCorp and CBH access undertakings*, 29 May 2009, p. 13. Note that while the clause references used by Riverina in this part of its submission relate to GrainCorp’s proposed Undertaking, Riverina informed the ACCC that its submission relates to both GrainCorp and CBH.

<sup>92</sup> Riverina (Australia) Pty Ltd, *Submission in relation to proposed GrainCorp and CBH access undertakings*, 29 May 2009, p. 13. Again, note that while this submission of Riverina’s refers to GrainCorp rather than CBH, Riverina informed the ACCC that its submission relates to both GrainCorp and CBH.

<sup>93</sup> Riverina (Australia) Pty Ltd, *Submission in relation to proposed GrainCorp and CBH access undertakings*, 29 May 2009, p. 13.

## 5.5 Submissions from interested parties in response to ACCC's Draft Decision

### 5.5.1 AGEA

AGEA submitted the following in relation to the ACCC's views as set out in its Draft Decision on the Objectives section of CBH's April Undertaking:

The Objectives section ties into key clauses and is critical to the working of the proposed Undertakings.

#### *BHCs*

The ACCC considers that the reference to 'reasonable costs' at CBH clause 2(e)(i)(A) ... is ambiguous with respect to what costs an access provider may recover through charges levied on the access seeker.

The ACCC is of the view that the objective of balancing the legitimate interests of the BHCs with the interests of access seekers is more likely to be appropriate pursuant to section 44ZZA(3) of the TPA if the word 'efficient' is substituted for 'reasonable'. AGEA accepts that a reference to "efficient" costs, instead of "reasonable" costs, would be consistent with the pricing principles at section 44ZZCA of the TPA. However, AGEA is concerned that there will continue to be uncertainty as to the proper application and meaning of this clause as "efficient" costs cannot be objectively determined unless there is proper transparency and non-discrimination.

AGEA agrees with the ACCC's decision that the interpretation of CBH clause 2(e)(i)(D) ... (which refers to the "Port Operator's ability to meet its own or its Trading Division's reasonably anticipated requirements for Port Terminal Services") in the context of an access Undertaking (rather than in relation to a Part IIIA arbitration) is unclear and that it is likely that difficulties would arise in determining the proper application of this clause.

As noted by the ACCC, one interpretation of the clause could be that BHCs intend to reserve and set aside their own or their Trading Division's 'reasonably anticipated requirements' for port capacity and then provide access to third parties for the remaining capacity.

For the reasons given in AGEA's original submission, AGEA remains concerned that BHCs' Objectives clause makes the undertaking circular and biased in favour of BHCs by allowing BHCs to make decisions which are consistent with the objectives of the undertaking, when the objectives of the undertakings provide the opportunity for BHCs to favour their own interests. The problems created by the Objectives clause are exacerbated by weak ring-fencing policies and an overall lack of transparency in relation to BHCs' operational decisions and costs and charges.

As long as one of BHCs' stated Objectives is biased in favour of their own interests, the ACCC should continue to reject BHCs' Undertakings.

AGEA submitted the following in relation to the ACCC's views as set out in its Draft Decision of the Structure section of CBH's April Undertaking:

#### **Specific terms and conditions in the Port Schedules**

AGEA agrees that the structure of the proposed Undertaking is not appropriate given the proposed reference to terms and conditions in the "Port

Schedule” (even with the statement that terms in the “Port Schedule” will prevail over the General Terms). All of the proposed terms and conditions of access should be clearly set out in the standard port terminal services agreement offered to accredited wheat exporters. Having other or further terms and conditions in the “Port Schedules” is likely to create confusion and uncertainty.

## 5.6 ACCC’s view on the April Undertaking

### 5.6.1 Background to the April Undertaking

Given that the background section of the April Undertaking is merely descriptive and does not place any obligations on CBH, it is not necessary for the ACCC to consider whether it is appropriate pursuant to section 44ZZA(3).

### 5.6.2 Objectives of the April Undertaking

Unlike the background section, the objectives section is critical to the working of the April Undertaking.

The objectives section ties into key clauses of the April Undertaking in the following manner:

- the first non-discriminatory access clause (6.4) provides that CBH must not provide access on ‘different terms’ unless such terms are, inter alia, ‘consistent with the objectives of this Undertaking set out in clause 2’;<sup>94</sup> and
- it is proposed that any variations to the Port Terminal Rules must be consistent with the objectives section.<sup>95</sup>

The ACCC considers that the objectives section, as a whole, is not appropriate having regard to matters in section 44ZZA given its concerns with the following particular objectives:

#### 5.6.2.1 “The recovery of all reasonable costs associated with the granting of access to the Port Terminal Services” (clause 2(e)(i)(A))

The ACCC considers that the reference to ‘reasonable costs’ at clause 2(e)(i)(A) is ambiguous with respect to what costs an access provider may recover through charges levied on the access seeker. Further, it is not clear whether allowing for recovery of ‘all reasonable costs’ would be in accordance with the pricing principles at 44ZZCA (which make reference to ‘efficient costs’ rather than ‘reasonable costs’).

The ACCC considers that this clause does not appropriately balance the legitimate business interests of CBH with the interests of access seekers, and the ambiguity of the clause raises concerns about the certainty and clarity of the terms of the April Undertaking.

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<sup>94</sup> Co-operative Bulk Handling Limited, *Port Terminal Services Access Undertaking*, 14 April 2009, clause 6.4(a)(ii)(C).

<sup>95</sup> Co-operative Bulk Handling Limited, *Port Terminal Services Access Undertaking*, 14 April 2009, clause 9.2(b)(i)(A).

The ACCC is of the view that this objective is more likely to be appropriate pursuant to section 44ZZA(3) of the TPA if the word ‘efficient’ is substituted for ‘reasonable’.

The ACCC notes AGEA’s concern that even with this change, the meaning of ‘efficient costs’ may remain uncertain. The ACCC considers, however that the term ‘efficient costs’ is appropriate in a regulatory setting having regard to the matters at section 44ZZA(3). The term ‘efficient costs’ is commonly used in regulated industries.

#### **5.6.2.2 “The Port Operator’s ability to meet its own or its Trading Divisions’ reasonably anticipated requirements for Port Terminal Services” (clause 2(e)(i)(D))**

The ACCC considers that the interpretation of clause 2(e)(i)(D) in the context of an access undertaking (rather than in relation to a Part IIIA arbitration) is unclear and that it is likely that difficulties would arise in determining the proper application of this clause. It is noted that the use of the term ‘reasonably anticipated requirements’ in section 44W of the TPA is referring to “an existing user” (i.e. any existing user, not just the access provider).

One interpretation of the clause could be that CBH intends to reserve and set aside its own or its Trading Division’s ‘reasonably anticipated requirements’ for port capacity and then provide access to third parties for the remaining capacity. This could allow CBH to significantly promote the interests of CBH above those of potential access seekers in a manner that is neither in the interests of potential access seekers, or in the broader public interest, including the public interest in having competition in markets. This interpretation of the clause runs counter to the objectives of the WEMA and particularly the objective of ensuring ‘fair’ access to port terminal services.

This ambiguity raises concerns about the certainty and clarity of the terms of the April Undertaking.

#### **5.6.3 Structure of the April Undertaking**

The ACCC considers that the structure section is not appropriate having regard to matters at section 44ZZA(3) given its concerns with the following particular clauses:

##### **5.6.3.1 Specific terms and conditions in the Port Schedules (clause 3.1(b)(ii))**

The ACCC is of the view it is not appropriate for the Port Schedules to include any ‘specific terms and conditions on which access will be offered’.

The terms and conditions on which access is offered are set out in the standard terms offered to accredited wheat exporters. Having other terms and conditions in the Port Schedules is likely to create confusion and uncertainty about the terms of access (even with the operation of clause 3.2 – setting out that the terms of a Port Schedule will prevail over the General Terms to the extent of any inconsistency).

It is the ACCC’s view that, instead, the terms and conditions of access should *all* be clearly set out in the standard terms offered to accredited wheat exporters.

The ACCC considers that this will not cause any issues for CBH because, despite clause 3.1(b)(ii), its Port Schedules do not appear to include any specific terms or conditions.

#### **5.6.3.2 Using ‘reasonable endeavours’ to procure (clause 3.3)**

The ACCC considers that if another body was required to act (or not act) in a certain manner by the April Undertaking, then that party should be a party to the April Undertaking.

However, the ACCC considers that inclusion of the obligation to procure clause is nonetheless appropriate in the unlikely case that it is required.

However, an obligation to use ‘reasonable endeavours’ does not appropriately balance the legitimate business interests of CBH with the interests of access seekers, who require more certainty that the terms of the April Undertaking will be carried out.

It is the ACCC’s view that the words ‘use reasonable endeavours to’ should be removed from this clause to strengthen the obligation to procure.

#### **5.6.4 CBH’s September Undertaking**

The clauses in CBH’s September Undertaking relating to the background, objectives and structure of the undertaking (ie. clauses 2 and 3 of the September Undertaking) are set out in CBH’s September Undertaking at Annexure A.

#### **5.6.5 ACCC’s views on CBH’s September Undertaking**

The ACCC considers that the clauses in CBH’s September Undertaking relating to the background, objectives and structure of the undertaking have addressed the ACCC’s concerns with the clauses relating to the background, objectives and structure of CBH’s April Undertaking set out in the ACCC’s Further Draft Decision.

Therefore, the ACCC considers that the clauses in relation to the background, objectives and structure of CBH’s September Undertaking are appropriate.

## 6 Commencement, term and variation

### Summary

#### *Commencement*

The commencement section of the September Undertaking is appropriate given that it has addressed the ACCC's concerns with the commencement section of CBH's April Undertaking. These concerns were that the commencement clause was not appropriate given it did not make it clear the date upon which CBH undertakes to comply with the obligations in the Undertaking, given that for the purposes of the WEMA an undertaking comes into operation at the time when the ACCC publishes its decision to accept the undertaking.<sup>96</sup>

#### *Term*

The two year term of the September Undertaking is appropriate pursuant to section 44ZZA(3) given the transitional state of the wheat export industry.

The three year term proposed in CBH's April Undertaking was not considered to be appropriate given the transitional state of the industry (i.e. CBH's proposed term was slightly too long). In coming to this view the ACCC also took into account the desirability of having consistent bulk wheat port access regulation arrangements across Australia (noting that AusBulk and GrainCorp have since had two year terms accepted for their Undertakings).

#### *Withdrawal and variation*

It is not necessary for the ACCC to form a view on the appropriateness of the withdrawal and variation clauses of the September Undertaking given that they are merely descriptive.

#### *Extension*

The extension section of the September Undertaking is appropriate given that it has addressed the ACCC's concerns with the commencement section of CBH's April Undertaking. These concerns were that the extension clause was not appropriate given that clause 4.6(a) referred to submitting an undertaking 'at least three months' before the expiry of the April Undertaking. This proposal was inconsistent with the statutory obligation in section 44ZZBC of the TPA for the ACCC to use reasonable endeavours to make a decision on an access undertaking application within 6 months.

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<sup>96</sup> *Wheat Export Marketing Act 2008*, s 24(3).

## 6.1 CBH's April Undertaking

### 6.1.1 Commencement and Term

The April Undertaking is expressed to commence on 1 October 2009.<sup>97</sup>

The April Undertaking provides for expiration on the earlier of 30 September 2012, or when the ACCC consents to CBH withdrawing the Undertaking in accordance with Part IIIA of the TPA, including under clause 4.3 of the Undertaking (which provides for 'early withdrawal,' as described below).<sup>98</sup>

### 6.1.2 Withdrawal & variation of the April Undertaking

The April Undertaking provides that CBH may seek the approval of the ACCC to the withdrawal of the Undertaking if:

- a. CBH or a Related Body Corporate ceases to be an Accredited Wheat Exporter under the WEMA; or
- b. the WEMA is amended such that an Accredited Wheat Exporter is no longer required to have in place an access undertaking under Part IIIA of the TPA in relation to access to any of the Port Terminal Services for the purposes of obtaining or maintaining accreditation under that Act.<sup>99</sup>

In terms of variation, the April Undertaking provides that CBH may seek the approval of the ACCC for variation via the removal of the Port Terminal Services provided at a particular Port on the occurrence of:

- a. the disposal of the Port Terminal to a person who is not a Related Body Corporate of CBH and CBH ceases to operate or control the Port Terminal Facility; or
- b. if there is in force under Division 2A Part IIIA of the TPA a regime established by a State or Territory for access to services provided at the Port Terminal, and under that regime Accredited Wheat Exporters have access to Port Terminal Services (or services substantially similar to the Port Terminal Services) for purposes relating to the export of Bulk Wheat.<sup>100</sup>

The April Undertaking also provides, in relation to variation, that CBH may seek the approval of the ACCC to vary the Undertaking if CBH is of the opinion that circumstances have changed such that the Undertaking:

- a. is no longer commercially viable for CBH or becomes inconsistent with the objectives set out in clause 2; or

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<sup>97</sup> Co-operative Bulk Handling Limited, *Port Terminal Services Access Undertaking*, 14 April 2009, clause 4.1.

<sup>98</sup> Co-operative Bulk Handling Limited, *Port Terminal Services Access Undertaking*, 14 April 2009, clause 4.2.

<sup>99</sup> Co-operative Bulk Handling Limited, *Port Terminal Services Access Undertaking*, 14 April 2009, clause 4.3.

<sup>100</sup> Co-operative Bulk Handling Limited, *Port Terminal Services Access Undertaking*, 14 April 2009, clause 4.4.



- b. is no longer consistent with the Continuous Disclosure Rules as a result of changes to the WEMA.<sup>101</sup>

The April Undertaking also provides that, prior to seeking the approval of the ACCC for a variation of this kind,<sup>102</sup> CBH will first consult with Users and Applicants regarding the proposed variation.<sup>103</sup>

### 6.1.3 Extension of the April Undertaking

Clause 4.6 proposes a mechanism for extension of the April Undertaking in certain circumstances. In summary, this clause provides:

- a. At least three months before the expiry of the Undertaking, CBH will submit to the ACCC a written statement outlining whether or not it intends to submit a new undertaking to the ACCC for its consideration.
- b. If CBH intends to submit a new undertaking to the ACCC, CBH will also apply to the ACCC for an extension of the expiring Undertaking.
- c. The application for extension would include a proposed extension period which, in CBH's view, 'reasonably estimates the time it would take for [CBH] to formulate a new undertaking and have that undertaking take effect following approval by the ACCC.'<sup>104</sup>

It is proposed that if CBH does not propose to submit to the ACCC a new undertaking, then the steps at paragraphs (b) and (c) are not applicable.<sup>105</sup> It is also proposed that nothing in clause 4.6 (regarding the extension of the Undertaking) prevents CBH from submitting a new undertaking to the ACCC at any time during the term of current Undertaking.<sup>106</sup>

## 6.2 CBH's supporting submissions in relation to its April Undertaking

In its submission, CBH notes that the proposed term of the Undertaking is 3 years, and submits that the term is appropriate:

'...because of the rapidly changing structure and operation of the export wheat supply chain. At this early point in the deregulation process, it is difficult to predict the future dynamics of the industry. In addition, the 2010

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<sup>101</sup> Co-operative Bulk Handling Limited, *Port Terminal Services Access Undertaking*, 14 April 2009, clause 4.5.

<sup>102</sup> That is, per clause 4.5(a), where CBH is of the opinion that circumstances have changed such that the undertaking is no longer commercially viable or becomes inconsistent with the objectives; or that the undertaking is no longer consistent with the Continuous Disclosure Rules as a result of changes to the WEMA.

<sup>103</sup> Co-operative Bulk Handling Limited, *Port Terminal Services Access Undertaking*, 14 April 2009, clause 4.5(b).

<sup>104</sup> Co-operative Bulk Handling Limited, *Port Terminal Services Access Undertaking*, 14 April 2009, clause 4.6(c).

<sup>105</sup> Co-operative Bulk Handling Limited, *Port Terminal Services Access Undertaking*, 14 April 2009, clause 4.6(d).

<sup>106</sup> Co-operative Bulk Handling Limited, *Port Terminal Services Access Undertaking*, 14 April 2009, clause 4.6(e).

Productivity Commission review may conclude that there is no compelling case for the continued inclusion of the access test in the WEMA.<sup>107</sup>

CBH reiterates this position in its supplementary submission,<sup>108</sup> but notes that it would be efficient and appropriate for each of the April Undertakings (i.e. those proposed by CBH, ABB and GrainCorp) to have the same expiry date.<sup>109</sup>

CBH also submits that the April Undertaking is provided to satisfy the access test in the WEMA, and as result proposes that CBH may seek its withdrawal in the circumstances described above.<sup>110</sup> In its supplementary submission, CBH clarifies that the purpose of including an express reference to seeking ACCC approval to withdraw or vary the April Undertaking was to disclose that such an application might be made in appropriate circumstances. CBH states that it would not object if this aspect of the April Undertaking were required to be removed.<sup>111</sup>

In its supplementary submission, CBH states that consultation with Users and Applicants regarding any proposed variation to the Undertaking would include:

- preparing, publishing and providing Users/Applicants with a consultation document on the proposed variation;
- arranging and requesting written submissions and face to face consultations with Users/Applicants and interested third parties;
- publishing a summary of responses to the proposed variation and making any appropriate changes to the proposed variation (or not, as the case may be), and seeking further submissions and consultations on any amendments;
- submitting the proposed variation to the ACCC.<sup>112</sup>

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<sup>107</sup> Co-operative Bulk Handling Limited, *Submission to the ACCC*, 14 April 2009, para 5.2, p. 31.

<sup>108</sup> Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, para 12.2, p. 45.

<sup>109</sup> Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, para 12.2, p. 46.

<sup>110</sup> Co-operative Bulk Handling Limited, *Submission to the ACCC*, 14 April 2009, para 5.2, p. 31.

<sup>111</sup> Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, para 14.2, p. 46.

<sup>112</sup> Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, Schedule 2, pp. 77-78.

## 6.3 Submissions from interested parties in response to ACCC's Issues Paper

### 6.3.1 AGEA<sup>113</sup>

#### 6.3.1.1 Term

AGEA, in its submission of 29 May 2009, suggested that the proposed two year term of CBH's undertaking is unacceptable to wheat exporters and unlikely to promote efficient investment. AGEA submits that wheat exporters 'need the comfort of knowing that their investment is protected by guaranteed access to port terminal services for at least five years.'<sup>114</sup>

AGEA submits that the CBH undertaking should operate for a minimum of five years and have a common expiry date with the undertakings of the other bulk handlers.<sup>115</sup>

#### 6.3.1.2 Early withdrawal and variation

In relation to the variation of the April Undertaking, AGEA submits that:

- a. the circumstances in which CBH may seek to vary the access undertaking are broader than the TPA;<sup>116</sup>
- b. the provider of an access undertaking is adequately protected by section 44ZZA(7) of the TPA,<sup>117</sup> and it is unnecessary for the undertaking to specify the circumstances in which CBH may seek the ACCC's approval to withdraw or vary the undertaking, as this is covered by that section;<sup>118</sup>
- c. 'it is not appropriate for the undertaking to specify the circumstances in which the ACCC may (or may not) consent to a variation of an access undertaking as this may fetter the ACCC's statutory discretion';<sup>119</sup>
- d. If the undertaking is to contain a term regarding variation, that term should be consistent with section 44ZZA(7) of the TPA.<sup>120</sup>

AGEA also notes that the undertaking proposes that CBH may seek variation of the undertaking if the Port Terminal is disposed to a person who is not a Related Body

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<sup>113</sup> The ACCC notes that AGEA's submission of 29 May 2009 was made in relation to all three bulk handlers. In summarising AGEA's submission, the ACCC interprets references to 'the bulk handlers,' 'the BHCs' and 'the Port Operators' as references to CBH in circumstances where the AGEA submission is commenting on aspects common to all three of the undertakings.

<sup>114</sup> AGEA, *Submission in relation to proposed access undertakings*, 29 May 2009, para 7.1, p. 18.

<sup>115</sup> Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, Schedule 1, para D2(i), p. 40.

<sup>116</sup> Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 7.2, p. 18.

<sup>117</sup> Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 7.2, p. 18.

<sup>118</sup> Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, Schedule 1, para D2(iii), p. 40.

<sup>119</sup> Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 7.2, p. 18.

<sup>120</sup> Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, Schedule 1, para D2(iv), p. 40.

Corporate of CBH, and CBH ceases to operate or control the Port Terminal Facilities at that Port Terminal. AGEA submits that '[a]ny disposal of a port terminal service that is the subject of an access undertaking should be strictly on terms that access to those services continues.'<sup>121</sup>

### **6.3.1.3 Extension**

AGEA submits that there is a 'mismatch' between what is proposed in the CBH undertaking in relation to extension of the undertaking and what is specified in section 44ZZBC(1) of the TPA in terms of extension to an access undertaking. AGEA submits that the bulk handlers should be required to submit a statement outlining their intention to provide a new undertaking at least six months prior to the expiry of the existing undertaking, and to submit a new undertaking not less than six months before the expiry of the undertaking.<sup>122</sup>

AGEA also submits that it is appropriate that the undertaking applies only to new Access Agreements.<sup>123</sup>

### **6.3.2 Pastoralists & Graziers Association of WA (Inc)**

The Pastoralists & Graziers Association of WA (**the PGA**) notes that the CBH Undertaking is proposed to expire on the earlier of 30 September 2012 or when the ACCC consents to its withdrawal, while the ABB and GrainCorp Undertakings are proposed to expire on the earlier of 30 September 2011 or when the ACCC consents to its withdrawal. The PGA submits that the '...disparity between the Port Service Operators should be unified.'<sup>124</sup>

The PGA also submits that the proposed three year term of the CBH Undertaking '...is also unlikely to promote efficient investment from any competitor with regards to upcountry facilities.'<sup>125</sup>

### **6.3.3 Western Australian Department of Agriculture and Food**

The Western Australian Department of Agriculture and Food (**DAFWA**) submits that '...the undertakings of the Bulk Handlers should all expire together, preferably in 2012. This will allow a single review of the operation of the undertakings over the period and the need for their continuation.'<sup>126</sup>

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<sup>121</sup> Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 7.3, p. 18.

<sup>122</sup> Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 7.4, p. 18.

<sup>123</sup> Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, Schedule 1, para D2(v), p. 40.

<sup>124</sup> Pastoralists and Graziers Association, *Submission in relation to proposed CBH access undertaking*, 29 May 2009, para 4.13, p. 9.

<sup>125</sup> Pastoralists and Graziers Association, *Submission in relation to proposed CBH access undertaking*, 29 May 2009, para 4.14, p. 9.

<sup>126</sup> Department of Agriculture and Food Western Australia, *Submission in relation to proposed CBH access undertaking*, 18 May 2009, p. 3.

## 6.4 Submissions in response to ACCC's Draft Decision

### 6.4.1 CBH

In its submission of 25 August 2009, CBH proposes to replace clause 4 of its April Undertaking with a new clause to:

- (i) Reduce the term to two years, in line with the ACCC's view in the Draft Decision;
- (ii) remove the unnecessary statements of indicative circumstances in which CBH can seek a variation to or withdrawal of the Undertaking, and instead rely on the relevant provisions of the Trade Practices Act 1974 (Cth);
- (iii) similarly, remove the unnecessary prescription of circumstances in which CBH can seek an extension; and
- (iv) generally simplify the section.<sup>127</sup>

### 6.4.2 AGEA<sup>128</sup>

AGEA agrees with the ACCC's Draft Decision that the April Undertaking should be for a term of two years.<sup>129</sup>

## 6.5 ACCC's views on the April Undertaking

### 6.5.1 Term

Section 44ZZBA(1) of the TPA provides:

- (1) If the Commission accepts an access undertaking or an access code, it comes into operation at:
  - (a) If, within 21 days after the Commission publishes its decision, no person has applied to the [Australian Competition] Tribunal for review of the decision – the end of that period; or
  - (b) If a person applies to the Tribunal within that period for review of the decision and the Tribunal affirms the decision – the time of the Tribunal's decision.

However, section 24(3) of the WEMA provides:

- (2) For the purposes of paragraph (2)(c) [regarding whether a person passes the access test at a particular time]:
  - (a) assume that subsection 44ZZBA(1) of the *Trade Practices Act 1974* had never been enacted; and

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<sup>127</sup> Co-operative Bulk Handling Limited, *Submission in relation to Draft Decision on CBH Access Undertaking – Term and Variation*, 25 August 2009, para 2, p. 1.

<sup>128</sup> Australian Grain Exporters Association, *Submission in relation to Draft Decisions on Port Terminal Services Access Undertakings*, 3 September 2009.

<sup>129</sup> Australian Grain Exporters Association, *Submission in relation to Draft Decisions on Port Terminal Services Access Undertakings*, 3 September 2009, para 6.1.

- (b) assume that an access undertaking comes into operation at the time when the ACCC publishes its decision to accept the undertaking.

The Explanatory Memorandum to the WEMA explains that this clause was included to clarify that the ACCC's decision to accept an access undertaking is sufficient to pass the access test. The Explanatory Memorandum goes on to state that:

...This contrasts with section 44ZZBA of the *Trade Practices Act 1974* which provides for appeal processes before an undertaking comes into force. Subclause 24(3) of the Bill does not prevent appeals against the ACCC's decisions from taking place, but means that the access test is passed once the ACCC approves an undertaking. This has been done to eliminate the possibility of a third party delaying the accreditation of a port terminal service provider through vexatious use of the legal process. A port terminal service provider should not be disadvantaged by such appeals if it has acted in good faith and provided an access undertaking that is satisfactory to the ACCC...

Given the interaction between section 44ZZBA(1) of the TPA and section 24(3) of the WEMA, the ACCC considers it is not appropriate for the April Undertaking to simply specify that it commences on 1 October 2009.

It would be more likely to be appropriate if the clause specified that this was the commencement date for the purposes of section 24 of the WEMA.

In relation to the term of CBH's April Undertaking, the ACCC is of the view that having an undertaking with a short duration is appropriate. In taking this view the ACCC notes the transitional state of the bulk wheat export industry and the desirability of avoiding the imposition of regulation that is not appropriate on a newly deregulated industry, which would not be in the public interest. The ACCC notes that, given the transitional state of the industry, access arrangements that are appropriate now may not be appropriate in several years time. The ACCC considers that three years would be slightly too long a term and that a shorter term of two years would better mitigate these risks.

In this regard, the ACCC has also taken into account the desirability of having consistent bulk wheat port access regulation arrangements across Australia (noting that ABB and GrainCorp have proposed two year terms for their Undertakings).

### **6.5.2 Withdrawal and variation**

Section 44ZZA(7) of the TPA states that an access provider may withdraw or vary an undertaking at any time, but only with the consent of the ACCC. Further, the ACCC may consent to a variation of the undertaking if it thinks appropriate, having regard to the matters in section 44ZZA(3).<sup>130</sup>

The ACCC considers that, in light of section 44ZZA(7), it is unnecessary for the April Undertaking to specify the particular circumstances in which CBH may seek the withdrawal or variation of the April Undertaking. The ACCC considers that the clauses CBH has proposed are merely indicative of the circumstances in which variation or withdrawal may be sought, and in no way fetter the discretion of the ACCC in relation to those matters as provided under the TPA.

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<sup>130</sup> *Trade Practices Act 1974* (Cth) s 44ZZA(7).

Therefore, it is not necessary for the ACCC to form a view on the appropriateness of the withdrawal and variation clauses pursuant to section 44ZZA(3) given that they are merely descriptive.

### **6.5.3 Extension**

Section 44ZZBB of the TPA provides, in relation to the extension of access undertakings:

- (1) If an access undertaking is in operation under section 44ZZBA (including as a result of an extension under this section), the provider of the service may apply in writing to the Commission for an extension of the period for which it is in operation.
- (2) The provider of the service must specify in the application a proposed extension period.
- (3) The Commission may, by notice in writing, extend the period for which the undertaking is in operation if it thinks it appropriate to do so having regard to the matters mentioned in subsection 44ZZA(3). The notice must specify the extension period.<sup>131</sup>

The ACCC considers that, in light of section 44ZZBB, it is unnecessary for the April Undertaking to specify the particular circumstances in which CBH may seek the extension of the proposed Undertaking. The ACCC considers that the clauses CBH has proposed are merely indicative of what CBH may do in seeking an extension, and in no way fetter the discretion of the ACCC in relation to those matters as provided under the TPA.

Furthermore, it is the ACCC's view that clause 4.6(a) of the April Undertaking is not appropriate pursuant to section 44ZZA(3). This clause refers to CBH submitting a statement regarding whether or not it intends to submit a new undertaking at least three months before the expiry of the April Undertaking. The ACCC considers that, in light of the statutory obligation in section 44ZZBC of the TPA for the ACCC to use reasonable endeavours to make a decision on an access undertaking application within 6 months of receiving the application, or such longer period, the reference to 3 months in clause 4.6(a) creates confusion and is not appropriate. The ACCC also notes that it is not possible to foresee whether CBH will wish to submit a different undertaking in the future, or the length of time it would take for the ACCC to consider such undertaking, and it is therefore not appropriate to attempt to anticipate such time frames in the current April Undertaking.

### **6.5.4 CBH's September Undertaking**

The clauses in CBH's September Undertaking relating to the term and variation of the undertaking (ie. clause 4 of the September Undertaking) are set out in CBH's September Undertaking at Annexure A.

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<sup>131</sup> *Trade Practices Act 1974* (Cth) s 44ZZBB(1) – (3), note omitted.

### **6.5.5 ACCC's views on CBH's September Undertaking**

The ACCC considers that the clauses in CBH's September Undertaking relating to the term and variation of the undertaking have addressed the ACCC's concerns with the clauses relating to the term and variation of CBH's April Undertaking set out in the ACCC's Further Draft Decision.

Therefore, the ACCC considers that the clauses in relation to the term and variation of CBH's September Undertaking are appropriate.



## 7 Scope

### Summary

In the present circumstances, it is appropriate that CBH's September Undertaking applies only to wheat (rather than all grains).

In the present circumstances, it is also appropriate that CBH's September Undertaking applies only to port terminal services (rather than including up-country services).

It is appropriate that CBH's September Undertaking applies to all port terminal services regardless of whether they are bundled with other CBH services.

It is also appropriate that, CBH's proposed Undertaking expressly excludes "fumigation of grain as a preventative measure", that it also specifies what type of fumigation would be included within the scope of the proposed Undertaking.

Therefore the drafting of the scope of CBH's September Undertaking is appropriate given that it has addressed the ACCC's concerns with the drafting of the scope of CBH's April Undertaking. These concerns were that the drafting lacked clarity. In relation to the drafting of the scope of the April Undertaking:

- it would have been appropriate for the definition of Port Terminal Services to be amended to make it clear that the lists of port terminal services in Schedules 3 – 6 were not exhaustive;
- it would have been appropriate for the Schedules 3 – 6 to expressly include 'cargo accumulation';
- it would have been appropriate for clause 5.4(d) (regarding sharing of efficiency savings) to be removed given its lack of clarity.

The ACCC notes that several submissions called for increased access to ports for employees of superintendence companies. The ACCC accepts that there may be benefits in allowing employees of superintendence companies to access port terminals, particularly in relation to improving the transparency of port operations but notes that the September Undertaking is an undertaking focusing on providing access to port terminal services to accredited wheat exporters. It is not an undertaking specifically to provide access to employees of superintendence companies.

### 7.1 CBH's April Undertaking

CBH's April Undertaking applies to access to Port Terminal Services provided by means of its Port Terminal Facilities located at Albany, Esperance, Geraldton, and Kwinana. Port Terminal Services are defined in the April Undertaking as:

**Port Terminal Services** means the services in relation to Bulk Wheat described in the Port Schedules provided by means of a Port Terminal Facility, and includes the use of a Port Terminal Facility.<sup>132</sup>

CBH further outlines the nature of Port Terminal Services stating that subject to the Port Schedules they may include:

- a. intake and receival services;
- b. storage and handling services;
- c. ship nomination, acceptance, booking, cancellation and cargo accumulation; and
- d. ship loading.<sup>133</sup>

CBH's April Undertaking also sets out the meaning of Port Terminal Facility:

**Port Terminal Facility** means a ship loader that is:

at a Port; and

capable of handling Bulk Wheat;

and includes any of the following facilities:

an intake/receival facility;

a grain storage facility;

a weighing facility; and

a shipping belt;

that is:

at the Port; and

associated with the ship loader; and

capable of dealing with Bulk Wheat.

The Port Terminal Facilities at each Port are described in the relevant Port Schedules.

The April Undertaking also seeks to clarify what is not covered by the Undertaking, stating:

...

- (b) To avoid doubt, this Undertaking does not apply:

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<sup>132</sup> Co-operative Bulk Handling Limited, *Port Terminal Services Access Undertaking*, 14 April 2009, clause 5.2.

<sup>133</sup> Co-operative Bulk Handling Limited, *Port Terminal Services Access Undertaking*, 14 April 2009, clause 5.3.

- i) to access to services not being Port Terminal Services in relation to Bulk Wheat provided by the Port Operator; or
- ii) in relation to other facilities owned by the Port Operator which are part of the grain supply chain, such as up country receival and accumulation facilities; or
- iii) to fumigation of grain as a preventative measure; or
- iv) to the transportation of Bulk Wheat to port; or
- v) to grains which are not wheat; or
- vi) to wheat which is not Bulk Wheat.<sup>134</sup>

CBH's April Undertaking provides more detail on the Port Terminal Facilities and Port Terminal Services on a port by port basis in Schedules 3 to 6. The schedules cover factual information about the facilities, and further detail on the services provided at each port, including:

- Receival;
- Sampling;
- Weighing;
- Storage; and
- Out-turning services.<sup>135</sup>

## 7.2 CBH's submissions in support of the April Undertaking

CBH states that the proposed Undertaking only covers bulk wheat and port terminal services as required by the WEMA, and states that Parliament resolved not to include up-country receival points in the WEMA.<sup>136</sup> CBH states that Port Terminal Services are defined in clause 5.1(b) of the April Undertaking which in turn refers to the Port Schedules.<sup>137</sup>

CBH seeks to clarify two particular features of its Port Terminal Service definition. It states:

- The Port Terminal Service is for the purpose of cargo accumulation for export only; and

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<sup>134</sup> Co-operative Bulk Handling Limited, *Port Terminal Services Access Undertaking*, 14 April 2009, clause 5.4(b).

<sup>135</sup> Co-operative Bulk Handling Limited, *Port Terminal Services Access Undertaking*, 14 April 2009, Schedules 3-6.

<sup>136</sup> Co-operative Bulk Handling Limited, *Submission to the ACCC*, 14 April 2009, p. 2.

<sup>137</sup> Co-operative Bulk Handling Limited, *Submission to the ACCC*, 14 April 2009, p. 31.

- The Port Terminal Service is a segregated service. The Undertaking does not allow or require CBH to co-mingle the wheat of an access seeker with the wheat of other users.<sup>138</sup>

CBH states that it is appropriate to limit the storage service to cargo accumulation purposes is a response to the export focus of the WEMA and the limited storage capacity of the Port Facility.<sup>139</sup>

CBH states that it will offer a segregated service, as opposed to a co-mingled service because:

a service that involves the co-mingling of grain with grain of other users (including CBH's Grain Express customers) is a service provided by facilities other than the Port Terminal Facilities'.<sup>140</sup>

In addition, CBH states that it may not be in a position to verify the condition of grain brought to the terminal by an access seeker and that, by segregating the access seekers' grain, it reduces the risk of contaminating its facilities or other customers' grain. CBH states that this segregated service offers discretion for access seekers wishing to offer their customers grain of particular origin or narrow specification.

CBH states that the April Undertaking will not apply to those customers that use the Grain Express system. It states:

Exporters that acquire the Grain Express Service will not acquire Port Terminal Services under the Undertaking but will agree the terms of their services with CBH independent from the Undertaking process.<sup>141</sup>

CBH considers that if an access undertaking were to be the 'exclusive means' by which it may provide services using its port terminal facilities, it would effectively require CBH to:

- refuse to allow customers to negotiate terms outside the Undertaking process, even if both parties wish to do so;
- substantially change CBH's existing contractual arrangements for Grain Express customers;
- substantially change the delivery of services to Grain Express customers by reducing the ability of CBH to treat grain stocks held in country and port locations as part of a single system from which customers' grain entitlements and Outturn request may be satisfied; and
- separate its port terminal operations from its country functions.

Further, CBH considers that such as position:

- would significantly decrease the efficiency of the WA export grain supply chain;

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<sup>138</sup> Co-operative Bulk Handling Limited, *Submission to the ACCC*, 14 April 2009, p. 31.

<sup>139</sup> Co-operative Bulk Handling Limited, *Submission to the ACCC*, 14 April 2009, p. 32.

<sup>140</sup> Co-operative Bulk Handling Limited, *Submission to the ACCC*, 14 April 2009, p. 32.

<sup>141</sup> Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 22.

- is inconsistent with:
  - the ACCC’s reasoning in deciding not to revoke CBH’s Grain Express notification;
  - the intended purpose of the ‘access test’ in section 24 of the WEMA;
  - recent reasoning of the High Court in relation to the distinction between infrastructure facilities and the services provided by means of those facilities;
  - the Bulk Handling Act 1967 (WA); and
  - the express objects of Part IIIA of the Trade Practices Act (Cth) (TPA).<sup>142</sup>

CBH considers that the standard terms and conditions offered pursuant to the April Undertaking differ from the terms and conditions of the Grain Express services, ‘only to the extent that the Grain Express Services encompasses different services’. Further, CBH states that the ‘Port Terminal Service offered under the Undertaking is substantially different from the Grain Express Services and must therefore be supplied on terms that differ from the Grain Express terms to the extent of those differences’.<sup>143</sup>

CBH also states if its Grain Express customers were required to acquire port terminal services via the April Undertaking, ‘the effect of that requirement is to prohibit CBH from offering an integrated service’. CBH considers that this requirement exceeds the scope of regulation that was introduced by the WEMA.

CBH states that it is not appropriate to provide ‘preventative fumigation’ pursuant to the April Undertaking, stating that it falls outside the definition of Port Terminal Services in the WEMA.<sup>144</sup> As the port storage facilities are specifically for the purposes of cargo accumulation, CBH states that it is more appropriate to undertake preventative fumigation at the point grain is first delivered into storage and handling infrastructure. Further CBH states that the correct application of phosphine takes approximately 28 days and it would be inefficient to tie up port storage facilities while this process was occurring.<sup>145</sup>

In response to the question in the ACCC’s Issues Paper about how the April Undertaking would interact with other grains exported via CBH’s port terminals, CBH states:

The proposed undertaking is not expected to directly impact [on] the export of grains other than bulk wheat at CBH’s terminals. However, CBH’s proposed Capacity Allocation System will apply to all grain exports. As has been the case since it was first in operation, the shipping stem includes vessels for grain other than wheat. There are some non-grain vessels included within the shipping stem operating independently out of the ports

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<sup>142</sup> Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 22.

<sup>143</sup> Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 23.

<sup>144</sup> Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 47.

<sup>145</sup> Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 47.

(except for Kwinana) that CBH cannot prevent from berthing at those ports. When those vessels are at berth they displace the berth slots available for grain vessels and CBH is as a consequence prevented from loading grain. Accordingly CBH requires some flexibility to attempt to mitigate the impact of the berthing of those other vessels. It is not appropriate that those non-grain vessels are subject to the Undertaking.<sup>146</sup>

In relation to access to ports by superintendence and inspection companies, CBH states that the April Undertaking is not concerned with providing physical access to the port terminal for non-wheat exporting third parties.<sup>147</sup>

## 7.3 Submissions in response to ACCC's Issues Paper

### 7.3.1 AGEA

AGEA submits that the scope of the April Undertaking should not be limited to services at port and not limited to only bulk wheat. AGEA states that upstream facilities cannot feasibly be separated from port terminal services and notes that currently the port operator provides both port services and upstream services under a single contract.<sup>148</sup> AGEA states:

It is artificial to try to compartmentalise port terminal services from the upstream services when such services are all provided by the same company and under the same contract.<sup>149</sup>

AGEA submits that as the April Undertaking only covers bulk wheat, port operators have the potential to restrict access to port by exhausting the port terminal's capacity in favour of other grains.<sup>150</sup>

AGEA submits that the service definition must include 'all services provided by means of the port terminal facilities to which the undertaking applies, as well as the use of the port terminal facilities'.<sup>151</sup> Further, AGEA states that the service definition must identify the geographical parameters of the port terminal facilities and include all services provided within that area. It states that the geographical boundaries should at least begin at the point where the wheat arrives and include every other point until the wheat is loaded into the ship's hold.<sup>152</sup> However, AGEA points out the limitations of defining the service on geographical lines, providing an example of where storage

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<sup>146</sup> Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, pp. 75-76.

<sup>147</sup> Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 90.

<sup>148</sup> Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, p. 4.

<sup>149</sup> Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, p. 9.

<sup>150</sup> Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, p. 10.

<sup>151</sup> Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, p. 19.

<sup>152</sup> Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, p. 19.

facilities at some ports in Western Australian and South Australia ports are located outside the geographical confines of the port.<sup>153</sup>

AGEA sets out in detail what it considers must be included in the service definition:

- i) daily intake to port by grade;
- ii) information of stock on hand at port;
- iii) port capacity;
- iv) stock movements back out of port (prior consultation with marketer in question);
- v) managing port-related stock swaps;
- vi) weighing of wheat upon receipt by BHCs and again upon outturn onboard vessel;
- vii) unloading;
- viii) storage;
- ix) fumigation and management—quality of grain is to be maintained at the same level as when it was delivered to the BHCs “quality in = quality out” over the rail;
- x) segregating/blending as directed by AWE;
- xi) accumulating;
- xii) elevating to ship;
- xiii) sampling of wheat upon receipt by BHCs and again upon outturn onboard vessel;
- xiv) loading, stowing and trimming;
- xv) access by independent superintendent/surveyor;
- xvi) documentation evidencing the process;
  - A. weight
  - B. quality
  - C. AQIS compliance
- xvii) managing vessel nominations and shipping stem on a timely basis;
- xviii) notifying problems and respond to request from marketers on a timely basis e.g. daily report on quality loaded.<sup>154</sup>

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<sup>153</sup> Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, p. 20.

AGEA notes that CBH seeks to exclude "fumigation of grain as a preventative measure" from the scope of its Undertaking. AGEA submits that "CBH cannot exclude fumigation services where such services are provided within the geographic confines of a port terminal facility".<sup>155</sup>

AGEA also states that at the time of making its submission it was unclear whether CBH intended to exclude Grain Express from the terms of the access undertaking. AGEA stated that if CBH seeks to exclude Grain Express from the April Undertaking it requests the opportunity to make further submissions on this issue (which it does below).<sup>156</sup>

### 7.3.2 Department of Agriculture and Food (WA)

The Department of Agriculture and Food (WA) submits that it is strongly of the view that CBH's April Undertaking should cover all grains, not just wheat.<sup>157</sup> It states that the WA Government is in the process of removing restrictions on exports of barley, lupins and canola from WA and that, hence, those grains will be in a similar position to wheat in regard to alternative exporters having equitable access to CBH's port handling facilities.

### 7.3.3 The Western Australian Farmers Federation (Inc)

The Western Australian Farmers Federation (WAFarmers) submits that:

While the Undertaking is not required to, and does not, relate to any part of the export grain supply chain other than "Port Terminal Services", as a grower organisation it is important for us to note that a failure in coordination of grain accumulation from an up-country site or sites will impact on out-loading and vessel prioritisation.

It is to this end that WAFarmers supports the continuation of CBH's pivotal logistical role and believes that the prospect of new entrants establishing new port terminals would be detrimental to Western Australian growers' 'bottom line'.<sup>158</sup>

WAFarmers questions the need for the April Undertaking, stating:

WAFarmers believes that Section 24(i) of the Wheat Export Marketing Act already provides for disclosure and transparency and the fact that CBH is already bound by the State Government's Bulk Handling Act to provide access on [a] fair and reasonable basis to its infrastructure under Section 19 [which provides] '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.'

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<sup>154</sup> Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, pp. 19-20.

<sup>155</sup> Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, p. 20.

<sup>156</sup> Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, p. 10.

<sup>157</sup> Department of Agriculture and Food Western Australia, *Submission in relation to proposed CBH access undertaking*, 18 May 2009, covering letter.

<sup>158</sup> The Western Australian Farmers Federation (Inc), *Submission in relation to proposed CBH access undertaking*, 29 May 2009, p. 1.



As any costs will eventually find their way back to growers, with due respect, WAFarmers questions the requirement for an expensive Port Terminal Access Test when obligations are already fulfilled by compliance [with] the Wheat Export Marketing Act and Bulk Handling Act.

The incentive to provide open access under the Acts and constraints on anti-competitive conduct means that further intrusive and prescriptive regulation is not necessary. Such an approach will add unnecessary costs which will be ultimately passed on to exporters and growers and make CBH less competitive relative to the other handling companies around Australia and the world.<sup>159</sup>

#### 7.3.4 PGA

The PGA submits that “[t]he scope of the proposed Undertaking by CBH should not be limited to services at the port terminal, as up country services are an integral part of the grain logistics system, and the export of bulk wheat.”<sup>160</sup>

In this regard PGA submits:

CBH is a monopoly provider of port terminal services in Western Australia. CBH also owns the majority of Western Australia’s grain storage and hauling infrastructure. There are no alternative providers of port terminal services within a distance that make them commercially viable competitors.

Port terminal services are but one part of the services necessary for access to bulk wheat export markets. Competition in bulk wheat export markets requires that any bulk handler provide access to *all* of the services provided by facilities which are upstream from and separate to port terminal facilities. It is artificial to seek to compartmentalise port terminal services from the upstream services when such services are all provided by the same company and under the same contract. The PGA acknowledges that section 24 of the [WEMA] is only directed at port terminal services. This fact should not be allowed to deflect the underlying commercial reality that in Western Australia both upstream and port terminal services are provided by CBH.

In Western Australia some of the port terminal services are provided by facilities which are upcountry from the port terminal facilities. The PGA holds that the upcountry activities of the port operator are closely related and cannot feasibly be separated from port terminal services. CBH is the monopoly provider of port terminal services and the monopoly provider of upstream and downstream services.

The absence of alternative port terminal facilities and upcountry storage and handling services means that Western Australian growers are constrained in using Grain Express, which may exacerbate CBH’s monopoly position.

The absence of alternative upcountry receival sites and port terminal facilities in Western Australia means that growers are disadvantaged as competition in upcountry services is limited due to the control of the port terminal services by CBH. The Undertaking does not ensure that growers are not disadvantaged

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<sup>159</sup> The Western Australian Farmers Federation (Inc), *Submission in relation to proposed CBH access undertaking*, 29 May 2009, p. 2.

<sup>160</sup> Pastoralists and Graziers Association, *Submission in relation to proposed CBH access undertaking*, 29 May 2009, para 4.3, p. 6.

due to a lack of competition through the provision by CBH of upstream services which are part of the port terminal service.<sup>161</sup>

The PGA submits that port terminal services are but one part of the services necessary for access to bulk wheat export markets. It submits that other necessary services include:

- Receival from growers by rail or truck;
- Grading;
- Fumigation;
- Sampling;
- Storage;
- Segregation and/or blending;
- Weighing services;
- Rail and road transport services which transport the wheat from storage to the port terminal facility; and
- Shipping belts and ship loaders.<sup>162</sup>

### **7.3.5 Riverina**

Riverina submits that it supports the submission made by the WA Department of Agriculture and Food that the Port Terminal Rules should apply to all grains and not be limited to wheat.<sup>163</sup>

### **7.3.6 Grain Industry Association of Victoria (GIAV)**

GIAV (which provided a submission relating to all three bulk handlers) submits that the scope of the April Undertaking should not be limited to services at the port terminal, but should also cover rail and road access.<sup>164</sup> GIAV states that it is often ‘upstream access’ issues—for instance transport to port, and the capacity of the bulk handler to load transport at its up country facilities—that is the constraining factor on export capacity.<sup>165</sup>

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<sup>161</sup> Pastoralists and Graziers Association, *Submission in relation to proposed CBH access undertaking*, 29 May 2009, pp. 2-3.

<sup>162</sup> Pastoralists and Graziers Association, *Submission in relation to proposed CBH access undertaking*, 29 May 2009, pp. 4-5.

<sup>163</sup> Riverina (Australia) Pty Ltd, *Submission in relation to proposed GrainCorp and CBH access undertakings*, 29 May 2009, p. 4.

<sup>164</sup> Grain Industry Association of Victoria, *Submission in relation to proposed access undertakings*, 1 June 2009, p. 1.

<sup>165</sup> Grain Industry Association of Victoria, *Submission in relation to proposed access undertakings*, 1 June 2009, p. 1.

GIAV also submits that the undertaking should apply equally to parties which use the port operators' up-country services and those that do not.<sup>166</sup>

### 7.3.7 New South Wales Farmers Association

The NSW Famers Association (which provided a submission relating to all three bulk handlers) notes that the April Undertaking does not cover up-country storage and handling facilities and is concerned that 'a lack of regulation has possibly led to the deterioration of competition, and therefore higher fees and charges which are inevitably passed on to the industry'.<sup>167</sup>

### 7.3.8 SGS Australia

SGS states that superintendence and inspection companies 'play a vital role in facilitating trade by assisting their clients to mitigate the substantial risk taken on by parties buying and selling large quantities of grain'.<sup>168</sup> SGS submits that Australian port operators are generally very restrictive in granting access to superintendence companies at loading, and is concerned that the 'continuation of such policies will jeopardize Australia's place in the international market in the future'.<sup>169</sup>

### 7.3.9 Intertek

Intertek submits that some port operators unnecessarily restrict the rights of exporters and customers to appoint an independent superintendent to supervise the loading of a vessel, and collect samples and monitor quality. Intertek submits that superintendent companies need access to maintain a chain of custody on samples; and conduct testing and monitor the quality of cargo during loading.<sup>170</sup> Intertek states that there appears to be a disparity among the port operators in the grain industry and those in other industries, such as oil and chemical plants, that permit greater access to their ports.<sup>171</sup>

## 7.4 Submissions in response to ACCC's Draft Decision

### 7.4.1 CBH

#### 7.4.1.1 Fumigation

In a submission to the ACCC dated 20 August 2009, CBH submits the following in relation to fumigation:

We refer to paragraph 7.4 of the ACCC's draft decision in relation to CBH's access undertaking (**Undertaking**). In particular, we refer to the ACCC's conclusion (on page 88) that it is not appropriate to expressly exclude "fumigation as a preventative measure".

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<sup>166</sup> Grain Industry Association of Victoria, *Submission in relation to proposed access undertakings*, 1 June 2009, p. 2.

<sup>167</sup> NSW Farmers Association, *Submission in relation to proposed access undertakings*, June 2009, p. 5.

<sup>168</sup> SGS Australia, *Submission in relation to proposed access undertakings*, 26 May 2009, p. 1.

<sup>169</sup> SGS Australia, *Submission in relation to proposed access undertakings*, 26 May 2009, p. 3.

<sup>170</sup> Intertek, *Submission in relation to proposed access undertakings*, 29 May 2009, p. 5.

<sup>171</sup> Intertek, *Submission in relation to proposed access undertakings*, 29 May 2009, p. 5.

This letter contains CBH’s further submissions in relation to that aspect of the draft decision (**Draft Decision**). This submission is one of a series of further submissions on particular aspects of the Draft Decision. They are being provided on an issue by issue basis so that the ACCC may have the maximum possible period for considering submissions prior to the issue of a final decision in relation to the undertaking.

## **1 “Fumigation as a preventative measure” is clear**

1.1 On page 88, the Draft Decision states:

*“The ACCC accepts submissions by AGEA and PGA that fumigation is an essential part of Port Terminal Services. While it may be the case that not all fumigation of grain is appropriate at port, it is unclear precisely how the term “preventative measure” would be interpreted in this context”*

1.2 Fumigation as a preventative measure is the application of fumigant to a quantity of grain to prevent (rather than to respond to) pest infestation. It is clearly distinguishable from fumigation in response to infestation. CBH considers that it would obviously be inappropriate for CBH to exclude fumigation of infested grain from the Port Terminal Service.

...

## **2 Fumigation as a preventative measure is not usually provided at port**

2.1 CBH generally conducts any preventative fumigation at up-country storage sites and does not fumigate during cargo accumulation at port. This is because:

- (i) *as is explained below, fumigation with phosphine takes a week longer than the standard window for cargo accumulation;*
- (ii) *risk of infestation increases over time and fumigation as a preventative measure is usually required only for grain that is stored for an extended period;*
- (iii) *long-term grain storage occurs up-country, where storage is cheaper and is less likely to cause bottlenecks; and*
- (iv) *at peak times, following the harvest, most of the grain coming through port terminals is harvest grain, which is unlikely to require fumigation at all.*

2.2 *For these reasons, CBH disagrees with the view that fumigation as a preventative measure is an essential element of Port Terminal Services.*

## **3 Fumigation as a preventative measure takes longer than cargo accumulation**

3.1 Fumigation of a stack of grain using phosphine requires a storage area to be “under gas” for a minimum of 28 days. The ACCC is aware, for efficiency purposes, the Undertaking and the port terminal Rules require cargo accumulation to occur within 21 days. Port Terminal storage facilities are not efficient locations for the long term storage of grain. Rather, they are used to accumulate grain for the purpose of export.

3.2 If the Undertaking required CBH to provide, on request, fumigation of grain as a preventative measure, the accumulation window would have to be

extended to greater than 28 days or alternatively, preventative fumigation would have to be carried out for less than the recommended period of 28 days. The second of these options is likely to decrease the affect of the fumigant and increase the prospect of insect resistance due to insects ingesting non-fatal doses of the fumigant.

3.3 In short, this requirement would lead to either or both of:

*a reduction in the efficiency of the port terminal; and/or*

*a risk of insect resistance to fumigant.*

3.4 This aspect of CBH's Undertaking should not be viewed as a blanket refusal to supply preventative fumigation at port. If, in exceptional circumstances, CBH agrees with a party to provide storage for longer than the cargo accumulation window, CBH may also agree to provide fumigation and services as a preventative measure. However, it submits that it should not be compelled to offer such services in the Undertaking.

#### **4 Neither ABB, nor GrainCorp expressly offer preventative fumigation**

4.1 Because Western Australia has a lower incidence of pest resistance to phosphine, there may be different approaches taken to fumigation services in Eastern Australia. That said, CBH observes that neither GrainCorp nor ABB expressly offer preventative fumigation as part of their Port Terminal Services.

4.2 GrainCorp's Undertaking offers only fumigation for infested grain (clause 3.4) and applies testing requirements for wheat from "unapproved" sources. It does not include preventative fumigation.

4.3 ABB's Undertaking and standard terms say very little about fumigation services. Methyl Bromide fumigation is offered at 3 of 6 ports but the circumstances in which that service will be provided are unclear.

4.4 In short, the only difference between CBH's position on this issue and that of ABB and GrainCorp's is that CBH has explained itself more clearly. It is surprising that the ACCC has singled CBH's Undertaking out for criticism on this issue.<sup>172</sup>

#### **7.4.1.2 Coverage of Grain Express**

In a submission to the ACCC dated 24 August 2009, CBH states:

##### **1 The Draft Decision seeks to regulate facilities, not services**

1.1 Section 44ZZA of the Trade Practices Act 1974 (Cth)(TPA) provides for access undertakings in relation to services. The definition of "service" in section 44B of the TPA contains a clear distinction between services and facilities. That distinction was explicitly recognised in *Rail Access Corp v NSW Minerals Council Ltd*<sup>173</sup> and was also central to the High Court's decision last year in *BHP Billiton v NCC*<sup>174</sup>.

1.2 The Draft Decision seeks to require CBH to make the Undertaking's negotiation and arbitration processes available for the port terminal service component of any agreement that is offered to customers where any of the

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<sup>172</sup> Co-operative Bulk Handling Limited, *Submission in relation to Draft Decision on CBH Access Undertaking – Fumigation*, 20 August 2009.

services supplied under the agreement uses port terminal facilities in relation to bulk wheat. CBH submits that this, in effect, is regulation of the port terminal facility, not the port terminal service.

## **2 Multiple services may be supplied by the same facilities but bundled services using additional (unregulated) infrastructure may be excluded from an undertaking**

2.1 As is clear from the decision in *BHP Billiton v NCC*, a single facility may be used to provide several services. BHPBIO's rail lines, together with other facilities, were used to supply BHPBIO an integrated transportation, blending and stockpiling service. Fortescue Metals Group (FMG) did not seek access to that service. Instead it sought access to run its rolling stock on BHPBIO's rail lines.

2.2 As a thought experiment, the ACCC could ask itself whether, if BHPBIO had offered an undertaking for the above-rail service sought by FMG, and also offered a bundled haulage service, would the ACCC have refused BHPBIO's undertaking because it did not apply to the integrated haulage service?

2.3 CBH's approach to the Undertaking was to offer a stand-alone port terminal service, giving customers a choice between the CBH integrated service and making their own arrangements to port. That is the appropriate solution if it is accepted that port terminal facilities (and not up-country storage facilities) meet the criteria for economic regulation in Part IIIA of the TPA. The Grain Express service is an alternative, voluntary service that uses additional, duplicable facilities to provide a complete country to vessel solution.

## **3 Regulating part of the bundle reduces efficiency**

3.1 Importantly, under Grain Express, grain in storage at port terminals is part of the integrated supply chain that enables CBH to satisfy outturn requests by customers without moving grain in an ad-hoc manner. This core efficiency of Grain Express would be substantially eroded if CBH's port storage was unbundled from the up-country supply facilities.

3.2 CBH understands the ACCC's view that enabling Grain Express customers to use the negotiation and arbitration process under the Undertaking would not unbundle the Grain Express service. That view does not align with the way Grain Express services are actually performed. It appears that the ACCC has assumed that Grain Express stops at the port terminal. This is not the case. In fact, grain in storage at port is available for immediate out-turning for a customer that may have just acquired an entitlement at an up-country storage site in that port zone. CBH may load equivalent grain to satisfy that customer's requirements. This enables CBH to flexibly out-turn customers' entitlements, while simultaneously moving grain in a coordinated fashion (often in efficient unit trains).

3.3 However, if a customer must have the ability to arbitrate the port terminal service component of the bundled service, CBH will need to create a distinct port terminal component of the bundled service to be arbitrated. In the case of a service that involves grain in any part of the system (both up-country and port terminal facilities) being treated as part of a single system, the only way

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<sup>173</sup> (1998) 87 FCR 517.  
<sup>174</sup> [2008] HCA 45.

to achieve a clear port terminal component is to effectively unbundle the service.

#### **4 Regulating part of a bundle doesn't work anyway**

4.1 The problem with applying a negotiate/arbitrate process to part of a single contract is that the access provider can easily use the "unregulated" terms and conditions to offset the effect of regulation in the balance of the agreement.

4.2 For example, if CBH wished to offset the potential effect of an adverse arbitration decision on port terminal charges, it could simply adjust its pricing for other parts of the bundle, rendering the arbitration meaningless.

4.3 A further difficulty with the partial regulation of a bundle is that many non-price terms apply to both regulated and non-regulated services. It is therefore difficult to arbitrate a multi-purpose clause for the purpose of the regulated service only.

#### **5 The Draft Decision inaccurately characterises the Grain Express notification**

5.1 The Draft Decision states at page 88:

"It is important to note that CBH's Grain Express notification only relates to the bundling of up-country storage & handling services with transportation to port, while the grain remains in its system. It does not cover the bundling of CBH's port services with its up-country storage, handling and transportation services."

5.2 This is incorrect. The description of the notified conduct, both on the Form G and in the supporting submission, is clear. The notified conduct is described as follows on the form G:

"In substance, CBH will offer to supply storage and handling services on the condition that Growers or Marketers acquire:

(i) supply chain coordination services from CBH; and

(ii) to the extent that grain remains in CBH's custody, that they acquire transport services from CBH (through its nominated carrier)."

5.3 As the ACCC is aware, CBH supplies storage & handling services at all four of its port terminals. It does so on the condition that is the subject of the notification. The supporting submission to the Grain Express notification describes these services (and the notified conduct) in detail so there can be no confusion. The ACCC's characterisation of the notified conduct inserts the words "up-country" before "storage & handling" in the Draft Decision, but no such qualification or restriction appears in CBH's Form G, supporting submission or in the ACCC's press release or decision on the Grain Express notification.

...

However, in a further submission from CBH dated 27 August 2009 CBH states that it intends to amend its undertaking to address the comments and recommendations of the ACCC set out in the Scope chapter of the ACCC's Draft Decision.

CBH notes that its amendments are intended to:

- not exclude Port Terminal Services which are provided pursuant to CBH's bundled "Grain Express" service offering. While CBH is proposing these amendments, it continues to disagree with the ACCC's view on this issue;
- consolidate (on a non-exhaustive basis) the Port Terminal Services previously set out in schedules 5 to 8 of the undertaking;
- generally clarify and simplify the description of the Port Terminal Services, on a non-exhaustive basis; and
- include fumigation of insect infestation, and accumulation of cargo for export purposes, as part of the Port Terminal Services.<sup>175</sup>

#### 7.4.2 AGEA

AGEA submitted the following in relation to the ACCC's views set out in its Draft Decision on the scope of CBH's April Undertaking:

AGEA strongly agrees with the ACCC that:

- i) it is not appropriate that CBH's proposed Undertaking only applies to port terminal services when they are not bundled with other CBH services;

...

AGEA does not agree with the ACCC's draft decision to limit the scope of the proposed Undertaking to wheat and to port terminal services (rather than including up-country services). AGEA submits that in the least, CBH's proposed Undertaking must include up-country services, where the Port Terminal Services provided are part of the Grain Express service. This is necessary as the up-country services are bundled with and intrinsically linked to the Port Terminal Services.

...

AGEA agrees that the drafting of the definition of "Port Terminal Services" in the proposed Undertakings lack clarity and is therefore not appropriate pursuant to section 44ZZA(3).

AGEA agrees with the ACCC that the BHCs' definition should be substituted with the following definition proposed by the ACCC:

*"Port Terminal Services means the services described in [the Port Schedules] in relation to Bulk Wheat provided by means of a Port Terminal Facility, and includes the use of a Port Terminal Facility and the use of all other associated infrastructure necessary to allow an Accredited Wheat Exporter to export Bulk Wheat through that Port Terminal."*

AGEA also agrees with the ACCC that the BHCs' definition of "port terminal services" must be amended to make it clear that the lists of port terminal services in the Port Schedules or definitions are not exhaustive. The definition of "port terminal services" must include all services provided by means of the port terminal facilities to which the proposed Undertaking applies, as well as the use of the port terminal facilities

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<sup>175</sup> Co-operative Bulk Handling Limited, *Submission in relation to Draft Decision on CBH Access Undertaking – Scope*, 27 August 2009, p. 1.



CBH's revised definition on the meaning of "port terminal services" is too narrow and satisfies only the latter requirement of making the definition inclusive.<sup>176</sup> The revised clause 5.3 of CBH's proposed Undertaking, which seeks to set out what the Undertaking does not cover, is not acceptable. As a drafting point, the application of the proposed Undertaking is determined by the clauses which define the scope and it should be obvious from the scope what the Undertaking does not cover. Revised clause 5.3 is unnecessary and potentially makes the Undertaking confusing.

AGEA further submits that the definition of "Port Terminal Services" should be the same across the proposed Undertaking, the port terminal services agreement and the port loading protocol.

AGEA agrees that it is not appropriate that CBH's proposed Undertaking expressly excludes "fumigation of grain as a preventative measure". In CBH's further submission on this point<sup>177</sup>, CBH does not deny that preventative fumigation occurs at port (CBH merely states it does not normally occur during cargo accumulation at port). Preventative fumigation is an essential part of port terminal services and, to the extent that the service is offered at port, it must be part of the proposed Undertaking.<sup>178</sup>

***BHCs - Not necessary for proposed Undertaking to expressly provide for access to employees of superintendence companies***

The ACCC is of the view that it is not necessary for the BHCs' proposed Undertaking to expressly provide for access to port terminals by employees of superintendence companies submissions. AGEA believes that there must be an obligation on the BHCs to allow an AWEs' superintendent (or independent third person nominated by the AWEs) access to the port to sample AWEs' wheat and inspect the loading of AWEs' stock onto vessels. This is essential to protect the AWEs' interests as regards any issues with the condition of the ship, that of the cargo being loaded on board the vessel and relevant sales terms.

It is a common term under international sales contracts for both buyers and sellers to be entitled to have a representative present during the loading of the vessel. Certain markets require this, if the weight and quality is to be final at loadport.<sup>179</sup>

### **7.4.3 PGA**

The PGA submitted the following in relation to the ACCC's views as set out in its Draft Decision on the Scope section of CBH's proposed Undertaking:

**In the present circumstances, it is appropriate that CBH's proposed Undertaking applies only to wheat (rather than all grains).**

2.1 The PGA agrees with the ACCC's acceptance of CBH's submission that the proposed Undertaking applies only to wheat. Limiting the scope of the

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<sup>176</sup> Co-operative Bulk Handling Limited, *Submission in relation to Draft Decision on CBH Access Undertaking – Scope*, 27 August 2009.

<sup>177</sup> Co-operative Bulk Handling Limited, *Submission in relation to Draft Decision on CBH Access Undertaking – Fumigation*, 20 August 2009.

<sup>178</sup> Australian Grain Exporters Association, *Submission in relation to Draft Decisions on Port Terminal Services Access Undertakings*, 3 September 2009, p. 11.

<sup>179</sup> Australian Grain Exporters Association, *Submission in relation to Draft Decisions on Port Terminal Services Access Undertakings*, 3 September 2009, p. 5.

Undertaking to wheat reduces any potential risk of imposing regulation when the industry is newly liberalised and in transition.

**In the present circumstances, it is appropriate that CBH's proposed Undertaking applies only to port terminal services (rather than including up-country services).**

2.2 The PGA does not agree with the ACCC acceptance of the CBH submission that it is appropriate that the proposed Undertaking applies only to services offered at port, and not up-country.

2.3 Port terminal services are but one part of the services necessary for access to bulk wheat export markets. The upcountry activities of port operators are closely related and cannot feasibly be separated from port terminal services. CBH is the monopoly provider of both port terminal services and upstream services in Western Australia. The proposed Undertaking does not ensure that growers are not disadvantaged due to a lack of competition through the control of both services by CBH.

**It is not appropriate that CBH's proposed Undertaking only applies to port terminal services when they are not bundled with other CBH services.**

2.4 The PGA agrees with the ACCC's non-acceptance of CBH's submission that the proposed Undertaking applies only to those customers who wish to acquire port terminal services on a stand alone basis, and that it would not apply to those customers who acquire port terminal services as part of a bundled service.

2.5 CBH offers a consolidated or bundled wheat export supply chain logistics service under an exclusive dealing notification provided to the ACCC, known as Grain Express. Under Grain Express CBH supplies grain and handling services, grain supply co-ordination services, and grain transport services to growers while the grain remains in CBH's custody. When the grain is marketed the storage and handling fees are charged to the marketer.

2.6 The CBH Grain Express notification only relates to the bundling of upcountry storage and handling services with transportation to port, while the grain remains in the system. It does not cover the bundling of CBH's port services with its upcountry storage, handling and transportation services.

2.7 CBH controls 197 receival sites through out the Western Australian grain belt. Typically, wheat is unloaded at receival sites, sampled, analysed, weighed, graded and sorted. Wheat may also be warehoused for varying periods of time at a site by growers before being sold (where title is transferred to another person). If grain requires fumigation, this is carried out prior to being loaded for transport from a receival site.

2.8 Wheat is transported from upcountry receival and storage sites to port by rail or road. Under Grain Express, CBH arranges transport to port, using rail and road service operators which are determined by CBH. Access to port terminal ...services is essential to export bulk wheat from Australia. In Western Australia all grain for export is allocated to Grain Express, so Western Australian growers have no option but to utilise Grain Express in marketing their wheat.

2.10 The absence of alternative upcountry receival sites and port terminal facilities in Western Australia means that it is unlikely that growers who wish to acquire port terminal services on a stand alone basis would be able to do so, as currently these services can only be accessed as part of a bundled service.

**It is not appropriate that CBH's proposed Undertaking expressly excludes "fumigation of grain as a preventative measure."**

2.11 The PGA agrees with the ACCC's non-acceptance of CBH's submission that "fumigation of grain as a preventative measure" ought to be expressly excluded from the scope of its proposed Undertaking.

...

2.13 In Western Australia fumigation is carried out at facilities which are upcountry from the port terminal facilities for a minimum period of 28 days. The upcountry activities of CBH are closely related with the port activities, and cannot feasibly be separated under the Grain Express system.

**The drafting of the scope of the proposed Undertaking is not appropriate because it lacks clarity.**

2.14 The PGA agrees with the ACCC that the drafting of the scope of CBH's proposed Undertaking lacks clarity and therefore is not appropriate pursuant to section 44ZZA (3) of the TPA, and section 5 of the WEMA.

2.15 The PGA agrees with the ACCC's recommendations that:

- it would be appropriate for the definition of Port Terminal Services be amended to make it clear that the lists of port terminal services in Schedules 3-6 are not exhaustive;
- it would be appropriate for Schedules 3-6 to expressly include 'cargo accumulation';
- it would be appropriate for clause 5.4(d) (regarding sharing of efficiency savings) to be removed given its lack of clarity

**It is not necessary for CBH's proposed Undertaking to expressly provide for access to port terminals by employees of superintendence companies**

2.16 The PGA agrees with the ACCC that the Undertaking is to provide access to port terminal services to accredited wheat exporters only, not employees of superintendence companies.<sup>180</sup>

#### **7.4.4 Late submissions**

The ACCC notes that it also received two late submissions from SGS Australia and The Grain and Feed Trade Association (GAFTA) which largely reiterate the earlier SGS submission of 26 May 2009.

### **7.5 ACCC's views on the April Undertaking**

This section sets out the ACCC's views as to whether the services definition in the April Undertaking is appropriate having regard to the matters in section 44ZZA(3) of the TPA.

#### **7.5.1 Scope of the proposed service definition**

##### **7.5.1.1 Appropriate that the April Undertaking relates only to wheat**

The ACCC accepts CBH's submissions that it is appropriate that the April Undertaking applies only to wheat.

The ACCC notes AGEA's submission that CBH's April Undertaking should not be limited to wheat. In this regard, the ACCC maintains its view that it is appropriate that

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<sup>180</sup> Pastoralists and Graziers Association, *Submission in relation to Draft Decision on CBH Access Undertaking*, 3 September 2009, p. 5.

the April Undertaking applies only to wheat. The ACCC recognises that, as CBH has submitted, it is clear that the intention of the WEMA is that the April Undertakings should apply only to wheat.

This is because section 24 of the WEMA requires that, for the period after 1 October 2009, in order for a person that provides port terminal services to also hold or maintain accreditation *to export bulk wheat*, there must be in operation, under Division 6 of Part IIIA of the TPA, an access undertaking relating to the provision of access to port terminal services for *purposes relating to the export of wheat* (our emphasis).

The ACCC also considers that limiting the scope of the April Undertaking to wheat reduces the risk and undesirability of imposing regulation that is not appropriate at a time when the industry is newly liberalised and in transition.

However, the ACCC recognises that limiting the April Undertaking to wheat has the potential to create a number of issues in the grains industry.

First, limiting the April Undertaking to wheat leaves open the possibility that different port terminal rules could apply to wheat than those that apply for other grains.

In this regard, it is very encouraging that CBH has submitted that its proposed Capacity Allocation System will apply to all grain exports. The ACCC considers that this approach will alleviate any possibility of inconsistency between protocols that apply to wheat and those applying to other grains.

The second issue is one raised by AGEA, that given the April Undertaking relates only to wheat, port operators have the potential to restrict access to port by exhausting the port terminal's capacity in favour of other grains.<sup>181</sup>

While the ACCC has no evidence to suggest that such behaviour would be likely to occur, the ACCC recognises that providing a greater level of transparency over stocks at port would assist access seekers and would alleviate the potential for port operators to engage in this behaviour. Accordingly, in the Publication of Information chapter the ACCC sets out its view that publication of stocks at port (all grains) would be an appropriate part of any revised Undertaking.

The ACCC also notes that if an access seeker experiences issues in relation to accessing the port terminal services for the export of wheat (that have been influenced in some way by decisions made about other grains) the access seeker could seek to arbitrate on that access issue or enforce the non-discrimination clause in the Undertaking.

#### **7.5.1.2 Appropriate that the April Undertaking relates only to services offered at port**

The ACCC also accepts CBH's submissions that it is appropriate that the April Undertaking applies only to services offered at port (not up-country).

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<sup>181</sup> Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, p. 10.

The ACCC notes AGEA and PGA's submissions that CBH's undertaking should not be limited to services at port. In this regard, the ACCC maintains its view that it is appropriate that the undertaking applies only to port terminal services. The ACCC recognises that, as CBH has submitted, it is clear that the intention of the WEMA is that the proposed Undertakings should apply only to services offered at port.

In this regard, the ACCC notes that the Explanatory Memorandum to the WEMA dismissed calls to extend the access test to cover up-country services, stating that:

Up-country facilities do not display natural monopoly characteristics as they have low barriers to entry and there are already a number of competitors in the industry who provide up-country storage services.<sup>182</sup>

The Explanatory Memorandum goes on to note that an extension of the access arrangements to up-country storage facilities would 'impose an excessive regulatory burden'.<sup>183</sup> Further, the Second Reading Speech of the WEMA provides:

The Senate inquiry also identified concerns in relation to the potential for bulk-handling companies to restrict access to up-country storage facilities in a similar manner to concerns in relation to port facilities.

It is unclear from the evidence presented to the Senate inquiry whether the problem would necessarily arise, and if so, the extent of legislation that would be required to correct it.

If the highest level of regulation were to be imposed on the more than 500 up-country facilities, there is no doubt that this would create increased compliance costs which would almost certainly be directly passed back to growers.

The government will, therefore, continue to monitor the ability of exporters to access up-country storage facilities.

Let me say here, if any problems are identified then the government will take steps to remedy the situation including, if necessary, the development of a code of conduct.<sup>184</sup>

Nevertheless, the ACCC is cognisant of submissions to both the Issues Paper and Draft Decision calling for CBH's Undertaking to be extended to include services offered at CBH's up-country storage and handling facilities. Many of these submissions stated that it was artificial to draw a distinction between services offered at port and those offered up country.

The ACCC is aware that in WA the vast majority of exporters use CBH's 'Grain Express' bundled service for the export of their wheat. The ACCC notes PGA's submission that in Western Australia both upstream and port terminal services are provided by CBH (which differs from other states where there are at least some competing up-country storage and handling networks). Given this, there may be some benefits to the proposed Undertaking applying to CBH's up-country storage and handling facilities and well as to the ports.

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<sup>182</sup> Explanatory Memorandum, *Wheat Export Marketing Bill 2008* (Cth), p. 13.

<sup>183</sup> Explanatory Memorandum, *Wheat Export Marketing Bill 2008* (Cth), p. 14.

<sup>184</sup> House of Representatives, *Votes and Proceedings, Hansard*, Thursday 29 May 2009, pp. 76-77.

ACCC notes CBH's submission that "... if CBH wished to offset the potential effect of an adverse arbitration decision on port terminal charges, it could simply adjust its pricing for other parts of the bundle, rendering the arbitration meaningless."<sup>185</sup> In this regard, the ACCC notes that one of the intentions of the WEMA was to help growers get a better price for wheat that reflects market forces<sup>186</sup> and that the scenario described by CBH appears contrary to that objective.

However, it has not been the ACCC's role in this process to form any views on the competitiveness of the supply of up-country storage and handling services. As set out in the Legislative Framework chapter, the ACCC does not consider that its role in this process was to conduct a thorough assessment of the state of competition in the bulk wheat export supply chain.

It is the ACCC's view that, given the clear intention of the WEMA, and having regard to the risk and undesirability of imposing regulation that is not appropriate at a time when the industry is newly liberalised and in transition, it is appropriate pursuant to section 44ZZA(3) of the TPA that the scope of the April Undertaking be limited to services at port. The ACCC notes that the question of whether the access test should be extended up-country is a question of policy for government and notes that the Federal Government has stated that it will monitor developments in the up-country stages of the grain supply chain.

#### **7.5.1.3 Not appropriate not to cover port terminal services when bundled with other services**

As outlined above, CBH states that the April Undertaking will only apply to those customers who wish to acquire port terminal services on a stand alone basis - i.e. it will not apply to those customers who acquire port terminal services as part of a bundled service. CBH makes several arguments as to why it considers that it would not be appropriate to require it to offer the port terminal service component of Grain Express pursuant to the April Undertaking.

One argument CBH makes is that if the Undertaking 'included' Grain Express customers, it would prevent access seekers and CBH negotiating and agreeing to non-standard terms.

This assertion by CBH is incorrect. An access undertaking does not prevent parties from agreeing to whatever terms and conditions they like. To the contrary, commercial agreement is encouraged. An access undertaking can be considered as an 'avenue of last resort'. It sets out the *minimum* terms and conditions that an access provider offers to provide to an access seeker. There is nothing to prevent parties from agreeing to different terms and conditions of access.

CBH also submits that requiring the April Undertaking to apply to bundled services would 'prohibit CBH from offering an integrated service' and 'significantly decrease the efficiency of the WA export grain supply chain'.

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<sup>185</sup> CBH, *CBH Access Undertaking – Application of undertaking to Grain Express service*, 24 August 2009, p. 3.

<sup>186</sup> Explanatory Memorandum, *Wheat Export Marketing Bill 2008* (Cth), pp. 12-13.

The ACCC considers that these submissions reflect a misunderstanding of the nature of a Part IIIA access undertaking.

An access undertaking relating to one component of a supply chain does not, in any way, prevent an access provider from offering a bundled service. It simply means that, if an access seeker is not satisfied with the terms offered to it in relation to the *port terminal services* component of the bundle, it can use the negotiation and arbitration provisions of the undertaking to try to improve its terms and conditions of access in relation to *that component* only. Accordingly there is no reason why providing the ACCC with an access undertaking covering all port terminal services would stop CBH from continuing its 'pivotal logistical role'<sup>187</sup> in WA. In fact, promoting competition in alternative up-country supply chains would be likely to provide incentives on CBH to become more efficient.

CBH also argues that requiring its Undertaking to apply to bundled services would be contrary to the intended purpose of the 'access test' in section 24 of the WEMA.

To the contrary, the ACCC considers that it would in fact be inconsistent with the access test in the WEMA to have an access undertaking that only applied to the stand-alone port terminal service (particularly given that the vast majority of access seekers in WA use the bundled Grain Express product).

The ACCC considers that the intent of the WEMA is to implement an access regime that covered *all* bulk wheat exports through a given port terminal. Simply because port terminal services are being offered as part of a bundled product does not alter the fact that they are port terminal services, as defined in the WEMA.

Another argument CBH makes is that requiring the April Undertaking to cover bundled offers would be inconsistent with the ACCC's reasoning in deciding not to revoke CBH's Grain Express notification.

By way of background, the ACCC notes that last year the ACCC was asked to consider elements of CBH's grain storage, handling and transportation arrangements between its up-country receival sites and its ports – known as 'Grain Express'.

The ACCC was involved because elements of the Grain Express system potentially raise concerns under the exclusive dealing provisions of the Trade Practices Act.

Broadly, exclusive dealing involves one trader imposing restrictions on another's freedom to choose with whom, in what or where it deals. Businesses can receive automatic immunity from legal action for exclusive dealing conduct by lodging a 'notification' with the ACCC. The ACCC can only remove the immunity if it decides that the conduct substantially lessens competition and is not in the public interest.

CBH lodged a notification in June last year.

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<sup>187</sup> As described by the Western Australian Farmers Federation (Inc), *Submission in relation to proposed CBH access undertaking*, 29 May 2009, p. 1.

The notified conduct covers the requirement under the Grain Express system that, while grain is in CBH's custody, its transportation will be arranged and coordinated by CBH. CBH uses both road and rail freight services to move grain in its system.

In the ACCC's Draft Decision on CBH's April Undertaking, the ACCC stated that CBH's Grain Express notification only relates to the bundling of up-country storage and handling services with transportation to port, while the grain remains in its system. The ACCC stated in its Draft Decision that the notified conduct does not cover the bundling of CBH's port services with its up-country storage, handling and transportation services.

The ACCC notes the assertion in CBH's letters of 24 August 2009 and 24 September 2009 to the ACCC that CBH's Grain Express notification relates to, among other things, CBH bundling storage and handling services at all four of its ports with supply chain coordination services and transport services (while the grain remains in its system).

The ACCC notes that the focus of the notified conduct and CBH's supporting submission was the bundling of grain transport services to one of 15 Destination Sites within CBH's storage and handling service provided through its storage and handling network. The ACCC considers that it is not clear in the notification Form G or in CBH's supporting submission that storage and handling services, as they relate to ports, were intended to include port terminal services such as ship loading.

The ACCC also notes that its public assessment statement in relation to the notification focused on the potential efficiencies to be gained by CBH being able to coordinate movements of grain (via road and rail) in its system to Destination Sites. CBH was made aware of the basis of the ACCC's assessment of the notification in the public assessment statement and made no attempt to correct any possible misunderstanding about the extent of the notified conduct.

The ACCC is considering this issue further in assessing whether to review the notified arrangements.

However, it is important to note that the process for considering an application for immunity for the exclusive dealing provisions of the TPA is separate and distinct from any access undertaking arrangements under Part IIIA. Notification only provides immunity for exclusive dealing conduct and is not directly relevant to the consideration of issues in relation to Part IIIA access undertakings. This was clearly noted in the ACCC's public assessment statement about the notification.

For the reasons set out above, the ACCC considers that it is not appropriate that the April Undertaking does not cover all bulk wheat exporters acquiring port terminal services from CBH—regardless of what other services they may acquire from CBH, and in what form the services are acquired.

The ACCC notes that the requirement for all port terminal service users to be covered by the access undertaking does not necessitate the breaking up of any bundled offer, and that there are several ways in which CBH could give effect to this requirement



under a revised undertaking. Firstly, the indicative access agreement attached to the undertaking could apply to both the bundled offer and the stand alone port terminal service. Alternatively, the indicative access agreement attached to the undertaking could apply to the stand alone port terminal service and make it clear which components of the bundled offer are port terminal services. Users would also need to be made aware of the ability to negotiate and arbitrate on the port terminal service components of the bundled offer. CBH informed the ACCC that its revised undertaking will adopt the former approach.

#### **7.5.1.4 Fumigation of grain as a preventative measure**

The ACCC considers that it is not appropriate to expressly exclude fumigation of grain as a preventative measure from the scope of its Undertaking without specifying what type of fumigation measures will be subject to the April Undertaking.

The ACCC accepts submissions made by AGEA and the PGA that fumigation is an essential part of port terminal services. While it may be the case that not all fumigation of grain is appropriate at port, it is unclear precisely how the term “preventative measure” would be interpreted in this context without further specification about what type of fumigation would be included within the scope of the proposed Undertaking.

As noted above, CBH provided a further submission in relation to fumigation on 20 August 2009 which noted that fumigation as a preventative measure is not usually provided at port for several reasons including the time taken to fumigate and the impact it would have on the efficiency of the export terminal.

#### **7.5.1.5 Drafting of the scope lacks clarity**

Aside from proposing that its proposed Undertaking not apply to bundled services, the ACCC recognises that CBH has attempted to draft the scope of its April Undertaking to be consistent with the service definition in the WEMA. Nevertheless the ACCC considers that the drafting of the scope of CBH’s April Undertaking lacks clarity and is therefore not appropriate pursuant to section 44ZZA(3).

The definition of Port Terminal Service in the WEMA is:

*Port terminal service* means a service (within the meaning of Part IIIA of the *Trade Practices Act 1974*) provided by means of a port terminal facility, and includes the use of a port terminal facility.<sup>188</sup>

A Port Terminal Facility is defined in the WEMA the following manner:

“Port Terminal Facility” means a ship loader that is:

- (a) at a Port Terminal; and
- (b) capable of handling Bulk Wheat;

and includes any of the following facilities:

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<sup>188</sup> *Wheat Export Marketing Act 2008* (Cth) s 5.

- (c) an intake/receival facility;
- (d) a grain storage facility;
- (e) a weighing facility;
- (f) a shipping belt;

that is:

- (g) at the Port Terminal; and
- (h) associated with the ship loader; and
- (i) capable of dealing with Bulk Wheat.<sup>189</sup>

***Clause 5.1(b) – amendments to make it clear that the lists of port terminal services in Schedules 3 – 6 are not exhaustive***

The ACCC considers that the current drafting of the scope of CBH’s proposed Undertaking risks inadvertently excluding relevant services.

It is not clear whether the elements of the service described in the Schedules 3 – 6 are intended to be exhaustive. That is, clause 5.1(b) provides that port terminal services ‘means the services described in the Port Schedules’ (emphasis added). This drafting leaves the services definition open to an interpretation that the specified elements of the service in Schedules 3 – 6 may be an exhaustive list.

Therefore, for the avoidance of doubt, the ACCC is of the view that the service description should include drafting such that any services necessarily required by access seekers to port terminal services are captured. This could be achieved by the substitution of clause 5.1(b) with the following:

**Port Terminal Services** means the services described in Schedules 3 – 6 in relation to Bulk Wheat provided by means of a Port Terminal Facility, and includes the use of a Port Terminal Facility and the use of all other associated infrastructure necessary to allow an Accredited Wheat Exporter to export Bulk Wheat through that Port Terminal.

***Schedules 3-6 – inclusion of ‘cargo accumulation’***

The ACCC is of the view that it would be appropriate for cargo accumulation services to be explicitly included within the scope of the Undertaking.

The ACCC accepts arguments made by AGEA that cargo accumulation is an essential part of port terminal services. The ACCC considers that a transparent cargo accumulation procedure is an important element of the port terminal service, as the potential costs to the industry could be significant if the cargo accumulation process is poorly managed.

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<sup>189</sup> *Wheat Export Marketing Act 2008* (Cth) s 5.

The ACCC notes that the exclusion of ‘cargo accumulation’ from Schedules 3 – 6 may have been inadvertent given that clause 5.3(c) of the proposed Undertaking includes a reference to ‘cargo accumulation’ (although the ACCC understands that clause 5.3 is merely illustrative in nature).

#### ***Removal of clause 5.4(d) – irrelevant to scope***

The ACCC notes that under the heading “What this Undertaking does not cover”, clause 5.4(d) provides:

Nothing in this Undertaking requires the Port Operator or Related Body Corporate to share efficiency savings or benefits from the operation of a separate integrated supply chain service whether or not the integrated supply chain service utilises the Port Terminal Facilities.<sup>190</sup>

The ACCC considers that the rationale for, and implications of, clause 5.4(d) are not clear.

The ACCC is of the view that inclusion of this clause in the context of defining the scope of the Undertaking introduces an unnecessary degree of uncertainty for access seekers and is therefore not appropriate.

#### **7.5.1.6 Not necessary for CBH’s proposed Undertaking to expressly provide for access to employees of superintendence companies**

The ACCC notes that several submissions called for increased access to ports for employees of superintendence companies.

The ACCC accepts that there may be benefits in allowing employees of superintendence companies to access port terminals, particularly in relation to improving the transparency of port operations.

However, the proposed Undertaking is an undertaking focusing on providing access to port terminal services to *accredited wheat exporters*. It is not an undertaking specifically to provide access to employees of superintendence companies. That said, the ACCC notes that a failure of CBH to allow an accredited wheat exporter to bring an employee of a superintendence company into the port terminal area could be an issue dealt with by negotiation or arbitration under the proposed Undertaking (see the Publish, Negotiate, Arbitrate chapter).

The ACCC further notes that failure to allow access to an employee of a superintendence company may, in some circumstances, have the potential to breach the non-discrimination obligations that the ACCC considers necessary for inclusion in a revised undertaking.

#### **7.5.2 CBH’s September Undertaking**

The clauses in CBH’s September Undertaking relating to scope of the undertaking (ie.

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<sup>190</sup> Co-operative Bulk Handling Limited, *Port Terminal Services Access Undertaking*, 14 April 2009, clause 5.4(d).

clause 5 and Schedules 4 to 7 of the September Undertaking) are set out in CBH's September Undertaking at Annexure A.

### **7.5.3 ACCC's views on CBH's September Undertaking**

The ACCC considers that the clauses in CBH's September Undertaking relating to the scope of the undertaking have addressed the ACCC's concerns with the clauses relating to the scope of CBH's April Undertaking set out in the ACCC's Further Draft Decision.

Therefore, the ACCC considers that the clauses in relation to the scope of CBH's September Undertaking are appropriate.

## 8 Publish/Negotiate/Arbitrate

### Summary

The ACCC is of the view that, in the present circumstances, it is appropriate that CBH's September Undertaking adopts a publish-negotiate-arbitrate approach (rather than providing for ex ante price regulation). In forming this view, the ACCC has had regard to the transitional state of the industry and the relatively short duration of the September Undertaking.

The ACCC also considers however, that the drafting of the publish-negotiate-arbitrate component of the September Undertaking is appropriate given that it has addressed the ACCC's concerns with the drafting of the publish-negotiate-arbitrate component of CBH's April Undertaking. In the ACCC's Further Draft Decision on CBH's April Undertaking, the ACCC stated that it considered it was more likely to be appropriate for the undertaking to:

- include an indicative access agreement setting standard terms for access to the service;
- require CBH to publish a single set of prices for port terminal services, which may include differentiated prices for different circumstances (i.e. for different processes for testing of grain depending on where it has been stored – but *only* where these processes are justifiable with regard to hygiene, quality or associated factors), provided those circumstances are transparently stated and the pricing differences are justified on the basis of different costs;
- require CBH to publish prices by the beginning of September for the 2010/2011 season;
- provide measures to ensure that the negotiation, dispute resolution and arbitration mechanisms are applicable to Access Agreements for the 2009/2010 season;
- provide appropriate arrangements to ensure access seekers are not delayed in obtaining access by reason of engaging in a negotiation with CBH on non-standard terms or prices, or by reason of resolving a dispute with CBH pursuant to the processes in the undertaking;
- address the issues identified by the ACCC in the discussion below regarding the timeframes and lack of clarity and certainty in the drafting of the April Undertaking, as well as the disproportionate discretion of the access provider;
- not include a 'pre-condition' to invoking the dispute resolution process, as currently included in clause 7.3(c);
- provide that when a Dispute is referred to arbitration, it is referred to the ACCC in the first instance;
- provide a mechanism by which the ACCC may consider whether or not it wishes to arbitrate the Dispute;
- provide for the Dispute to be arbitrated by the ACCC if it so chooses, or for the Dispute to be arbitrated by a private arbitrator if the ACCC so chooses;

- permit the ACCC to conduct an arbitration adopting the processes and having regard to the matters set out in Part IIIA of the TPA if it chooses to be the arbitrator;
- require a private arbitrator, if appointed, to keep the ACCC informed of the progress of the arbitration, including timelines and processes for making submissions; and
- allow the ACCC to make submissions to an arbitration conducted by a private arbitrator.

The ACCC notes that drafting of the publish-negotiate-arbitrate component of the September Undertaking has adopted each of these recommendations.

## 8.1 CBH's April Undertaking

The April Undertaking proposes a 'publish-negotiate-arbitrate' model for dealing with the publication of prices and terms, negotiating for access and resolving disputes. The key relevant clauses are 6, 7 and 8 of the April Undertaking, though other clauses are also relevant.

### 8.1.1 Obligation to publish price and non-price terms

Clause 6.1 obliges CBH, by no later than 30 September each year, for access to each of its Port Terminal Service, to publish 'Reference Prices' and 'Standard Terms.' If CBH has not published by that time at the commencement of the proposed Undertaking, it must publish within 15 Business Days of commencement. Unless varied, the Reference Prices and Standard Terms must apply at least until 30 September of the next year.

### 8.1.2 Access, Standard Terms and Standard Services

Clause 6.2 provides that the 'Port Terminal Services' for each Port are set out in the relevant Port Schedules. Further, clause 6.2(b) provides that, unless otherwise specified in a Port Schedule, access to a Standard Port Terminal Service (and CBH's obligation to enter into an Access Agreement for them) will only be offered for a term expiring no later than 30 September of the year following the year in which the Standard Terms were first published, subject to appropriate 'holding over' provisions.

Clause 6.1(f) provides that if an Applicant seeks access to non-standard Port Terminal Services, CBH and the Applicant may negotiate different prices and non-price terms.

Clause 6.3 provides that parties may agree to include terms in an agreement applying to services other than Port Terminal Services, but that the Undertaking only applies to the terms relating to the provision of Port Terminal Services.

Clause 6.4 provides that if an Applicant requests a Standard Port Terminal Service, CBH must *offer*, in accordance with clause 7, that Service at the Reference Prices for that Service applicable at that time. Clause 7 sets out the negotiation process (see below). Clause 7.7(b)(i) reiterates that CBH must offer the Standard Terms to the Applicant where the Applicant requests access to a Port Terminal Service, subject to the Applicant satisfying the Prudential Requirements (see below).

Clause 6.4 goes on to provide that CBH must not *provide access* on terms and conditions which are different from the Standard Terms and Reference Prices, or which differ between Applicants/Users, except in certain circumstances. Per clause 6.4, CBH may provide access on different terms where those terms are:

- consistent with the objects of the proposed Undertaking;
- offered on an arm's length commercial basis; and
- commercially justifiable, taking into account the 21 matters listed in clause 6.5.

Clause 7.7 reiterates that, subject to clauses 6.4 and 6.5, CBH may offer amended Standard Terms to reflect terms which CBH considers reasonably necessary or desirable to accommodate a request for access to a service other than a Port Terminal Service. Further, clause 7.7 states that CBH may agree changes to the Standard Terms requested by the Applicant.

Clause 7.7(a) provides that the granting of access is finalised by the execution of an Access Agreement. Clause 7.7(c) provides that once the Applicant has notified CBH that it is satisfied with the terms and conditions of the Access Agreement as drafted, CBH will, as soon as reasonably practicable, provide a final Access Agreement (or if applicable, an amendment to an existing Access Agreement) to the Applicant for execution. Clause 7.7(d) provides that if CBH offers an Access Agreement and the Applicant accepts the terms and conditions offered in that Access Agreement, CBH and the Applicant will execute the Access Agreement. The clause states that the parties will use reasonable endeavours to comply with this clause as soon as practicable.<sup>191</sup>

### **8.1.3 Negotiating for access**

#### **8.1.3.1 Good faith negotiations**

Clause 7.1 of the Undertaking provides that CBH will negotiate in good faith for the provision of access to Port Terminal Services.

#### **8.1.3.2 Confidentiality**

Clause 7.2 relates to confidentiality during the negotiation process. It provides that if a party provides 'Confidential Information' to the other party as part of the negotiation process, the party receiving that information will treat it as secret and confidential, as the property of the provider, and will not use the information for any purpose other than that which the provisions of the Undertaking allow. A party may disclose the Confidential Information to the extent necessary for the provision of advice from legal advisors, financiers, accountants or other consultants, provided those persons are under a legal obligation not to disclose the information. The confidentiality obligation is reiterated in clause 7.3(b).

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<sup>191</sup> Co-operative Bulk Handling Limited, *Port Terminal Services Access Undertaking*, 14 April 2009, clause 7.7(d).

### **8.1.3.3 Provision of information by CBH to Applicant**

Clause 7.4(a) provides that, if requested by the Applicant, CBH will provide the Applicant with information related to access to the Port Terminal Services that may be reasonably required by the Applicant in relation to the Access Application. CBH will provide this information subject to:

- CBH not disclosing any information which would breach a confidentiality obligation or which it considers is commercially sensitive in relation to its own operations; or
- the Applicant paying the reasonable costs incurred by CBH in obtaining information that is not ordinarily and freely available to CBH.

Under clause 7.4(a)(ii)(B), CBH may also refuse an information request if it is unduly onerous, or the expense and resources required to provide the information is disproportionate to the benefit to be obtained from the information.

### **8.1.3.4 Access application, acknowledgement and commencement of negotiations**

Clause 7.5(a)(i) provides that requests for access to Port Terminal Services are to be submitted in the form of an Access Application, which is set out at Schedule 1. The form requires the Applicant to provide 'request details,' being season; applicant's application type and business category; and 'applicant details', being company name; ACN/ABN; website; address; contact details; details of authorised company representative, including authorisation; and duration of the agreement sought. The form also requires the Applicant to provide 'indicative export tonnage'. Clause 7.5(a)(ii) provides that an Applicant may seek initial meetings with CBH to discuss the application and seek clarification on the process as outlined in the Undertaking, or the information requirements of the form.

Parties will commence negotiation to progress towards an Access Agreement as soon as reasonably possible following CBH's acknowledgement of receipt of an Access Application.<sup>192</sup> Clause 7.5(b) requires CBH to acknowledge receipt of the Application within five Business Days of receipt, or such longer period as required if CBH requires additional information regarding, or clarification of, the Application. If CBH seeks further information or clarification, it must advise the Applicant of the additional information or the clarification within five Business Days of receipt of the Application. Upon receiving the required information or clarification, CBH will provide written acknowledgement of the receipt of the completed Access Application within five Business Days. The 'Negotiation Period' commences upon CBH's acknowledgement of the application.<sup>193</sup>

### **8.1.3.5 Negotiation, 'pre-conditions' to negotiation and ceasing negotiation**

Clause 7.4(b) provides that:

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<sup>192</sup> Co-operative Bulk Handling Limited, *Port Terminal Services Access Undertaking*, 14 April 2009, clause 7.6(a).

<sup>193</sup> Co-operative Bulk Handling Limited, *Port Terminal Services Access Undertaking*, 14 April 2009, clause 7.6(b).



- CBH reserves the right to negotiate only with Applicants who comply with the requirements and processes set out in the Undertaking, and that if an Applicant does not comply and CBH considers that such non-compliance is material, CBH is not obliged to continue negotiations with the Applicant;
- the Applicant must be an Accredited Wheat Exporter;
- CBH may require, at any time, the Applicant to demonstrate that it can meet the Prudential Requirements (see further below), and CBH may refuse to commence negotiations, or may cease negotiations, with an Applicant if they do not meet or are unable to demonstrate that they meet the Prudential Requirements;
- CBH may at any time refer a request for access to the arbitrator if CBH is of the view that the Applicant's request is frivolous in nature, or that the Applicant is not negotiating in good faith. If the arbitrator determines that the request is frivolous, then CBH will be entitled to cease negotiations, and will not be obliged to comply with the proposed Undertaking in respect of the request, and may apply to the arbitrator for an order for the Applicant to pay CBH's reasonable costs incurred in relation to the request for access.

Clause 7.4(b)(iv) provides that if CBH refuses to negotiate for the reasons described at points 1 or 3 above, then within 10 Business Days of the decision to refuse to negotiate, CBH must explain in writing to the Applicant the reasons for the refusal.

Clause 7.6 provides that CBH will be entitled to cease negotiations upon the cessation of the 'Negotiation Period,' which will occur upon:

- a. CBH believing that the negotiations are not progressing in good faith towards the development of an access agreement within a reasonable time period;
- b. CBH receiving evidence confirming that the Applicant no longer satisfies the Prudential Requirements;
- c. the execution of an Access Agreement;
- d. written notification from the Applicant that it no longer wishes to proceed with its Access Application; or
- e. the expiration of three months, or if an extension is agreed upon, at the end of that extended period.

Clause 7.4(b)(vi) states that if the Applicant considers that CBH has unreasonably refused to commence or unreasonably ceased negotiations under clause 7.4(b), then that matter will constitute a Dispute which must be dealt with in accordance with clause 8.

Clause 7.6(b)(v) states that if CBH receives evidence confirming that the Applicant no longer satisfies the Prudential Requirements, it will advise the Applicant of the evidence and issue a notice of intent to end the Negotiation Period, to become effective ten Business Days after the issue of the notice. CBH will be required to provide the Applicant with written reasons for its decision to end the Negotiation Period.

### 8.1.3.6 Prudential requirements

Clause 7.4(b)(iv) stipulates that to meet the Prudential Requirements, the Applicant must:

- be solvent; and
- the Applicant, or a Related Body Corporate, must not be currently, or have been in the previous two years, in ‘Material Default,’ meaning any breach of a fundamental or essential term, or repeated breaches of any of the terms of an Access Agreement, or any agreement for the provision of services by CBH;<sup>194</sup> and
- be able to demonstrate to CBH that it has a legal ownership structure with a sufficient capital base and assets of value to meet the actual or potential liabilities under an Access Agreement, including demonstrated timely payment of access charges and payment of insurance premiums and deductibles under the required policies of insurance, or otherwise provides Credit Support.

### 8.1.4 Pre-arbitration dispute resolution

Clause 7.3(c) provides that, if at any time during the negotiation process a dispute arises between the parties which, after reasonable negotiation, the parties are unable to resolve, then either party may seek to resolve the dispute in accordance with the process in clause 8.

Clause 7.6(d) provides that, if both CBH and the Applicant comply with clause 7.1 but fail to execute an Access Agreement before the cessation of the Negotiation Period, that matter will constitute a Dispute which either party may refer to arbitration under clause 8.

Clause 8.1(a) of the Undertaking provides for ‘Disputes’ to be resolved in accordance with clause 8, unless expressly agreed otherwise. ‘Dispute’ in this sense is defined as a bona fide dispute between CBH and an Applicant/User arising under the proposed Undertaking.<sup>195</sup> Clause 8.1(b) states that Disputes in relation to an executed Access Agreement will be dealt with under the provisions of that Access Agreement.

Clause 8.1(c) states that by 31 July of each year, CBH will report to the ACCC on any material Disputes in relation to an Access Agreement and any material Disputes raised by Applicants, Users or CBH in the last 12 months, which will include the details of any resolution and the status of unresolved matters.

Clause 8.1(a) goes on to provide that either party to a Dispute may give the other party a ‘Dispute Notice’ specifying the Dispute and requiring it to be dealt with under clause 8. The parties are required to use ‘reasonable endeavours acting in good faith’ to settle the Dispute as soon as practicable.

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<sup>194</sup> Co-operative Bulk Handling Limited, *Port Terminal Services Access Undertaking*, 14 April 2009, clause 1.1.

<sup>195</sup> Co-operative Bulk Handling Limited, *Port Terminal Services Access Undertaking*, 14 April 2009, clause 1.1.

Clause 8.2 states that within five Business Days of a party giving the other party a Dispute Notice, senior representatives from each party are to meet and use reasonable endeavours acting in good faith in order to resolve the Dispute by joint discussions.

Clause 8.3(a) provides that if a Dispute is not resolved via discussion between senior representatives, then within 10 Business Days after the date of the Dispute Notice and if the parties agree, they can attempt to resolve the Dispute by mediation. Clause 8.3(b) states if the parties agree to attempt to resolve the dispute by mediation, the Dispute will be referred to the Chief Executive Officers of the parties involved who will attempt to resolve the Dispute, including by informal mediation. Clause 8.3(c) states if the dispute is not resolved within 10 Business Days of being referred to CEOs, the Dispute will be referred to formal mediation. If the parties are unable to agree upon a mediator within 10 Business Days, on the request of either party the Dispute will be referred to a mediator appointed by the President of the Western Australian Chapter of the Institute of Arbitrators and Mediators of Australia (IAMA). Clause 8.3(d) sets out matters in relation to the conduct and costs of the mediation.

## **8.1.5 Arbitration**

### **8.1.5.1 Referral to arbitration**

Clause 8.3(a)(ii) provides that, if after senior representatives have discussed the Dispute, the parties do not wish to resolve the Dispute by mediation, either party may, by notice in writing to the other and the arbitrator, refer the Dispute to arbitration. A Dispute may also be referred to arbitration:

- if the Dispute is not resolved by joint discussion under clause 8.2;
- at any time after the appointment of the mediator under clause 8.3(c).<sup>196</sup>

Under clause 8.4(b), CBH must notify the ACCC of the details of any Dispute which has been referred to arbitration and provide the ACCC with the arbitrator's final determination. Clause 8.4(d) requires CBH to indemnify the arbitrator from any claims made against it arising out of the performance of its duties under clause 8, except for certain conduct, and pay costs.

Clause 8.4(c) provides that if the Applicant serves notice of a Dispute, the notice will also include an agreement by that Applicant to:

- pay any of the costs of the arbitration as determined by the arbitrator under clause 8.10; and
- indemnify the arbitrator from any claims made against the arbitrator arising from the performance of its duties under clause 8, except for certain conduct.

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<sup>196</sup> Co-operative Bulk Handling Limited, *Port Terminal Services Access Undertaking*, 14 April 2009, clause 8.4(a).

### **8.1.5.2 Selection of arbitrator**

Clause 8.5(a) provides that the arbitration must be conducted by an arbitrator appointed by agreement of the parties.

Clause 8.5(b) requires that within two Business Days of the parties agreeing to an arbitrator, CBH must notify the ACCC.

Under clause 8.5(c) within five Business Days of receiving the notice, the ACCC may give notice to the parties of its objection if the ACCC forms the view on reasonable grounds that the original arbitrator appointed by the parties is either not independent or appropriately qualified. If the ACCC issues such a notice, the parties must nominate an alternative arbitrator and notify the ACCC of the identity and qualifications of the arbitrator within two Business Days of the parties agreeing to an arbitrator. If the ACCC does not provide notice within five Business Days of the parties giving notice of the appointment of a substitute arbitrator, the arbitrator appointed by the parties stands.

Alternatively, under clause 8.5(d), if the parties fail to agree on an arbitrator within the later of 10 Business Days of the referral to arbitration or 10 Business Days of the ACCC giving notice of its objection to the choice of the arbitrator, either party may request the ACCC to appoint an arbitrator, which must not be the ACCC.

### **8.1.5.3 Termination of arbitration**

Clause 8.6(d) provides that the arbitrator may at any time terminate the arbitration without making an award if it thinks that:

- the notification of the Dispute is vexatious;
- the subject matter of the Dispute is trivial, misconceived or lacking in substance;  
or
- the party who notified the Dispute has not engaged in negotiations in good faith.

### **8.1.5.4 Conduct of the arbitration**

Clause 8.6 outlines the arbitration procedures, though clause 8.5(e) provides that the arbitration will not proceed unless and until the Applicant has agreed to pay the arbitrator's costs as determined under clause 8.10. Clause 8.6 provides:

- the arbitration must be conducted in private, unless the parties agree otherwise, and subject to the involvement of and disclosures to the ACCC;
- parties may appoint representatives, including those with legal qualifications, to represent or assist in the arbitration;
- the arbitrator will:<sup>197</sup>

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<sup>197</sup> Co-operative Bulk Handling Limited, *Port Terminal Services Access Undertaking*, 14 April 2009, clause 8.6(c).

- observe the rules of natural justice, but is not required to observe the rules of evidence;
- proceed as quickly as is possible and consistent with a fair and proper assessment;
- encourage written presentations by the parties with rebuttal opportunities and questioning by the arbitrator;
- call on any party the arbitrator believes necessary to give evidence;
- permit the ACCC, on request, to make submissions to the arbitrator on matters relevant to the Dispute;
- decide how to receive evidence and submissions and consider confidentiality issues;
- present a draft determination and hear argument from the parties before making a final determination; and
- hand down a written final determination including reasons, findings of law and fact, and references to evidence on which findings of fact were based.

#### **8.1.5.5 Matters the arbitrator must take into account**

Clause 8.7(a) provides that, in deciding a Dispute, the arbitrator will take into account:

- ‘the principles, methodologies and provisions set out in this Undertaking, in particular clauses 6.4 and 6.5’;<sup>198</sup>
- the objectives and principles in Part IIIA of the TPA and the Competition Principles Agreement;
- the benefit to the public from having competitive markets;
- any guidance published, or submissions provided, by the ACCC; and
- any other matter the arbitrator thinks appropriate.

Clause 8.7(b) provides that, in making its determination, the arbitrator:

- may deal with any matters referred to in section 44V of the TPA;
- will not make a decision which would have any of the effects described in section 44W of the TPA; and
- will take into account the matters referred to in section 44X of the TPA.

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<sup>198</sup> Co-operative Bulk Handling Limited, *Port Terminal Services Access Undertaking*, 14 April 2009, clause 8.7(a)(i).

### **8.1.5.6 Other matters – confidentiality, costs and effect of decision**

Clause 8.8 requires the arbitrator to take all reasonable steps to protect the confidentiality of information that a party has identified is confidential or commercially sensitive. The clause goes on to permit the arbitrator to require the parties to comply with confidentiality regimes, and to make confidential and public versions of its determinations, and limit access to the confidential version. Clause 8.8(d) states that the entire dispute resolution process remains subject to the confidentiality clause at clause 7.2.

Clause 8.10 provides that the arbitrator's costs and the costs of the parties to the arbitration will be borne by the parties in such proportions as the arbitrator determines, and the parties may make submissions on the issue of costs prior to that determination.

Clause 8.9 states that the arbitrator's determination is final and binding subject to any rights of review by a court of law. If an Applicant does not comply with the arbitrator's determination or direction, CBH is no longer obliged to continue negotiations regarding the provision of access for that Applicant,<sup>199</sup> except where the determination or direction is subject to review by a court of law. CBH will comply with the lawful directions or determinations of the arbitrator except where the determination or direction is subject to a review by a court of law.<sup>200</sup>

## **8.2 CBH's submissions made in support of April Undertaking**

### **8.2.1 Initial submission of 14 April 2009**

CBH's initial submission focuses largely on why a negotiate-arbitrate model is appropriate rather than an ex ante pricing approach, and CBH makes few comments regarding the appropriateness of particular proposed negotiate-arbitrate clauses. CBH does note, however, that the negotiation arrangements in the April Undertaking are similar to those in the ARTC Interstate Access Undertaking, though without an Indicative Access Proposal and with the provision of independent arbitration rather than arbitration by the ACCC. CBH submits that the ACCC will still be given an oversight role in that it could veto the chosen arbitrator and appoint another arbitrator if the parties are unable to agree and participate in the arbitration process.<sup>201</sup>

#### **8.2.1.1 CBH submits that publication of pricing is appropriate**

In general, CBH submits that annual publication of pricing for standard Port Terminal Services is appropriate because:

- it provides transparency in the provision of Port Terminal Services;

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<sup>199</sup> Co-operative Bulk Handling Limited, *Port Terminal Services Access Undertaking*, 14 April 2009, clause 8.9(b).

<sup>200</sup> Co-operative Bulk Handling Limited, *Port Terminal Services Access Undertaking*, 14 April 2009, clause 8.9(c).

<sup>201</sup> Co-operative Bulk Handling Limited, *Submission to the ACCC*, 14 April 2009, p. 35.

- it facilitates *ex post* monitoring to ensure CBH does not engage in discriminatory pricing;
- it promotes efficient negotiation and timely agreement on the terms of access;
- access seekers are well resourced and are able to assess and negotiate terms and conditions of access;
- it is not practicable to undertake a uniform price determination for each port; and
- the proposed Undertaking provides for arbitration.<sup>202</sup>

CBH also submits that in the context of CBH providing access to Port Terminal Services in the past and presently, the regulatory costs of undertaking *ex ante* price regulation outweighs the benefits, particularly given that:

- the legislative framework of the WEMA itself leans towards light-handed regulation;
- ‘there is a history of open access on reasonable terms and conditions’;
- CBH has an incentive to maximise throughput at its terminals;
- ‘Port Operators’ have historically faced wheat exporters ‘with considerable countervailing power and will continue to do so’;
- the April Undertaking contains a non-discrimination obligation;
- Australian wheat exporters may substitute overseas supply chains with Australia in response to any attempt by CBH to charge a monopoly price for Port Terminal Services, leading to a reduction in wheat exports and reduced revenue for growers;
- the threat of arbitration and/or heavier-handed regulation is a powerful disincentive against monopoly pricing (to the extent it is possible in the first place); and
- growers are constantly questioning supply chain costs.<sup>203</sup>

CBH submits also that the provision of Port Terminal Services is subject to a substantial level of regulatory oversight by Wheat Exports Australia and the ACCC, and will also be the subject of a detailed review by the Productivity Commission.<sup>204</sup> CBH further submits that the cooperative structure of CBH acts a constraint.<sup>205</sup>

CBH provided further details on some of these arguments:

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<sup>202</sup> Co-operative Bulk Handling Limited, *Submission to the ACCC*, 14 April 2009, p. 33.

<sup>203</sup> Co-operative Bulk Handling Limited, *Submission to the ACCC*, 14 April 2009, p. 33.

<sup>204</sup> Co-operative Bulk Handling Limited, *Submission to the ACCC*, 14 April 2009, p. 18.

<sup>205</sup> Co-operative Bulk Handling Limited, *Submission to the ACCC*, 14 April 2009, p. 3.

### 8.2.1.2 Cooperative structure is a constraint

CBH submits that it is a grower-owned co-operative governed by the *Companies (Co-operative) Act 1943* (WA) and by its Memorandum of Association and Articles of Association. CBH submits that because of this, its primary motivation is to act in the interests of grain producers by ensuring a reliable and cost-effective grain storage and handling service, and to use its income to establish and conduct systems for handling grain in bulk, rather than pay dividends to shareholders. CBH submits that its culture, operations and decision-making are driven by the requirement to provide grain storage and handling services to grain growers, rather than to maximise profits and distribute returns to shareholders.<sup>206</sup> CBH reiterates these points in its supplementary submission.<sup>207</sup>

### 8.2.1.3 Regulatory constraints

CBH submits that it has obligations under the *Bulk Handling Act 1967* (WA) and associated regulations that mean that it is already legislatively bound to allow other parties access to its ports.<sup>208</sup> CBH reiterates these points in its supplementary submission.<sup>209</sup>

CBH submits that it is also constrained by the threat of heavier-handed regulation if it is found to have acted inappropriately, including via the Productivity Commission review of the WEMA.<sup>210</sup>

### 8.2.1.4 Throughput business

CBH submits that because the majority of costs associated with CBH's port terminals are fixed and sunk, there is a strong incentive for CBH to facilitate increased throughput at its ports. CBH submits that by maximising throughput, it can optimise the efficiency of its port operations, particularly where a port terminal is operating below capacity.<sup>211</sup> CBH reiterates these points in its supplementary submission.<sup>212</sup>

In its further submission CBH acknowledges that vertical integration may create incentives to discriminate, but that CBH has different incentives due to its cooperative status and due to the ring fencing in place as a result of Grain Express. CBH also accepts that appropriate measures are required to address both the perception and potential reality of discrimination, and those measures are in place.<sup>213</sup>

### 8.2.1.5 Threat of new entry and container exports

CBH submits that the ability of 'Port Operators' to raise prices above efficient levels is constrained by the potential entry of new competing port facilities and from competition from container exports. CBH cites examples of new port terminals in South Australia and Victoria to illustrate this point, but not in Western Australia. In

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<sup>206</sup> Co-operative Bulk Handling Limited, *Submission to the ACCC*, 14 April 2009, pp. 22-23.

<sup>207</sup> Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, pp. 7-8.

<sup>208</sup> Co-operative Bulk Handling Limited, *Submission to the ACCC*, 14 April 2009, pp. 23-24.

<sup>209</sup> Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, pp. 7-8.

<sup>210</sup> Co-operative Bulk Handling Limited, *Submission to the ACCC*, 14 April 2009, p. 30.

<sup>211</sup> Co-operative Bulk Handling Limited, *Submission to the ACCC*, 14 April 2009, pp. 24-25.

<sup>212</sup> Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 43.

<sup>213</sup> Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 74.



relation to Western Australia, CBH submits that while no actual new entry has occurred, media coverage indicates that preliminary steps toward new entry are taking place. CBH further submits that because of the high proportion of fixed and sunk costs involved in supplying Port Terminal Services, even small scale entry is capable of effectively constraining CBH. CBH submits it is strongly constrained by the threat of new entry, however small the entrant.<sup>214</sup> CBH reiterates these points in its supplementary submission.<sup>215</sup>

CBH provided further information on this issue in its supplementary submission, but also stated that the issue of new entry:

‘...is not central to the assessment of the Undertaking because the Undertaking adopts a position that addresses all of the issues that would arise even if there were not realistic constraint from the threat of new entry.’<sup>216</sup>

CBH also submits that a ‘small but not insignificant portion’<sup>217</sup> of Australia’s wheat is exported in containers. CBH submits that while containerisation is not necessarily a realistic substitute for the purposes of exporting all wheat, it provides an alternative mechanism and therefore poses a pricing constraint to the Port Terminal Services.<sup>218</sup>

#### **8.2.1.6 Power of access seekers**

CBH submits that a significant number of access seekers are vertically integrated multi-national companies with substantial experience in grain exports, supply chain logistics, global grain marketing and flour milling. CBH submits that these exporters have a ‘substantial degree of bargaining power’ and the ability to shift their supply sources (and crop investments) to wheat produced in other countries, or to refuse to trade with Grain Pool, if they feel dissatisfied with their treatment by CBH.

CBH submits these customers are also ‘well positioned to obtain and interpret the large amount of transparent information available,’ and to draw any concerns about the provision of the Port Terminal Services to the attention of the appropriate regulatory agencies.<sup>219</sup>

In its supplementary submission, CBH submits that while bulk wheat exporters have limited flexibility in Australia in choosing the source of grain to supply to the market, there is considerable choice at a global level. Further, CBH submits, any outcome that reduces returns to growers by making WA wheat less competitive will result in a response from CBH’s members, who are growers.<sup>220</sup>

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<sup>214</sup> Co-operative Bulk Handling Limited, *Submission to the ACCC*, 14 April 2009, pp. 25-26.

<sup>215</sup> Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 37.

<sup>216</sup> Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 68.

<sup>217</sup> Co-operative Bulk Handling Limited, *Submission to the ACCC*, 14 April 2009, p. 26.

<sup>218</sup> Co-operative Bulk Handling Limited, *Submission to the ACCC*, 14 April 2009, p. 26.

<sup>219</sup> Co-operative Bulk Handling Limited, *Submission to the ACCC*, 14 April 2009, p. 27.

<sup>220</sup> Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 73.

## **8.2.2 Further CBH submission of 29 June 2009**

### **8.2.2.1 Publication of Standard Terms/Reference Prices**

In its further submission, CBH submits that publication of standard terms and reference prices should occur earlier than the date set out in the undertaking as submitted, and proposes that the date be moved to 31 August 2009.<sup>221</sup>

### **8.2.2.2 Timeframes in clause 6, 7 and 8**

CBH submits that the timeframes suggested in the publish/negotiate/arbitrate clauses of the undertaking are appropriate because:

- they strike a balance between the need for CBH and the Applicant to engage in good faith negotiations, taking into account the need for all parties to consult with advisers and stakeholders, the need for timely processing and the resolution of any conflict or disputes that may arise as part of the process;
- CBH may have to negotiate with up to 23 or more access seekers, which could prove to be very onerous and resource intensive for CBH;
- CBH has modelled the negotiation and dispute resolution provision closely on provisions contained in similar undertakings that have been approved by the ACCC: in particular, the ARTC Interstate Access Undertaking and the Dalrymple Bay Coal Terminal access undertaking.<sup>222</sup>

### **8.2.2.3 Holding over arrangements**

In relation to the reference in clause 6.2(b) to ‘appropriate “holding over” provisions,’ CBH envisages that such provisions would:

- allow a reasonable period of time for the continued operation of an access agreement on the same terms and conditions, pending the completion of the negotiation for an amended or replacement access agreement or the resolution of any dispute (save for circumstances where a debt was due and owing and for CBH to continue to perform the agreement would lead to further bad debt risk for CBH); but
- providing an appropriate end date from which Users will be subject to the operation of any revised standard terms that may take effect in accordance with the provisions of the Undertaking.<sup>223</sup>

CBH further submits that the terms and conditions upon which access will be provided prior to the execution of an access agreement, such as where parties are involved in a dispute, will be the Standard Terms and Reference Prices current at the

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<sup>221</sup> Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 50.

<sup>222</sup> Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 78. The ACCC has not accepted an access undertaking in relation to the Dalrymple Bay coal terminal. An access undertaking was, however, accepted by the Queensland Competition Authority, which is a different entity to the ACCC.

<sup>223</sup> Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, pp. 79-80.

time that the Applicant proposes to access the services. CBH submits that if a dispute arises, CBH will not refuse supply and will agree to backdate the results of an arbitration determination to the commencement of service.<sup>224</sup>

#### **8.2.2.4 Application process**

CBH submits that the timeframes for acknowledgement of an access application are included in order to facilitate early identification and clarification of any issues that need to be dealt with as a priority. CBH submits that the timeframes strike a balance between the need for CBH and the Applicant to engage in good faith negotiations, taking into account:

- the need for all parties to consult with advisers and stakeholders; and
- the need for timely processing, and the resolution of any conflict or disputes that may arise as part of the process.<sup>225</sup>

Further to this, CBH suggests that the pre-submission meetings provided for under clause 7.5(a)(ii) are a means of ‘assisting to expedite the timescales.’<sup>226</sup>

In relation to the proposed Access Application form in Schedule 1, CBH submits that ‘Customer Type’ refers to whether the customer is accredited, conditionally or unconditionally, by the WEA under the WEMA, while ‘Business Category’ refers to the nature of the Applicant as an exporter, trader, buyer, agent or otherwise describes their status.<sup>227</sup>

CBH submits that if an Applicant does not have a website, CBH will not refuse access. CBH submits that this requirement was intended as a means of CBH collecting information on an Applicant that is easily accessible and publicly available, while the absence of a website may, along with other factors, indicate that an Applicant is not a bona fide applicant.<sup>228</sup>

CBH submits that if the Negotiation Period ceases, an Applicant will be entitled to make another application for access, and that all applications would be dealt with on the same basis but subject to Applicants making further applications and negotiating those applications in good faith.<sup>229</sup>

#### **8.2.2.5 Information requests**

In relation to CBH’s obligation under clause 7.4(a)(ii) to provide further information on request to assist negotiations and its discretion to refuse requests if ‘unduly onerous’ or ‘disproportionate’ CBH submitted that:

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<sup>224</sup> Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 81.

<sup>225</sup> Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 56.

<sup>226</sup> Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 56.

<sup>227</sup> Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 83.

<sup>228</sup> Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 83.

<sup>229</sup> Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 83.

- in both cases, CBH would apply an objective test as to what in the circumstances would be considered unduly onerous or disproportionate by a regulator or tribunal in reviewing CBH's appraisal or determination of the request; and
- in considering whether a request is unduly onerous or the expense is disproportionate to the benefit, CBH would take into account and apply the Objectives of the Undertaking set out in clause 2 and in particular, the balancing of the interests of the public, the interests of applicants seeking access and the legitimate business interests of CBH in providing the services and dealing with the request.<sup>230</sup>

CBH submits that it is prepared to state an estimate of reasonable costs in obtaining information that is not ordinarily and freely available to it.<sup>231</sup>

#### **8.2.2.6 Discretion to cease negotiations**

CBH submits that the criteria in relation to its ability to cease negotiations with an Applicant under the Undertaking are clear and reasonable.<sup>232</sup> It submits that it is necessary for it to have the discretion not to negotiate with an Applicant if CBH considers the Applicant has not followed the process in the Undertaking because:

- CBH provides services to and is required to coordinate access among a number of access seekers or potential access seekers;
- CBH as the operator of the port terminal services in complying with its obligations under the proposed Undertaking must ensure that an appropriate balance is struck between protecting the interests of other Users or Applicants in respect of the provision of access to the port terminal services together with the interests of the public and CBH's legitimate business interests.<sup>233</sup>

In determining whether Applicants are not following the processes, CBH submits it will take into account:

- the timeliness of compliance with the procedural steps outlined in the process;
- the Applicant's compliance with its other obligations set out in the proposed Undertaking;
- the reasonably anticipated consequences of failure by an Applicant to comply with the procedural requirements and other obligations under the proposed Undertaking in so far as those consequences may adversely effect other Applicants or potential Applicants; and

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<sup>230</sup> Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, pp. 81-82.

<sup>231</sup> Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, pp. 54-55.

<sup>232</sup> Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 55.

<sup>233</sup> Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 82.

- the diversion of CBH’s resources away from other Applicants in order to deal with the failure of individual Applicants to follow the procedural requirements and comply with obligations under the Undertaking.<sup>234</sup>

CBH submits that in deciding if negotiations were not progressing in good faith towards the development of an Access Agreement within a reasonable time period under clause 7.6(b)(iv), it would take into account factors such as:

- the timeliness of compliance with the procedural steps outlined in the process; and
- the Applicant’s compliance with its other obligations set out in the Undertaking.<sup>235</sup>

### 8.2.2.7 Prudential requirements

In relation to Prudential Requirements, CBH submits that it is entitled to ensure that it makes its own enquiries, as part of its commercial assessment (particularly with regard to solvency risk) of parties whom it conducts business with to ensure that they are able to meet objective and prudent criteria to assist in determining whether it is commercially acceptable to enter into an agreement with that party.<sup>236</sup>

CBH submits that the WEA accreditation process alone does not necessarily provide any information to CBH that CBH can rely on in this regard. CBH submits that while the information may be accurate and complete at the time provided to the WEA, the information may be out of date by the time that CBH enters into a commercial arrangement with that entity. Further, CBH notes that the WEA has warned that its assessment of the financial solvency of an accredited wheat exporter is not a guarantee that the exporter will meet its financial obligations.<sup>237</sup>

### 8.2.2.8 Different terms to access seekers

In response to the ACCC’s question as to whether the various factors CBH could take into account in deciding to offer different terms to different Applicants or Users were appropriate, CBH submits that the ability to offer different terms reflects the particular requirements of each user and that the approach was consistent with the pricing principles set out in section 44ZZCA of the TPA, and promoted efficiency in the use of Port Terminal Services.<sup>238</sup>

In response to the ACCC’s question on what is the difference between ‘amended Standard Terms’ and ‘different terms’ as provided in the proposed Undertaking, CBH submits:

‘The distinction is between under 7.7 (b)(ii) a service arrangement entered into between CBH and a third party for a service that is not regulated by the Undertaking, and under 6.4, for a service that is regulated by the Undertaking, but on different terms to the (regulated) Standard Terms.’<sup>239</sup>

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<sup>234</sup> Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 82.

<sup>235</sup> Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 83.

<sup>236</sup> Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 55.

<sup>237</sup> Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 55.

<sup>238</sup> Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, pp. 53-54.

<sup>239</sup> Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 83.

### **8.2.2.9 Definition of dispute and scope of dispute resolution mechanism**

CBH submits that a ‘bona fide’ dispute, as referred to in clause 1.1, refers to a dispute has been brought in good faith and without fraud. CBH notes that the intent of adding the requirement for a bona fide dispute was to distinguish disputes that are vexatious, frivolous, an abuse of process or have been made in bad faith from those that are genuine and substantial evidence based disputes.<sup>240</sup>

In relation to clause 8.1(b), which provides that disputes in relation to an Access Agreement once executed will be dealt with under the dispute resolution mechanism in that Agreement, CBH submits that an allegation of discrimination had the potential to be a breach of the Undertaking itself, specifically clause 9.2, which prohibits discrimination in operational decision-making. CBH notes that clause 8.1(b) required amendment to clarify the inconsistency.<sup>241</sup>

CBH submits that through its professional advisers it has confirmed with the Institute of Arbitrators and Mediators of Australia (**IAMA**) that its involvement as a mediator as contemplated by the proposed Undertaking is workable.<sup>242</sup>

### **8.2.2.10 Reporting material disputes to the ACCC**

CBH submits that clause 8.1(c) proposes that only material disputes are to be reported to the ACCC on the basis that only disputes which relate the compliance with and performance of the obligations of the parties under the terms of the proposed Undertaking are relevant for the ACCC to consider in its role under the provisions of the WEMA.<sup>243</sup>

CBH also submits that any disputes arising in respect of Access Agreements and port terminal rules are material matters which would be reported to the ACCC. CBH submits that non-material disputes are likely to be disputes over insubstantial matters such as the payment of invoices, debt collection and matters that are resolved amicably and quickly with the agreement of the parties.<sup>244</sup>

### **8.2.2.11 Arbitration**

CBH submits that the IAMA had the capability and the available, suitably qualified persons to act as an arbitrator as required under the terms of the Undertaking.<sup>245</sup>

In relation to timeframes for the arbitration, CBH submits that under clause 8.4(b) it would notify the ACCC within 5 Business Days of the details of the dispute being referred to arbitration.<sup>246</sup> CBH also submits that the duration and cost of an arbitration would depend on the complexity of the issues and the approach taken by the parties. CBH estimates that an arbitration should be completed in 1 to 2 months, and that if a dispute were unable to be resolved prior to the required date for services to commence, CBH would provide Port Terminal Services on the Standard Terms and

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<sup>240</sup> Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, pp. 83-84.

<sup>241</sup> Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 84.

<sup>242</sup> Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 84.

<sup>243</sup> Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 84.

<sup>244</sup> Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 84.

<sup>245</sup> Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, pp. 84-85.

<sup>246</sup> Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 85.

Conditions and backdate the arbitration result to the entire contract period once the determination had been made.<sup>247</sup>

In relation to compliance with determinations of the arbitrator, CBH submits that the question of whether an Applicant has complied with a determination or direction of an arbitrator could be referred to the arbitrator or if necessary, to a Court. CBH submits that whether a person has complied is a question of fact and reaching a conclusion as to whether there was non-compliance would be determined by evidence of the Applicant's compliance with the specific terms of any determination.<sup>248</sup>

CBH submits that the confidentiality provisions relating to the dispute resolution process set out in clauses 7 and 8 provide for the protection of confidentiality of information in respect of arbitration proceedings.<sup>249</sup>

CBH also submits that arbitration decisions should be back-datable under the proposed Undertaking.<sup>250</sup>

## **8.3 Submissions from interested parties in response to ACCC's Issues Paper**

### **8.3.1 AGEA<sup>251</sup>**

#### **8.3.1.1 Price and non-price terms**

AGEA submits that price and non-price terms should be a part of the April Undertaking and must be published in advance of the commencement of the April Undertaking (or the expiry of the current terms), and that port protocols should also be part of the undertakings.<sup>252</sup>

#### **8.3.1.2 Timing for publication**

AGEA submits that requirement to publish standard terms and reference prices does not provide certainty and transparency unless publication occurs well in advance of the commencement of the April Undertaking. AGEA also submits that users need to know the terms and conditions on which the services will be provided in order to assess the reliability of the service, plan, budget and generally compete in the market.<sup>253</sup>

AGEA submits that the April Undertaking contemplates that price and non-price terms can be unilaterally imposed by the bulk handler as late as 15 business days after commencement of the April Undertaking, when the bulk handler's storage and

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<sup>247</sup> Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 51.

<sup>248</sup> Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 85.

<sup>249</sup> Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 59.

<sup>250</sup> Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 51.

<sup>251</sup> AGEA provided three submissions to the ACCC: 11, 18 and 29 May 2009. This section largely draws upon the submission of 29 May 2009, which was the most substantial.

<sup>252</sup> Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 9.6, p. 24 & Schedule 1, para F2, p. 42.

<sup>253</sup> Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 9.6, p. 24.

handling agreements are also scheduled to commence.<sup>254</sup> AGEA notes that Australian wheat exporters (AWEs) enter into forward sale contracts well before 1 October, with the export season beginning in earnest about the time that both the new storage and handling contracts and the April Undertaking are proposed to commence. AGEA submits that the consequence of providing the price and non-price terms 15 business days after they are due to commence would be that:

- e. AWEs would feel compelled to enter into contracts with the bulk handler without a proper opportunity to negotiate;
- f. AWEs will have to wait until they have negotiated access to the port terminal services before starting to look for export sales;
- g. grain marketers would be prevented from entering into wheat export sales contracts until the terms and conditions and pricing of port terminal services are provided, thus reducing the level of competition and the overall efficiency of the bulk wheat export market;
- h. alternatively to (b), AWEs must decide whether to take the commercial risk of entering into export sales contracts before knowing whether they will be able to perform the contracts, as the bulk handler may block access to port terminal services;
- i. further to (d), grain marketers could be forced to enter into export wheat sales contracts without knowing the price or level of service available at port (such as when vessels will be called to berth and the wheat load rate, exposing AWEs to extensive demurrage claims and possibly rendering them in default of wheat sales contracts) and the associated key bulk handling services which need to be priced into those contracts.<sup>255</sup>

AGEA also submits that standard terms and references prices must be published by least 1 September.<sup>256</sup>

### **8.3.1.3 Negotiating for access**

AGEA submits that AWEs do not have a realistic alternative supplier of port terminal services and have little, if any bargaining power. AGEA submits that the imbalance in market power has resulted in bulk handlers refusing to negotiate, imposing unfair terms and prices and discriminating against AWEs who do not accept the bulk handlers' standard terms and conditions.<sup>257</sup>

AGEA submits that the April Undertaking does not provide a genuine framework for negotiations and exacerbate the imbalance in bargaining power because:

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<sup>254</sup> Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 9.2, p. 23.

<sup>255</sup> Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 9.5, pp. 23-24.

<sup>256</sup> Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 12.1, p. 29.

<sup>257</sup> Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 11.1, p. 27.



- the bulk handler not required to negotiate in good faith and reach agreement on the terms of access;
- the effect of offering terms and conditions immediately before 1 October is that AWEs know that if they do not execute the agreements, they will be denied access to bulk handling services;
- the application process and timeframes for conducting negotiations are slow and unwieldy;
- the dispute resolution mechanism does not provide for the speedy resolution of disputes; and
- the bulk handler is allowed to ‘reserve the right to negotiate’, ‘refuse to negotiate’ and to ‘cease’ negotiations in various circumstances.<sup>258</sup>

AGEA further submits that it is not appropriate that the April Undertaking includes such a number of grounds on which the bulk handler may cease negotiations with the Applicant because the dispute resolution process is lengthy and the right to cease negotiations could lead to AWEs incurring substantial losses over non-performance of sales contracts. AGEA submits that the bulk handler should be required to negotiate on reasonable terms with any person that is an accredited wheat exporter.<sup>259</sup>

AGEA suggests that with the ability for the bulk handler to publish terms and conditions as little as one day before or up to 15 business days after the April Undertaking takes effect, and no limitation on the additional information that can be requested in relation to receiving an access application, it would likely be mid-October before negotiations regarding terms of access would begin.<sup>260</sup> AGEA also submits that the timeframe for acknowledgements was not appropriate and would slow the negotiation process.<sup>261</sup>

AGEA submits that the wheat season traditionally runs from 1 October to 30 September of each year and that negotiations for forward sales contracts begin well before this period. AGEA submits that AWEs must therefore decide whether to take the commercial risk of entering into export sales contracts before knowing whether they will be able to perform the contracts, as the bulk handler may otherwise block access to port terminal services. Alternatively, an AWE would have to wait until it has negotiated access to the port terminal services, before starting to look for export sales.<sup>262</sup>

AGEA submits that the definition of Prudential Requirements in the proposed Undertakings is neither appropriate or necessary. AGEA submits that it is unnecessary

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<sup>258</sup> Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 11.2, p. 27.

<sup>259</sup> Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, Schedule 1 para H2 (iv), p. 44.

<sup>260</sup> Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 11.3, p. 27.

<sup>261</sup> Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, Schedule 1 para H2 (ix), p. 45.

<sup>262</sup> Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, Schedule 1 para H2 (ix), p. 45.

for the bulk handler to require AWEs to satisfy additional ‘Prudential Requirements’ in the context of the requirements for accreditation as a wheat exporter under the WEMA.<sup>263</sup> AGEA submits that once an AWE obtains accreditation under the WEMA, it should not be necessary for the bulk handler to enquire into the AWE’s financial standing.<sup>264</sup>

#### **8.3.1.4 Dispute Resolution**

AGEA submits that the dispute resolution mechanism in the April Undertaking is inadequate as an effective mechanism for the speedy resolution of disputes.<sup>265</sup> AGEA submits that for general disputes, the dispute resolution procedure must provide that:

- either party may notify the other party of a dispute;
- representatives of the parties must meet within 48 hours and endeavour to resolve the dispute;
- if the dispute cannot be resolved, either party may give notice to the ACCC that a dispute exists under the April Undertaking and may refer the dispute to arbitration, which is to be conducted by the ACCC;
- the arbitration must be conducted in accordance with arbitration rules to be specified in the April Undertaking, which must include an obligation to keep confidential any information disclosed during the arbitration;
- the arbitration must be heard and concluded within 14 days of the notice of referral to the ACCC and the ACCC must endeavour to make a determination within 14 days; and
- the bulk handler must take reasonable steps to mitigate loss, including continuing to provide port terminal services during, and pending the determination of, any dispute.<sup>266</sup>

AGEA also submits that the confidentiality provisions relating to dispute resolution do not sufficiently protect commercially sensitive information and that there should be an obligation on the parties and the arbitrator that the entire arbitration process is confidential, unless and only to the extent that both parties agree in writing otherwise.<sup>267</sup>

#### **8.3.2 PGA**

The PGA submits that the failure to specify price and non-price terms in the April Undertaking and the restrictive definition of ‘port terminal services’ are sufficient

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<sup>263</sup> Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 11.5, p. 28.

<sup>264</sup> Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, Schedule 1 para H2 (v), p. 45.

<sup>265</sup> Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 13.1, Schedule J2(i), p. 46.

<sup>266</sup> Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 13.2, p. 30.

<sup>267</sup> Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, Schedule 1 J2, pp. 46-47.

reasons for the ACCC to not accept the undertaking.<sup>268</sup> The PGA submits that the April Undertaking is impossible to assess without specific prices or terms and conditions on which access to port terminal services will be provided.<sup>269</sup>

The PGA submits that the price and non-price terms must be published in advance of the commencement of the April Undertaking, as users need to know terms and conditions to assess the reliability of the service, plan, budget, and generally compete in the market.<sup>270</sup>

The PGA submits that there are presently no penalties if CBH fails to provide the standard terms before the April Undertaking is due to commence and therefore there it has no incentive to do so. The PGA submits that the consequences of CBH providing price and non-price terms after the commencement of the proposed Undertaking will be:

- a. marketers having to wait until they have negotiated access to the port terminal services before starting to look for export sales;
- b. marketers being prevented from entering into wheat export sales contracts with growers until the terms and conditions and pricing of port terminal services are provided, thus reducing the level of competition and the overall efficiency of the bulk wheat export market;
- c. marketers being forced to enter into wheat export sales contracts without knowing the price or level of service available at port (such as when vessels will be called to berth and the wheat load rate, exposing themselves to extensive demurrage claims and possibly rendering them in default of wheat export sales contracts) and the associated key bulk handling services which need to be priced into those contracts, which may be reflect in prices offered to growers.<sup>271</sup>

## **8.4 Submissions received in response to ACCC Draft Decision**

The following submissions on the publish-negotiate-arbitrate model were received in response to the ACCC's Draft Decision.

### **8.4.1 CBH**

#### **8.4.1.1 Further submissions**

CBH provided the ACCC with a number of submissions following the release of the Draft Decision. The following submissions related to the publish/negotiate/arbitrate clauses of the April Undertaking:

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<sup>268</sup> Pastoralists and Graziers Association, *Submission in relation to proposed CBH access undertaking*, 29 May 2009, para 2.15(e), p. 4.

<sup>269</sup> Pastoralists and Graziers Association, *Submission in relation to proposed CBH access undertaking*, 29 May 2009, para 4.43, p. 14.

<sup>270</sup> Pastoralists and Graziers Association, *Submission in relation to proposed CBH access undertaking*, 29 May 2009, para 4.41, pp. 13-14.

<sup>271</sup> Pastoralists and Graziers Association, *Submission in relation to proposed CBH access undertaking*, 29 May 2009, para 4.42, p. 14.

- 24 August 2009, in relation to the application and negotiation process;
- 25 August 2009, in relation to the dispute resolution and arbitration process; and
- 31 August 2009 in relation to price and non-price terms.

#### **8.4.1.2 Application and negotiation process**

In its submission of 24 August 2009, in relation to the application and negotiation process, CBH submits that it is proposing amendments to address concerns raised by the ACCC, specifically to:

- ‘add certainty regarding the timing of CBH’s acknowledgement of an Access Application, requests for further information or clarification regarding the Access Application, and the commencement of the Negotiation Period;
- clarify the circumstances (including timing) which will entitle CBH to refuse or cease to negotiate or enter into an Access Agreement with the Applicant;
- remove “pre-conditions” for the referral of negotiation disputes to the arbitrator; and
- remove ambiguity and reiteration, and limiting CBH’s discretion in relation to the negotiation process generally.’<sup>272</sup>

#### **8.4.1.3 Dispute resolution and arbitration process**

In its submission of 25 August 2009, in relation to the dispute resolution and arbitration processes in the April Undertaking, CBH submits that it intends to make amendments to address comments and recommendations made in the ACCC’s Draft Decision, specifically to:<sup>273</sup>

- ‘add certainty regarding the availability of the dispute resolution process;
- provide for a greater role for the ACCC [in the arbitration process], while enabling the parties to choose alternative means of dispute resolution by agreement;
- remove “pre-conditions” for the referral of negotiation disputes to the arbitrator; and
- remove ambiguity and reiteration, and limiting CBH’s discretion in relation to the negotiation process generally.’<sup>274</sup>

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<sup>272</sup> Co-operative Bulk Handling Limited, *Submission in relation to Draft Decision on CBH Access Undertaking – Application and Negotiation Process*, 24 August 2009, p. 2.

<sup>273</sup> Co-operative Bulk Handling Limited, *Submission in relation to Draft Decision on CBH Access Undertaking – Dispute Resolution*, 25 August 2009, p. 1.

<sup>274</sup> Co-operative Bulk Handling Limited, *Submission in relation to Draft Decision on CBH Access Undertaking – Dispute Resolution*, 25 August 2009, pp. 1-2.

#### 8.4.1.4 Price and non-price terms

In its submission of 31 August 2009, in relation to price and non-price terms, CBH submits that it intends to make amendments to address comments and recommendations made in the ACCC's Draft Decision, except in relation to the 'holding over' arrangements.<sup>275</sup>

CBH submits that its proposed amendments are intended to:

1. 'include the indicative terms of the Port Terminal Services Agreement in the undertaking in line with the ACCC's view in the Draft Decision;
2. bring forward the timing for CBH's publication of the price and non-price terms for each season; and
3. clarify and limit the grounds on which CBH may differentiate between different Applicants and Users.'<sup>276</sup>

In relation to 'holding over' arrangements, CBH submits that it agrees with the ACCC's views that Applicants should not be delayed in obtaining access because they are engaging in the negotiation process, including where the dispute resolution and arbitration processes are being followed.<sup>277</sup> CBH submits that it did not include a specific holding over arrangement in clause 6 because it believes that that proposed amendments to clause 4.3 clause 7.5(a) appropriately deal with the concern.<sup>278</sup>

CBH submits that under clause 7.5(a), if an Applicant requires the 'standard offering' Port Terminal Services on the published prices, then it may lodge an Access Application accompanied by a notice stating that it wants the standard offering, in which case within five Business Days CBH and the Applicant must execute an Access Agreement in the form of the Price and Non-Price Terms Documents. If an Applicant requires non-standard Port Terminal Services, or prices other than those published by CBH, then:

1. the Applicant can follow the procedure above and obtain the 'standard offering'; and
2. simultaneously lodge an Access Application for the non-standard Port Terminal Services, or for prices other than those published by CBH.<sup>279</sup>

CBH submits that during the period when the Applicant and CBH are negotiating the non-standard Port Terminal Services, or prices other than those published by CBH,

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<sup>275</sup> Co-operative Bulk Handling Limited, *Submission in relation to Draft Decision on CBH Access Undertaking – Price and Non-Price Terms*, 1 September 2009, p. 1.

<sup>276</sup> Co-operative Bulk Handling Limited, *Submission in relation to Draft Decision on CBH Access Undertaking – Price and Non-Price Terms*, 31 August 2009, p. 1.

<sup>277</sup> Co-operative Bulk Handling Limited, *Submission in relation to Draft Decision on CBH Access Undertaking – Price and Non-Price Terms*, 31 August 2009, p. 2.

<sup>278</sup> Co-operative Bulk Handling Limited, *Submission in relation to Draft Decision on CBH Access Undertaking – Price and Non-Price Terms*, 31 August 2009, p. 2.

<sup>279</sup> Co-operative Bulk Handling Limited, *Submission in relation to Draft Decision on CBH Access Undertaking – Price and Non-Price Terms*, 31 August 2009, pp. 2-3.

the Applicant will receive the ‘standard offering.’ CBH submits that the non-standard Access Agreement, once finalised and executed, would include a provision terminating the ‘standard offering’ Access Agreement. Further, CBH submits that if an Applicant has either a ‘standard offering’ Access Agreement or a ‘non-standard offering’ Access Agreement, and wishes to amend the terms on which it receives the Port Terminal Services, clause 4.3 allows the Applicant to lodge a new Access Application and follow the process set out in clause 7 for a replacement Access Agreement. During the period when the Applicant and CBH are negotiating the new Access Application, the existing Access Agreement will be in operation.<sup>280</sup>

## **8.4.2 AGEA**

AGEA provided a submission in relation to all bulk handling companies (BHCs).

### **8.4.2.1 General comments on the publish negotiate arbitrate approach**

AGEA agrees that the proposed publish-negotiate-arbitrate framework needs to be underpinned by a robust set of mechanisms giving effect to the publication, negotiation and arbitration procedures.<sup>281</sup>

### **8.4.2.2 Timing for publication of standard terms and reference prices**

AGEA notes that the ACCC did not require prices to be part of the proposed Undertaking. AGEA submits that, in light of this position, it agrees with the ACCC that proposed prices must be published within a sufficient time for access seekers to negotiate access agreements before those prices come into force.<sup>282</sup> AGEA submits that BHCs have historically published prices as late as mid-October, ‘which is not acceptable.’<sup>283</sup>

AGEA submits that:

The BHCs have provided proposed port terminal services agreement (which may be revised), but have not published prices. AGEA is concerned that the BHCs will delay publishing prices until after 1 October 2009, as they have done in the past.

AGEA submits that:

- (a) BHCs should also be required to publish the prices of those port terminal services before the ACCC decides whether to accept the Undertaking and, subsequently, by no later than 31 August of the relevant year;
- (b) the published prices should include standard and non-standard services offered by the BHCs;

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<sup>280</sup> Co-operative Bulk Handling Limited, *Submission in relation to Draft Decision on CBH Access Undertaking – Price and Non-Price Terms*, 31 August 2009, p. 3.

<sup>281</sup> Australian Grain Exporters Association, *Submission in relation to Draft Decisions on Port Terminal Services Access Undertakings*, 3 September 2009, para 1.1.

<sup>282</sup> Australian Grain Exporters Association, *Submission in relation to Draft Decisions on Port Terminal Services Access Undertakings*, 3 September 2009, para 8.2-8.3.

<sup>283</sup> Australian Grain Exporters Association, *Submission in relation to Draft Decisions on Port Terminal Services Access Undertakings*, 3 September 2009, para 8.2.

- (c) the published prices should provide transparency in relation to BHCs' costs of providing the service to ensure prices are based on actual costs and are not discriminatory;
- (d) prices should be sufficiently transparent so that it can be determined whether services are being provided in return for the prices paid;
- (e) the published prices should not be subject to change during the term of the port terminal services agreement;
- (f) alternatively to sub-paragraph (e), the opportunity to amend published prices should be limited to the same circumstances in which a variation of the Undertaking is permitted.<sup>284</sup>

AGEA also submits that:

BHCs should be required to publish price and non-price terms *before* the Undertakings commence to ensure there is transparency in relation to price and non-price terms, that prices reflect the BHCs' cost of providing the service and there is no opportunity to discriminate. The requirement to publish prices before the Undertakings commence will also provide a benchmark against which to measure any proposed change in price to again ensure there is transparency and that any increase in price reflects an increase in BHCs' cost of providing the service.<sup>285</sup>

AGEA submits that unless prices are published before the ACCC accepts the April Undertaking, there will be no real opportunity to ensure that BHCs do not hinder access to port terminal services or discriminate through the charges imposed.<sup>286</sup>

AGEA submits that it is very concerned that the BHCs have not published prices and there will not be a proper opportunity to negotiate before the April Undertaking is due to take effect on 1 October 2009.<sup>287</sup>

#### 8.4.2.3 Timeframes

AGEA agrees with the ACCC's Draft Decision that, in general, the timeframes proposed by CBH in clauses 7 and 8 are not appropriate.<sup>288</sup> Specifically, AGEA submits that:

- (i) In relation to CBH (clause 7.4(a)) ... the lack of any timeframes for the performance of obligations creates uncertainty and is not appropriate.
- (ii) In relation to CBH clause 7.4(b)(iii) ... it is not appropriate that CBH may, at *any time, before or during the negotiation process*, require the Applicant to demonstrate that it can meet the Prudential Requirements.

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<sup>284</sup> Australian Grain Exporters Association, *Submission in relation to Draft Decisions on Port Terminal Services Access Undertakings*, 3 September 2009, para 8.4-8.5.

<sup>285</sup> Australian Grain Exporters Association, *Submission in relation to Draft Decisions on Port Terminal Services Access Undertakings*, 3 September 2009, para 1.4-1.5.

<sup>286</sup> Australian Grain Exporters Association, *Submission in relation to Draft Decisions on Port Terminal Services Access Undertakings*, 3 September 2009, para 8.6.

<sup>287</sup> Australian Grain Exporters Association, *Submission in relation to Draft Decisions on Port Terminal Services Access Undertakings*, 3 September 2009, para 8.7.

<sup>288</sup> Australian Grain Exporters Association, *Submission in relation to Draft Decisions on Port Terminal Services Access Undertakings*, 3 September 2009, para 8.17.

If the ACCC accepts that the BHCs can impose Prudential Requirements, it is more appropriate that the proposed Undertaking specifies a particular point in time at which the AWEs must demonstrate that it can meet the Prudential Requirements, and a particular timeframe within which CBH must confirm that those requirements have or have not been met. CBH should be required to respond within 3 business days.

- (iii) In relation to CBH (clause 7.4(b)(v)) ... it is not appropriate for the BHCs to have 10 Business Days to provide reasons for refusing to negotiate with AWEs in the circumstances described.

The BHCs should provide reasons to the AWEs at the time the BHCs refuse to negotiate, i.e. within 2 business days.

- (iv) In relation to CBH (clause 7.5(b)(i)) ... it is not appropriate that the BHCs be permitted to take 5 Business Days to acknowledge receipt of an access application. This should only take 2 business days.
- (v) The timings in CBH (clause 7.5(b)(iii) and (iv)) ... are also not appropriate. Five business days should suffice, particularly for CBH clause 7.5(b)(iv)....
- (vi) CBH (clause 7.6(a)) ... should be required to be ready to negotiate within 1 business day.
- (vii) CBH clause 7.6(b)(iv) ... is inappropriate. It has the effect of entitling the BHC to cease negotiations at their discretion.
- (viii) CBH clause 7.7(c) ... should require the BHC to provide a final access agreement within 1 business day of the terms being agreed.
- (ix) CBH must be required to comply with clause 7.7(d) ... as all times, not just "*as soon as practicable*" ...
- (x) CBH's clause 8.2 ... does not acknowledge the serious nature of access disputes and the urgency with which they must be dealt.
- (xi) For general disputes, the dispute resolution procedure must provide for authorised representatives to meet immediately, with the senior representatives of the parties to otherwise meet within 48 hours of notification of a dispute and endeavour to resolve the dispute;
- (i) If the above negotiation is not successful and mediation is to take place, AGEA believes that the dispute should be referred to Grain Trade Australia ("**GTA**") within 72 hours of the dispute notice. It is possible for GTA to agree to perform the mediation within defined terms and time limits to be set out in a predetermined dispute resolution agreement. As such, it is possible to specify that each party is to provide each other and the mediator with their summary of the dispute within 7 business days of the reference to GTA with the mediation to take place within a further 7 business days.<sup>289</sup>

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<sup>289</sup> Australian Grain Exporters Association, *Submission in relation to Draft Decisions on Port Terminal Services Access Undertakings*, 3 September 2009, para 8.17. Please note that this section of AGEA's submission referred to the relevant clauses of the ABB, CBH and GrainCorp proposed Undertakings. The extract here has been edited to refer only to the CBH clauses.



#### 8.4.2.4 Clarity and certainty

AGEA agrees with the ACCC's Draft Decision that clauses 6 to 8 of the April Undertaking lack clarity and certainty.<sup>290</sup> In particular, AGEA submits that:

- (i) In relation to CBH clauses 7.4(a)(ii)(B)-(C) ... where the applicant agrees to pay the reasonable costs, the BHC must be required to provide the information.
- (ii) CBH clause 7.4(b)(i) ... is not appropriate as it entitles the BHCs to cease negotiations as its discretion. The clause should be deleted.
- (iii) AGEA agrees that the BHCs must provide reasons for ceasing or refusing to negotiate under any circumstances (CBH clause 7.4(b)(v)) .... Reasons should be provided within 1 business days.
- (iv) CBH clause 7.5(a)(ii) ... should be amended to require the BHCs to attend any meeting requested within 1 business day.
- (v) AGEA agrees that CBH clause 7.6(b)(v) ... is not appropriate, as it essentially repeats the Prudential Requirements matter referred to in clause 7.4(b)(iii) ....<sup>291</sup>

#### 8.4.2.5 Discretion of bulk handlers

AGEA agrees with the ACCC's Draft Decision that the negotiation component of the April Undertaking does not achieve 'an appropriate balance between the interests of the access provider and access seekers in that there is disproportionate discretion on the part of the access provider to refuse to negotiate, which undermines the possibility of a robust negotiate-arbitrate mechanism.'<sup>292</sup> Specifically, AGEA submits that:

- (i) In relation to CBH clause 7.4(a)(ii) ... the discretion that the BHCs have to refuse a request for information from an Applicant, including where the Applicant does not agree to pay 'reasonable costs' incurred by the BHCs (which, as noted above, is itself not appropriate).
- (ii) In relation to CBH clause 7.4(b)(i) ... the discretion that BHCs have not to negotiate with an Applicant if the BHC considers the Applicant does not materially comply with the requirements and processes set out in the proposed Undertaking.
- (iii) In relation to CBH clauses 7.4(b)(iii) & (iv), and clause 7.6(b)(v) ... the discretion that the BHCs have to at any time, before or during the negotiation process, to require the AWEs to demonstrate that it meets the Prudential Requirements, and to cease or refuse to commence negotiations if the Applicant does not meet those requirements (see further below).

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<sup>290</sup> Australian Grain Exporters Association, *Submission in relation to Draft Decisions on Port Terminal Services Access Undertakings*, 3 September 2009, para 8.21.

<sup>291</sup> Australian Grain Exporters Association, *Submission in relation to Draft Decisions on Port Terminal Services Access Undertakings*, 3 September 2009, para 8.21. Please note that this section of AGEA's submission referred to the relevant clauses of the ABB, CBH and GrainCorp proposed Undertakings. The extract here has been edited to refer only to the CBH clauses.

<sup>292</sup> Australian Grain Exporters Association, *Submission in relation to Draft Decisions on Port Terminal Services Access Undertakings*, 3 September 2009, para 8.22.

- (iv) In relation to CBH clause 7.4(b)(vii) ... the discretion that the BHCs have to refer an application to the arbitrator if the BHC is of the view that the application is frivolous in nature or that the Applicant is not negotiating in good faith, and for BHCs to seek reasonable costs.
- (v) In relation to CBH clause 7.5(b) ... the discretion that the BHCs have in relation to the acknowledgement of an Access Application, and to request further information or clarification from AWEs.
- (vi) In relation to CBH clause 7.6(b)(iv) ... the discretion that the BHCs have to cease negotiations if the BHCs believe that the negotiations are not progressing in good faith towards the development of an Access Agreement within a reasonable time period;
- (vii) The discretions effectively created by the uncertain time periods in CBH clauses 7.6(a), and 7.7(c) and (d)...<sup>293</sup>

#### **8.4.2.6 Prudential Requirements**

In relation to the requirement in the April Undertaking that an access seeker must satisfy 'Prudential Requirements', AGEA submits that:

An accredited AWE must comply with WEA's stringent accreditation scheme, which includes having regard to the "*financial resources available to the company*" (s 13(1)(c)(i) of the WEM Act). It is unacceptable that after AWEs obtain accreditation, BHCs can still seek to impose Prudential Requirements upon AWEs that are not reasonable....

If the ACCC accepts that the BHCs are entitled to impose reasonable Prudential Requirements, it is essential that there be a dispute resolution mechanism in place to deal with disputes arising out of the BHCs' application and decisions based on their Prudential Requirements.<sup>294</sup>

#### **8.4.2.7 Timeliness of dispute resolution process**

AGEA submits that:

Disputes can arise at various times on a number of issues, such as:

- (a) securing capacity or determining load position, which is allocated by BHCs in advance of the vessel's estimated time of arrival ("ETA") at their discretion with reference to "operational efficiencies" that are not transparent to access seekers;
- (b) at the time of loading, in relation to insect infestation, late changes in load order, operational changes at port and so on.

It is critical that dispute resolution and arbitration is efficient and timely. Certain disputes such as the substitution of vessels in shipping stems or any dispute affecting the timing of a vessel's loading require a resolution by an umpire within 24 hours and the umpire's decision must be binding. Longer

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<sup>293</sup> Australian Grain Exporters Association, *Submission in relation to Draft Decisions on Port Terminal Services Access Undertakings*, 3 September 2009, para 8.22. Please note that this section of AGEA's submission referred to the relevant clauses of the ABB, CBH and GrainCorp proposed Undertakings. The extract here has been edited to refer only to the CBH clauses.

<sup>294</sup> Australian Grain Exporters Association, *Submission in relation to Draft Decisions on Port Terminal Services Access Undertakings*, 3 September 2009, para 8.13-8.14.

issues should be resolved by "fast track" mediation or arbitration. The referring must party to act reasonably when determining whether to invoke this dispute resolution process. The umpire could be chosen from a panel that is either agreed each year between the BHCs and AWEs, or in the alternative appointed by the ACCC.<sup>295</sup>

#### **8.4.2.8 Involvement of Grain Trade Australia (GTA) in dispute resolution**

In relation to the conduct of the mediation and arbitration processes under the April Undertaking, AGEA submits that:

It is AGEA's preference for there to be only one body to whom mediations are referred. AGEA would prefer mediations (and arbitrations) to be referred to GTA as it has the requisite industry experience to conduct mediations (and arbitrations).

GTA must be required to enforce a strict policy to ensure that any mediator, arbitrator or umpire does not have a conflict of interest in the matter. That would include any nominated person that is also employed or retained as an agent advisor or legal representative of parties that could have an interest in the outcome.

The local State laws must apply to the dispute resolution process and the right to appeal on an error of law must be preserved.<sup>296</sup>

#### **8.4.2.9 Selection of the arbitrator and arbitration process**

AGEA submits, in relation to the process for an arbitration:

To be effective, any arbitration must be conducted in accordance with arbitration rules to be specified in the proposed Undertakings, which must include an obligation to keep confidential any information disclosed during the arbitration.

The arbitration rules must require both parties to serve relevant materials including evidence within 7 days and the dispute be heard and concluded within 14 days of the notice of referral to the ACCC. The ACCC must endeavour to make a determination within 14 days.

Where arbitration is to be conducted by private arbitration, the dispute should be referred to GTA, with a copy of all materials, including the award, to be provided to the ACCC....

At all times during any dispute resolution process, BHCs must continue to negotiate access agreements and provide full access to port terminal services.<sup>297</sup>

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<sup>295</sup> Australian Grain Exporters Association, *Submission in relation to Draft Decisions on Port Terminal Services Access Undertakings*, 3 September 2009, para 8.15-8.16.

<sup>296</sup> Australian Grain Exporters Association, *Submission in relation to Draft Decisions on Port Terminal Services Access Undertakings*, 3 September 2009, para 8.23-8.25.

<sup>297</sup> Australian Grain Exporters Association, *Submission in relation to Draft Decisions on Port Terminal Services Access Undertakings*, 3 September 2009, para 8.26-8.33.

#### **8.4.2.10 ‘Holding over’ arrangements**

In relation to ‘holding over’ arrangements – by which an access seeker may obtain access pending the conclusion of negotiation of an access agreement or pending the resolution of a dispute – AGEA submits that:

It is essential that AWEs are able to access to port terminal services during the period that they are negotiating access and also during any periods of dispute.

The BHCs proposed Undertakings apply where AWEs are negotiating access to the port terminals.

As such, holding over arrangements are an important aspect of the negotiate-arbitrate approach and it is not appropriate for an access seeker to be delayed in obtaining access because they are engaging in the negotiation process in the proposed Undertaking, including where the dispute resolution and arbitration processes are invoked.

This must apply to all port access negotiations, whether they be under the standard terms offered by the BHCs or any variations.<sup>298</sup>

#### **8.4.2.11 Indicative Access Agreement**

AGEA agrees that the non-inclusion of an Indicative Access Agreement in the April Undertaking results in a lack of certainty and clarity for potential access seekers and is, therefore, not appropriate having regard to the matters set out in section 44ZZA(3) of the TPA.<sup>299</sup>

#### **8.4.2.12 Appropriate clauses**

AGEA acknowledges that certain clauses in the April Undertaking are appropriate:

AGEA agrees either party must be able to unilaterally refer a dispute to arbitration. AGEA also considers that throughout the dispute resolution process, all parties must be obliged to act in good faith.

The proposed undertaking should require that all information relevant for the negotiate-arbitrate processes should be protected by robust confidentiality requirements that protect both the BHC and the AWEs.<sup>300</sup>

#### **8.4.2.13 Revised CBH clauses**

AGEA submits in relation to CBH’s revised clause 7:

- (a) CBH clause 7.2(b): it is not appropriate that CBH has ten business days to respond to a request for information. CBH should be able to respond within five business days, at the most.

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<sup>298</sup> Australian Grain Exporters Association, *Submission in relation to Draft Decisions on Port Terminal Services Access Undertakings*, 3 September 2009, para 8.37-8.40.

<sup>299</sup> Australian Grain Exporters Association, *Submission in relation to Draft Decisions on Port Terminal Services Access Undertakings*, 3 September 2009, para 9.1.

<sup>300</sup> Australian Grain Exporters Association, *Submission in relation to Draft Decisions on Port Terminal Services Access Undertakings*, 3 September 2009, para 8.35-8.36.

- (b) CBH clause 7.2(e): it is not appropriate that CBH has ten business days to meet with AWEs applying for access. CBH should be able to meet with AWEs within three business days, at the most.
- (c) CBH clause 7.4: it is not appropriate to require AWEs to satisfy CBH's eligibility criteria. Accredited AWEs must comply with WEA's stringent accreditation scheme. Clause 7.4(1)(vi) and (vii) are matters for WEA, given its functions under the [Wheat Export Marketing] Act. Clause 7.4(c) gives CBH a wide discretion to cease or refuse to negotiate with an applicant "for any reason". It is not appropriate that an applicant must wait ten business days before referring a dispute to arbitration (clause 7.4(d)). (Note that "Material default" in clause 7.4(a)(iv) is not defined).

CBH clause 7.5(a) should require CBH to provide a final access agreement within 1 business day of being advised by the AWEs that the terms are agreed.

Clause 7.6 (c) and (e): it is not appropriate for AWEs to be forced to wait three months before they can activate the dispute resolution clause. AWEs must be entitled to commence the dispute resolution process at any time.<sup>301</sup>

#### AGEA submits in relation to CBH's revised clause 8:

- (a) Clause 8.2: it is not appropriate that negotiations occur within five business days of a dispute notice. The parties' representatives should be able to meet within two business days.
- (b) Clause 8.3(b) should include a requirement that both parties provide each other and the mediator with their summary of the dispute within five business days of the reference to mediation.
- (c) Clause 8.4: the referral to arbitration should occur within two business days after mediation under clause 8.3.
- (d) Clause 8.4(c) should include a requirement that the ACCC will endeavour to make a determination within 14 days.
- (e) Clauses 8.4 and 8.5 should include a provision that requires both parties to serve relevant materials including evidence within 7 days of the referral to arbitration and that the dispute will be heard and concluded within 14 days of the date when the ACC determines that it shall conduct the arbitration or 14 days from the reference to a private arbitrator.
- (f) Clause 8.5 should include a requirement that the private arbitrator will endeavour to make a determination within 14 days.
- (g) Clause 8.5(f) should be deleted. The parties are entitled to refer a dispute to arbitration and have the right to have their dispute heard and determined.
- (h) Clause 8.8(b) is contrary to CBH's obligation to provide access and should be deleted. Regardless of whether an applicant has complied with a determination, CBH is required to continue negotiations and provide access to port terminal services. If an applicant does not comply with a

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<sup>301</sup> Australian Grain Exporters Association, *Submission in relation to Draft Decisions on Port Terminal Services Access Undertakings*, 3 September 2009, para 8.18-8.20.

determination, CBH will be able to protect its position by pursuing other remedies.<sup>302</sup>

### 8.4.3 Grain Trade Australia

Grain Trade Australia (GTA) provided a submission explaining its role in arbitrating contractual disputes in the grain industry:

As part of its role, GTA provides an arbitration service for the resolution of contractual disputes, based on the GTA Trade Rules and the Dispute Resolution Rules (which include a set of “Fast Track” Rules for the expeditious resolution of disputes).

GTA has conducted approximately 150 arbitrations over the last 20 years. GTA relies on volunteers from within the industry to act as arbitrators. Currently GTA has 100 arbitrators on its list. GTA arbitrations are conducted in accordance with the *Commercial Arbitration Acts* in place in the various States. Any challenges to GTA arbitration to date have been dismissed by the Courts who have up-held the GTA process.<sup>303</sup>

GTA also submits that it is able to offer its expertise in administration of dispute resolution in relation to the proposed Undertakings of the bulk handlers:

It is envisaged that disputes would broadly concern

1. the Access Application process, and
2. the Access Agreement (inc Standard Terms and Shipping Protocols).

While the terms of the process are open to negotiation, GTA would propose;

1. An expedited process producing a legally binding award within 3-5 days of commencement of the process, or sooner (i.e. hours) if the parties require;
2. Specialist trained arbitrators drawn from the current GTA list to deal with Access Application and Access Agreement disputes.

The parties would be encouraged to agree on an arbitrator from the GTA list. If the parties cannot agree, the GTA CEO would be empowered to make an appointment (which would be subject to a party's right to object on the grounds of apprehended or actual bias).

It is anticipated that an “unreasoned” award could be produced within 3-5 days with a fully reasoned award to be produced shortly thereafter.

It is not anticipated that the process would provide for appeals (other than to the Courts) unless the parties so desire. Similarly enforcement of awards would ultimately be a matter for the Courts, or perhaps the ACCC if appropriate.

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<sup>302</sup> Australian Grain Exporters Association, *Submission in relation to Draft Decisions on Port Terminal Services Access Undertakings*, 3 September 2009, para 8.34.

<sup>303</sup> Grain Trade Australia, *Memorandum re ACCC Access Undertaking Dispute Resolution Process*, 25 August 2009, p. 1.

Fees would be in-line with current GTA arbitration fees, estimated at \$7,000 each party, perhaps subject to the time taken and complexity of the dispute.<sup>304</sup>

#### **8.4.4 PGA**

The PGA agrees with the ACCC that the proposed publish-negotiate-arbitrate component of the April Undertaking is vague and ambiguous; does not appropriately address the interests of access seekers; and that as a result is unlikely to ensure fair and transparent access to port terminal services.<sup>305</sup> The PGA agrees with each of the ACCC's recommendations on page 129 of the Draft Decision.<sup>306</sup>

### **8.5 ACCC's view on the April Undertaking**

#### **8.5.1 Introduction**

The ACCC has identified the following issues as arising for consideration in relation to the proposed publish-negotiate-arbitrate component of the April Undertaking:

- the appropriateness of the publish-negotiate-arbitrate approach without ex ante price regulation, and the form in which prices are published;
- the absence of an indicative access agreement as part of the April Undertaking;
- the appropriateness of the timing for the publication of standard terms and reference prices;
- generally, the appropriateness of the timeframes proposed in various clauses and the degree of certainty and clarity provided in the drafting of various clauses;
- the appropriateness of the discretion afforded to CBH in the negotiation process;
- the appropriateness of the dispute resolution and arbitration processes, including for the selection of the arbitrator and conduct of the arbitration;
- the absence of appropriate 'holding over' arrangements.

The ACCC notes that the submissions of AGEA and the PGA in relation to the Draft Decision broadly supported the ACCC's view on these issues.

##### **8.5.1.1 Lack of consultation on rationale for various provisions**

As a preliminary point, the ACCC notes that CBH did not provide comments in support of many of the clauses in the publish-negotiate-arbitrate component of the

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<sup>304</sup> Grain Trade Australia, *Memorandum re ACCC Access Undertaking Dispute Resolution Process*, 25 August 2009, pp. 1-2.

<sup>305</sup> Pastoralists and Graziers Association, *Submission in relation to Draft Decision on CBH Access Undertaking*, 3 September 2009, p. 8.

<sup>306</sup> Pastoralists and Graziers Association, *Submission in relation to Draft Decision on CBH Access Undertaking*, 3 September 2009, p. 9.

April Undertaking in its initial submission, and it was only in response to a request for information from the ACCC that CBH elaborated on why it considered its particular approach appropriate. CBH provided its public response to the ACCC's information request on 29 June 2009, and consequently CBH's further submissions have not yet been subject to public consultation.

The ACCC acknowledges that CBH's further submission in some instances provides further explanation, and therefore clarity, as to how many of the proposed clauses are intended to operate, and in other instances CBH has proposed to alter clauses of the proposed Undertaking in response to comments arising from the public consultation. While this is beneficial, the ACCC considers it also highlights deficiencies in the drafting of many clauses as they currently appear in the April Undertaking.

### **8.5.2 Appropriateness of publish-negotiate-arbitrate approach**

CBH has proposed a 'publish-negotiate-arbitrate' approach in its April Undertaking, under which it would be obliged to publish price and non-price terms for access to the service, provide those terms to access seekers on a non-discriminatory basis, and then be subject to dispute resolution and arbitration procedures in the event of a dispute with an access seeker during negotiations for access. This model is different to an 'ex ante pricing' model that has previously been put forward in an access undertaking to the ACCC for assessment,<sup>307</sup> where the undertaking sets a price or price methodology for the service to which it relates.

An issue for the ACCC is therefore whether the less prescriptive publish-negotiate-arbitrate approach put forward by the April Undertaking is by itself appropriate, or whether it is appropriate for the April Undertaking to include ex ante pricing regulation.

The ACCC notes that there is no requirement in Division 6 of Part IIIA that an access undertaking include price, and reiterates that the ACCC's role is to decide whether or not a proposed undertaking is appropriate, having regard to the matters in section 44ZZA(3).

In this particular case, there are some specific features of this industry at this time.

First, the ACCC reiterates its comments regarding the transitional state of the bulk wheat export industry. 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 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. The ACCC also notes the planned Productivity Commission review of the WEMA, and statements by the government that it will monitor up-country developments.

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<sup>307</sup> See for example the *ARTC 2002 Interstate Access Undertaking*, and the *ARTC 2008 Interstate Access Undertaking*.



Second, before the ACCC would consider a publish-negotiate-arbitrate framework appropriate, it would expect it to be underpinned by a robust set of mechanisms giving effect to the publication, negotiation and arbitration procedures. Given that CBH is vertically integrated, strong non-discrimination obligations and appropriate transparency measures would also be appropriate (see the Non-Discrimination chapter).

It should be noted that the ACCC has expressed the view elsewhere in this Final Decision that appropriate non-discrimination measures should prohibit CBH discriminating in favour of itself except to the extent that the cost of providing access to other operators is higher, as per s.44ZZCA of the TPA. As a transparency measure to support this, appropriate measures would require prices to be transparently specified for a standard set of port terminal services to all parties, including CBH, with any special requirements due to different origin being separately enumerated and priced.

These underpinning measures would allow access seekers to commercially negotiate with CBH in a framework where both parties know that prices, terms and conditions may be subject to arbitration by the ACCC or a private arbitrator, applying the pricing principles in s.44ZZCA of the TPA and general non-discrimination requirements.

Third, the April Undertaking is for a limited duration. CBH is subject to the threat of more prescriptive regulatory requirements in any future Undertaking should the publish-negotiate-arbitrate framework not be effective. CBH will have a strong incentive to ensure that prices are commercially reasonable and non-discriminatory to avoid more costly and intrusive regulation in future (such as cost modelling for all its port terminals, ex ante pricing and prescriptive ring-fencing).

Finally, the April Undertaking covers six port terminals, and the April Undertakings of all three bulk handlers cover 17 port terminals altogether. Given the transitional state of the industry, it would be a significant cost burden on the industry to require ex ante cost modelling of 17 port terminals if only a few may prove the subject of an arbitration that would warrant cost modelling.

Therefore the ACCC considers it is likely to be appropriate for the April Undertaking to adopt a publish-negotiate-arbitrate approach rather than an ex ante regulated price approach, provided that the mechanisms giving effect to the publish-negotiate-arbitrate approach are robust. In this regard the ACCC reiterates its previous comments regarding the need for the proposed Undertaking to be certain and clear, and to provide for 'fair and transparent access' to access seekers. The ACCC considers that it is in the interests of access seekers, and consistent with the WEMA, for the publish-negotiate-arbitrate mechanism to be robust.

The ACCC wishes to emphasise that in reaching this view it is not suggesting that the absence of ex ante regulation of prices for port terminal services is likely to be appropriate in all circumstances. The ACCC is instead acknowledging that it is appropriate for the April Undertaking not to provide for ex ante pricing regulation given the circumstances at this particular time. The ACCC wishes to expressly recognise the possibility that ex ante price regulation may be appropriate for port terminal services in certain circumstances, and takes no view on what may be

appropriate in relation to any subsequent undertaking proposed by CBH following the expiry of the current proposed Undertaking.

The ACCC notes as a general comment that the publish-negotiate-arbitrate clauses in the April Undertaking are to a large extent modelled on clauses contained in the access undertaking submitted by the Australian Rail Track Corporation (ARTC), and accepted by the ACCC on 30 July 2008. The ACCC considers the fact that it accepted as appropriate particular clauses in the ARTC access undertaking provides little support for a conclusion that similar clauses in the current context are appropriate, as the circumstances of the current proposed Undertaking and the ARTC Interstate Access Undertaking are clearly distinguishable. Significantly, the ACCC notes that the ARTC Access Undertaking included a regulated access price. The ACCC therefore considers that, as a general matter, it is appropriate for the publish-negotiate-arbitrate mechanism in the current context to be, in a sense, more ‘prescriptive’ than that in the ARTC Access Undertaking.

### **8.5.3 Absence of an indicative access agreement**

Please refer to the discussion of this issue below in the Indicative Access Agreement chapter. In summary, the ACCC considers it is not appropriate that the April Undertaking does not include an indicative access agreement.

### **8.5.4 Timing for publication of standard terms and reference prices**

The April Undertaking states that CBH may publish Standard Terms and Reference Prices for the season by no later than 30 September of each year,<sup>308</sup> or within 15 Business Days of the commencement of the proposed Undertaking if not already published.<sup>309</sup>

In light of the ACCC’s view that the April Undertaking should include an indicative access agreement setting out non-price terms, the ACCC considers it likely to be appropriate that the obligation to publish be limited to an obligation only to publish prices.

The ACCC considers that any time for publication of prices must allow sufficient opportunity for access seekers to negotiate access agreements before those prices become effective, and in this regard also refers to the discussion below in relation to holding over arrangements. The ACCC considers that publication by no later than 30 September is not appropriate in this regard.

The ACCC notes that CBH has, in its supplementary submission to the ACCC, proposed a revision whereby it would publish by no later 31 August in the relevant year. The ACCC considers that publication by no later than this date is more likely to be appropriate.

The ACCC also considers it is not appropriate for CBH to publish prices within 15 Business Days of the commencement of the proposed Undertaking if it has not

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<sup>308</sup> Co-operative Bulk Handling Limited, *Port Terminal Services Access Undertaking*, 14 April 2009, clause 6.1(a).

<sup>309</sup> Co-operative Bulk Handling Limited, *Port Terminal Services Access Undertaking*, 14 April 2009, clause 6.1(d).

already published, particularly if non-price terms are to be already included in an indicative access agreement. The ACCC considers that publication three weeks after commencement of the Undertaking creates uncertainty as to the prices that are to apply, and the ACCC considers that a period of three Business Days is more likely to be appropriate.

### **8.5.5 General issues – negotiation, dispute resolution, arbitration**

After the obligation to publish, the mechanism in the April Undertaking essentially contains three components, set out in clauses 7 and 8:

- a process for the negotiation of access agreement ('negotiation component');
- a dispute resolution procedure in the event of dispute between the access seeker and access provider during negotiations ('dispute resolution component'); and
- the ability for resolution of the dispute to be escalated to arbitration ('arbitration component').

The ACCC considers that two general issues arise in relation to these components:

1. the specified timeframes are in some instances unnecessarily long, while in other instances are vague or non-existent, thereby providing scope for the negotiation, dispute resolution and arbitration processes to be frustrated or delayed; and
2. the drafting of numerous clauses lacks clarity and certainty.

#### **8.5.5.1 Timeframes**

The ACCC considers that many of the timings proposed by CBH in clauses 7 and 8 are not appropriate. The ACCC considers that the timeframes are in some instances unnecessarily long, in others defined without sufficient clarity, while in other instances timeframes are absent altogether. The ACCC considers that this creates uncertainty, ambiguity and is not in the interests of access seekers or CBH.

In particular, the ACCC considers that:

- In relation to clause 7.4(a), the lack of any timeframes for the performance of obligations creates uncertainty and is not appropriate.
- In relation to clause 7.4(b)(iii), it is not appropriate that CBH may, at *any time, before or during the negotiation process*, require the Applicant to demonstrate that it can meet the Prudential Requirements. It is more likely to be appropriate that the April Undertaking specifies a particular point in time at which the Applicant must demonstrate that it can meet the Prudential Requirements, and a particular timeframe within which CBH must confirm that those requirements have or have not been met.
- In relation to clause 7.4(b)(v), it is not appropriate for CBH to have 10 Business Days to provide reasons for refusing to negotiate with an access seeker in the circumstances described. It is more likely to be appropriate for CBH to provide reasons to the access seeker at the time that CBH refuses to negotiate.

- In relation to clause 7.5(b)(i), it is not appropriate that CBH be permitted to take 5 Business Days to acknowledge receipt of an access application. The information contained in an application is specified in Schedule 1 to the April Undertaking and includes matters such as company name, address, contact details etc, and the ACCC questions that CBH would need 5 Business Days to assess such information. The timings in clause 7.5(b)(iii) and (iv) are also not appropriate, although the ACCC acknowledges that CBH may in some circumstances require additional information from an access seeker (or clarification of information) in relation to the provision of access, particularly where access is sought on non-standard terms. The ACCC considers the timings in clause 7.5(b) are of particular concern as clause 7.6(b) provides that the ‘Negotiation Period’ under the April Undertaking – the ‘official’ period for negotiations – commences upon CBH acknowledging receipt of the Access Application. The discretion conferred pursuant to clause 7.5(b)(ii)-(iv) to seek further information/clarification therefore provides the access provider with the ability to delay the commencement of ‘official’ negotiation.
- In relation to clause 7.6(a), the reference to both parties commencing negotiations ‘as soon as reasonably possible to progress towards an Access Agreement’ lacks certainty and is therefore not appropriate. It is more likely to be appropriate for the reference to be to a specified period of time.
- In relation to clause 7.6(b)(iv), the reference to ‘a reasonable time period’ lacks certainty and is therefore not appropriate.
- In relation to clause 7.7(c) and (d), the references to ‘as soon as reasonably practicable’ and ‘reasonable endeavours to comply with this clause as soon as practicable’ respectively are not appropriate. The ACCC considers it is not appropriate that the potential for delay be created once the parties have essentially reached agreement on terms of access but prior to execution of the access agreement. It is more likely to be appropriate for these clauses to include short, specified timeframes.
- In relation to clause 8.3(c), the reference to ‘10 Business Days’ is not appropriate. It is more likely to be appropriate for this clause to refer to 5 Business Days, to reduce unnecessary delay and to create incentives for parties to resolve disputes quickly. Further, as it is difficult to determine how long it may take the IAMA to appoint a mediator, and for that mediation to commence, it is more likely to be appropriate for timeframes leading up to that stage to be shorter.
- In relation to clause 8.3(d), it is not appropriate that there is no specified timeframe for the conduct of the mediation, as this creates uncertainty.
- In relation to clause 8.4(b), it is not appropriate that there is no specified timeframe within which CBH must notify the ACCC, as this creates uncertainty. Please refer, however, to the discussion below: **Arbitration component – further issues.**

The ACCC notes CBH’s submission that the proposed timeframes are appropriate, but finds CBH’s supporting arguments unconvincing. In particular, the ACCC considers

that CBH's argument that negotiating with 23 access seekers may be onerous and resource intensive for CBH difficult to reconcile with CBH's claim that it has a strong incentive to maximise throughput at its terminals (see above).

#### **8.5.5.2 Lack of clarity and certainty**

The ACCC considers that the drafting of numerous provisions in clauses 6-8 lack clarity and certainty, making those clauses not appropriate. The ACCC acknowledges that in some instances CBH may have intended certain provisions to recognise or address legitimate considerations, but considers that the drafting of those provisions does not appropriately give expression to those considerations, and instead results in ambiguity and uncertainty.

The ACCC considers that clauses 6.1(f), 6.2(a), 6.4, 6.5 and 7.7 create significant ambiguity and uncertainty as to how one of the most fundamental obligations in the April Undertaking – to offer access – is intended to operate. The ACCC considers that the drafting of these clauses is repetitious (particularly 7.7) and convoluted – for example clause 6.4 is expressed as subject to clause 6.5, then clause 6.4(a)(ii)(D) refers to 'taking into account the matters set out in clause 6.5,' then clause 7.7 – which on one interpretation appears merely to repeat matters in clause 6.4 – is expressed also to be subject to clauses 6.4 *and* 6.5. The ACCC considers that in other instances the drafting lacks clarity – for example, clause 6.4(a)(i) refers to an obligation to 'offer' the Standard Port Terminal Service, whereas clause 6.4(a)(ii) refers to an obligation to 'not *provide access*,' without any sense of what the difference (if any) entails. Further, the ACCC considers that various provisions in clause 6.5 are vague – for instance, 'geographic and seasonal variations.'

The ACCC therefore considers it is more likely to be appropriate for the Undertaking to provide greater certainty and clarity in relation to this key obligation.

The ACCC also considers:

- In relation to clause 7.4 (a)(ii)(B) and (C), the references to 'unduly onerous,' 'disproportionate to the benefit to be obtained from the information,' 'reasonable costs incurred' and 'information that is not ordinarily and freely available to the Port Operator' are not appropriate. The ACCC notes the further explanation of the terms 'unduly onerous' and 'disproportionate' provided by CBH in response to the ACCC's information request (see above), but considers that these responses only marginally improve the uncertainty and ambiguity. The ACCC considers it is more likely to be appropriate if terms in this clause are drafted with greater clarity and certainty.
- In relation to clause 7.4(b)(i), the reference to non-compliance that CBH believes is material is not appropriate because it appears to depend on CBH's subjective view at its absolute discretion.
- In relation to clause 7.4(b)(v), it is not appropriate that CBH provide reasons for refusing to negotiate only in certain circumstances, and it is more likely to be appropriate that CBH provides reasons for ceasing or refusing to negotiate in all circumstances, at the same time as it ceases or refuses to negotiate.

- In relation to clause 7.5(ii), it is not appropriate that the clause merely recognises the ability of the Applicant to *seek* a meeting with CBH, as there is no obligation on CBH actually to have the meeting sought.
- In relation to clause 7.6(b)(v), it is not appropriate that this clause essentially repeats the Prudential Requirements matter referred to in clause 7.4(b)(iii).
- In relation to clause 8.1(a), it is not appropriate that the clause refers to parties using reasonable endeavours to settle the Dispute as soon as is practicable, in light of the specified timeframes in clause 8.
- In relation to clauses 8.3(a)(ii), it is not appropriate that this clause refers to providing a notice to the arbitrator, as it appears that in the circumstances contemplated by those clauses an arbitrator has not yet been appointed. Please refer, however, to the discussion below: **Arbitration component – further issues**.
- It is more likely to be appropriate that it is clearly specified that clause 8.3(d) applies to formal mediation conducted either by a mediator appointed by agreement between the parties, or as appointed by the President of the WA Chapter of the IAMA.
- It is more likely to be appropriate for the Access Application form in Schedule 1 to be amended in light of CBH’s further submission (see above).

## **8.5.6 Negotiation component – further issues**

### **8.5.6.1 Disproportionate discretion on CBH**

The ACCC considers that the negotiation component does not achieve an appropriate balance between the interests of the access provider and access seekers in that there is disproportionate discretion on the part of the access provider to refuse to negotiate, or to cease negotiations, with the access seeker. The ACCC considers that this discretion creates the potential for the negotiation process to be delayed or frustrated, and therefore creates uncertainty. The ACCC also considers that this discretion undermines the robustness of the negotiate-arbitrate mechanism as a whole.

The ACCC in particular notes:

- In relation to clause 7.4(a)(ii), the discretion that CBH has to refuse a request for information from an Applicant, including where the Applicant does not agree to pay ‘reasonable costs’ incurred by CBH (which, as noted above, is itself not appropriate).
- In relation to clause 7.4(b)(i), the discretion that CBH has not to negotiate with an Applicant if CBH considers the Applicant does not materially comply with the requirements and processes set out in the April Undertaking.
- In relation to clause 7.4(b)(iii) & (iv), and clause 7.6(b)(v), the discretion that CBH has to at any time, before or during the negotiation process, to require the Applicant to demonstrate that it meets the Prudential Requirements, and to cease

or refuse to commence negotiations if the Applicant does not meet those requirements (see further below).

- In relation to clause 7.4(b)(vii), the discretion that CBH has to refer an application to the arbitrator if CBH is of the view that the application is frivolous in nature or that the Applicant is not negotiating in good faith, and for CBH to seek reasonable costs.
- In relation to clause 7.5(b), the discretion that CBH has in relation to the acknowledgement of an Access Application, and to request further information or clarification from an Applicant (see also above).
- In relation to clause 7.6(b)(iv), the discretion that CBH has to cease negotiations if CBH believes that the negotiations are not progressing in good faith towards the development of an Access Agreement within a reasonable time period;
- The discretions effectively created by the uncertain time periods in clauses 7.6(a), and 7.7(c) and (d) (see above).

The ACCC considers that timeframes that are not appropriate and a lack of sufficient clarity and certainty, as described above, in some instances compound the problematic nature of certain of the areas of discretion set out above.

The ACCC notes that in some circumstances the April Undertaking permits the Applicant to refer a matter to the arbitrator if it believes CBH has exercised its discretion improperly, and allows for negotiations to recommence if the arbitrator finds CBH has acted improperly. The ACCC notes, however, that this avenue is expressly recognised in only some situations, not all, and even where it is provided, provides the access seeker only with the ability to continue negotiations at a future time if the arbitrator so orders. The ACCC considers it is more likely to be appropriate for the arbitrator to conclusively resolve the dispute if a matter is referred in this way, as requiring recommencement of negotiations creates opportunities for unnecessary delay.

Similarly, the April Undertaking provides few opportunities for the Applicant to refer a matter to the arbitrator if the Applicant is dissatisfied with the conduct of CBH.

The ACCC considers as a general matter that where the April Undertaking provides CBH with a discretion to refuse to negotiate, or cease or potentially otherwise delay or hinder negotiations, such discretion should be drafted with sufficient clarity and certainty to minimise the possibility of that discretion being misused. The ACCC also considers that any such discretion is more likely to be appropriate where it balances the interests of CBH with the interests of access seekers.

The ACCC considers that the clauses are not appropriate for the reasons stated, but acknowledges that CBH may have intended the discretions to recognise or address legitimate considerations. In particular, in relation to the Prudential Requirements, the ACCC acknowledges that it is likely to be appropriate for the proposed Undertaking to include some form of recognition that an access seeker must meet prudential requirements in order to obtain access, but that such a requirement should be drafted with greater certainty, and to better balance the interests of the access provider and

access seekers. The ACCC considers in particular that clauses 7.4(b)(iv)(B) and (C) as currently drafted are not appropriate, as they create too wide a discretion for CBH, lack clarity and create uncertainty.

The ACCC also considers that the Undertaking does not appropriately recognise the ability of an access seeker to re-apply for access in circumstances where negotiations may cease and an Access Agreement has not been executed (for example, at the expiry of the 'Negotiation Period'). The ACCC notes CBH's submission that an Applicant would be able to submit a new application for access,<sup>310</sup> and the ACCC considers that it is more likely to be appropriate for the Undertaking to reflect this so as to provide greater clarity and certainty for access seekers.

The ACCC considers that disputes in relation to Prudential Requirements would fall within the scope of the dispute resolution and arbitration provisions of the proposed Undertaking, given CBH's revised definition of Dispute:

Dispute means a dispute between an Applicant and the Port Operator in relation to access to the Port Terminal Services under this Undertaking and includes disputes arising in the course of the negotiation process in Part 7 of this Undertaking...<sup>311</sup>

#### **8.5.6.2 Appropriate clauses**

The ACCC considers that it is appropriate for the April Undertaking to include an obligation on CBH to negotiate in good faith, as recognised in clause 7.1. The ACCC would also expect that access seekers utilising the process in the April Undertaking would also act in good faith.

The ACCC also considers it appropriate that the proposed Undertaking provides a mechanism for dealing with confidential information that may be relevant to the negotiation, dispute resolution and arbitration process, as somewhat recognised by clauses 7.2, 7.3(b) and 8.8(d). The ACCC considers however that reiterating the obligation in clause 7.2 at clause 7.3(b) and then 8.8(d) creates unnecessary confusion and it is more likely to be appropriate that the Undertaking contains a single clause dealing with confidentiality during the negotiation, dispute resolution and arbitration process. The ACCC considers it is also likely to be appropriate for the Undertaking to provide for disclosure of confidential information to the mediator and arbitrator as relevant, and to the ACCC.

The ACCC considers it is appropriate for the Undertaking to include clause 7.3(a), or something similar, to provide guidance on how the negotiation, dispute resolution and arbitration processes are intended to operate, as this provides clarity.

### **8.5.7 Dispute resolution component – further issues**

#### **8.5.7.1 Pre-condition to invoking dispute resolution mechanism**

The ACCC notes that clause 7.3(c) of the April Undertaking provides that if, at any time during the negotiation process, a dispute arises between the parties which, after

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<sup>310</sup> Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 83.

<sup>311</sup> Co-operative Bulk Handling Limited, *Proposed revised clause 8*, 25 August 2009.



reasonable negotiation, the parties are unable to resolve to their mutual satisfaction, then either party may seek to resolve the dispute in accordance with the Dispute resolution process in clause 8.

The ACCC considers that clause 7.3(c) is not appropriate, as it effectively imposes a 'pre-condition' on the invocation of the dispute resolution mechanism by requiring the parties to engage in 'reasonable negotiation' prior to invoking clause 8. The ACCC considers that the term 'reasonable negotiation' lacks certainty and that clause 7.3(c) could potentially allow either the access seeker or the access provider to unnecessarily delay the timely resolution of the dispute.

#### **8.5.7.2 Definition of dispute**

The ACCC notes that the definition of 'Dispute' in clause 1.1 refers to a 'bona fide' dispute. The ACCC also notes that in its supplementary submission CBH explained that 'bona fide' referred to a dispute that had been brought in good faith and without fraud.<sup>312</sup>

The ACCC considers that it is likely to be appropriate for 'Dispute' to be defined to mean a 'bona fide' dispute, as this is a widely-known term, the use of which here is intended to prevent either the access seeker or the access provider invoking the dispute resolution process in relation to a frivolous or vexatious disputes. The ACCC considers it is not appropriate, however, for CBH to have discretion to decide what is and what is not, a bona fide dispute, as this does not adequately balance the legitimate business interests of CBH and the interests of access seekers.

#### **8.5.7.3 Involvement of GTA (or another independent body) in dispute resolution**

The ACCC notes AGEA's submission in response to the Draft Decision that it may be appropriate for Grain Trade Australia (GTA) to have a role in relation to the dispute resolution processes in the proposed Undertaking.

The April Undertaking provides that a Dispute may be referred to a mediator agreed upon by both parties, and therefore there is no apparent obstacle to the parties agreeing to have the Dispute mediated by GTA. Similarly in relation to an arbitration to be conducted by a private arbitrator (see further below), the parties may agree to have the Dispute arbitrated by GTA.

The ACCC considers it appropriate, as proposed by CBH, that if the parties cannot agree, the President of IAMA appoint a mediator to mediate the Dispute, as this provides a 'back stop' to the process if the parties cannot agree. The ACCC acknowledges that while GTA may also be able to perform this function, it could not be considered inappropriate under section 44ZZA(3) for this function to be performed by the President of IAMA.

#### **8.5.7.4 Dispute resolution mechanism in the access agreement**

The ACCC notes that clause 8.1(b) of the April Undertaking provides that any disputes in relation to an executed access agreement will be dealt with pursuant to the

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<sup>312</sup> Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, pp. 83-84.

provisions of that agreement. The ACCC considers it is appropriate that these clauses limit the scope of the dispute resolution mechanism to ‘Disputes’ that arise during the negotiation of an Access Agreement. Once the parties have an access agreement, they have direct rights of enforcement in contract and need not revert to the proposed Undertaking. The ACCC notes CBH’s submission that an allegation of discriminatory conduct could be a breach of the proposed Undertaking itself, and that clause 8.1(b) requires amendment to clarify the inconsistency.<sup>313</sup>

Subject to CBH addressing the matters referred to in the Indicative Access Agreement chapter, the ACCC considers it is likely to be appropriate for:

- disputes in relation to an executed Access Agreement to be dealt with pursuant to that Agreement; and
- for CBH by 31 July each year to provide a report to the ACCC on any material disputes in relation to an Access Agreement.

## **8.5.8 Arbitration component – further issues**

### **8.5.8.1 Selection of the arbitrator**

The ACCC considers that clause 8.5 is not appropriate having regard to the public interest.

The ACCC considers it is more likely to be appropriate for the ACCC to have a role as arbitrator. The ACCC considers that clear public interest considerations arise in relation to the April Undertaking, and which may also arise in relation to certain Disputes between an access seeker and an access provider. In this regard the ACCC notes again the effect of the WEMA in reforming the arrangements for the export of bulk wheat from Australia via the introduction of competition, as well as the transitional state of the industry at present. The ACCC considers it would be better placed than a private arbitrator to have regard to these matters in arbitrating a dispute which raises such matters, particularly due to its experience in economic regulation and in arbitrating matters with public interest considerations.

The ACCC also considers that if the ACCC had a role as arbitrator in the Undertaking, then that consideration would support the appropriateness of the overall publish-negotiate-arbitrate approach proposed by CBH. That is, if it were possible for the ACCC to arbitrate certain Disputes, the ACCC would thereby maintain an additional degree of oversight in relation to the Undertaking, thereby enhancing the robustness of the dispute resolution mechanism.

The ACCC notes, however, the likelihood that not every Dispute that may arise in relation to the proposed Undertaking will warrant arbitration by the ACCC. While it is not possible for the ACCC predict, at this stage, the particular Disputes upon which it may or may not choose to arbitrate, it is possible that purely commercial or technical disputes with no public interest considerations may more appropriately be arbitrated by a private arbitrator.

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<sup>313</sup> Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 84.

The ACCC therefore considers it more likely to be appropriate for the April Undertaking to provide:

- when a Dispute is referred to arbitration, it is referred to the ACCC in the first instance;
- at the time a Dispute is referred to the arbitration and notified to the ACCC, for the parties to inform the ACCC whether they have agreed upon, or are likely to agree upon, a private arbitrator to arbitrate the Dispute;
- a mechanism by which the ACCC may consider whether or not it wishes to arbitrate the Dispute; and
- for the Dispute to be arbitrated by the ACCC if it so chooses, or for the Dispute to be arbitrated by a private arbitrator if the ACCC so chooses.

The ACCC notes, of course, that the April Undertaking does not remove the ability of parties to resolve disputes to their mutual satisfaction by mediation or arbitration without recourse to the mechanism in the proposed Undertaking, if they agree to take that course.

#### **8.5.8.2 Conduct of the arbitration**

The ACCC considers that clause 8.7(a) is not appropriate as it lacks clarity and certainty, and to some extent replicates matters in clause 8.7(b). The ACCC considers it is nonetheless likely to be appropriate for the arbitration component to include the matters acknowledged in clause 8.7(a)(iv) and (v).

The ACCC considers that, in light of its view that it is more likely to be appropriate for the ACCC to have a role as arbitrator, it is also more likely to be appropriate for the arbitration component to provide for differences in the circumstances depending on whether the arbitrator is the ACCC or a private arbitrator. In particular, the ACCC considers that it is more likely to be appropriate for the April Undertaking:

- to require a private arbitrator to keep the ACCC informed of the progress of the arbitration, including timelines and processes for making submissions;
- to allow the ACCC to make submissions in its absolute discretion in relation to an arbitration conducted by a private arbitrator (the current drafting of the proposed Undertaking is unclear as to upon whose request the ACCC may make submissions); and
- to permit the ACCC to conduct an arbitration in accordance with the provisions of Part IIIA of the TPA if it chooses to be the arbitrator.

The ACCC also considers that these matters would also support the appropriateness of the overall publish-negotiate-arbitrate approach proposed by CBH.

#### **8.5.8.3 Appropriate clauses**

The ACCC considers it is appropriate to allow either party unilaterally to refer the dispute to arbitration, as this provides a ‘check’ on the ability of either party to delay

or frustrate the dispute resolution process. The ACCC also considers it appropriate for the arbitrator to take into account the matters listed in clause 8.6(d) as a check on the ability of either party improperly to refer a matter to arbitration.

### 8.5.9 Holding over arrangements

Clause 6.2(b) provides that access to a Port Terminal Service<sup>314</sup> will be offered for a period expiring no later than 30 September of the year following the year in which the Standard Terms were first published, subject to appropriate ‘holding over’ provisions. In response to a question from the ACCC asking what constitutes ‘appropriate holding over provisions,’ CBH explained that such provisions would:

- allow a reasonable period of time for the continued operation of an access agreement on the same terms and conditions, pending the completion of the negotiation for an amended or replacement access agreement or the resolution of any dispute (save for circumstances where a debt was due and owing and for CBH to continue to perform the agreement would lead to further bad debt risk for CBH); but
- providing an appropriate end date from which Users will be subject to the operation of any revised standard terms that may take effect in accordance with the provisions of the Undertaking.<sup>315</sup>

CBH further submits that the terms and conditions upon which access will be provided prior to the execution of an access agreement, such as where parties are involved in a dispute, will be the Standard Terms and Reference Prices current at the time that the Applicant proposes to access the services. CBH submits that if a dispute arises, CBH will not refuse supply and will agree to backdate the results of an arbitration determination to the commencement of service.<sup>316</sup>

The ACCC considers that the publish-negotiate-arbitrate mechanism is not appropriate as it does not adequately provide ‘holding over’ arrangements, being arrangements whereby an access seeker may obtain access to the service without an executed access agreement while they are negotiating for an access agreement pursuant to the April Undertaking. The ACCC considers that holding over arrangements are an important aspect of the negotiate-arbitrate approach and that it is not appropriate for an access seeker to be delayed in obtaining access because they are engaging in the negotiation process in the proposed Undertaking, including where the dispute resolution and arbitration processes are invoked. The ACCC considers that such an outcome creates uncertainty, is not in the interests of access seekers, and is unlikely to ensure that the April Undertaking provides fair and transparent access.

The ACCC considers that CBH’s construction is not apparent on the face of the proposed Undertaking, and that it is more likely to be appropriate that the proposed Undertaking specifies with greater clarity and certainty the circumstances in which ‘holding over’ arrangements will apply, and how they will apply. The ACCC considers that CBH’s further submission provides some additional clarity and

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<sup>314</sup> And CBH’s obligation to enter into an Access Agreement for that/those service/s.

<sup>315</sup> Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, pp. 79-80.

<sup>316</sup> Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 81.

certainty and it is likely be appropriate for those comments to be reflected in the Undertaking.

The ACCC also considers it not appropriate for the April Undertaking to contain clause 4.7 as currently drafted. Clause 4.7 provides that the proposed Undertaking applies only to the negotiation of new Access Agreements (and the negotiation of access in addition to that already the subject of an Access Agreement), and that nothing in the April Undertaking can require a party to an existing Access Agreement to vary a term or provision of that agreement. The ACCC notes CBH's submission that it is appropriate that the April Undertaking applies only to new access agreements, as to do otherwise would create substantial interference with existing contractual obligations.<sup>317</sup>

The ACCC nonetheless considers that, on its face, this clause potentially prevents the application of the April Undertaking to Access Agreements for the 2009/10 season, on the basis that access seekers could sign agreements prior to the commencement of the proposed Undertaking, and then, by virtue of clause 4.7, be precluded from negotiating non-standard terms or prices. The ACCC considers that this would be an unacceptable outcome, as it would essentially render the negotiate-arbitrate mechanism redundant for the first season.

The ACCC consider it is more likely to be appropriate for the April Undertaking to include a mechanism that ensures that the negotiate-arbitrate process is available to access seekers who wish to negotiate non-standard terms or prices for the 2009/10 season. The ACCC considers that an option in this regard could be the inclusion of a clause that obliges CBH to negotiate, as per the negotiate-arbitrate mechanism, variations to Access Agreements entered into prior to the commencement of the April Undertaking. Such a clause would not be intended to create commercial uncertainty for CBH through the potential variation of multiple contracts, but rather to create an incentive for CBH to negotiate access agreements as if the April Undertaking were in effect, and thereby avoid the problem of the potential circumvention of the negotiate-arbitrate mechanism.

#### **8.5.9.1 CBH's proposed approach to 'holding over' arrangements**

The ACCC notes that CBH's proposal for addressing these concerns provides for:

- an Applicant to obtain access to Port Terminal Services on the 'standard offering' while negotiating for access to Port Terminal Services on different price and non-price terms; and
- an Applicant to vary an Access Agreement post-execution by following the processes in clause 7 of the proposed Undertaking.

The ACCC considers that CBH's proposal addresses the ACCC's concerns in this regard and is likely to be appropriate if included in a revised undertaking.

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<sup>317</sup> Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 46.

### 8.5.10 Conclusion in relation to publish-negotiate-arbitrate component

The ACCC considers it is appropriate for the April Undertaking to adopt a publish-negotiate-arbitrate approach, and not provide ex ante price regulation, if the publish-negotiate-arbitrate component is robust. The ACCC considers, however, that the publish-negotiate-arbitrate component of the April Undertaking is not appropriate for the following reasons:

- The proposed publish-negotiate-arbitrate component lacks clarity and certainty. The ACCC considers that the drafting of numerous clauses is either vague, ambiguous, confusing or unnecessarily broad or restrictive, which is of itself not appropriate and which also creates uncertainty as to how the mechanism will operate in practice.
- The proposed publish-negotiate-arbitrate component does not appropriately address the interests of access seekers. The ACCC considers that many clauses of the proposed mechanism provide too great a discretion on the access provider to refuse to negotiate, or to cease negotiations once commenced, which has the potential to delay or frustrate the overall access application process. The opportunity for delay and frustration creates further uncertainty as to how the mechanism will operate in practice. The lack of certainty and clarity described above, and the absence of appropriate holding over arrangements are also not in the interests of access seekers.
- The proposed publish-negotiate-arbitrate component is not in the public interest. The ACCC considers it is not in the public interest to accept an access undertaking that lacks certainty and clarity, and that does not appropriately address the interests of access seekers. Further, the ACCC considers that the arbitration component in particular does not appropriately recognise public interest considerations, as outlined above.
- The proposed publish-negotiate-arbitrate component is not appropriate in the context established by the WEMA. The ACCC considers that the lack of clarity and certainty and the failure to address the interests of access seekers are unlikely to ensure fair and transparent access to port terminal services.

The ACCC considers it is more likely to be appropriate for the April Undertaking to:

- include an indicative access agreement setting standard terms for access to the service;
- require CBH to publish a single set of prices for port terminal services, which may include differentiated prices for particular circumstances (i.e. for different processes for testing of grain depending on where it has been stored – but *only* where these processes are justifiable with regard to hygiene, quality or associated factors), provided those circumstances are transparently stated and the pricing differences are justified on the basis of different costs;
- require CBH to publish prices by the beginning of September;

- provide measures to ensure that the negotiation, dispute resolution and arbitration mechanisms are applicable to Access Agreements for the 2009/2010 season;
- provide appropriate arrangements to ensure access seekers are not delayed in obtaining access by reason of engaging in a negotiation with CBH on non-standard terms or prices, or by reason of resolving a dispute with CBH pursuant to the processes in the proposed Undertaking;
- address the issues identified by the ACCC in the discussion above regarding the timeframes and lack of clarity and certainty in the drafting of the April Undertaking, as well as the disproportionate discretion of the access provider;
- not include a ‘pre-condition’ to invoking the dispute resolution process, as currently included in clause 7.3(c);
- provide that when a Dispute is referred to arbitration, it is referred to the ACCC in the first instance;
- provide a mechanism by which the ACCC may consider whether or not it wishes to arbitrate the Dispute;
- provide for the Dispute to be arbitrated by the ACCC if it so chooses, or for the Dispute to be arbitrated by a private arbitrator if the ACCC so chooses;
- permit the ACCC to conduct an arbitration adopting the processes and having regard to the matters set out in Part IIIA of the TPA if it chooses to be the arbitrator;
- require a private arbitrator, if appointed, to keep the ACCC informed of the progress of the arbitration, including timelines and processes for making submissions; and
- allow the ACCC to make submissions in relation to an arbitration conducted by a private arbitrator.

#### **8.5.11 CBH’s September Undertaking**

The clauses in CBH’s September Undertaking relating to its publish, negotiate, arbitrate model (ie. clauses 6, 7, 8 and 9 of the September Undertaking) are set out in CBH’s September Undertaking at Annexure A.

#### **8.5.12 ACCC’s views on CBH’s September Undertaking**

The ACCC considers that the clauses in CBH’s September Undertaking relating to its publish, negotiate, arbitrate model have addressed the ACCC’s concerns with the clauses relating to the publish, negotiate, arbitrate model in CBH’s April Undertaking set out in the ACCC’s Further Draft Decision.

Therefore, the ACCC considers that the clauses in relation to the publish, negotiate, arbitrate model of CBH's September Undertaking are appropriate.



## 9 Indicative Access Agreement

### Summary

#### *Inclusion of an indicative access agreement*

It is appropriate that CBH's September Undertaking includes an Indicative Access Agreement. This will:

- provide a clear starting point for negotiations between an access seeker and CBH (and is therefore critical to ensuring access seekers can effectively negotiate with CBH); and
- ensure that the costs of negotiation and/or arbitration are not excessive.

For the avoidance of doubt, however, it is important to note that inclusion of an Indicative Access Agreement in the September Undertaking does *not* mean that access seekers and CBH are precluded from negotiating around that agreement (either by commercial agreement or by utilising the Negotiation and/or Arbitration provisions in the September Undertaking).

#### *Substance of August Indicative Access Agreement appropriate*

The Indicative Access Agreement in the September Undertaking (the **September Indicative Access Agreement**) forms an appropriate basis for an indicative access agreement. This is because it addresses the concerns the ACCC had with an earlier version of CBH's Indicative Access Agreement (referred to as the **August Indicative Access Agreement**). The ACCC considered that in order to be appropriate, improvements would need to be made to the August Indicative Access Agreement to ensure that:

- any ability of CBH to unilaterally vary the terms of an executed indicative access agreement could only be exercised in appropriate circumstances; and
- the indicative access agreement was sufficiently certain and clear in its terms and conditions, effect and operation.

The ACCC notes that there may be concerns among some interested parties about whether the terms of the September Indicative Access Agreement are acceptable, based on the commercial considerations and circumstances of those interested parties. The ACCC notes however, 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 terms that vary from any of those standard 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).

### ***Variation of the Indicative Access Agreement***

CBH's approach in its September Undertaking of dealing with variation of the September Indicative Access Agreement is appropriate given that it addresses the concerns of the ACCC about CBH's approach in its April Undertaking of retaining discretion to unilaterally vary its "standard terms" (i.e. the price and non-price related terms which are intended to be included in CBH's Indicative Access Agreement). The ACCC was of the view that this would result in a lack of certainty and clarity for potential access seekers and would undermine the benefits of inclusion of an indicative access agreement in the Undertaking.

The ACCC noted that it would be more appropriate for the variation provisions in section 44ZZA(7) of the TPA to apply to variations of the Indicative Access Agreement. The ACCC notes that this approach has been adopted by CBH in its September Undertaking.

The ACCC notes that this does not preclude parties from negotiating non-standard terms that vary from those in the Indicative Access Agreement.

## **9.1 CBH's April Undertaking**

In its April Undertaking, CBH did not include an indicative access agreement setting out the standard terms and conditions of access to port terminal services. Instead, the April Undertaking provides for an obligation on CBH to simply publish its standard terms and reference prices. Further details about the mechanism it proposed in the April Undertaking are set out in the Publish, Negotiate, Arbitrate chapter.

CBH's April Undertaking allows CBH to vary its standard terms in accordance with the following procedure:

### **Variation to Reference Prices and Standard Terms**

- (a) the Port Operator may vary the Reference Prices or the Standard Terms, provided that the amended Reference Prices and Standard Terms are consistent with **clause 6.4**<sup>318</sup> and the objectives in **clause 2**.<sup>319</sup>
- (b) Any variation under **clause 6.6(a)** must be published at least 30 days prior to the date on which it is to become effective in the same locations as it publishes its Reference Prices and Standard Terms.
- (c) The Port Operator must provide the ACCC with copies of variations to the Reference Prices and Standard Terms promptly following publication.
- (d) To avoid doubt, any variations to the Reference Prices or Standard Terms does not automatically override the terms of existing Access Agreements.<sup>320</sup>

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<sup>318</sup> The non-discriminatory access clause.

<sup>319</sup> The objectives clause.

<sup>320</sup> Clause 6.6 of CBH's August Indicative Access Agreement.

## 9.2 CBH's supporting submissions in relation to its April Undertaking

In its submission in support of its April Undertaking, CBH submits that it is not practical to include the standard terms in the proposed Undertaking because the industry generally works on an annual contracting basis and that incorporating the terms and conditions into the April Undertaking itself would remove the flexibility to deal with developments and emerging market efficiency incentives such as capacity booking mechanisms without obtaining consent to variation.

CBH also submits that it would create regulatory difficulty if any breach of contract were enforceable as a breach of the Undertaking.<sup>321</sup>

In relation to variation of standard terms, CBH submits that it envisages varying standard terms or reference prices pursuant to clause 6.6 of the April Undertaking only in very limited circumstances. CBH submits that it did not expect it would do so more than once in any year, if at all. CBH submits that such circumstances may include:

- the imposition of any direct costs associated with changes in legislation (e.g. taxation, levies or any new or amended form and levels of taxation or levy); or
- unforeseeable changes in circumstances directly affecting the provision of the port terminal services;
- CBH has not varied its standard terms or prices during the course of the operational period of those terms or prices in the past.
- As the full impact of the changes to the regulatory framework, market adjustments and related consequences of the changes to the regulatory framework remain unclear, market participants do not have the same level of certainty that existed prior to the deregulation of the export wheat market and the coming into forces of the WEMA undertaking.<sup>322</sup>

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<sup>321</sup> Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 52. The ACCC notes that the legal nature of the access undertaking and an executed access agreement are different. The access undertaking is Court enforceable under the *Trade Practices Act*, whereas an executed access agreement is enforceable under contract law.

<sup>322</sup> Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 80.

## 9.3 Submissions from interested parties in response to the ACCC's Issues Paper

### 9.3.1 AGEA

AGEA submits that CBH has provided draft standard terms and conditions but not prices. AGEA argues that CBH's draft terms and conditions are deficient as they are not binding.<sup>323</sup>

AGEA argued that the proposed access undertakings contemplate that the price and non-price terms can be unilaterally varied by CBH without negotiation with its customers. AGEA argued that the terms and conditions of access to port terminal facilities must comply with and, if not incorporated in the undertaking, be subordinate to the proposed access undertaking where necessary.<sup>324</sup> AGEA also argued for the inclusion of a list of particular terms to be included as part of the undertaking.<sup>325</sup>

AGEA argued that CBH should not be able to vary price and non-price terms except in clearly defined circumstances (such as a material adverse change) and provided both parties agree to the proposed changes. AGEA submit that the implementation of the amended terms should only take effect after six months' notice, in order to give wheat exporters time to adjust.<sup>326</sup>

### 9.3.2 Pastoralists and Graziers Association of WA

PGA, as with AGEA argued that CBH's draft terms and conditions are deficient as they are not binding.<sup>327</sup> PGA also argued for a list of particular terms to be included as part of the undertaking, including a limited opportunity for CBH to vary price and non-price terms.<sup>328</sup>

## 9.4 The ACCC's Draft Decision and consultation on the August Indicative Access Agreement

Upon request by the ACCC, CBH provided a draft copy of its proposed 2009/10 Season Port Terminal Services Agreement on 4 August 2009 (i.e. the August Indicative Access Agreement). The August Indicative Access Agreement was published on the ACCC's website, but was not originally provided to the ACCC as part of CBH's April 14 Undertaking. The ACCC annexed this document to its Draft

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<sup>323</sup> Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 9.1, p. 23.

<sup>324</sup> Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 9.3, p. 23.

<sup>325</sup> Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 4.17(a)-(g), pp. 12-13.

<sup>326</sup> Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 9.8, p. 24.

<sup>327</sup> Pastoralists and Graziers Association, *Submission in relation to proposed CBH access undertaking*, 29 May 2009, para 4.35, p. 12.

<sup>328</sup> Pastoralists and Graziers Association, *Submission in relation to proposed CBH access undertaking*, 29 May 2009, para 4.40, p. 13.

Decision, released on 6 August 2009, and sought submissions on whether it would form an appropriate basis for an indicative access agreement.

The ACCC does not intend to provide a detailed description of the provisions of the August Indicative Access Agreement in this Final Decision. However, for the sake of clarity, CBH's August Indicative Access Agreement includes the following matters in relation to the supply of port terminal services by CBH to access seekers:

- commencement and termination of the agreement;<sup>329</sup>
- definition of terms used;<sup>330</sup>
- interpretation of the agreement, including provisions in relation to the use of (or reference to) specific terms, documents, quantitative terms used (i.e. time, currency and measurement), and CBH's discretions and approvals;<sup>331</sup>
- Port Terminal Rules of CBH, including provisions in relation to obligations to comply with these<sup>332</sup>
- grain receival services, including provisions in relation to service availability, rights and obligations to be observed before and during delivery, receival procedures, warranties by the access seeker, and CBH's Harvest mass Management Scheme;<sup>333</sup>
- grain storage services, including provisions in relation to service availability, grain entitlements, grain fumigation, shrinkage, grain dust, and additional grain storage charges<sup>334</sup>
- port outturning services, including provisions in relation to service availability, outturn requests, the export outturn request form, operational decision making for acceptance or rejection of customer grain, acceptance of outturn requests, outturn standards, weighing process, AQIS sampling, the right for CBH to invoice prior to outturning, access seekers' obligation to maintain the relevant grain export licenses, misrepresentations by access seekers, vessel cleanliness, stevedoring services, demurrage and despatch, and rights upon the non-shipment of grain;<sup>335</sup>
- additional information and services;<sup>336</sup>

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<sup>329</sup> Co-operative Bulk Handling Limited, *Draft 2009/10 Season Port Terminal Services Agreement for Standard Port Terminal Services*, 4 August 2009, clause 1.

<sup>330</sup> Co-operative Bulk Handling Limited, *Draft 2009/10 Season Port Terminal Services Agreement for Standard Port Terminal Services*, 4 August 2009, clause 2.

<sup>331</sup> Co-operative Bulk Handling Limited, *Draft 2009/10 Season Port Terminal Services Agreement for Standard Port Terminal Services*, 4 August 2009, clause 3.

<sup>332</sup> Co-operative Bulk Handling Limited, *Draft 2009/10 Season Port Terminal Services Agreement for Standard Port Terminal Services*, 4 August 2009, clause 4.

<sup>333</sup> Co-operative Bulk Handling Limited, *Draft 2009/10 Season Port Terminal Services Agreement for Standard Port Terminal Services*, 4 August 2009, clause 5.

<sup>334</sup> Co-operative Bulk Handling Limited, *Draft 2009/10 Season Port Terminal Services Agreement for Standard Port Terminal Services*, 4 August 2009, clause 6.

<sup>335</sup> Co-operative Bulk Handling Limited, *Draft 2009/10 Season Port Terminal Services Agreement for Standard Port Terminal Services*, 4 August 2009, clause 7.

<sup>336</sup> Co-operative Bulk Handling Limited, *Draft 2009/10 Season Port Terminal Services Agreement for Standard Port Terminal Services*, 4 August 2009, clause 8.

- payments, including provisions in relation to fess and charges, application for credit terms, credit terms, credit information, invoicing, payment terms, certificates, interest on late payments, costs recoverable by CBH, notice for changes to pricing, set offs, and security;<sup>337</sup>
- CBH's lien and right to withhold grain, including provisions in relation to CBH's statutory lien and right to withhold access seekers' grain;<sup>338</sup>
- due care and diligence obligations on CBH and access seekers;<sup>339</sup>
- appointment of agents, including provisions in relation to notice and obligations, and liability for agent's actions;<sup>340</sup>
- CBH liability, including provisions in relation to CBH's liability for shortfall at a port terminal facility, damage for gross negligence or wilful misconduct, liability caps, limitations of grain loss and damage, limitation of loss or damage for delay, contribution to loss, conditional exclusions of statutory liability, exclusion of CBH liability for indirect or consequential loss, indemnity and release, exclusion of CBH warranties, express exclusions to CBH liability, and indemnity of CBH by access seekers;<sup>341</sup>
- insurance and risk, including provisions in relation to transfer of risk;<sup>342</sup>
- force majeure events;<sup>343</sup>
- title to grain;<sup>344</sup>
- port terminal facility access, including provisions in relation to access procedures, public receptions, and port terminal facility safety;<sup>345</sup>
- confidentiality, including provisions in relation to general obligations, conditions for disclosure, notice to other parties, indemnities, and the binding nature of confidentiality provisions;<sup>346</sup>
- disputes resolution process for disputes arising under the executed access agreement, including provisions in relation to relevant disputes, escalation to

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<sup>337</sup> Co-operative Bulk Handling Limited, *Draft 2009/10 Season Port Terminal Services Agreement for Standard Port Terminal Services*, 4 August 2009, clause 9.

<sup>338</sup> Co-operative Bulk Handling Limited, *Draft 2009/10 Season Port Terminal Services Agreement for Standard Port Terminal Services*, 4 August 2009, clause 10.

<sup>339</sup> Co-operative Bulk Handling Limited, *Draft 2009/10 Season Port Terminal Services Agreement for Standard Port Terminal Services*, 4 August 2009, clause 11.

<sup>340</sup> Co-operative Bulk Handling Limited, *Draft 2009/10 Season Port Terminal Services Agreement for Standard Port Terminal Services*, 4 August 2009, clause 12.

<sup>341</sup> Co-operative Bulk Handling Limited, *Draft 2009/10 Season Port Terminal Services Agreement for Standard Port Terminal Services*, 4 August 2009, clause 13.

<sup>342</sup> Co-operative Bulk Handling Limited, *Draft 2009/10 Season Port Terminal Services Agreement for Standard Port Terminal Services*, 4 August 2009, clause 14.

<sup>343</sup> Co-operative Bulk Handling Limited, *Draft 2009/10 Season Port Terminal Services Agreement for Standard Port Terminal Services*, 4 August 2009, clause 15.

<sup>344</sup> Co-operative Bulk Handling Limited, *Draft 2009/10 Season Port Terminal Services Agreement for Standard Port Terminal Services*, 4 August 2009, clause 16.

<sup>345</sup> Co-operative Bulk Handling Limited, *Draft 2009/10 Season Port Terminal Services Agreement for Standard Port Terminal Services*, 4 August 2009, clause 17.

<sup>346</sup> Co-operative Bulk Handling Limited, *Draft 2009/10 Season Port Terminal Services Agreement for Standard Port Terminal Services*, 4 August 2009, clause 18.

disputes to an ‘executive panel’, payment of invoices pending dispute resolution, referral to arbitration, arbitration procedures, matters to be taken into account by the arbitrator, confidentiality, effect of the arbitrator’s determination, and arbitrator costs;<sup>347</sup>

- the entire agreement, including provisions in relation to variation of the terms of the executed agreement;<sup>348</sup>
- notices, including provisions in relation to types of notices, operational and urgent notices, when notices take effect, deemed receipt, changes of address, and electronic mail;<sup>349</sup>
- miscellaneous other matters, including provisions in relation to assignment<sup>350</sup>, waivers<sup>351</sup>, ‘no partnership’ conditions<sup>352</sup>, governing laws and jurisdiction<sup>353</sup>, attorneys<sup>354</sup>, CBH’s discretion to sub-contract<sup>355</sup> and severance<sup>356</sup>;
- Schedule 1, which would set out the relevant reference prices for port terminal services under the executed agreement;<sup>357</sup> and
- Schedule 2, which would attach the Auction Premium Rebate rules.<sup>358</sup>

A number of interested parties, in their submissions to the ACCC in response to the Draft Decision also made submissions about the appropriateness of the August indicative Access Agreement. These submissions are set out below.

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<sup>347</sup> Co-operative Bulk Handling Limited, *Draft 2009/10 Season Port Terminal Services Agreement for Standard Port Terminal Services*, 4 August 2009, clause 19.

<sup>348</sup> Co-operative Bulk Handling Limited, *Draft 2009/10 Season Port Terminal Services Agreement for Standard Port Terminal Services*, 4 August 2009, clause 20.

<sup>349</sup> Co-operative Bulk Handling Limited, *Draft 2009/10 Season Port Terminal Services Agreement for Standard Port Terminal Services*, 4 August 2009, clause 21.

<sup>350</sup> Co-operative Bulk Handling Limited, *Draft 2009/10 Season Port Terminal Services Agreement for Standard Port Terminal Services*, 4 August 2009, clause 22.

<sup>351</sup> Co-operative Bulk Handling Limited, *Draft 2009/10 Season Port Terminal Services Agreement for Standard Port Terminal Services*, 4 August 2009, clause 23.

<sup>352</sup> Co-operative Bulk Handling Limited, *Draft 2009/10 Season Port Terminal Services Agreement for Standard Port Terminal Services*, 4 August 2009, clause 24.

<sup>353</sup> Co-operative Bulk Handling Limited, *Draft 2009/10 Season Port Terminal Services Agreement for Standard Port Terminal Services*, 4 August 2009, clause 25.

<sup>354</sup> Co-operative Bulk Handling Limited, *Draft 2009/10 Season Port Terminal Services Agreement for Standard Port Terminal Services*, 4 August 2009, clause 26.

<sup>355</sup> Co-operative Bulk Handling Limited, *Draft 2009/10 Season Port Terminal Services Agreement for Standard Port Terminal Services*, 4 August 2009, clause 27.

<sup>356</sup> Co-operative Bulk Handling Limited, *Draft 2009/10 Season Port Terminal Services Agreement for Standard Port Terminal Services*, 4 August 2009, clause 28.

<sup>357</sup> Co-operative Bulk Handling Limited, *Draft 2009/10 Season Port Terminal Services Agreement for Standard Port Terminal Services*, 4 August 2009, Schedule 1 (though the ACCC notes that Schedule 1 of the August Indicative Access Agreement was blank).

<sup>358</sup> Co-operative Bulk Handling Limited, *Draft 2009/10 Season Port Terminal Services Agreement for Standard Port Terminal Services*, 4 August 2009, Schedule 2 (though the ACCC notes that Schedule 2 of the August Indicative Access Agreement was blank).

## 9.5 Submissions in response to ACCC's Draft Decision

### 9.5.1 CBH

CBH, in its submission on the ACCC's Draft Decision, does not make any submissions in support of its August Indicative Access Agreement.

### 9.5.2 AGEA

#### 9.5.2.1 Inclusion of an indicative access agreement in the Undertaking

AGEA submits that the non-inclusion of an indicative access agreement in the April Undertaking would result in a lack of certainty and clarity for potential access seekers and is, therefore, not appropriate having regard to the matters set out in section 44ZZA(3) of the TPA.<sup>359</sup>

#### 9.5.2.2 Standard terms that should be included in the indicative access agreement

AGEA also submits that indicative access agreements should ensure:

- (a) transparency in relation to port stocks (for wheat and other grains), accumulation plans (including incoming rail/road slots) and ship load order; and
- (b) accountability of BHCs, for example, in relation to demurrage/despatch and port inload spots.<sup>360</sup>

AGEA further submits that the indicative access agreements should include prices (for standard and non-standard services) and be binding, or require BHCs to publish prices (for standard and non-standard services) by 31 August at the latest.<sup>361</sup>

In relation to the proposed standard terms of the indicative access agreement, AGEA submits that the following elements should be included:

- (a) the prices for the services;
- (b) clearly specified circumstances in which higher charges (e.g., overtime) may apply, subject to AWEs being given an option to unload in peak times and BHCs providing documentary proof that overtime charges were incurred and why they were necessary;
- (c) certainty of term, so that the price and non-price terms are binding for the duration of the contract; it is inappropriate for the BHCs to be in a position to unilaterally alter the contractual terms;

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<sup>359</sup> Australian Grain Exporters Association, *Submission in relation to the ACCC's Draft Decision*, 3 September 2009, para 9.1.

<sup>360</sup> Australian Grain Exporters Association, *Submission in relation to the ACCC's Draft Decision*, 3 September 2009, para 9.2.

<sup>361</sup> Australian Grain Exporters Association, *Submission in relation to the ACCC's Draft Decision*, 3 September 2009, para 9.3. For AGEA's further submissions on the 'timing for publication of Standard Terms and reference prices', refer to the Publish Negotiate Arbitrate chapter of this document.



- (d) limited opportunity to vary price and non-price terms (for example, only in the event of a material adverse change with reference to the Council of Australian Government's Competition and Infrastructure Reform Agreement pricing principles, i.e. that pricing must be based on the cost to the BHCs of providing the service, plus a reasonable commercial margin), and only if both parties agree to the changes, provided also that the varied price or non-price terms will only take effect after a minimum 6 months' notice to AWEs;
- (e) provisions which require the terms and conditions to be applied to wheat of specific grades or quality specifications which require segregation from other parcels throughout the port terminal facility;
- (f) the specification of minimum performance criteria which BHCs are required to meet including:
  - i. acceptance of vessel nominations regardless of stock entitlements within 24 hours;
  - ii. changes to vessel slots and cargo accumulation;
  - iii. unloading of trains/road transport within six hours;
  - iv. load rates and time to count as per Austwheat 2008 charter party (as amended from time to time);
  - v. benchmark criteria for grading, fumigation, weighing, compliance with AQIS requirements, loading to receival standards. The grain loaded to the ship should be of a standard not less than that delivered to the port terminal by or on behalf of the exporter. The terminal should provide running samples and/or analysis during loading so that any deviation from the required quality is known by the exporter prior to the completion of loading.
  - vi. settling despatch demurrage at the applicable vessel rate.
- (g) an effective right for AWEs to recover their loss and damage against BHCs if BHCs breach the terms and conditions of the port terminal services;
- (h) a shipping protocol which provides:
  - i. that if AWEs pay the vessel nomination fee and are allocated an estimated load date, BHCs must provide the necessary services to allow AWEs to load the vessel (within a three day spread), failing which BHCs will be liable for any loss or damage AWEs may suffer;
  - ii. transparency as to how the BHCs accept vessel nominations and provided vessel slots;
  - iii. mutual rights to terminate on the grounds of force majeure;
  - iv. a dispute resolution mechanism whereby disputes may be referred to an independent 'umpire' for a binding and timely decision; in order to be effective, this will require decisions to be made within 24 hours of one party notifying the other of a dispute;
- (i) an obligation on BHCs to provide AWEs with information relating to weight, quality and AQIS compliance and all other necessary information to assess whether BHCs have met the performance criteria within 24 hours of the information being available;

- (j) an obligation on BHCs to allow AWEs' superintendent (or independent third person nominated by AWEs) access to the port to sample AWEs' wheat and inspect the loading of AWEs' stock onto vessels;
- (k) an obligation on BHCs to provide AWEs with daily updates on:
  - i. stock on hand at port;
  - ii. daily receipts by grade into port;
  - iii. the port's capacity;
  - iv. wheat accumulation;
  - v. unloading from upcountry transporters into port;
  - vi. stock movements;
- (l) an obligation on BHCs to take running samples (for testing in relation to quality and specifications) as the grain is loaded onboard vessels;
- (m) an obligation on BHCs to notify AWEs promptly if there is a problem or BHCs expect that they might not be able to perform their obligations;
- (n) a complaints procedure to an independent body;
- (o) a requirement that BHCs engage an independent auditor to undertake an audit of BHCs' compliance with the undertaking at such times as the ACCC may reasonably direct, but at least once in any 12 month period;
- (p) an entitlement on the part of the ACCC to investigate any matters arising out of or relating to any complaints or the audit;
- (q) a dispute resolution mechanism which allows for the speedy resolution of disputes, including a mechanism to refer any disputes under the undertaking to arbitration by the ACCC.<sup>362</sup>

### 9.5.2.3 Specific comments on the standard terms of the August Indicative Access Agreement

In relation to the standard terms to be included in an indicative access agreement, AGEA submits the following in relation to specific provisions of CBH's August Indicative Access Agreement:

#### 1. Clause 1.1(b) Commencement:

*"The terms and conditions set out in this Agreement shall be deemed to be accepted by the Customer if the Customer utilises any of the Services contained in this Agreement notwithstanding the fact that the Customer has not executed this Agreement"*

The above is contrary to a "publish/negotiate/arbitrate model".

#### 2. Clause 3.5 Discretions and Approvals:

*(a) Whenever the Customer is required to form an opinion, give approval, exercise a discretion or perform any act under this Agreement, it must be done*

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<sup>362</sup> Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 4.17.

*reasonably in the circumstances, and based on reasonable grounds, and not capriciously, or arbitrarily refused or unduly delayed.*

*(b) In making any decision pursuant to this Agreement CBH shall have regard to the efficient running of the CBH Port Terminal Facility and balancing of the interests of all Customers of the Port Terminal Facility.*

*(c) CBH's refusal to accept a request for Service will not be a breach of the Agreement for making a decision which in its reasonable opinion is in the best interests of the overall performance of the Port Terminal Facility and the Bulk Grain export market as a whole."*

First, it is unnecessary and inconsistent with the port loading protocols (which set out the manner in which CBH is to make certain decisions) for the port terminal services agreement to deal with the manner in which CBH is to make decisions regarding access to port terminal services.

Secondly, where the port terminal services agreement or the port loading protocols provides that CBH is required to make a decision, the factors that CBH may take into account in making that decision should be specifically set out and should not be able to be capable of being qualified, contradicted or overridden by a general discretion of the kind in clause 3.5.

Thirdly, there is an imbalance between the objective manner in which the Customer is required to make decisions and the subjective manner in which CBH is able to make decisions. The criteria pursuant to which CBH is held to account is vague, opaque and uncertain.

It is not appropriate that CBH's subjective view is the basis of its absolute discretion whether or not to refuse a request to provide services.

### **3. Clause 5.1 Service Availability**

*"(a) Grain Receival Services are provided by CBH under this Agreement for the purpose of export accumulation only and will not be available more than 21 days before the ETA.*

*(b) CBH agrees to make Grain Receival Services available at the Port Terminal Facilities in accordance with the terms and conditions of this Agreement and the Port Terminal Rules.*

*(c) Prior to requesting Grain Receival Services, the Customer must acquire Capacity.*

*(d) If the Customer requires Grain Receival Services, the Customer must submit a Cargo Request Form to CBH no later than 30 days prior to the Nominated Vessel's ETA.*

*(e) At least 22 days prior to the Nominated Vessel's ETA, the Customer must submit a valid Vessel Nomination (in accordance with the Port Terminal Rules)."*

There is no reason why AWEs should be required to demonstrate stock entitlement. There is no prejudice or risk to CBH which is not compensated for by the forfeiture of the booking fee. The AWEs have assumed the risk and associated fees payable to CBH by booking a vessel slot. It is not in the interests of the AWEs to book a slot they do not require or fail to produce the wheat for loading. The AWEs will suffer financial loss if the wheat is not accumulated. CBH should not require the vessel's name until 5 days prior to slot date.

#### **4. Clause 5.2 Before Delivery**

*"(f) Each acceptable sample analysis will permit the Customer to deliver the Grain to the Port".*

The above criteria pursuant to which CBH is held to account is vague, opaque and uncertain.

There is no benchmark against which CBH is required to accept the wheat. It is not appropriate that CBH's subjective view is the basis of its absolute discretion whether or not to refuse a request to provide services.

#### **5. Clause 5.3 During Delivery**

*"(f)(iii) [CBH shall not be required to] warrant or promise that grain in any Stack Segregation meets any grade specification*

*(iv) provide multiple Stack Segregations by grade if, at the relevant time, there is insufficient storage capacity in the relevant Port Terminal Facilities to provide multiple Stack Segregations without:*

*(A) substantially reducing the efficient use of the Port Terminal Facility; or*

*(B) adversely affecting the existing cargo accumulation or loading plans for other users of the Port Terminal Facility."*

CBH should be required to warrant that the grain in all stack segregation is returned to the same quality and quantity as received by CBH (clause 5.3(f)(iii)).

Pursuant to Clause 5.3(f)(iv), CBH is entitled to unilaterally refuse to provide essential services.

It is not appropriate that CBH's subjective view is the basis of its absolute discretion whether or not to refuse a request to provide services. Discretionary or subjective decisions must be kept to the absolute minimum. Decisions should only be made on the basis of objectively ascertainable criteria with full transparency.

#### **6. Clause 5.6 Harvest Mass Management Scheme.**

*"(b) If as part of CBH's HMMS the Customer gives CBH a Forfeiture Approval Authority to forfeit Grain in excess of the Acceptable Vehicle Mass (as that term is defined in the HMMS), CBH is entitled to deduct, in accordance with the HMMS and the Forfeiture Approval Authority, the relevant tonnage from the delivered Grain when calculating the Customer's Grain Entitlement in accordance with clause 6.4. Title to any Grain deducted under this clause vests in CBH and CBH may donate the Grain or the proceeds from its sale to a charity or local government at CBH's discretion."*

Clause 5.6(b) entitles CBH to take title to grain from its owners.

It is inappropriate that CBH is entitled to profit from any breach of legislation or regulation.

If grain is to be forfeited, such requirement must come from the applicable legislative authority. Title should certainly not be vested in a competitor of the AWEs to deal with the wheat as it pleases, including by sale and retention of proceeds.

**7. Clause 6.9 Title to surplus Grain:**

*"Title in any Grain remaining in the CBH system which is surplus to the Customer's Grain Entitlement shall transfer to CBH and CBH shall be entitled to sell or dispose of any surplus Grain as it sees fit and retain any proceeds."*

CBH should not be entitled to retain surplus amounts of grain in its system. That CBH retains surplus grain illustrates the effect of CBH applying the substantial shrinkage and dust rates (see clauses 6.6 and 6.7).

**8. 7.3 Export Outturn Request Form:**

*"On receipt of an Export Outturn Request, CBH will determine its ability to meet the request and advise the Customer if CBH has:*

*(a) accepted the Outturn Request; or*

*(b) rejected the Outturn Request."*

The above is not a robust non-discriminatory access clause.

The above lacks clarity and certainty and provides CBH with the disproportionate discretion to deny AWEs the ability to outturn their own grain from CBH facilities.

If CBH fails to meet an outturn request, CBH must within 24 hours of receiving the request, advise the AWEs in writing why that request was denied.

**9. 7.4 Operational Decision Making**

*"In making any decision to accept or reject the Outturn Request, CBH shall make its determination in accordance with the terms of the Undertaking and in particular having regard to the following:..."*

Again, this clause lacks clarity and certainty and provides CBH with a disproportionate discretion to deny AWEs the ability to outturn their own grain from CBH facilities. In particular, CBH is entitled base its decisions whether to outturn wheat and when, on:

*(a) the "balance conflicts of interests of Customers of the Port Terminal Facilities".*

However, there is no benchmark as to what value or priority each of the conflicting interests are to be given.

*(b) "the application by CBH of objective commercial criteria and practices and policies to promote fair, reasonable and non-discriminatory Operational Decision making"*

The above is vague and meaningless.

*(c) the "giving priority to vessels based on the lead time given between nomination and vessel ETA, and the likely availability of sufficient Grain Entitlement at the Port prior to vessel ETA, the likely uncommitted storage capacity at the Port Terminal Facility and the uncommitted inloading capacity necessary to make a Nominated Vessel's Nominated Tonnage";*

(d) *"taking into account in particular, the objectives of:*

*(i) minimising Demurrage at the Port over a given period; and*

*(ii) maximising throughput of Grain at the Port over a given period;"*

CBH is not privy to vessel demurrage rates, except for those of its trading arm.

Again, the above is vague and meaningless. CBH does not state what it will do as a result of any of the above mentioned elements.

The clause continues to set out events that entitle CBH to exercise complete discretion as to who and when grain is to be outturned. There is no transparency or tangible basis upon which to assess actual compliance. Decisions should be based on objectively ascertainable criteria.

#### **10. 7.10 Right to Invoice Prior to Outturning**

*"If Grain is scheduled to be Outturned into a ship's hold from a Port Terminal Facility, CBH reserves the right to invoice the Customer and receive payment for the Port Outturning Service charges prior to the Grain being Outturned onto a ship."*

AWEs must comply with WEA's stringent accreditation scheme. Among other things, WEA must have regard to the *"financial resources available to the company"* (s.13(1)(c)(i) of the WEM Act). It is unnecessary for BHCs to require AWEs to pay for services up front.

Additionally, CBH has not provided any benchmark against which it will exercise its discretion to require pre-payment, and at what point pre-payment will be required.

#### **11. 7.13 Cleanliness**

*"(b) CBH is not obliged to inspect any vessel for cleanliness but if it does inspect then CBH, acting reasonably at all times, is entitled to reject the vessel as unfit for the transportation of Grain and to refuse to load the vessel."*

It is not appropriate that CBH is able to reject a vessel as being unfit. AMSA and AQIS inspect the vessels and are responsible for determining cleanliness. It is unnecessary for CBH to take on this role if the vessel has already passed the customary surveys. Clause 7.13 might be intended to provide further justification for rejecting or delaying vessels to change the vessel line-up to suit CBH. If it wishes to take on that role, it must be fully reasonable for the consequences.

#### **12. 8 ADDITIONAL INFORMATION AND SERVICES**

*"Service Description: CBH may also provide additional information or services over and above the standard information and services that CBH has agreed to provide under this Agreement..."*

*(c) The decision of CBH whether to provide any additional information or services requested by the Customer will be at CBH's absolute discretion unless it is required to provide such additional information by any law..."*

Despite the AWEs requesting additional information and services, CBH advising the AWEs of the cost and the AWEs agreeing to the cost, CBH

retains the discretion to refuse to provide the information and service. This is not fair and transparent access.

The discretion to refuse to provide the information and service is unfettered. There is no obligation to provide reasons for the refusal.

### **13. PAYMENT**

#### Clause 9.1 Fees and Charges

CBH requires payment on uncommercial terms. For instance, Upfront Marketer Fee and Auction Premium fees are payable within 5 business days of date of the CBH invoice.

It is possible that the AWEs may not have received the invoice at that time, let alone had the opportunity to arrange payment (see comments on clause 9.4 below).

Conversely, where CBH is overpaid pursuant to clause 7.10, it has 30 days to refund those monies.

Clause 9.1 (c) provides:

*"(c) The Customer acknowledges that:*

*(i) the fees set out in Schedule 1 represent the cost to CBH of providing the service to which the fees relate*

*(ii) the charges set out in Schedule 1 are a realistic assessment of the loss and damage that CBH will suffer as a result of a failure by the Customer to comply with their obligations under the Agreement and the Port Terminal Rules."*

AWEs are not able to acknowledge the above. There is no transparency in relation to the cost of providing the service. CBH should be required to publish the charges it proposes to charge for standard and non-standard services. CBH's costs for those charges should be transparent.

### **14. Clause 9.5 Invoicing**

*"(b) CBH will endeavour to issue invoices pertaining to bulk vessel shipments within 14 days of the vessel departure."*

However, pursuant to: Clause 9.6 Payment terms

*"(a) If credit terms are made available by CBH at its discretion, then the Customer must pay the amount set out in any invoice provided by CBH within 14 days of the date of the invoice".*

Read together, a CBH invoice can be due before it is actually sent by CBH. CBH charges interest on late payment at the rate of 5% above the 90 day Bank bill rate offered by the Commonwealth Bank of Australia as at 31st October each year or as otherwise amended (clause 9.8(a)).

Further to the above, CBH should not be entitled to take any prejudicial steps against the AWEs where the invoice is disputed.

### **15. 9.10 Notice**

*"CBH shall provide the Customer with at least sixty (60) days' written notice of any changes to the charges specified in Schedule 1."*

The above does not accord with a proper "publish-negotiate-arbitrate approach".

CBH has not made any allowance for the negotiation of changes to its unilaterally imposed charges.

CBH should not be able to amend prices within the term of the agreement. Alternatively, if CBH is permitted to amend price (or any other term of the agreement), that right should be limited to the same circumstances in which amendment of the proposed Undertaking is permitted (see section 44AAZ(7)).

#### **16. 9.11 Set off**

*"(a) Any amounts owing by CBH or any of its Related Bodies Corporate to the Customer whether under this Agreement or otherwise, may, at the election of CBH, be set off (without prior notice) against any amounts owing by the Customer to CBH or any of its Related Bodies Corporate, whether under this Agreement or otherwise."*

It is not appropriate the CBH is entitled to set-off any amounts owing by it or any of its related bodies corporate to the AWEs whether under this or other agreements, at CBH's sole discretion. It is neither necessary nor appropriate that a "set off" clause be contained in the minimum terms and conditions in an access agreement. It is open to CBH to negotiate a clause of this kind with access seekers.

Further, it is unacceptable that the right is unilateral. Clause 9.11(d) expressly prohibits the AWEs from enjoying the same right.

However, if CBH had a ring-fencing policy in place, it is unclear how it and its related bodies corporate would be aware of the various transactions that provide for the set-off opportunity.

#### **17. 9.12 Security**

*"The Customer shall provide such security to CBH as CBH reasonably requires (including the execution of personal guarantees by the Customer's signatories to this Agreement, directors, shareholders or beneficiaries of the Customer)."*

AGEA refers to its comments in relation to clause 7.10 above. An AWE must comply with WEA's stringent accreditation scheme, which includes having regard to the "financial resources available to the company" (s.13(1)(c)(i) of the WEM Act). It is unacceptable that CBH can unilaterally and without reference to any benchmarks, require any such security, especially from shareholders of an accredited wheat exporter.

#### **18. 10.1 Statutory Lien**

*"CBH has, in priority to all other claims, liens or security, a lien over any Grain received by it, in respect of any fees and charges payable to CBH in respect of that Grain."*

CBH is granting itself a right to lien over wheat for invoices that are due but may have even left CBH's office, let alone been received by the AWEs or for there to have been an opportunity for the applicable accounts department to make payment.



## 19. Clause 13 CBH Liability

Liability terms and limits must reflect commercial reality and contain realistic limits on liability. Given the volume of stock BHCs handle, BHCs should not be able to exclude or limit liability. Requiring BHCs to be responsible for loss or damage caused would improve efficiency.

CBH seeks to cap its liability to \$100,000 for any single event and limited to a maximum in aggregate of \$250,000 for the term of this agreement (clause 13.2), including where cause by negligence of CBH's breach of agreement.

CBH excludes delay claims (clause 13.5).

CBH excludes consequential loss claims (clause 13.8).

## 20. 17.1 Access Procedure

*"(b) CBH may, in its absolute discretion, refuse or reject any visitation request or propose alternative times and/or places for the visit."*

As noted in paragraph 1.10 above, it is a common term under international sales contracts for both buyers and sellers to be entitled to have a representative present during the loading of the vessel. Certain markets require this, if the weight and quality is to be final at loadport.

## 21. 18 CONFIDENTIALITY

Clause 18 permits information to be disclosed to the extent necessary for the provision of advice from legal advisers, financiers, accountants or other consultants. The only situation where disclosure of confidential information should be permitted is where such disclosure is required by law. Despite this, there is no obligation on third parties to also maintain confidentiality. The obligation on the third parties only extends to where they have a "*legal obligation not to disclose*". To be effective, the contractual obligation must be extended to cover the third parties. Further there is no requirement for the BHCs to indemnify for any loss and damage suffered a AWE as a result of the confidentiality obligation being breached. There should also be an obligation upon the BHCs to notify the relevant AWE of any event that has or could likely result in a breach of the confidentiality obligation. This would be along the same lines as the notification obligation under section 17 of WEA Act.

## 22. 19 DISPUTE RESOLUTION

CBH's dispute resolution clause is unduly complex and unwieldy.<sup>363</sup>

In relation to liability clauses generally, AGEA submits that bulk handlers should not be allowed to cap their liability, exclude consequential loss claims or exclude liability unless caused by negligence (gross or otherwise) or wilful default.<sup>364</sup>

AGEA also submits that liability terms and limits must reflect commercial reality and contain realistic limits on liability. AGEA submits that, given the volume of stock bulk handlers deal with, they should not be able to exclude or limit liability. Further,

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<sup>363</sup> Australian Grain Exporters Association, *Submission in relation to the ACCC's Draft Decision*, 3 September 2009, Schedule 6.

<sup>364</sup> Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 12.2.

AGEA submits that requiring bulk handlers to be responsible for loss or damage caused would improve efficiency.<sup>365</sup>

In relation to the issue of bulk handler liability under an indicative access agreement, AGEA submits that:

“Bulk handlers should provide fair compensation if they fail to provide the services that they are paid to provide. The terms and conditions of most bulk handlers who control port facilities cap their liability to access seekers at extraordinarily low levels. The grain cargoes involved in bulk shipments are worth large sums of money and if bulk handlers fail to properly provide port-related services, they can cause exporters to suffer losses well above these caps.

For example, if a bulk handler negligently fails to load uncontaminated cargo within an allocated shipment time, a wheat exporter is exposed to potentially enormous losses including costs such as replacing a contaminated cargo and paying for sea freight to transport the replacement cargo to an export customer. Wheat exporters have to pay all these costs even if they arise solely due to bulk handler negligence. These liability caps should be removed so that bulk handlers are fully accountable if they fail to provide services.”<sup>366</sup>

#### **9.5.2.4 Variation of an indicative access agreement**

AGEA submits that the bulk handlers’ approach to variation of the standard terms is not appropriate. AGEA submits that the ability for the bulk handlers to unilaterally change the indicative access agreement would result in a lack of certainty and clarity for potential access seekers and undermine the benefits of inclusion of the indicative access agreement in the undertaking. AGEA notes that the undertakings are for a short period and submits that any variation of the indicative access agreement (and the Port Terminal Rules, which should both form part of the proposed Undertakings) should be in accordance with the process under section 44ZZA(7) of the TPA. AGEA submits that the same should apply in relation to bulk handlers’ published prices.<sup>367</sup>

In relation to unilateral variations to prices under an indicative access agreement, AGEA submits:

“Bulk handling fee structures are also convoluted and contain elements that are subject to change without notice. If fee structures cannot be relied on because the bulk handler changes them without notice after exporters price their wheat export program, this causes wheat exporters to incur costs which cannot be recovered from customers. The lack of available alternative port facilities, combined with bulk handlers’ refusal to negotiate, mean that exporters have little choice but to pay these increased fees. Noting that these contracts are only 12 months in duration, bulk handlers should be required to negotiate reasonable terms and conditions with grain marketers, then stick to them during the contract period. This would allow marketers to price their grain sales with certainty about bulk handlers’ costs and level of service,

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<sup>365</sup> Australian Grain Exporters Association, *Submission in relation to proposed access undertakings* 29 May 2009, Schedule 1, para I2.

<sup>366</sup> Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 18 May 2009, pp. 2-3.

<sup>367</sup> Australian Grain Exporters Association, *Submission in relation to Draft Decisions on Port Terminal Services Access Undertakings*, 3 September 2009, para 9.5-9.9.

without the risk that they will be exposed to unexpected financial losses or denial of port facilities, thereby reducing their competitiveness.”<sup>368</sup>

### 9.5.3 New South Wales Farmers’ Association

In relation to the issue of bulk handler liability under an indicative access agreement, the NSW Farmers’ Association submits that:

“Another example of substantial market power relates to the storage and handling terms and conditions of a port operator which limits their liability in relation to a claim, which is recognised by ‘the bulk handler’ to be valid and ‘the bulk handler’ agrees to compensate the Client or, in other event, where ‘the bulk handler’ is liable to compensate or indemnify the Client, then ‘the bulk handler’s’ maximum liability in respect of a claim shall not exceed \$500,000 for grain out loaded onto any shipping vessel, and \$10,000 for grain out loaded onto rail or road truck on any one day for a site. In the situation where a ship haul can be worth in excess of \$25 million and the entire value of its contents can be placed in jeopardy if the ship fails to leave the port, it would seem to the Association that ‘the bulk handler’s’ liability is unusually conservative.”<sup>369</sup>

In relation to specific provisions of the standard terms of an indicative access agreement, the NSW Farmers’ Association submits that:

“There are concerns that many of the fees and charges set by bulk handlers who are port operators, at their port facilities are not a fair representation of the usual commercial rates. For example interest on overdue accounts is outlined as follows in ‘the bulk handler’s’ Storage and Handling Agreement Clause 3.9. *“the interest rate applicable under this Clause 3.9 is the rate which is 6% above the bank bill buying rate for bills with a tender of 90 days quoted from time to time by National Australia Bank.”* The Association understands that in most industries the commercially accepted rate is 2% above the 90 day bank bill. The Association feels that many of the fees set by the port operators and for that matter the upcountry grain storage and handling facilitators (as they often represent an extension of the port facilities business model), are not representative of a truly competitive market place nor is the environment conducive to the introduction of competition. For competitor to survive it would seem necessary to closely monitor the fees set by port operators until such time as adequate competition is available to regulate this situation in the market place. Furthermore policy makers should give serious consideration toward how the industry is to achieve improved competition within regional areas of the nation in particular within the natural geographic and infrastructure created monopolies surrounding ports and port zones.”<sup>370</sup>

### 9.5.4 PGA

#### 9.5.4.1 Inclusion of an indicative access agreement in the Undertaking

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<sup>368</sup> Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 18 May 2009, p. 4.

<sup>369</sup> NSW Farmers Association, *Submission in relation to proposed access undertakings*, June 2009, p. 4.

<sup>370</sup> NSW Farmers Association, *Submission in relation to proposed access undertakings*, June 2009, p. 4.

The PGA submits that the non-inclusion of an indicative access agreement in the Undertaking would result in a lack of certainty and clarity for potential access seekers and is, therefore, not appropriate under section 44ZZA(3) of the TPA.<sup>371</sup>

#### **9.5.4.2 Standard terms that should be included in the indicative access agreement**

The PGA submits that indicative access agreements are necessary to enable growers and exporters to effectively negotiate with CBH.<sup>372</sup> However, the PGA also submits that it does not consider that the standard terms proposed by CBH form an appropriate indicative access agreement (in their current form), mainly due to a lack of certainty and clarity provided for potential access seekers.<sup>373</sup>

The PGA further submits that CBH's April Undertaking does not contain the necessary minimum terms and conditions in relation to the provision of access to all port terminal services, and that the standard terms should include:

- (a) the prices for the services;
- (b) a clearly specified list of all services received for that price, including upstream and downstream;
- (c) clearly specified circumstances in which higher charges (e.g., overtime) may apply, and CBH providing documentary proof that overtime charges were incurred and why they were necessary;
- (d) limited opportunity to vary price and non-price terms, Pricing should be based on the cost of CBH in providing the service, plus a reasonable commercial margin;
- (e) an effective right for growers to recover their loss and damage against CBH if CBH breaches the terms and conditions of the port terminal services;<sup>374</sup>

#### **9.5.4.3 Limitations on Bulk Handler Liability**

In relation to the issue of bulk handler liability under an indicative access agreement, the PGA submits that:

'...CBH solely deals with large volumes of stock and require advance notice and payment for storage and handling services, yet they take on no responsibility, exclude liability for loss caused by their conduct and do not provide any transparency on performance.

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<sup>371</sup> Pastoralists and Graziers Association, *Submission in relation to Draft Decision on CBH Access Undertaking*, 3 September 2009, para 4.1.

<sup>372</sup> Pastoralists and Graziers Association, *Submission in relation to Draft Decision on CBH Access Undertaking*, 3 September 2009, para 4.3.

<sup>373</sup> Pastoralists and Graziers Association, *Submission in relation to Draft Decision on CBH Access Undertaking*, 3 September 2009, para 9.3.

<sup>374</sup> Pastoralists and Graziers Association, *Submission in relation to proposed CBH access undertaking*, 29 May 2009, para 4.40; and *Submission in relation to Draft Decision on CBH Access Undertaking*, 3 September 2009, para 4.2.

CBH has no incentive to manage the services efficiently. CBH transfers the risk and cost on to growers by imposing unfair terms, charging prices that are unrelated to the cost of providing the service and by refusing access to services unless growers agree to their terms and conditions.<sup>375</sup>

#### **9.5.4.4 Variations to the standard terms of an indicative access agreement**

In relation to the ability for CBH to vary the standard terms contained in an indicative access agreement, the PGA submits that the CBH approach to variation of the standard terms is not appropriate, as the ability for CBH to unilaterally change the indicative access agreement may result in a lack of certainty and clarity for potential access seekers.<sup>376</sup>

In relation to the ability for CBH to vary the standard terms the PGA also submits that:

“Users need to know the terms and conditions on which the services will be provided to assess the reliability of the service; plan, budget and generally compete in the market. Growers and exporters need to be able to make long term decisions and require certainty in their contracts in order to do so.”<sup>377</sup>

#### **9.5.5 Glencore Grain Pty Ltd**

##### **9.5.5.1 Specific comments on the standard terms of the August Indicative Access Agreement**

In relation to the standard terms to be included in an indicative access agreement, Glencore submits the following comments in relation to specific provisions of CBH’s August Indicative Access Agreement:<sup>378</sup>

- 5.1 Cl 5.5(i): as the Customer may not always be the owner, this clause should be deleted or modified.
- 5.2 Cl.5.5(v): the term “crop year” covering 1 October to 30 September is requested – the more limited period presently in the clauses is impractical.
- 5.3 HMMS is objected to as it gives CBH or its beneficiaries a windfall if a truck is overloaded. Instead it is requested that the clause provide that overloaded trucks will be reported to police – this is the practice in some other countries.
- 5.4 The calculation of Grain Entitlement under cl 6.4 allows a deduction for shrinkage and five other matters whereas Bulk Handling Regulation

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<sup>375</sup> Pastoralists and Graziers Association, *Submission in relation to proposed CBH access undertaking*, 29 May 2009, para 4.11-4.12.

<sup>376</sup> Pastoralists and Graziers Association, *Submission in relation to Draft Decision on CBH Access Undertaking*, 3 September 2009, para 4.4.

<sup>377</sup> Pastoralists and Graziers Association, *Submission in relation to Draft Decision on CBH Access Undertaking*, 3 September 2009, para 4.5.

<sup>378</sup> Glencore Grain, *Letter to CBH in relation to Draft Decision on CBH Access Undertaking – Indicative Access Agreement and Port Terminal Rules*, 3 September 2009, para 5.1-5.7.

allows only a deduction for shrinkage and under s 41 of the Bulk Handling Act the other matters would have to be disregarded.

- 5.5 Cl 7.1(a): “export accumulation only” is superfluous. The clause does not appear to add anything and should be deleted.
- 5.6 Cl 7.4: in the case of a successful bidder at auction an Outturn Request with the appropriate laycan should be automatically accepted, otherwise the auction result is undermined. In other cases the complex array of considerations on whether to accept an Outturn Request goes much further than the qualifications to the entitlement to use bulk handling facilities at a port under s 19 of the Bulk Handling Act, namely meeting prescribed charges, the charter being in place, prescribed particulars and 14 day notice. The clause should be cut back to be consistent with the statutory provisions.
- 5.7 Cl 10.1: CBH’s lien for all of its charges, entitled “statutory lien”, contrasts with s 35(1) of the Bulk Handling Act which gives CBH only a lien for charges under the Act. The clause is misleading and should be deleted or made consistent with s 35(1).

## **9.6 ACCC’s views on the April Undertaking**

### **9.6.1 Necessary for undertaking to include an indicative access agreement**

The ACCC considers that the approach taken by CBH in its April Undertaking of not including an indicative access agreement results in a lack of certainty and clarity for potential access seekers and is, therefore, not appropriate having regard to the matters set out in section 44ZZA(3) of the TPA.

Indicative access agreements are a common inclusion in access undertakings.<sup>379</sup> They assist access seekers (through the negotiation and arbitration framework discussed in the Publish, Negotiate, Arbitrate chapter of this decision) to conclude a set of agreed access terms and conditions with the access provider. These terms and conditions are then embodied in a contractual relationship between the access provider and an access seeker (i.e. an Access Agreement).

Including an indicative access agreement in an undertaking would provide a clear starting point for negotiations and is therefore crucial to ensure access seekers can effectively negotiate with CBH. Another key benefit of inclusion of the indicative access agreement is to ensure that the costs of negotiation and/or arbitration are not excessive.

The ACCC notes that CBH would be required to offer the indicative access agreement to access seekers of CBH’s port terminal services on the basis of the standard terms provided under that agreement. For the avoidance of doubt, however, it is important to note that inclusion of an indicative access agreement in an undertaking does *not* mean that access seekers and CBH are precluded from negotiating around the indicative access agreement. There is nothing to stop CBH agreeing to different terms and

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<sup>379</sup> See, for example, the access undertaking submitted by the Australian Rail Track Corporation (ARTC), and accepted by the ACCC on 30 July 2008.

conditions with access seekers, either by commercial agreement or via the negotiation / arbitration framework in the Undertaking. Nevertheless, an indicative access agreement serves the function of operating as a 'minimum offer' by the access provider.

### **9.6.2 Revisions required to August Indicative Access Agreement**

The ACCC does not consider that the August Indicative Access Agreement would form an appropriate basis for an indicative access agreement as it is currently drafted.

The ACCC considers that CBH's August Indicative Access Agreement includes an appropriate dispute resolution process that balances the legitimate business interests of CBH with the interests of access seekers.

However, the ACCC also considers that, in order to be acceptable to the ACCC, improvements would need to be made to ensure that:

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

CBH's dispute resolution process and the two areas requiring improvement above are discussed in detail below.

The ACCC notes submissions from a number of interested parties raising concerns about whether a number of the terms of the indicative access agreement are acceptable, based on the commercial considerations and circumstances of those interested parties. The ACCC notes however, that the standard terms provided under the 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 terms that vary from any of those standard 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 August Indicative Access Agreement would be acceptable to particular parties (given likely differences between the commercial considerations and circumstances of specific access seekers).

### **9.6.2.1 Dispute Resolution**

A key feature of an effective indicative access agreement is a robust dispute resolution process. The ACCC is concerned with ensuring fair and transparent access to port terminal services and that includes ensuring that the dispute resolution process fairly balances the legitimate business interests of CBH with the interests of access seekers.

The dispute resolution process provided under clause 19 of CBH's August Indicative Access Agreement is set out below:

## **19 DISPUTE RESOLUTION**

### **19.1 Disputes**

(a) Save for any dispute arising:

(i) under the Auction Rules which shall be dealt with in accordance with the provisions of the Auction Rules; and

(ii) under the Ring Fencing Rules which shall be dealt with in accordance with the provisions of the Ring Fencing Rules, all disputes arising out of or in connection with this Agreement or the Port Terminal Rules shall be dealt with in accordance with the provisions of this clause 19.

(b) A dispute shall be referred to the Customer's Manager and the CBH Operations Manager - Logistics for resolution. The CBH Operations Manager - Logistics and the Customer's Manager shall meet or confer at least once within 24 hours of the notification of the dispute to discuss the dispute and attempt to resolve the dispute.

(c) Where the dispute relates to invoiced Services, the Customer is to inform the CBH Operations Manager - Logistics immediately, and before the due date of that invoice.

(d) Any dispute relating to a breach of the terms and conditions of this Access Agreement shall not, of itself, amount to a dispute relating to a breach of the Undertaking or the rules forming part of the Undertaking,

### **19.2 Escalation of Dispute – Executive Panel**

If no resolution of the dispute can be reached in accordance with clause 19.1, within seven (7) days of the dispute being notified to the other party, each party shall refer the dispute to the General Manager - Operations of CBH and the CEO of the Customer (or such person designated by the Customer as having authority equivalent to that of a CEO) (the "Executive Panel"). The Executive Panel:

(a) will meet at least once at a time mutually convenient no later than 2 Business Days after the dispute has been referred to it; and

(b) may decide on the methods and procedure by which it will resolve the dispute, which may include the obtaining of expert advice.

### **19.3 Payment of invoices pending resolution of a dispute**

Notwithstanding anything in this Agreement, the Customer is not entitled to withhold payment of the undisputed amount of any invoice. If the Customer



cannot provide a reasonable estimate of the disputed amount the Customer will not be entitled to withhold any payment.

#### **19.4 Arbitration**

##### **(a) Referral to arbitration**

(i) If the Dispute is not resolved within ten Business Days after being referred to the Executive Panel under clause 19.2, either of the parties may give notice to the other party to refer the Dispute to Arbitration in Western Australia by a single arbitrator appointed by agreement of the parties or if they fail to agree within ten Business Days, an arbitrator appointed by the President of the Western Australian Chapter of the Institute of Arbitrators and Mediators of Australia (IAMA) acting on the request of either party.

(ii) CBH must notify the ACCC of the details of any Dispute which has been referred to arbitration. CBH must provide the arbitrator's final determination to the ACCC.

(iii) If the Customer serves notice under clause 19.4(a)(i), that notice will also include an agreement by that Customer to:

A) pay any amounts determined in accordance with clause 19.4 (f); and

B) indemnify the arbitrator from any claims made against the arbitrator arising in connection with the performance by the arbitrator of its duties under this clause 19, such indemnity excluding circumstances where the conduct of the arbitrator constitutes wilful negligence, or is dishonest or unlawful conduct.

(iv) CBH must pay any amounts determined in accordance with clause 19.4 (f) and will indemnify the arbitrator from any claims made against the arbitrator arising in connection with the performance by the arbitrator of its duties under this clause 19, such indemnity excluding circumstances where the conduct of the arbitrator constitutes wilful negligence, or is dishonest or unlawful conduct.

(v) The arbitrator will not proceed with the arbitration unless and until the Customer has agreed to pay the arbitrator's costs as determined under clause 19.4(f).

##### **(b) Arbitration procedure**

(i) Unless CBH and the Customer agree otherwise, the arbitration must be conducted in private.

(ii) A party may appoint a person, including a legally qualified person, to represent it or assist it in the arbitration.

(iii) The arbitrator will when conducting the arbitration:

A) observe the rules of natural justice but is not required to observe the rules of evidence;

B) proceed as quickly as is possible and consistent with a fair and proper assessment of the matter;

C) while having the right to decide on the form of presentations, encourage a written presentation by each party with exchange and with rebuttal opportunities and questioning by the arbitrator;

D) call on any party the arbitrator believes necessary to give evidence;

E) decide how to receive evidence and consider the need to keep evidence confidential and the need to protect the confidentiality of the arbitration process;

F) present its determination in a draft form to the parties and hear argument from the parties before making a final determination; and

G) hand down a final determination in writing which includes all its reasons for making the determination and findings on material questions of law and fact, including references to evidence on which the findings of fact were based.

(iv) The arbitrator may at any time terminate arbitration (without making an award) if it thinks that:

A) the notification of the Dispute is vexatious;

B) the subject matter of the Dispute is trivial, misconceived or lacking in substance; or

C) the party who notified the Dispute has not engaged in negotiations in good faith.

(c) Matters which arbitrator must take into account

In deciding a Dispute the arbitrator will take into account the principles, methodologies and provisions set out in the Undertaking, in particular clauses 6.4 and 6.5;

(d) Confidentiality

(i) The arbitrator must take all reasonable steps to protect the confidentiality of information that a party has identified is confidential or commercially sensitive.

(ii) The arbitrator may require the parties to comply with rules and orders aimed at protecting the confidentiality of information provided by the parties, including:

A) requiring each party to give confidentiality undertakings to the other party and their external advisers; and

B) limiting access to confidential information to specified individuals subject to confidentiality undertakings provided by those individuals.

(iii) The arbitrator may make confidential and non-confidential versions of its determination and limit access to the confidential versions to specific individuals.

(iv) For the purpose of clarity, the entire dispute resolution process outlined in this clause 19 remains subject to clause 18.

(e) Effect of arbitrator's determination

(i) The determination of the arbitrator will be final and binding subject to any rights of review by a court of law.

(ii) Except where the determination or direction is subject to a review by a court of law, if a Customer does not comply with a determination or direction of the arbitrator, then CBH will no longer be obliged to provide services under this Agreement for that Customer.

(iii) Except where the determination or direction is subject to a review by a court of law, CBH will comply with the lawful directions or determinations of the arbitrator.

(f) Arbitrator's costs

The arbitrator's costs and the costs of the parties to the arbitration will be borne by the parties in such proportions as the arbitrator determines. Each party may make submissions to the arbitrator on the issue of costs at any time prior to that determination.

The ACCC considers that the dispute resolution provisions at clause 19 of CBH's August Indicative Access Agreement (set out above) are appropriate for inclusion in the Undertaking. This is because the relevant processes and timeframes that must be followed for the resolution of disputes have been drafted with a sufficient level of clarity and detail.

#### **9.6.2.2 Unilateral variation of terms of an executed indicative access agreement**

The ACCC is of the view that CBH's approach to the variation of agreed non-price related terms under an executed access agreement is appropriate. This is because, under the August Indicative Access Agreement, variations to agreed non-price related terms are only allowed to occur with the written agreement of both parties to that agreement under clause 20(b), which states that "[t]his Agreement may only be amended or varied by Agreement in writing signed by both parties expressly amending this Agreement and unless the context otherwise requires, a reference to this Agreement shall include a reference to this Agreement as amended or varied from time to time."<sup>380</sup>

In relation to variation of price terms under the August Indicative Access Agreement, it is unclear whether it is envisaged that prices could be unilaterally varied by CBH under an executed indicative access agreement. In this regard, the ACCC notes that clause 9.10 of the August Indicative Access Agreement provides that "CBH shall provide the Customer with at least sixty (60) days' written notice of any changes to the charges specified in Schedule 1."<sup>381</sup> However, CBH's August Indicative Access Agreement does not appear to include a specific provision that expressly provides CBH with an ability to actually vary its prices. The ACCC also notes that Schedule 1 was blank as at the time of consultation on the August Indicative Access Agreement.

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<sup>380</sup> Clause 20(b) of CBH's August Indicative Access Agreement.

<sup>381</sup> Clause 9.10 of CBH's August Indicative Access Agreement.

Regardless of the intention of the August Indicative Access Agreement, the ACCC notes that it would not be appropriate for CBH to have an unrestricted ability to unilaterally vary either the agreed price or non-price related terms under an executed access agreement (which may include agreed standard terms or non-standard terms), since this would result in a lack of certainty and clarity for access seekers with such an executed access agreement in place.

The ACCC considers that the ability to vary the agreed price and non-price terms under an executed access agreement should only be permitted in the following circumstances:

- for non-price related agreed terms, variations should only be permitted to occur with the written agreement of all relevant parties to the executed access agreement; and
- for price related agreed terms, variations should only be permitted to occur with the written agreement of all relevant parties to the executed access agreement, or by CBH (on a unilateral basis) under a limited range of clearly defined circumstances (e.g. where there is a new law, or change to an existing law, which results in an increase in the cost to CBH of providing a particular port terminal service).

The ACCC notes that it would be more appropriate for any unilateral price rises under the second scenario set out be subject to the negotiation and arbitration provisions in the undertaking in the event that an access seeker did not accept CBH's decision to vary prices.

### **9.6.2.3 Certainty and clarity**

The ACCC is concerned that a number of the clauses in CBH's August Indicative Access Agreement do not provide for sufficient certainty and clarity in its terms, effect and operation. It is important that the indicative access agreement is sufficiently clear and certain given that the intention of the indicative access agreement is to provide a clear starting point for negotiations between an access seeker and CBH (and clarity is therefore critical to ensuring access seekers can effectively negotiate with CBH) and ensure that the costs of negotiation and/or arbitration are not excessive.

In particular, the ACCC considers that:

- in relation to clause 3.5(c), which states that:

CBH's refusal to accept a request for Service will not be a breach of the Agreement for making a decision which in its reasonable opinion is in the best interests of the overall performance of the Port Terminal Facility and the Bulk Wheat export market as a whole.

It is not appropriate for CBH to have the broad discretion to refuse to supply access seekers with port terminal services based on the subjective decision criteria set out in this provision. The ACCC considers it more appropriate for this

provision to be removed or redrafted to provide a more objective basis for the exercise of such discretion.

- in relation to clause 5.3(b), which states that:

The grade, variety and other characteristics of the Grain delivered are to be declared in writing by the Customer by no later than the time of delivery and CBH takes no responsibility for the accuracy, completeness or veracity of the information relating to the Grain declared by the Customer. If the load is found to be contaminated or showing signs of insect infestation or activity for any reason the load will be rejected.

It is not appropriate for CBH to have the discretion to reject deliveries that it has found to be contaminated or showing signs of insect infestation or activity “*for any reason*”. This confers an unreasonably wide discretion on CBH to refuse access, and the ACCC considers it more appropriate for the exercise of this discretion to be expressed so as to not exclude circumstances where the contamination or infestation occurred as a result of any act or omission of CBH, and to provide an obligation on CBH to notify the access seeker upon making a decision to reject.

- in relation to clause 5.3(c), which states that:

If a load is found to be contaminated the Customer will not be permitted to deliver to CBH Port Terminal Facilities until the Customer has provided CBH with evidence in the form of independent expert verification that there is no further risk of contamination. If the Contaminant is manageable and capable of being removed by treatment prior to delivery then the Customer must produce a new sample for testing prior to delivery.

It is not appropriate that this clause does not clearly specify whether the prohibition on delivery by an access seeker relates only to the delivery load that is found to be contaminated, or to all subsequent deliveries from that access seeker. It is also not appropriate that there is no clear process under which the access seeker is able to provide independent verification that there is no further risk of contamination. The ACCC considers it would be more appropriate for this provision to be more clearly drafted to avoid uncertainty.

- in relation to clause 6.5(b), which states that:

Fumigation services will be carried out by CBH on all wheat where required in its Port Terminal Facility to protect the Grain. The application of fumigation services will limit availability of the Grain in accordance with standard CBH Grain protection practices. CBH will consult with the Customer as to the type of fumigant to be used. The Customer must nominate a representative who is available on a 24/7 basis to confirm available fumigation options. If CBH using reasonable endeavours is unable to obtain confirmation from the representative, CBH will determine the type of fumigant to be used. The Customer will be responsible for all fumigation costs incurred pursuant to this clause 6.5(b).

It is not appropriate that the fees relating to mandatory fumigation services conducted by CBH on the access seeker’s behalf are not clearly specified. The

ACCC considers it would be more appropriate if the relevant fees for these mandatory services were specified.

- in relation to clause 6.5(d)(ii), which states that:

6.5 Grain Fumigation

(d) Where Grain has been fumigated at the Port Terminal Facility by CBH:...

(ii) CBH shall provide a Fumigation Certificate detailing any Grain treatment information following a written request from the Customer.

It is not appropriate that there is no defined timeframe in relation to the obligation on CBH to provide access seekers with fumigation certificates. The ACCC considers it would be more appropriate for a clear timeframe to be provided for the provision of such fumigation certificates.

- in relation to clause 6.8(b)(ii), which states that:

6.8 Additional Grain Storage Charges

CBH will invoice the Customer for Additional Storage Charges at the rate specified in Schedule 1 if:...

(b) Three days have passed since the ETA in the original Vessel Nomination and the Customer's vessel has not commenced loading as a result of...

(ii) quality issues with the Customer's Grain Entitlement.

References to "*quality issues*" are not appropriate. The ACCC considers it more appropriate for further clarification or specific listed examples as to what any such "quality issues" are likely to consist of to be included in the provision.

- in relation to clause 7.10(b), which states that:

7.10 Right to Invoice Prior to Outturning

If Grain is scheduled to be Outturned into a ship's hold from a Port Terminal Facility, CBH reserves the right to invoice the Customer and receive payment for the Port Outturning Service charges prior to the Grain being Outturned onto a ship. Where there are variations in respect of the amount of Grain actually Outturned and the costs incurred in Outturning, CBH and the Customer agree that:...

(b) CBH is entitled to invoice the Customer for any additional Grain Outturned plus costs incurred by CBH as a direct result of the actions of the Customer or the Customer's agent.

It is not appropriate that the additional out-turning services imposed by CBH are not specified, and that the "*costs incurred by CBH*", and for which access seekers will be liable, are not clearly defined. The ACCC considers it more appropriate for the fees for additional services to be specified and for clear examples to be included of the types of "*costs incurred by CBH*" likely to be encompassed and invoiced to customers.

- in relation to clause 9.1(c)(i), which states that:

9.1 Fees and Charges...

(c) The Customer acknowledges that:

(i) the fees set out in Schedule 1 represent the cost to CBH of providing the service to which the fees relate...

It is not appropriate that CBH requires access seekers to acknowledge that “*the fees set out in Schedule 1 represent the cost to CBH of providing the services to which the fees relate*”, since customers are not likely to know CBH’s cost base for the supply of port terminal services, and the fees charged by CBH are likely to comprise a profit margin component. The ACCC considers it would be more appropriate for this provision to be removed altogether.

- in relation to clause 13.5(a), which states that:

13.5 Limitation of Loss or Damage for delay

In the event of:

(a) delays incurred in CBH Outturning the Grain...

...and such delay causes any shortfall in Grain Entitlement, then CBH’s liability will only extend to the remedies provided in clause 13.1(b). CBH will not be liable for any other Loss or Damage caused by such delay.

It is not appropriate for CBH to exclude its liability for “*delays incurred in CBH outturning the Bulk Wheat*”. The ACCC considers it more appropriate for this exclusion to CBH liability to be expressed to exclude circumstances where the delay occurred as a result of any act or omission of CBH.

### **9.6.3 Variation of the indicative access agreement**

CBH’s approach in its April Undertaking of retaining discretion to unilaterally vary its “standard terms” (i.e. the price and non-price related terms which are intended to be included in CBH’s indicative access agreement) is not appropriate. It results in a lack of certainty and clarity for potential access seekers and undermines the benefits of inclusion of an indicative access agreement in the undertaking.

As set out in the ACCC’s Further Draft Decision, it would likely be more appropriate for the variation provisions in section 44ZZA(7) of the TPA to apply to any variations of the indicative access agreement. This does not preclude parties from negotiating non-standard terms that vary from those in the indicative access agreement.

The ability for CBH to unilaterally change the indicative access agreement (even with the requirement for changes to adhere to clauses 6.4 and 2) would result in a lack of certainty and clarity for potential access seekers and undermine the benefits of inclusion of the indicative access agreement in the undertaking.

In response to CBH's arguments regarding the possible creation of regulatory difficulty if any breach of contract were enforceable as a breach of the Undertaking the ACCC notes that the legal nature and status of the access undertaking and an executed access agreement are different. The access undertaking is Court enforceable under the Trade Practices Act, whereas an executed access agreement is enforceable by the parties under contract law.

The ACCC also understands that, in relation to the standard terms of access, there is not as great a need for flexibility as is the case in relation to the port terminal rules (see the Capacity Management chapter). Further, the ACCC notes that the parties are able to negotiate non-standard terms that vary from those in the indicative access agreement.

For these reasons, and given the short term of the Undertaking, the ACCC considers that it would be more appropriate for any variation of the indicative access agreement to take place in accordance with the process under section 44ZZA(7) of the TPA.

#### **9.6.4 CBH's September Undertaking**

The Indicative Access Agreement and associated clauses in CBH's September Undertaking (Schedule 2 and clauses 6 and 7) are set out at Annexure A.

#### **9.6.5 ACCC's views on CBH's September Undertaking**

The ACCC considers that the Indicative Access Agreement and associated clauses in CBH's September Undertaking have addressed the ACCC's concerns with the clauses relating to the August Indicative Access Agreement and associated clauses in the April Undertaking set out in the ACCC's Further Draft Decision.

Therefore, the ACCC considers that the Indicative Access Agreement and associated clauses in CBH's September Undertaking are appropriate.



# 10 Non-discrimination

## Summary

It is appropriate that CBH's September Undertaking includes non-discrimination and no hindering access clauses.

The particular non-discrimination and no-hindering access clauses in CBH's September Undertaking are appropriate given that they address the ACCC's concerns about the non-discrimination and no-hindering access clauses proposed by CBH in its April Undertaking. These concerns were that the non-discrimination and no hindering access clauses proposed by CBH were not appropriate given the lack of clarity about their interpretation. Further, the drafting of the non-discrimination and no hindering access clauses did not ensure that they would protect against CBH discriminating in favour of its own trading business.

The ACCC, in its Further Draft Decision, made recommendations about changes that could be made to the non-discrimination and no hindering access clauses to make them sufficiently robust to protect against anti-competitive self-preferential treatment by CBH. For the avoidance of doubt, the ACCC notes that the non-discrimination clause should protect against (amongst other matters) the ability of CBH to anti-competitively discriminate between wheat exporters on the basis of where grain was stored (i.e. whether it was stored in CBH's up-country storage and handling network, a third party storage network or on-farm).

The ACCC notes that CBH has adopted these recommendations in its September Undertaking.

Further, in order for the ACCC to be able to monitor compliance with the non-discrimination clause, it is appropriate that CBH's September Undertaking allows the ACCC to request an audit be undertaken to assess compliance with the non-discrimination clause (but no more than twice in every twelve months).

## 10.1 CBH's April Undertaking

The following are CBH's non-discrimination provisions within its April Undertaking:

### 6.4 Non-discriminatory access

- (a) Subject to clause 6.5:
  - (i) if an Applicant requests a Port Terminal Service, the Port Operator must offer the Port Terminal Service on the Standard Terms and at the Reference Prices applicable from time to time to that Port Terminal Service in accordance with **clause 7**;
  - (ii) the Port Operator must not provide access to the Port Terminal Service Applicants or Users (including its own Trading Division) on terms and conditions which are different from:

- (A) in the case of Port Terminal Services, the Reference Prices or Standard Terms; or
- (B) in all cases, the price and non-price terms offered to another Applicant or User,

unless those different terms are:

- (C) consistent with the objectives of this Undertaking set out in **clause 2**; and
- (D) commercially justifiable taking into account the matters set out in **clause 6.5**; and
- (E) offered on an arms length commercial basis.<sup>382</sup>

The non-discriminatory access clause set out above is expressed to be subject to the price and non-price terms provisions outlined in clause 6.5 of CBH's April Undertaking. Clause 6.5 sets out the basis upon which the price and non-price terms for the provision of access to Port Terminal Services might differ between different access seekers. The following is the list of matters CBH will have regard to in determining the price and non-price terms it offers:

For the purposes of this Undertaking, the price and non-price terms for the provision of access to Port Terminal Services to different Applicants or Users will be determined having regard to:

- (a) the economically efficient operation of the Port Terminal Facilities and the Port;
- (b) the Port Operator's legitimate business interests and investment in the Port Terminal Services, Port Terminal Facilities and the Port;
- (c) all costs that the Port Operator incurs or may incur in providing access, including any costs of extending the Port Terminal Services, but not costs associated with losses arising from increased competition in upstream or downstream markets;
- (d) the economic value to the Port Operator of any additional investment that the Applicant or Port Operator has agreed to undertake;
- (e) the interests of all persons who have rights to use the Port;
- (f) the operational and technical requirements necessary for the safe and reliable operation of the Port Terminal Services, the Port Terminal Facilities and the Port;
- (g) any differences in the costs of providing access to Port Terminal Services to different Applicants or Users;
- (h) the opportunity cost of accommodating the requirements of one Applicant or User compared to the requirements of one or more other Applicants or Users;

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<sup>382</sup> Co-operative Bulk Handling Limited, *Port Terminal Services Access Undertaking*, 14 April 2009, clause 6.4.

- (i) the provision of quality related services reasonably required by the Port Operator in respect of some Applicants or Users but not others, including security of Bulk Wheat integrity, testing of Bulk Wheat or Bulk Wheat classification, fumigation and protection requirements for Bulk Wheat;
- (j) the relative risk related to storing and handling different Bulk Wheat segregations for Applicants and Users;
- (k) available port capacity, including receipt, handling, storage and cargo accumulation capacity;
- (l) differences in types and grades of Applicants' or Users' Bulk Wheat;
- (m) differences in Applicants' or Users' Bulk Wheat volumes;
- (n) differences in periods of time during which access to Port Terminal Services is required by Applicants or Users;
- (o) differences in levels of Applicants' or Users' usage of Port Terminal Services;
- (p) differences in modes of receipt, storage or outturn including different transport modes to receive Bulk Wheat and different ship configurations;
- (q) geographic and seasonal variations;
- (r) minimisation of demurrage at a Port over a given period;
- (s) maximisation of throughput of Bulk Wheat and other commodities at a Port over a given period;
- (t) unless the Port Operator is offering segregated services at a Port, the ability to mix the same grade of Bulk Wheat owned by different owners and / or mix different grades of Bulk Wheat owned by the same or different owners; and
- (u) the credit risk of an Applicant or User.<sup>383</sup>

The non-discrimination clauses in CBH's April Undertaking are also linked to the 'Objectives' provisions set out in clause 2. For instance, CBH can provide access to Applicants or Users (including its own Trading Division) on terms which differ from the Reference Prices or Standard Terms if those different terms are consistent with the objectives of the undertaking set out in clause 2 as follows:

## **2 Objectives**

This Undertaking has the following objectives:

- (a) providing a framework to manage negotiations with Applicants for access to services provided by certain facilities at the Port Terminal Facilities in relation to export of Bulk Wheat;

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<sup>383</sup> Co-operative Bulk Handling Limited, *Port Terminal Services Access Undertaking*, 14 April 2009, clause 6.5.

- (b) establishing a workable, transparent, non discriminatory and efficient process for lodging and processing Access Applications;
- (c) providing a non discriminatory approach to pricing under which the Port Operator publishes reference prices and terms and conditions for the provision of certain standard services annually;
- (d) operating consistently with the objectives and principles in Part IIIA of the TPA and the Competition Principles Agreement;
- (e) reaching an appropriate balance between:
  - (i) the legitimate business interests of the Port Operator, including:
    - (A) the recovery of all reasonable costs associated with the granting of access to the Port Terminal Services;
    - (B) a fair and reasonable return on the Port Operator's investment in the Port Terminal Facility commensurate with its commercial risk;
    - (C) the Port Operator's business interests relating to the export of grain other than Bulk Wheat and to the export of non grain commodities using the Port Terminal Facilities; and
    - (D) the Port Operator's ability to meet its own or its Trading Business' reasonably anticipated requirements for Port Terminal Services;
  - (ii) the interest of the public, including:
    - (A) ensuring efficient use of resources; and
    - (B) the promotion of economically efficient investment, use and operation of the Port Terminal Facilities; and
  - (iii) the interests of Applicants wanting access to the Port Terminal Services, including providing access to the Port Terminal Services:
    - (A) on non discriminatory price and non price terms; and
    - (B) in a transparent, open, efficient and non discriminatory manner;
- (f) providing an efficient, effective and binding resolution process in the event that the Port Operator and the Applicant are unable to negotiate a mutually acceptable Access Agreement; and
- (g) in accordance with the objective in s44AA(b) of the TPA, providing for a uniform approach to access to the Port Terminal Services at the different Port Terminal Facilities to the extent practicable having regard to the different characteristics of the Port Terminal Facilities.<sup>384</sup>

CBH also commits not to discriminate in making 'Operational Decisions.' CBH's April Undertaking states that Operational Decisions has the followings meaning:

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<sup>384</sup> Co-operative Bulk Handling Limited, *Port Terminal Services Access Undertaking*, 14 April 2009, clause 2.

[...] decisions made in the course of providing the Port Terminal Services including day to day decisions concerning scheduling, cargo accumulation decisions and ship loading.<sup>385</sup>

Clause 9.2(b) of CBH's April Undertaking states:

In making Operational Decisions relating to the provision of access to the Port Terminal Services, the Port Operator must:

make decisions:

- in a manner consistent the objects of this Undertaking;
- that are commercially justifiable, taking into account the matters referred to in clause 9.2(c); and

subject to clause 9.2(c), must not discriminate between Users or in favour of its Trading Business in providing Port Terminal Services.<sup>386</sup>

Clause 9.2(c) states:

The Port Operator's obligations under clause 9.2(b) will be read subject to the qualification that many Operational Decisions made relating to the provision of Port Terminal Services will necessarily involve conflicts of interests of users of the Port. Particularly when viewed in isolation, some decisions necessarily confer a relative disadvantage on one user of the Port and an advantage on others. The fact that an individual Operational Decision confers a relative disadvantage on one user of the Port or an advantage on another does not, of itself, mean that the Port Operator has breached this Undertaking.<sup>387</sup>

CBH states at 9.2(d) that, without limiting clause 9.2(c) or clause 6.5, the Port Operator may in making Operational Decisions:

give priority to vessels based on the lead time given between nomination and vessel ETA, the likely availability of sufficient Bulk Wheat at the Port prior to vessel ETA, the likely uncommitted storage capacity at the Port Terminal Facility and the uncommitted inloading capacity necessary to make a nominated vessel's nominated cargo tonnage;

take into account in particular the objectives of:

- minimising demurrage at the Port over a given period; and
- maximising throughput of Bulk Wheat and other commodities at the Port over a given period; and

vary a cargo assembly plan or queuing order for vessels as a result of:

- insufficient Bulk Wheat at the Port accumulated by the User necessary to make a User's nominated vessel's nominated cargo tonnage;

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<sup>385</sup> Co-operative Bulk Handling Limited, *Port Terminal Services Access Undertaking*, 14 April 2009, clause 9.2(a).

<sup>386</sup> Co-operative Bulk Handling Limited, *Port Terminal Services Access Undertaking*, 14 April 2009, clause 9.2(b).

<sup>387</sup> Co-operative Bulk Handling Limited, *Port Terminal Services Access Undertaking*, 14 April 2009, clause 9.2(c).

- variations in vessel arrival times;
- failure of vessels to pass surveys;
- stability and ship worthiness inspections;
- vessel congestion;
- variation in cargo requirements;
- lack of performance of freight providers;
- equipment failure;
- maintenance outages;
- weather preventing relevant activities at the Port Terminal Facilities;
- embargo, strike, lockout, or labour conditions impacting on the provision of the Port Terminal Services;
- any material breach by the user of the Port Terminal Services of the Access Agreement;
- the status of the accreditation of the user of the Port Terminal Services under the Access Agreement;
- contamination of accumulated cargoes or contamination of loads; or
- a User not working a vessel or accumulating a cargo on a 24 hour/7 day basis where another User is able to do so.<sup>388</sup>

CBH's April Undertaking, at clause 9.3, also includes a 'No hindering access' provision, which states:

### **9.3 No hindering access**

The Port Operator must not engage in conduct having a purpose of hindering access to the Port Terminal Services by any User in the exercise of a reasonable right of access.<sup>389</sup>

## **10.2 CBH's submissions in support of its April Undertaking**

CBH notes that vertical integration may create incentives to discriminate. However, CBH advances the following factors which it states mitigate these incentives:

- CBH is non-profit making (i.e. any operating surplus is invested in services and infrastructure rather than paid to shareholders);
- its members (Growers) ultimately pay the cost of supply chain services;
- Discrimination drives up those costs by reducing efficiency;

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<sup>388</sup> Co-operative Bulk Handling Limited, *Port Terminal Services Access Undertaking*, 14 April 2009, clause 9.2(d).

<sup>389</sup> Co-operative Bulk Handling Limited, *Port Terminal Services Access Undertaking*, 14 April 2009, clause 9.3.

- CBH and [GrainPool] are adequately ring-fenced as a result of Grain Express.<sup>390</sup>

CBH further submits that:

The principal objective of operating the Port Terminals is to efficiently handle the maximum volumes of grain that are capable of being handled by the Port Terminal facilities. Increased volumes of grain handled by use of the facilities leads to increased income in relation to the provision of those services and therefore a more efficient use of those resources, an improved return on capital and a net reduction in the overall cost to the owners and users of the services provided by CBH.<sup>391</sup>

CBH adds that the principle of non-discrimination ‘applies not only in the context of access negotiations (clause 6.4) but in the context of operational decision-making in the performance of an access agreement (clause 9.2, 9.3 and 9.4)’.<sup>392</sup>

CBH further submits:

In relation to the negotiation of price and non-price terms and conditions, the starting point is the published standard terms and conditions for Port Terminal Services. To the extent that additional costs have to be incurred, or efficiency savings made when providing services to users, the Undertaking provides that these cost variations are to be reflected in the published prices available to Applicants and users. This approach is consistent with the pricing principles set out in section 44ZZCA of the TPA.

The Undertaking also recognises that it can be appropriate for Port Terminal Services to be provided to different users on differentiated terms, reflecting the particular requirements of each user. Again, this approach is consistent with the pricing principles set out in section 44ZZCA of the TPA and promotes efficiency in the use of Port Terminal Services.<sup>393</sup>

In relation to clause 6.5 of the April Undertaking and the matters which CBH will have regard to in providing Port Terminal Services, CBH submits that:

In summary, CBH proposes that any decision will be based on a consideration of **all** of the matters listed in clause 6.5 **and** only where such a decision is consistent with the Objectives of the Undertaking set out in clause 2. CBH does not propose that any one of the matters of itself would be capable of providing commercial justification, however in determining how those different terms will be constituted, CBH will consider relevant information and evidence available to CBH from internal and public sources, together with any information or evidence from Applicants or Users and assess the weight to be given to the matters listed based on the robustness and veracity of the information and evidence provided.

Such information or evidence may include audited financial information, independently verified statistical information, professional advice from

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<sup>390</sup> Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 75.

<sup>391</sup> Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 75.

<sup>392</sup> Co-operative Bulk Handling Limited, *Submission to the ACCC*, 14 April 2009, para 5.5, p. 35. Note however, that CBH’s proposed Undertaking does not include a clause 9.4.

<sup>393</sup> Co-operative Bulk Handling Limited, *Submission to the ACCC*, 14 April 2009, para 5.5, p. 35.

suitably qualified advisers, such as economic consultants, legal advisers or financial advisers and other materials from verifiable and reputable sources.<sup>394</sup>

CBH submits that, while there are a number of factors which constrain it, the April Undertaking has been drafted ‘as if CBH had an incentive and opportunity to discriminate’.<sup>395</sup>

CBH states that should bulk wheat exporters believe that CBH has engaged in discriminatory conduct in relation to the provision of port terminal services, then recourse to the complaint and dispute resolution mechanism in the CBH ring-fencing policy is one option for the exporter.<sup>396</sup>

In relation to its non-discriminatory access clause, CBH submits:

Non-discriminatory access is a key feature of the Undertaking. CBH must provide access in accordance with price and non-price terms that include efficiency, fairness and transparency as central elements; it must not discriminate between access seekers, or in favour of its own operations.<sup>397</sup>

Further, CBH submits that should GrainPool (CBH’s Trading Business) seek access under the Undertaking then it will be ‘treated in exactly the same manner as any other applicant’ in accordance with the non-discriminatory access clause at 6.4 and factoring in the commercial considerations at clause 6.5.<sup>398</sup>

In relation to the making of day-to-day decisions, CBH submits:

Operationally, the Undertaking recognises that decisions must be taken that will necessarily advantage one user over another in the context of that decision alone. However, the Undertaking provides a mechanism for preventing preferential self-dealing and ensuring decisions are made on objectively verifiable commercial factors.<sup>399</sup>

CBH states that it ‘considers that incentives and opportunities to engage in discriminatory conduct on an operational level are limited’.<sup>400</sup> However, CBH states that ‘it also recognises the importance of non-discriminatory principles and outcomes to multiple stakeholders involved in bulk wheat export including the ACCC, the Federal Government, prospective access seekers, grain growers and the public at large’.<sup>401</sup>

CBH states that, given the importance of non-discriminatory access:

the Undertaking contains clearly expressed and mandatory non discrimination requirements, which may be applied directly to the conduct of the Port

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<sup>394</sup> Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 79.

<sup>395</sup> Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, para 4.1, p. 38.

<sup>396</sup> Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 74.

<sup>397</sup> Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, para 27.2, p. 53.

<sup>398</sup> Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 79.

<sup>399</sup> Co-operative Bulk Handling Limited, *Submission to the ACCC*, 14 April 2009, n 3, p. 4.

<sup>400</sup> Co-operative Bulk Handling Limited, *Submission to the ACCC*, 14 April 2009, para 5.7, p. 36.

<sup>401</sup> Co-operative Bulk Handling Limited, *Submission to the ACCC*, 14 April 2009, para 5.7, pp. 36-37.



Operator. Importantly, these non discrimination principles apply both to the negotiation of terms and conditions of access and also at the day to day operational level of decision making in relation to capacity management and scheduling.<sup>402</sup>

CBH states that the ‘inclusion of non-discrimination principles in operational decision-making effectively enables discriminatory conduct to be enforced as a breach of the Undertaking’.<sup>403</sup>

### **10.3 Submissions from interested parties in response to ACCC’s Issues Paper, dated 29 April 2009**

#### **10.3.1 AGEA**

In relation to CBH’s non-discriminatory access clause in its April Undertaking, AGEA states that the provisions within CBH’s non-discriminatory access clause actually have the effect of providing a justification for discrimination (rather than ensuring against it).<sup>404</sup>

AGEA notes the link between CBH’s non-discriminatory access clause and the ‘objectives’ clause of the Undertaking. To this end, AGEA submits that:

CBH clause 6.4 gives BHCs complete discretion to decide whether discrimination is consistent with the objectives of the undertaking and therefore justified. The objectives of the undertaking include reaching an appropriate balance between factors including BHCs’ own “*legitimate business interests*”, “*recovery of all [of their] reasonable costs*” and their “*ability to meet [their] own or [their] Trading Divisions’ reasonably anticipated requirements for Port Terminal Services*”. BHCs’ conflict of interest would inevitably result in BHCs deciding to discriminate in its price and non-price terms in favour of its own interests or its Trading Divisions.<sup>405</sup>

AGEA also notes the way in which CBH has linked the non-discriminatory access clause to clause 6.5 – which relates to price and non-price terms. AGEA submits that:

...this clause provide a non-exhaustive list of factors justifying discrimination on the price and non-price terms on which access to port terminal services will be provided. The factors set out in clause 6.5 [...] lack certainty and allow BHCs to favour their own interests.<sup>406</sup>

The following paragraphs outline AGEA’s views on the list of CBH considerations found at clause 6.5:

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<sup>402</sup> Co-operative Bulk Handling Limited, *Submission to the ACCC*, 14 April 2009, para 5.7, p. 37.

<sup>403</sup> Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, para 6.1, p. 26.

<sup>404</sup> Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 10.1, p. 25.

<sup>405</sup> Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 10.2, p. 25.

<sup>406</sup> Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 10.4, p. 25.

- (a) CBH clause 6.5(b) refers to BHCs' *"legitimate business interests and investment"* and provides a self-serving justification to adjust price and non-price terms in favour of its own interests;
- (b) CBH clause 6.5(e) refers to *"the interests of all persons who have rights to use the Port Terminal"*, but there is no obligation for all rights to be afforded equal weight;
- (d) CBH clause 6.5(k) refer to *"available Port Terminal capacity, including receipt, handling, storage and cargo accumulation capacity"*: in most cases, BHCs control all of these elements and BHCs should not be entitled to discriminate on the occurrence of elements that it controls;
- (e) CBH clause 6.5(p) refers to *"differences in modes of receipt, storage or outturn including different transport modes to receive Bulk Wheat and different ship configuration"*, which suggests that discrimination may occur in the event that non-BHC services are used;
- (f) CBH clause 6.5(r) refer to *"minimisation of demurrage at the port over a given period"*: this clause suggests that discrimination and the calling of vessels to berth out of order might be permitted according to which vessel has the highest demurrage rate. It is unclear how this clause would operate because demurrage rates ordinarily are confidential between the parties to the vessel charter party and BHCs should not be privy to vessel demurrage rates. In any event, a AWE's ability to negotiate a low demurrage should not result in that AWE being penalised by having another vessel being given priority at berthing, because it has a higher demurrage rate.<sup>407</sup>

The following paragraphs, taken from AGEA's submission, are AGEA's views regarding CBH's non-discrimination commitments in the context of CBH making Operational Decisions:

The BHCs' discretion to make Operational Decisions is too wide and subjective. AWEs need the certainty of knowing shipping slots will be available. The Port Protocols should clearly define the obligations to accept vessel nominations. If AWEs fail to get wheat to port by the load date, AWEs forfeit the booking fee and BHCs' interests are protected.

CBH clause 9.2(d)(i) entitles BHCs to make Operational Decisions to give priority to vessels based on the *"lead time given between nomination and vessel ETA and likely availability of sufficient Bulk Wheat at the Port Terminal prior to vessel ETA"*. BHCs control the movement and accumulation of wheat at port.

CBH clause 9.2(d)(ii) provides opportunities for BHCs to restrict access to port terminal services and is vague and uncertain.

(a) In relation to CBH clause 9.2(d)(ii)(A), in the normal course of events, BHCs are not aware of the AWE's vessel demurrage rate. In any event, a AWE's ability to negotiate a low demurrage should not result in that AWE being penalised by having another vessel being given priority at berthing, because it has a higher demurrage rate.

(b) In relation to CBH clause 9.2(d)(ii)(B), as BHCs controls the movement and accumulation of wheat at port, it is within its means to show that the

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<sup>407</sup> Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 10.4, pp. 25-26.

throughput of bulk wheat is maximised by loading its vessels in priority to other AWEs.<sup>408</sup>

CBH clause 9.2(d)(iii) provides BHCs with very broad entitlements to vary a cargo assembly plan or queuing order of a vessel. BHCs control the movement and accumulation of wheat at port facility (CBH clause 9.2(d)(iii)(A)). BHCs should not be entitled to vary a cargo assembly plan or queuing order as a result of vessel congestion (CBH clause 9.2(d)(iii)(A)).<sup>409</sup>

### 10.3.2 PGA

In relation to the ability of CBH to discriminate in favour of its trading arm, GrainPool, PGA submits:

CBH exercises its monopoly power by discriminating in favour of their trading division GrainPool, which disadvantages competition by imposing unfair terms and conditions and restricting Australian wheat exporters' access to port terminal services, through the allocation of shipping slots [being] based on entitlements. As allocations are decided by CBH based on entitlement, pooling operations are favoured over non pooling entities due to volume. This may force growers into using pooling operations. [CBH's proposed] Undertaking will not prevent this behaviour continuing, to the detriment of efficiency and competition in the Australian wheat export market, reducing prices and limiting choice for Western Australian growers.<sup>410</sup>

The PGA submits that the ACCC should not accept CBH's proposed Undertaking.

### 10.3.3 GIAV

GIAV (which made its submission in relation to CBH as well as GrainCorp) submits that wheat exporters are currently discriminated against when delivering grain to CBH's ports from 'private/third party upcountry facilities'.<sup>411</sup>

On this issue, GIAV submits:

While recognising that section 24 of the Wheat Export Marketing Act is only directed at port terminal services, this should not be deflect the underlying commercial reality that both upstream and port terminal services are provided by the same entity or related entities.

The BHCs' have demonstrated in their agreements, pricing and discussion that they intend to leverage their position at the ports to protect their upcountry system.<sup>412</sup>

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<sup>408</sup> Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 15.5, pp. 33-34.

<sup>409</sup> Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 15.6, p. 34.

<sup>410</sup> Pastoralists and Graziers Association, *Submission in relation to proposed CBH access undertaking*, 29 May 2009, para 2.14, pp. 3-4.

<sup>411</sup> Grain Industry Association of Victoria, *Submission in relation to proposed access undertakings*, 1 June 2009, p. 2.

<sup>412</sup> Grain Industry Association of Victoria, *Submission in relation to proposed access undertakings*, 1 June 2009, pp. 1-2.

### 10.3.4 NSW Farmers Association

The NSW Farmers Association (who made its submission in relation to CBH as well as GrainCorp) submits that CBH charges more at its ports if ‘the grain has not come from a related upcountry storage facility’.<sup>413</sup> On this issue, the NSW Farmers Association states:

There appears to be a growing potential for dominant vertically integrated business models to create a lack of incentive for investment in alternative bulk storage and logistic paths to port for both themselves or others who are forced to use ‘their loading facilities and therefore ‘voluntar[il]y’ meet ‘their access conditions.’<sup>414</sup>

## 10.4 Submissions received on CBH’s April Undertaking in response to ACCC’s Draft Decision

### 10.4.1 CBH

In response to the views set out in the ACCC’s Draft Decision regarding non-discrimination, CBH submits the following non-discrimination clause and sets out its reasons for amendment:

#### Proposed non-discrimination clause

CBH proposes to include the following clause in its amended undertaking:

#### Non-Discriminatory access

- (f) Subject to clause 6.6(b), in providing access to Port Terminal Services, the Port Operator must not discriminate between different Applicants or Users (including its own Trading Division) in favour of its own Trading Division including, but not limited to, discrimination based on the location or identity of the storage custodian, handler or transporter of Applicants’ or Users’ Bulk Wheat.
- (g) The Port Operator shall not be in breach of its obligation under clause 6.6(a) where in providing access to Port Terminal Services, the Port Operator differentiates between different Applicants or Users (including its own Trading Division) on the basis that:
  - (i) the cost of providing access to other Applicants or Users is higher, including where the Applicant or other User utilises capacity less efficiently than other Applicants or other Users;
  - (ii) if it is necessary on the grounds of hygiene, grain quality, health and safety and Legislative Requirements.<sup>415</sup>

CBH outlines the following reasons for these proposed amendments:

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<sup>413</sup> NSW Farmers Association, *Submission in relation to proposed access undertakings*, June 2009, p. 5.

<sup>414</sup> NSW Farmers Association, *Submission in relation to proposed access undertakings*, June 2009, p. 5.

<sup>415</sup> Co-operative Bulk Handling Limited, *Submission in relation to Draft Decision on CBH Access Undertaking – Non-Discrimination*, 24 August 2009, pp. 1-2.

### Reasons for amendment

The above clause has been amended from the ACCC's proposed wording by the insertion of the expression "including where the applicant or other user utilises capacity less efficiently than other applicants or other users".

The purpose of this amendment is to clarify that the efficiency with which all users utilise terminal capacity will be a relevant factor for the differential pricing of services under the undertaking. In the absence of this clarification it is possible that the provision could be interpreted narrowly so that the only differences that could be taken into account were the cash costs involved in servicing different users.

The ACCC may hold the view that the additional wording is unnecessary, because an arbitrator would be unlikely to adopt the narrow interpretation suggested above. However, CBH submits that an important function of the undertaking is to inform the parties as to their rights and obligations so that disputes either do not arise or may be settled by agreement. Making it clear that inefficient use of capacity is a proper basis for differences in terms and conditions of access may reduce the likelihood of disputes. Because this wording is included as a sub-set of costs, it should not be capable of:

- (i) reducing the clarity of the provision; or
- (ii) expanding the basis upon which CBH may offer different terms.

Finally, in response to a question asked at the meeting on 18 August 2009, we are instructed to confirm that CBH does not consider that this clause would entitle it to discriminate on the basis that providing a service to one user would result foregone grain marketing profits. These foregone profits are not a cost basis for discrimination.<sup>416</sup>

### 10.4.2 AGEA

In response to the views set out in the ACCC's Draft Decision regarding non-discrimination, AGEA submits:

It is imperative that the BHCs proposed Undertakings include robust and enforceable non-discrimination and no hindering access clauses. BHCs' compliance with these clauses should be subject to an annual audit by an independent third party.

The non-discrimination and no hindering access clauses proposed by the BHCs are not appropriate given the lack of clarity about their interpretation. The BHCs' non-discrimination clauses do not ensure the BHCs will be prohibited from discriminating in favour of their own marketing arm.

Specifically, the BHCs must not be able to discriminate between AWEs on any basis, including where grain was stored (i.e. whether it was stored in the BHCs' up-country storage and handling network, a third party storage network or on-farm) or how it was transported to the BHCs' facilities.

The non-discrimination no hindering access clauses must be wide enough to encompass all forms discrimination and hindrance, such as but not limited to,

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<sup>416</sup> Co-operative Bulk Handling Limited, *Submission in relation to Draft Decision on CBH Access Undertaking – Non-discrimination*, 24 August 2009, p. 2.

the prices charged and delays in obtaining access to the port terminal facilities.<sup>417</sup>

AGEA further submits:

**Appropriate to include a non-discrimination clause in the proposed Undertaking**

AGEA agrees that it is appropriate for the BHCs proposed Undertakings to include a non-discriminatory access clause obliging it to not discriminate against access seekers in favour of its affiliated trading business.

The anti-discrimination clause must be robust in order to avoid regional monopolies unfairly controlling infrastructure necessary to export wheat in bulk quantities, to the detriment of other accredited exporters.

AGEA agrees with the ACCC's proposed non-discrimination clause, which is straightforward and clear. As the ACCC suggests, price discrimination should only be permitted where it aids efficiency and therefore should be limited to circumstances where the cost of providing access to other access seekers is higher. If price discrimination is permitted in circumstances where the cost of providing access is higher, there must also be transparency in relation to such costs so that access seekers know the differential in price is justified.

The alternative clause recently proposed by CBH is not appropriate. CBH has proposed that its obligation not to discriminate should be "subject to" CBH's entitlement to discriminate if CBH determines on subjective grounds that:

- (a) the cost of providing access to other Applicants or Users is higher, *including where the Applicant or User utilises capacity less efficiently than other Applicants or other Users;*
- (b) it is necessary on the grounds of hygiene, grain quality, health and safety and Legislative Requirements.

Adding the words "*including where the Applicant or User utilises capacity less efficiently*" is not appropriate. It introduces subjective decision making and does not reflect the principle accepted by the ACCC in relation to permissible price discrimination. CBH's decision could not be determined by reference to objective factors and its decision making process on the issue lacks transparency. Incorporating a reference to the efficient utilisation of capacity does not reflect the ACCC's view on the circumstances in which price discrimination is permitted. Price discrimination should only be permitted where it aids efficiency, that is, where the cost of providing access to access seekers is higher. CBH's proposed non-discrimination clause goes beyond this principle and is not acceptable.

The ACCC has stated that price discrimination in favour of BHCs' trading operations should not occur except to the extent that the cost of provision of services to other users is higher than provision of the service to itself.

However, unless there is transparency in relation to BHCs' operational decisions and costs and charges and binding terms and conditions of access, including binding indicative pricings for their standard and non-standard services which are published in advance of the commencement of the Undertakings, it will not be possible to determine whether discrimination has taken place. To ensure fair and transparent access to port terminal services, BHCs' compliance with the non-discrimination clause, ring-fencing policies

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<sup>417</sup> Australian Grain Exporters Association, *Submission in relation to Draft Decisions on Port Terminal Services Access Undertakings*, 3 September 2009, p. 6.

and the proposed Undertaking generally must be the subject of an annual audit by an independent third party.

#### ***Non-discrimination in making Operational Decisions***

Although there should be a general umbrella obligation of non-discrimination in the negotiation and provision of port terminal services, AGEA accepts the ACCC's position that it is appropriate for BHCs to include a non-discrimination clause in relation to its operational decisions. However, AGEA agrees with the ACCC's reasons for rejecting proposed CBH clause 9.2(b)(ii) and 9.2(d) (GrainCorp/ABB clause 8.3 and 8.4) which makes the ability to discriminate in relation to operational decisions 'subject to' other clauses, the combined effect of which would not achieve the objective of prohibiting BHCs from discriminating in favour of its own business.

#### ***A more appropriate non-discrimination clause***

AGEA agrees with the ACCC's proposed non-discrimination clause, save that the requirement to not discriminate must also extend to the negotiation process of the provision of port terminal services and the dispute resolution process.<sup>418</sup>

### **10.4.3 PGA**

In response to the views set out in the ACCC's Draft Decision regarding non-discrimination, PGA submits:

#### ***Appropriate to include a non-discrimination clause in the proposed Undertaking***

The PGA agrees with the ACCC that it is appropriate that CBH's proposed Undertaking include robust non-discriminatory and no hindering access clauses obligating it to not discriminate against access seekers in favour of its affiliated trading business.

The PGA agrees with the ACCC that it would be appropriate for CBH's proposed Undertaking to provide for an annual audit procedure of compliance with the non-discrimination clause.

The PGA acknowledges that the ACCC has not, in its assessment of CBH's proposed Undertaking formed any views on the claims by interested parties of current or past discriminatory behaviour by CBH in favour of its trading arm, and notes that these matters are being assessed by the ACCC's Enforcement and Compliance Division.<sup>419</sup>

## **10.5 ACCC's views on the April Undertaking**

### **10.5.1 Appropriate to include a non-discrimination clause in the Undertaking**

The ACCC is 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.

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<sup>418</sup> Australian Grain Exporters Association, *Submission in relation to Draft Decisions on Port Terminal Services Access Undertakings*, 3 September 2009, pp. 22-23. (Footnotes omitted).

<sup>419</sup> Pastoralists and Graziers Association, *Submission in relation to Draft Decision on CBH Access Undertaking*, 3 September 2009, p. 10.

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.

While a number of interested parties providing submissions on this process have raised allegations of current or past discriminatory conduct by CBH in favour of its trading arm, it is important to note that the ACCC, in its assessment of CBH's April Undertaking, has not formed any views on the legitimacy or otherwise of these claims. To the extent that claims have raised allegations relating to restrictions on anti-competitive conduct under Part IV of the TPA, these matters are being assessed by the ACCC's Enforcement and Compliance Division.

In the process of assessing the appropriateness of the Undertaking pursuant to s44ZZA(3) of the TPA, the need for a robust non-discriminatory access clause is highlighted by examining the intent of the WEMA. Clause 24 of the Explanatory Memorandum to the WEMA states:

This clause is 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. All accredited exporters should have access to these facilities while allowing the operators of the facility to function in a commercial environment.<sup>420</sup>

As set out in the Legislative Framework chapter of this decision, the ACCC is of the view that, in the current context, 'fair' access ought largely to be equated with non-discriminatory access, reflecting the desirability of ensuring that access to port terminal services is, on the whole, provided on a non-discriminatory basis except where there is a legitimate reason for differential treatment.

In this regard, the ACCC recognises that a service provider may engage in price discrimination where it aids efficiency.<sup>421</sup> In fact, price discrimination may be an essential tool to enable a network owner to recover the legitimate costs of its investment. It is likely to promote the following objectives:

- ensuring efficient use of the network;
- reducing the average price on the network; and
- minimising the risk-adjusted cost of capital.

This is recognised in the pricing principles specified in s44ZZCA of the TPA, which provides as follows:

The pricing principles relating to the price of access to a service are:

- (a) that regulated access prices should:

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<sup>420</sup> Explanatory Memorandum, *Wheat Export Marketing Bill 2008* (Cth), p. 31.

<sup>421</sup> *Trade Practices Act 1974* (Cth) s 44ZZCA(b)(i).



- (i) be set so as to generate expected revenue for a regulated service or services that is at least sufficient to meet the efficient costs of providing access to the regulated service or services; and
  - (ii) include a return on investment commensurate with the regulatory and commercial risks involved; and
- (b) that the access price structures should:
- (i) allow multi-part pricing and price discrimination when it aids efficiency; and
  - (ii) 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
- (c) that access pricing regimes should provide incentives to reduce costs or otherwise improve productivity.<sup>422</sup>

However, as set out in the Legislative Framework chapter of this decision, the ACCC is of the view that, while there is a place for price discrimination, this should only occur in specified circumstances, that is, where the cost of providing access to other operators is higher. Therefore, price discrimination in favour of CBH's trading operations should not occur except to the extent that the cost of provision of services to other users is higher than provision of the service to itself.

## **10.5.2 The particular non-discrimination clauses proposed by CBH in its April Undertaking are not appropriate**

### **10.5.2.1 Clauses 6.4 (and 6.5)**

As the ACCC explains in the Indicative Access Agreement chapter, the ACCC considers that it is not appropriate that CBH's April Undertaking does not include in its April Undertaking the minimum standard terms and conditions upon which it undertakes to offer access to its port terminal services.

As set out in the Indicative Access Agreement chapter, the ACCC considers that it would be appropriate for these standard terms and conditions to form a part of CBH's Undertaking.

With minimum standard terms in the Undertaking, the scope for discrimination in offering port terminal services via access agreement negotiations will be significantly reduced.

Nevertheless, the ACCC considers that it is still appropriate that CBH has included a non-discrimination clause that applies in relation to 'non-standard' terms and conditions of access, to ensure that such terms and conditions comply with the principles of non-discriminatory access.

However, the ACCC considers that the particular non-discrimination clause put forward by CBH at clause 6.4 is not appropriate having regard to the matters in

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<sup>422</sup> *Trade Practices Act 1974 (Cth) s 44ZZCA.*

s44ZZCA(3). A simpler non-discrimination clause (as set out later in this chapter) is likely to be more appropriate.

Clause 6.4 is to be read subject to clause 6.5, which provides a wide range of caveats on the non-discrimination obligation. Read together, the ACCC is of the view that this non-discrimination clause will not achieve the objective of prohibiting CBH from discriminating in favour of its own business.

In particular, the ACCC is of the view that the following provisions at clause 6.5 are not appropriate and do not constitute legitimate grounds for discrimination:

- (c) *all costs that the Port Operator incurs or may incur in providing access, including any costs of extending the Port Terminal Services, but not costs associated with losses arising from increased competition in upstream or downstream markets;*

The ACCC considers that the reference to ‘all costs’ is not appropriate given that the pricing principles at section 44ZZCA make reference to ‘efficient costs’ rather than ‘all costs’.

- (d) *the economic value to the Port Operator of any additional investment that the Applicant or Port Operator has agreed to undertake;*

The ACCC is of the view that this clause lacks clarity and is therefore not appropriate. For instance, it is not clear what type of investment this clause relates to. In addition, it is not clear what type of investment an ‘Applicant’ would agree to undertake.

- (h) *the opportunity cost of accommodating the requirements of one Applicant or User compared to the requirements of one or more other Applicants or Users;*

The ACCC does not agree that opportunity cost (what is foregone by employing resources in their current use rather than the most valuable alternative use) is a relevant commercial justification for CBH to discriminate.

It is possible that ‘opportunity cost’ considerations by CBH might allow it to charge for the opportunity cost of wheat received via an alternative up-country storage and handling facility. This would clearly constitute an unreasonable justification for discrimination and is contrary to the objective of the WEMA of promoting competition in the wheat export industry.

- (j) *the relative risk related to storing and handling different Bulk Wheat segregations for Applicants and Users;*

The ACCC believes that it would be standard commercial practice to include the cost of risk in the standard terms and conditions of access.

Non-discrimination clauses should be designed to proscribe anti-competitive conduct which favours an affiliated entity of the service provider. This type of clause is not appropriate to be included in a non-discrimination clause.

- (n) *differences in periods of time during which access to Port Terminal Services is required by Applicants or Users;*

The ACCC considers that this clause is not appropriate because it is likely that CBH would have significant discretion over the ‘periods of time’ during which access seekers can access port terminal services. As a result, it is difficult to see how this clause could form legitimate grounds for discrimination. The ACCC is of the view that this clause does not appropriately balance the legitimate business interests of the provider with the interests of persons who might want access to the service.

*(p) differences in modes of receipt, storage or outturn including different transport modes to receive Bulk Wheat and different ship configurations;*

The ACCC is of the view that this clause is not appropriate. This clause, as drafted in the April Undertaking, lacks clarity and provides CBH with scope to discriminate based on subjective determinations on why different modes of receipt, storage and outturn would necessitate discrimination.

*(q) geographic and seasonal variations;*

The ACCC considers that this clause is not appropriate as it lacks clarity. For instance, it is unclear what criteria CBH would use in applying this clause.

*(r) minimisation of demurrage at the port over a given period*

The ACCC is of this view that this clause is also not appropriate as it lacks clarity. For instance, it is unclear who this clause refers to, and why, as AGEA notes in its submission, a wheat exporter who negotiates a lower demurrage rate should be penalised for this.

*(s) maximisation of throughput of Bulk Wheat and other commodities at the port over a given period;*

The ACCC considers that this clause is not appropriate as it lacks sufficient clarity and provides CBH with a level of discretion that is not appropriate. For instance, it is unclear how CBH would determine that discriminating against access seekers would in effect maximise throughput. Further, there is a lack of clarity around what the term ‘over a given period’ refers to.

*(u) the credit risk of an Applicant or User;*

The ACCC is of the view that clauses relating to ‘the credit risk of an Applicant or User’ are more appropriately included in section 7 of CBH’s April Undertaking – ‘Negotiating for Access’. Credit risk matters are an ex ante consideration and generally would be dealt with in relation to negotiation for access. It is unclear why it would need to be used as a justification for discriminating against particular Applicants or Users.

In relation to the other matters within 6.5:

- (a) the economically efficient operation of the Port Terminal Services, the Port Terminal Facilities and the Port Terminal;
- (b) the Port Operator's legitimate business interests and investment in the Port Terminal Services, Port Terminal Facilities and the Port Terminal;

- (e) the interests of all persons who have rights to use the Port Terminal;
- (f) the operational and technical requirements necessary for the safe and reliable operation of the Port Terminal Services, the Port Terminal Facilities and the Port Terminal;
- (g) any differences in the costs of providing access to Port Terminal Services to different Applicants or Users;
- (i) the provision of quality related services reasonably required by the Port Operator in respect of some Applicants or Users, but not others including security of Bulk Wheat integrity, testing of Bulk Wheat or Bulk Wheat classification, fumigation and protection requirements for Bulk Wheat;
- (k) available Port Terminal capacity, including receipt, handling, storage and cargo accumulation capacity;
- (l) differences in types and grades of Applicants' or Users' Bulk Wheat;
- (m) differences in Applicants' or Users' Bulk Wheat volumes;
- (o) differences in levels of Applicants' or Users' usage of Port Terminal Services; and
- (t) unless the Port Operator is offering segregated services at a Port Terminal, the ability to mix the same grade of Bulk Wheat owned by different owners and / or mix different grades of Bulk Wheat owned by the same or different owners;

it is unclear why CBH considers it necessary for these to be expressly mentioned as caveats to the non-discrimination clause. These factors appear to relate to normal commercial reasons for differentiating between services provided to different access seekers (although the precise meaning of some of the factors is unclear).

As noted above, a robust non-discrimination clause aims to prevent discrimination by the bulk handler against access seekers *in favour* of its affiliated businesses (except to the extent that the cost of provision of services by CBH to other access seekers is higher than provision of the service to itself).

Treating access seekers differently purely because of legitimate commercial factors will *not* be caught by a properly drafted non-discrimination clause.

#### **10.5.2.2 Clauses 9.2(b)(ii) and 9.2(d) – Non-discrimination in making Operational Decisions**

The ACCC is of the view that it is appropriate for CBH to include a non-discrimination clause in relation to its operational decisions.

CBH's non-discrimination provision at clause 9.2(b)(ii) is to be read together in conjunction with another clause (in this case, the qualification at clause 9.2(c)). Further, in the making of Operational Decisions, CBH's April Undertaking provides for (at clause 9.2(d)) the matters at clause 6.5 to be taken into consideration.

Clause 9.2(d) provides a range of justifications for prioritising vessels and varying cargo assembly plans.

The ACCC is of the view that, read together with clauses 6.5 and 9.2(d), the non-discrimination clause in 9.2(b)(ii) would not achieve the objective of prohibiting CBH from ‘discriminating in favour of its own business’.

This is because, as explained above, clause 6.4 sets out an inappropriately broad and unclear list of caveats to the non-discrimination clause. Further, clause 9.2(d) also sets out a number of other justifications for prioritising vessels.

As a general point (without commenting on the appropriateness of the factors in clause 9.2(d)), the ACCC considers that it is not appropriate that clause 9.2(d) contains provisions relating to prioritising vessels and varying cargo assembly plans. Similar provisions are set out in CBH’s port terminal rules. For the sake of clarity, all provisions regarding capacity management should be set out in the port terminal rules (which the ACCC, as noted in the Capacity Management chapter, considers should be attached to the Undertaking).

Clause 9.2 of CBH’s April Undertaking is discussed further in the Capacity Management chapter.

### **10.5.3 A more appropriate non-discrimination clause**

The ACCC notes the amended non-discrimination clause proposed by CBH in its submission on the ACCC’s Draft Decision. The ACCC is of the view that this amended clause, like the one in CBH’s April Undertaking, is not appropriate as it lacks clarity and would not achieve the objective of prohibiting CBH from discriminating in favour of its own downstream operations.

The ACCC notes that non-discrimination clauses applicable in other regulated industries tend to be significantly less complex than the non-discrimination clauses set out in CBH’s April Undertaking.

For instance, in relation to regulated gas pipelines, the National Gas Law states that a covered service provider providing light regulation services must not engage in price discrimination other than price discrimination ‘that is conducive to efficient service provision’.<sup>423</sup>

The ACCC considers that non-discrimination obligations would be better addressed via a single clause. That is, the ACCC takes the view that it would be more appropriate that clauses 6.4 and 9.2 be combined to create a single non-discriminatory access clause.

In addition, the ACCC is of the view that a clearer and more concise non-discriminatory access clause is more likely to be appropriate. For example, for the reasons set out above, the ACCC is more likely to consider appropriate the following type of non-discrimination clause:

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<sup>423</sup> *National Gas (South Australia) Act 2008 (SA) Schedule, National Gas Law, clause 136.*

### **CBH must not discriminate in providing port terminal services**

In providing access to Port Terminal Services, CBH must not discriminate between different Applicants or Users (including its own Trading Division) in favour of its own Trading Division except to the extent that the cost of providing access to other Applicants or Users is higher.

For the avoidance of doubt, the non-discrimination clause should protect against (amongst other matters) the ability of CBH to anti-competitively discriminate between wheat exporters on the basis of where grain was stored (i.e. whether it was stored in CBH's up-country storage and handling network, a third party storage network or on-farm).

The ACCC notes the submissions from AGEA that the non-discrimination clause should extend beyond the act of provision of access to the negotiation and dispute resolution process. In this regard, the ACCC is of the view that AGEA has adopted an unduly narrow interpretation of the meaning of the words 'in providing access to Port Terminal Services'. The non-discrimination clause will extend to all matters relating to, and necessary for, the provision of access including setting the terms and conditions of access. In relation to dispute resolution, the April Undertaking provided that an arbitrator must take into account the non-discrimination clause. Therefore, the operation of the clause will extend to the negotiation and dispute resolution processes, where relevant.

The ACCC notes CBH's concerns that the ACCC's proposed non-discrimination clause 'could be interpreted narrowly so that the only differences that could be taken into account were the cash costs involved in servicing different users'.<sup>424</sup> In response to this submission, the ACCC notes:

- The ACCC's proposed non-discrimination clause is based on the pricing principles set out in s44ZZCA of the TPA. These principles provide that access price structures should 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.<sup>425</sup>
- Given CBH's vertically integrated structure, discrimination by CBH in favour of its own trading business by way of different price and/or non-price terms and conditions of access, is only appropriate where these different terms and conditions reflect differences in the underlying costs of providing access to different access seekers.
- The ACCC's view is that 'the cost of providing access' in respect of the Undertaking would be viewed relatively broadly in the sense that 'costs' would be viewed as all genuine and verifiable costs of providing a particular service to different access seekers. 'Costs' in this context should not be limited to (although they would include) explicit cash costs. 'Costs' would likely include, amongst

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<sup>424</sup> Co-operative Bulk Handling Limited, *Submission in relation to Draft Decision on CBH Access Undertaking – Non-discrimination*, 24 August 2009, p. 2.

<sup>425</sup> See *Trade Practices Act 1974* (Cth), s 44ZZCA(b)(ii) [emphasis added].

other things, all verifiable accounting costs, operating and capital, of providing the service in question.

- Further, the ACCC is mindful that investments in improved production processes that generate genuine productive efficiencies should be encouraged, not discouraged. As a general principle, where CBH has generated improved efficiencies in a production process that give rise to verifiable lower costs (e.g. per-unit costs) in respect of a certain service provided by that process, CBH should be permitted to pass through the cost differences generated by those efficiencies in the form of lower access charges to those access seekers using that service, provided that all access seekers reasonably have the non-discriminatory ability to use that service if they choose, whether or not they in fact choose to use it.

#### **10.5.4 No hindering access clause in the April Undertaking is not appropriate**

In relation to the no hindering access clause at 9.3, the ACCC considers that it is appropriate that such a clause be included in CBH's April Undertaking. 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.

However, the ACCC is of the view that the drafting of clause 9.3 is not appropriate as the terms of the clause would likely prove difficult to interpret. In particular, the ACCC considers that the phrase 'in the exercise of a reasonable right of access' is ambiguous and the implications of the phrase for the operation of the clause are unclear.

The ACCC notes that clause 9.3 of CBH's April Undertaking partially reflects s44ZZ of the TPA – 'Prohibition on hindering access to declared services' – which states:

##### **Prohibition on hindering access to declared services**

(1) The provider or a user of a service to which a third party has access under a determination, or a body corporate related to the provider or a user of the service, must not engage in conduct for the purpose of preventing or hindering the third party's access to the service under the determination.

(2) A person may be taken to have engaged in conduct for the purpose referred to in subsection (1) even though, after all the evidence has been considered, the existence of that purpose is ascertainable only by inference from the conduct of the person or from other relevant circumstances. This subsection does not limit the manner in which the purpose of a person may be established for the purposes of subsection (1).

(3) In this section, a user of a service includes a person who has a right to use the service.<sup>426</sup>

The ACCC notes that s44ZZ(2) explains the concept of 'for the purpose of preventing or hindering the third party's access'. In order to promote certainty and clarity for access seekers, the ACCC considers that clause 9.3 of CBH's April Undertaking would be more appropriate if it reflected the terms of s44ZZ of the Act.

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<sup>426</sup> *Trade Practices Act 1974 (Cth)*, s 44ZZ.

### **10.5.5 Enforcement of non-discrimination commitments**

The ACCC notes that, under s44ZZJ of the TPA, if the ACCC thinks that the provider of an access undertaking has breached any of its terms, the ACCC may apply to the Federal Court to enforce the access undertaking. The Court may make orders directing the provider to comply with the undertaking, directing the provider to compensate any other person who has suffered loss or damage as a result of the breach, or any other order that the Court thinks appropriate. The enforcement of the terms of the access undertaking would include the non-discrimination clause.

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.

The ACCC considers that 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, it would be appropriate that:

- rather than prescribing a mandatory audit, the audit would only need to be carried out at the direction of the ACCC (which may occur, for example, in response to allegations of discrimination); and
- that the audit not be carried out more than twice in every twelve months (to keep down costs on CBH of conducting the audit).

Further, the ACCC recognises that it may be the case that a WEA-directed audit report may satisfy CBH's compliance with its obligations to provide the ACCC with an audit of compliance with its non-discrimination clause. In this regard, the ACCC notes that if the WEA's audit processes cover the areas in which the ACCC also seeks an audit report, then it is likely that the WEA-directed audit report, if provided to the ACCC by CBH, would provide sufficient information for the ACCC's purposes. The ACCC notes, however, that this would only be appropriate if the WEA-directed audit was conducted within 3 months of the request made by the ACCC.

The ACCC further notes, however, that it would require the discretion to determine whether the WEA-directed audit did indeed satisfy the ACCC's request for an audit of compliance with the non-discrimination clause.

### **10.5.6 CBH's September Undertaking**

The clauses in CBH's September Undertaking relating to non-discrimination, no hindering access and the ability of the ACCC to audit compliance with the non-discrimination clause (ie. clauses 6.2, 6.3, 10.6 and schedule 8 of the September Undertaking) are set out in CBH's September Undertaking at Annexure A.

### **10.5.7 ACCC's views on CBH's September Undertaking**

The ACCC considers that the clauses in CBH's September Undertaking relating to non-discrimination, no hindering access and the ability of the ACCC to audit compliance with the non-discrimination clause have addressed the ACCC's concerns



with the clauses relating to these areas in CBH's April Undertaking set out in the ACCC's Further Draft Decision.

Therefore, the ACCC considers that the clauses in relation to non-discrimination, no hindering access and the ability of the ACCC to audit compliance with the non-discrimination clause of CBH's September Undertaking are appropriate.

# 11 Ring-Fencing

## Summary

CBH's September Undertaking does not include ring-fencing measures.

Ring-fencing is one tool that can be used, in conjunction with robust non-discrimination and no hindering access clauses, fair and transparent port terminal protocols and an indicative access agreement to protect against anti-competitive discrimination.

The ACCC notes that CBH is already subject to ring-fencing arrangements arising from the ACCC's decision not to revoke a 'notification' from CBH relating to a component of its Grain Express product in 2008. CBH's ring-fencing rules in its April Undertaking differed in some respects from the ring-fencing arrangements which form part of CBH's Grain Express exclusive dealing notification. For instance, the Grain Express ring-fencing policy provides for a more robust complaints handling/resolution process than the process provided for in the April Undertaking.

However, given that CBH's September Undertaking contains robust non-discrimination and no hindering access clauses, fair and transparent port terminal protocols and an indicative access agreement (as well as measures to deal with the potential for information about port terminal services to be used to the advantage of CBH's wheat exporting arm), then, in the circumstances, it is not necessary for CBH to include ring-fencing measures in its September Undertaking at this particular point in time.

In forming this view, the ACCC has taken into account the transitional state of the industry and the possibility that any ring-fencing measures that were implemented at this point in time may need to be revised in the medium term in accordance with any regulatory changes (either to extend or reduce the regulation to which CBH is subject). The ACCC considers that this would be an undesirable outcome in that it could impose unnecessary regulatory costs during a time of industry transition.

The ACCC has also taken into account the short duration of CBH's September Undertaking and will closely monitor the effectiveness of the undertaking in ensuring against anti-competitive discrimination during its operation.

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

It is important to note that the ACCC's approach taken to ring-fencing in assessing this particular access Undertaking is not indicative of the approach to ring-fencing that the ACCC would be likely to take in relation to other regulated industries. The approach taken on this occasion reflects the factors outlined above, and in particular, that the industry is still transitioning from having a single desk responsible for the export of wheat in mid 2008 to the current situation of having 23 wheat exporters

accredited to export wheat from Australia; and that the arrangements can be revisited in two years.

Finally, it is also important to note that the ACCC's approach to CBH's ring-fencing measures in this further draft decision has no bearing on the need for CBH to continue compliance with the ring-fencing arrangements it agreed to adhere to in conjunction with the ACCC's decision not to revoke the 'notification' relating to a component of the Grain Express product.

CBH's agreement to comply with these ring-fencing measures formed an important part of the ACCC's decision not to revoke the notification. Accordingly, the ACCC does not accept CBH's position that ring-fencing measures provided to the ACCC in conjunction with the April Undertaking can apply in substitution for those arrangements referred to in CBH's Grain Express notification to the ACCC.

## 11.1 CBH's April Undertaking

CBH's April Undertaking includes Information and Operational Segregation Rules (ring-fencing rules) at Schedule 2 of its April Undertaking<sup>427</sup>. Given that these rules are fairly extensive, a summary (rather than the entirety of the rules) has been set out below.

### 11.1.1 CBH ring-fencing rules

#### 11.1.1.1 Application

Clause 2 provides that the ring fencing rules 'apply in substitution for the ring-fencing arrangements referred to in the Port Operator's Grain Express notification to the ACCC'.<sup>428</sup>

#### 11.1.1.2 Organizational structure

Clause 3 provides:

- (a) The Port Operator organisational structure includes its:
  - (i) Chief Executive Officer (CEO), Chief Operating Officer (if any) and Board;
  - (ii) Operations Business; and
  - (iii) Support Services Staff.
- (b) Any Trading Business must be operationally distinct from the Port Operator and its Other Business Units, and must be managed by its own Board and management structure.

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<sup>427</sup> Co-operative Bulk Handling Limited, *Port Terminal Services Access Undertaking*, 14 April 2009, Schedule 2, pp. 28-35.

<sup>428</sup> Co-operative Bulk Handling Limited, *Port Terminal Services Access Undertaking*, 14 April 2009, Schedule 2, p. 28.

- (c) Each of the General Managers of the Operations Business and the Trading Business may report directly to the CEO (or COO) and Board, but the Operations Business and the Trading Business shall otherwise be operated as distinct businesses.
- (d) The functions and responsibilities of the Operations Business include
  - (i) planning, maintenance and operations of upcountry receival and storage facilities;
  - (ii) management of road and rail freight contracts and arrangements;
  - (iii) gathering and managing information on grain quality, quantity and grade;
  - (iv) negotiation and management of storage and handling agreements with marketers;
  - (v) management and operation of the Metro Grain Centre;
  - (vi) management, maintenance and operation of port storage and ship loading facilities; and
  - (vii) provision of crop forecasting and information services to growers.

### **11.1.1.3 Separation of business units**

Clause 4 provides:

The Port Operator must implement measures to ensure that:

- (a) its Trading Business is organisationally and operationally separate from its Other Business Units; and
- (b) its Trading Business does not carry out any Port Terminal Services.

### **11.1.1.4 Separation of work areas**

Clause 5 provides:

The Port Operator must ensure that its Trading Business and its Other Business Units have separate work areas. The Port Operator must not permit employees of its Trading Business (other than Support Services Staff) to enter a work area of the Operations Business Unit except where such access is for the purpose of arm's length dealings regarding the provision of services to the Trading Business.

### **11.1.1.5 Separation of employees**

Clause 6 provides:

- (a) The Port Operator must ensure that employees, other than Support Services Staff, who are involved in the operations of the:
  - (i) Operations Business are not also simultaneously involved in the operations of the Trading Business; and
  - (ii) Trading Business [is] not also simultaneously involved in the operations of the Operations Business.

- (b) In respect of:
- (i) a previous Trading Business employee (other than Support Services Staff); and

- (ii) a previous Third Party Trader employee,

who was involved in any trading or marketing of Bulk Wheat and who commences employment with the Operations Business, the Port Operator must not permit that person to be involved in any activities regarding an Access Application by the Trading Business or the Third Party Trader respectively:

- (iii) for a period of three months commencing on the date that person ceases employment with the Trading Business or the Third Party Trader; or
- (iv) if at the date of that person ceasing employment with the Trading Business or the Third Party Trader, the Operation Business was considering an Access Application by the Trading Business or the Third Party Trader, until the later of either the Access Application being withdrawn, an Access Agreement being executed, or the making of an arbitration determination regarding the Access Application,

whichever is the later.

- (c) A previous Operations Business employee (other than Support Services Staff) who commences employment with the Trading Business must not be involved in any activities regarding an Access Application for a period of three months commencing on the date that person ceased employment with the Operations Business.

#### **11.1.1.6 Accounting separation**

Clause 7 provides:

- (a) The Port Operator must make arrangements, including the preparation of procedures and policies, to effectively ensure that it maintains audited separate accounts and accounting arrangements for the Trading Business, so as to give a true and fair view of the costs relating to the Trading Business as distinct from other costs incurred by the Port Operator.
- (b) Without limiting item 7(a), the accounts and records of the Trading Business must be kept in a way that enables all income, expenditure, assets and liabilities relating to the carrying out of its business activities and operations to be properly recorded and distinguished from the other income, expenditure, assets and liabilities of the Port Operator and its Related Bodies Corporate.
- (c) Without limiting the ACCC's powers under these ring fencing rules or otherwise, the Port Operator must provide the ACCC with such documents, including copies of the procedures and policies described in this item 7, as the ACCC may reasonably request when directing an audit under item 13, for the purpose of ascertaining whether the Port Operator is complying with its obligations under this item 7.

#### **11.1.1.7 Information technology access controls and information flows**

Clause 8 provides:

- (a) The Port Operator must establish, maintain and enforce appropriate controls regarding access to information technology systems, such that Third Party Confidential Information may be accessed only by:
  - (i) employees of the Operations Business; and
  - (ii) Support Service Staff.
- (b) Subject to item 8(c), the Operations Business must not:
  - (i) disclose Third Party Confidential Information to other entities, including its own Related Bodies Corporate and their employees;
  - (ii) use Third Party Confidential Information for the purpose of substantially damaging the Third Party to whom the Third Party Confidential Information relates or conferring upon the Trading Business an unfair competitive advantage over any Third Party in the marketing of Bulk Wheat; or
  - (iii) allow other entities, including its own Related Bodies Corporate and their employees, to access Third Party Confidential Information in the Port Operator's possession.
- (c) The Operations Business may disclose:
  - (i) to a Third Party, Third Party Confidential Information that solely relates to that Third Party's Bulk Wheat; or
  - (ii) subject to item 8(d), to any person, information concerning the grade, quality, quantity, location or attributes of Bulk Wheat received by the Port Operator (Receival Specific Information), provided that the Receival Specific Information is either aggregated to such an extent that, or stripped of the identity of the parties to which the information relates so that, the recipient of the aggregated or deidentified information without access to the pre-aggregated or pre-deidentified Receival Specific Information would not be capable of identifying information specific to any particular Third Party.
- (d) Item 8(c)(ii) shall not apply to prohibit the Operations Business from disclosing Third Party Confidential Information amongst its employees, advisors and contractors on a need to know basis.
- (e) The Operations Business must maintain a current register of all persons who use its Bulk Wheat management database.
- (f) The Operations Business must not allow the Trading Business' employees to access Third Party Confidential Information through Operations Business' databases

Third Party Confidential Information is defined as:

Third Party Confidential Information means information exchanged between a Third Party and the Operations Business (or any of their nominated representatives) that:

- (a) is information of the Third Party which is by its nature confidential or which is designated by the Third Party as being confidential;

- (b) relates to a Third Party's entitlement to or interest in any Bulk Wheat delivered to or held in the custody of the Port Operator, unless authorised to be disclosed by the Third Party;
- (c) relates to the origin, grade, quality, quantity, location or attributes of Bulk Wheat owned by the Third Party; but excludes information that:
- (d) is required to be disclosed under the WEMA;

#### **11.1.1.8 Outsourcing**

Clause 9 provides:

If the Operations Business or the Trading Business arranges for another entity to perform any of its functions or operations, it must ensure that the entity complies with these ring fencing rules as if it were the Operations Business or the Trading Business, as the case may be.

#### **11.1.1.9 Policies, procedures and systems**

Clause 10 provides:

- (a) The Port Operator must establish, maintain and comply with auditable policies, procedures and systems for the purpose of ensuring compliance with the Port Operator's obligations under these ring fencing rules.
- (b) The policies, procedures and systems must include, without limitation, policies, procedures and systems:
  - (i) for the maintenance of a register and records of the Port Operator's employees which must identify the name of each employee (including the executive officer or officers to whom employees report either directly or indirectly), their position, and confirmation of whether they are Support Services Staff, employees involved in the Operations Business, or employees involved in the conduct of any Trading Business;
  - (ii) for the transfer of employees between the Trading Business and the Other Business Units which complies with items 6(b) and 6(c);
  - (iii) governing access to the information technology systems of and information about the Operations Business;
  - (iv) for the flow of information between the Operations Business and the Trading Business, and from the Operations Business and the Trading Business to the Port Operator's directors, officers and senior management;
  - (v) for the treatment of Third Party Confidential Information;
  - (vi) for the outsourcing of any functions or operations of the Operations Business;
  - (vii) for the training of employees about the obligations imposed on the Port Operator and under these ring fencing rules; and
  - (viii) for dealing with any complaints made by a Third Party in connection with a reasonably founded and credible belief that the Port Operator has not complied with these ring fencing rules.

#### **11.1.1.10 Employee training**

Clause 11 provides:

- (a) The Port Operator's employees will be made aware that:
  - (i) a failure to comply with the Port Operator's obligations under these ring fencing rules may constitute a disciplinary offence and expose both the employee and the Port Operator to penalties for a breach of the TPA or the WEMA; and
  - (ii) they should contact the Port Operator's legal department if they have any concerns regarding these ring fencing rules, including their application to any particular conduct, or the employee's adherence to them.
- (b) The Port Operator will provide and publish information and guidance to its employees to ensure, so far as is reasonably practicable, that they are made aware of their obligations under these ring fencing rules.
- (c) The Port Operator will provide training to its employees who:
  - (i) deal directly with Third Parties;
  - (ii) are involved directly in providing Third Parties with access to Port Terminal Services; and
  - (iii) have access to Receival Specific Information;to ensure, so far as is reasonably practicable, that they are made aware of their obligations under these ring fencing rules.
- (d) If any Port Operator employee is knowingly involved in conduct that breaches these ring fencing rules, or any specific process created to implement these ring fencing rules, then without prejudice to any other action that the Port Operator may be required by law to take, or shall otherwise think appropriate:
  - (i) the conduct of that employee will be taken into account in relation to their performance appraisal and remuneration review; and
  - (ii) that employee shall receive such training as determined by the Port Operator's compliance manager.
- (e) The Port Operator will make its employees aware that engaging in deliberate conduct in repeated or serious breach of these ring fencing rules will be grounds for dismissal.

#### **11.1.1.11 Complaints handling**

Clause 12 provides:

- (a) If a Third Party considers on reasonable and credible grounds that the Port Operator has not complied with these ring fencing rules, they may lodge a written complaint (including detailed grounds and supporting evidence for the complaint) with the CEO of the Port Operator Group.
- (b) A complaint must be referred to:
  - (i) the Operations Business' General Manager;



- (ii) the Port Operator Group General Counsel; or
  - (iii) the Port Operator's compliance officer.
- (c) The Port Operator must conduct an internal investigation of the complaint, to determine whether there has been a compliance failure by the Port Operator.
- (d) If that investigation concludes that the Port Operator has committed a breach of these ring fencing rules, the Port Operator must:
- (i) inform the complainant of that finding; and
  - (ii) if the Port Operator (acting reasonably) considers that the breach has:
    - (A) given rise to substantial financial loss to the complainant; or
    - (B) conferred an unfair substantial competitive advantage on any User; or
    - (C) occurred more than once in any three year period;
- the Port Operator must appoint an appropriately qualified external auditor to conduct a review of the breach and an investigation of the Port Operator's compliance with the relevant ring fencing rules.
- (e) The auditor will compile a report identifying:
- (i) whether the Port Operator has complied with the ring fencing rules that were the subject of the investigations described in items 12(c) and 12(d)(ii);
  - (ii) if the auditor determines that the Port Operator has not complied with these ring fencing rules, state the particulars of the noncompliance;
  - (iii) state the process adopted for the review; and
  - (iv) provide recommendations for appropriately addressing the compliance failure.

#### **11.1.1.12 Audit**

Clause 13 provides:

- (a) The Port Operator's compliance with these ring fencing rules, and the Port Operator's related processes and procedures, must be audited by an independent auditor at such times as the ACCC may reasonably direct, but not more than once in any 12 month period.
- (b) The Port Operator must select the independent auditor and must notify the ACCC of the appointment (including the auditor's name and qualifications).
- (c) The auditor shall review:
  - (i) records of any complaints;
  - (ii) the Port Operator's compliance with these ring fencing rules;

- (iii) all relevant policies or procedures implemented under or otherwise relating to these ring fencing rules; and
  - (iv) any other issues relevant to the Port Operator's compliance with the principles and obligations under these ring fencing rules.
- (d) The auditor's report must be provided to the ACCC and include:
- (i) recommendations for any necessary improvements in the Port Operator's policies or processes and any response by the Port Operator to those recommendations; and
  - (ii) a report on the Port Operator's past compliance with any recommendations previously made by an auditor in respect of these ring fencing rules.

## **11.2 CBH's submissions in response to ACCC's Issues Paper, dated 29 April 2009**

CBH states that the 'provision of Port Terminal Services provides the relevant Port Operator with very limited (and only a very partial picture of) the sales arrangements of the relevant customer'<sup>429</sup> and states that the Port Operator will not have any information about:

- (i) the identity of the ultimate customer (unless there is a monopoly buyer at the relevant destination port). This is particularly the case as grains are often traded several times while they remain in the logistics or delivery chain;
- (ii) the price at which, or other terms on which, the wheat was sold;
- (iii) the date on which the exporter won the tender, or entered into the contract, to supply the wheat;
- (iv) whether the exporter is fulfilling the entire customer order from wheat exported from that port (or whether the exporter is supplementing the order from wheat exported from any other port around the world);
- (v) whether the grains exported will be blended with any other grains at another location after export;
- (vi) each of the other arrangements that the exporter may have to acquire wheat, trade wheat or supply wheat, either in Australia or overseas; or
- (vii) any of the customers' future tenders, contracts, marketing proposals or trading positions.

CBH submits:

Put simply, a snapshot of information about the volume of grain to be exported on one or more vessels provides the Port Operator with absolutely no visibility of the exporter's wider trading operations. That position is determined by the owner's stocks, purchases and sales of wheat at a global level and over a period of time:

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<sup>429</sup> Co-operative Bulk Handling Limited, *Submission to the ACCC*, 14 April 2009, para 4.9, p. 29.

Trading Position = Contracted Purchases + Stock on hand – Contracted Sales

Port Operators are not aware of or privy to a wheat owner's sale and purchase contractual arrangements, the prices at which those sales take place, the wheat owner's trading position or any information in relation to competition for future sales'.<sup>430</sup>

CBH considers that the ring fencing measures in its April Undertaking are 'substantially more detailed than those regarded as acceptable by the ACCC in its consideration of the Grain Express Notification'. CBH states that it has adopted 'a more detailed approach in recognition of the WEMA's focus on vertical integration issues'<sup>431</sup> and states that it 'accepts that appropriate measures are required to address both the perception and potential reality of discrimination'.<sup>432</sup>

CBH states that the audits provided for in its ring-fencing rules will identify breaches of the ring-fencing rules.<sup>433</sup> CBH submits that 'the ACCC will have the opportunity to consult with CBH as to the selection and appointment of the auditor. If the ACCC objects to CBH's nomination, CBH will choose an alternative auditor, provided that one is available'.<sup>434</sup>

On the April accounting separation regime, CBH states the following:

The costs for Grain Pool are managed and processed for accounting separately and Grain Pool is required to prepare a separate audited financial report in accordance with accounting standards and Corporations Act requirements.

In addition, there is a separation of individuals responsible for processing transactions on Grain Pool's behalf from other entities – such separation arrangements include a separate system for processing grower payments from Grain Pool

Grain Pool is also charged a shared services fee monthly for the costs of shared services provided to Grain Pool. This includes finance, HR, ICT, executive time, etc

The audit team from Ernst & Young for Grain Pool is also separate from the CBH audit team and that Ernst & Young audit team audits and verifies that all costs are correctly allocated to the right entity.

....

The Annual Report of Co-operative Bulk Handling Limited complies with Australian Accounting Standards which include Australian equivalents of International Financial Reporting Standards (AIFRS) and also complies with International Financial Reporting Standards (IFRS). Further, a breakdown of operating segments is provided by business unit., for which, CBH has adopted AASB 8 – Operating Segments as the means of reporting. To allow this report to be properly audited CBH records profit and loss on a divisional basis. In the case of Grain Pool, separate special purpose accounts are filed with the

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<sup>430</sup> Co-operative Bulk Handling Limited, *Submission to the ACCC*, 14 April 2009, para 4.9, p. 30.

<sup>431</sup> Co-operative Bulk Handling Limited, *Submission to the ACCC*, 14 April 2009, para 5.9, p. 38.

<sup>432</sup> Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 75.

<sup>433</sup> Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 66.

<sup>434</sup> Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 88.

Australian Securities and Exchange Commission. An example of these segment accounts are shown below.<sup>435</sup>

CBH submits that:

Any ring-fencing arrangement must distinguish between legitimate and prohibited information flows. To prohibit all information flows would be an unworkable outcome. The Undertaking takes an orthodox, measured approach to this issue. Clause 6(c)(ii) refers to information that is intended to be placed in the public domain. CBH will not provide any information to GPPL that is not available to all other exporters. The complaints handling procedure is not limited to CBH. The auditor will review all complaints under clause 13.<sup>436</sup>

## 11.3 Submissions from interested parties in response to ACCC's Issues Paper, dated 29 April 2009

### 11.3.1 AGEA

In relation to CBH's ring fencing rules, AGEA submits that the clauses relating to separate business units and work areas 'does not of itself protect the flow of confidential information. CBH has not explained any process it intends to implement to create or ensure Chinese Walls exist'.<sup>437</sup> On this issue, AGEA submits the following:

If the work areas are to be kept separate, no employees should be permitted access to the other businesses' work area. Qualifying the issue of access to permit such access for the alleged "purpose of arm's length dealings" allows the ring-fencing arrangement to breakdown.<sup>438</sup>

AGEA submits that CBH clause 6(a) of its ring fencing rules, which permits Support Services Staff to be involved in the Operations Business and the Trading Business provided such involvement is not simultaneous, 'is inadequate and it is not clear why it is limited to Support Services Staff'. AGEA submits that:

there must be a strict separation of all staff at all times. Further, no employee of the Trading Business or any employee of a previous Third Party Trader should be permitted to be employed with the Operations Business for at least 12 months after they cease employment with the Trading Business or a previous Third Party Trader (and vice versa).<sup>439</sup>

On CBH clause 6(c)(ii), AGEA submits:

Clause 6(c)(ii) allows the Operations Business to pass on to "any person" information concerning grade, quality quantity, location or attributes of bulk wheat received by CBH, provided that the information is aggregated. That the information is aggregated does not render it useless and, in fact, providing that

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<sup>435</sup> Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, pp. 85-86.

<sup>436</sup> Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 66.

<sup>437</sup> Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 16.7, p. 35.

<sup>438</sup> Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 16.8, p. 35.

<sup>439</sup> Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 16.9, p. 36.

information may confer an unfair advantage to the particular exporter to the detriment of the applicant or user. This clause entitles CBH to provide GrainPool with valuable information that is not available to AWE. For example, GrainPool will know what grain is stored and where throughout the CBH grain system, which will assist GrainPool to plan its sales contracts, and vessel requirements. Understanding what portion / grades of crop is sold / warehoused gives GrainPool significant advantage in planning sales programs and potential when setting bids for acquisition.<sup>440</sup>

AGEA submits that CBH clause 8(d) is ‘vague and uncertain’ and states that it is unclear what is a ‘need to know basis’ in the context of allowing the disclosure of prohibited information.<sup>441</sup>

AGEA submits that the complaints handling procedure in CBH’s ring fencing rules ‘must provide for complaints to be made to an independent third party’. AGEA submits that ‘CBH lacks the impartiality to conduct a proper and independent investigation into a complaint about its own potential breach of the ring fencing rules’.<sup>442</sup>

### **11.3.2 WA Department of Agriculture and Food (DAFWA)**

DAFWA notes CBH’s ring fencing provisions but states that it:

‘is of the view that the best solution for this issue would be for CBH to ‘spin off’ its grain marketing operations (Grain Pool Pty Ltd) as a separate commercial entity and retain CBH purely as a grower owned and operated storage and handling entity. In the event that this occurs the need for a Port Services Access Undertaking would appear to be redundant’.<sup>443</sup>

On this point, DAFWA adds that:

‘[o]ften perception is as damaging as reality, hence DAFWA suggests the only way to overcome this issue is true separation of the two entities’.<sup>444</sup>

### **11.3.3 The Western Australian Farmers Federation (WA Farmers)**

WA Farmers is of the view that CBH’s ring fencing rules are adequate. WA Farmers submits:

Through regular interactions with CBH, WA Farmers is satisfied that CBH has amended and implemented its existing ring fencing arrangements from its Grain Express project as per CBH’s Port Terminal Services Access Undertaking, Schedule 2 – Information and Operational Segregation Rules.

The new arrangements include provisions for the legally distinct entities to conduct trading activities, which has resulted in the physical segregation and

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<sup>440</sup> Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 16.10, p. 36.

<sup>441</sup> Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 16.11, p. 36.

<sup>442</sup> Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 16.12, p. 36.

<sup>443</sup> Department of Agriculture and Food Western Australia, *Submission in relation to proposed CBH access undertaking*, 18 May 2009, para 6.1, p. 2.

<sup>444</sup> Department of Agriculture and Food Western Australia, *Submission in relation to proposed CBH access undertaking*, 18 May 2009, para 6.12, p. 3.

accounting separation of these entities whereby information flow is restricted and compliance is ensured via external independent audits.<sup>445</sup>

### 11.3.4 PGA

In relation to CBH's ring-fencing rules, the PGA submits that it considers that the ring-fencing arrangements are inadequate.

PGA submits:

The ACCC has proposed that ring fencing rules are critical to a fair and transparent access regime. The CBH Undertaking states that its ring fencing measures are substantially more detailed than those regarded as acceptable by the ACCC.

CBH has an obvious conflict of interest. It has enormous potential and real incentive to exercise their monopoly power in the bulk handling services market to inhibit competition by discriminating in favour of their Trading Division Grain Pool and restricting access to services.

The CBH Undertaking sets out details of CBH's organisational structure and undertakes to implement measures to ensure that CBH's trading arm is organisationally separate from its other business units. The CBH Undertaking provides for the separation of work areas, and separation of employees and for information technology access controls.

The PGA considers these arrangements to be inadequate. The ringed fencing provisions provide that CBH's Trading Business and Other Business Units must have separate work areas. The PGA understands that CBH's Trading Business and Other Business Units occupy different floors (one level apart) in the same building. The physical separation of work areas does not of itself protect the flow of confidential information. CBH has not explained any process it intends to implement to create or ensure Chinese Walls exist.

If the work areas are to be kept separate, no employees should be permitted access to the other businesses' work area. The proposed arrangements permit Support Services Staff to be involved in the Operations Business and the Trading Business, provided such involvement is not "simultaneous". This is inadequate and it is not clear why it is limited to Support Services Staff. There must be a strict separation of all staff at all times.

The proposed arrangements also allow the Operations Business to pass on to "any person" information concerning grade, quality quantity, location or attributes of bulk wheat received by CBH, provided that the information is aggregated. That the information is aggregated does not render it useless and, providing that information may confer an unfair advantage to the particular exporter to the detriment of the applicant or user. This may entitle CBH to provide GrainPool with valuable information that is not available to its competition. GrainPool may be permitted to know the quantities and types of grain is stored throughout the CBH system, which may assist GrainPool to plan its sales contracts, and vessel requirements, giving them a significant advantage over their competition.

Example: On 21 January 2009 growers in Western Australia received a letter from the Grain Pool advising them that the Grain Pool had entered into a "strategic partnership with leading WA plant breeder InterGrain to develop a market for premium noodle [wheat] varieties."

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<sup>445</sup> The Western Australian Farmers Federation (Inc), *Submission in relation to proposed CBH access undertaking*, 29 May 2009, p. 3.

After the PGA had publicly questioned the validity of this arrangement, the PGA was contacted by the CBH General Manager Corporate Affairs and Grower Services to attend a meeting between Grain Pool and InterGrain to discuss this issue. Although the meeting was attended only by members of Grain Pool, it is concerning that management between the two entities interact and freely discuss information.

The complaints handling procedure in the proposed arrangements does not provide for complaints to be made to an independent third party. CBH may lack the impartiality to conduct a proper and independent investigation into a complaint about its own potential breach of the ring fencing rules.<sup>446</sup>

## 11.4 Submissions in response to ACCC's Draft Decision

### 11.4.1 CBH

In response to the ACCC's Draft Decision, CBH did not make a submission on the ACCC's conclusion that it is not necessary for ring-fencing measures to be included in its Undertaking at this time.

### 11.4.2 AGEA

In response to the views set out in the ACCC's Draft Decision regarding ring-fencing, AGEA submits:

#### **Ring-fencing**

AGEA believes that the ACCC should not discard the need for robust and enforced ring-fencing policies (with a requirement for an annual audit as to compliance with the ring-fencing provisions) even if the BHCs' Undertakings contain a robust non-discrimination and no hindering access clause. The respective histories of the BHCs suggest that without ACCC intervention, the BHCs will not provide ring-fencing policies that are adequate and they will in any event, be discarded when convenient to that BHC. Removing ring-fencing policies will take away any protection against the BHCs providing confidential information to their marketing arm. The result will be a complete failure of operators being required to provide "*fair and transparent access*" to their port terminal services to AWEs (see paragraphs 11.1 – 11.11 below).<sup>447</sup>

AGEA further submits:

The ACCC considers, and AGEA agrees, that the BHCs' current ring-fencing rules are not an effective safeguard against anti-competitive discrimination in the provision of port terminal services.

However, AGEA does not agree with the ACCC's view that if the BHCs' proposed Undertakings are amended to contain "*robust non-discrimination and no hindering access clauses, fair and transparent port terminal protocols and an indicative access agreement (as well as measures to deal with the potential for information about port terminal services to be used to the advantage of [the BHCs'] wheat exporting arm), then, in the circumstances, it*

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<sup>446</sup> Pastoralists and Graziers Association, *Submission in relation to proposed CBH access undertaking*, 29 May 2009, para 4.22-4.28, pp. 10-11.

<sup>447</sup> Australian Grain Exporters Association, *Submission in relation to Draft Decisions on Port Terminal Services Access Undertakings*, 3 September 2009, p. 7.

*would not be necessary for ring-fencing measures to be included in [the BHCs'] undertaking at this particular point in time."*

As is clear from the above, the BHCs are not offering to provide access to terminal services in accordance with the above principles. As such, and for the further reasons set out immediately below, a robust ring-fencing policy is essential to ensure BHCs provide fair and transparent access to port terminal services to all AWEs.

The ACCC has taken the above view due to transitional nature of the industry and the short duration of the proposed Undertaking.

AGEA recognises that the duration of the Undertaking may be considered to be short.

However, in an industry that is in transition and now involves 23 companies that are accredited to AWEs, it is essential that robust ring-fencing rules are out in place.

The substantial number of failings identified by the ACCC in the BHCs proposed Undertakings which require wholesale rectification is telling.

The BHCs have shown that they will not provide fair and transparent access to port terminal facilities to AWEs, unless required to do so under the risk that their trading arm losing export accreditation.

As noted by the ACCC, some BHCs have drawn out this proposed Undertaking process. They have not been open and frank. Each revised submission has in reality, been an attempt to have the ACCC accept their proposed Undertakings with as little as possible monopolistic advantages surrendered.

The majority of the BHCs' submissions to the ACCC have been timed so as to exclude the possibility of those submissions being subjected to proper public scrutiny and consultation before the ACCC provided its draft decisions.

Twenty three newly accredited companies have been identified by WEA as being worthy of exporting bulk wheat from Australia. At the same time that these newly accredited AWEs are trying to gain a foothold in the Australian bulk wheat market, the BHCs should not be allowed the opportunity to provide port terminal services without robust ring-fencing rules being part of their proposed Undertakings.

History has shown that the information exchange between BHCs and their respective trading arms is impossible to deter. To avoid the opportunity for discrimination, quality and quantity data on receivals and other stock information should be publicly available information and should be updated daily.<sup>448</sup>

### **11.4.3 PGA**

In response to the views set out in the ACCC's Draft Decision regarding ring-fencing, the PGA submits:

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<sup>448</sup> Australian Grain Exporters Association, *Submission in relation to Draft Decisions on Port Terminal Services Access Undertakings*, 3 September 2009, p. 24.



## RING-FENCING (SECTION 11)

The PGA agrees with the ACCC that the ring-fencing rules in CBH's proposed Undertaking do not, in their current form serve as an effective safeguard against anti-competitive discrimination in the provision of port terminal services.

The PGA agrees with the ACCC's non-acceptance of CBH's position that ring-fencing measures provided to the ACCC in conjunction with the current access undertaking assessment can apply in substitution for those arrangements referred to in CBH's Grain Express notification.<sup>449</sup>

### 11.5 ACCC's views on the April Undertaking

Ring-fencing is one tool that can be used, in conjunction with robust non-discrimination and no hindering access clauses, fair and transparent port terminal protocols and an indicative access agreement to protect against anti-competitive discrimination.

The ACCC notes that CBH is already subject to ring-fencing arrangements arising from the ACCC's decision not to revoke a 'notification' from CBH relating to a component of its Grain Express product in 2008. CBH's ring-fencing rules in its April Undertaking differ in some respects from the ring-fencing arrangements which form part of CBH's Grain Express exclusive dealing notification. For instance, the Grain Express ring-fencing policy provides for a more robust complaints handling/resolutions process than the process provided in its April Undertaking.

The ACCC is therefore of the view that the ring-fencing rules in CBH's April Undertaking would not serve as an effective safeguard against anti-competitive discrimination in the provision of port terminal services.

However, were CBH's Undertaking amended to contain robust non-discrimination and no hindering access clauses, fair and transparent port terminal protocols and indicative access agreements, then, in the circumstances, it would not be necessary for CBH to include ring-fencing measures in its Undertaking at this particular point in time.

In addition, it would be necessary for CBH's Undertaking to include measures to deal with the potential for information about port terminal services to be used to the advantage of CBH's wheat exporting arm. Such appropriate measures are discussed in the Publication of Information chapter. These measures require publication of key port terminal information (such as vessel nomination applications) on the shipping stem a short time after its receipt by CBH (i.e. the next business day). This would increase transparency of nominations that have been made and lessen the opportunity for CBH's marketing arm to misuse key port terminal information relating to other wheat exporters whilst not imposing unduly prescriptive regulation on CBH. It is important to note that any such discriminatory conduct would be prohibited by a

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<sup>449</sup> Pastoralists and Graziers Association, *Submission in relation to Draft Decision on CBH Access Undertaking*, 3 September 2009, pp. 10-11.

robust non-discrimination clause, such as that recommended by the ACCC in the Non-Discrimination chapter.

In forming the view that ring-fencing measures are not required at this time, the ACCC has taken into account the transitional state of the industry and the possibility that any ring-fencing measures that were implemented at this point in time may need to be revised in the medium term in accordance with any regulatory changes (either to extend or reduce the regulation to which CBH is subject).<sup>450</sup> The ACCC considers that this would be an undesirable outcome in that it could impose unnecessary regulatory costs during a time of industry transition, particularly given the short duration of CBH's Undertaking.

That said, the ACCC is cognisant of calls by a number of interested parties for robust ring-fencing measures, and notes that it will closely monitor the effectiveness of CBH's Undertaking in ensuring against anti-competitive discrimination during its operation. Should the Undertaking not prove effective, the ACCC may impose ring-fencing in future regulatory arrangements.

The ACCC 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.

It is important to note that the ACCC's approach to ring-fencing in assessing this particular access Undertaking is not indicative of the approach to ring-fencing that the ACCC would be likely to take in relation to other regulated industries. The approach taken on this occasion reflects the factors outlined above, and in particular, that the industry is still transitioning from having a single desk responsible for the export of wheat in mid 2008 to the current situation of having 23 wheat exporters accredited to export wheat from Australia; and that the arrangements can be revisited in two years.

Finally, it is also important to note that the ACCC's approach to CBH's ring-fencing measures in this decision has no bearing on the need for CBH to comply with the ring-fencing arrangements it agreed to adhere to in conjunction with the ACCC's decision not to revoke the 'notification' relating to a component of the Grain Express product.

CBH's agreement to comply with these ring-fencing measures formed an important part of the ACCC's decision not to revoke the notification. Accordingly, the ACCC does not accept CBH's position that ring-fencing measures provided to the ACCC in conjunction with the April access Undertaking assessment can apply in substitution for those arrangements referred to in CBH's Grain Express notification to the ACCC.

### **11.5.1 CBH's September Undertaking**

CBH's September Undertaking does not include ring-fencing measures.

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<sup>450</sup> For example, the ACCC notes the planned Productivity Commission review of the WEMA and statements by the Federal Government that it will monitor developments in the up-country stages of the grain supply chain

### **11.5.2 ACCC's views on CBH's September Undertaking**

For the reasons set out above, given that CBH's September Undertaking contains robust non-discrimination and no hindering access clauses, fair and transparent port terminal protocols and an indicative access agreement (as well as measures to deal with the potential for information about port terminal services to be used to the advantage of CBH's wheat exporting arm), then, in the circumstances, it is not necessary for ring-fencing measures to be included in CBH's September Undertaking at this particular point in time.

## 12 Capacity Management

### Summary

#### *Appropriate for the port protocols to form part of the Undertaking*

Port Terminal Rules (PTRs) set out the key processes by which CBH will manage demand for the Port Terminal Services (including policies and procedures relating to the nomination and acceptance of ships to be loaded using the Port Terminal Service). For this reason the ACCC notes that the inclusion of the PTRs in the September Undertaking is appropriate.

#### *Procedure for variation of port protocols can be flexible*

The variation mechanism set out in CBH's September Undertaking is appropriate given that it addresses the ACCC's concerns with the variation mechanism in CBH's April Undertaking. These concerns were that the variation mechanism was not appropriate because it provides too much discretion to CBH and insufficient certainty for access seekers.

That said, in the interests of retaining flexibility and efficiency, the ACCC noted that it would be prepared for the variation mechanism to be based on a robust industry consultation process rather than a formal ACCC consultation process. The ACCC notes that CBH's September Undertaking has adopted this approach.

The ACCC will, however, closely monitor the success of this variation method and will take its findings into account in any future review of access undertakings.

To ensure that the PTRs that have been varied can be enforced, it is appropriate that a provision is included in the September Undertaking that obliges CBH to comply with the PTRs (as varied from time to time). In addition, it is appropriate that the September Undertaking includes a provision stating that any variations to the PTRs are subject to the non-discrimination provisions in the Undertaking (see further below). Further, it is appropriate that the September Undertaking provides that the revised PTRs must contain an expeditious dispute resolution mechanism.

#### *Substance of the port protocols*

The ACCC considers that the PTRs in the September Undertaking are appropriate because they address the ACCC's concerns with the August PTRs raised in the Further Draft Decision.

The ACCC notes that its approach to the assessment of the PTRs has given weight to the legitimate business interests of CBH in being able to run its port terminal facilities with a sufficient degree of flexibility and without unduly prescriptive regulation so as to maintain an efficient supply chain. The ACCC further notes that the robust non-discrimination clause and no-hindering access clause in CBH's September Undertaking (together with the ability of the ACCC to order an audit of CBH's compliance with the non-discrimination clause) are intended to constrain the ability of CBH to exercise discretion under its PTRs in an anti-competitive manner.

## 12.1 CBH's April Undertaking

### 12.1.1 Obligation to publish Port Terminal Rules

CBH's April Undertaking states that CBH will, 'from time to time publish on its website ... a statement setting out ... the policies and procedures for managing demand for the Port Terminal Service (including the ... policies and procedures relating to the nomination and acceptance of ships to be loaded using the Port Terminal Service)'. This statement is referred to as 'Port Terminal Rules' (PTRs).<sup>451</sup>

Clause 9.1(b) provides that '[t]he current Port Terminal Rules are available on CBH's website at [www.cbhoperations.com.au](http://www.cbhoperations.com.au).'<sup>452</sup>

### 12.1.2 The Port Terminal Rules

Clause 6.1(a) obliges CBH to publish, by no later than 30 September of each year on its website, standard offer terms and conditions (Standard Terms).<sup>453</sup> Clause 6.1(a)(ii) provides that the Standard Terms 'must include an obligation for the Port Operator to comply with the Port Terminal Rules when providing the Port Terminal Services'.<sup>454</sup>

Clause 9.1(a) provides that the PTRs 'must be consistent' with CBH's obligation to provide non discriminatory access under clause 6.4 (which is subject to the exceptions contained in clause 6.5) and the objectives of the proposed Undertaking set out in clause 2.<sup>455</sup>

### 12.1.3 Varying the Port Terminal Rules

In accordance with the April Undertaking, CBH may vary the PTRs 'provided that they are consistent' with: (i) CBH's obligation to provide non discriminatory access under clause 6.4 (which is subject to the exceptions contained in clause 6.5); and (ii) the objectives of the proposed Undertaking set out at clause 2.<sup>456</sup>

Any variation 'under clause 9.1(c) must be published at least 30 days prior to the date on which it is to become effective' in the 'same locations as [CBH] publishes its Port Terminal Rules.'<sup>457</sup>

CBH must give the ACCC copies of the varied PTRs 'promptly' after they are published.<sup>458</sup>

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<sup>451</sup> Co-operative Bulk Handling Limited, *Port Terminal Services Access Undertaking*, 14 April 2009, clauses 9.1(a) and 1.1.

<sup>452</sup> Co-operative Bulk Handling Limited, *Port Terminal Services Access Undertaking*, 14 April 2009, clause 9.1(b).

<sup>453</sup> Co-operative Bulk Handling Limited, *Port Terminal Services Access Undertaking*, 14 April 2009, clause 6.1(a).

<sup>454</sup> Co-operative Bulk Handling Limited, *Port Terminal Services Access Undertaking*, 14 April 2009, clause 6.1(a)(ii).

<sup>455</sup> Co-operative Bulk Handling Limited, *Port Terminal Services Access Undertaking*, 14 April 2009, clause 9.1(a).

<sup>456</sup> Co-operative Bulk Handling Limited, *Port Terminal Services Access Undertaking*, 14 April 2009, clause 9.1(c).

<sup>457</sup> Co-operative Bulk Handling Limited, *Port Terminal Services Access Undertaking*, 14 April 2009, clause 9.1(d).

#### 12.1.4 Operational Decisions

In making decisions relating to the provision of access to the Port Terminal Services, the April Undertaking provides that CBH is likely to make ‘Operational Decisions’.<sup>459</sup>

Operational Decisions are defined in the April Undertaking as ‘decisions made in the course of providing the Port Terminal Services’.<sup>460</sup>

Clause 9.2(a) provides a list of the kinds of areas Operational Decisions will cover, such as: ‘scheduling, cargo accumulation decisions and ship loading’.<sup>461</sup> This list is not exhaustive.

In arriving at an Operation Decision relating to the provision of access to the Port Terminal Services, the April Undertaking requires that CBH:

- (i) ‘make decisions in a manner consistent with the objects of the Undertaking’ and ‘make decisions that are commercially justifiable, taking into account the matters referred to in clause 9.2(c)’<sup>462</sup>; and
- (ii) ‘subject to clause 9.2(c), must not discriminate between Users ... in providing Port Terminal Services.’<sup>463</sup>

The April Undertaking provides that the obligations in 9.2(b) are subject to the ‘qualification’ in 9.2(c) that ‘many Operational Decisions made ... will necessarily involve conflicts of interest of users of the Port’ and may ‘necessarily confer a relative disadvantage on one user ... and an advantage on others.’<sup>464</sup>

Further, the April Undertaking provides that the ‘fact that an individual Operational Decision confers a relative disadvantage on one user of the Port or an advantage on another does not, of itself, mean that the Port Operator has breached this Undertaking.’<sup>465</sup>

Without limiting the qualifications in clause 9.2(c) (set out above) or the matters that CBH can have regard to in determining the price and non-price terms for the

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<sup>458</sup> Co-operative Bulk Handling Limited, *Port Terminal Services Access Undertaking*, 14 April 2009, clause 9.1(e).

<sup>459</sup> Co-operative Bulk Handling Limited, *Port Terminal Services Access Undertaking*, 14 April 2009, clauses 9.2(a) and 1.1.

<sup>460</sup> Co-operative Bulk Handling Limited, *Port Terminal Services Access Undertaking*, 14 April 2009, clause 9.2(a).

<sup>461</sup> Co-operative Bulk Handling Limited, *Port Terminal Services Access Undertaking*, 14 April 2009, clause 9.2(a).

<sup>462</sup> Co-operative Bulk Handling Limited, *Port Terminal Services Access Undertaking*, 14 April 2009, clause 9.2(b)(i).

<sup>463</sup> Co-operative Bulk Handling Limited, *Port Terminal Services Access Undertaking*, 14 April 2009, clause 9.2(b)(ii).

<sup>464</sup> Co-operative Bulk Handling Limited, *Port Terminal Services Access Undertaking*, 14 April 2009, clause 9.2(c).

<sup>465</sup> Co-operative Bulk Handling Limited, *Port Terminal Services Access Undertaking*, 14 April 2009, clause 9.2(c).

provision of access to Port Terminal Services for different ‘Applicants or Users’ (as set out in clause 6.5),<sup>466</sup> CBH may, in making Operational Decisions:

- (i) give priority to vessels based on the ‘lead time given between nomination and vessel ETA, the likely availability of sufficient Bulk Wheat at the Port prior to vessel ETA, the likely uncommitted storage capacity at the Port Terminal Facility and the uncommitted inloading capacity necessary to make a nominated vessel’s nominated cargo tonnage’;<sup>467</sup>
- (ii) take into account, in particular, the objectives of:<sup>468</sup>
  - a. ‘minimising demurrage at the Port over a given period’;
  - b. ‘maximising throughput ... at the Port over a given period’;
- (iii) ‘vary a cargo assembly plan or ‘queuing order for vessels’ as a result of’;<sup>469</sup>
  - a. ‘insufficient Bulk Wheat at the Port accumulated by the User necessary to make a User’s nominated vessel’s nominated cargo tonnage’;
  - b. ‘variations in vessel arrival times’;
  - c. ‘failure of vessels to pass surveys’;
  - d. ‘stability and ship worthiness inspections’;
  - e. ‘vessel congestion’;
  - f. ‘variation in cargo requirements’;
  - g. ‘lack of performance of freight providers’;
  - h. ‘equipment failure’;
  - i. ‘maintenance outages’;
  - j. ‘weather preventing relevant activities at the Port Terminal Facilities’;
  - k. ‘embargo, strike, lockout, or labour conditions impacting on the provision of the Port Terminal Services’;
  - l. ‘any material breach by the user of the Port Terminal Facilities’;

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<sup>466</sup> Co-operative Bulk Handling Limited, *Port Terminal Services Access Undertaking*, 14 April 2009, clause 9.2(d).

<sup>467</sup> Co-operative Bulk Handling Limited, *Port Terminal Services Access Undertaking*, 14 April 2009, clause 9.2(d)(i).

<sup>468</sup> Co-operative Bulk Handling Limited, *Port Terminal Services Access Undertaking*, 14 April 2009, clause 9.2(d)(ii).

<sup>469</sup> Co-operative Bulk Handling Limited, *Port Terminal Services Access Undertaking*, 14 April 2009, clause 9.2(d)(iii).

- m. ‘the status of the accreditation of the user of the Port Terminal Services under the Access Agreement’;
- n. ‘contamination of accumulated cargoes or contamination of loads’; or
- o. ‘a User not working a vessel or accumulating a cargo on a 24 hour / 7 day basis where another User is able to do so’.

### **12.1.5 Other matters**

The Standard Terms ‘must include an obligation for the Port Operator to comply with the Port Terminal Rules when providing the Port Terminal Services’.<sup>470</sup>

CBH must not engage in conduct ‘having a purpose of hindering access to the Port Terminal Services by any User in the exercise of a reasonable right of access’.<sup>471</sup>

## **12.2 CBH’s supporting submission to the April Undertaking**

This section summarises the arguments in CBH’s supporting submission that expand on or otherwise explain the approach taken in relation to the Capacity management (Clause 9) component of the April Undertaking.

### **12.2.1 General comments on the proposed PTRs**

#### **12.2.1.1 CBH submits that the public interest and the interests of access seekers are served by access arrangements which ensure certainty, transparency and non-discrimination**

CBH submits that the public interest and the interests of access seekers are served by CBH ‘continuing to provide access to Port Terminal Services to accredited wheat exporters ... under more fully documented arrangements which ensure certainty, transparency and non-discrimination’.<sup>472</sup>

CBH also submits that access seekers ‘want certainty – certainty of terms ... certainty of non-discrimination and the certainty of disciplined processes for negotiation and dispute resolution. The Undertaking provides all these things.’<sup>473</sup>

#### **12.2.1.2 CBH submits that the PTRs are not incorporated in the April Undertaking as CBH requires the flexibility to amend the PTRs to adapt to changing circumstances**

CBH submits that the draft ‘Port Terminal Rules are ... not incorporated in the Undertaking ... because they must retain the flexibility to change ... with operational

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<sup>470</sup> Co-operative Bulk Handling Limited, *Port Terminal Services Access Undertaking*, 14 April 2009, clause 6.1(a)(ii).

<sup>471</sup> Co-operative Bulk Handling Limited, *Port Terminal Services Access Undertaking*, 14 April 2009, clause 9.3.

<sup>472</sup> Co-operative Bulk Handling Limited, *Submission to the ACCC*, 14 April 2009, pp. 5-6.

<sup>473</sup> Co-operative Bulk Handling Limited, *Submission to the ACCC*, 14 April 2009, p. 41.



requirements and other factors that may become evident as the full consequences of deregulation become apparent.<sup>474</sup>

CBH submits that '[h]owever the Port Terminal Rules (and any amendments to them) are required to comply with the principles of non-discrimination and be implemented and interpreted in a non-discriminatory manner. The Standard Terms require CBH to comply with the Port terminal Rules.'<sup>475</sup>

CBH also submits that the 'Port Terminal Rules, together with the non-price terms and conditions and Cargo Accumulation Guidelines, will govern the operational provision of the Port Terminal Services.'<sup>476</sup>

**12.2.1.3 CBH submits that the transparency provided by publication of the PTRs and the shipping stem as required under the WEMA, when combined with the terms of the April Undertaking, 'substantially addresses' any concerns that CBH may discriminate in relation to its management of the PTRs or the shipping stem**

CBH submits that 'there is generally excess capacity at each export grain terminal operated by CBH' with 'port allocations being given in accordance with published non-discriminatory protocols.'<sup>477</sup>

CBH submits that the April Undertaking relies on two key mechanisms for capacity management: the Port Terminal Rules and the shipping stem, both of which are in the public domain.<sup>478</sup> When read in combination with the ring-fencing provisions, CBH submits that these commitments 'should substantially address any concerns about the way port terminal capacity ... is managed.'<sup>479</sup>

CBH submits that as the April Undertaking 'obliges CBH to publish these documents ... CBH is subject to oversight by both the WEA under the WEMA and the ACCC under the Undertaking',<sup>480</sup>

CBH also submits that this publication requirement 'provides transparency about the operation of the port and the port allocation and enables wheat exporters to ensure that ... [CBH] is complying with its obligations under the Port Terminal Rules and management of the shipping stem.'<sup>481</sup>

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<sup>474</sup> Co-operative Bulk Handling Limited, *Submission to the ACCC*, 14 April 2009, p. 4.

<sup>475</sup> Co-operative Bulk Handling Limited, *Submission to the ACCC*, 14 April 2009, p. 4.

<sup>476</sup> Co-operative Bulk Handling Limited, *Submission to the ACCC*, 14 April 2009, p. 4.

<sup>477</sup> Co-operative Bulk Handling Limited, *Submission to the ACCC*, 14 April 2009, pp. 35-36.

<sup>478</sup> Co-operative Bulk Handling Limited, *Submission to the ACCC*, 14 April 2009, p. 36.

<sup>479</sup> Co-operative Bulk Handling Limited, *Submission to the ACCC*, 14 April 2009, p. 36.

<sup>480</sup> Co-operative Bulk Handling Limited, *Submission to the ACCC*, 14 April 2009, p. 36.

<sup>481</sup> Co-operative Bulk Handling Limited, *Submission to the ACCC*, 14 April 2009, p. 15, 28 and 36.

#### **12.2.1.4 CBH submits that the approach to capacity management in the April Undertaking provides an appropriate balance between the need to ensure non-discrimination in relation to operational matters and the need for flexibility in relation to port rules**

CBH submits that the ‘approach to capacity management and scheduling ... is designed to strike an appropriate balance between:’

- (i) ‘the need to ensure non-discrimination in relation to operational matters such as ... the movement and loading of vessels in the shipping stem; and’
- (ii) ‘the need for the Port Operator to maintain ... appropriate flexibility in relation to port rules so that operational decision making does not become mired in administrative complexity or victim to gaming by access seekers.’<sup>482</sup>

CBH submits that this balance is provided by ‘the principles of non-discrimination ... in the Undertaking (see clauses 6.4, 9.2, 9.3 and 9.4);’ applying ‘at the day to day operational level of decision making in relation to capacity management and scheduling’. CBH submits that while the PTRs are not included in the April Undertaking, ‘the Capacity Management aspects of the Undertaking, such as the port rules are explicitly subject to non-discrimination principles.’<sup>483</sup>

CBH submits that a ‘number of inherent safeguards exist to ensure these obligations will be complied with. The Port Terminal Rules themselves are required to be published’ providing ‘access seekers and potential access seekers with the opportunity to object to any current provisions ... or to any changes to the Port Terminal Rules once made. Operational decisions are subject to a dispute resolution process under the Standard Terms.’<sup>484</sup> In addition, CBH submits that ‘[i]ntense scrutiny is already applied to shipping stem decisions by an informed market and an effective regulator in the WEA.’<sup>485</sup>

#### **12.2.1.5 CBH submits that given the complex requirements involved in providing Port Terminal Services and the transitional state of the industry, it would not be appropriate to require the PTRs to be included in the April Undertaking such that the PTRs could only be amended for the duration of the Undertaking**

CBH also submits that ‘it would be both unworkable and not appropriate to require the port rules to form part of the Undertaking itself’ as the ‘movement of millions of tonnes of export wheat through port facilities in the space of a few months creates ... inevitable scheduling conflicts and no facility could be constructed efficiently that would be free of such inherent conflicts.’<sup>486</sup>

CBH submits that an ‘inefficiency in one part of the supply chain may give rise to a cascading series of problems and requires changes in other parts of the logistics chain’

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<sup>482</sup> Co-operative Bulk Handling Limited, *Submission to the ACCC*, 14 April 2009, p. 36.

<sup>483</sup> Co-operative Bulk Handling Limited, *Submission to the ACCC*, 14 April 2009, pp. 36-37.

<sup>484</sup> Co-operative Bulk Handling Limited, *Submission to the ACCC*, 14 April 2009, p. 37.

<sup>485</sup> Co-operative Bulk Handling Limited, *Submission to the ACCC*, 14 April 2009, p. 37.

<sup>486</sup> Co-operative Bulk Handling Limited, *Submission to the ACCC*, 14 April 2009, p. 37.

and as a result, the PTRs ‘that provide the framework for operational decision making must remain flexible enough so that changes may be efficiently implemented’.<sup>487</sup>

CBH submits that given the fact that the bulk wheat export industry is in transition, ‘it is unrealistic to expect a Port Operator to have comprehensively and finally determined the precise form of its Port Terminal Rules such that they would require no amendment for the duration of the Undertaking.’<sup>488</sup>

CBH submits that ‘[a]ccordingly, it is essential for the efficient operation of facilities the Port Operators have a mechanism to amend Port Terminal Rules where appropriate, and without having to provide a new or amended Undertaking.’<sup>489</sup>

CBH submits however that ‘it is appropriate for any changes to the Port Terminal Rules to be made in accordance with the non-discrimination principles embodied in the Undertaking, to be made publicly and for decisions in relation to Port Terminal Rules to be subject to an appropriate dispute resolution process. All of these measures are embodied in the Undertaking.’<sup>490</sup>

## **12.2.2 Operational Decisions**

### **12.2.2.1 CBH submits that the April Undertaking provides a mechanism for ensuring operational decisions are made on objectively verifiable commercial factors**

CBH submits that ‘[o]perationally, the Undertaking recognises that decisions must be taken that will necessarily advantage one user over another in the context of that decision alone. However the Undertaking provides a mechanism for preventing preferential self-dealing and ensuring decisions are made on objectively verifiable commercial factors’.<sup>491</sup> Further, CBH submits that this ‘principle applies ... in the context of operational decision making in the performance of an access agreement (clause 9.2, 9.3 and 9.4).’<sup>492</sup>

## **12.3 CBH’s supplementary submission to the April Undertaking**

This section summarises the arguments in CBH’s supplementary submission, dated 29 June 2009, that expands on or otherwise explains the approach taken in relation to the Capacity management (Clause 9) component in the April Undertaking.

CBH’s supplementary submission responds to matters raised in the ACCC’s Issues Paper, Information Request and the public submissions received from interested parties.

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<sup>487</sup> Co-operative Bulk Handling Limited, *Submission to the ACCC*, 14 April 2009, p. 37.

<sup>488</sup> Co-operative Bulk Handling Limited, *Submission to the ACCC*, 14 April 2009, p. 38.

<sup>489</sup> Co-operative Bulk Handling Limited, *Submission to the ACCC*, 14 April 2009, p. 38.

<sup>490</sup> Co-operative Bulk Handling Limited, *Submission to the ACCC*, 14 April 2009, p. 38.

<sup>491</sup> Co-operative Bulk Handling Limited, *Submission to the ACCC*, 14 April 2009, n 31, p. 35.

<sup>492</sup> Co-operative Bulk Handling Limited, *Submission to the ACCC*, 14 April 2009, p. 35.

## **12.3.1 Responses to general comments on CBH’s April Undertaking**

### **12.3.1.1 CBH submits that the April Undertaking does provide transparency in relation to CBH’s management of shipping slots and accumulation at port**

CBH submits that it is ‘required to publish Shipping Stem information under the WEMA’ and it ‘is unclear how any additional transparency could reasonably be required.’<sup>493</sup>

CBH also submits that the April Undertaking ‘incorporates detailed enforceable provisions concerning non-discrimination in decision making’ and ‘appropriate ring fencing measures and dispute resolution procedures’, therefore ‘it is difficult to see what further measures could be adopted to address these issues.’<sup>494</sup>

### **12.3.1.2 CBH submits that the alignment of its transport and shipping stem is aimed at increasing efficiency and reducing costs**

CBH submits that it ‘is unclear what legitimate concern arises from CBH’s quoted intention “to regulate bookings in its Shipping Stem or schedule so that monthly shipping requirements meet the capacity of the state’s up-country transport network to bring grain to port”’. CBH submits that this is ‘a benign statement of CBH’s intention to properly arrange its resources to meet the demand for services and in doing so increase efficiency and reduce cost.’<sup>495</sup>

### **12.3.1.3 CBH submits that decisions in relation to ‘surge’ transport costs are made without reference to the identity of the customer**

CBH submits that ‘decisions in relation to surge transport are made entirely without reference to the identity of the customer’ which are ‘made at a managerial level within CBH that is indifferent to the identity of the customer. The sole consideration in making these decisions is the efficient deployment of CBH’s supply chain infrastructure.’<sup>496</sup>

CBH also submits that ‘under Grain Express ... it is impossible to determine whose grain is moving at any one time and for that reason, impossible to selectively charge grain owners. Under Grain Express grain is moved to port to meet cargo requirements regardless of the identity of the exporter.’<sup>497</sup>

### **12.3.1.4 CBH submits that its treatment of ‘risk’ in relation to grain from different sources is standard commercial practice**

CBH submits that its ‘proposed terms and conditions under the [April] Undertaking do not differ in their treatment of risk from:

- (i) ‘CBH’s grain services agreement under Grain Express;’

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<sup>493</sup> Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 41.

<sup>494</sup> Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 41.

<sup>495</sup> Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 41.

<sup>496</sup> Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 42.

<sup>497</sup> Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 42.

- (ii) 'CBH's delivery and warehousing terms under which grain is received from Growers;'
- (iii) 'The equivalent terms and conditions of other storage and handling operators in Australia and other countries.'<sup>498</sup>

CBH submits that if access seekers do 'wish to require CBH to assume additional risk, that will have an obvious and proportional effect upon CBH's charges.'<sup>499</sup>

### **12.3.2 Responses to comments on CBH's PTRs**

#### **12.3.2.1 CBH submits that certain claims by interested parties do not provide any arguments, facts, examples or evidence in support and as a result, CBH has been unable to make any detailed response to the statements**

In relation to a number of claims by interested parties, CBH has submitted that '[i]n the absence of any supporting arguments, facts, examples or evidence, CBH is unable to make any detailed response to the statement.'<sup>500</sup>

#### **12.3.2.2 CBH submits that the PTRs should not be included in the April Undertaking**

CBH notes that its 'submission at 5.7 (original submission) sets out the basis upon which it is submitted that the port protocols should not be included in the undertaking'.<sup>501</sup>

#### **12.3.2.3 CBH submits that its revised PTRs will likely include an independent umpire to resolve operational disputes but that a 24 hour turnaround is unworkable**

CBH submits that in 'considering the revised port capacity allocation procedure, CBH will be proposing that an umpire should be appointed for the resolution of operational disputes and will include such provisions as consequential amendments to the port protocols in finalising its capacity allocation proposals.'<sup>502</sup>

CBH also submits that it 'does not consider that a 24 hour dispute resolution process would be workable' as an 'umpire would have difficulty becoming sufficiently informed in that time.'<sup>503</sup>

#### **12.3.2.4 CBH submits that the approach to the PTRs in the April Undertaking strikes an appropriate balance between the interests of access seekers and CBH's legitimate business interests**

CBH submits that the PTRs must have 'sufficient scope ... to ensure the respect of the legitimate interests of other Users of the port terminal facility and to ensure as far as

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<sup>498</sup> Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 42.

<sup>499</sup> Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 42.

<sup>500</sup> Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, Schedule 1, pp. 61-62 & 64.

<sup>501</sup> Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 60.

<sup>502</sup> Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 59.

<sup>503</sup> Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, pp. 59-60.

possible that all Users or Applicants are not disadvantaged or prejudiced as a result of the failures of particular parties in particular circumstances'.<sup>504</sup>

CBH also submits that under the PTRs, CBH 'is the entity responsible for managing access, and in the performance of that function ... must deal equitably with all Users and potential Users ... to ensure as far as possible that the requirements amongst all Users are managed in a way that does not give preference to nor disadvantage or prejudice any parties.'<sup>505</sup>

CBH submits that 'many factors arise in everyday operations that may not be completely foreseeable, and not within the control or scope of responsibility of CBH to manage, and therefore not adequately dealt with in a more prescriptive and rigid set of rules ... which is likely to [lead to] ... the removal of effective control by CBH and therefore a decrease in the efficiency of the Port Terminal Facilities.'<sup>506</sup>

CBH submits that examples of matters requiring flexibility in relation to providing Port Terminal Services include '[v]essels failing to clear survey', '[l]ack of entitlement for loading', '[v]ariations in road and rail services', '[w]eather disruptions to loading, berthing or departure', '[q]uarantine related matters such as the presence of insects or rodents', '[c]hanges to vessel ETA', '[t]erminal blockage as a result of unexpected changes to vessels' ability to load', '[t]ides', '[s]trikes and other industrial action', and '[m]echanical failures'.<sup>507</sup>

CBH submits that the PTRs 'have been drafted in a way that provides the appropriate balance'.<sup>508</sup>

### 12.3.3 Capacity Allocation System

CBH also made submissions explaining the provisions of its Capacity Allocation System.

CBH submitted on 29 June 2009 that '[f]inalised Port Rules, incorporating the new Capacity Allocation System and Auction Rules will be completed as soon as possible'.<sup>509</sup>

As these documents were not formally submitted as part of the April Undertaking prior to the release of the Draft Decision, the ACCC considered that it would not be appropriate to comment on the terms of the PTRs or the draft capacity allocation system or draft auction rules as part of the Draft Decision.

However, as the ACCC annexed a version of the revised documents to the Draft Decision (at **Annexure B**) for comment during the consultation period on the Draft Decision, it set out a summary of CBH's arguments in relation to those documents.

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<sup>504</sup> Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 60.

<sup>505</sup> Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 60.

<sup>506</sup> Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 60.

<sup>507</sup> Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, pp. 60-61.

<sup>508</sup> Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 61. These points are reiterated on p. 64.

<sup>509</sup> Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, pp. 26 & 89.

### **12.3.3.1 Outline of CBH's Capacity Allocation System**

The following outline of CBH's Capacity Allocation System is extracted from pages 18 to 19 of CBH's further submission to the ACCC dated 29 June 2009:

#### **During Harvest Period**

- During harvest period (1 November to 15 January), expressions of interest (EOI) sought
  - Capacity is allocated by reference to an export window (each window is first / last half of each month)
- Demand for shipping capacity is tallied and if the total capacity requirements are less than available capacity, all requests for capacity are allocated
  - A secondary trade or swap of allocations between or amongst entitlement holders can occur (CBH is notified of any changes)
- If demand exceeds supply, EOIs are allocated in proportion to available capacity
- Any unallocated capacity is notified and made available on a first come, first served basis.

#### **Annual Shipping period**

- Primary auction held during August – September for majority of expected shipping capacity allocated by reference to export windows
  - Auction is live (on-line, web based) and open to view by all participants, including access to price and demand.
- Secondary auction is held for additional available capacity every month to two months prior to the start of the month of shipping
  - A secondary trade or swap of allocations between or amongst entitlement holders can occur (CBH is notified of any changes)
- Any unused capacity is notified and made available on a first come, first served basis
  - The unused capacity is the capacity passed in at the primary auction and any new capacity acquired in the intervening period. A secondary trade or swap of allocations between or amongst entitlement holders can occur (CBH is notified of any changes).

#### **All cases**

- Shipper nominates in accordance with nomination rules
- Nomination includes requirement for pre-delivery samples, and cargo accumulation plan.
  - As CBH have custody of grain and control grain movements, no pre-delivery samples are required nor is an accumulation plan required to be negotiated (under Grain Express)

- Deliveries commence up to 21 days before arrival date of vessel
  - CBH under Grain Express can use accumulated grain at port or deliveries from up-country storage for accumulation of cargo
- Vessel nominated 21 days prior to loading
- Cargo accumulated at port
- When cargo accumulated, vessel may enter the berth queue – priority determined by the order of provision of vessel’s notice of readiness
- Ship berths and is loaded with cargo
- Loaded ship departs port

### **12.3.3.2 CBH’s explanation of the process by which shipping capacity will be allocated**

CBH submits that its Capacity Allocation System (CAS) ‘will be incorporated by reference into the Port Rules.’<sup>510</sup>

CBH submits that the CAS ‘uses an auction mechanism for the period to achieve an efficient allocation of shipping capacity ... without securing windfall profits for CBH because any surplus ... is returned to Exporters in proportion to the volume of grain exported.’<sup>511</sup>

CBH submits that Shipping Capacity Allocation will operate over two periods throughout the year:

- (i) ‘The Harvest Shipping Period 1 Nov – 15 Jan where ‘capacity will be allocated subsequent to Exporters providing CBH with expressions of interest for shipping capacity’.<sup>512</sup>
- (ii) ‘The Annual Shipping Period 15 Jan - 31 Oct where capacity will be allocated on the basis of a price/volume based auction’, namely ‘an ascending “clock auction” mechanism’ will apply. CBH also submits that ‘[t]he first phase allocation of Core Capacity for the Annual Shipping Period (15 Jan – 31 Oct) will be conducted in the period of August/September prior to Harvest. A subsequent rolling allocation of residual Core Capacity and any required Surge Capacity will be conducted two months prior to the relevant shipping period. All proceeds ... will be returned to all Exporters using CBH Port Terminals in full, less direct costs and on a pro rata basis, allocated using all tonnes shipped from 1 Nov – 31 Oct.’<sup>513</sup>

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<sup>510</sup> Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 26.

<sup>511</sup> Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 26.

<sup>512</sup> Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 31.

<sup>513</sup> Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 31.



CBH submits that these ‘allocation processes will allow Exporters to establish an operational commitment for the accumulation of their grain within agreed ship loading windows.’<sup>514</sup>

**12.3.3.3 CBH submits that for the purposes of the Undertaking, the important issues in relation to the CAS are that it is non-discriminatory, its design doesn’t allow CBH to generate a surplus from the auction and that the process achieves the intended efficiency outcomes**

CBH submits that the ‘key issues in relation to CBH’s capacity allocation auction are:’

- (i) ‘[i]s the auction process non-discriminatory’;
- (ii) ‘[i]s there an appropriate process to ensure that CBH does not generate a revenue surplus from the auction’; and
- (iii) ‘[d]oes the auction design conform to appropriate standards in order to ensure that it appropriately achieves the intended efficiency outcomes’.<sup>515</sup>

1. *Non-discrimination*

CBH submits that its ‘approach to capacity allocation requires CBH to make allocation decisions where available shipping capacity is over subscribed’ which ‘creates the potential for allegations of preferential self dealing if one of the applicants for capacity’ is CBH’s trading arm.<sup>516</sup>

CBH submits that an ‘auction, designed and administered by an independent operator and conducted according to clear rules that apply equally to all market participants is an effective measure to assure the market that CBH will not have any opportunity or ability to exercise discretion in relation to the allocation of capacity in oversubscribed periods.’<sup>517</sup>

2. *No surplus retained by CBH*

CBH submits that the auction process contains a mechanism ‘to ensure that any premium paid ... for capacity in high demand periods is not retained by CBH but is instead returned to market participants.’<sup>518</sup>

CBH submits that ‘the most appropriate, equitable and efficiency enhancing approach is to calculate the aggregate surplus generated, deduct CBH’s costs of administering the auction and rebate the surplus to users of shipping capacity in proportion to the tonnage of grain those participants have exported through CBH’s port terminals.’

CBH submits that the CAS does this through ‘a rebate system for “Auction Proceeds”, which are defined as the per tonne bid values made by Exporters to win the allocation of slots of Shipping Capacity, less the direct cost of the auction

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<sup>514</sup> Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 31.

<sup>515</sup> Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 32.

<sup>516</sup> Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 32.

<sup>517</sup> Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 32.

<sup>518</sup> Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 32.

including any set up costs' where auction proceeds 'will be rebated to Exporters on a per tonne basis, proportionally distributed over the entire shipping period' and will be 'paid to participating Exporters within 30 days of the completion of the export program for the season on 31 October.'<sup>519</sup>

CBH submits that this:

'will have the effect of accentuating the relative difference in capacity cost between low demand and high demand periods, creating an incentive for Exporters to use available capacity in less demanded periods at a lower cost. In short, capacity during peak months will be allocated to those customers who value it most, without deriving a monopoly rent for CBH as the owner of the capacity constrained infrastructure.'<sup>520</sup>

### 3. *Auction efficiency*

CBH submits that 'it has determined that the most efficient and non-discriminatory mechanism for allocating shipping capacity at its port terminals is an auction process.'<sup>521</sup>

In light of this, CBH sets out the following quote from the Productivity Commission 2003 report 'The Role of Auctions in Allocating Public Resources':

The main advantage of an auction is its tendency to attain allocated efficiency without requiring governments to have accurate prior knowledge of resource values or costs. This outcome is achievable by promoting competition among bidders; those who place a relatively high value on the good on sale will generally be willing to bid highest for it. Auctions can therefore assign resources to those able to make the best use of them. Compared with administrative methods of allocating public resources, auctions are more transparent and less dependent on official subjective judgment. Last but not least, bidding competition can yield revenues or cost savings for governments.<sup>522</sup>

CBH submits that the Productivity Commission also noted:

Despite their potential merits, auctions can perform poorly if they are not carefully designed and conducted. Specific market conditions and design issues can distort auction outcomes and affect the revenue raising potential of an efficient allocation.<sup>523</sup>

CBH submits that it is 'in discussions with Tradeslot, a specialist auction design firm' which 'will be instructed to design and administer auction rules that promote efficiency and reduce the risk of gaming or distortion.'<sup>524</sup>

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<sup>519</sup> Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 32.

<sup>520</sup> Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 33.

<sup>521</sup> Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 33.

<sup>522</sup> Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 33.

<sup>523</sup> Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 33.

<sup>524</sup> Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 33.

#### **12.3.3.4 CBH submits that requiring the inclusion of the Capacity Allocation System in the Undertaking is unnecessary given the PTRs apply to all grains and the excessive regulatory effect such inclusion would have**

CBH submits that the CAS, 'like the Port Rules, applies to all grains and applies ... to Grain Express customers and access seekers under the Undertaking.' CBH submits that this broader scope of application is 'one of the reasons why it is not appropriate to include the Port Rules and the Capacity Allocation System in the Undertaking itself.'<sup>525</sup> CBH also submits that including the PTRs and CAS 'would effect regulatory outcomes in excess of the intended scope of the Undertaking under the WEMA' where, 'in any event' the inclusion of 'non-discrimination principles in operational decision-making effectively enables discriminatory conduct to be enforced as a breach of the Undertaking.'<sup>526</sup>

In addition, CBH submits that the lack of response to its proposal from customers in November 2008 in relation to a proposal for an allocation system for priority shipping 'highlights the difficulty that CBH would face in any potential alteration of the rules around accessing the Shipping Stem'.<sup>527</sup>

#### **12.3.3.5 CBH submits that the CAS will apply to all grains, as the shipping stem currently applies**

CBH submits that the 'proposed Capacity Allocation System will apply to all grain exports' and the 'shipping stem includes vessels for grain other than wheat.'

CBH also submits that there 'are some non-grain vessels included within the shipping stem operating independently out of the ports (except for Kwinana) that CBH cannot prevent from berthing at those ports.'<sup>528</sup>

### **12.4 Submissions from interested parties in response to the ACCC's Issues Paper, dated 29 April 2009**

This section summarises the arguments put forward in public submissions by interested parties in response to CBH's April Undertaking and supporting submission in relation to Capacity management (Clause 9) in the April Undertaking.

#### **12.4.1 Australian Grain Exporters Association (AGEA)**

##### **12.4.1.1 AGEA's general comments on CBH's April Undertaking**

AGEA submits that '[f]air and transparent access requires ... an ... undertaking which has clarity, certainty and transparency. The rules must be detailed and clear ... [and] be capable of objective application. Discretionary or subjective decisions must be kept

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<sup>525</sup> Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 26.

<sup>526</sup> Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 26.

<sup>527</sup> Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 30.

<sup>528</sup> Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 76.

to the absolute minimum. Decisions and the reasons for them must be disclosed in a timely way and open to effective and timely review.<sup>529</sup>

AGEA also submits that unless the access undertakings provide transparency in relation to BHCs' decisions<sup>530</sup>, 'BHCs will be able to manipulate logistics, substitute vessels and/or vary the shipping stem to confer preferential treatment on themselves'.<sup>531</sup>

#### 12.4.1.2 AGEA's general comments on CBH's April PTRs

##### 1. *Transparency and certainty required in the application of the PTRs and shipping stem*

AGEA submits that the PTRs do not provide transparency 'in relation to the management and operation of BHCs' port terminals and shipping stem. The Port Protocols provide the BHCs with wide discretions and lack objective criteria for the allocation of shipping slots'.<sup>532</sup> AGEA further submits that the PTRs 'do not contain clearly defined rules which are capable of objective application'.<sup>533</sup>

AGEA also submits that 'there is no transparency in relation to the shipping stems', bringing into question 'the ability of the BHCs to manipulate the shipping stem to their commercial advantage'.<sup>534</sup>

AGEA also submits that '[t]ransparency should ensure that port protocols are applied to BHCs ... and AWEs on a 'no less favourable' basis. This does not occur at present'.<sup>535</sup>

In addition, AGEA submits that the access provider's need for flexibility and the access seeker's need for transparency and certainty can be balanced by 'clearly specifying the obligations of the BHCs'.<sup>536</sup>

##### 2. *Conflict of interest means BHC will discriminate against other users*

AGEA submits that 'BHCs' conflict of interest make it inevitable that BHCs will give preferential treatment to their Trading Divisions and make operational decisions that allow them to maximise profits [for example, in the allocation of overtime and other

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<sup>529</sup> Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 2.6, p. 2.

<sup>530</sup> It should be noted that AGEA's submissions on the proposed Undertakings (including the proposed port protocols) are, unless otherwise specified, comments relating to the proposed Undertaking and proposed port protocols of all three bulk handling companies (ABB, GrainCorp and CBH).

<sup>531</sup> Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 4.12, p. 10.

<sup>532</sup> Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 14.1, p. 31.

<sup>533</sup> Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, Schedule 1, para K2(iii), p. 48.

<sup>534</sup> Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 14.6, p. 32.

<sup>535</sup> Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 14.7, p. 32.

<sup>536</sup> Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, Schedule 1, para K2(ii), p. 48.

expenses], to the detriment of other users of the port and competition in the bulk wheat export market.<sup>537</sup>

To mitigate against these risks AGEA states that ‘a clearly defined shipping protocol and transparency in relation to BHCs’ decision-making is required.’<sup>538</sup>

3. *Certainty of reserved shipping slots and limited re-ordering of shipping slots*

AGEA submits that access seekers must have ‘the certainty of knowing that if they book a spot for a vessel on a particular day, the service will be delivered or they will be adequately compensated.’<sup>539</sup> ‘At present ... BHCs have the discretion to change booking slots and do not incur any liability if they fail to deliver.’<sup>540</sup>

AGEA also submits that ‘[r]eordering of the load order of vessels in the shipping stem should only be allowed in certain ... circumstances and with full transparency in the decision-making process.’ The reason proposed for this is that ‘[o]therwise, BHCs may assert that delays were encountered in getting stock to port or insufficient stock was accumulated, but AWEs would never know if that was the case.’<sup>541</sup>

4. *Entitlement should not be a basis on which an ability to export is determined*

AGEA submits that the ‘ability to export stock should not be subject to BHCs being satisfied that AWEs have stock available because’:

- (i) ‘BHCs control the ability of AWEs to get stock to port and accumulation.’
- (ii) ‘BHCs can allow their stock to sit in port, taking up accumulation space ... [and] therefore have the ability to manipulate the logistics of getting stock to port to serve their own interests’; and
- (iii) ‘AWEs enter into forward sale contracts’ under which they have legal title to wheat ‘but this would not be apparent from BHCs’ system’.<sup>542</sup>

5. *The capacity allocation process should be completely transparent*

AGEA submits that there ‘must be complete transparency in relation to capacity allocation or an independent person should be appointed to make decisions about capacity allocation.’<sup>543</sup>

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<sup>537</sup> Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 14.2, p. 31.

<sup>538</sup> Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 14.2, p. 31.

<sup>539</sup> Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 14.3, p. 31.

<sup>540</sup> Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 14.3, p. 31.

<sup>541</sup> Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 14.5, p. 31.

<sup>542</sup> Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 14.4, p. 31.

<sup>543</sup> Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 14.6, p. 32.

AGEA submits that capacity could be allocated by way of an auction process whereby:

AWEs can bid for capacity by port, for any month at ... the export out-loading charge ... The initial tender should take place as early as possible, with the full annual capacity put up for tender. In each tender, AWEs can bid for a maximum of 25% capacity in each port. The tender should be operated by an independent third party ... Tenders for under-subscribed capacity could then be held at intervals to be determined. Where a tender is oversubscribed, the capacity should be issued on a pro-rated basis ...

Where storage capacity at port is limited ... capacity should be allocated on the basis that a port user has access to storage facilities for [an appropriate] ... period ... to allow the user to accumulate and ship their vessel.<sup>544</sup>

#### 6. *Dispute resolution process for operational matters*

AGEA submits that the PTRs must 'contain a clear dispute resolution mechanism whereby disputes [in relation to the PTRs] may be referred to an independent umpire for a binding decision to be made within 24 hours'. The reason proposed for this is that '[i]f a dispute is not resolved within 24 hours, the opportunity to export stock may be lost because a slot may have been allocated to another party.'<sup>545</sup>

#### 7. *Varying the PTRs*

AGEA submits that the access provider's right to unilaterally vary the PTRs 'is inconsistent with the requirement of clarity and certainty' and notes that BHCs 'are only required to "consult" with AWEs before implementation of the varied terms and conditions.'<sup>546</sup>

### **12.4.1.3 Specific comments on CBH's April PTRs and capacity allocation system**

#### 1. *PTRs must contain certain provisions*

AGEA submits that the PTRs must provide:<sup>547</sup>

- (i) that if the access seekers 'pay the vessel nomination fee and are allocated an estimated load date, BHCs must provide the necessary services to allow ... load[ing of] the vessel (within a three day spread), failing which BHCs will be liable for any loss or damage' suffered;
- (ii) 'transparency as to how the BHCs accept vessel nominations and provide vessel slots';
- (iii) 'mutual rights to terminate on the grounds of force majeure';

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<sup>544</sup> Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 14.9-14.10, pp. 32-33.

<sup>545</sup> Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 14.11, p. 33.

<sup>546</sup> Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, Schedule 1, para K2(vii), p. 48.

<sup>547</sup> Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 4.17(h), p. 14.

- (iv) 'a dispute resolution mechanism whereby disputes may be referred to an independent 'umpire' for a binding and timely decision' within 24 hours.

2. *The clauses in the April PTRs are uncertain, lack transparency and provide opportunities for discrimination*

AGEA submits that:<sup>548</sup>

- (i) in relation to clause 4 of the April PTRs, 'a "Year" is defined as being 1 November to 31 October.' However, a year in the Port Terminal Services Agreement is 1 October to 30 September. Accordingly, the Forecast Submission Period is not properly defined' and in addition, 'there is no reason why CBH needs to know an AWE's future requirements';
- (ii) in relation to clause 5.2, 'the booking process applies from 15 September until 14 October in each Year, or such other period as the BHCs may publish from time to time' which does not correspond with 'CBH's Port Terminal Services Agreements';
- (iii) in relation to clause 5.2(c) and 6.2(c), the references to "the relevant Users' shipping history, "the efficient operation of the relevant Port Terminal facility", "the Port Operator's Bulk Wheat storage network" and "the efficient operation of the relevant Port Terminal Facility" is uncertain' and shows 'the lack of transparency in the way CBH can exercise unfettered discretions to discriminate in favour of its own interest[s]';
- (iv) in relation to clause 5.2(d)(iii) and 5.2(e), 'in the event that the [access seeker] does not ship the wheat (i.e. use CBH's services), the [access seeker] is not entitled to a refund of the undisclosed fee ... [h]owever, CBH does not incur any liability if it fails to provide the service';
- (v) in relation to clause 6.2 [an expression of interest process by which Port Terminal Services are allocated], 'CBH decides what EOIs to offer' and 'retains the discretion to accept all or part of the EOI';
- (vi) in relation to clauses 6.5 to 6.8, 'there is no way for [access seekers] to know how CBH applies these rules because CBH refuses to provide AWEs with relevant data.' AGEA also submits that '22 days is a long lead time pending confirmation of a exporter's status in the nomination and accumulation process'; and
- (vii) 'it is not clear whether the "Timetable of Port Terminal Rules" would apply to CBH sites only, or to CBH and non-CBH sites.'

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<sup>548</sup> Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, Schedule 4, pp. 55-56.

3. *Any certainty achieved by the April PTRs are frustrated by the uncertainty in CBH's export accumulation guidelines*

AGEA submits that 'CBH's export accumulation guidelines apply after a User's Shipping Window is booked. Any clarity that might have been achieved by CBH's Shipping Rules can be frustrated by CBH's export accumulation guidelines.'<sup>549</sup>

AGEA submits that the following examples from 'the current port Export Accumulation Guidelines' demonstrate this:<sup>550</sup>

- (i) '[v]essels arriving before their contracted lay-can window may be considered for early loading at **CBH discretion** for operational reasons such as port blockages and the continuation of port efficiencies' [AGEA's emphasis];
- (ii) '[p]riority changes due to updated ETAs within this stage will be at the **sole discretion of CBH** based on how advanced accumulation arrangements have progressed for each nomination' [AGEA's emphasis];
- (iii) '[p]riority for vessels that have progressed from the Assembly stage will be locked in, however CBH Operations **reserve the right at its sole discretion to make changes** for operational reasons such as port blockages and the continuation of port efficiencies. These changes will also take into account the impact on cargo accumulations for other vessels within this window' [AGEA's emphasis].

4. *The draft 2009/2010 Shipping Capacity Access Allocations policy auction proposals are labour intensive, time consuming and complicated with no limits on capacity for single parties*

AGEA submits that 'the auction model contained in CBH's ... access allocations policy is ... labour intensive, time consuming and complicated. Furthermore, there is no ... limit on capacity for any single party. The ... auction model will not prevent related parties of CBH bidding up the auction and securing as many slots as required to the detriment of AWEs.'<sup>551</sup>

5. *AGEA's proposed amendments to the draft 2009/2010 Shipping Capacity Access Allocations policy*

AGEA submits that in relation to CBH's 2009/2010 Shipping Capacity Access Allocations policy, 'the policy is subject to change.'<sup>552</sup>

AGEA note however that CBH's draft allocation policy should be 'amended to contain or deal with the following provisions':<sup>553</sup>

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<sup>549</sup> Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, Schedule 4, p. 56

<sup>550</sup> Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, Schedule 4, p. 56.

<sup>551</sup> Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 14.9, p. 32.

<sup>552</sup> Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, Schedule 4, p. 56.



- (i) 'there should be one system that applies for the entire season – the policy currently provides a different set of rules for, essentially, peak and non-peak periods';
- (ii) 'CBH must provide details of the port's operational capacity prior to the tender process. The capacity referred to in the ... policy is conservative and needs to be reviewed. Capacity should be based on the port terminal operational capacity, i.e. daily intake, storage flexibility and outturn, and should not be linked to inward logistics';
- (iii) 'tenders for shipping slots should be held on a fortnightly basis';
- (iv) 'tenders should be managed by an independent third party';
- (v) '[access seekers] should be permitted to bid for Capacity by port, for any month at Par to the Export Outloading Charge for the relevant month';
- (vi) 'bids should be submitted in 10,000mt increments';
- (vii) 'alternative supply chains should be able to be nominated and treated by CBH equally in terms of pricing and access to port terminal services, i.e. Grain Express or direct port access model';
- (viii) 'where a tender is oversubscribed, the capacity should be issued on a pro-rata basis (Capacity / total tonnage bid \* tonnage bid by individual shipper)';
- (ix) 'part certificates should be offered to the nearest 1,000 tonnes';
- (x) 'successful bids in each tender should be issued with Shipping Certificates in 10,000mt increments';
- (xi) 'Shipping Certificates should be able to be traded in a secondary market, independent of CBH';
- (xii) 'in the event that CBH fails to load a vessel within the dates specified on the Shipping Certificates, storage should not be levied against the shipper beyond the last day specified on the Shipping Certificates';
- (xiii) 'Shipping Certificates must be paid for within 3 days of allocation at 50% of the price';
- (xiv) 'any unpaid Shipping Certificates should be reoffered in the next fortnightly tender';
- (xv) 'in case of pro-rata allocation due to oversubscription excess deposit should be returned to the bidder 24 hrs after the tender';

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<sup>553</sup> Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, Schedule 4, pp. 56-57.

- (xvi) ‘only [access seekers] with a current CBH grain services agreement should be entitled to bid for certificates’;
- (xvii) ‘remaining 50% [of the price] should be payable at presentation of Shipping Certificates’;
- (xviii) ‘Shipping Certificates should be presented to CBH [at the] latest 30 days prior to the first day of the shipment period specified on the Shipping Certificate’;
- (xix) ‘the holder of the Shipping Certificates should narrow the shipping period to a 10 day window within the shipping month no later than 30 days prior to the first day of the narrowed shipping window’;
- (xx) ‘[access seekers] should provide the name of performing vessel 7 days prior vessel ETA’;
- (xxi) ‘[access seekers] should have stock entitlement not less than 5 working days prior vessel’s ETA’;
- (xxii) ‘Shipping Certificates that are not presented should be forfeited without refund and capacity will be reallocated at the next fortnightly tender’; and
- (xxiii) ‘CBH and [access seekers] should be liable where they fail to meet benchmarks and other obligations’.

#### **12.4.1.4 General comments on clause 9.2 – ‘Operational Decisions’**

1. *The arguments raised in relation to the April PTRs are also relevant to the clauses on Operational Decisions*

AGEA submits that its arguments in relation to the April PTRs (as set out above) are also relevant to the clauses in the April Undertaking dealing with ‘Operational Decisions’.<sup>554</sup>

2. *The criteria CBH can take into account when making Operational Decisions are largely subjective and create uncertainty*

AGEA submits that CBH’s discretion in making Operational Decisions ‘is too wide and subjective’ and that access seekers ‘need the certainty of knowing shipping slots will be available.’<sup>555</sup>

AGEA proposes that this could be achieved by having PTRs that ‘clearly define the obligations to accept vessel nominations’, whereby if the access seeker ‘fails to get wheat to port by the load date’ they ‘forfeit the booking fee’, which would protect CBH’s interests.<sup>556</sup>

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<sup>554</sup> Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 15.1, p. 33.

<sup>555</sup> Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 15.2, p. 33.

<sup>556</sup> Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 15.2, p. 33.

#### 12.4.1.5 Specific comments on clause 9.2 – ‘Operational Decisions’

1. *CBH can determine priority of a particular vessel based on factors within its control*

AGEA notes that clause 9.2(d)(i) ‘entitles BHCs to make Operational Decisions to give priority to vessels based on the “lead time given between nomination and vessel ETA and likely availability of sufficient Bulk Wheat at the Port Terminal prior to vessel ETA”’.<sup>557</sup>

AGEA submits that CBH controls ‘the movement and accumulation of wheat at port.’<sup>558</sup>

2. *The objectives CBH can take into account when making Operational Decisions are vague and provide opportunities for CBH to restrict access*

AGEA submits that clause 9.2(d)(ii) ‘provides opportunities for BHCs to restrict access to port terminal services’ and is vague and uncertain’.<sup>559</sup> In particular, AGEA submits that:<sup>560</sup>

- (i) under clause 9.2(d)(ii)(A), CBH would not normally be ‘aware of the AWE’s vessel demurrage rate’ and regardless, an access seeker’s ‘ability to negotiate a low demurrage should not result in ... another vessel being given priority ... because it has a higher demurrage rate.’; and
- (ii) under clause 9.2(d)(ii)(B), as CBH ‘controls the movement and accumulation of wheat at port, it is within its means to show that the throughput of bulk wheat is maximised by loading its vessels in priority’ to other access seeker’s vessels.

3. *The factors on which CBH can vary a cargo assembly or queuing order are broad and some are within CBH’s control*

AGEA submits that clause 9.2(d)(iii) provides CBH with ‘very broad entitlements to vary a cargo assembly plan or queuing order of a vessel.’<sup>561</sup> In particular, AGEA submits that:<sup>562</sup>

- (i) with regard to the criterion in clause 9.2(d)(iii)(A), CBH ‘control[s] the movement and accumulation of wheat at port facility’; and

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<sup>557</sup> Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 15.4, p. 33.

<sup>558</sup> Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 15.4, p. 33.

<sup>559</sup> Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 15.5, p. 33.

<sup>560</sup> Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 15.5, p. 34.

<sup>561</sup> Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 15.6, p. 34.

<sup>562</sup> Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 15.5, p. 34.

- (ii) with regard to the criterion in clause 9.2(d)(iii)(E), ‘vessel congestion’ is a ground that is not appropriate.

## **12.4.2 Western Australian Farmers Federation (WAFF)**

### **12.4.2.1 WAFF submits that the requirement on CBH to publish the shipping stem would make transparent any anti-competitive conduct**

WAFF submits that ‘CBH is required to provide transparent records of both the shipping nomination and queuing processes as well as make the available shipping stem information to enable monitoring of compliance’ and that ‘[o]ver time, this shipping stem information would make transparent any anti-competitive practices’ which provides ‘an opportunity to adopt existing remedies under Section 46 of the Trade Practices Act to prevent further breaches.’<sup>563</sup>

### **12.4.2.2 WAFF submits that the Export Accumulation Guidelines and Port Queuing Policy in combination with the Grain Services Agreement provides a logical and binding dispute resolution mechanism**

WAFF submits that ‘CBH has demonstrated that it has clear and equitable Export Accumulation Guidelines and a Port Queuing Policy that operate in conjunction with the customer’s Grain Services Agreement that allows for disputes to be resolved in a logical and binding manner.’<sup>564</sup>

WAFF also submits that the ‘[p]ort management guidelines, including required notice periods for ordering the use of terminal infrastructure are available to all users of infrastructure services and these guidelines, in conjunction with CBH’s terms, conditions and prices for access to the infrastructure services should allow prospective customers the confidence to market their grain in a fair and transparent system.’<sup>565</sup>

## **12.4.3 PGA**

### **12.4.3.1 The PGA submits that allocation based on entitlement favours pooling operations**

The PGA submits that ‘CBH ... discriminate[s] in favour of [its] trading division Grain Pool ... by imposing unfair terms and conditions and restricting Australian wheat exporters’ access to port terminal services, through the allocation of shipping slots ... based on entitlements.’<sup>566</sup>

The PGA also submits that ‘[a]s allocations are decided by CBH based on entitlement, pooling operations are favoured over non pooling entities due to volume. This may force growers into using pooling operations. The [April] Undertaking will not prevent this behaviour continuing, to the detriment of efficiency and competition in the

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<sup>563</sup> The Western Australian Farmers Federation (Inc), *Submission in relation to proposed CBH access undertaking*, 29 May 2009, p. 2.

<sup>564</sup> The Western Australian Farmers Federation (Inc), *Submission in relation to proposed CBH access undertaking*, 29 May 2009, p. 2.

<sup>565</sup> The Western Australian Farmers Federation (Inc), *Submission in relation to proposed CBH access undertaking*, 29 May 2009, p. 2.

<sup>566</sup> Pastoralists and Graziers Association, *Submission in relation to proposed CBH access undertaking*, 29 May 2009, para 2.14, p. 3.

Australian wheat export market, reducing prices and limiting choice for Western Australian growers.<sup>567</sup>

#### **12.4.3.2 The PGA submits that the April Undertaking does not provide transparency in relation to the management of shipping slots and accumulation at port**

The PGA submits that the '[April] Undertaking does not provide any transparency in relation to CBH's management of shipping slots and accumulation at port. Unless the proposed access undertakings provide transparency in relation to CBH's decisions, CBH may be able to manipulate logistics, substitute vessels and/or vary the shipping stem to confer preferential treatment on [its] trading division.'<sup>568</sup>

#### **12.4.4 GIAV**

##### **12.4.4.1 GIAV submits that the draft allocation policy for export capacity under the direct port access arrangement is on restrictive terms and at higher prices**

GIAV submits that CBH's 'draft proposal ...for allocating export capacity in WA ... states that they will provide some form of direct port access, but they have made it clear that this will be on restrictive terms and at higher prices.'<sup>569</sup>

### **12.5 Revised PTRs received on 31 July 2009**

On 6 August 2009 the ACCC released a draft decision not to accept CBH's proposed Undertaking dated 14 April 2009 in its current form.

At the same time as releasing its Draft Decision on CBH's April Undertaking the ACCC commenced consultation on CBH's revised PTRs received on 31 July 2009.

#### **12.5.1 CBH's proposed Port Terminal Rules dated 6 August 2009 (August PTRs)**

##### **12.5.1.1 Objects<sup>570</sup>**

The primary objects of the August PTRs are to:

- ensure that all Customers are provided with access to Port Terminal Facilities in a fair, equitable and transparent manner;
- ensure that the manner and timing for booking Shipping Windows for all Customers is non-discriminatory;

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<sup>567</sup> Pastoralists and Graziers Association, *Submission in relation to proposed CBH access undertaking*, 29 May 2009, para 2.14, pp. 3-4 and para 4.42(b), p. 14.

<sup>568</sup> Pastoralists and Graziers Association, *Submission in relation to proposed CBH access undertaking*, 29 May 2009, para 4.33, p. 12.

<sup>569</sup> Grain Industry Association of Victoria, *Submission in relation to proposed access undertakings*, 1 June 2009, p. 2.

<sup>570</sup> Co-operative Bulk Handling Limited, *Port Terminal Rules*, clause 2.1.

- achieve and maintain the optimum operational efficiency of the Product supply chain and the Port Terminal Facilities, by maximising the throughput of Products and minimising demurrage at the Port Terminal Facilities over a given period;
- provide a basis for decisions relating to the prioritisation of one vessel over another vessel; and
- ensure compliance by Customers and CBH with their respective obligations under the Port Terminal Rules.

### 12.5.1.2 Efficiency of operation

CBH notes that the ‘key components of a successful Grain export accumulation program are ample notice of nominations, accurate scheduling and working together with Customers, transport service providers and shipping related third parties.’<sup>571</sup>

CBH states that it is committed to providing fair access to Port Terminal Facilities for all Customers, but that ‘[c]onsiderable Grain export accumulation challenges arise daily due to the liquid nature of Grain, the potential presence of insects and the complexity of balancing the service demands of and amongst multiple Customers.’ CBH argues that the more notice that individual Customers can provide, the higher the probability of prompt loading of their vessels upon Arrival.<sup>572</sup>

Because of the potential for multiple customers seeking to book a vessel to be loaded on the same day, the Port Terminal Rules endeavour to provide transparency in the order in which vessels are loaded.<sup>573</sup>

### 12.5.1.3 Variation

The Port Terminal Rules may be varied by CBH provided that CBH:<sup>574</sup>

- consults in good faith with all Customers, Applicants and Users to deal with technical and operational matters that arise under or in connection with the Port Terminal Rules;
- complies with the consultation process set out in **rule 2.3(d)**;
- uses reasonable endeavours to accommodate any reasonable requests that may be made by a Customer during the consultation process in respect of the proposed variation; and
- ensures that the Port Terminal Rules remain consistent with the terms of the Undertaking.

Subject to **rule 2.3(a)**, the Port Terminal Rules may include provisions that are necessary for, or reasonably required by, CBH to comply with:<sup>575</sup>

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<sup>571</sup> Co-operative Bulk Handling Limited, *Port Terminal Rules*, clause 2.2(a).

<sup>572</sup> Co-operative Bulk Handling Limited, *Port Terminal Rules*, clause 2.2(b).

<sup>573</sup> Co-operative Bulk Handling Limited, *Port Terminal Rules*, clause 2.2(c).

<sup>574</sup> Co-operative Bulk Handling Limited, *Port Terminal Rules*, clause 2.3(a).

- the requirements of the Undertaking;
- changed or unforeseen technical or operational circumstances; and
- obligations arising under contractual or other operational arrangements with third parties on which the provision of the Port Terminal Services are dependent.

Any variation to the Port Terminal Rules must be consistent with the requirements of the Undertaking and in particular, clauses 2 and 6.4 of the Undertaking. A variation forms part of the Port Terminal Rules and is binding on CBH and Customers. The Port Terminal Rules may be further varied from time to time, subject to **rules 2.3(a) and 2.3(b)**.<sup>576</sup>

Where CBH proposes to make a variation under clause 2.3, it will publish the details of the proposed variation, provide copies of the proposed variation to all Customers, Applicants and Users, arrange for and request written responses and consultation meetings and publish copies of responses received.<sup>577</sup>

Where there are amendments to the proposed variation, CBH shall seek further written responses and consultation meetings before confirming or withdrawing the proposed variation.<sup>578</sup>

No variation shall take effect unless the proposed variation has been published for at least 30 days. In addition, no variation shall take effect during the period from 1 November to the following 15 January in each year.<sup>579</sup>

All acts done in accordance with the superseded Port Terminal Rules will be treated as validly done in accordance with the current Port Terminal Rules.<sup>580</sup> Any Vessels nominated under superseded Port Terminal Rules will continue to be governed in accordance with the superseded Port Terminal Rules unless the Customer and CBH agree otherwise.<sup>581</sup> Any Vessels nominated after the Port Terminal Rules have been varied in accordance with **rule 2.3** will be required to be nominated under the varied Port Terminal Rules.<sup>582</sup>

#### **12.5.1.4 Customer's general obligations**<sup>583</sup>

CBH must discharge its obligations to Customers exporting under the Port Terminal Rules in accordance with the terms of its Access Agreements. In the case of Bulk Wheat Exports under the Port Terminal Services Agreement, these obligations are subject to CBH's obligations under the Undertaking. All Customers must provide

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<sup>575</sup> Co-operative Bulk Handling Limited, *Port Terminal Rules*, clause 2.3(b).

<sup>576</sup> Co-operative Bulk Handling Limited, *Port Terminal Rules*, clause 2.3(c).

<sup>577</sup> Co-operative Bulk Handling Limited, *Port Terminal Rules*, clause 2.3(d).

<sup>578</sup> Co-operative Bulk Handling Limited, *Port Terminal Rules*, clause 2.3(d)(v).

<sup>579</sup> Co-operative Bulk Handling Limited, *Port Terminal Rules*, clause 2.3(e).

<sup>580</sup> Co-operative Bulk Handling Limited, *Port Terminal Rules*, clause 2.3(f).

<sup>581</sup> Co-operative Bulk Handling Limited, *Port Terminal Rules*, clause 2.3(g).

<sup>582</sup> Co-operative Bulk Handling Limited, *Port Terminal Rules*, clause 2.3(h).

<sup>583</sup> Co-operative Bulk Handling Limited, *Port Terminal Rules*, clause 3.

CBH with relevant, complete and accurate information in a timely manner upon CBH's request.

#### **12.5.1.5 Services Forecast**<sup>584</sup>

Within the Forecast Submission Period each Year, each Customer must submit a forecast of the Customer's exporting requirement for the current Year to CBH, including the following details:

- anticipated gross tonnage of Bulk Wheat;
- anticipated gross tonnage of other grains;
- anticipated tonnage to be shipped by Customers under each GSA, PTSA and Negotiated Agreement; and
- anticipated shipping programme.

All information provided by CBH and the Customer under the Rules will be treated in accordance with the confidentiality provisions of the relevant Access Agreement.

#### **12.5.1.6 Harvest Shipping Period Port Terminal Services**

##### *Acquiring Harvest Capacity*<sup>585</sup>

When applying for Harvest Capacity, the Customer must declare at the time of making any application in respect of each tonne of Harvest Capacity or Spare Capacity whether the Capacity it is applying for is GSA Capacity, PTSA Capacity or Negotiated Agreement Capacity. Once the declaration is made it will be irrevocable.<sup>586</sup>

From 15 September until 30 September in each Year, Customers are required to provide CBH with their expressions of interest, containing all specified information to request to export Grain cargoes during the Harvest Shipping Period from a nominated Port Terminal Facility (**Harvest Period EOI**).<sup>587</sup>

CBH will allocate Harvest Capacity (**Advised Harvest Capacity**) to Customers during the Harvest Shipping Period, allowing them to secure access to Port Terminal Facilities for Grain export accumulation and export capacity in advance of obtaining Grain Entitlement.<sup>588</sup>

Where Customers provide Harvest Period EOIs that exceed the Advised Harvest Capacity, CBH will allocate the Harvest Capacity in a manner that is consistent with **clause 6.4** of the Undertaking and the objectives set out in **clause 2** of the Undertaking.<sup>589</sup>

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<sup>584</sup> Co-operative Bulk Handling Limited, *Port Terminal Rules*, clause 4.

<sup>585</sup> Co-operative Bulk Handling Limited, *Port Terminal Rules*, clause 5.1.

<sup>586</sup> Co-operative Bulk Handling Limited, *Port Terminal Rules*, clause 5.1(b).

<sup>587</sup> Co-operative Bulk Handling Limited, *Port Terminal Rules*, clause 5.1(c)(i).

<sup>588</sup> Co-operative Bulk Handling Limited, *Port Terminal Rules*, clause 5.1(c)(ii).

<sup>589</sup> Co-operative Bulk Handling Limited, *Port Terminal Rules*, clause 5.1(d).



The approach for the purposes of the 2009/10 Season will be to proportionally reduce the relevant Harvest Period EOIs until they meet the Advised Harvest Capacity. If the demand for Harvest Capacity in the 2009/10 Season significantly exceeds the Advised Harvest Capacity in a majority of Shipping Windows then CBH may extend the Auctions to cover the Harvest Shipping Period.<sup>590</sup>

CBH may accept all or part of a Harvest Period EOI before 1 October in each Year or a later date that CBH determines.<sup>591</sup>

Where the Harvest Period EOIs awarded do not exceed the Advised Harvest Capacity (in this instance **Spare Capacity**) in any Shipping Window during the Harvest Period, Customers may submit a Spare Capacity Booking Form to CBH. If the Spare Capacity Booking Form is correctly completed and the Harvest Capacity requested is less than or equal to the Spare Capacity, CBH will accept the Spare Capacity Booking Form and allocate Harvest Capacity to the Customer.<sup>592</sup>

Where CBH allocates Harvest Capacity to a Customer (either in accordance to a Harvest Period EOI or a Spare Capacity Booking Form), CBH will give notice of that acceptance to the Customer and the Customer must pay CBH in accordance with the Access Agreement under which the Customer will receive the Capacity. Subject to **rule 5.1(h)**, CBH must provide Port Terminal Services in accordance with the relevant Access Agreement at the relevant Port Terminal Facility.<sup>593</sup>

CBH's obligation under **rule 5.1(g)(iii)** is subject to the Customer obtaining or delivering the relevant Grain Entitlement, complying with the notice requirements under rule 7, the Arrival of the Customer's Nominated Vessel within the Shipping Window for the relevant Port Terminal Facility and that vessel passing the Relevant Surveys.<sup>594</sup>

#### *Trading Harvest Capacity*

Not less than seven days prior to the start of the Shipping Window for the Customer's vessel nominated under **rule 7.1**, where a Customer does not expect to accumulate sufficient Grain Entitlement for any booked Port Terminal Services under its Access Agreement, with the consent of the Port Operator, the Customer may transfer its Harvest Capacity entitlement to another Customer.<sup>595</sup>

Where a Customer has secured Harvest Capacity, only the following transfers or trades of Harvest Capacity are permitted:<sup>596</sup>

- GSA Capacity for the Harvest Shipping Period may only be traded with or transferred to another Customer that has a current GSA in place with CBH;

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<sup>590</sup> Co-operative Bulk Handling Limited, *Port Terminal Rules*, clause 5.1(d).

<sup>591</sup> Co-operative Bulk Handling Limited, *Port Terminal Rules*, clause 5.1(e).

<sup>592</sup> Co-operative Bulk Handling Limited, *Port Terminal Rules*, clause 5.1(f).

<sup>593</sup> Co-operative Bulk Handling Limited, *Port Terminal Rules*, clause 5.1(g).

<sup>594</sup> Co-operative Bulk Handling Limited, *Port Terminal Rules*, clause 5.1(h).

<sup>595</sup> Co-operative Bulk Handling Limited, *Port Terminal Rules*, clause 5.2(a).

<sup>596</sup> Co-operative Bulk Handling Limited, *Port Terminal Rules*, clause 5.2(a)(i).

- PTSA Capacity for the Harvest Shipping Period may only be traded with or transferred to another Customer that has a current PTSA in place with CBH; and
- Negotiated Agreement Capacity for the Harvest Shipping Period may only be traded with or transferred to another Customer that has a current Negotiated Agreement in place with CBH.

The Customer may transfer its Harvest Capacity entitlement in the case of a PTSA Customer where the PTSA Customer has:<sup>597</sup>

- agreed to sell to the transferee the grain that the PTSA Customer has accumulated at the Port Terminal Facility; or
- made arrangements to Outload any Grain accumulated at the Port Terminal Facility, and pay the relevant charge under its Access Agreement, and there is sufficient time for the transferee to accumulate sufficient Grain in the assembly window (as may be modified with the consent of CBH, such consent not to be unreasonably withheld).

The Customer may transfer its Harvest Capacity entitlement in the case of a Negotiated Agreement Customer where the Negotiated Agreement Customer has:<sup>598</sup>

- agreed to sell to the transferee the grain that the Negotiated Agreement Customer has accumulated at the Port Terminal Facility; or
- made arrangements to Outload any Grain accumulated at the Port Terminal Facility, and pay the relevant charge under its Access Agreement, and there is sufficient time for the transferee to accumulate sufficient Grain in the assembly window (as may be modified with the consent of CBH, such consent not to be unreasonably withheld).

Any purported trade or transfer by a Customer of Harvest Capacity that does not comply with **rule 5.2(a)** is void.<sup>599</sup> The transferee of the Harvest Capacity entitlement must comply with this **rule 5**, and in particular the transferring Customer's Vessel Nomination if one has been provided prior to the transfer under **rules 7.1** or **7.2**.<sup>600</sup>

All transfers must be proposed using the Transfer of Shipping Capacity Form, accurately filled out and complete in all material regards and signed by the transferor and transferee, prior to submission to CBH.<sup>601</sup>

Subject to CBH approval and the transferor and transferee complying with their obligations under **rule 5.2(a)** to **(d)**, CBH shall sign a copy of the Transfer of

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<sup>597</sup> Co-operative Bulk Handling Limited, *Port Terminal Rules*, clause 5.2(a)(ii).

<sup>598</sup> Co-operative Bulk Handling Limited, *Port Terminal Rules*, clause 5.2(a)(ii)(A).

<sup>599</sup> Co-operative Bulk Handling Limited, *Port Terminal Rules*, clause 5.2(b).

<sup>600</sup> Co-operative Bulk Handling Limited, *Port Terminal Rules*, clause 5.2(c).

<sup>601</sup> Co-operative Bulk Handling Limited, *Port Terminal Rules*, clause 5.2(d).

Shipping Capacity Form, provide a copy to the transferor and transferee and amend the Shipping Capacity Register to record the details of the transfer.<sup>602</sup>

The Customer transferring Harvest Capacity must pay CBH a fee of a \$50 for each 1000 tonnes of Harvest Capacity transferred to cover CBH's administrative costs associated with the transfer.<sup>603</sup> No transfer is effective until approved by CBH under **rule 5.2(e)**.<sup>604</sup>

### **12.5.1.7 Annual Shipping Period Port Terminal Services**

#### *Acquiring capacity in annual shipping period*

In addition to applying for Capacity during the Harvest Period, a Customer may apply under **rule 6.1** for Capacity during the Annual Shipping Period.<sup>605</sup>

Shipping during the Annual Shipping Period (the period outside the Harvest Shipping Period) is allocated using a market based Auction process. All Customers may participate in the Auction process in order to acquire Capacity. Grain Entitlement is not required to acquire Capacity.<sup>606</sup>

Auctions will be held in stages. The First Phase Auction will be held in September in order to allocate the majority of Capacity over the Annual Shipping Period. CBH will publish the dates each Auction is scheduled to be held and a schedule of the Capacity on offer at each Auction no later than seven days before the start of the Auction.<sup>607</sup>

Each Auction will be held in accordance with the Auction Rules under which each prospective Customer will have the opportunity to acquire Shipping Windows for a defined tonnage at each Port Terminal Facility, regardless of whether the Customer is a GSA Customer, a PTSA Customer or a Negotiated Agreement Customer.<sup>608</sup>

Any Capacity that is passed in at the First Phase Auction will be re-auctioned in the Second Phase Auctions together with any remaining Capacity. The Second Phase Auctions will be held on a monthly basis in accordance with the Auction timeline published by CBH from time to time. The Second Phase Auctions will offer Capacity for shipment for the Shipping Window that commences two months from the date of each Second Phase Auction.<sup>609</sup>

A Customer must declare in respect of each tonne of Capacity acquired by Auction whether the Capacity it is applying for is GSA Capacity, PTSA Capacity, or Negotiated Agreement Capacity. Once the declaration is made, it is irrevocable. The Customer must make this declaration prior to 1 November in the case of a First Phase

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<sup>602</sup> Co-operative Bulk Handling Limited, *Port Terminal Rules*, clause 5.2(e).

<sup>603</sup> Co-operative Bulk Handling Limited, *Port Terminal Rules*, clause 5.2(f).

<sup>604</sup> Co-operative Bulk Handling Limited, *Port Terminal Rules*, clause 5.2(g).

<sup>605</sup> Co-operative Bulk Handling Limited, *Port Terminal Rules*, clause 6.1(a).

<sup>606</sup> Co-operative Bulk Handling Limited, *Port Terminal Rules*, clause 6.1(b).

<sup>607</sup> Co-operative Bulk Handling Limited, *Port Terminal Rules*, clause 6.1(c).

<sup>608</sup> Co-operative Bulk Handling Limited, *Port Terminal Rules*, clause 6.1(d).

<sup>609</sup> Co-operative Bulk Handling Limited, *Port Terminal Rules*, clause 6.1(e).

Auction, and in the case of a Second Phase Auction, within 7 days of the end of the Auction where the Capacity was acquired.<sup>610</sup>

Customers may submit a Spare Capacity Booking Form to CBH at any time up to 22 days before the first day of the relevant Shipping Window where:<sup>611</sup>

- Not less than 7 days has passed since the end of the last Second Phase Auction prior to the commencement of the Shipping Window; and
- the Capacity awarded at Auction does not exceed the advised Capacity for that Shipping Window during the Annual Shipping Period (in this **rule 6.1(f)** “**Spare Capacity**”).

At the time of making any application for Spare Capacity during the Annual Shipping Period, a Customer must declare whether the Capacity it is applying for is GSA Capacity, PTSA Capacity or Negotiated Agreement Capacity and once made, the declaration shall be irrevocable.<sup>612</sup>

CBH will accept the Spare Capacity Booking Form and allocate Capacity to the Customer, subject to the Spare Capacity Booking Form being correctly completed and the Capacity requested being less than or equal to the Spare Capacity.<sup>613</sup>

When a Customer is successful in securing Capacity in a Shipping Window at an Auction held under the Auction Rules CBH shall confirm the Capacity secured by the Customer at that Auction. The Customer must pay CBH in accordance with the Access Agreement in respect of which the Customer will receive Capacity and subject to **rule 6.1(i)**, CBH shall provide Port Terminal Services in accordance with the relevant Access Agreement at the relevant Port Terminal Facility.<sup>614</sup>

CBH’s obligation under **rule 6.1(h)(ii)** is subject to the Customer obtaining or delivering the relevant Grain Entitlement, complying with the notice requirements under **rule 7**, the Arrival of the Customer’s Nominated Vessel within the Shipping Window for the relevant Port Terminal Facility, and that vessel passing the Relevant Surveys.<sup>615</sup>

Customers are required to nominate vessels into Shipping Windows in accordance with the Port Terminal Rules at the later of the allocation of Spare Capacity following acceptance of the Spare Capacity Booking Form or the allocation of the Shipping Window.<sup>616</sup>

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<sup>610</sup> Co-operative Bulk Handling Limited, *Port Terminal Rules*, clause 6.1(f).

<sup>611</sup> Co-operative Bulk Handling Limited, *Port Terminal Rules*, clause 6.1(g).

<sup>612</sup> Co-operative Bulk Handling Limited, *Port Terminal Rules*, clause 6.1(g).

<sup>613</sup> Co-operative Bulk Handling Limited, *Port Terminal Rules*, clause 6.1(i).

<sup>614</sup> Co-operative Bulk Handling Limited, *Port Terminal Rules*, clause 6.1(h).

<sup>615</sup> Co-operative Bulk Handling Limited, *Port Terminal Rules*, clause 6.1(i).

<sup>616</sup> Co-operative Bulk Handling Limited, *Port Terminal Rules*, clause 6.1(j).

### *Trading Annual Shipping Period Capacity*

Customers may transfer Annual Shipping Period Capacity that they have acquired from CBH (whether in the Auctions, by a Spare Capacity Booking Form or purchased from another Customer in the Secondary Market). Harvest Capacity secured under a GSA may only be traded with or transferred to another Customer that has a current GSA in place with CBH. Harvest Capacity secured under a PTSA may only be traded with or transferred to another Customer that has a current PTSA in place with CBH. Harvest Capacity secured under a Negotiated Agreement may only be traded with or transferred to another Customer that has a current Negotiated Agreement in place with CBH.<sup>617</sup>

Any purported trade or transfer by a Customer of Harvest Capacity that does not comply with **rule 6.2(a)** is void.<sup>618</sup>

All transfers must be proposed using the Transfer of Shipping Capacity Form, accurately filled out and complete in all material regards and signed by the transferor and transferee, prior to submission to CBH.<sup>619</sup>

All transfers of Annual Shipping Period Capacity must be completed no later than 30 days prior to the first day of the Shipping Window.<sup>620</sup>

Subject to the transferor complying with its obligations under **rule 6.2(a)** to **(c)**, and CBH's approval, CBH shall sign a copy of the Transfer of Shipping Capacity Form, provide a copy to the transferor and transferee and amend the Shipping Capacity Register to record the details of the transfer.<sup>621</sup> The Customer transferring Capacity must pay CBH a fee of a \$50 for each 1000 tonnes of Capacity transferred for CBH's administrative costs associated with the transfer.<sup>622</sup>

No transfer shall be effective until approved by CBH under **rule 6.2(e)**.<sup>623</sup>

#### **12.5.1.8 Nominating vessels for shipping windows during the Harvest period**

##### *PTSA and Negotiated Agreement Customers*

Vessel Nominations for PTSA and Negotiated Agreement Customers must be made no later than 22 days prior to the Nominated Vessel's ETA. The ETA must be no later than the last day of the Grace Period and in accordance with the rules outlined in **rule 8.1**.<sup>624</sup> The Grain cargo must be fully accumulated no later than 48 hours prior to the ETA in order for it to be loaded.<sup>625</sup>

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<sup>617</sup> Co-operative Bulk Handling Limited, *Port Terminal Rules*, clause 6.2(a).

<sup>618</sup> Co-operative Bulk Handling Limited, *Port Terminal Rules*, clause 6.2(b).

<sup>619</sup> Co-operative Bulk Handling Limited, *Port Terminal Rules*, clause 6.2(c).

<sup>620</sup> Co-operative Bulk Handling Limited, *Port Terminal Rules*, clause 6.2(d).

<sup>621</sup> Co-operative Bulk Handling Limited, *Port Terminal Rules*, clause 6.2(e).

<sup>622</sup> Co-operative Bulk Handling Limited, *Port Terminal Rules*, clause 6.2(f).

<sup>623</sup> Co-operative Bulk Handling Limited, *Port Terminal Rules*, clause 6.2(g).

<sup>624</sup> Co-operative Bulk Handling Limited, *Port Terminal Rules*, clause 7.1(a).

<sup>625</sup> Co-operative Bulk Handling Limited, *Port Terminal Rules*, clause 7.1(b).

CBH note that during Harvest, ‘Customers will experience greater delays in deliveries at the Port Terminal Facilities of Albany, Esperance and Geraldton, as vehicles will queue along with Grower deliveries’. PTSA and Negotiated Agreement Customers should note that this will place additional time constraints on the cargo accumulation process.<sup>626</sup>

CBH may waive compliance with **rules 8.1(c) and 8.1(g)** during the Harvest Period provided that the PTSA or Negotiated Agreement Customer makes a declaration contained in the Direct to Port Delivery Declaration Form in respect of each load of Grain delivered to the Port Terminal Facility.<sup>627</sup>

#### *GSA Customers*

Vessel Nominations for GSA Customers must be made no later than 22 days prior to the Nominated Vessel’s ETA. The ETA must be no later than the last day of the Grace Period and in accordance with the rules outlined in **rule 8.1**.<sup>628</sup> No later than 48 hours prior to the ETA, a GSA Customer must have Grain Entitlement equivalent or greater than the Nominated Tonnage for each Grade to be loaded onto the Nominated Vessel.<sup>629</sup>

### **12.5.1.9 Nominating Vessels for Shipping Windows in the Annual Shipping Period**

#### *Direct to Port Process*

##### 1. Shipping Notification<sup>630</sup>

Upon receiving notice from the PTSA Customer or Negotiated Access Customer of an intended shipment (a **Cargo Request Form**) within a Shipping Window allocated in accordance with **rule 6.1**, CBH must agree on an Accumulation Plan with the PTSA Customer or Negotiated Access Customer and allocate the PTSA Customer or Negotiated Access Customer a shipping date in accordance with the Shipping Stem Policy.

A Cargo Request Form in relation to a Shipping Window must be given no later than 30 days prior to the ETA of the vessel actually nominated to be loaded in the Vessel Nomination. The PTSA Customer or Negotiated Access Customer must submit a pre-delivery sample of grain from each source of the grain, with the Cargo Request Form, as well as a Declaration that the pre-delivery sample is a representative sample of the grain to be delivered and is not misleading as well as to treatment of the Grain.

##### 2. Accumulation Plan<sup>631</sup>

The PTSA Customer or Negotiated Access Customer and CBH must agree an Accumulation Plan detailing:

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<sup>626</sup> Co-operative Bulk Handling Limited, *Port Terminal Rules*, clause 7.1(c).

<sup>627</sup> Co-operative Bulk Handling Limited, *Port Terminal Rules*, clause 7.1(d).

<sup>628</sup> Co-operative Bulk Handling Limited, *Port Terminal Rules*, clause 7.2(a).

<sup>629</sup> Co-operative Bulk Handling Limited, *Port Terminal Rules*, clause 7.2(b).

<sup>630</sup> Co-operative Bulk Handling Limited, *Port Terminal Rules*, clause 8.1(a).

<sup>631</sup> Co-operative Bulk Handling Limited, *Port Terminal Rules*, clause 8.1(b).

- whether deliveries of Grain to a Port Terminal Facility for export are to be made by road or rail, subject to the capabilities of the Port Terminal Facility to receive such deliveries; and
- the agreed timetable for deliveries to the Port Terminal Facility; fitting in with pre-planned deliveries.

Where deliveries are made by road, all loads must comply with the requirements of the Heavy Vehicle Mass Management Scheme. CBH is not required to allow a PTSA Customer or Negotiated Access Customer access to rail access train paths utilised by CBH.

### 3. Pre-delivery testing<sup>632</sup>

The PTSA Customer or Negotiated Access Customer must coordinate the collection and delivery to CBH of pre-delivery samples. CBH must coordinate the testing of pre-delivery samples from the PTSA Customer or Negotiated Access Customer, prior to the delivery of Grain to the Port Terminal Facilities. This is done in order to confirm the grain type and other characteristics of the Grain to be delivered, check for the presence of chemicals and other contaminants and check for the presence of insect activity and live insects, to minimise the risk of cross contamination whilst the Grain is held by CBH at the Port Terminal Facilities.

### 4. Sampling<sup>633</sup>

CBH will sample Grain delivered at the Port Terminal Facility, using CBH Sampling Facilities operated by personnel of CBH. The CBH personnel will:

- visually inspect the Grain for obvious signs of contaminants as it exits the vehicles; and
- sample the Grain unloaded into the grid as it is elevated on the way to storage, and in all cases, CBH will provide the PTSA Customer or Negotiated Access Customer with a record of the results of the sampling.

CBH states that the purpose of the sampling of loads of Grain is to:

- confirm the grain type and other characteristics of the Grain being delivered;
- check for the visible evidence of chemicals and other contaminants; and
- check for the visible evidence of insect activity and live insects, to minimise the risk of cross contamination whilst the Grain is held by CBH at the Port Terminal Facilities.

### 5. Unloading<sup>634</sup>

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<sup>632</sup> Co-operative Bulk Handling Limited, *Port Terminal Rules*, clause 8.1(c).

<sup>633</sup> Co-operative Bulk Handling Limited, *Port Terminal Rules*, clause 8.1(d)

<sup>634</sup> Co-operative Bulk Handling Limited, *Port Terminal Rules*, clause 8.1(e).

Subject to the Delivery Queue Policy in rule 14, CBH will provide access to the Port Terminal Facilities to road vehicles and rail vehicles (where such facilities exist at the Port Terminal Facilities) for the purpose of PTSA Customers or Negotiated Access Customers unloading deliveries of Grain from the vehicles, for Grain export accumulation.

Access to the Port Terminal Facilities for unloading Grain will be provided by way of:

- road or rail vehicle access (where such facilities exist at the Port Terminal Facilities) including access to roadways, rail track, passing loops and sidings located within the Port Terminal Facilities; and
- unloading through a grid capable of accepting deliveries by road or rail (where such facilities exist at the Port Terminal Facilities).

Where vehicles containing the PTSA Customer's or Negotiated Access Customer's Grain arrive at the Port Terminal Facilities as scheduled (or within a reasonable time before or after the scheduled time, so that it can be unloaded to comply with the scheduled time) CBH must use all reasonable endeavours to ensure that the vehicles are unloaded at a rate (commensurate with the type, condition and volumes of the Grain) that enables the PTSA Customer's or Negotiated Access Customer's Nominated Vessel to be loaded at its ETA. The vehicles will not be unloaded at a rate greater than the maximum receival rating of the relevant grid.

#### 6. Weighing<sup>635</sup>

All Grain delivered to the Port Terminal Facilities for unloading must be weighed using CBH's weighing facilities operated by personnel of CBH. The CBH personnel must:

- record the gross and tare weights of the road vehicles containing the loads of Grain; or
- at CBH's discretion where the Port Terminal Facilities have such facilities, batch weigh the Grain unloaded from rail vehicles into the grid.

In all cases, CBH must provide the PTSA Customer or Negotiated Access Customer with a weighbridge ticket or other statement certifying the weight and quantity of Grain delivered and confirming the name of the person in whose name the Grain is delivered. This is based on the information contained in the PTSA Customer's or Negotiated Access Customer's Direct to Port Declaration Form provided to CBH at or prior to the delivery of each load of Grain at the Port Terminal Facility.

#### 7. Fumigation<sup>636</sup>

The PTSA Customer or Negotiated Access Customer must provide CBH with a Fumigation Certificate detailing all chemicals applied to the Grain prior to delivery at

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<sup>635</sup> Co-operative Bulk Handling Limited, *Port Terminal Rules*, clause 8.1(f).

<sup>636</sup> Co-operative Bulk Handling Limited, *Port Terminal Rules*, clause 8.1(g).



the Port Terminal Facility, in relation to all Grain delivered after 1 February in a Season and all Grain that is not of the current Season.

#### 8. Storage of Grain<sup>637</sup>

Storage and handling of all Grain delivered by a PTSA Customer or Negotiated Access Customer at the Port Terminal Facilities must be segregated from all other grain stored or handled at the Port Terminal Facilities.

All delivery and unloading points, including any discharge grids, storage locations, and the movement of Grain following discharge will be nominated and determined by CBH in its sole discretion, acting in accordance with the Port Terminal Rules.

Any excess Grain following loading of PTSA Customer's or Negotiated Access Customer's Nominated Vessel must be segregated from all other Grain stored or handled at the Port Terminal Facilities.

#### *GSA Customers*<sup>638</sup>

GSA Customers must provide a Vessel Nomination to CBH no later than 22 days prior to the last day of the Grace Period. The ETA of the Nominated Vessel must be no later than the last day of the Grace Period. All Vessel Nominations will be input into CBH's shipping interface contained on LoadNet® for Marketers™ system. At the time the Vessel Nomination is provided to CBH, the GSA Customer must have full Grain Entitlement for the cargo outlined in the Vessel Nomination.

#### **12.5.1.10 Vessel Nominations**

##### *Details*

When making a Vessel Nomination, Customers must provide the following vessel nomination and handling instruction details to CBH by entry into CBH's shipping interface in LoadNet® for Marketers™:<sup>639</sup>

- maximum nominated tonnage (including Master's discretion);
- destination details;
- product description (commodity type and other characteristics);
- ETA;
- discharge port;
- shipping agency;
- vessel part loading;

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<sup>637</sup> Co-operative Bulk Handling Limited, *Port Terminal Rules*, clause 8.1(h).

<sup>638</sup> Co-operative Bulk Handling Limited, *Port Terminal Rules*, clause 8.2.

<sup>639</sup> Co-operative Bulk Handling Limited, *Port Terminal Rules*, clause 9.1(a).

- de-ballasting requirements;
- ship loading sequence plan;
- vessel details (including beam, Arrival and departure drafts, dry-weight, vessel type/class, hold and hatch details, net and gross capacities);
- cargo details (including batch reference, load tolerance range, total load tonnage);
- stevedore details;
- vessel name; and
- Capacity Contract Reference number.

All Vessel Nominations must:<sup>640</sup>

- provide a vessel ETA that is within the relevant Grace Period for the Capacity the Customer is attempting to utilise;
- provide Laycans less or equal to 14 days;
- have ownership of cargo; and
- provide port, grades, quality and tonnage details.

A TBA nomination is acceptable to CBH as long as the above criteria have been met and a vessel name is provided by no later than 15 days before the ETA.<sup>641</sup>

#### *Amendment of Vessel Nominations*<sup>642</sup>

CBH may permit the amendment of a Vessel Nomination for operational reasons where, in its reasonable opinion, accepting the amendment:

- would not depart from the principles outlined in clauses 6.4, 6.5 and 9.2 of the Undertaking entered into by CBH;
- assists in minimising demurrage and maximising throughput at the Port over a given period;
- does not materially alter the outcome or adversely affect Customers participating in the Harvest Period EOI or Annual Shipping Period Auctions; and
- would not result in other Customers incurring materially greater demurrage than would be the case if the amendment had not been accepted.

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<sup>640</sup> Co-operative Bulk Handling Limited, *Port Terminal Rules*, clause 9.1(b).

<sup>641</sup> Co-operative Bulk Handling Limited, *Port Terminal Rules*, clause 9.1(c).

<sup>642</sup> Co-operative Bulk Handling Limited, *Port Terminal Rules*, clause 9.2.

### *Additional Charges*

Additional charges may be payable to CBH to cover CBH's costs incurred where a Customer requests amendments to the Vessel Nomination.<sup>643</sup>

#### **12.5.1.11 Lost capacity**

##### *Harvest Shipping Period*

Where a Customer's vessel Arrives outside of the Shipping Window but within the Grace Period, or the Customer acquires or accumulates Grain Entitlement sufficient to load the vessel within the Grace Period and the Customer's Vessel has Arrived (following acceptance by CBH of a Vessel Nomination in respect of Harvest Capacity), CBH will use its reasonable endeavours to load the vessel.<sup>644</sup>

Where a Customer's vessel has not Arrived within the Grace Period, or the Customer does not have full Grain Entitlement within 48 hours of the ETA of the Nominated Vessel following acceptance by CBH of a Vessel Nomination in respect of Harvest Capacity, the Harvest Capacity shall be treated as Lost Capacity and the Customer shall pay the fees specified as payable for Lost Capacity in the Access Agreement.<sup>645</sup>

Where the Customer does not submit and have accepted by CBH a Vessel Nomination for Harvest Capacity more than 22 days before the last day of the Grace Period or the Customer does not ship all acquired Harvest Capacity within the Harvest Shipping Period, the Customer will be regarded as not having shipped the Grain in the relevant Shipping Window, the Harvest Capacity shall be treated as Lost Capacity and the Customer shall pay the fees specified as payable for Lost Capacity in the Access Agreement.<sup>646</sup>

##### *Annual Shipping Period*

Where a Customer's vessel Arrives outside of the Shipping Window but within the Grace Period or the PTSA Customer or Negotiated Agreement Customer acquires or accumulates Grain Entitlement sufficient to load the vessel within the Grace Period and the Customer's Vessel has Arrived (following acceptance by CBH of a Vessel Nomination in respect of Annual Shipping Period Capacity), CBH will use its reasonable endeavours to load the vessel.<sup>647</sup>

Where the Customer does not submit and have accepted by CBH a Vessel Nomination more than 22 days before the last day of the Grace Period or the Customer's Nominated Vessel does not Arrive within the Grace Period the Customer will be regarded as not to have shipped the Grain in the relevant Shipping Window, the Grain Capacity shall be treated as Lost Capacity and the Customer shall pay the fees specified as payable for Lost Capacity in the Access Agreement.<sup>648</sup>

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<sup>643</sup> Co-operative Bulk Handling Limited, *Port Terminal Rules*, clause 9.3.

<sup>644</sup> Co-operative Bulk Handling Limited, *Port Terminal Rules*, clause 10.1(a).

<sup>645</sup> Co-operative Bulk Handling Limited, *Port Terminal Rules*, clause 10.1(b).

<sup>646</sup> Co-operative Bulk Handling Limited, *Port Terminal Rules*, clause 10.1(c).

<sup>647</sup> Co-operative Bulk Handling Limited, *Port Terminal Rules*, clause 10.2(a).

<sup>648</sup> Co-operative Bulk Handling Limited, *Port Terminal Rules*, clause 10.2(b).

Where a GSA Customer does not obtain the full Grain Entitlement for the cargo at the time of Vessel Nomination or a PTSA Customer or Negotiated Agreement Customer (as the case may be) does not obtain the full Grain Entitlement for the cargo at the time of Arrival of the Nominated Vessel, the Customer will be regarded as not to have shipped the Grain in the relevant Shipping Window, the Grain Capacity shall be treated as Lost Capacity and the Customer shall pay the fees specified as payable for Lost Capacity in the Access Agreement.<sup>649</sup>

#### **12.5.1.12 Shipping stem policy**

##### *Prioritising Loading of Vessels*

The Shipping Stem is ordered by the Estimated Time of Commencement of Loading (ETC). In allocating or adjusting an ETC to a Customer CBH shall have regard to (in order of decreasing importance):<sup>650</sup>

- the ETA of a vessel if the ETA is within the Shipping Window for which Capacity is being utilised and the Vessel actually Arrived within its Shipping Window;
- the Nomination Date of the Vessel Nomination;
- the Nomination Time of the Vessel Nomination;
- changes in the ETA of a vessel (including those that would take it outside of the Shipping Window for which Capacity is being utilised);
- changes in the expected Accumulation Plan of a vessel for a GSA Customer or departures from an agreed Accumulation Plan for PTSA Customers or Negotiated Agreement Customers; and
- loading a vessel whose cargo remains at Port but which failed to Arrive prior to the last day of the Shipping Window.

##### *Adjustments to the Stem*

Adjustments to the Shipping Stem are at CBH's sole discretion acting in accordance with the Port Terminal Rules. CBH may adjust the Shipping Stem to cater for extraordinary or unusual circumstances including, but not limited to:<sup>651</sup>

- Customer's requests to defer Vessels;
- Customer's requests to bring Vessels forward;
- Accepting a Vessel Nomination with less than the required notice having been provided by the Customer, where CBH is reasonably of the opinion that to do so

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<sup>649</sup> Co-operative Bulk Handling Limited, *Port Terminal Rules*, clause 10.2(b).

<sup>650</sup> Co-operative Bulk Handling Limited, *Port Terminal Rules*, clause 11.1.

<sup>651</sup> Co-operative Bulk Handling Limited, *Port Terminal Rules*, clause 11.2.

will not cause any material detriment to CBH or other Customers and is in accordance with the principles outlined in clauses 6.4, 6.5 and 9.2 of the Undertaking provided by CBH.

#### *Discretion to Accept Vessel Nominations*<sup>652</sup>

For the purposes of assessing the priority for **rule 11.11** CBH reserves the right to adjust the ETA by taking the Customer to have provided 22 days notice from the date the Vessel Nomination was accepted under **rule 11.3**.

Vessel Nominations accepted under **rule 11.3** in all cases will have a lower priority than Vessel Nominations that comply fully with the requirements of **rule 9.1**, unless the loading of the Vessel Nomination accepted under **rule 11.3** is necessary to ensure the continued operation of the Port Terminal.

This is notwithstanding that CBH may in its reasonable discretion accept a Vessel Nomination that does not comply fully with the requirements of **rule 9.1**.

#### *Other Information*

The Shipping Stem shall provide information about the total Capacity in relation to a Shipping Window and the amount of Capacity currently allocated.<sup>653</sup>

#### **12.5.1.13 Storage priority policy**<sup>654</sup>

From time to time, CBH shall allocate the use of storage Capacity in a Port Terminal in order to meet the order of vessels contained in the Shipping Stem, having regard to the Objects contained in **rule 2.1** of the Port Terminal Rules.

#### **12.5.1.14 Port Queue policy**

##### *Allocating Priority*<sup>655</sup>

The port queue is the berthing priority for each vessel that has Arrived at a Port Terminal Facility and is waiting to be loaded.

Berth priority for vessels is determined by cargo accumulation status, the Arrival time of a vessel and its relationship to the Shipping Window of the Vessel Nomination.<sup>656</sup>

Unless in CBH's 'reasonable opinion', it is necessary for the efficient operation of the Port Terminal Facility, CBH will not call a vessel in to berth until the full cargo is ready for loading at the Port Terminal Facility and the Customer has full Grain Entitlement for the cargo.<sup>657</sup>

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<sup>652</sup> Co-operative Bulk Handling Limited, *Port Terminal Rules*, clause 11.3.

<sup>653</sup> Co-operative Bulk Handling Limited, *Port Terminal Rules*, clause 11.4.

<sup>654</sup> Co-operative Bulk Handling Limited, *Port Terminal Rules*, clause 12.

<sup>655</sup> Co-operative Bulk Handling Limited, *Port Terminal Rules*, clause 13.1.

<sup>656</sup> Co-operative Bulk Handling Limited, *Port Terminal Rules*, clause 13.1(b).

<sup>657</sup> Co-operative Bulk Handling Limited, *Port Terminal Rules*, clause 13.1(c).

### *Non compliant vessels*<sup>658</sup>

Customer vessels must pass all Relevant Surveys within 24 hours of berthing. CBH may require Customers to move their vessel from the berth if it fails survey in accordance with **rule 13.2(a)** and the non-compliant vessel is holding up the berth from another vessel. Where a vessel fails any Relevant Surveys it retains its original priority once it has passed the Relevant Surveys.

### *Two porting*

CBH recognises vessels which have received part of their grain cargo from a previous call (two port) at another Western Australian port. If this is applicable, then the actual Arrival date at the first port of call is used to establish its priority in the port berthing queue.<sup>659</sup>

#### **12.5.1.15 Delivery Queue Policy**

Each PTSA Customer and Negotiated Agreement Customer will be allocated an assembly window once they have a confirmed Vessel Nomination and ETA, during which time the PTSA Customer or Negotiated Agreement Customer will be permitted to deliver loads of Grain to the Port Terminal Facility for the purposes of Export Accumulation (**Assembly Window**).<sup>660</sup>

From time to time, CBH will allocate Assembly Windows in order to meet the order of vessels on the Shipping Stem, having regard to the Objects contained in **rule 2.1** of the Port Terminal Rules.<sup>661</sup>

Assembly Windows will be allocated all year round at Kwinana and outside of the Harvest Period at Geraldton, Albany and Esperance. During the Harvest Period at Geraldton, Albany and Esperance, PTSA Customers' and Negotiated Agreement Customers' grain delivery vehicles will be required to queue for services along with other vehicles seeking access.<sup>662</sup>

PTSA Customers and Negotiated Agreement Customers may not access a delivery queue at a Port Terminal Facility until it has been provided with an Assembly Window by CBH.<sup>663</sup>

Provided that a PTSA Customer or Negotiated Agreement Customer arrives at the relevant Port Terminal Facility within its Assembly Window, the PTSA Customer's or Negotiated Agreement Customer's priority in the delivery queue will be determined by the time that they arrived.<sup>664</sup>

If a Customer's vehicle breaks down or is rejected in accordance with the terms and conditions of the Access Agreement or the Port Terminal Rules and the non-

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<sup>658</sup> Co-operative Bulk Handling Limited, *Port Terminal Rules*, clause 13.2.

<sup>659</sup> Co-operative Bulk Handling Limited, *Port Terminal Rules*, clause 13.3.

<sup>660</sup> Co-operative Bulk Handling Limited, *Port Terminal Rules*, clause 14(a).

<sup>661</sup> Co-operative Bulk Handling Limited, *Port Terminal Rules*, clause 14(b).

<sup>662</sup> Co-operative Bulk Handling Limited, *Port Terminal Rules*, clause 14(c).

<sup>663</sup> Co-operative Bulk Handling Limited, *Port Terminal Rules*, clause 14(d).

<sup>664</sup> Co-operative Bulk Handling Limited, *Port Terminal Rules*, clause 14(e).

compliant vehicle is holding up the delivery queue for other vehicles, CBH may require the Customer to move its vehicle from the delivery queue.<sup>665</sup>

#### **12.5.1.16 Dispute Resolution**

Any dispute over the application of the Port Terminal Rules or the exercise of discretion by CBH, except in relation to the Auction Rules, will be dealt with in accordance with the provisions of the relevant Access Agreement.<sup>666</sup>

Any dispute over the application of the Auction Rules will be dealt with in accordance with the terms of the Auction Rules.<sup>667</sup>

#### **12.5.2 CBH's proposed Auction Rules and process<sup>668</sup>**

Under CBH's August capacity allocation system, Shipping Capacity Allocation will operate over two periods throughout the year:

- the Harvest Shipping Period 1 Nov – 15 Jan where capacity will be allocated on the basis of expressions of interest;
- the Annual Shipping Period 15 Jan – 31 Oct where capacity will be allocated on the basis of a price/volume based auction.

The Annual Shipping Period will be conducted via an auction mechanism that will have three distinct components:

- a first phase allocation of Core Capacity for the Annual Shipping Period (15 Jan – 31 Oct) to be conducted in the period of August/September prior to harvest;
- subsequent rolling allocation of residual Core Capacity and any required Surge Capacity to be conducted two months prior to the relevant shipping period;
- an ascending "clock auction" mechanism with proceeds (the auction premium) to be returned to all exporters using CBH port terminals in full, less direct costs and on a pro rata basis, allocated using all tonnes shipped from 1 Nov to 31 Oct.

##### **12.5.2.1 Harvest Shipping Period**

CBH states that due to the nomination of grain to exporters, it is highly unlikely capacity during the Harvest Shipping Period will be oversubscribed. The period will operate on the basis of an expression of interest and capacity allocation mechanism.

Expressions of interest will be called for no later than 1 September and allocations made no later than 1 October.

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<sup>665</sup> Co-operative Bulk Handling Limited, *Port Terminal Rules*, clause 14(f).

<sup>666</sup> Co-operative Bulk Handling Limited, *Port Terminal Rules*, clause 15.1(a).

<sup>667</sup> Co-operative Bulk Handling Limited, *Port Terminal Rules*, clause 15.1(b).

<sup>668</sup> Co-operative Bulk Handling Limited, *Auction Process Outline*, 6 July 2009. For the purposes of this Further Draft Decision, the specific draft Auction Rules provided by CBH on 6 July 2009 have not been set out here as they are summarised by the *Auction Process Outline*. The ACCC's views below on the PTRs are to be taken as being applicable to the draft Auction Rules.

### **12.5.2.2 Annual Shipping Period**

Shipping Capacity will be initially allocated via an auction process (“primary market”). Market participants can then trade Shipping Capacity purchased at auction (“secondary market”) to provide operational flexibility.

Auction proceeds minus administration costs will be proportionately distributed over the entire annual export task (exports from 1 Nov – 31 Oct) on a per tonne basis and then passed back to the exporter.

The amount of core capacity available in any given year will be dependent upon crop size. If in any given half month period the entire available Core Capacity is allocated via the auction process, CBH will offer additional “Surge” capacity. The cost of the Core Capacity transport task will be borne by the Grower and the cost of Surge Capacity will be borne by the Exporter.

Nominated harvest period slots using Grain Express will have entitlement arrangements that are considerably more flexible than during the Annual Shipping Period.

### **12.5.2.3 First phase auction**

The First Phase Auction will be held in August/September 2009. Bidders will remain confidential but prices will be openly published.

Successful bidders at auction are asked to designate those slots to be delivered to port via direct access arrangements or via Grain Express. The designation cannot be changed once submitted.

### **12.5.2.4 Training and testing**

Training will be available for all exporters who intend to participate in the clock auction, with a Test auction being held in August.

### **12.5.2.5 Second phase auction**

Second phase auctions providing access to any additional Core and required Surge Capacity will take place in monthly intervals from November and follow the same mechanism as the First Phase Auction.

### **12.5.2.6 Definition of Core Capacity**

Core Transport Resources are those contracted to CBH on long term arrangements that provide a dedicated grain transport service with pre-set tonnage targets and prescriptive transport routes on a daily/weekly/monthly/annual basis. CBH typically has separate transport contracts within each shipping zone, except for the rail transport service provider who operates across Zones.

Core Transport Resources have been contracted by CBH on the basis of providing the industry/growers the most efficient transport resource to meet the specific needs of each separate harvest, performing on a set and consistent basis. CBH argues that acquiring an excessive amount of Core Transport Resources will unnecessarily add to supply chain cost.



CBH will provide the Core Capacity based on an application of resources over the full year to clear storage in preparation for the following season. Core Transport Resources may be deployed in such a way as to increase accumulation Capacity for specific periods.

#### **12.5.2.7 Definition of Surge Capacity**

The extent and nature of Surge Transport Resources will vary depending on requirement and availability. Surge comes from contracted resources providing additional capacity as these are a known quantity both operationally and commercially.

#### **12.5.2.8 Auction proceeds**

CBH states that it has no intent to engage in profiteering via the Auction process. Auction proceeds less direct costs will be returned to exporters who use the CBH Port Terminals via rebates to the Marketer Fees (FOB). Auction proceeds will be rebated to exporters on a per tonne basis, proportionally distributed over the entire shipping period.

#### **12.5.2.9 Secondary market**

Each time a slot is traded, CBH will record the trade and charge an administrative fee to the new owner of the slot on a per tonne basis.

#### **12.5.2.10 Market oversight and anti-cornering provisions**

The operating rules for the proposed auction mechanism are to be modelled on a combination of ASX market supervision and Division 2 of Part 7.10 of the *Corporations Act 2001* (Cth). CBH reserves the right to refer any disciplinary action to the ACCC for full and proper disclosure. Some conduct may simultaneously result in a breach both of CBH rules and legislation. CBH envisages that where this is the case, it is possible that both CBH and/or the ACCC will exercise their respective rights to take action in response to the breach.

CBH and an Auction Review Committee will monitor compliance with business rules. If necessary, they will instigate enforcement action by referring the suspected breach of a market rule by a customer to its Disciplinary Tribunal, to ACCC/ASIC, or to both.

#### **12.5.2.11 Market structure**

CBH proposes to introduce the following mechanisms:

- market rules and procedures;
- independent reviews to ensure compliance with those rules and procedures;
- a formal (twice yearly) process of consultation with market participants.

### **12.5.2.12 Despatch/demurrage**

Demurrage/despatch risk sharing arrangements for 2009/10 will be as per the 2008/09 Grain Services Agreement (CBH and the exporter will agree at the time of vessel nomination whether the arrangements will apply on a cargo by cargo basis). Despatch/demurrage arrangements will not apply to harvest shipping.

## **12.6 Submissions in response to the ACCC's Draft Decision, the 31 July 2009 PTRs and additional capacity allocation documents**

### **12.6.1 CBH**

CBH made the following submissions on capacity allocation in response to the Draft Decision, the 31 July 2009 Port Terminal Rules, the 6 July 2009 Auction Process Outline and the 6 July draft Auction Rules:<sup>669</sup>

This further submission explains and addresses some particular issues raised by the ACCC in relation to the CBH port capacity auction process (PCAP), which is embodied in the Port Terminal Rules submitted to the ACCC on 31 July 2009.

#### **1 Overview of PCAP**

1.1 In 2009, CBH proposes to introduce a new system for allocating the available capacity of its Port Terminal Facilities (Port Capacity). Allocation will operate over two periods throughout the year:

(i) 1 November to 15 January (Harvest Shipping Period) where capacity will be allocated on the basis of expressions of interest; and

(ii) 16 January to 31 October (Annual Shipping Period) where capacity will be allocated on the basis of a price/volume based auction.

1.2 In the Harvest Shipping Period, when demand may be low, Port Capacity will be available to exporters by expression of interest, with CBH exercising no discretion in relation to the allocation of capacity. In the Annual Shipping Period, when demand will be higher, Port Capacity will be allocated to exporters in a three phase auction process.

1.3 The PCAP does not discriminate between exporters. Grain Express customers and customers who make their own up-country supply chain arrangements will have the same opportunity and ability to access Port Capacity.

1.4 The PCAP will allow exporters to establish an operational commitment for the accumulation of their grain within agreed ship loading windows at the Port Terminal Facility.

#### **2 Different systems for Harvest Shipping Period and Annual Shipping Period**

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<sup>669</sup> Co-operative Bulk Handling Limited, *Submission in relation to Draft Decision on CBH Access Undertaking – Capacity Allocation*, 31 August 2009.

2.1 In 2009, capacity allocation during the Harvest Shipping Period is proposed to be allocated via an Expression of Interest (EOI) process as follows:-

- (i) EOI will be called for no later than 15 September 2009;
- (ii) Allocations will be made no later than 1 October 2009;
- (iii) EOIs offered will be in full month shipping windows;
- (iv) EOIs can be submitted without grain entitlement by any customer holding a Grain Services Agreement (Grain Express) or PTS Agreement;
- (v) Submissions must include the maximum lift-by window/port/zone/commodity/grade and include multi port requirements;
- (vi) Confirmation of shipping slots will be provided with a summarised statement of slots gained including all particulars for each slot;
- (vii) Exporters will be required to pay an Up Front Marketer Fee as a prepayment to secure the capacity within 5 working days from date of invoicing;
- (viii) Exporters may trade their Harvest Shipping slots in part or in full in increments of 1,000mt with another eligible exporter and in line with the secondary market business rules in the Port Terminal Rules.

2.2 Demand for Port Capacity during the Harvest Shipping Period is unlikely to exceed supply. The nomination of grain to exporters and the pace of harvest constrain the ability to ship during this period - marketers cannot ship grain that they have not acquired or accumulated for shipping. Past experience, including the 2008/2009 Harvest Shipping Period confirms this.

2.3 Port Capacity during the Harvest Period (Harvest Capacity) is therefore not expected to be a scarce resource and will be simply allocated to qualified exporters on application. This mechanism was successfully employed in 2008/9.

2.4 The ACCC has suggested that making capacity year-round subject to the auction system would have the benefit of simplicity by having a single system. This proposal has merit. For the 2010/2011 harvest, CBH may seek to amend the Port Terminal Rules to auction the entire year's Capacity. However, there are several reasons why CBH has chosen not to do so this year:

- (i) there is insufficient time to introduce the auction system and conduct auctions sufficiently in advance of the harvest;
- (ii) auctions cost approximately \$ 20,000 [each];
- (iii) if capacity is not scarce, CBH believes that the benefit of having one single system may not justify the additional cost of holding auctions during the Harvest Shipping Period.

### **3 PCAP fees are non-discriminatory**

3.1 CBH's published prices for Port Terminal Services will be the same whether or not exporters have acquired, or agreed to acquire services through Grain Express. PCAP provides an inherently non-discriminatory market-based means of allocating a valuable resource.

#### **4 CBH's incentives**

4.1 CBH is also a grower owned organisation with the express mandate to maximise farm-gate returns. With regard to Port Capacity, its objectives are:

(i) to ensure the grain supply chain is efficient and has the flexibility to deal with the increasing variability of crop size and the capability to deal with significantly large harvest volumes, and

(ii) to ensure that Port Capacity is allocated on a fair, equitable and transparent basis in such a way as to ensure that exporters who have grain to export, can do so within a practicable window.

4.2 These objectives have guided the development of Grain Express and the PCAP.

4.3 CBH has neither commercial nor operational incentives to restrict the supply of Port Capacity because:

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

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

(iii) Whether port export volume comes from the CBH Supply Chain or direct from farm storage, CBH has a commercial incentive to attract volume through its Ports. CBH does not earn margins on the provision of freight services within its supply chain. The bundling of freight with storage and handling is a means of achieving supply chain efficiency. It is not a means of leveraging increased margins.

#### **5. Calculating capacity**

5.1 Port Capacity is a function of the following factors:

(i) port intake capacity;

(ii) intra-port transport capacity;

(iii) labour deployment;

(iv) fumigation demands;

(v) port terminal storage;

(vi) outloading speed; and

(vii) berth capacity.

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

5.3 The theoretical maximum capacity of the CBH Port Terminals in any given half month, ignoring prevailing circumstances is as follows:

- (i) Geraldton - 150,000
- (ii) Kwinana - 315,000
- (iii) Albany - 175,000
- (iv) Esperance - 130,000
- (v) Monthly total - 1,540,000
- (vi) Annual total - 18,480,000

5.4 However:

- (i) harvest size and characteristics vary between years and between zones;
- (ii) Port Terminal Facilities are connected to supply chains which bring grain to port (either the CBH Grain Express supply chain or third party supply chains); and
- (iii) depending on the harvest, and other factors that are difficult to predict and often beyond the control of transporters, storage & handling operators or individual supply chain participants, those supply chains may not deliver grain at a speed or in a form that allows the Port Terminal to achieve the maximum Port Capacity.

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

5.6 The theoretical maxima referred to above are targets that CBH aims for but any system for allocating Port Capacity must take account of the potential limitations of the connected supply chains and the potential for unforeseen events to reduce number of vessels that will actually be able to be loaded. Otherwise, CBH would be allocating capacity that may, in reality, be unachievable.

5.7 For this reason, before allocating capacity, CBH must consider factors including the harvest size and characteristics as well as the likely performance of the supply chain to port.

5.8 With its theoretical, maximum monthly objective in mind, CBH considers what capacity it can realistically offer given the likely performance of supply chains.

The performance of these supply chains may itself be influenced by the pricing behaviour of suppliers on supply chain component services. For example, CBH charges additional storage, handling and transport fees for increasing the performance of its non-port services at peak time. That service component is called "surge" and is referred to in the Port Terminal Rules because it has an effect on the speed at which grain may be delivered to port and made available for shipping.

5.9 The deployment of "surge" resources by CBH has a significant effect at port. For this reason, CBH will offer some lots of Capacity which are described as "surge lots". These are the additional tranches of Capacity that CBH considers that it will be able to make available by deploying surge resources up-country. This raises an issue for the auction system, because prices paid for Port Terminal Services are not to be used to finance CBH's up-country network. For this reason, exporters who acquire surge lots will not be charged Surge Fees. Surge Fees will be charged only to customers who acquire surge lots and nominate Grain Express as their chosen supply chain solution.

5.10 Capacity is highly variable, very difficult to model and dependent upon a significant number of considerations:

(i) The number of segregations that may be required. This will depend upon customer requirements and harvest characteristics.

(ii) The grade mix required within the Port Terminal.

(iii) The speed of delivery into the Port Terminal. One objective of the Grain Express supply chain is to maximise the efficient use rail transport. It is a critical KPI for Grain Express and a function of campaign clearance. One Standard Gauge train set represents the equivalent carrying capacity of sixty six road trains. In the Kwinana Grain Terminal for example, it will take an average of 3 hours to discharge the train. The equivalent volume in road transport would take up to 11 hours to discharge due to the relatively inefficient process of cycling and tipping trucks. CBH anticipate that the majority of volume that will come from an alternate supply chain will be delivered to port via road based facilities. Therefore where trucks replace trains at the Kwinana in-take grids, the rated in-take capacity of the Port is estimated less than 30% of its rail equivalent. Whilst the impact of road compared to rail is profound at Kwinana, the relative congestion and poor cycle speeds of trucks as compared to rail mean that road transport acts to reduce the in-take speed of the Port Terminals. Therefore relative share of rail verse road deliveries to a port in any given month will impact Port Capacity and must be known before Port Capacity can be accurately predicted [CBH note that 'this is likely to be one of the unintended consequences of section 24 of the WEMA. As an alternative to building rail loading storage infrastructure, exporters wishing to make their own supply chain arrangements may acquire grain from growers with on-farm storage and have growers deliver that stock direct to the port by road on the exporters' behalf. This would have a serious adverse effect on efficiency, while simultaneously threatening the viability of the rail network by bleeding it of volume'.]

(iv) Grower deliveries to Port during Harvest. During harvest CBH rely heavily on rail transport to cycle grain into the Port Terminals. This is because the congestion created in the vicinity of the Ports during harvest means that the cycle efficiency of road transport to accumulate for cargos at the ports is impacted. Therefore the point (iii) above is exacerbated during harvest.

## **6 The Process to Determine Capacity ... to be offered in Auction Phases**

6.1 The concepts described above demonstrate that the way grain gets to a Port Terminal will have a significant impact upon the likely ability of that Terminal to load vessels in any given period. It is for this reason that CBH is conducting phased auctions, beginning with a proportion of the theoretical maximum capacity of each Port Terminal. Subsequent phases will provide additional capacity, with the benefit of greater information

about harvest characteristics and supply chain performance. Capacity will be offered in three stages:

- (i) Phase 1 Auction,
- (ii) Phase 2 Auction (rolling monthly)
- (iii) Phase 3 Spare capacity allocation.

#### 6.2 Phase 1 Auction (October)

(i) In the first phase auction, CBH will offer capacity for the period January 15 to October 31. In determining the quantum of capacity offered, CBH will make reference to the following considerations:

- (A) Anticipated harvest volume,
- (B) The geographic spread of the crop,
- (C) The potential size of the domestic market,
- (D) Prevailing weather conditions.

(ii) In any given season, it is efficient to match CBH Port Capacity with the quantity of the harvest at hand. CBH will assume carry in equals carry out and the export task will match the harvest volume. Providing terminal capacity either above or below this figure makes little economic sense.

(iii) Uncertainty regarding harvest volume is still significant in the final quarter of the growing season. Late rains or frosts can have a significant impact upon final yields. Whilst CBH has developed expertise in predicting crop volume over many years, accuracy is never assured. Through the intersection of feed-back from growers specifying the number of hectares sown on farm, combined with CBH views regarding farm yield by Area, it is possible to build a prediction of likely harvest volumes by port zone; but this remains a prediction only. Despite all the science available, CBH crop forecasts have generally proven to be within +/- 20% of the final mark with further fluctuations across port zones. It is for this reason that CBH will be conservative in its crop forecast and initial allocation of capacity.

(iv) Therefore, in the first phase auction and harvest EOI, CBH will allocate capacity on the basis of a full year crop clearance at 75% of the forecast crop. On the basis of a 2009/10 harvest size of 13.3 million tonnes (less one million of domestic consumption, less approximately 1 million tonnes that is likely to be shipped during the Harvest Period), CBH will offer 8.5 million tonnes of capacity for the period 15 Jan - 31 October.

(v) After the first phase auction is complete, winning bidders of Capacity in the first auction will need to nominate the means by which grain will be delivered to port (i.e. whether the exporter will be using Grain Express or another supply chain solution) so that CBH can:

- (A) in the case of Grain Express customers, deploy sufficient resources to ensure appropriate stocks of grain are at port [CBH note that 'this may involve CBH charging Grain Express customers "surge" fees, which are required to cover the cost of additional resources such as increased labour and road transport charges to provide an enhanced service up-country at peak times'];

(B) in the case of other customers, deploy sufficient resources to receive grain at port from the external supply chain.

6.3 Phase 2 Auction. The phase 2 auction will commence on 15 November. At this stage the final harvest volume remains a prediction but better information is available. At this stage CBH Operations will consider the outcomes of the first auction and the likely proportion of grain that will come to port from within and without the CBH system. It will make an assessment of the impact of the integration of each of these (considering the issues raised in point 5 above) and offer a further tranche of capacity in this second phase.

6.4 Phase 3 Spare Capacity Allocation. Once the first and second phase auctions are complete, CBH will have a clear understanding of the performance of the supply chains. After consideration of the relative complexity of the port accumulation plans contemplated for each port zone, CBH will then make a final determination of Port Capacity by zone. This capacity will be offered as spare capacity and will be notified on the CBH shipping stem. This capacity will be offered on a first come, first served basis.

6.5 After the completion of each phase, CBH will ask the exporter to nominate the means by which grain will be delivered to port (i.e. whether the exporter will be using Grain Express or another supply chain solution) Once this nomination is made:

(i) customers who have nominated to use non-CBH supply chain to service their acquired capacity may trade that capacity with each other; and

(ii) customers who have nominated to use Grain Express to service their acquired Capacity may trade that Capacity with each other; but

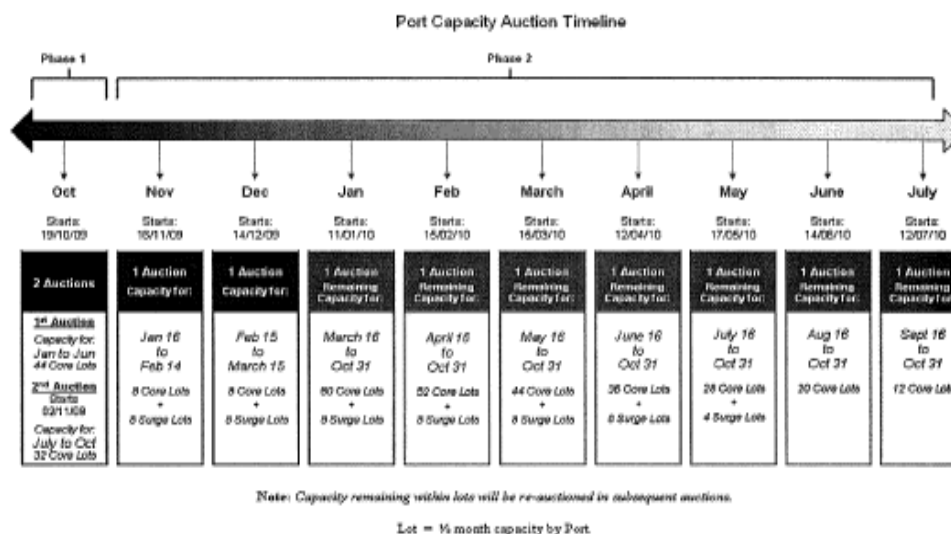
(iii) customers who have nominated to use non-CBH supply chain to service their acquired Capacity may not trade that Capacity for Capacity that another customer has nominated to be serviced by Grain Express and vice versa.

6.6 This restriction is not a form of discrimination. The up-country supply chains will be under considerable pressure to get grain to port in a timely manner. Capacity nominations tell supply chain managers the magnitude and complexity of that task, as well as the effect of the supply chain mix on Port Storage Capacity (e.g., the number of segregations required). Supply chain managers will rely upon this information to allocate resources to meet the demand represented by the nominated Capacity. Many of these resources may be acquired on a take or pay basis. If Port Capacity nominated to Grain Express were to be traded for capacity assigned to an alternative supply chain, CBH will have acquired resources unnecessarily and these resources would lay idle (and vice versa).

6.7 Finally, CBH will make available any additional Capacity that becomes available following the auctions and prior to the last available nomination date for a shipping window. This additional Capacity may become available as a result of any number of factors including changes in shipping schedules, efficient intake of grain due to higher than expected levels of more efficient unit train deliveries to port or good weather conditions (CBH cannot load ships in the rain for obvious reasons). It is difficult to predict if and when such additional Capacity may become available but in the peak of the post-harvest period, CBH is doing everything possible to allow the maximum flow of capacity to the market in an effective and transparent process without over selling capacity or over committing resources.



6.8 The following timeline sets out the proposed auction schedule for 2009 and 2010:



## 7 Conclusion

7.1 CBH submits that the current form of the PCAP is appropriate because:

(i) the allocation system used by CBH in that previous harvest did not sufficiently encourage exporters to ship outside the peak shipping period of 15 January to 30 March and required CBH to exercise discretion in allocation decisions;

(ii) auctions are an efficient, non-discriminatory means of allocating capacity that reduce the need for discretionary decision-making by CBH;

(iii) PCAP is the best alternative to the status-quo that could have been achieved in time for the 2009/2010 harvest;

(iv) because net auction proceeds (and any interest earned on them [CBH note that they 'confirm that the interest earned on auction proceeds will be added to the pool of returns and distributed with returns to exporters']) are returned to exporters in full, CBH has no opportunity or incentive to discriminate; and

(v) PCAP is subject to the Non-discrimination and No Hindering Access provisions in the Undertaking.

CBH made the following submissions on Capacity Management in response to the Draft Decision, the 31 July 2009 Port Terminal Rules and CBH's additional documents:<sup>670</sup>

### **CBH Access Undertaking: Further submission in relation to Clause 10 of the CBH Undertaking (Capacity Management)**

<sup>670</sup> Co-operative Bulk Handling Limited, *Submission in relation to Draft Decision on CBH Access Undertaking – Capacity Management*, 1 September 2009, pp. 1-3.

This submission addresses the ACCC's comments in Part 12 of its draft decision (Draft Decision) and specifically, the comments of the ACCC in relation to:

- the nature of the inclusion of the Port Terminal Rules in the proposed Undertaking;
- the process to be applied in varying the Port Terminal Rules.

The balance of the issues raised by the ACCC in Part 12 of its Draft Decision have been taken into account in amending the Port Terminal Rules themselves, a draft of which will be provided as soon as possible, with a supporting submission.

...

## **2 Reasons for amendments**

2.1 CBH is proposing to amend this part of its Undertaking to address the concerns raised by the ACCC, and to specifically to:

- (i) provide for the Port Terminal Rules to form part of the Undertaking (as a schedule);
- (ii) require the Port Operator to comply with the Port Terminal Rules;
- (iii) require the Port Operator to publish the Port Terminal Rules;
- (iv) incorporate the Auction Rules into the Port Terminal Rules;
- (v) enable the Port Operator to require its customers to agree to comply with the Port Terminal Rules as a condition of acquiring Port Terminal Services;
- (vi) to provide robust and certain procedures for variation of the Port Terminal Rules; and
- (vii) remove the inconsistency caused by the inclusion of "Operational Decision-making" provisions in this clause.

2.2 The proposed new clause of the Undertaking contains clear obligations to publish and comply with the Port Terminal Rules. Please note that the new broader definition of "Access Agreement" captures all agreements for containing provisions for the supply of Port Terminal Services.

2.3 Other important features of the proposed amendments include:

- (i) A variation process to deal with exceptional circumstances (Clause 10.3), which is defined as follows:

*“Exceptional Circumstances” means circumstances in which urgent variation 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, including any changes required for address or eliminate unforeseen gaming opportunities”;*

This process contains appropriate provision for publication of the proposed variation, notification to Users and the ACCC and publication of any non-confidential responses.

CBH submits that an abridged process of this kind is necessary to address the kind of changes that may be required if, for example, an undetected flaw

were to be discovered in the Auction Rules that enabled Users to unfairly manipulate the process to the detriment of other Users.

(ii) A variation process to deal with all other variations of the Port Terminal Rules (Clause 10.2). That process includes a more detailed consultation process, as suggested in the Draft Decision. The process includes, with clear times for performance of obligations, provisions requiring:

(A) publication of a sufficiently detailed variation notice;

(B) the provision of copies of the variation notice to all users and the ACCC;

(C) publication of non-confidential responses; and

(D) the conduct of meetings on request by any user or the ACCC.

2.4 Finally, the transitional measures in Clause 10.5 are necessary to provide certainty in cases where:

(i) the validity of actions taken prior to the effective date of a variation might otherwise be called into question;

(ii) the requirement that vessel nominations are governed by the Port Terminal Rules that existed at the time of nomination. This is necessary to ensure that when users make nomination decisions, they have the requisite degree of certainty about which rules will apply to that particular nomination.

2.5 We note the various additional comments made by the ACCC in relation to the number of documents concerning capacity allocation and the need to ensure that all of the relevant rules, policies and procedures are appropriately handled under the Undertaking.

## 12.6.2 AGEA

AGEA made the following submissions on capacity management generally:<sup>671</sup>

### Capacity Management

1.22 It is not appropriate that the BHCs proposed Undertakings do not include binding indicative policies and procedures for managing demand for the port terminal services (i.e. port loading protocols), as these documents set out the key processes by which the BHCs will allocate and manage port terminal capacity. AGEA understands from the materials provided by the BHCs that ... CBH's port terminal services protocols will not be part of the proposed Undertaking or the access agreement. This needs to be addressed and consistency across the BHCs requires that the protocols be part of the proposed [Undertaking].

1.23 AGEA notes that the ACCC considers it desirable that the BHCs have flexibility to run their operations in an efficient manner.

1.24 The BHCs have been operating their business for a significant period of time. CBH was incorporated on 4 April 1933. There are likely to be very few, if any, events that will be unforeseen or of a material adverse nature, when the contract period only runs for 12 months.

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<sup>671</sup> Australian Grain Exporters Association, *Submission in relation to Draft Decisions on Port Terminal Services Access Undertakings*, 3 September 2009, para 1.22-1.26, p. 7.

1.25 The standard terms and conditions run for 12 months. The BHCs should not be permitted to vary prices or standard terms or the Port Loading Protocols during that 12 month period. If an amendment is required, the BHCs can rely upon section 44ZZA(7).

1.26 If the ACCC accepts that BHCs should be able to amend the port loading protocols during the 12 month term and that the circumstances in which amendment should be allowed should not be limited to section 44ZZA(7), then any variation must be strictly in accordance with a mechanism to be specified in the port loading protocols whereby:

- (a) A robust industry consultation process must take place.
- (b) The BHC must provide the AWEs at least 3 months notice of the proposed change, in order for the AWEs to consider the proposal and enter into meaningful negotiations with the BHC and if necessary, to give AWEs time to adjust.
- (c) Any dispute in relation to variations may be referred to mediation or arbitration;
- (d) Any variations must also be subject to the non-discrimination clauses in the proposed Undertaking.

AGEA made the following further submissions on capacity management.<sup>672</sup>

## **12. Capacity Management**

12.1 The port loading protocols are not appropriate for the reason that they lack sufficient clarity, certainty and transparency in relation to decision making about capacity management. Intake capacity at all ports is known. BHCs should be accountable for intake delays, which it is within their capacity to manage and control. In the case of Grain Express, the intake capacity is controlled by CBH and CBH is accountable for intake and freight.

...

12.2 The port loading protocols do not make BHCs accountable. Transport is pre-booked and confirmed with BHCs to meet their schedule. Late arrivals or transport delays are penalised, thereby minimising the risk of delays. BHCs should be held accountable for stocks, which are within their control at port, and delays.

12.3 Any adjustment in the shipping stem has the potential to expose AWEs to demurrage. Accordingly, the shipping stem must not be subject to change except in certain, specified circumstances and with full transparency in the decision-making process. To ensure BHCs are accountable for shipping performance and the efficient operation of the facilities, AWEs should be compensated for delays caused by BHCs' including vessel demurrage. Conversely, BHCs should be entitled to be rewarded by way of a share in despatch rates if vessels are unloaded at a faster than expected rate. The BHCs' exposure to demurrage, (and conversely right to despatch), should be calculated by reference to the vessel loading window which is provided by the BHCs and the demurrage rate linked to the Baltic Exchange.

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<sup>672</sup> Australian Grain Exporters Association, *Submission in relation to Draft Decisions on Port Terminal Services Access Undertakings*, 3 September 2009 para 12.1-12.6 & 12.9-12.14, pp. 25-26.

***Nature of the inclusion of the PLPs in the proposed Undertaking and Access Agreements***

12.4 As the port terminal protocols set out the key process by which the BHCs will allocate port terminal capacity, they must be included in the proposed Undertakings and in a form that is binding. Certainty and clarity in the provision of access to port terminal services cannot be achieved without this as the minimum requirement. For similar reasons, the port terminal services agreement must also be included in and form part of the proposed Undertakings.

***Varying the Port Terminal [Rules]***

12.5 As the port terminal protocols must form part of the key processes by which the BHCs will allocate port terminal capacity and form part of the proposed Undertakings, the opportunity to amend the protocols must be limited to the circumstances in which amendment of the proposed Undertakings is permitted (i.e. in accordance with section 44ZZA(7)).

12.6 Alternatively, any variation of the port loading protocols must only take place after consultation with the port users and within strict binding confines of terms that form part of the proposed Undertaking.

...

12.9 AGEA agrees that the process to be applied in the proposed CBH Undertaking when seeking a variation of the port terminal protocols provides too much discretion to CBH and insufficient certainty for access seekers.

12.10 The discretion is such that the proposed Undertaking does not in any way ensure fair and transparent access to port terminal services.

12.11 AGEA agrees that any proposed Undertaking should include a provision allowing the ACCC to treat a breach of the amended port terminal protocols as a breach of the Undertaking.

***Interaction of the Operational Decisions clause and the [PTRs]***

12.12 As 'Operational Decisions' are stated to constitute all decisions made in the course of providing the Port Terminal Services, they must form part of the proposed Undertaking.

**Whether the Operational Decisions clause provides an appropriate balance between providing access seekers with sufficient certainty and clarity as to their terms, effect and operation and the BHCs with sufficient flexibility in their management of the Port Terminal Services**

12.13 AGEA agrees with the ACCC's position.

AGEA also made the following comments in relation to CBH's August Port Terminal Rules and auction proposal.<sup>673</sup>

**CBH - Considerations that the ACCC may take into account in assessing any future PTRs**

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<sup>673</sup> Australian Grain Exporters Association, *Submission in relation to Draft Decisions on Port Terminal Services Access Undertakings*, 3 September 2009, para 12.15-12.44, pp. 26-30.

12.15 AGEA notes that the ACCC has no in-principle objection to the use of a well designed auction process run by an independent third party under which capacity is allocated as, in very general terms, a well functioning price mechanism can ameliorate circumstances of 'excess demand'. However, AGEA considers that CBH's proposed auction model will not achieve these objectives.

12.16 Port terminal facilities tend to be underutilised in Australia. The real inefficiencies occur upcountry and in the process of transporting wheat to port. An auction process will not address upcountry inefficiencies, encourage efficient utilisation of resources or provide incentives to upgrade facilities. These issues need to be addressed to properly address access to port terminal services.

12.17 Auctioning shipping slot windows will not improve access to port terminal services for the following reasons:

(a) An auction of shipping slots is not equivalent to access to ports. By its nature, not everybody can be successful at an auction. Those that miss out must turn to the secondary market, thus creating a demand for a secondary market and driving up prices in the primary and secondary market.

(b) CBH admits that ship loading capacity is in excess of historical exports and, therefore, it is clear that what is being auctioned is the supply chain, not shipping capacity. CBH has consistently failed to stipulate what is the limiting factor to capacity in each port and continues to confuse the issue by vaguely claiming it depends on a wide range of factors and circumstances.

(c) CBH treats shipping capacity at a specific port zone in a specific window as a commodity of which a fixed quantum is available. However, CBH is the sole arbiter of the quantum and no independent verification is available. CBH is proposing to offer 70% of whatever volume it decides to offer, in its absolute discretion. CBH has too much control over the decision-making at this point and its decision is not subject to scrutiny.

(d) CBH distinguishes between "core" capacity and "surge" capacity. Yet, core capacity can only be known when crop size and volume is known. CBH should be able to advise what core capacity is available at any point in time. AGEA strongly opposes any auction process based on notions of "core" and "surge" capacity.

(e) CBH claims that the reason for auctioning shipping slots is that they anticipate that demand exceeds supply after the harvest period and therefore additional capacity, in the form of "surge" capacity, will be made available at a premium over the base core price. However, the capacity either exists or it does not. Describing it as "surge" capacity is a misnomer – it is the capacity at which CBH charges a premium for the service.

(f) The auction will cover shipping slots until October 2010. 70 pct of the "core" capacity from November 2009 to October 2010 will be auctioned by mid October 2009. Successful bidders have to declare then whether they will make use of Grain Express or select Direct Access. No change is allowed after that date. It should be sufficient to declare the option of Grain Express or Direct Access when nominating the ship. This is another attempt by CBH to provide "direct access" on paper but in reality force exporters to lock themselves into one or the other for one year in advance.

(g) CBH intends to impose internal "soft caps" on individual exporters, which will only be known to the Auction Review Committee. Apparently, the caps will depend on trade history of individual exporters – but there is

no trade history at the moment. Thus, the trigger points for the soft caps are totally subjective and there is no transparency on this issue.

12.18 AWEs sell to their overseas customers under forward contracts. These may range from prompt shipment to up to six months' forward, depending on customer requirements and market view. In order for AWEs to fill their requirements to execute sales contracts, they potentially will need to go through three different phases in order to achieve this:

- (a) the First Phase Auction - 70 pct of core capacity for whole year;
- (b) Second Phase Auction - balance 30 pct core plus surge 2 months prior shipping window with surge price only known before that auction;
- (c) Secondary market at unknown cost.

12.19 The risk for AWEs is that they do not know the actual cost of shipping until they have completed the acquisition of shipping slots. Further, they assume the risk that, in the end, they may still be short. In order to avoid these risks, exporters may try to confirm an overseas sale once they have secured shipping slots for the positions sold. However, this is unrealistic as the overseas customer needs to decide on his purchases within hours, not weeks or months. The consequence may be the loss of export market share to other (easier) origins.

12.20 AGEA's position regarding the auction model contained in CBH's further revised proposed access allocation policy remains that it is labour intensive, time consuming and complicated. Loading ships with grain is a relatively straightforward activity. The proposed detail in CBH's auction system will make the auction model unnecessarily rigid and complex. The auction process needs to match the fluidity of the grain and shipping markets, otherwise it will likely lead to confusion and chaos.

12.21 Furthermore, there is no proposed limit on capacity for any single party. The proposed auction model will not prevent related parties of CBH bidding up the auction and securing as many slots as required to the detriment of AWEs.

12.22 The failure to have a robust ring-fencing policy in place, means that any overpayment by CBH's trading arm, can be transferred back from CBH to GrainPool.

12.23 Although an Auction Review Committee (ARC) is proposed, the committee comprises 1 CBH person, 1 Tradeslot person and 1 accountant. Tradeslot has been hired by CBH to run the auction, so in fact there are two persons on the panel who may have biased views when it comes to decision making. The powers of the ARC include cancellation of auction trades and suspension and cancellation of bidder registration. These powers have serious economic consequences if used against any one bidder, including denial of export rights granted by WEA. There are no clear guidelines in relation to the circumstances in which the ARC can use its powers and no audit process to ensure the system is fair and equitable.

12.24 There is no transparency in relation to actual cost (either surge fees, auction fees, secondary market transfer fees, late fees and so on). Most of these charges will be borne by the exporters, but there is no transparency provided to determine whether the charges reflect or are disproportionate to the cost of providing the services. Although a rebate on the cost might be proposed, there is no transparency as to how the rebate will work.

12.25 The auction process allows CBH at least two further income windfalls and creates inefficiencies.

12.26 The first, is by allowing CBH to sell vessel allocations at a premium, which is in no way linked to the cost of providing the service.

12.27 The second, is by allowing CBH to recover the "cost" of implementing the auction system. CBH intends to charge for and therefore recover the cost of the administration of the service, without there being any required audit process to ensure that CBH is not making a further profit on a process imposed by CBH. It also appears that CBH proposed to charge:

(a) A secondary market transfer fee of \$0.05 per tonne. This fee (based on tonnage) is not related and likely to be disproportionate to the cost of the service.

(b) A fee if the exporter does not utilise CBH's upcountry services, which is discriminatory.

12.28 The auction system will do nothing to ensure fair and transparent access to vessel slots.

12.29 The auction system will increase the cost of exporting wheat from Australia, reducing the competitiveness of accredited exporters compared to suppliers of wheat from other countries and reduce the returns of Australian farmers. It will also place in jeopardy long term sales arrangements as it will undermine the security of shipping supply inevitably necessary to ensure performance of long term sales contracts.

12.30 There must be complete transparency in relation to capacity allocation or an independent person should be appointed to make decisions about capacity allocation. An option would be a process where capacity is allocated by way of an auction process whereby AWEs can bid for capacity by port, for any month at par (i.e. the export out-loading charge).

12.31 The initial tender should take place as early as possible, with the **full annual capacity put up for tender**. By not releasing the full capacity, CBH is artificially increasing the price of each slot.

12.32 In each tender, AWEs can bid for a maximum of 25% capacity in each port.

12.33 The tender should be operated by an independent third party (e.g. PriceWaterhouseCoopers, or similar). Tenders for under-subscribed capacity could then be held at intervals to be determined. Where a tender is oversubscribed, the capacity should be issued on a pro-rated basis.

12.34 A secondary market should then be allowed to develop, without the interference of CBH.

12.35 Certainly, CBH should not be entitled to profit from the secondary market, by charging fees that are in excess of any costs incurred by it.

12.36 Logically, if there is to be a secondary market, there is a question of whether this should exclude the BHCs' own trading arm from participating as a seller of excess capacity. Any participation must be subject to stringent auditing process to ensure non-discriminatory access is provided.



12.37 AGEA refers to CBH's revised submission relating to capacity allocation. The revised submissions contain the same flaws as highlighted above.

12.38 In addition to the above, the following comments are made:

(a) CBH requires EOIs for no later than 15 September. It will be difficult to confirm commodity/grade splits for forecast sales over the requisite period [clause 2.1(i)];

(b) CBH does profit from limiting capacity (see paragraph 12.27 above) [cl.4.3(i)];

(c) The likelihood of a new entrant establishing a new port terminal to compete with port operators is negligible given the cost and current geographical spread of port terminals servicing the grain belt (see AGEA's original Submission at paragraph 3.21 [4.3(ii)]);

(d) CBH controls the performance of supply chain to port [clause 5.7];

(e) Most of the matters referred to in CBH's revised submission relating to capacity allocation contain assertions that are not supported by any independent economic analysis and should be regarded with caution due to their self-serving nature.

12.39 In summary, CBH is the party setting capacity on an arbitrary basis and determining when or if such capacity is made available for auction.

12.40 CBH expect AWEs to bid for capacity without the true transparency of knowing how much capacity is actually available, nor at what marginal cost additional capacity can be released.

12.41 CBH has elected to be deeply involved in the capacity management market at all times, rather than allowing the market forces to apply.

12.42 CBH is attempting to control a process in which they should remain disengaged in once capacity is initially allocated.

12.43 CBH is also charging fees for services that it should not be providing, at a rate that is not linked to the associated cost.

12.44 AGEA refers to CBH's revised submission relating to Part 12 of the ACCC's draft decision. Specifically:

(a) CBH states that it will provide a further draft Port Terminal Rules "as soon as possible, with a supporting submission". AGEA is unable to say whether a revised proposed Port Terminal Rules would be appropriate until AGEA has had the opportunity to review and consider the revised documents. AGEA requests an opportunity to do so;

(b) Clause 10.1(b): CBH "may" require the users of its port terminal facilities to comply with the Port Terminal Rules. This discretion upon which CBH can base its decision is not objectively ascertainable and there is no transparency as to how the discretion will be exercised or whether it will be applied to all access seekers equally;

(c) Clause 10.2: The rights to vary the Port Terminal Rules are tainted with the same flaws as the processes listed ("Non- discrimination" ... "No Hindering": this clause reference does not appear to exist.

...

(d) Clause 10.3: Does not provide any time frames within which steps are to be completed, any obligation on CBH to take into account any comments. There is no transparency as to how the discretion will be exercised.

AGEA submits the following in relation to CBH's August Port Terminal Rules:<sup>674</sup>

On the whole, CBH's proposed Port Terminal Rules ("PTRs") do not provide sufficient certainty and clarity in its terms, effect and operation in order to enable the access provider and access seekers to be adequately aware of their respective rights and obligations, and thereby avoid unnecessary costs, monetary or otherwise, when seeking to export bulk wheat from Western Australia. AGEA makes the following comments in relation to the PTRs

1. "**Auction Rules** means the rules of that name published by the Port Operator from time to time attached as Schedule 1 to the Port Terminal Rules".

The above is not clear and transparent. AGEA cannot properly comment on terms and conditions that may be introduced in the future. AGEA's comments in relation to CBH's proposed auction model are set out in paragraphs 12.15 – 12.43 of AGEA's further submission.

## 2. Objects

### 2.1 Primary Objects

CBH's objects clause should be clear and concise, providing the structure around which the AWEs will be provide[d] with fair and transparent access to CBH's port terminal services.

The objects clause gives CBH the discretion to determine who will have access to the port terminal services and when that access will be granted, without any benchmark against which those discretionary decisions can be measured. Discretionary or subjective decisions must be kept to the absolute minimum. Decisions should be made based on objectively ascertainable criteria and transparency should be provided in relation to the decision making process.

**Clause 2.1(c)** entitles CBH to exercise its direction base[d] upon "*minimisation of demurrage at the Port Terminal Facilities over a given period*". This clause suggests that discrimination and the calling of vessels to berth out of order might be permitted according to which vessel has the highest demurrage rate. It is unclear how this clause would operate because demurrage rates ordinarily are confidential between the parties to the vessel charterparty and BHCs should not be privy to vessel demurrage rates. In any event, a[n] AWE's ability to negotiate a low demurrage should not result in that AWE being penalised by having another vessel being given priority at berthing, because it has a higher demurrage rate.

### 3. 2.3(a) Variation

The PTRs should form part of the proposed Undertaking (together with the port terminal services agreement) and CBH should not be able to vary the

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<sup>674</sup> Australian Grain Exporters Association, *Submission in relation to Draft Decisions on Port Terminal Services Access Undertakings*, 3 September 2009, Schedule 5, pp. 63-68.

terms of the PTRs (or the proposed Undertaking or the port terminal services agreement) except in accordance with section 44ZZA(7).

Alternatively, if CBH is permitted to vary the PTRs, then any variation must be strictly in accordance with a mechanism whereby:

- (a) A robust industry consultation process must take place.
- (b) The BHC must provide the AWEs at least 3 months' notice of the proposed change, in order for the AWE to consider the proposal and enter into meaningful negotiations with the BHC and if necessary, to give AWEs time to adjust.
- (c) Any dispute in relation to variations may be referred to mediation or arbitration;
- (d) Any variations must also be subject to the non-discrimination clauses in the proposed Undertaking.

#### **4. 2.3(b) Variation**

Pursuant to clause 2.3 (b), the Customer acknowledges and agrees that the Port Terminal Rules may include provisions that are necessary for, or reasonably required by, the Port Operator to comply with:

- "(i) the requirements of the Undertaking;*
- (ii) changed or unforeseen technical or operational circumstances; and*
- (iii) obligations arising under contractual or other operational arrangements with third parties on which the provision of the Port Terminal Services are dependent."*

The above is vague and does not provide a transparent means by which CBH may vary its PTRs. There is no definition as to what constitutes a "changed or unforeseen technical or operational circumstances". Variations are binding on the AWEs (clause 2.3(c)(ii)) and variations may be further varied from time to time (clause 2.3(c)(iii)).

#### **5. Clause 3 - Customer's General Obligations**

*"(b) Upon request, all Customers must provide the Port Operator with relevant, complete and accurate information in a timely manner."*

The above obligation is vague and open to misuse. CBH does not define what is to be considered "relevant".

As there is not a robust ring-fencing policy in place, the further information can be provided to CBH's trading arm, without recourse.

#### **6. Clause 4 - Services Forecast**

Pursuant to this clause, CBH obtains from all AWEs details of the following:

- "(a) anticipated gross tonnage of Bulk Wheat;*
- (b) anticipated gross tonnage of other grains;*
- (c) anticipated tonnage to be shipped by Customers under each GSA, PTSA and Negotiated Agreement; and*

*(d) anticipated shipping programme."*

As there is not a robust ring-fencing policy in place, the further information can be provided to CBH's trading arm, without recourse.

#### **7. Clause 5.1 Acquiring Harvest Capacity**

The CBH process is overcomplicated, unwieldy and opaque. There is no transparency in relation to CBH's decision making and this clause allows open discrimination to occur.

...

There is no definition as to what constitutes a "*changed or unforeseen technical or operational circumstances*" separate or discriminate between those entities requiring vessel slots that have utilised CBH's upcountry services (GSA Customer) and those that merely enter into a contract for the use of port terminal services (PTSA Customer).

Similarly, CBH should not separate or discriminate port capacity according to whether the AWEs are a GSA customer or a PTSA customer (clause 5.1(b)).

A PTSA customer that is an AWEs would compete for PTSA customer port capacity with exporters of non-wheat products. As such, they are treated differently to those AWEs that use CBH upcountry services.

CBH proposes to hold auctions for shipping slots. CBH provides for these auction periods to be extended if the demand for Harvest Capacity "*significantly exceeds the Advised Harvest Capacity in a majority of Shipping Windows*" (clause 5.1(d)). This statement of intent is vague and entitles CBH to exercise its directions without notice or recourse. It will inhibit AWEs' ability to ship wheat from Western Australia.

Clause 5.1(e) provides that "*The Port Operator may accept all or part of a Harvest Period EOI before 1 October in each Year, or such later date as the Port Operator may determine.*"

The above is vague and uncertain. The AWEs are not provided with any certainty as to whether they will be able to perform their sales contracts.

#### **8. Clause 5.2 Trading Harvest Capacity**

It is unacceptable that an AWEs' ability to trade wheat is dependent upon CBH providing its permission. Only parties with the same type of contractual relationship with CBH may trade grain (clause 5.1(a)(i)).

The above restriction will inhibit the development of any secondary market.

CBH is not required to provide any reasons for stopping the trading of wheat.

As a result CBH is not allowing fairness and transparency in the trade of wheat capacity.

CBH should not be entitled to charge a fee (clause 5.2(f)) for a service that is not actually required from CBH. Certainly any fee that is charged should be minimal and not linked to the tonnage transferred as any administrative cost that is incurred by CBH is not related to the tonnage amount.

#### **9. Clause 6.1 Acquiring Capacity in Annual Shipping Period**

AGEA refers to paragraphs 12.15 – 12.43 above.

#### **10. Clause 7 Nominating Vessels for Shipping Windows during the Harvest Period**

AWEs will be treated differently by CBH when seeking to accumulate wheat at port for export depending on whether they are a PTSA Customer, Negotiated Agreement Customer or GSA Customer.

At clause 7.1 (c), the PTRs prescribe that "*PTSA and Negotiated Agreement Customers should note that this will place additional time constraints on the cargo accumulation process*". This warning is not provided to AWEs that utilise CBH's up-country services. This would appear to indicate that those parties using CBH's other services will receive preferential treatment.

CBH fails to set out what these delays will practically mean. Nor does it provide that fair and transparent access will continue to be provided.

CBH says that it "*may*" waive certain obligations, such as sampling and fumigation (clause 7.1(d)). However, this is at CBH's sole discretion and no benchmark is provided as to how and when such discretion will be exercised is provided.

#### **11. Clause 8 Nominating Vessels for Shipping Windows in the Annual Shipping Period**

##### **8.1 Direct to Port Process**

Once again, AWEs that do not use CBH up-country services will be discriminated against.

Clause 8.1(b) provides that deliveries to the port are subject to the port's capabilities, which are controlled by CBH. The PTRs do not provide for equal access as between those AWEs that utilise CBH's up-country services and those that only use the port terminal facilities.

Acceptance into the port terminal facilities is subject to CBH's "*agreed timetable for deliveries to the Port Terminal Facility; fitting in with pre-planned deliveries*". No explanation is provided as to what make up these "*pre-planned deliveries*". Again, there is a failure to provide fair and transparent access.

CBH at clause 8.1(b)(ii) specifically provides that:

*"(ii) For the avoidance of doubt, the Port Operator is not required to allow a PTSA Customer or Negotiated Access Customer access to rail access train paths utilised by the Port Operator."*

CBH is attempting to close AWEs out from those train paths, regardless of whether CBH is utilising that service at the time sought by the AWEs.

#### **12. Clause 9.2 Amendment of Vessel Nominations**

[AGEA does not consider clause 9.2 to be] fair and transparent access for the following reasons:

(a) CBH has the absolute discretion to determine whether it is acting reasonably when amending vessel nominations;

(b) there is no transparency in relation to CBH's decision making process and the matters CBH may take into account are not objectively ascertainable;

(c) CBH would not have access to information about demurrage rates, save for those rates being paid by its trading arm. Further, if that information was known, a party that could negotiate a lower rate should not be penalised;

(d) maximising throughput should not be a reason to penalise AWEs for complying with CBH vessel nomination protocols and paying the prescribed fees;

(e) "*materially alter the outcome or adversely affect Customers*" is too vague and cannot be objectively determined;

(f) "*materially alter the outcome or adversely affect Customers*" also, contradicts clause 9.2(a)(ii)(A). CBH is entitled to alter vessel nominations where it increases demurrage rates paid.

### 13. Clause 9.3 Additional Charges

[In relation to the additional charges set out in Clause 9.3, AGEA argues that] ... there is no transparency and CBH is not required to provide documentary proof as to what additional costs were incurred and how they were quantified. Instead, CBH is entitled to unilaterally apply ad hoc charges. CBH should be required to publish all costs and charges it proposes to charge for standard and non-standard services. Further, there must be transparency in relation to CBH's costs to ensure fair and transparent access is given, with no hindering of access or discrimination.

### 14. Clause 10 Lost Capacity

[Clause 10.1(c)] ... results in the AWEs being exposed to paying fees to CBH as a direct result of CBH exercising its discretion not to accept a Nomination for Harvest Capacity. See also clause 12.2. Additionally, there is no transparency and CBH is not required to provide any justification for not accepting the Nomination.

### 15. 11.2 Adjustments to the Stem

[Clause 11.2] ... makes it impossible for there to be any way to determine whether fair and transparent port terminal access is being provided to AWEs.

There is no transparency. There is no definition provided as to what qualifies as "*extraordinary or unusual circumstances*". The discretion is with CBH and CBH determines whether it is acting reasonably. AGEA refers to paragraphs 4.12, 14.5 and 14.6 of its original submission in relation to the shipping stem.

There is no definition as to what constitutes "*material detriment*".

### 16. 11.3 Discretion to Accept Vessel Nominations

Again, there is no transparency and no benchmark to determine when CBH is able to exercise its discretion. Discretionary or subjective decisions must be kept to the absolute minimum. Decisions should only be made on the basis of objectively ascertainable criteria with full transparency.

### 12.6.3 Glencore

Glencore made the following submissions on CBH's proposed auction system in a letter to CBH copied to the ACCC on 3 September 2009:<sup>675</sup>

#### 1 Auction System

1.1 We support, with other marketers, an auction system for fairly allocating physical capacity at ports that is in short supply or which is constrained. However the auction system proposed in the Auction Rules does not identify any physical capacity for auction. The rules merely refer to lots without saying what the lots are – notwithstanding that 1000t features in an aspect of the lots.

1.2 The Port Terminal Rules are unclear and confusing as to what is being auctioned. They refer to “Shipping” then “Capacity” then “Shipping Windows for a Defined Tonnage”: cl 6.1(b)-(d). The Frequently Asked Questions: Port Capacity Access Allocations” refer to “around 70% of CBH's Core Capacity” and for Phase Two Auctions “remaining Core Capacity and any Surge Capacity”. The Capacity terms are defined in the Frequently Asked Questions to include “transport”. However if what is being auctioned is a slot at a berth there is no transport to auction. If the transport refers to transport from domestic receival point to port, which could be transport paid for by the grower under the Grain Services Agreement or Grain Express, it is wrong for CBH to charge for the same transport again by auction.

1.3 Surge fees or Surge Capacity should not form any part of an auction system. They are a discretionary cost and not a constrained feature of a port. Thus also the Surge Fee should not be part of the start price under Auction Rule 8.2. If Surge Capacity is not the subject of auction, and if an auction premium had been paid, it should be clear that no surge charge would be imposed. The rules around the surge charge need to be made much clearer.

1.4 Please give an example in terms of tonnages, slots, time period, transport to port arrangements etc of “70% of CBH's Core Capacity”. Will the remaining 30% be available at the time of auction or later or will it be locked up? Will the 30% be available by outturn request form or in some other way? The answers in the FAQs leave open the possibility that after some sort of capacity had been purchased at auction similar capacity may be acquired without auction, which of course would be unfair. The present details do not allow the capacity on auction to be objectively valued.

1.5 CBH's ability to ration a type of capacity gives it the ability to manipulate to its advantage, e.g.:

- it enables it to limit the market for capacity and thus to push up the value of capacity, at least some of which would improve CBH's own earnings;

- it could be used to favour its own marketing arm, e.g. if the CBH board fixed the percentage to be auctioned it is a fair bet that the marketing arm would learn of this before other marketers and the marketing arm would be able to decide earlier than its competitors whether to bid at auction or acquire non-auctioned capacity.

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<sup>675</sup> Glencore Grain, *Letter to CBH in relation to Draft Decision on CBH Access Undertaking – Indicative Access Agreement and Port Terminal Rules*, 3 September 2009.

These powers of CBH will need to be deleted. If there is an auction of a type of capacity, the capacity should be objective and observable, e.g. (if it is the case) particular shipping windows for which there is an excess of demand over supply; or particular slots at the grid for which there is an excess of demand over supply.

1.6 CBH's control over every aspect of the auction – the auction phases, auction catalogue of lots, alterations, round timing, start prices – means that the auction is not independently managed by Tradeslot. This makes the statement in this regard in Auction Rule 5 misleading.

1.7 A registered bidder agreement is superfluous if bidders are already required to be party to a GSA or other agreement with CBH. The form of the agreement has not been provided.

1.8 The simultaneous auctioning of all slots at all ports over a period of up to five days is impractical, complex and too time consuming. An auction should be completed well within a day and what is not auctioned should be disposed of by a simplified auction, informal offerings or through brokers. Any slots purchased at auction should be disposable at any future auction or offering of slots.

1.9 Overshoot in Auction Rule 10.7 needs to be explained with an example.

1.10 The Port Terminal Rules refer to the Auction Rules for the meaning of the Secondary Market but the Auction Rules have nothing on the Secondary Market.

1.11 The 5 cents per tonne fee to CBH for registering the transfer of shipping slots equates to \$2,500 per Panamax vessel. As the act of registering a transfer is little more than a click on a mouse, this fee is grossly excessive. A reasonable fee would be up to \$10 per 1000 tonne traded.

1.12 The Auction Premium rebate scenarios at FAQs p 6 are of rebates to people who purchase capacity, thus marketers, whereas under sch 7 of the GSA and sch 2 of the PTSA the rebates are payable to “customers” who could include growers. Please clarify this aspect of the rebates and also provide us a copy of the modelling on which the scenarios were based. The cost of developing and running the auction system, which is to be deducted from the rebates, could be considerable. The modelling is necessary for us to see the true intent and scope of the rebates and the cost of the auction system.

We would like to make it clear that we would want CBH to benefit from the auction premiums to develop its port facilities.

## **2 Necessary modifications to the auction system**

2.1 The true source of delay in loading ships is both CBH's delay in transporting grain to port to meet a particular shipping window and insufficient numbers or sizes of grid at port through which the potential trucks or trains deliver grain.

The transport delay may be solved by marketers making their own arrangements and does not require any auction system. The grid constraint is only temporary until new or improved grids are constructed. While it exists an auction system could raise funds to deal with this source of delay. But under the proposed auction system auction premiums paid to CBH are to be paid back to customers as a rebate (FAQs, p. 6 and GSA cl 12.9). This



leaves no prospect of funds to improve or increase port intake capacity. The proposed auction system will merely preserve the present sources of delay.

In whose interest is such an auction system? Not the growers and marketers because they want to deliver grain to port without transport delay and without grid delay. But such an auction system does favour CBH's control of transport to port because it reduces shipping windows to those that can be matched with what wheat CBH can deliver to port.

2.2 Thus the auction system needs to be modified for the auctioning of access to port over the grid and the income from the auction must be applied to the removal of this constraint by improving and increasing grids. The berth slots do not need to be auctioned because once marketers have fixed rights to deliver to a port they can organise their shipping to fit in with what can be outloaded. Such capacity which is passed in at auction can be sold by a later simplified auction, informal offerings or through brokers.

Generally this modification will solve most of the earlier mentioned defects. As there are at least two allocation systems in use in Australia – the vehicle booking system in ports and the slot system at Sydney airport – these will need to be examined for pointers or details.

2.3 The auction system will need paper trials.

2.4 In summary if there is to be an auction system all the defects mentioned in section 1 have to be fixed up and the system needs to deal with constrained grid capacity.

### **3 Port Terminal Rules**

3.1 The Port Operator is not identified.

3.2 Rule 2.3(b) includes an acknowledgement by the customer that the rules are necessary and reasonable and that they comply with the related access undertaking. The acknowledgement is misleading and involves matters of fact, not rules. It should be deleted.

3.3 The EOI procedure does not appear to serve any purpose if marketers are bidding for actual usable capacity. The EOI procedure should be deleted and the auction brought forward.

3.4 Rule 7.1 says that "PTSA and Negotiated Agreement Customers should note that this (referring to queues) will place additional constraints on the cargo accumulation process." This is vague and could be used to give precedence for the reception of CBH-organised transport at port over marketers who organise their own transport. Such precedence could undermine the firmness of shipping windows allocated by auction or otherwise. Rule 7.1 in its present form should be deleted.

3.5 A demurrage/despatch arrangement should generally apply between the port user and CBH. It is necessary to give incentives to both sides not to delay delivery to port and to not delay loading.

3.6 The Port Terminal Rules should only deal with the use of a port, the fees for such use and the fees for additional services such as blending, cleaning, or screening, operating times and overtime rates. This practical information is missing from the rules.

3.7 Please provide an example of a Negotiated Agreement or the key terms of such an agreement.

...

7.1 To deal with the immediate problem of constrained grid capacity at the CBH ports we support a simple auction of capacity or slots at the grids.

7.2 However the auction system you have proposed is of a different kind, is complex and time consuming and needs to be changed as we have indicated in sections 1 and 2 above, We have also requested clarifications and details, including the presently fixed charges and the prescribed terms, conditions and charges.

7.3 The Port Terminal Rules should be rules for using the terminal and should include fees, times, overtime and a provision for a demurrage/despatch arrangement.

7.4 We need a marked up copy of the Grain Services Agreement, subject to which that agreement should be amended in technical ways and to ensure consistency with the Bulk Handling Act as indicated in section 4 above.

7.5 The auction system being an important part of access to the ports the access undertaking should directly relate to it. The way it is at present the auction system is, in our view, an impediment to the undertaking being accepted by the ACCC.

7.6 Surge Capacity and Surge Fees should be removed entirely from the auction system.

Glencore also made some further general observations on capacity allocation issues in its letter to CBH of 2 September 2009 that was copied to the ACCC.<sup>676</sup>

3.1 “secondary market business rules in the Port Terminal Rules.” There are no rules identified as such.

3.2 “Published prices will be the same whether or not exporters have acquired or agreed to acquire services through Grain Express.” We need to see not only the actual prices but be satisfied that each price does not overcharge for the particular service. This is another reason why actual rates in an access undertaking have to be published: they are a very good guide to the reasonableness of the undertaking.

...

3.3.1 “Port intake capacity” (cl 5.1): this is the constraint, which until relieved, may be the subject of auction.

3.3.2 “For this reason, before allocating capacity, CBH must consider factors including the harvest size and characteristics as well as the likely performance of the supply chain to port.” (cl 5.7). CBH’s practical duty, also under s 19 of the Bulk Handling Act, is to grant access to anyone wishing to use its port loaders, a task which requires no consideration of the harvest size or transport to port, merely how long the person wishes to use the port loader, and if there is excess demand for the loader fairly allocating access, such as by auction. The size of the harvest and transport to port is a matter for growers and marketers and does not affect how port intake capacity or berth capacity is allocated.

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<sup>676</sup> Glencore Grain, *Letter to CBH in relation to Draft Decision on CBH Access Undertaking – capacity allocation*, 3 September 2009, p. 3.

3.3.3 Surge in cl 5.9 now has a new feature, namely that some exporters do not have to pay for it. As we have already said the rules around surge need to be clarified.

3.3.4 The remainder of sec 5 and sec 6 describes CBH's manipulation of capacity and its management of auctions whereas what is required is a simple auction of the capacity that is constrained, which is at the grid, after which marketers will be able to book shipping to meet the capacity at auction.

## 12.6.4 PGA

The PGA submits the following in relation to CBH's proposed capacity allocation issues in the proposed Undertaking:

7.1 The PGA agrees with the ACCC that it is not appropriate that CBH's proposed Undertaking does not include policies and procedures for managing demand for the Port Terminal Services, including shipping slot allocation and accumulation.

7.2 CBH may be able to manipulate logistics, substitute vessels and/or vary the shipping stem to confer preferential treatment on their trading division, unless the proposed Undertaking provides a level of transparency.<sup>677</sup>

## 12.7 ACCC's views on the April Undertaking

### 12.7.1 Introduction

The ACCC has identified the following issues as arising for consideration in relation to 'Capacity Management':

- the nature of the inclusion of the PTRs (and other associated documents relating to CBH's capacity allocation system<sup>678</sup>) in the proposed Undertaking and Access Agreements;
- the process to be applied in varying the PTRs;
- whether the substance of the PTRs provides an appropriate balance between providing access seekers with sufficient certainty and clarity as to their terms, effect and operation; and CBH with sufficient flexibility in its management of the Port Terminal Services; and
- whether the Operational Decisions clause provides an appropriate balance between providing access seekers with sufficient certainty and clarity as to their terms, effect and operation; and CBH with sufficient flexibility in its management of the Port Terminal Services.

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<sup>677</sup> Pastoralists and Graziers Association, *Submission in relation to Draft Decision on CBH Access Undertaking*, 3 September 2009, para 7.1-7.2, p. 11.

<sup>678</sup> Hereinafter a reference to the PTRs is to be taken as a reference to the PTRs and other associated documents relating to CBH's capacity allocation system.

The ACCC considers it important that the Undertaking provides for sufficient certainty and clarity in its terms, effect and operation in order to enable the access provider and access seekers to be adequately aware of their respective rights and obligations, and thereby avoid unnecessary costs, monetary or otherwise, when utilising the processes set by the Undertaking.

The ACCC considers that an undertaking that achieves these aims is in the public interest, would promote the interests of persons who might want access to the service, while also protecting the legitimate business interests of the provider, and would allow for an enforceable undertaking.

## **12.7.2 Nature of the inclusion of the PTRs in the April Undertaking and Access Agreements**

### **12.7.2.1 PTRs do not form part of the April Undertaking**

CBH's draft 'Published Port Terminal Rules' were included in CBH's supporting submission accompanying the April Undertaking. However neither this version nor any other version of the PTRs form part of the April Undertaking.

Prior to the release of the Draft Decision, CBH submitted a revised draft of its proposed 'Auction Process Outline' (the original version was received by the ACCC on 19 May 2009) and 'Draft Auction Rules' to the ACCC on 29 June 2009 as part of CBH's further submission to the ACCC that comprised the additional elements of CBH's capacity allocation system.

Given that the various documents that set out the elements of CBH's policies and procedures for managing demand for the Port Terminal Service (including CBH's policies and procedures relating to the nomination and acceptance of ships to be loaded using the Port Terminal Service) and set out the key processes by which CBH will allocate and manage port terminal capacity, it is the ACCC's view that the non-inclusion of these documents in the April Undertaking is not appropriate.

### **12.7.2.2 CBH's 'Standard Terms' must include an obligation for CBH to comply with the PTRs when providing the Port Terminal Services**

Clause 6.1(a) of the April Undertaking obliges CBH to publish, by no later than 30 September of each year ... standard offer terms and conditions (Standard Terms).<sup>679</sup> Clause 6.1(a)(ii) also provides that the Standard Terms [Standard Access Agreement] 'must include an obligation for the Port Operator to comply with the Port Terminal Rules when providing the Port Terminal Services'.<sup>680</sup>

As the ACCC understood this proposal, the PTRs would not form part of the contractual terms and conditions that CBH agrees to provide to access seekers for the term of the Standard Access Agreement, but rather that CBH is obliged to comply with the terms of the PTRs, whereby a breach of this obligation would be a breach of

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<sup>679</sup> Co-operative Bulk Handling Limited, *Port Terminal Services Access Undertaking*, 14 April 2009, clause 6.1(a).

<sup>680</sup> Co-operative Bulk Handling Limited, *Port Terminal Services Access Undertaking*, 14 April 2009, clause 6.1(a)(ii).

the Undertaking/Standard Access Agreement. Under the April Undertaking however, CBH could vary the PTRs subject to the terms in the April Undertaking.

In the ACCC's view, the practical result of this provision does not provide for sufficient certainty and clarity in the terms, effect and operation of the April Undertaking because:

- (i) the wording of the obligation in clause 6.1(a)(ii) does not appear to require CBH to comply with the terms of the PTRs when providing Port Terminal Services in Access Agreements that are negotiated outside the framework in relation to the 'Standard Terms'; and
- (ii) the PTRs, in combination with other associated documents relating to CBH's capacity allocation system, set out CBH's policies and procedures for managing demand for the Port Terminal Services. As set out above, the obligation in 6.1(a)(ii) should require CBH to comply with all other documents related to capacity allocation and the managing of demand for Port Terminal Services.

In light of this, the ACCC's view is that the obligation in relation to CBH complying with the PTRs when providing Port Terminal Services in clause 6.1(a)(ii) of CBH's April Undertaking is not likely to be appropriate in that form.

The ACCC considers that, while it is appropriate that the PTRs be part of the Undertaking, the obligation on CBH in clause 6.1(a)(ii) should be expanded so that CBH must comply with the PTRs when providing the Port Terminal Services under all forms of Access Agreements, on the terms contained in the PTRs that are in existence at the date the access undertaking came into operation or, if relevant, as varied from time to time in accordance with the variation methodology in the undertaking (discussed further below).

When combined with the recommendation in relation to the variation methodology, it is the ACCC's preliminary view that this approach would be more appropriate as it would maintain a flexible and pragmatic approach to variations of the PTRs – allowing CBH to respond to operational concerns – while providing access seekers with sufficient certainty and clarity in relation to the terms, effect and operation of the proposed PTRs.

### **12.7.3 Varying the PTRs and other associated documents relating to CBH's capacity allocation system**

It is the ACCC's view that the process to be applied in the April Undertaking when seeking a variation of the PTRs provides too much discretion for CBH and insufficient certainty for access seekers. Given the PTRs form part of the key processes by which CBH will allocate port terminal capacity, their variation should, in most circumstances, take place after consultation with the port users. The ACCC's view is that a PTR variation process should be included in the Undertaking.

As discussed above, the ACCC has recommended that the PTRs and other associated documents relating to CBH's capacity allocation system should form part of the Undertaking.

Further, in order to vary the PTRs under the Undertaking, the obligation on CBH in clause 6.1(a)(ii) of the April Undertaking should be expanded so that CBH must comply with the PTRs when providing the Port Terminal Services under all forms of Access Agreements, on the terms contained in the PTRs that are in existence at the date the access undertaking came into operation or, if relevant, as varied from time to time in accordance with the variation methodology in the Undertaking. In addition, a provision should be included in the undertaking that states that any variations to the PTRs must be made in accordance with, and are subject to, the non-discrimination clause in the Undertaking.

The variation methodology for the PTRs in the Undertaking would require:

- (i) an adequate consultation process (the proposed methodology set out at pages 77-78 of CBH's supplementary submission in relation to variations to the proposed Undertaking could be used as a base) where access seekers are given a sufficient degree of notice about amendments, with the PTRs as varied from time to time being required to be published on its website and provided to the ACCC within 5 days;
- (ii) in recognition of the fact that parties may not respond to CBH's communications regarding proposed changes, in certain specifically defined circumstances (i.e. force majeure situations) that are set out clearly in the Undertaking, the amendments may be implemented unilaterally;
- (iii) and a clause would be included in the Undertaking obligating CBH to comply with the PTRs (as amended from time to time).

The ACCC notes that this leaves CBH with the flexibility to vary the PTRs and lies somewhere in the middle of the spectrum of possible PTR variation mechanisms that could be included in the Undertaking. On one end would be the mechanism to allow CBH the flexibility to amend the PTRs at will, and at the other end, the mechanism of only allowing CBH to amend to the PTRs in accordance with the formal variation mechanism in section 44ZZA(7) of the Act.

The ACCC notes AGEA's submission to the Draft Decision that, as an alternative to variation of the PTRs solely under section 44ZZA(7) of the TPA, variations to the PTRs must take place in accordance with a strict mechanism set out in the Undertaking, and that a provision should be included in the Undertaking that allows the ACCC to treat a breach of the amended PTRs as a breach of the Undertaking.

While the ACCC recognises that the recommended 'model' could lead to amendments being made to the PTRs (given that the ACCC will not review all proposed amendments to determine their appropriateness) it is the ACCC's preliminary view that this risk is mitigated by:

- the inclusion of a robust consultation mechanism;
- the inclusion of a provision allowing the ACCC to treat a breach of the amended PTRs as a breach of the Undertaking (that is, clarifying that CBH will comply with the PTRs, as amended from time to time);
- the recommendation for a clearer non-discrimination provision and the inclusion of a provision that any variation to the PTRs must be made in accordance with and subject to the non-discrimination provisions in the Undertaking; and

- the fact that if there are issues with this particular model, the term of the Undertaking is relatively short and the variation mechanism could be strengthened in any future Undertaking, if necessary.

It is the ACCC's preliminary view that this approach is more likely to be appropriate as it would maintain a flexible and pragmatic approach to variations of the PTRs – allowing CBH to respond to operational concerns without having to formally vary the Undertaking itself – while providing access seekers with sufficient certainty and clarity in the terms, effect and operation of the key processes by which CBH will allocate and manage port terminal capacity as provided by the PTRs.

To ensure that the ACCC can enforce PTRs that have been varied, a provision should be included in the undertaking that obliges CBH to comply with the PTRs (as varied from time to time).

#### **12.7.4 Transparency provisions in the April Undertaking and the WEMA**

The ACCC has considered whether the provisions in the April Undertaking and the transparency provisions in the WEMA are sufficient to adequately deal with concerns in relation to capacity management issues.

With regard to this consideration, the ACCC notes that the very premise behind the requirements under the WEMA for bulk handlers to provide an access undertaking to the ACCC is that these bulk handlers are vertically integrated and an access undertaking is required to provide a level of constraint against the potential for discrimination in the provision of port terminal services. Further, the transparency provided by publication of certain information in relation to the shipping stem and the publication of PTRs, does not in the ACCC's view, by itself, provide satisfactory protection against the ability for CBH to discriminate in favour of its own trading arm.

As a result, the ACCC considers that it is necessary to include the PTRs in the Undertaking in order to provide for sufficient certainty and clarity in its terms, effect and operation in order to enable the access provider and access seekers to be adequately aware of their respective rights and obligations, and thereby avoid unnecessary costs, monetary or otherwise, when utilising the processes set by the PTRs (and other associated documents relating to CBH's capacity allocation system) and Undertaking.

#### **12.7.5 Considerations that the ACCC noted in the Draft Decision dated 6 August 2009 that the ACCC may take into account in assessing the substance of any future PTRs**

CBH made a number of submissions explaining the provisions of its proposed capacity allocation system prior to the release of the Draft Decision, noting that '[f]inalised Port Rules, incorporating the new Capacity Allocation System and Auction Rules will be completed as soon as possible' and handed to the ACCC.<sup>681</sup>

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<sup>681</sup> Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 26 and 89.

As set out in the Draft Decision, as these documents were not submitted as part of the April Undertaking, the ACCC considered that it would not be appropriate to specifically comment on the terms of the PTRs or the draft capacity allocation system or draft auction rules as part of the Draft Decision.

However, in the interests of expediency, and as the ACCC annexed the most recent version of the revised PTRs received prior to the release of the Draft Decision (at **Annexure B**) for comment during the consultation period on the Draft Decision, the ACCC made the following high level comments in relation to the future assessment of the substance of any submitted PTRs and other associated documents relating to CBH's capacity allocation system:

- (i) The ACCC notes that it would consider the appropriateness of the clauses in the PTRs and any other associated documents in light of the fact that these documents form part of the key processes by which CBH will allocate and manage its port terminal capacity. The ACCC considers it relevant that the Undertaking provides for sufficient certainty and clarity in its terms, effect and operation in order to enable CBH and access seekers to be adequately aware of their respective rights and obligations and will consider these documents with these considerations at the forefront.
- (ii) However, the ACCC also recognises that the process of vessel nomination, acceptance and rejection and overall capacity management is an evolving process. This is (at least in part) due to the existence of a range of possible exogenous developments which can precipitate a change to any previously stated plan. As a result, the ACCC recognises that the maintenance of a flexible and pragmatic approach is required to maintain the overall efficiency of the system (and is proposed under the recommendation in relation to the variation mechanism for the undertaking).

As part of the Draft Decision, the ACCC also noted that CBH's proposed capacity allocation methodology is based on an auction system. The ACCC noted that it has no in-principle objection to the use of a well designed auction process run by an independent third party under which capacity is allocated as, in very general terms, a well functioning price mechanism can ameliorate circumstances of 'excess demand'.

## **12.7.6 The August PTRs and capacity allocation system**

### **12.7.6.1 The ACCC's preliminary views**

#### ***August PTRs***

CBH did not submit a version of its PTRs for assessment as part of its April Undertaking.

However, the ACCC notes that CBH advised that it intended to lodge a revised Undertaking that will include a version of its PTRs. As a result of this advice, the ACCC consulted on the version of the PTRs received on 31 July 2009 as part of the ACCC's consultation on the Draft Decision.



With regard to this, it is the ACCC's preliminary view is that while the August PTRs cover some of the issues set out above as being relevant to the assessment of any future PTRs submitted by CBH, the ACCC considers that additional amendments would be necessary in order for the PTRs to be considered appropriate for the reasons that many of the August provisions lack sufficient clarity, certainty and transparency, and also allow CBH a level of discretion that is not appropriate in making key decisions about capacity management.

The ACCC notes that the following matters represent a non-exhaustive list of the areas in the PTRs that may benefit from greater certainty, clarity and transparency:

- removing materials which are irrelevant for the operation of the provisions;
- providing greater clarity as to the meaning of particular terms and processes;
- minimising the circumstances in which CBH is required to exercise discretion;
- imposing timelines in relation to specific obligations;
- including the Auction Rules as part of the PTRs.

### ***Capacity allocation system***

In relation to the capacity allocation system in the August PTRs, interested parties have argued that: the system allocates an inappropriate form of 'capacity'; that many of the procedures that are to be applied are overly complex and biased in favour of CBH (for example, the charges imposed in the secondary market); that it remains unclear how the quantum of capacity that will be allocated is determined and how much will be auctioned at each phase; and that there should be one system of capacity allocation that applies all year.

The ACCC understands that CBH is proposing revisions to its proposed capacity allocation system based largely on recommendations from the ACCC that clarifies the type of 'capacity' that is being allocated, setting out how capacity is assessed, improving transparency around when and how the capacity is auctioned, removing 'surge' payments for non-Grain Express customers, simplifying the procedures in the auction process, and allowing for the auction system to be extended to the entire season (in certain circumstances).

In making these recommendations, the ACCC notes that it considers it important that the Undertaking provides for sufficient certainty and clarity in its terms, effect and operation in order to enable CBH and access seekers to be adequately aware of their respective rights and obligations. However, the ACCC also recognises that the process of capacity management is an evolving process. This is (at least in part) due to the existence of a range of possible exogenous developments which can precipitate a change to any previously stated plan. As a result, the ACCC recognises that the maintenance of a flexible and pragmatic approach is required to maintain the overall efficiency of the system.

### ***Submissions from interested parties***

The ACCC notes that submissions by interested parties on the August PTRs can be summarised as follows:

- (i) the meaning of certain terms in the PTRs are unclear;
- (ii) the circumstances in which particular provisions of the PTRs will operate are unclear;
- (iii) certain provisions of the PTRs are either not binding on CBH or are unduly burdensome on access seekers (for example, unilaterally allowing CBH to apply ad hoc charges on access seekers or allowing CBH to take into account matters within its control);
- (iv) certain provisions in the PTRs are open-ended; and
- (v) certain provisions in the PTRs lack transparency, provide insufficient guidance as to how CBH's discretion will be exercised or allow CBH to make subjective decisions.

The substance of arguments from interested parties is that there are certain terms and processes set out in the August PTRs and capacity allocation system that the interested parties consider could be more clearly defined and / or that could be spelt out in greater detail as to their applicability.

The ACCC agrees that as the PTRs form part of the key processes by which CBH will allocate and manage port terminal capacity, it is important that the Undertaking provides sufficient certainty and clarity in its terms, effect and operation in order to enable CBH and access seekers to be aware of their respective rights and obligations.

However, the ACCC also recognises that the process of vessel nomination, acceptance and rejection and overall capacity management is an evolving process. This is (at least in part) due to the existence of a range of possible exogenous developments which can precipitate a change to any previously stated plan. As a result, the ACCC recognises that the maintenance of a flexible and pragmatic approach is required to maintain the overall efficiency of the system.

Therefore, the ACCC considers that the specific level of prescription suggested by interested parties in relation to the August PTRs is, at this particular point in time, unnecessary in light of the combined effect of the ACCC's recommendations in the Draft Decision for clearer and more transparent PTRs (which to a large extent reflect the substance of comments by interested parties on the August PTRs) and the specific recommendations in relation to the non-discrimination and no-hindering access clauses that were included in the Draft Decision – both of which should be reflected in any Undertaking submitted to the ACCC.

Expanding on this, the ACCC recommends that CBH's revised Undertaking, in order to be considered appropriate by the ACCC, include robust non-discrimination and no-hindering access clauses, supported by the ability of the ACCC to request an audit of compliance with the non-discrimination clause.

These measures, together with the recommendations in relation to the Capacity Management provisions in the April Undertaking should achieve the objective of providing fair and transparent access to port terminal services for access seekers by providing for sufficient certainty and clarity in its terms, effect and operation in order to enable the access provider and access seekers to be adequately aware of their

respective rights and obligations, and thereby avoid unnecessary costs, monetary or otherwise, when utilising the processes set by the Undertaking.

### ***The dispute resolution process in the PTRs and Auction Rules***

The ACCC's view is that the provisions in the August PTRs setting out a PTR dispute resolution mechanism is not appropriate because the mechanism is outdated as it refers all relevant disputes over the operation of the PTRs to the provisions in the Access Agreement.

The ACCC's view is that a revised dispute resolution provision in PTRs and Auction Rules is more appropriate where the process is not open ended, reasons for decisions are required to be given and set timeframes are given for final decisions to be made.

The ACCC does not consider it necessary that disputes under the PTRs be able to be referred to an independent arbitrator at this particular point in time, as the requirement may inappropriately affect the legitimate business interests of CBH in being able to run its port terminal facilities with a sufficient degree of flexibility and may also impose significant costs on both CBH and access seekers. The ACCC also considers that to impose such a requirement could risk the undesirability of imposing regulation that is not appropriate at a time when the industry is newly liberalised and in transition.

## **12.7.7 Operational Decisions in the April Undertaking**

### **12.7.7.1 Interaction of the Operational Decisions clause in 9.2 and the PTRs**

Under the April Undertaking, 'Operational Decisions' constitute all decisions made in the course of providing the Port Terminal Services.

The ACCC notes that as a result of the definition of Operational Decisions, there is significant potential overlap with the provisions in the PTRs. From this point of view, the interaction between the PTRs and the Operational Decisions component of the April Undertaking is unclear. The ACCC's preliminary view is that it is more likely to be appropriate that the provisions under clause 9.2 are included in the PTRs. See the Non-Discrimination chapter for more detail on this issue.

### **12.7.7.2 Whether the Operational Decisions clause provides an appropriate balance between providing access seekers with sufficient certainty and clarity as to their terms, effect and operation and CBH with sufficient flexibility in its management of the Port Terminal Services**

Given the divergence of views as to the effect of the wording in the Operational Decisions clause in the April Undertaking (clause 9.2), the ACCC has considered the appropriateness of the wording of the clauses, noting that the ACCC considers it to be important that the Undertaking provides for sufficient certainty and clarity in its terms, effect and operation in order to enable CBH and access seekers to be adequately aware of their respective rights and obligations.

However, the ACCC also recognises that the process of making Operational Decisions in the provision of Port Terminal Services – namely overall capacity management – is an evolving process. This is (at least in part) due to the existence of a range of possible exogenous developments which can precipitate a change to any

previously stated plan. As a result, the ACCC recognises that the maintenance of a flexible and pragmatic approach is required to maintain the overall efficiency of the system.

The ACCC's following comments on the particular provisions of the Operational Decisions clause are made in recognition of both sets of challenges.

1. The ACCC's view is that clause 9.2(b)(i)(B) of the April Undertaking is not appropriate because the requirement to 'make decisions that are commercially justifiable taking into account the matters referred to in clause 9.2(c)' provides too much discretion to CBH and insufficient certainty for access seekers given that 9.2(c) provides that CBH will be able to make some decisions that 'when viewed in isolation ... necessarily confer a relative disadvantage on one user of the Port and an advantage on others'. A clause that expands on the criteria that are likely to be relevant and the process to be applied in determining whether a decision is 'commercially justifiable' would be appropriate.
2. The ACCC's view is that clause 9.2(d)(i) of the April Undertaking is not appropriate because the criteria used and the process to be applied in CBH's assessment of the 'likely availability of sufficient Bulk Wheat', 'the likely uncommitted storage capacity at the Port Terminal Facility', and the 'uncommitted inloading capacity necessary to make a nominated vessel's nominated cargo tonnage' are unclear.
3. The ACCC's view is that clauses 9.2(d)(ii)(A) and 9.2(d)(ii)(B) of the April Undertaking are not appropriate because the criteria that are within CBH's control or require subjective determinations by CBH when determining whether the objective of minimising demurrage or maximising throughput 'over a given period' are unclear and require further explanation. For example, CBH could determine that an objective when making an Operational Decision is to maximise throughput 'over a given period', with that given period to be 12 months. Clauses that remove the 'over a given period' qualifiers would be appropriate.
4. The ACCC's view is that clause 9.2(d)(iii) of the April Undertaking is not appropriate because the criteria that are within CBH's control or require subjective determinations by CBH when varying a cargo assembly plan or queuing order for vessels are unclear and require further explanation (for example, 'vessel congestion', 'weather preventing relevant activities', 'lack of performance of freight providers').
5. The ACCC's view is that clause 9.3 of the April Undertaking is not appropriate. See the Non-Discrimination chapter for more detail.

### **12.7.8 CBH's September Undertaking**

The clauses in CBH's September Undertaking relating to capacity management (ie. clause 10 and schedule 3 of the September Undertaking) are set out in CBH's September Undertaking at Annexure A.

### **12.7.9 ACCC's views on CBH's September Undertaking**

The ACCC considers that the clauses in CBH's September Undertaking relating to capacity management have addressed the ACCC's concerns with the clauses relating to capacity management in CBH's April Undertaking set out in the ACCC's Further Draft Decision.

Therefore, the ACCC considers that the clauses relating to capacity management in CBH's September Undertaking are appropriate.

## 13 Publication of information

### **Summary**

#### ***Publication of stocks of grain at port***

It is appropriate that CBH's September Undertaking includes an obligation to publish stocks of grains at port.

Such an obligation addresses concerns raised by interested parties that port operators have the potential to restrict access to port for bulk wheat services by exhausting the port terminal's capacity in favour of other grains.

Specifically, it is appropriate that this obligation to require publication (on CBH's website) of information on stocks at port of bulk wheat as compared to non-wheat grains, on a monthly basis. The ACCC considers that this will provide a level of transparency over whether CBH is restricting access to port by exhausting the port terminal's capacity in favour of other grains whilst not risking the imposition of onerous reporting requirements that are not appropriate at a time when the industry is newly liberalised and in transition.

For the avoidance of doubt, this obligation does not extend to publication of up-country information. This is because, as set out in the Scope chapter of this decision, it is the ACCC's view that CBH's approach of limiting its September Undertaking to port terminal services (and by extension, information about its port operations) is appropriate in the circumstances.

#### ***Publication of key port terminal information***

As set out in the Ring-Fencing chapter, the ACCC considers that it is appropriate that arrangements be provided for in the proposed Undertaking to address the potential for CBH's marketing arm to misuse port terminal information to its advantage.

Specifically, the ACCC considers that it is appropriate that CBH's September Undertaking deals with this issue including an obligation to publish key port terminal information (such as vessel nominations) on the shipping stem a short time after its receipt by CBH (i.e. the next business day). This will increase transparency of nominations that have been made and lessen the opportunity for CBH's marketing arm to misuse key port terminal information whilst not imposing unduly prescriptive regulation on CBH. It is important to note that any such discriminatory conduct will be prohibited by the robust non-discrimination and no-hindering access clauses in CBH's September Undertaking.

#### ***Publication of key service standards***

It is appropriate that CBH's September Undertaking includes an obligation to report on a number of key service standards.

Such reporting (on CBH's website) will provide a degree of transparency around the level of service being provided to wheat exporters and assist potential access seekers in assessing the appropriateness of the price offered for a service.

Part IIIA of the TPA does not prescribe what must be included in an access undertaking. Therefore, a potential access provider has a degree of discretion in how to structure its proposed Undertaking and what it includes in the undertaking. However, the ACCC notes that acceptance of an Undertaking by the ACCC precludes that service from being declared under Part IIIA (see section 44H(3)) of the TPA). In these circumstances, it is appropriate that the range of terms and conditions of access be sufficient to give access seekers certainty regarding the service subject of the undertaking, and the terms and conditions upon which that service will be provided.

This chapter addresses the need for additional clauses to those proposed in CBH's April Undertaking.

## **13.1 Publication of stocks at port**

### **13.1.1 CBH's April Undertaking**

CBH's April Undertaking does not include an obligation to publish any information about stocks held in storage either in its ports or in its up-country storage and handling network.

### **13.1.2 CBH's submissions in support of its April Undertaking**

In response to submissions from interested parties in relation to the publication of information at port, CBH states:

As the ACCC is aware, CBH and other port terminal operators are required to publish Shipping Stem information under the WEMA. It is unclear how any additional transparency could reasonably be required.<sup>682</sup>

CBH also states that much of the information held at its ports can be obtained from government agencies or through the access available on CBH's web based information services such as those already offered to exporters.<sup>683</sup>

In response to submissions calling for greater transparency on the information held in its system, CBH submits:

These complaints are both incorrect and not directly relevant to the Undertaking, because they address services that are performed using country storage facilities. If an Exporter accesses the Port Terminal Service under the Undertaking, it will not require CBH to provide the kind of detailed stock information across the entire CBH network. It will also have handled its own logistics and transport to port. If, like CBH, that process has involved information gathering up-country, then those Exporters will have already met its stock knowledge requirements. To the extent that information regarding

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<sup>682</sup> Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 41.

<sup>683</sup> Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 54.

stock held at port for the Port Terminal Service, CBH will provide this information to Exporters on a daily basis.

To the extent that CBH's information services under Grain Express are relevant, CBH currently provides the following information to marketers:

- Acquisitions (Grower loads)
- Acquisitions Name & Address of growers - matches each Acquisition transmission
- Movements (including freight) from site to site within the CBH system
- Outturns (Domestic) for all non-shipping transactions for grain leaving the control of CBH
- Stock levels (operational) for all stocks held by CBH, at a site, grain, grade level
- Property Details (a full listing of all CBH client property details). This is a CBH-generated format and not considered a recognised standard but has been included in this document for completeness.

Riverina's complaint is essentially that it has difficulty accessing information and that CBH provides the information it requires too slowly. Exporters have access stock information in two ways. If an Exporter wants information about its stock holdings, it can access that information through Stocknet at any time. If it requires more specific information, such as on grower deliveries, it may use the client access tool, which uses software provided free of charge by CBH. Riverina and some other Exporters consider that the client access software is difficult for them to use and have asked CBH to send out information in report form. CBH has done so but the conversion of the data to report form means that the report is sent well after the information itself could have been accessed by an Exporter that was able to use the client access software. Many Exporters have been able to use the CBH client access software effectively. Riverina is one of a small minority of Exporters who have requested CBH to perform the task of extracting relevant data into a report format. In short, the information was always available but a small minority of Exporters have experienced some difficulty using it.<sup>684</sup>

### **13.1.3 Submissions from interested parties in response to ACCC's Issues Paper, dated 29 April 2009**

#### **13.1.3.1 AGEA**

AGEA submits that the BHCs have the ability to discriminate against other traders through manipulating other grain stocks at port:

The proposed access undertakings do not provide transparency in relation to BHCs' management of shipping slots and accumulation at port. Unless the proposed access undertakings provide transparency in relation to BHCs' decisions, BHCs will be able to manipulate logistics, substitute vessels and/or

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<sup>684</sup> Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 91.



vary the shipping stem to confer preferential treatment on themselves of their Trading Division.<sup>685</sup>

Further, AGEA submits:

BHCs can allow their stock to sit in port, taking up accumulation space from other AWEs. BHCs therefore have the ability to manipulate the logistics of getting stock to port to serve their own interests (or the interests of their Trading Division).<sup>686</sup>

AGEA also submits that:

There is a critical imbalance between the information available to BHCs as port operators and the information available to AWEs. BHCs control inventory movements, quality profile, transportation and capacity at ports and have within their control information relating to logistics of stock into port. BHCs know who is transporting stock into port, what stock is coming into port, how much stock is in the port and when and how much stock is due to leave the port. BHCs could refuse to allow AWEs to accumulate stock on the basis that the port is full, but no-one would know if that is the case.

This imbalance in information is exacerbated in situations where, as is the case here, the BHCs provide upstream and downstream services. The result is that the BHCs possess a great deal of information about the trading activities of the AWEs (their competitors) and are consequently in a position to advantage the BHCs' related entities, or to disadvantage the AWEs. The undertakings do not ensure that AWEs obtain access to the same information that is available to BHCs.<sup>687</sup>

To overcome some of these issues, AGEA submits that the following information should be published by CBH on a timely basis:

- (a) port capacity;
- (b) stock on hand at port;
- (c) daily receivals by grade;
- (d) the accumulation programme at port;
- (e) stock movements;
- (f) allocation and changes to vessel loading slots;
- (g) weight, quality and AQIS compliance;

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<sup>685</sup> Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 4.12, p. 10.

<sup>686</sup> Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 14.4, p. 31.

<sup>687</sup> Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 4.13-4.14, pp. 11-12.

(h) all other necessary information for AWEs to assess whether BHCs have met the performance criteria.<sup>688</sup>

AGEA also submits that CBH should provide daily updates on:

- (i) stock on hand at port;
- (ii) daily receivals by grade into port;
- (iii) the port's capacity;
- (iv) wheat accumulation;
- (v) unloading from upcountry transporters into port;
- (vi) stock movements.<sup>689</sup>

### **13.1.3.2 Western Australian Farmers Federation (WAFarmers)**

WAFarmers made the following comment in relation to the transparency of information:

In addition to shipping stem information, WAFarmers remains steadfast in its request to CBH that as much information as is commercially viable be made available to growers so that they can make informed decisions given that they are individual marketers.<sup>690</sup>

### **13.1.3.3 New South Wales Farmers Association**

The NSW Farmers Association, who provided its submission in relation to CBH as well as GrainCorp, submits that there is a lack of transparency of information relating to the grain supply chain. It states:

It is widely known within the industry that Australian storage and handlers have information readily available to them relating to stocks on hand, which can be updated on a daily basis. In fact WEA may be within its rights to request this information, if it believes this is appropriate. Therefore if WEA were directed it might provide an additional and useful service to the wider industry in receiving and publishing the relevant information.<sup>691</sup>

### **13.1.3.4 PGA**

The PGA submits that there is an imbalance between the information held by CBH and grain marketers, stating:

There is a critical imbalance between the information available to CBH as port operator and the information available to assist growers in their negotiations with grain marketers. CBH controls inventory movements,

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<sup>688</sup> Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 4.16, p. 12.

<sup>689</sup> Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 4.17(k), p. 14.

<sup>690</sup> Western Australian Farmers Federation (Inc), *Submission in relation to proposed CBH access undertaking*, 29 May 2009, p. 2.

<sup>691</sup> NSW Farmers Association, *Submission in relation to proposed access undertakings*, June 2009, p. 5.

quality profile, transportation and capacity at ports and have within their control information relating to logistics of stock into port, including all information relating to up country storage. CBH knows who is transporting stock into port, what stock is coming into port, how much stock is in the port and when and how much stock is due to leave the port throughout Western Australia.<sup>692</sup>

The PGA also submits that CBH should provide growers and exporters with timely information relating to:

- (a) port capacity;
- (b) stock on hand at port;
- (c) daily receivals by grade;
- (d) the accumulation programme at port;
- (e) stock movements;
- (f) allocation and changes to vessel loading slots;
- (g) weight, quality and AQIS compliance;
- (h) all other necessary information for exporters and growers to assess whether CBH has met the performance criteria.<sup>693</sup>

#### **13.1.4 CBH's submissions in response to ACCC's Draft Decision**

As part of its submission on the ACCC's Draft Decision, CBH put forward possible amendments to the Undertaking in relation to publication of stocks at port with the intent to address the comments and recommendations made in the Draft Decision by the ACCC and to provide additional levels of transparency regarding CBH's provision of access to Port Terminal Services under its Undertaking.<sup>694</sup>

CBH proposed a new Clause 12 with Clause 12(a), relating to the publication of stocks at port, worded as follows:

Within the last three days of each month, the Port Operator will publish on its website a statement of the total amount of grain (including Bulk Wheat) situated at each of the Port Terminal Facilities. The Port Operator must use reasonable endeavours to ensure that the statement is accurate within +/- 5%.<sup>695</sup>

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<sup>692</sup> Pastoralists and Graziers Association, *Submission in relation to proposed CBH access undertaking*, 29 May 2009, para 2.12, p. 3.

<sup>693</sup> Pastoralists and Graziers Association, *Submission in relation to proposed CBH access undertaking*, 29 May 2009, para 4.32, p. 12.

<sup>694</sup> Co-operative Bulk Handling Limited, *Submission in relation to Draft Decision on CBH Access Undertaking – Other Issues*, 31 August 2009, para 2.1, p. 1.

<sup>695</sup> Co-operative Bulk Handling Limited, *Submission in relation to Draft Decision on CBH Access Undertaking – Other Issues*, 31 August 2009, Annexure A, Clause 12(a), p. 3.

### 13.1.5 Submissions from interested parties in response to ACCC's Draft Decision

#### 13.1.5.1 AGEA

AGEA submits that it was not appropriate that the BHCs' proposed Undertakings do not include an obligation to publish stocks of all grains at port.<sup>696</sup> AGEA submits that the BHCs should provide port stocks "by grain and grade".<sup>697</sup> AGEA submits that such an obligation would address concerns that port operators have the potential to restrict access to port for bulk wheat services by exhausting the port terminal's capacity in favour of other grains.<sup>698</sup>

AGEA also submits that the information provided should be broken down on a port by port level and updated every 24 hours.<sup>699</sup>

#### 13.1.5.2 PGA

The PGA made the following submissions in relation to publication of stocks at grain at port:

8.1 The PGA agrees with the ACCC that it is not appropriate that the CBH's proposed Undertaking does not include an obligation to publish stocks of grain at port.

8.2 The PGA holds that the current ring-fencing arrangement may not be adequate enough to protect this information from being made available to CBH's trading division.

8.3 The PGA does not agree with the ACCC that it is appropriate that the CBH's proposed Undertaking does not include an obligation to publish stocks of grain at up-country networks.

8.4 CBH is the monopoly provider of both port terminal services and upstream services in Western Australia. CBH controls 197 receival sites; and the export supply chain through Grain Express. Growers sell their wheat to a wide range of grain traders or marketers at any point along the export supply chain, and wheat may be traded several times while it remains in the CBH system before being sold to the end user.

8.5 Growers require aggregate information of upcountry stack levels to ensure that they have a fair and competitive position in the market place.<sup>700</sup>

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<sup>696</sup> Australian Grain Exporters Association, *Submission in relation to Draft Decisions on Port Terminal Services Access Undertakings*, 3 September 2009, para 1.27.

<sup>697</sup> Australian Grain Exporters Association, *Submission in relation to Draft Decisions on Port Terminal Services Access Undertakings*, 3 September 2009, para 13.3(iii).

<sup>698</sup> Australian Grain Exporters Association, *Submission in relation to Draft Decisions on Port Terminal Services Access Undertakings*, 3 September 2009, para 1.28.

<sup>699</sup> Australian Grain Exporters Association, *Submission in relation to Draft Decisions on Port Terminal Services Access Undertakings*, 3 September 2009, para 13.4.

<sup>700</sup> Pastoralists and Graziers Association, *Submission in relation to Draft Decision on CBH Access Undertaking*, 3 September 2009, para 8.1-8.4.

### 13.1.6 ACCC's view on the April Undertaking regarding publication of stocks at port

The ACCC considers that it is not appropriate that CBH's April Undertaking does not include a requirement to publish information about stock held at port.

The ACCC notes the submission made by AGEA that, given the April Undertaking relates only to wheat, port operators have the potential to restrict access to port by exhausting the port terminal's capacity in favour of other grains.<sup>701</sup>

While the ACCC does not have evidence to suggest that such behaviour has occurred, the ACCC recognises that providing a greater level of transparency over stocks at port would assist to alleviate the potential for port operators to engage in this behaviour. Accordingly, the ACCC considers that it would be appropriate for CBH's Undertaking to state that it will publish information relating to the stocks held at port on a regular basis. The ACCC also considers that it would be appropriate for CBH's Undertaking to require publication of that information in a prominent position on CBH's website.

In relation to the regularity of publication and the type of information to be published the ACCC considers that a requirement to publish information on stocks at port of Bulk Wheat as compared to non-wheat, on a monthly basis, would be appropriate. The ACCC considers this would provide a level of transparency over whether port operators were restricting access to port by exhausting the port terminal's capacity in favour of other grains whilst not risking the imposition of onerous reporting requirements that are not appropriate at a time when the industry is newly liberalised and in transition.

In this regard, while the ACCC notes AGEA's further submission that port stocks by grain and grade should be broken down on a port by port basis and updated every 24 hours,<sup>702</sup> the ACCC considers that such reporting could be unduly prescriptive at this point in time. The ACCC also notes that breaking down stocks by grain and grade at every port could potentially compromise confidential information in relation to the stock position of smaller users of the port terminal.

The ACCC considers CBH's approach of not including an obligation to publish stocks held *up-country*, is appropriate in the circumstances.

The ACCC recognises that, as CBH has submitted, it is clear that the intention of the WEMA is that the Undertaking should apply only to services offered at port.

In this regard, the ACCC notes that the Explanatory Memorandum to the WEMA responded to calls to extend the access test to cover up-country services, stating that:

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<sup>701</sup> Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 4.9, p. 10.

<sup>702</sup> Australian Grain Exporters Association, *Submission in relation to Draft Decisions on Port Terminal Services Access Undertakings*, 3 September 2009, para 13.4.

Up-country facilities do not display natural monopoly characteristics as they have low barriers to entry and there are already a number of competitors in the industry who provide up-country storage services.<sup>703</sup>

The Explanatory Memorandum goes on to note that an extension of the access arrangements to up-country storage facilities would ‘impose an excessive regulatory burden’.<sup>704</sup> Further, the Second Reading Speech of the WEMA provides:

The Senate inquiry also identified concerns in relation to the potential for bulk-handling companies to restrict access to up-country storage facilities in a similar manner to concerns in relation to port facilities.

It is unclear from the evidence presented to the Senate inquiry whether the problem would necessarily arise, and if so, the extent of legislation that would be required to correct it.

If the highest level of regulation were to be imposed on the more than 500 up-country facilities, there is no doubt that this would create increased compliance costs which would almost certainly be directly passed back to growers.

The government will, therefore, continue to monitor the ability of exporters to access up-country storage facilities.

Let me say here, if any problems are identified then the government will take steps to remedy the situation including, if necessary, the development of a code of conduct.<sup>705</sup>

While the ACCC is cognisant of the submissions made calling for the publication of information in relation to stocks held in CBH’s up-country storage and handling facilities, the ACCC notes that the ring-fencing rules CBH currently has in place prohibit the sharing of information between CBH and GrainPool.

Given this, the clear express intention of the WEMA, and having regard to the risk and undesirability of imposing regulation that is not appropriate at a time when the industry is newly liberalised and in transition, the ACCC considers that it is appropriate pursuant to section 44ZZA(3) of the TPA, that CBH’s Undertaking does not include a requirement to publish stocks held in its up-country network.

### **13.1.7 CBH’s September Undertaking**

The clause in CBH’s September Undertaking relating to the obligation to publish information on stock at the port (ie. clause 12(a) of the September Undertaking) is set out in CBH’s September Undertaking at Annexure A.

### **13.1.8 ACCC’s views on CBH’s September Undertaking**

The ACCC considers that clause in CBH’s September Undertaking relating to obligation to publish information on stock at the port has addressed the concern of the ACCC in relation to the failure of CBH’s April Undertaking to include such an obligation.

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<sup>703</sup> Explanatory Memorandum, *Wheat Export Marketing Bill 2008* (Cth), p. 13.

<sup>704</sup> Explanatory Memorandum, *Wheat Export Marketing Bill 2008* (Cth), p. 14.

<sup>705</sup> House of Representatives, *Votes and Proceedings, Hansard*, Thursday 29 May 2009, pp. 76–77.

## 13.2 Publication of key port terminal information

### 13.2.1 CBH's April Undertaking

CBH's April Undertaking does not include an obligation to publish key port terminal information.

### 13.2.2 CBH's submissions in response to ACCC's Draft Decision

As part of its submission on the ACCC's Draft Decision, CBH put forward possible amendments to the Undertaking in relation to publication of key port terminal information with the intent to address the comments and recommendations made in the Draft Decision by the ACCC and to provide additional levels of transparency regarding CBH's provision of access to Port Terminal Services under its Undertaking.<sup>706</sup>

CBH proposed a new Clause 12 with Clause 12(b) relating to the publication of key port terminal information, worded as follows:

By the close of the Business Day following the Business Day on which the Port Operator receives a vessel nomination from a User (including its Trading Business), the Port Operator will publish the nomination on its website. Vessel nominations received after 4pm on a day will be deemed to be received at 8am on the next Business Day.<sup>707</sup>

### 13.2.3 Submissions from interested parties in response to ACCC's Draft Decision

#### 13.2.3.1 AGEA

AGEA submits that the BHCs should provide the following information:<sup>708</sup>

- Port intake capacity;
- Intake booking slots;
- Refusal of request for acceptance of cargo receipt;
- Refusal of request for cargo outturn;
- Acceptance of vessel nominations regardless of stock;
- Changes to vessel slots and cargo accumulation;
- Unloading of trains/road transport within six hours;
- Load rates and time to count as per Austwheat 2008 charterparty (as amended from time to time);
- Benchmark criteria for grading, fumigation, weighing;
- Compliance with AQIS requirements, loading to receipt standards. The grain loaded to the ship should be of a standard not less than that

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<sup>706</sup> Co-operative Bulk Handling Limited, *Submission in relation to Draft Decision on CBH Access Undertaking – Other Issues*, 31 August 2009, para 2.1.

<sup>707</sup> Co-operative Bulk Handling Limited, *Submission in relation to Draft Decision on CBH Access Undertaking – Other Issues*, 31 August 2009, Annexure A, clause 12(b), p. 3.

<sup>708</sup> Australian Grain Exporters Association, *Submission in relation to Draft Decisions on Port Terminal Services Access Undertakings*, 3 September 2009, para 13.3.

delivered to the port terminal by or on behalf of the exporter. The terminal should provide running samples and/or analysis during loading so that any deviation from the required quality is known by the exporter prior to the completion of loading;

- Settling despatch demurrage at the applicable vessel rate.

AGEA submits that the information provided should be broken down on a port by port level and updated every 24 hours.<sup>709</sup>

AGEA argues that it is appropriate for the Undertaking to address the potential for the BHCs' marketing arm to misuse port terminal information to its advantage.<sup>710</sup> AGEA also notes that they agreed with the ACCC's view that the appropriate approach to deal with the issue would be for the Undertakings to require publication of key port terminal information (such as cargo nomination applications) on the shipping stem within a short time after it is received by the BHC, and suggests that the information should be provided within 24 hours.<sup>711</sup>

### **13.2.3.2 PGA**

The PGA agrees with the ACCC that it is appropriate that arrangements be provided in CBH's Undertaking to address the potential for CBH's marketing arm to misuse port terminal information to its advantage, and also agrees with the ACCC's recommendation that the proposed Undertaking require publication of key port terminal information, such as vessel nominations on the shipping stem.<sup>712</sup>

### **13.2.4 ACCC's view on the April Undertaking regarding publication of key port terminal information**

As set out in the Ring-Fencing chapter, the ACCC considers that it is appropriate that arrangements be provided for in the Undertaking to address the potential for CBH's marketing arm to misuse port terminal information to its advantage.

The ACCC considers that the appropriate approach to dealing with this issue would be for the Undertaking to require publication of key port terminal information (such as vessel nominations) on the Shipping Stem a short time after its receipt by CBH.

The ACCC considers that a requirement to publish information about vessel nominations that are updated each business day is likely to be appropriate as it would appropriately balance the legitimate business interests of the provider and the interests of persons who might want access to the service by increasing the transparency of nominations that have been made and lessen the opportunity for CBH's marketing arm to misuse key port terminal information.

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<sup>709</sup> Australian Grain Exporters Association, *Submission in relation to Draft Decisions on Port Terminal Services Access Undertakings*, 3 September 2009, para 13.4.

<sup>710</sup> Australian Grain Exporters Association, *Submission in relation to Draft Decisions on Port Terminal Services Access Undertakings*, 3 September 2009, para 1.29.

<sup>711</sup> Australian Grain Exporters Association, *Submission in relation to Draft Decisions on Port Terminal Services Access Undertakings*, 3 September 2009, para 1.31-1.32.

<sup>712</sup> Pastoralists and Graziers Association, *Submission in relation to Draft Decision on CBH Access Undertaking*, 3 September 2009, para 8.6-8.7.



Therefore, while the ACCC notes the further submission from AGEA arguing for the publication of various categories of additional information about the port terminals, the ACCC is concerned that this would risk the undesirability of imposing onerous reporting requirements that are not appropriate at a time when the industry is newly liberalised and in transition.

The ACCC also notes that it considers that CBH's Undertaking, in order to be considered appropriate by the ACCC, needs to include robust non-discrimination and no-hindering access clauses, supported by the ability of the ACCC to request an audit of compliance with the non-discrimination clause. The ACCC considers that these measures, together with clear and transparent Port Terminal Rules and a robust arbitration framework regarding access to port terminal services, is likely to achieve the objectives of providing fair and transparent access to port terminal services for wheat exporters (without the need to publish such extensive information sought by AGEA and others).

### **13.2.5 CBH's September Undertaking**

The clause in CBH's September Undertaking relating to obligation to publish key port terminal information (ie. clause 12(b) of the September Undertaking) is set out in CBH's September Undertaking at Annexure A.

### **13.2.6 ACCC's views on CBH's September Undertaking**

The ACCC considers that clause in CBH's September Undertaking relating to the obligation to publish key port terminal information has addressed the concern of the ACCC in relation to the failure of CBH's April Undertaking to include such an obligation.

## **13.3 Port performance indicators**

### **13.3.1 CBH's April Undertaking**

CBH's April Undertaking does not place any obligation on it to maintain and publish performance indicators.

### **13.3.2 CBH's submissions in response to ACCC's Issues Paper, dated 29 April 2009**

In response to questions in the ACCC Issues Paper and submissions from interested parties, CBH states:

CBH does not consider that performance indicators should be mandated through the Undertaking. To do so would import a level [of] operational and contractual supervision that exceeds what is required in other similar processes. No substantive case has been made in relation to the introduction of that degree of control of private services as part of a Government regulatory process.

It is also questionable whether the information gathered serves a useful purpose or adds to existing information relating to performance.

The terms and conditions offered under the Undertaking contain no less discipline on CBH's performance than CBH's Grain Services Agreement under Grain Express. The inclusion of the access test in the WEMA was not

for the purpose of regulating the quality and detailed delivery of services by the owners of port terminal facilities. Rather, it was included to ensure that appropriate access to services was offered by vertically integrated port terminal operators. The inclusion of performance indicators would exceed the extend [sic] of regulation intended by the introduction of the WEMA.<sup>713</sup>

### **13.3.3 Submissions from interested parties in response to ACCC's Issues Paper, dated 29 April 2009**

#### **13.3.3.1 AGEA**

AGEA calls for the following minimum performance criteria to be included in the standard terms:

- (f) the specification of minimum performance criteria which BHCs are required to meet including:
  - i) acceptance of vessel nominations regardless of stock entitlements within 24 hours;
  - ii) changes to vessel slots and cargo accumulation;
  - iii) unloading of trains/road transport within six hours;
  - iv) load rates and time to count as per Austwheat 2008 charterparty (as amended from time to time);
  - v) benchmark criteria for grading, fumigation, weighing, compliance with AQIS requirements, loading to receival standards. The grain loaded to the ship should be of a standard not less than that delivered to the port terminal by or on behalf of the exporter. The terminal should provide running samples and/or analysis during loading so that any deviation from the required quality is known by the exporter prior to the completion of loading.
  - vi) settling despatch demurrage at the applicable vessel rate.<sup>714</sup>

#### **13.3.4 CBH's submissions in response to ACCC's Draft Decision**

As part of its submission on the ACCC's Draft Decision, CBH put forward possible amendments to the Undertaking in relation to publication of port performance indicators with the intent to address the comments and recommendations made in the Draft Decision by the ACCC and to provide additional levels of transparency regarding CBH's provision of access to Port Terminal Services under its Undertaking.<sup>715</sup>

CBH proposed a new Clause 12 with Clause 12(c) relating to the publication of key port terminal information, worded as follows:

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<sup>713</sup> Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 39.

<sup>714</sup> Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 4.17(f).

<sup>715</sup> Co-operative Bulk Handling Limited, *Submission in relation to Draft Decision on CBH Access Undertaking – Other Issues*, 31 August 2009, para 2.1, p. 1.

Within the last three days of each of December, March, June and September, the Port Operator will publish on its website a statement of the key indicators of its performance of the Port Terminal Services at each Port Terminal Facility, including details of the:

- (i) average number of days between the ETA on original vessel nomination and the date of the presentation of the Notice of Readiness;
- (ii) average number of days between presentation of a Notice of Readiness and Commencement of Loading for vessels that arrive within their contracted Shipping Window;
- (iii) average number of days between presentation of a Notice of Readiness and Commencement of Loading for vessels that arrive outside their contracted Shipping Window;
- (iv) number of vessels rejected in the year to date;
- (v) number of vessels presenting a Notice of Readiness outside of the contracted Shipping Window in the year and month to date;
- (vi) Quantum of tonnes of wheat exported in the year and month to date; and
- (vii) number of vessels loaded in the year and month to date.<sup>716</sup>

CBH submits that cargo accumulation times were not included as a key service standard because they:

are not indicative of the performance of the Port Operator, as they are not within the control of the Port Operator. Cargo accumulation times are reflective of the performance of the entire supply chain, including the behaviour of exporters themselves. CBH submits that the information proposed to be published under clause 12(c)(i),(ii), (iii) and (v) is more relevant.<sup>717</sup>

CBH further submits that transport queuing times were not included because they are:

substantially affected by the number of vehicles arriving at a Terminal at any given time. CBH has no control over the arrival of grower deliveries. CBH's only way to affect queue length is to unload vehicles quickly. With such a substantial variable inherently unknown, the indicator is at best useless and at worst, misleading.<sup>718</sup>

Finally, CBH submits that they did not include demurrage because:

[CBH] have insufficient knowledge to publish information about demurrage. Demurrage is a matter of contract between an exporter and its shipping company. Even if [CBH] had such knowledge, demurrage is not indicative of [CBH's] performance. Any number of factors unrelated to [CBH] may cause demurrage, including the performance of the up-country supply chain. CBH submits that the information proposed to be published under clause 12(c)(i),(ii), (iii) and (v) is more relevant.<sup>719</sup>

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<sup>716</sup> Co-operative Bulk Handling Limited, *Submission in relation to Draft Decision on CBH Access Undertaking – Other Issues*, 31 August 2009, Annexure A, clause 12(b), p. 3.

<sup>717</sup> Co-operative Bulk Handling Limited, *Submission in relation to Draft Decision on CBH Access Undertaking – Other Issues*, 31 August 2009, para 2.2(i).

<sup>718</sup> Co-operative Bulk Handling Limited, *Submission in relation to Draft Decision on CBH Access Undertaking – Other Issues*, 31 August 2009, para 2.2(ii).

<sup>719</sup> Co-operative Bulk Handling Limited, *Submission in relation to Draft Decision on CBH Access Undertaking – Other Issues*, 31 August 2009, para 2.2(iii).

### 13.3.5 Submissions from interested parties in response to ACCC's Draft Decision

#### 13.3.5.1 AGEA

AGEA submits the following in relation to the publication of port performance indicators or key service standards:<sup>720</sup>

13.1 AGEA agrees with the ACCC that it is not appropriate that the BHCs' proposed Undertakings do not include a requirement to report on a number of service performance levels. Such reporting would provide a degree of transparency around the level of service being provided to AWEs and assist potential access seekers in assessing the appropriateness of the price offered for a service.

13.2 AGEA agrees with the ACCC that the BHCs should publish the following performance indicators below, which should be specified and included in the BHCs proposed Undertakings:

- (i) The shipping stem
- (ii) Ship rejections;
- (iii) Cargo assembly times;
- (iv) Transport queuing times;
- (v) Port blockouts; and
- (vi) Overtime charged.

...

13.4 The above information in paragraphs 13.2 and 13.3 should be broken down on a port by port level and updated every 24 hours.

...

13.6 A further useful indicator as to whether non-discriminatory port terminal access is being provided, could be the percentage of vessel slots that are allocated to the BHCs' trading arms. Further guidance may be attained by determining the number of vessel slots that are subsequently traded by the BHCs' trading arms to AWEs.

AGEA comments that CBH's revised submission of 30 August 2009 relating, amongst other things, to performance indicators is "too narrow."<sup>721</sup> Specifically, AGEA submits that:

13.7(i) The level of information CBH proposes to publish is manifestly inadequate to accurately determine performance levels and to ensure all AWEs have access to the same levels of information. Without a robust ring-fencing system in place, the BHCs' ability to discriminate is greatly increased.

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<sup>720</sup> Australian Grain Exporters Association, *Submission in relation to Draft Decisions on Port Terminal Services Access Undertakings*, 3 September 2009, para 13.1-13.2, 13.4 and 13.6. Also see para 1.34.

<sup>721</sup> Australian Grain Exporters Association, *Submission in relation to Draft Decisions on Port Terminal Services Access Undertakings*, 3 September 2009, para 13.7.

(ii) In its further Submission on capacity allocation dated 30 August 2009, CBH noted that the port capacity is a function of the following factors:

- (a) port intake capacity;
- (b) intra-port transport capacity;
- (c) labour deployment;
- (e) fumigation demands;
- (f) port terminal storage;
- (g) outloading speed; and
- (h) berth capacity.

Yet, CBH does [not] accept that it should provide performance levels concerning the above.

(iii) Cargo accumulation times do form part of the information required to determine performance levels (paragraph 2.2(i);

(iv) CBH has control over the receipt of wheat into the port terminal facilities (paragraph 2.2(ii)). As such, it is imperative that its performance is able to be monitored.<sup>722</sup>

AGEA also submits that:

CBH claims to not have knowledge of demurrage and that in any event, it “*is not indicative of the Port Operator's performance*”.

Pursuant to **clause 2.1(c)** of CBH's Port Terminal Rules a primary object of CBH is to exercise its direction base upon “*minimisation of demurrage at the Port Terminal Facilities over a given period*”.

Pursuant to **clause 9.2** of CBH's Port Terminal Rules:

“(a) *The Port Operator may permit the amendment of a Vessel Nomination for operational reasons where, in its reasonable opinion, accepting the amendment:*

(ii) *is to assist achievement of:*

(A) *minimising demurrage at the Port over a given period; or*

Pursuant to **clause 7.4** of the Port Terminal Service Agreement,

“*In making any decision to accept or reject the Outturn Request, CBH shall make its determination in accordance with the terms of the Undertaking and in particular having regard to the following:...*”

(d) “*taking into account in particular, the objectives of:*

(i) *minimising Demurrage at the Port over a given period; and*

(ii) *maximising throughput of Grain at the Port over a given period; ”*

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<sup>722</sup> Australian Grain Exporters Association, *Submission in relation to Draft Decisions on Port Terminal Services Access Undertakings*, 3 September 2009, para 13.7(i)-(iv).

The above runs contrary to CBH's position that it is not necessary to publish demurrage information.<sup>723</sup>

### 13.3.5.2 PGA

The PGA submits the following in relation to the publication of key service standards:

8.8 The PGA agrees with the ACCC that it is not appropriate that CBH's proposed Undertaking does not include a requirement to report on a number of service performance levels.

8.9 The PGA agrees with the ACCC's recommendations of possible indicators including:

- ship rejections;
- cargo assembly times;
- transport queuing times;
- port block outs;
- over time charged;
- demurrage.<sup>724</sup>

### 13.3.6 ACCC's views on the April Undertaking regarding port performance indicators

The ACCC considers that it is not appropriate that CBH's April Undertaking does not include a requirement to report on a number of service performance indicators.

Such reporting (in a prominent position on CBH's website) would provide a degree of transparency around the level of service being provided to wheat exporters and assist potential access seekers in assessing the appropriateness of the price offered for a service.

While not seeking to prescribe what service performance indicators should be included in an undertaking, the ACCC notes the following possible indicators:

- Ship rejections;
- Cargo assembly times;
- Transport queuing times;
- Port blockouts;
- Overtime charged;
- Demurrage.

The ACCC notes that, contrary to CBH's arguments, including obligations to report on service standards is a common obligation included access undertakings.<sup>725</sup>

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<sup>723</sup> Australian Grain Exporters Association, *Submission in relation to Draft Decisions on Port Terminal Services Access Undertakings*, 3 September 2009, para 13.7(v).

<sup>724</sup> Pastoralists and Graziers Association, *Submission in relation to Draft Decision on CBH Access Undertaking*, 3 September 2009, para 8.8-8.9.

<sup>725</sup> See, for example, the access undertaking submitted by the Australian Rail Track Corporation (ARTC), and accepted by the ACCC on 30 July 2008.

The ACCC also notes that it does not intend the requirement to publish port performance indicators to be an onerous obligation and recognises that, in order to appropriately balance the legitimate business interests of the provider and the interests of persons who might want access to the service, the obligation should not (in this particular context) require the collation of data that CBH does not already collect as part of its normal commercial practice. To do so would risk the imposition of regulation that is not appropriate at a time when the industry is newly liberalised and in transition.

Given this, while the ACCC notes AGEA's further submission recommending that the BHCs publish certain performance indicators, broken down on a port by port basis and updated every 24 hours, and AGEA's additional comments relating to the submission that CBH's revised proposal of 30 August 2009 is "too narrow", the ACCC considers that such reporting could be unduly prescriptive at this point in time.

The ACCC considers that the indicators proposed by CBH in its submission on the ACCC's Draft Decision would be likely to be appropriate as they would:

- appropriately balance the legitimate business interests of the provider and the interests of persons who might want access to the service by providing a degree of transparency around the level of service being provided to wheat exporters; and
- assist potential access seekers in assessing the appropriateness of the price offered for a service.

### **13.3.7 CBH's September Undertaking**

The clause in CBH's September Undertaking relating to obligation to publish a report on performance indicators (ie. clause 12(c) of the September Undertaking) is set out in CBH's September Undertaking at Annexure A.

### **13.3.8 ACCC's views on CBH's September Undertaking**

The ACCC considers that clause in CBH's September Undertaking relating to the obligation to publish a report on performance indicators has addressed the concern of the ACCC in relation to the failure of CBH's April Undertaking to include such an obligation.

## **14 Decision on CBH's September Undertaking**

### **Summary**

The ACCC's decision is to accept CBH's September Undertaking.

### **14.1 Decision on CBH's September Undertaking**

In relation to CBH's September Undertaking, the ACCC's view is that, having regard to the matters listed in section 44ZZA(3) of the TPA, it is appropriate to accept the September Undertaking.

As a result, the ACCC's decision is to accept the September Undertaking

The ACCC has provided comprehensive reasons for decision throughout this document.



## **Annexure A: CBH's September Undertaking**

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Co-operative Bulk Handling Limited

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# Port Terminal Services Access Undertaking

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Date

# Port Terminal Services Access Undertaking

by

**Co-operative Bulk Handling Limited** ABN 29 256 604 947 of 30 Delhi Street, West Perth, Western Australia (**Port Operator**)

in favour of

**Australian Competition and Consumer Commission** being a body corporate established under section 6A of the *Trade Practices Act 1974* (Cth) (**ACCC**)

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## Background

- A The Port Operator operates the Port Terminal Facilities.
- B The Port Terminal Facilities provide services relating to the export of Bulk Wheat and other commodities.
- C The Port Operator has historically provided access to services provided by the Port Terminal Facilities to third parties under open access policies.
- D The Port Operator or its Related Body Corporate has applied to become an Accredited Wheat Exporter under the *Wheat Export Marketing Act 2008* (Cth).
- E Under section 24 of the WEMA, a person who is also the provider of one or more port terminal services (as defined under that Act) must satisfy the 'access test' to be eligible for accreditation to export bulk wheat.
- F The 'access test' under the WEMA requires:
  - (a) the person to comply with the Continuous Disclosure Rules in relation to a port terminal service; and
  - (b) either there is:
    - (i) an access undertaking in operation (under Division 6 Part IIIA of the *Trade Practices Act 1974*) relating to the provision to Accredited Wheat Exporters of access to the port terminal service for purposes relating to export of Bulk Wheat; or
    - (ii) a decision in force that a regime established by a State or Territory for access to the port terminal service is an effective access regime (under Division 2A Part IIIA of the TPA) and under that regime Accredited Wheat Exporters have access to the port terminal service for purposes relating to the export of Bulk Wheat.

- G The Port Operator has submitted this Undertaking to the ACCC for approval under Part IIIA of the TPA for the purpose of satisfying the 'access test'.
- 

## Agreed terms

### 1 Interpretation

#### 1.1 Definitions

In this Undertaking unless the context otherwise requires:

**Access Agreement** means an agreement containing provisions requiring the Port Operator to supply Port Terminal Services to a party, whether made before, on or after the Commencement Date.

**Access Agreement Variation** is defined in **clause 4.3(a)**.

**Access Application** is defined in **clause 7.3(a)**.

**Accredited Wheat Exporter** means a person having accreditation as an accredited wheat exporter under the WEAS.

**Applicant** means the person seeking access to Port Terminal Services under **clause 7**.

**Auction Rules** means the Auction Rules set out in **Schedule 1** to the Port Terminal Rules (or as varied under **clause 10.2**).

**Bulk Wheat** means wheat for export from Australia other than wheat that is exported in a bag or a container that is capable of holding not more than 50 tonnes of wheat.

**Business Day** means a day which is not a Saturday, Sunday or public or bank holiday in Western Australia.

**Commencement Date** means the date specified in **clause 4.1**.

**Competition Principles Agreement** means the agreement entered into by the Commonwealth of Australia and each State and Territory of Australia in 1995 to implement the national competition policy of Australia.

**Confidential Information** means information of the Port Operator or an Applicant or a User (or any of their nominated representatives) in relation to the business of any of those persons that:

- (a) is by its nature confidential;
- (b) is specified to be confidential by the person who supplied it; or
- (c) is known, or ought to be known, by a person using or supplying it to be confidential or commercially valuable;

but excludes information that:

- (d) is comprised solely of the name, address and contact details of a person; or
- (e) was in the public domain at the time when it was supplied; or
- (f) subsequently becomes available other than through a breach of confidence or breach of this Undertaking; or
- (g) was in lawful possession of the recipient of the information prior to being provided by the other party; or
- (h) must be disclosed by law, including under the Continuous Disclosure Rules under the WEMA; or
- (i) ceases to be confidential in nature by any other lawful means.

**Continuous Disclosure Rules** means the continuous disclosure rules as defined in subsection 24(4) of the WEMA.

**Credit Support** means either:

- (a) a Parent Guarantee; or
- (b) Security.

**Dispute** means a dispute between an Applicant and the Port Operator in relation to access to the Port Terminal Services under this Undertaking and includes disputes arising in the course of the negotiation process in **clause 7** but does not include disputes in relation to an executed Access Agreement.

**Dispute Notice** is defined in **clause 8.1(b)**.

**Eligibility Requirements** means the requirements prescribed in **clauses 7.4(a)(iii) to 7.4(a)(vi)**.

**Effective Date** is defined in **clause 10.3(a)(vi)**.

**Exceptional Circumstances** means 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.

**Exceptional Circumstances Variation Notice** is defined in **clause 10.4(a)**.

**Government Agency** means any applicable Western Australian or Australian Federal Government department, authority, instrumentality or agency having jurisdiction in respect of any matter affected by this Undertaking.

**IAMA** is defined in **clause 8.3(a)(i)**.

**Legislative Requirements** means present and future obligations arising under:

- (a) applicable laws, statutes, regulations, by-laws, orders, ordinances, proclamations and decrees;
- (b) any binding requirement, instruction, direction or order of a Government Agency.

**Material Default** means any breach of a fundamental or essential term, or repeated breaches of any of the terms of:

- (a) an Access Agreement; or
- (b) any agreement for the provision of services by the Port Operator.

**Negotiation Period** is defined in **clause 7.6(c)**.

**Parent Guarantee** means a guarantee given by a Related Body Corporate of the Applicant or User who has an investment grade credit rating or is otherwise acceptable to the Port Operator (acting reasonably).

**Port** means the ports of:

- (a) Albany;
- (b) Esperance;
- (c) Geraldton; and
- (d) Kwinana.

**Port Schedules** means **schedules 4 to 7**.

**Port Terminal Facility** is defined in **clause 5.2(a)**.

**Port Terminal Rules** means the rules, policies and procedures in **Schedule 3** (or as varied under **clause 10.2**) and includes the Auction Rules.

**Port Terminal Services** is defined in **clause 5.1**.

**Price and Non-Price Terms Documents** is defined in **clause 6.1(a)**.

**PTR Variation Notice** is defined in **clause 10.3(a)**.

**PTSA** means the standard terms and conditions for the supply of Port Terminal Services by the Port Operator.

**Related Body Corporate** has the meaning given to Related Body Corporate in the *Corporations Act 2001* (Cth).

**Season** means the period between 1 October of one year and the next 30 September.

**Security** means an unconditional and irrevocable bank guarantee, letter of credit, performance or insurance bond issued by a bank holding an Australian banking licence or such other reputable person or institution accepted by the Port Operator and which is in a form reasonably satisfactory to the Port Operator.

**Solvent** means that, in the last five years:

- (a) the Applicant has been able to pay all its debts as and when they become due and has not failed to comply with a statutory demand under section 459F(1) of the *Corporations Act 2001* (Cth);
- (b) a meeting has not been convened to place the Applicant in voluntary liquidation or to appoint an administrator;



- (c) an application has not been made to a court for the Applicant to be wound up without that application being dismissed within one month;
- (d) a controller (as defined in the *Corporations Act 2001* (Cth)) of any of the Applicant's assets has not been appointed; or
- (e) the Applicant has not proposed to enter into or entered into any form of arrangement with its creditors or any of them, including a deed of company arrangement.

**TPA** means the *Trade Practices Act 1974* (Cth).

**Trading Business** means a:

- (a) business unit or division of the Port Operator; or
- (b) Related Body Corporate of the Port Operator, or any business unit or division of the Related Body Corporate,

which has responsibility for the trading and marketing of Bulk Wheat, and includes Grain Pool Pty Ltd and Agracorp Pty Ltd.

**User** means a party being supplied with, or with a right to be supplied with, Port Terminal Services under an Access Agreement.

**Varied Terms of Access** is defined in **clause 4.3(d)**.

**WEAS** means the Wheat Export Accreditation Scheme 2008.

**WEMA** means the *Wheat Export Marketing Act 2008* (Cth).

## 1.2 Interpretation

In this Undertaking, unless the context otherwise requires:

- (a) singular words will also have their plural meaning and vice versa;
- (b) a reference to a person includes companies and associations;
- (c) a reference to a consent of a party means the prior written consent of that party;
- (d) headings are for convenient reference only and do not affect the interpretation of this Undertaking;
- (e) a reference to a clause or a schedule is a reference to a clause, or schedule of this Undertaking;
- (f) a reference to an item in a schedule is a reference to the items in that schedule;
- (g) a reference to a party includes its successors and permitted assigns;
- (h) notices that are required to be given in writing to Port Operator may, if so agreed by Port Operator, be provided in electronic form;
- (i) a reference to any Act includes all statutes, regulations, codes, by-laws or ordinances and any notice, demand, order, direction, requirement or obligation under that Act (and vice versa) and unless otherwise provided in that Act includes all consolidations, amendments, re-enactments or

- replacements from time to time of that Act and a reference to "law" includes a reference to any Act and the common law;
- (j) the words "including", "for example" or "such as" when introducing an example, does not limit the meaning of the words to which the example relates to that example or examples of a similar kind; and
  - (k) a reference to \$ and dollars is to Australian currency.

## 2 Objectives

This Undertaking has the following objectives:

- (a) providing a framework to manage negotiations with Applicants for access to services provided by the Port Terminal Facilities in relation to the export of Bulk Wheat;
- (b) establishing a workable, transparent, non-discriminatory and efficient process for lodging and processing Access Applications;
- (c) providing a non-discriminatory approach to pricing under which the Port Operator publishes reference prices and terms and conditions for the provision of certain standard services annually;
- (d) operating consistently with the objectives and principles in Part IIIA of the TPA and the Competition Principles Agreement;
- (e) reaching an appropriate balance between:
  - (i) the legitimate business interests of the Port Operator, including:
    - (A) the recovery of efficient costs associated with the granting of access to the Port Terminal Services;
    - (B) a fair and reasonable return on the Port Operator's investment in the Port Terminal Facility commensurate with its commercial risk;
    - (C) the Port Operator's business interests relating to the export of grain other than Bulk Wheat and to the export of non-grain commodities using the Port Terminal Facilities; and
  - (ii) the interest of the public, including:
    - (A) ensuring efficient use of resources; and
    - (B) the promotion of economically efficient investment, use and operation of the Port Terminal Facilities; and
  - (iii) the interests of Applicants wanting access to the Port Terminal Services, including providing access to the Port Terminal Services:
    - (A) on non-discriminatory price and non-price terms; and
    - (B) in a transparent, open, efficient and non-discriminatory manner;

- (f) providing an efficient, effective and binding resolution process in the event that the Port Operator and the Applicant are unable to negotiate a mutually acceptable Access Agreement; and
- (g) in accordance with the objective in s44AA(b) of the TPA, providing for a uniform approach to access to the Port Terminal Services at the different Port Terminal Facilities to the extent practicable having regard to the different characteristics of the Port Terminal Facilities.

## 3 Structure

### 3.1 Components

This Undertaking comprises this document (including all schedules) which apply to Port Terminal Services provided by means of each Port Terminal Facility and apply only to Port Terminal Services provided by means of that particular Port Terminal Facility.

### 3.2 Obligation to procure

If the performance of an obligation under this Undertaking requires a Related Body Corporate of the Port Operator to take some action or refrain from taking some action, the Port Operator shall procure that Related Body Corporate to take that action or refrain from taking that action.

## 4 Term and variation

### 4.1 Commencement Date

The Commencement Date for the purposes of section 24 of the WEMA is 1 October 2009 and the Port Operator will comply with this Undertaking on and from that date.

### 4.2 Expiry

This Undertaking expires on the earlier of:

- (a) 30 September 2011; or
- (b) the day the ACCC consents to the Port Operator withdrawing this Undertaking in accordance with Part IIIA of the TPA.

### 4.3 Variation of Access Agreements

- (a) A User or the Port Operator may seek a variation to the provisions of an Access Agreement relating to the supply of Port Terminal Services (**Access Agreement Variation**).
- (b) A User's request for an Access Agreement Variation will be dealt with as a new application for access to the Port Terminal Services, to which the process in this Undertaking will apply.

- (c) The Port Operator's request for an Access Agreement Variation will be dealt with as a request for negotiation of an Access Agreement and the provisions of **clause 7.6** shall apply.
- (d) Upon the Port Operator and the User agreeing the terms of the Access Agreement Variation (**Varied Terms of Access**), the provisions of the Access Agreement relating to the supply of Port Terminal Services will be replaced by the Varied Terms of Access.
- (e) Until the Port Operator and the User agree the Varied Terms of Access, the provisions of the Access Agreement relating to the supply of Port Terminal Services will continue to apply.

## 5 Scope

### 5.1 Meaning of Port Terminal Services

**Port Terminal Services** means the services provided by means of the Port Terminal Facilities which enable an Accredited Wheat Exporter to export Bulk Wheat through the Port Terminal Facilities, including:

- (a) 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;
- (b) sampling by the Port Operator of a User's Bulk Wheat received and out-turned, to check for visible evidence of the presence of chemical residue, insect activity and live insects or other contaminants, and providing the User with a composite shipping sample of the User's Bulk Wheat;
- (c) weighing by the Port Operator of a User's Bulk Wheat received and out-turned, 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;
- (d) 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; and
- (e) fumigation in response to evidence of insect infestation;
- (f) accumulating and assembling Bulk Wheat for the purpose of loading cargo onto a vessel scheduled to arrive at the Port Terminal Facility;
- (g) administrative and logistics services required for shipping nomination, acceptance, booking and cancellation;
- (h) access to inspectors from the Australian Quarantine and Inspection Service, for inspection of the User's Bulk Wheat received and held at the Port Terminal Facilities; and
- (i) out-turning by the Port Operator of a User's Bulk Wheat received at the Port Terminal Facility, and loading onto the User's nominated vessel.

## 5.2 Meaning of Port Terminal Facility

- (a) **Port Terminal Facility** means a ship loader and associated infrastructure that is:
- (i) at a Port;
  - (ii) capable of handling Bulk Wheat; and
  - (iii) owned, operated and controlled by the Port Operator, including:
    - (iv) an intake/receival facility;
    - (v) a grain storage facility;
    - (vi) a weighing facility; and
    - (vii) a shipping belt;
- that is:
- (viii) at the port; and
  - (ix) associated with the ship loader; and
  - (x) capable of dealing with wheat in bulk.
- (b) The Port Terminal Facilities at each Port include those described in the Port Schedules.

## 5.3 What this Undertaking does not cover

This Undertaking does not apply:

- (a) to access to services in relation to Bulk Wheat provided by the Port Operator which are not Port Terminal Services; or
- (b) in relation to facilities owned by the Port Operator which are not Port Terminal Facilities, such as up country receival and accumulation facilities; or
- (c) to fumigation of grain by the Port Operator as a preventative measure; or
- (d) to the transportation by the Port Operator of Bulk Wheat to port; or
- (e) to grains which are not wheat; or
- (f) to wheat which is not Bulk Wheat.

## 5.4 Obligation to offer access

- (a) The Port Operator must offer access to the Port Terminal Services in accordance with the provisions of this Undertaking.
- (b) Access is available by means of the following obligations:
  - (i) If required to do so by an eligible Applicant in accordance with **clause 7.5(a)**, the Port Operator is obliged by **clause 7.5(a)** to execute an Access Agreement in the form of the Price and Non-Price Terms Documents;

- (ii) If required to do so by an eligible Applicant in accordance with **clause 7.5(b)**, the Port Operator is obliged by **clause 7.5(b)** to negotiate in good faith under the process in **clause 7.6** for terms that differ from the Price and Non-Price Terms Documents; and
- (iii) Disputes may be referred to arbitration under **clause 8**.

## 6 Price and non-price terms

### 6.1 Obligation to publish price and non-price 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 (and provide a copy to the ACCC within two Business Days of publication):
  - (i) a single set of reference prices; and
  - (ii) the PTSA,  
which will apply to access to the Port Terminal Services for the Season commencing in that year (together the **Price and Non-Price Terms Documents**).
- (b) For the first year of term of this Undertaking, the Port Operator must publish the Price and Non-Price Terms on its website (and provide a copy to the ACCC) within three Business Days of the Commencement Date.
- (c) The Price and Non-Price Terms Documents must be consistent with **clause 6.2** and the objectives set out in **clause 2**.
- (d) **Schedule 2** sets out an indicative PTSA for the term of this Undertaking.

### 6.2 Non-discriminatory access

- (a) Subject to **clause 6.2(b)**, in providing access to the Port Terminal Services, 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 Applicants' or Users' Bulk Wheat.
- (b) The Port Operator shall not be in breach of its obligation under **clause 6.2(a)** where, in providing access to the Port Terminal Services, the Port Operator differentiates between different Applicants or Users (including its own Trading Division) on the basis that the cost of providing access to an Applicant or User is higher than the cost of providing access to other Applicants or Users.

### 6.3 Audit

- (a) During the term of this Undertaking, the ACCC may by notice in writing require the Port Operator to appoint an Auditor to provide a report in relation to the Port Operator's compliance with **clause 6.2**. If the ACCC

requires the Port Operator to appoint an Auditor, the provisions set out in **Schedule 8** will apply.

- (b) The ACCC may authorise a Member of the ACCC to exercise any powers under **clause 6.3(a)** of this Undertaking on behalf of the ACCC.

## 7 Application and negotiating for access

### 7.1 Framework

- (a) This **clause 7** outlines the process to be followed for an Applicant to gain access to the Port Terminal Services. It provides for:
  - (i) **Preliminary inquiry:** requests by the Applicant for information to enable an Access Application to be lodged;
  - (ii) **Access Application:** submission of an Access Application by the Applicant;
  - (iii) **Standard Access Agreements:** procedure where the Applicant wants the Port Terminal Services under the Price and Non-Price Terms Documents; and
  - (iv) **Negotiation:** negotiations where an Applicant wants the Port Terminal Services under terms other than the Price and Non-Price Terms Documents.
- (b) For the avoidance of doubt, if a Dispute arises at any time during the processes described in **clauses 7.2, 7.3 and 7.6**, either party may seek to resolve the Dispute in accordance with the process described in **clause 8.4**.

### 7.2 Preliminary inquiry

- (a) An Applicant may request the Port Operator to provide information reasonably required by the Applicant to formulate and lodge its application for access to the Port Terminal Services.
- (b) Within five Business Days of receiving a request for information under **clause 7.2(a)**, the Port Operator must, subject to **clause 7.2(c)**, provide the Applicant with the requested information.
- (c) In responding to a request for information under **clause 7.2(a)**, the Port Operator is not required to disclose any Confidential Information.
- (d) Before submitting an Access Application under **clause 7.3(a)**, an Applicant may give written notice to the Port Operator requesting a preliminary meeting to:
  - (i) seek clarification of the processes described in this **clause 7.2** and **clauses 7.3 and 7.6**, particularly the required form of the proposed Access Application under **schedule 1**; and
  - (ii) discuss the proposed Access Application.

- (e) The Port Operator must be available to meet with the Applicant within five Business Days of receiving a notice under **clause 7.2(d)**.

### **7.3 Access Application**

- (a) An Applicant's request for access to the Port Terminal Services must be submitted to the Port Operator in the form prescribed in **schedule 1 (Access Application)**.
- (b) Within two Business Days of receiving an Access Application, the Port Operator must provide the Applicant with written notice:
  - (i) acknowledging receipt of the Access Application and confirming that it contains sufficient information to enable the Port Operator to consider the Access Application; or
  - (ii) acknowledging receipt of the Access Application and requiring the Applicant to provide the Port Operator with such:
    - (A) additional information; and
    - (B) clarification of any information provided in the Access Application,as is reasonably necessary for the Port Operator to consider the Access Application.
- (c) Within five Business Days of receiving a notice under **clause 7.3(b)(ii)**, the Applicant must provide the requested additional information or clarification.
- (d) Within two Business Days of receiving the additional information or clarification under **clause 7.3(c)**, the Port Operator must provide the Applicant with written notice confirming whether the additional information or clarification enables the Port Operator to consider the Access Application.
- (e) If the additional information or clarification is insufficient to enable the Port Operator to consider the Access Application, the process in **clauses 7.3(b)(ii) and 7.3(c)** and this **clause 7.3(d)** will be repeated until:
  - (i) the Applicant provides the information and clarifications required to enable the Port Operator to consider the Access Application; or
  - (ii) the Applicant or the Port Operator serves a Dispute Notice in relation to the Access Application; or
  - (iii) the Applicant withdraws the Access Application.

### **7.4 Eligibility**

- (a) The Port Operator's obligation to:
  - (i) negotiate with an Applicant under this Undertaking; and
  - (ii) enter into an Access Agreement,



is subject to the Applicant demonstrating, within seven Business Days of a written request by the Port Operator and to the Port Operator's reasonable satisfaction, that:

- (iii) the Applicant is Solvent;
- (iv) the Applicant and its Related Bodies Corporate are not currently in, and in the previous two years have not been in, Material Default;
- (v) the Applicant:
  - (A) has a legal ownership structure with a sufficient capital base and assets of value to meet the actual or potential liabilities under an Access Agreement, including the ability to pay access charges and insurance premiums when they fall due; or
  - (B) provides Credit Support;
- (vi) the Applicant is an Accredited Wheat Exporter; and
- (b) The Port Operator may give a written request to the Applicant to demonstrate that it satisfies the Eligibility Requirements:
  - (i) within five Business Days of the Port Operator receiving the Applicant's Access Application; and
  - (ii) after that time, within five Business Days of the Port Operator becoming aware of any credible grounds which give rise to a reasonable assumption that the Applicant may no longer satisfy the Eligibility Requirements.
- (c) the following information may be regarded as sufficient evidence of solvency for the purpose of this clause:
  - (i) the information required to be provided on a CBH credit application form; and
  - (ii) the Applicant's audited financial statements for the last financial year, including an audited statement of profit and loss and an audited statement of assets and liabilities; and
  - (iii) credit check from an independent credit reporting agency.
- (d) If the Port Operator decides that under this Undertaking it is entitled to refuse or cease to negotiate with the Applicant for any reason, including because the Applicant fails or ceases to satisfy the Eligibility Requirements, within two Business Days of that decision the Port Operator must give written notice of that fact to the Applicant, including the reasons for its decision.
- (e) If after receiving a notice under **clause 7.4(d)** the Applicant disagrees that the Port Operator is entitled under this Undertaking to refuse or cease to negotiate with the Applicant, then that matter will constitute a Dispute and the Applicant may within ten Business Days of receiving the notice refer the Dispute to arbitration under **clause 8.4**. Subject to any other directions by the arbitrator, if the arbitrator determines that the Port

Operator is not entitled under this Undertaking to refuse or cease to negotiate with the Applicant:

- (i) the Port Operator must commence or recommence negotiations immediately; and
- (ii) where the Negotiation Period had commenced before the Port Operator ceased negotiations, the Negotiation Period will be deemed to have been suspended from the date of cessation until the date of the arbitrator's determination.

## **7.5 Standard Access Agreement**

- (a) If an eligible Applicant requires the Port Terminal Services to be provided under the terms offered in the Price and Non-Price Terms Documents, then:
  - (i) when the Applicant submits its Access Application, or at any time after submitting its Access Application, the Applicant may give the Port Operator written notice of that fact; and
  - (ii) within five Business Days of the Port Operator receiving a notice under **clause 7.5(a)(i)**, the Port Operator and the Applicant must execute an Access Agreement in the form of the Price and Non-Price Terms Documents.
- (b) If an eligible Applicant requires the Port Terminal Services to be provided under terms other than those offered in the Price and Non-Price Terms Documents, then the Port Operator and the Applicant must comply with the negotiation procedures and arbitration procedures (if required) under **clause 7.6**.

## **7.6 Negotiation of Access Agreement**

- (a) This **clause 7.6** applies only when:
  - (i) the eligible Applicant requires the Port Terminal Services to be provided under terms other than those offered in the Price and Non-Price Terms Documents; or
  - (ii) the Port Operator seeks an Access Agreement Variation under the provisions of **clause 4.3**.
- (b) Each of the Port Operator and the eligible Applicant must negotiate for the Applicant's access to the Port Terminal Services or the Port Operator's request for an Access Agreement Variation in good faith and in accordance with this **clause 7.6**.
- (c) The period during which the Port Operator and the eligible Applicant must negotiate the Applicant's Access Application or the Port Operator's request for an Access Agreement Variation (**Negotiation Period**):
  - (i) commences on the later date of:
    - (A) a notice under **clause 7.3(b)(i)**;

- (B) a notice under **clause 7.3(d)** confirming that the additional information or clarification provided by the eligible Applicant enables the Port Operator to consider the Access Application; or
  - (C) a request for an Access Agreement Variation by the Port Operator under **clause 4.3** and
- (ii) ceases upon any of the following events:
- (A) execution of an Access Agreement in respect of the Access Application or execution of Varied Terms of Access in respect of an Access Agreement Variation;
  - (B) written notification by the Applicant that it no longer wishes to proceed with its Access Application;
  - (C) written notification by the Port Operator that it no longer wishes to proceed with an Access Agreement Variation; or
  - (D) the expiration of three months from the commencement of the Negotiation Period, or if both parties agree to extend the Negotiation Period, then the expiration of the agreed extended period.
- (d) Subject to **clause 7.6(e)**, upon cessation of the Negotiation Period the obligation of the parties to negotiate will cease.
- (e) Without limiting the definition of Dispute
- (i) if the eligible Applicant has complied with **clause 7.6(b)** throughout the Negotiation Period but the parties do not execute an Access Agreement before the conclusion of the Negotiation Period; or
  - (ii) if the Port Operator has complied with **clause 7.6(b)** throughout the Negotiation Period but the parties do not execute Varied Terms of Access before the conclusion of the Negotiation Period
- that matter will constitute a Dispute which either the Port Operator or the Applicant may refer to arbitration under **clause 8.4**.

## 8 Dispute resolution

### 8.1 Disputes

- (a) Any Dispute shall, unless otherwise expressly agreed by both parties, be resolved in accordance with this **clause 8**.
- (b) Either party may give to the other party to the Dispute a notice in writing (**Dispute Notice**) specifying the Dispute and requiring it to be dealt with in the manner set out in this **clause 8**. The parties acting in good faith shall attempt to resolve the Dispute as soon as is practicable.
- (c) Any disputes in relation to an executed Access Agreement will be dealt with in accordance with the provisions of that Access Agreement.

- (d) The Port Operator will by 31 July of each year provide a report to the ACCC on any disputes in relation to an Access Agreement and any Disputes in the preceding 12 months (except for the first year in which case the report will apply to the period from the commencement of this Undertaking) including the details of any resolutions and the status of unresolved matters.

## **8.2 Negotiation**

Within five Business Days of a party giving the other party a Dispute Notice, senior representatives from each party will meet and negotiate in good faith to resolve the Dispute.

## **8.3 Mediation**

- (a) If the Dispute is not resolved under **clause 8.2** within five Business Days after the date of the Dispute Notice then:
  - (i) if the parties agree, they will attempt to resolve the Dispute by formal mediation conducted by a mediator appointed by agreement between the parties or as appointed by the President of the Western Australian Chapter of the Institute of Arbitrators and Mediators of Australia (**IAMA**); or
  - (ii) if the parties do not agree to resolve the Dispute by mediation, either party may by notice in writing to the other refer the Dispute to be determined by arbitration under **clause 8.4**.
- (b) Unless the parties agree otherwise:
  - (i) any mediation will be conducted by a mediator under the IAMA Mediation Rules (whether or not the mediator is a legal practitioner);
  - (ii) any mediation shall be conducted within ten Business Days of the appointment of the mediator;
  - (iii) each party may appoint a person, including a legally qualified person to represent it or assist it in a mediation;
  - (iv) each party will bear their own costs relating to the preparation for and attendance at a mediation; and
  - (v) the costs of the mediator will be borne equally by the parties.

## **8.4 Referral to arbitration**

- (a) If the Dispute is not resolved under **clause 8.2** either party may by notice in writing to the other party and to the mediator terminate any mediation proceedings and give notice that the Dispute must be referred to arbitration under this **clause 8.4**.
- (b) Where a Dispute is referred to arbitration, it shall be referred to the ACCC at the address specified in **clause 11(c)** in the first instance.
- (c) Upon referral to the ACCC of the Dispute:

- (i) within five Business Days of receipt of the referral notice, the ACCC may give notice to the parties as to whether the Dispute shall be arbitrated by the ACCC or referred to a private arbitrator; and
  - (ii) if the ACCC does not give a notice under **clause 8.4(c)(i)**, the ACCC will be deemed to have given notice to the parties confirming that the Dispute be referred to a private arbitrator.
- (d) The ACCC may authorise a member to exercise the power to:
- (i) determine whether a Dispute shall be arbitrated by the ACCC or referred to a private arbitrator; and
  - (ii) give a notice under **clause 8.4(c)(i)**.
- (e) Where the ACCC determines that it shall conduct the arbitration such arbitration shall be conducted by the ACCC in accordance with the arbitration provisions of Part IIIA of the TPA.
- (f) Where either party serves notice under **clause 8.4(a)**, that notice will include:
- (i) the contact details for the parties to the dispute;
  - (ii) whether the parties have agreed or are likely to agree upon a private arbitrator if the ACCC does not arbitrate the dispute; and
  - (iii) an agreement by that party in the case of referral by the ACCC of the Dispute to a private arbitrator to:
    - (A) pay any amounts determined in accordance with **clause 8.9**; and
    - (B) indemnify the private arbitrator from any claims made against the private arbitrator arising in connection with the performance by the private arbitrator of its duties, such indemnity excluding circumstances where the conduct of the private arbitrator constitutes wilful negligence, or is dishonest or unlawful conduct.

## **8.5 Arbitration procedure – private arbitrator**

- (a) If a Dispute is referred to a private arbitrator, the parties shall attempt to agree upon a suitably qualified person to act as arbitrator.
- (b) If the parties fail to agree an arbitrator within ten Business Days of the ACCC giving a notice under **clause 8.4(c)(i)** referring the Dispute to a private arbitration, or the ACCC being deemed to give a notice under **clause 8.4(c)(ii)**, either party may request the President of the Western Australian Chapter of the IAMA to appoint an arbitrator, such appointment to be made within five Business Days of the request to IAMA.

- (c) Subject to the involvement of, and disclosures to, the ACCC, unless the Port Operator and the Applicant agree otherwise, the arbitration by a private arbitrator must be conducted in private.
- (d) A party may appoint a person, including a legally qualified person, to represent it or assist it in the arbitration.
- (e) The private arbitrator will, when conducting the arbitration:
  - (i) keep the ACCC informed of the progress of the arbitration, including timelines and processes for making submissions;
  - (ii) observe the rules of natural justice but is not required to observe the rules of evidence;
  - (iii) proceed as quickly as is possible and consistent with a fair and proper assessment of the matter;
  - (iv) while having the right to decide on the form of presentations, encourage a written presentation by each party with exchange and with rebuttal opportunities and questioning by the private arbitrator;
  - (v) call on any party the private arbitrator believes necessary to give evidence;
  - (vi) permit the ACCC, on its request, to make submissions to the private arbitrator on matters relevant to the Dispute;
  - (vii) decide how to receive evidence and consider the need to keep evidence confidential and the need to protect the confidentiality of the arbitration process;
  - (viii) present its determination in a draft form to the parties and hear argument from the parties before making a final determination;
  - (ix) hand down a final determination in writing which includes all its reasons for making the determination and findings on material questions of law and fact, including references to evidence on which the findings of fact were based; and
  - (x) provide a copy of the final determination to the ACCC at the time of handing down the final determination.
- (f) The private arbitrator may at any time terminate arbitration (without making an award) if it thinks that:
  - (i) the notification of the Dispute is vexatious;
  - (ii) the subject matter of the Dispute is trivial, misconceived or lacking in substance; or
  - (iii) the party who notified the Dispute has not engaged in negotiations in good faith.

## **8.6 Matters which private arbitrator must take into account**

- (a) In deciding a Dispute the private arbitrator will take into account:

- (i) the principles, methodologies and provisions set out in this Undertaking;
  - (ii) the provisions of Part IIIA of the TPA;
  - (iii) any relevant guidelines published by the ACCC;
  - (iv) any submissions provided by the ACCC; and
  - (v) any other matters that the private arbitrator thinks are appropriate to have regard to.
- (b) In making its determination, the arbitrator:
- (i) may deal with any matters referred to in section 44V of the TPA;
  - (ii) will not make a determination that would have any of the effects described in section 44W of the TPA; and
  - (iii) will take into account the matters referred to in section 44X of the TPA.

## **8.7 Confidentiality – private arbitration**

- (a) The private arbitrator must take all reasonable steps to protect the confidentiality of information that a party has identified is confidential or commercially sensitive.
- (b) The private arbitrator may require the parties to comply with rules and orders aimed at protecting the confidentiality of information provided by the parties, including:
  - (i) requiring each party to give confidentiality undertakings to the other party and their external advisers; and
  - (ii) limiting access to confidential information to specified individuals subject to confidentiality undertakings provided by those individuals.
- (c) The private arbitrator may make confidential and non-confidential versions of its determination and limit access to the confidential versions to specific individuals.
- (d) For the purpose of clarity, save for an arbitration conducted by the ACCC pursuant to **clause 8.4(d)** the entire dispute resolution process outlined in this **clause 8** is subject to **clause 9**.
- (e) Nothing in this **clause 8.7** shall prevent a private arbitrator from, or limit the extent to which a private arbitrator may, provide information to the ACCC.

## **8.8 Effect of private arbitrator's determination**

- (a) The determination of the private arbitrator will be final and binding subject, to any rights of review by a court of law.
- (b) Except where the determination or direction is subject to a review by a court of law, if an Applicant does not comply with a determination or direction of the private arbitrator, then the Port Operator will no longer be

obliged to continue negotiations regarding the provision of access for that Applicant.

- (c) Except where the determination or direction is subject to a review by a court of law, the Port Operator will comply with the lawful directions or determinations of the private arbitrator.

### **8.9 Private Arbitrator's costs**

The private arbitrator's costs and the costs of the parties to the arbitration will be borne by the parties in such proportions as the private arbitrator determines. Each party may make submissions to the private arbitrator on the issue of costs at any time prior to that determination.

### **8.10 Backdating of arbitration determination**

The ACCC and a private arbitrator shall have the discretion to determine that an arbitration determination shall take effect from the:

- (a) date of the Determination; or
- (b) date on which the Dispute Notice was served; or
- (c) date on which the relevant Access Application was submitted.

## **9 Confidentiality**

- (a) Subject to **clause 9(b)**, if a party provides Confidential Information to the other party as part of the negotiation or dispute resolution or arbitration processes under this Undertaking, the receiver of the Confidential Information will treat that Confidential Information as secret and confidential and the property solely of the provider of the Confidential Information and not use that Confidential Information for any purpose other than that which the provisions of this Undertaking allow.
- (b) A party is permitted to disclose Confidential Information to the extent necessary for the provision of information:
  - (i) to a mediator or arbitrator or to the ACCC as provided for under the provisions of this Undertaking; and
  - (ii) for the purposes of advice from legal advisors, financiers, accountants or other consultants (provided they are under a legal obligation not to disclose the Confidential Information to any third party).
- (c) Nothing in this **clause 9** shall prevent a party or a private arbitrator from, or limit the extent to which a party or a private arbitrator may, provide information to the ACCC.



## 10 Capacity management

### 10.1 Compliance with Port Terminal Rules

- (a) The Port Operator must comply with the Port Terminal Rules when providing or accessing the Port Terminal Services under an Access Agreement.
- (b) The Port Operator may require that Applicants agree to comply with the Port Terminal Rules as a condition of acquiring Port Terminal Services.
- (c) The Port Operator must publish the Port Terminal Rules on its website.

### 10.2 Variation of Port Terminal Rules

The Port Terminal Rules may be varied by the Port Operator provided that:

- (a) the variation is consistent with this Undertaking and in particular **clauses 6.2 and 10.6**;
- (b) the Port Operator has followed the process in **clause 10.3 or 10.4** in relation to the variation; and
- (c) the Port Terminal Rules must include an expeditious dispute resolution mechanism for dealing with disputes over compliance with the Port Terminal Rules or the Auction Rules.

### 10.3 Variation following notice and consultation

In order to vary the Port Terminal Rules for any reason other than Exceptional Circumstances, the Port Operator must:

- (a) publish a notice (**PTR Variation Notice**) on the Port Operator's website containing or annexing the following:
  - (i) a copy of the relevant part of the Port Terminal Rules with the proposed variation shown in mark-up;
  - (ii) the Port Operator's reasons for the variation;
  - (iii) a request that interested parties provide written responses in relation to the proposed changes;
  - (iv) a contact name and address for written responses to be addressed to the Port Operator, with a response closing date of no less than five Business Days of the date of publication of the PTR Variation Notice;
  - (v) a timetable including dates, times and venues for consultation meetings to be held, including by way of telephone conference , within a period of not less than ten and not more than 15 Business Days of the date of publication of the PTR Variation Notice; and
  - (vi) the proposed date on which the variation is proposed to take effect (**Effective Date**), which must be no less than 25 Business Days after publication of the PTR Variation Notice;

- (b) send copies of the PTR Variation Notice to all Users and the ACCC within one Business Day of publication of the PTR Variation Notice;
- (c) publish copies of all non-confidential responses received on the Port Operator's website and provide copies to all Users and the ACCC within one Business Day of receipt of each response;
- (d) if requested to do so by any User or the ACCC, conduct a meeting to discuss the proposed variation with interested parties;
- (e) review and consider in good faith any written responses and discussions with Users and the ACCC in relation to the proposed changes;
- (f) no less than 20 Business Days after publication of the PTR Variation Notice, publish on its website a statement withdrawing or confirming the proposed PTR Variation Notice; and
- (g) if the Port Operator proposes to amend a PTR Variation Notice, it must re-commence the variation process in this clause.

#### 10.4 Variation in Exceptional Circumstances

In Exceptional Circumstances, the Port Operator may vary the Port Terminal Rules on two Business Days notice, provided that the Port Operator must:

- (a) publish a notice (**Exceptional Circumstances Variation Notice**) on the Port Operator's website containing or annexing the following:
  - (i) a copy of the relevant part of the Port Terminal Rules with the proposed variation shown in mark-up;
  - (ii) the Port Operator's reasons for the variation, including the facts and matters that establish the existence of Exceptional Circumstances;
  - (iii) a request that interested parties provide written responses in relation to the proposed changes;
  - (iv) a contact name and address for written responses to be addressed to the Port Operator;
  - (v) the proposed Effective Date, which must be no less than two Business Days of publication of the Exceptional Circumstances Variation Notice;
- (b) send copies of the Exceptional Circumstances Variation Notice to all Users and the ACCC within one Business Day of publication of the Exceptional Circumstances Variation Notice;
- (c) publish copies of all non-confidential responses received on the Port Operator's website within one Business Day of receipt of each response;
- (d) review and consider in good faith any responses received in relation to the proposed changes; and
- (e) if the Port Operator proposes to amend the Exceptional Circumstances Variation Notice, re-commence the variation process in this clause.

## 10.5 Transitional measures

- (a) All activities performed in accordance with the Port Terminal Rules prior to the Effective Date of any variation shall remain valid notwithstanding any subsequent variation of the Port Terminal Rules.
- (b) The nomination of vessels in accordance with the Port Terminal Rules shall be governed in accordance with the Port Terminal Rules published at the time of nomination notwithstanding any subsequent variation of the Port Terminal Rules unless the User and the Port Operator agree otherwise.
- (c) Vessels nominated after the Effective Date of any variation of the Port Terminal Rules will be required to be nominated under the Port Terminal Rules as varied.

## 10.6 No hindering

- (a) The Port Operator and its Related Bodies Corporate must not engage in conduct for the purpose of preventing or hindering access to the Port Terminal Services by an Applicant or User.
- (b) A person may be taken to have engaged in conduct for the purpose referred to in **clause 10.6 (a)** even though, after all the evidence has been considered, the existence of that purpose is ascertainable only by inference from the conduct of the person or from other relevant circumstances. This clause does not limit the manner in which the purpose of a person may be established.

## 11 Contact details

- (a) Persons wishing to contact the Port Operator for further information or to apply for access to the Port Terminal Services should contact the Port Operator at the following address:

Customer Account Manager  
Grain Operations  
Co-operative Bulk Handling Limited  
Gayfer House, 30 Delhi Street  
West Perth WA 6005

- (b) Applicants are also encouraged to review the Port Operator's web site at [www.cbh.com.au](http://www.cbh.com.au) which includes information relevant to the Port Terminal Services.
- (c) Persons wishing to contact the ACCC in relation to this Undertaking should contact the ACCC at the following address:

General Manager  
Transport and General Prices Oversight  
Australian Competition and Consumer Commission  
Level 35, 360 Elizabeth Street  
Melbourne VIC 3000  
Fax (03) 9663 3699

## 12 Publication of key information

- (a) Within the last three days of each month, the Port Operator will publish in a prominent place on its website a statement of the total amount of Bulk Wheat and the total amount of grain other than Bulk Wheat situated at each of the Port Terminal Facilities. The Port Operator must use reasonable endeavours to ensure that the statement is accurate within + / - 5%.
- (b) By the close of the Business Day following the Business Day on which the Port Operator receives a vessel nomination from a User (including its Trading Business), the Port Operator will publish the nomination on the shipping stem and in a prominent place on its website. Vessel nominations received after 4.00pm on a Business Day, or on a non-Business Day will be deemed to be received at 8.00am on the next Business Day.
- (c) Within the last three days of each of December, March, June and September, the Port Operator will publish in a prominent place on its website a statement of the key indicators of its performance of the Port Terminal Services at each Port Terminal Facility, including details of the:
  - (i) average number of days between the ETA (as defined in the Port Terminal Rules) on original vessel nomination and the date of the presentation of the Notice of Readiness (as defined in the Port Terminal Rules);
  - (ii) average number of days between presentation of a Notice of Readiness and Commencement of Loading (as defined in the Port Terminal Rules) for vessels that arrive within their contracted Shipping Window (as defined in the Port Terminal Rules);
  - (iii) average number of days between presentation of a Notice of Readiness and Commencement of Loading for vessels that arrive outside their contracted Shipping Window;
  - (iv) number of vessels rejected in the year to date;
  - (v) number of vessels presenting a Notice of Readiness outside of the contracted Shipping Window in the year and month to date;
  - (vi) Quantum of tonnes of wheat exported in the year and month to date; and
  - (vii) number of vessels loaded in the year and month to date.

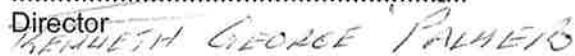
DATED the 24<sup>th</sup> day of SEPTEMBER 2009.

The common seal of Co-operative Bulk Handling Limited is affixed in the presence of:



  
.....  
Company Secretary/Director

LLOYD GUTHREY  
.....  
Name of Company Secretary/Director  
(print)

  
.....  
Director  
KENNETH GEORGE PALMER  
.....  
Name of Director (print)

# Schedule 1

## Access Application information

### 1 Request details

#### 1.1 Season

#### 1.2 Applicant's Application Type

### 2 Applicant details

#### 2.1 Company name

#### 2.2 ABN/ACN

#### 2.3 Website

#### 2.4 Address

#### 2.5 Contact details

#### 2.6 Details of authorised company representative (including authorisation)

#### 2.7 Duration of the Access Agreement sought

### 3 Indicative Export Tonnage

## Schedule 2

### Indicative Port Terminal Services Agreement



**CO-OPERATIVE BULK HANDLING LIMITED**  
(ABN 29 256 604 947)

**2009/10 Season  
PORT TERMINAL SERVICES AGREEMENT**

FOR

**Standard Port Terminal Services**

PROVIDED TO

**XXX**  
(ABN xxx)



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**THIS AGREEMENT** dated the .....

**BETWEEN:**

**CO-OPERATIVE BULK HANDLING LIMITED**  
(ABN 29 256 604 947)  
of Gayfer House, 30 Delhi Street, West Perth WA 6005  
("CBH")

**AND**

**XXX**  
(ABN xxx)  
of 'insert address'  
("Customer")

## **RECITALS**

- A. CBH operates Port Terminal Facilities in Western Australia.
- B. CBH provides its Customers with Port Terminal Services for the export of Bulk Wheat under the terms of its Undertaking.
- C. The Customer purchases Bulk Wheat and wishes to utilise the Services.
- D. CBH has agreed to provide the Customer with the Services pursuant to the terms and conditions of this Agreement.
- E. The Customer has agreed to the terms and conditions of this Agreement and will remunerate CBH for its provision of the Services in accordance with the terms of this Agreement.

## **THE PARTIES AGREE AS FOLLOWS:**

### **1 COMMENCEMENT AND TERMINATION**

#### **1.1 Commencement**

- (a) This Agreement will apply to Services provided by CBH after 1 October 2009 ("**Commencement Date**") unless otherwise agreed in writing between CBH and the Customer.
- (b) The terms and conditions set out in this Agreement shall be deemed to be accepted by the Customer if the Customer utilises any of the Services contained in this Agreement notwithstanding the fact that the Customer has not executed this Agreement.

#### **1.2 General Termination**

This Agreement will terminate on 31 October 2010 ("**End Date**") and the Customer must ensure that prior arrangements are made to Outturn all Bulk Wheat held by CBH prior to this date.

#### **1.3 Immediate Termination**

- (a) CBH may terminate this Agreement by notice to the Customer with immediate effect if:
  - (i) the Customer commits a Material Breach of this Agreement;
  - (ii) an Insolvency Event occurs; or
  - (iii) the Customer repudiates the Agreement.
- (b) If the Agreement is terminated under clause 1.3(a), CBH may require that all the Customer's Bulk Wheat be Outturned as soon as possible following termination, and the Customer's obligations under this Agreement will continue until all Bulk Wheat has been Outturned.

#### 1.4 Survival of Terms

Clauses 5.5, 9, 10, 13, 15, 18, 20, 21, 23, 24 and 25 shall survive the termination of this Agreement.

## 2 DEFINITIONS

In this Agreement:

"**ACCC**" means the Australian Competition and Consumer Commission.

"**Accumulation Plan**" means a plan for the delivery of grain to a Port Terminal Facility in order to accumulate a cargo for shipping .

"**Additional Storage Charges**" mean the charge with that description prescribed in Schedule 1.

"**Agreement**" means this agreement and all schedules, annexures and attachments.

"**Annual Shipping Period**" means the period 16 January to the next 31 October as modified from CBH from time to time prior to 31 August for the coming Year .

"**AQIS**" means the Australian Quarantine Inspection Services.

"**Arrived**" "**Arrives**" and "**Arrival**" means the time at which a vessel arrives at the waiting area designated from time to time by the relevant port authority for the Port Terminal Facility (whether or not it sets anchor), is ready to proceed to berthing and has presented a Notice of Readiness.

"**Auction**" means the sale by auction of Capacity during the Annual Shipping Period.

"**Auction Premium**" means any additional amount paid by the Customer for Capacity which is in excess of the start price for Capacity within a Lot in the Auction.

"**Auction Premium Rebate**" means the rebate calculated in accordance with Schedule 2.

"**Auction Rules**" means the rules of that name published by CBH from time to time attached as **Schedule 1** to the Port Terminal Rules. The current version of these rules can be found on CBH's website, [www.cbh.com.au](http://www.cbh.com.au).

"**Bulk Handling Act**" means the Bulk Handling Act 1967 (WA).

"**Bulk Handling Regulations**" means the Bulk Handling Act Regulations 1967 (WA).

"**Bulk Wheat**" means wheat for export from Australia other than wheat that is exported in a bag or a container that is capable of holding not more than 50 tonnes of wheat.

"**Bulk Wheat Entitlement**" means the Customer's entitlement under the Bulk Handling Act or this Agreement to the possession of Bulk Wheat in CBH's custody.

"**Bulk Wheat Reveal Services**" means the Bulk Wheat reveal services provided by CBH pursuant to clause 5.

"**Bulk Wheat Storage Services**" means the storage services provided by CBH pursuant to clause 6.

"**Business Day**" means a day that is not a Saturday, Sunday or gazetted public holiday in Western Australia.

"**Capacity**" means the capacity of a Port Terminal Facility, to put grain on board a vessel at a Port Terminal Facility during a Shipping Window, measured in tonnes.

"**Capacity Transfer Fee**" means the fee with that description prescribed in Schedule 1.

"**Charter Party**" means the agreement between the owner of a vessel and the party hiring the vessel for use of the vessel in transporting a cargo.

"**Commencement Date**" has the meaning set out in clause 1.1.

**"Contaminant"** means a Level 1 Contaminant, a Level 2 Contaminant or a Level 3 Contaminant as the case requires.

**"Corynetoxins Contamination"** means contamination by low molecular weight chemicals that cause annual ryegrass toxicity.

**"Credit Application Form"** means the form available from CBH on which all customers' credit application requests are to be made.

**"Customer's Manager"** means the Customer's representative who is responsible for the Customer's Bulk Wheat as notified in writing to CBH.

**"Demurrage"** means the defined level of damages paid to a vessel owner for the delays in loading or discharging the vessel after the Laytime has expired. It is customarily expressed in US dollars per day or portion thereof.

**"Direct to Port Delivery Declaration Form"** means the Port Delivery Form as published by CBH from time to time.

**"Dispatch"** means the money payable by the vessel owner to the charterer if the vessel completes loading within the agreed Laytime. It is customarily expressed in US dollars per day or portion thereof.

**"End Date"** has the meaning given in clause 1.2.

**"ETA"** means the estimated time of arrival of the Nominated Vessel.

**"Export Fee"** means the fee with that description prescribed in Schedule 1.

**"Export Outturn Request"** means an export outturn request in relation to Port Outturning Services.

**"Fair Market Price"** means the average value at the relevant time and place (of the requirement to determine the Fair Market Price) to be derived from the average of three independent broker valuations by broker appointed by Grain Trade Australia, with the valuations to take into account the Grade and variety and taking into account the cost of insurance, levies, taxes, charges, Freight and associated costs.

**"Force Majeure"** has the meaning given in clause 15.1.

**"Forfeiture Approval Authority"** means an authority issued by the Customer to CBH to forfeit Bulk Wheat in excess of the Acceptable Vehicle Mass (as that term is defined in the HMMS).

**"Freight"** means the independent Customer freight charges for delivery of Bulk Wheat to a Port Terminal Facility payable by a Customer.

**"Fumigation Statement"** means a statement declaring that a particular tonnage of Bulk Wheat has been fumigated, and shall be in the form adopted and prescribed by CBH from time to time.

**"Genetically Modified Organism"** has the meaning given to that term in the *Gene Technology Act 2000* (Cth).

**"Good Operating Practices"** means the practices, methods and acts engaged in or by a party who, in the conduct of its undertaking, exercises that degree of diligence, prudence and foresight reasonably and ordinarily exercised by skilled and experienced Australian operators engaged in the same type of undertaking under the same or similar circumstances and conditions.

**Government Agency** means any applicable Western Australian or Australian Federal Government department, authority, instrumentality or agency having jurisdiction in respect of any matter relating to this Agreement.

**"Grace Period"** means the period of 14 days commencing on the day following the last day of the Shipping Window.

**"Grade"** means, in relation to Bulk Wheat, the grade of the Bulk Wheat actually delivered to the Port Terminal Facility.

**"Gross Negligence"** means, if a duty of care is owed, an act or omission done with reckless disregard, whether consciously or not, for the consequences of the act or omission.

**"GST"** means any tax imposed by or through the GST Legislation on a supply (without regard to any input tax credit).

**"GST Legislation"** means *A New Tax System (Goods and Services Tax) Act 1999* (Cth) and any related tax imposition act (whether imposing tax as a duty of customs excise or otherwise) and includes any legislation which is enacted to validate recapture or recoup the tax imposed by any of such acts.

**"Harvest Shipping Period"** means 1 November to 15 January as modified from CBH from time to time prior to 31 August for the coming Year.

**"Heavy Metal Contamination"** means any heavy metal that if it comes into contact with or is contained in Bulk Wheat would present, in CBH's reasonable opinion, a health risk to the environment or humans, irrespective of whether that heavy metal is airborne, solid or contained in solution.

**"HMMS"** is CBH's Harvest Mass Management Scheme.

**"Indirect or Consequential Loss"** means indirect, consequential or remote loss and any loss in the nature of compensation for loss of production, loss of profit, loss of opportunity, loss of markets, loss of use of money, goods or other property or loss of goodwill or business reputation including any losses that the Customer may suffer in the event that the ability to resell the Bulk Wheat is adversely affected.

**"Insolvency Event"** means where the Customer:

- (i) does not pay its debts as and when they fall due;
- (ii) commits an act of bankruptcy;
- (iii) enters into a composition or arrangement with its creditors or calls a meeting of creditors with the view to entering into a composition or arrangement;
- (iv) has execution levied against it by creditors, debenture holders or trustees under a floating charge;
- (v) takes or has taken or instituted against it any actions or proceedings, whether voluntary or compulsory, which have the object of or which may result in the winding up or bankruptcy of the Customer (except, in the case of a corporation, for the purposes of a solvent reconstruction);
- (vi) has a winding up order made against it or (except for the purposes of a solvent reconstruction) passes a resolution for winding up; or
- (vii) is a party to the appointment of or has an administrator, official manager, receiver, receiver/manager, provisional liquidator or liquidator appointed to the whole or part of its property or undertaking.

**"Laycan"** means the earliest date on which Laytime can commence and the latest date, after which the charterer can opt to cancel the Charter Party.

**"Laytime"** means the amount of time that a charterer has to load a vessel before the vessel is deemed to be on Demurrage.

**"Level 1 Contaminant"** means a contaminant identified as Level 1 in the CBH contaminant list published by CBH for the current Season as amended from time to time, being contaminants that in CBH's opinion cannot be removed and constitute a significant food safety or quality risk.

**"Level 2 Contaminant"** means a contaminant identified as Level 2 in the CBH contaminant list published by CBH for the current Season as amended from time to time, being contaminants that in CBH's opinion pose a food safety or processing hazard and can have a significant impact on the integrity of the supply chain.

**"Level 3 Contaminant"** means a contaminant identified as Level 3 in the CBH contaminant list published by CBH for the current Season as amended from time to time, being contaminants that in CBH's opinion present a food safety or processing risk and can be managed on-farm.

**"LoadNet® for Marketers™"** means CBH's grain management interface for Acquirers which is available to registered users (including the Customer) at [www.cbh.com.au](http://www.cbh.com.au)

**"Loss or Damage"** means all losses, costs or damages (including legal costs on a solicitor client basis) arising in connection with any personal injury, death, damage to property or economic loss.

**"Lost Capacity"** has the meaning given in the Port Terminal Rules.

**"Lot"** means the Capacity within a Shipping Window at a Port that is offered to Customers at Auction.

**"Material Breach"** means a breach which:

- (a) in the reasonable opinion of CBH, is not capable of being remedied; or
- (b) the Customer has failed to remedy after being given at least 14 days written notice by CBH to do so.

**"Microbial Contamination"** means contamination by pathogenic (disease-causing) micro-organisms including *E. coli*, *Cryptosporidium*, *Giardia*, and *Salmonella*.

**"NCV"** means no commercial value.

**"Natural Toxicant Contamination"** means contamination by toxins that are produced by, or naturally occur in, plants or micro-organisms (including, without limitation, mycotoxins produced by fungi, and poisonous low molecular weight substances of plant and bacterial origin).

**"Nominated Tonnage"** means the tonnage of Bulk Wheat to be shipped in a particular Nominated Vessel and notified to CBH in accordance with this agreement and the Port Terminal Rules.

**"Nominated Vessel"** means a vessel nominated by the Customer and notified to CBH in accordance with the terms of this agreement and the Port Terminal Rules.

**"Notice of Readiness"** means a valid notice of readiness served by the owner of the Nominated Vessel pursuant to the Vessel Charter party stating, amongst other things, that the Nominated Vessel is ready to load in all respects (including physically and legally).

**"Outturn"** means to cause Bulk Wheat to physically leave CBH's custody at a Port Terminal Facility and is deemed to occur when the Bulk Wheat exits the delivery spout into a Bulk Wheat shipping vessel at which point physical possession of the Bulk Wheat passes from CBH to the Customer or a third party authorised by the Customer

**"Pesticide Residue Contamination"** means contamination by any substance in Bulk Wheat resulting from the use of a pesticide. The concept of pesticide residue includes any derivatives of a pesticide, such as conversion products, metabolites, reaction products, and impurities considered to be of potential toxicological significance.

**"Port"** means the ports of:

- (a) Albany;
- (b) Esperance;
- (c) Geraldton; and
- (d) Kwinana.

**"Port Grain Holdings"** means the information about quantities of the Customer's grain held at a Port by CBH and as required to be published in accordance with the Undertaking or Port Terminal Rules.

**"Port Outturning Services"** means the services provided by CBH pursuant to clause 7.



**"Port Terminal Facility"** means a ship loader and associated infrastructure that is:

- (a) at a Port;
- (b) capable of handling Bulk Wheat; and
- (c) owned, operated and controlled by CBH,

including:

- (d) an intake/receival facility;
- (e) a grain storage facility;
- (f) a weighing facility; and
- (g) a shipping belt;

that is:

- (h) at the port; and
- (i) associated with the ship loader; and
- (j) capable of dealing with wheat in bulk.

**"Port Terminal Rules"** means the port terminal rules published and amended by CBH from time to time in accordance with the Undertaking.

**"Port Terminal Service"** means the services provided by means of the Port Terminal Facilities which enable an Accredited Wheat Exporter to export Bulk Wheat through the Port Terminal Facilities, including:

- (a) unloading and receival by CBH of a Customer's Bulk Wheat at the Port Terminal Facilities, for the purpose of loading onto a vessel scheduled to arrive at the Port Terminal Facility;
- (b) sampling by CBH of a Customer's Bulk Wheat received and out-turned, to check for visible evidence of the presence of chemical residue, insect activity and live insects or other contaminants, and providing the Customer with a composite shipping sample of the Customer's Bulk Wheat;
- (c) weighing by CBH of a Customer's Bulk Wheat received and out-turned, using CBH's weighing facilities, and providing the Customer with a weighbridge ticket or other statement certifying the weight and quantity of Bulk Wheat delivered;
- (d) storage by CBH of a Customer'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; and
- (e) fumigation in response to evidence of insect infestation;
- (f) accumulating and assembling Bulk Wheat for the purpose of loading cargo onto a vessel scheduled to arrive at the Port Terminal Facility;
- (g) administrative and logistics services required for shipping nomination, acceptance, booking and cancellation;
- (h) access to inspectors from the Australian Quarantine and Inspection Service, for inspection of the Customer's Bulk Wheat received and held at the Port Terminal Facilities; and
- (i) out-turning by CBH of a Customer's Bulk Wheat received at the Port Terminal Facility, and loading onto the Customer's nominated vessel.

**"Pre-Delivery Sample Analysis Form"** means the form available from CBH from time to time.

**"Related Bodies Corporate"** has the meaning given to that term in the *Corporations Act 2001* (Cth).

**"Relevant Surveys"** means all relevant surveys required to be conducted on the Nominated Vessel before it can be loaded with the Bulk Wheat, including, but not limited to a structural survey of the Nominated Vessel and surveys conducted by AQIS.

**"Season"** means the period between 1 October of one year and the next 30 September.

**"Services"** means all of the services provided by CBH to the Customer pursuant to this Agreement.

**"Shipping Window"** means a half month period of between 14 and 16 days within which a Customer may nominate a vessel to arrive at a Port Terminal Facility for loading of a cargo for which the Customer has been allocated Capacity under the Port Terminal Rules.

**"Shrinkage"** means the allowance for loss in weight of Bulk Wheat that occurs during the storage and handling and transport process.

**"Stack"** means a stored quantity of Bulk Wheat delivered to the Port Terminal Facility for export accumulation and loading to a ship.

**"Storage"** means the silo, bin, Stack or other storage area at a Port Terminal Facility in which Bulk Wheat is accumulated for loading to an export Bulk Wheat shipping vessel.

**"Taxable Supply"** has the meaning given in the GST Legislation.

**"Tax Invoice"** has the meaning given in the GST Legislation.

**"Term"** means the term of this Agreement which commences on the Commencement Date and ends on the End Date, unless terminated earlier in accordance with the terms of this Agreement.

**"TPA"** means the *Trade Practices Act 1974* (Cth).

**"Undertaking"** means the undertaking provided by CBH to the ACCC under the provisions of the WEMA and Part IIIA of the TPA dated September 2009 and available on the ACCC website

**"Upfront Marketer Fee"** means the fee with that description prescribed in Schedule 1.

**"Varietal Purity"** refers to the consistency in the genetic make-up of seed Bulk Wheat, and is determined by measuring the percentage of seed in the sample of the declared variety.

**"Vessel Nomination"** means a nomination of a vessel to Outturn Bulk Wheat to the Nominated Tonnage onto a Nominated Vessel within a Shipping Window held by the Customer under this Agreement on the relevant Vessel Nomination Form or online via LoadNet® for Marketers™.

**"Vessel Nomination Form"** means the form available from CBH or online via LoadNet® for Marketers™ on which all Vessel Nominations must be made.

**"WEMA"** means the *Wheat Export Marketing Act 2008* (Cth).

**"Wilful Misconduct"** means an intentional and conscious disregard of any material provision of this Agreement, but does not include any error of judgment or mistake made by the person alleged to be culpable or by any director, employee, agent or contractor of that person in the exercise, in good faith, of any function, power, authority or discretion conferred on that person under this Agreement or under any law.

**"Year"** means 1 November to 31 October.

### 3 INTERPRETATION

In this Agreement:

#### 3.1 Interpretation

- (a) headings, sub-headings, captions and service descriptions do not affect the construction or interpretation of this Agreement;

- (b) a word in the singular includes the plural of that word and vice versa;
- (c) a word of any gender includes the corresponding words of each other gender and a reference to one sex includes a reference to all sexes;
- (d) "including" means "including, but not limited to";
- (e) where any word or phrase is given a defined meaning in this Agreement, any part of speech or other grammatical form of that word or phrase has a corresponding meaning; and
- (f) a reference in this Agreement to a thing (including an amount) is a reference to the whole and each part of it (but nothing in this clause 3.1(f) implies that performance of part of an obligation is the performance of the whole) and a reference to a group of persons is a reference to all of them collectively, to any 2 or more of them collectively and to each of them individually;

### 3.2 Documents and Parts of Documents

- (a) a reference to any law, document, instrument or agreement, including this Agreement, includes a reference to that law, document, instrument or agreement as amended, novated, supplemented, varied or replaced from time to time; and
- (b) a reference to a clause or annexure or attachment is (unless the context requires otherwise) a reference to a clause or annexure or attachment to this Agreement;

### 3.3 Persons and Corporations

- (a) a reference to a person includes a body politic, corporation, partnership, limited partnership, association or joint venture (whether incorporated or not) whatsoever and wheresoever formed and howsoever described and also a government, governmental or semi-governmental agency or local authority; and
- (b) a reference to a person includes that person's successors and permitted assigns and, in the case of a natural person, that person's legal personal representatives;

### 3.4 Time, Money and Measurement

- (a) a reference to an amount of money is a reference to the amount in the lawful currency of Australia;
- (b) a reference to time is a reference to the local time in Perth, Western Australia (unless otherwise stated);
- (c) where any matter or thing is required to be attended to or done on a day which is not a Business Day, it will be attended to or done on the first day thereafter which is a Business Day; and
- (d) measurements of physical quantities are in Australian legal units of measurement within the meaning of the *National Measurement Act 1960* (Cth).

### 3.5 Discretions and Approvals

- (a) Whenever the Customer is required to form an opinion, give approval, exercise a discretion or perform any act under this Agreement, it must be done reasonably in the circumstances, and based on reasonable grounds, and not capriciously, or arbitrarily refused or unduly delayed.
- (b) In making any decision pursuant to this Agreement CBH shall have regard to the efficient running of the CBH Port Terminal Facility and balancing of the interests of all Customers of the Port Terminal Facility.
- (c) CBH's refusal to accept a request for Service will not be a breach of the Agreement for making a decision where the refusal is made in compliance with the provisions of the Port Terminal Rules.

## 4 PORT TERMINAL RULES

CBH and the Customer:

- (a) agree to comply with the Port Terminal Rules; and
- (b) acknowledge that in case of any inconsistency between the terms of this Agreement and the Port Terminal Rules, the Port Terminal Rules shall apply.

## 5 BULK WHEAT RECEIVAL SERVICES

**Service Description:** This service provides Bulk Wheat receipt, storage assessment, weight measurement and handling at the point of receipt into a Port Terminal Facility.

### 5.1 Service Availability

- (a) Bulk Wheat Receipt Services are provided by CBH under this Agreement for the purpose of export accumulation only and will not be available more than 21 days before the ETA.
- (b) CBH agrees to make Bulk Wheat Receipt Services available at the Port Terminal Facilities in accordance with the terms and conditions of this Agreement and the Port Terminal Rules.
- (c) Prior to requesting Bulk Wheat Receipt Services, the Customer must acquire Capacity.
- (d) If the Customer requires Bulk Wheat Receipt Services, the Customer must submit a Vessel Nomination Form to CBH no later than 30 days prior to the ETA.
- (e) At least 22 days prior to the ETA, the Customer must submit a valid Vessel Nomination in accordance with the Port Terminal Rules.

### 5.2 Before Delivery

- (a) CBH requires a representative sample of the Bulk Wheat intended for delivery to minimise the risk of insect or chemical residue contaminated Bulk Wheat being received into the Port Terminal Facility.
- (b) The Customer must complete and provide CBH with a Pre-Delivery Sample Analysis Form, paying particular attention to completing the section marked '*Treatment*'.
- (c) The Customer must provide a one kilogram representative sample from each source of Bulk Wheat that the Customer intends to deliver to the Port Terminal Facility for placement into Storage. If the grain is from more than one storage type, the Storage identification must be clearly marked on each sample.
- (d) The Pre-Delivery Sample Analysis Form with the sample/s for chemical and insect analysis must be couriered direct to: "Australian Grains Centre, 700 Abernethy Road, Forrestfield WA 6058"
- (e) CBH will use all reasonable endeavours to provide the Customer with the sample results within 2 Business Days of the sample being received.
- (f) Each acceptable sample analysis will permit the Customer to deliver the Bulk Wheat to the Port Terminal Facility for up to 28 days from the date when the results are reported to the Customer. If the Customer wishes to deliver Bulk Wheat to the Port Terminal Facility after that 28 day period has expired, then the Customer must comply with the procedures in this clause 5.2 again.
- (g) If the sample contains any manageable Contaminants, the Bulk Wheat must be treated before a new sample is presented for testing. The costs of assessing the new sample will be paid by the Customer ("**Sample Reassessment Fee**").
- (h) The Port Terminal Rules set out the circumstances in which the requirement to provide a pre-delivery sample and conduct chemical residue testing will be waived.

### 5.3 During Delivery

- (a) Upon arrival of each truck load containing the Customer's Bulk Wheat, CBH staff will assess the VRL of the truck delivering loads to the Port Terminal Facility. Each truck is to have a valid permit to meet the presented combination and the gross weight tendered. Unloading of non-compliant vehicles will be refused and those vehicles will be required to leave the Port Terminal Facility.
- (b) The grade, variety and other characteristics of the Bulk Wheat delivered are to be declared in writing by the Customer by no later than the time of delivery and CBH takes no responsibility for the accuracy, completeness or veracity of the information relating to the Bulk Wheat declared by the Customer. If the load is found to be contaminated with Level 1 or Level 2 Contaminants or showing signs of insect infestation or activity the load will be rejected. CBH shall advise the Customer or nominated representative of the rejection as soon as practicable and in any event before the end of the day following the day of delivery.
- (c) If a load is found to be contaminated with a Level 1 Contaminant, the Customer will not be permitted to deliver that load or any additional load to CBH Port Terminal Facilities until the Customer has provided CBH with evidence in the form of independent expert verification that there is no further risk of Contamination. Alternatively, the Customer may request CBH to arrange at the Customer's cost for independent expert verification that there is no further risk of Contamination.
- (d) Independent expert verification may involve identifying the source site of contamination and the taking of steps by the Customer to ensure that the source site of contamination is not the source site for any future deliveries or that the Customer takes remedial action to ensure that the contaminant has been effectively removed from the source site of contamination.
- (e) If a load is found to be contaminated with a Level 2 Contaminant the Customer will not be permitted to deliver that load or any additional load to CBH Port Terminal Facilities until the Customer has provided CBH with evidence that the Customer has taken remedial action to ensure that the contaminant has been effectively removed.
- (f) Following completion of the steps outlined in clauses 5.3 (c) and (d) above, the Customer must produce a new representative sample from the source site of the contamination and complete the processes specified under clause 5.2 confirming the absence of contamination, prior to recommencing delivery.
- (g) Remedial fumigation following delivery of contaminated grain shall be by means of cylinderised phosphine and the Customer shall pay the Remedial Fumigation charges prescribed in Schedule 1.

#### 5.4 Receival Procedures

Where CBH receives a load of Bulk Wheat at the Port Terminal Facility (whether or not delivered by the Customer), CBH will at the time CBH receives the Bulk Wheat:

- (a) record the running Grade of the Bulk Wheat delivered to the Port Terminal Facility declared by the Customer;
- (b) determine the Storage into which the Bulk Wheat will be placed;
- (c) weigh the Bulk Wheat delivered;
- (d) store the Bulk Wheat in accordance with the Bulk Wheat Storage Services and any specific additional storage and handling requirements as agreed to in writing between the Customer and CBH;
- (e) furnish to the Customer a weighbridge ticket or a statement that specifies Bulk Wheat type, running Grade, weight and any other relevant details or specifications; and
- (f) receive from the person tendering a load of Bulk Wheat to CBH at the Port Terminal Facility, and the Customer shall deliver to CBH, a written statement declaring:
  - (i) the date of delivery;

- (ii) the place of delivery;
- (iii) the approximate quantity tendered; and
- (iv) the type and variety of Bulk Wheat.

## 5.5 Warranties

The Customer represents and warrants that:

- (a) it owns any Bulk Wheat tendered for delivery by or on behalf of it;
- (b) the full particulars of the variety of the Bulk Wheat disclosed on any form are true and correct;
- (c) it has not manipulated or loaded any delivery in any way to prevent the making of an accurate assessment by CBH of the quality of the Bulk Wheat using CBH's standard sampling procedures;
- (d) Bulk Wheat being tendered for delivery will not:
  - (i) include any Contaminant; or
  - (ii) be in breach of the Bulk Handling Act or the Bulk Handling Regulations;
- (e) unless it has advised CBH in writing prior to delivery, all of the Bulk Wheat was grown between the May and September immediately prior to the current Season;
- (f) all of the Bulk Wheat in a delivery has been or is only contained in equipment, bags, farm implements, farm storages and Bulk Wheat motor bodies that have:
  - (i) not contained any Bulk Wheat product prior to the containing Bulk Wheat of this current Season and are free from insects and vermin; or
  - (ii) previously contained a Bulk Wheat product, but have been freed of all such Bulk Wheat product and is free from insects and vermin;
- (g) any vehicle that has previously transported non-Bulk Wheat or contaminated Bulk Wheat products:
  - (i) is clean, dry and free of any remaining materials and odours from previous loads;
  - (ii) has been washed under high pressure prior to delivering any Bulk Wheat; and
  - (iii) has the details of previous loads disclosed on the relevant form;
- (h) if any of the Bulk Wheat has been treated with substances for the control of insects, details of the substances and the application of those substances has been provided in writing to CBH on the relevant form and the use of any other chemical in the process of planting, growing and storage of Bulk Wheat has been in accordance with the levels prescribed in any relevant legislation and also in accordance with the usage instructions;
- (i) none of the Bulk Wheat in a delivery is a Genetically Modified Organism (unless declared in writing to, and approved in writing by, CBH before the delivery enters the Port Terminal Facility); and
- (j) any information it provides to CBH is true and correct and not misleading or deceptive or likely to mislead or deceive.

## 5.6 HMMS and road vehicle registration

- (a) Subclauses 5.6(b) to 5.6(e) inclusive apply in relation to any deliveries from a farm by the Customer or its agent to the Port Terminal Facility during the Harvest Shipping Period or such other period as may be published from time to time by Main Roads WA. All road vehicles delivering Bulk Wheat to a Port must be registered with CBH. Outside of the

Harvest Shipping Period (or such other period published by Main Roads WA) CBH is not obliged to receive Bulk Wheat from road vehicles in excess of their relevant mass limits.

- (b) The HMMS is incorporated as part of the terms of this Agreement in respect of any deliveries of Bulk Wheat to the Port Terminal Facility by road vehicles that may occur.
- (c) If, as part of CBH's HMMS, the Customer has an option to give CBH a Forfeiture Approval Authority to forfeit Bulk Wheat in excess of the Acceptable Vehicle Mass (as that term is defined in the HMMS), CBH is entitled to deduct, in accordance with the HMMS and the Forfeiture Approval Authority, the relevant tonnage from the delivered Bulk Wheat when calculating the Customer's Bulk Wheat Entitlement in accordance with clause 6.3. Title to any Bulk Wheat deducted under this clause vests in CBH and CBH may donate the Bulk Wheat or the proceeds from its sale to a charity or local government at CBH's discretion.
- (d) A Forfeiture Approval Authority:
  - (i) is valid and binding on the Customer until CBH acknowledges receipt of an instruction to vary it; and
  - (ii) may be varied on an individual delivery basis by signing a contrary instruction on the PDF.
- (e) Notwithstanding anything in the HMMS, the Customer agrees:
  - (i) that it is solely responsible for ensuring that it or its carrier/agent comply with all relevant mass limits prescribed by legislation or regulation for the vehicle used;
  - (ii) it will take all necessary steps (including unloading of any mass in excess of those prescribed limits) to ensure compliance; and
  - (iii) to indemnify and keep CBH indemnified against all expenses, Loss or Damage incurred by CBH and all actions, claims and demands which may be made against CBH, that arise in relation to the Customer's non-compliance with any maximum mass limits prescribed by legislation or regulation for the vehicles used by it or its carrier/agent to deliver Bulk Wheat to a CBH Port Terminal Facility.

## 6 BULK WHEAT STORAGE SERVICES

**Service Description:** This service involves storage of Bulk Wheat at Port Terminal Facilities.

### 6.1 Service Availability

- (a) Bulk Wheat Storage Services are provided by CBH under this Agreement for the purpose of export accumulation only.
- (b) The Bulk Wheat Storage Services are provided at a Port Terminal Facility if the relevant Storage is available.

### 6.2 Outturn Specifications

Subject to clauses 6.5 and 6.6, the loads of Bulk Wheat delivered to CBH will be Outturned by CBH upon request from the Customer, subject to the terms of this Agreement.

### 6.3 Bulk Wheat Entitlement

- (a) CBH will maintain a register of the Customer's entitlement to Bulk Wheat stored at Port Terminal Facilities (the "**Bulk Wheat Entitlement**"). A certificate by an officer of CBH as to the Bulk Wheat Entitlement shall be prima facie evidence of the loads of Bulk Wheat that have been delivered to CBH and which the Customer is entitled to have Outturned from the CBH Port Terminal Facility, subject always to the terms and conditions of this Agreement.
- (b) Upon request and subject always to clause 6.3(d), CBH will provide the Customer with information regarding the Bulk Wheat held at the Port Terminal Facility and delivered to the Port Terminal Facility by the Customer.

- (c) The Bulk Wheat Entitlement of the Customer is calculated at any particular point in time by aggregating the weight of the loads of Bulk Wheat received by CBH at the Port Terminal Facility on behalf of the Customer or transferred to the Customer:
  - (i) less the relevant Shrinkage factor specified in clause 6.5,
  - (ii) less the relevant Bulk Wheat Dust Deduction in clause 6.6 where the Bulk Wheat is Outturned via the Port Terminal Facility into the Nominated Vessel;
  - (iii) less the weight of any Bulk Wheat that is damaged or destroyed as a result of a riot, industrial dispute, civil commotion, war, act of God or any unforeseen cause not attributable to the negligence of CBH;
  - (iv) less the weight of any NCV Bulk Wheat or damaged Bulk Wheat in respect of which an insurance claim has been made and paid to the Customer in accordance with clauses 13.1 and 14.1;
  - (v) less the weight of any Outturned Bulk Wheat.
- (d) CBH does not warrant the correctness or completeness of data that has been supplied by the Customer provided in relation to loads of Bulk Wheat.

#### 6.4 Bulk Wheat Fumigation

- (a) CBH will not fumigate Bulk Wheat delivered to the Port Terminal Facility unless insect activity is detected by either or both CBH and AQIS.
- (b) Fumigation services as set out in **Schedule 1** will be carried out by CBH on all Bulk Wheat where required in its Port Terminal Facility to protect the Bulk Wheat. The application of remedial fumigation services as set out in clause 5.3(g) will limit availability of the Bulk Wheat in accordance with standard CBH Bulk Wheat protection practices. CBH will consult with the Customer as to the type of fumigant to be used. The Customer must nominate a representative who is available on a 24/7 basis to confirm available fumigation options. If CBH using reasonable endeavours is unable to obtain confirmation from the representative or agreement with the representative as to an alternative fumigant, CBH will determine the type of fumigant to be used. The Customer will be responsible for all charges for fumigation services incurred pursuant to this clause 6.4(b) at the rates prescribed in **Schedule 1** unless an alternative fumigant and rate is agreed.
- (c) Where the Bulk Wheat delivered by a Customer to a Port Terminal Facility has been fumigated prior to delivery, the Customer shall provide a Fumigation Statement detailing any Bulk Wheat treatment information following a written request from CBH.
- (d) Where Bulk Wheat has been fumigated at the Port Terminal Facility by CBH:
  - (i) CBH shall have no liability for any delays in loading the Customer's Vessel as a result of the unavailability of the Bulk Wheat under fumigation;
  - (ii) CBH shall provide a Fumigation Statement detailing any Bulk Wheat treatment information within 3 Business Days of receiving a written request from the Customer.

#### 6.5 Shrinkage

Notwithstanding any other clause in this Agreement, CBH will apply a Shrinkage factor to all Bulk Wheat delivered by the Customer to the Port Terminal Facility to determine the quantity of Bulk Wheat that CBH is obliged to Outturn on behalf of the Customer.

The Shrinkage factor for Bulk Wheat is 0.50%.

#### 6.6 Bulk Wheat Dust

Dust, chaff or fines removed at any stage of the handling process into a CBH dust extraction system is considered be NCV dust and CBH is entitled to dispose of NCV dust as it sees fit. CBH will apply a Bulk Wheat Dust Deduction of 0.25% from a Customer's Bulk Wheat Entitlement when the relevant Bulk Wheat type is Outturned from a Port Terminal Facility into a vessel.



## 6.7 Additional Bulk Wheat Storage Charges

CBH will invoice the Customer for Additional Storage Charges at the rates specified in Schedule 1 if:

- (a) there is any residual Bulk Wheat Entitlement following the loading of the Customer's vessel; or
- (b) the relevant Shipping Window has passed and the Customer's Nominated Vessel has not commenced loading as a result of:
  - (i) the failure of the Customer to make a Vessel Nomination which has an ETA in the Shipping Window;
  - (ii) delays in the date and time of Arrival of the Customer's Nominated Vessel or delays in the passing of any Relevant Surveys;
  - (iii) the Customer failing to meet the Accumulation Plan agreed with CBH; or
  - (iv) quality issues with the Customer's Bulk Wheat Entitlement, namely:
    - A) the presence of insect activity and live insects in the Bulk Wheat;
    - B) Pesticide Residue Contamination, Corynetoxins Contamination, Microbial Contamination, Heavy Metal Contamination or Natural Toxicant Contamination;
    - C) the presence, at any level or concentration, of Genetically Modified Organisms; or
    - D) any other quality issue that would result in the Bulk Wheat not meeting an export specification requested by the Customer which does not comply with the Customer's Bulk Wheat Entitlement.

## 6.8 Title to surplus Bulk Wheat

Title in any Bulk Wheat remaining in the CBH system which is surplus to the Customer's Bulk Wheat Entitlement shall transfer to CBH and CBH shall be entitled to sell or dispose of any surplus Bulk Wheat as it sees fit and retain any proceeds.

## 7 PORT OUTTURNING SERVICES

**Service Description:** This service provides bulk Outturning of Bulk Wheat at a Port Terminal Facility into a ship's hold.

### 7.1 Service Availability

- (a) Port Outturning Services are provided by CBH under this Agreement for the purpose of export accumulation only.
- (b) Port Outturning Services are offered at all Port Terminal Facilities in accordance with the terms and conditions contained in this Agreement.
- (c) Port Outturning Service charges do not include any rail or road transportation costs in moving Bulk Wheat to the relevant Port Terminal Facility.

### 7.2 Vessel Nominations

The Customer must request any Port Outturning Services required either online through LoadNet® for Marketers™, or on a Vessel Nomination Form.

### 7.3 Vessel Nomination Form

On receipt of a Vessel Nomination, CBH will determine its ability to meet the request and advise the

Customer in accordance with the Port Terminal Rules if CBH has:

- (a) accepted the Vessel Nomination; or
- (b) rejected the Vessel Nomination.

#### 7.4 Operational Decision Making

In making any decision to accept or reject the Vessel Nomination or any amendment to a Vessel Nomination, CBH shall make its determination in accordance with the terms of the Undertaking having regard to the following:

- (a) that in making decisions relating to the provision of access to the Port Terminal Services, CBH must balance conflicts of interests of Customers of the Port Terminal Facilities;
- (b) the application by CBH of objective commercial criteria and practices and policies to promote fair, reasonable and non-discriminatory Operational Decision making;
- (c) giving priority to vessels based on the lead time given between nomination and vessel ETA, and the likely availability of sufficient Bulk Wheat Entitlement at the Port prior to vessel ETA, the likely uncommitted storage capacity at the Port Terminal Facility and the uncommitted inloading capacity necessary to make a Nominated Vessel's Nominated Tonnage;
- (d) the objectives of:
  - (i) minimising Demurrage at the Port over a given period; and
  - (ii) maximising throughput of Bulk Wheat at the Port over a given period; and
- (e) changes in relevant facts and circumstances including:
  - (i) insufficient Bulk Wheat Entitlement at the Port accumulated by the Customer necessary to make a Customer's Nominated Vessel's Nominated Tonnage;
  - (ii) variations in vessel arrival times;
  - (iii) failure of vessels to pass surveys;
  - (iv) stability and ship worthiness inspections;
  - (v) vessel congestion;
  - (vi) variation in cargo requirements;
  - (vii) lack of performance of freight providers;
  - (viii) equipment failure;
  - (ix) maintenance outages;
  - (x) contamination of accumulated cargoes or contamination of loads; or
  - (xi) a Material Breach;
  - (xii) a Customer not working a vessel or accumulating a cargo on a 24 hour/7 day basis where another Customer is able to do so;
  - (xiii) the Bulk Wheat is unavailable as a result of fumigation activities pursuant to clause 6.4;
  - (xiv) the Vessel Nomination contains inadequate or inaccurate information; or
  - (xv) an event of Force Majeure prevents the scheduling of Port Outturning Services.

#### 7.5 Acceptance of Vessel Nomination

Upon acceptance of an Vessel Nomination, CBH shall Outturn the Bulk Wheat in accordance with the Vessel Nomination Form and all other provisions of this Agreement.

#### 7.6 Outturn Standard

CBH is obliged to Outturn the Bulk Wheat delivered to the Port Terminal Facility by the Customer and held in Storage.

#### 7.7 Weigh

CBH shall weigh all Bulk Wheat Outturned using its certified batch weighers. In the absence of manifest error or fraud the CBH weight measurement will be final.

#### 7.8 AQIS Sampling

Bulk Wheat will be made available for inspection by AQIS inspectors at the Customer's cost prior to Outturning the Bulk Wheat onto the Nominated Vessel.

#### 7.9 Auction Premium Rebate

Within 30 days of the end of the Term, CBH will pay the Auction Premium Rebate (if any) to the Customer.

#### 7.10 Right to Invoice Prior to Outturning

If Bulk Wheat is scheduled to be Outturned into a ship's hold from a Port Terminal Facility, CBH reserves the right to invoice the Customer and receive payment for the Port Outturning Service charges prescribed in **Schedule 1** prior to the Bulk Wheat being Outturned onto a ship. Where there are variations in respect of the amount of Bulk Wheat actually Outturned and the costs incurred in Outturning, CBH and the Customer agree that:

- (a) within 30 days of the Bulk Wheat being Outturned onto a ship, CBH will refund any amounts paid by the Customer under this clause in respect of Port Outturning Service charges invoiced by CBH relating to Bulk Wheat that was not Outturned onto a ship; and
- (b) CBH is entitled to invoice the Customer for any additional charges prescribed in **Schedule 1** for Bulk Wheat Outturned by CBH as a direct result of the actions of the Customer or the Customer's agent.

#### 7.11 Bulk Wheat Export Licence

The Customer warrants that the appropriate Bulk Wheat export licence or accreditation (if applicable) continues to be held prior to requesting Port Outturning Services and that the request is within the terms of the licence. CBH reserves the right to request details of the Bulk Wheat export licence or accreditation, at any time, and the Customer agrees to provide a copy of the licence to CBH within twenty-four (24) hours of any such request.

#### 7.12 Misrepresentation

- (a) The Customer warrants that the Bulk Wheat and its Grade will not be misrepresented to third parties or incorrectly recorded on commercial or shipping documents.
- (b) The Customer indemnifies CBH against all Loss or Damage incurred in any dispute over Bulk Wheat quality arising from such misrepresentation or incorrect recording of the Grade on commercial or shipping documents.

#### 7.13 Cleanliness

- (a) The Customer is responsible for ensuring that all vessels arrive at a Port Terminal Facility in a clean, empty and well maintained state free from any Contaminants or residue.
- (b) CBH is not obliged to inspect any vessel for cleanliness but if it does inspect then CBH, acting reasonably at all times, is entitled to reject the vessel as unfit for the transportation of Bulk Wheat and to refuse to load the vessel.
- (c) CBH is not liable for any Loss or Damage caused as a result of a rejection of the vessel.

- (d) The Customer agrees to pay CBH for any costs incurred by CBH as a result of the rejection of a vessel by CBH or AQIS.
- (e) Vessels are not permitted to be cleaned at any Port Terminal Facility without CBH's consent. If CBH consents to cleaning of the vessel, and if a vessel fails inspection, CBH can instruct a vessel to be removed from the berth if it is preventing another vessel from loading at the same berth.

#### 7.14 Stevedoring

If the Customer requests, CBH is willing to arrange stevedoring services for the Customer's vessels when they are loaded at Port Terminal Facilities. Upon request CBH will provide the Customer with the necessary terms and conditions (including charges) for CBH's provision of stevedoring services.

#### 7.15 Demurrage and Dispatch

The parties may enter into Demurrage and Dispatch arrangements by mutual agreement at the time CBH is notified of the Vessel Nomination in accordance with the Port Terminal Rules, subject to the Customer complying with the Port Terminal Rules.

#### 7.16 Non-Shipment of Bulk Wheat

If Bulk Wheat is not shipped from a Port Terminal Facility as detailed in a Vessel Nomination other than as a result of circumstances directly within the control of CBH, then:

- (a) CBH will consult with the Customer about the re-positioning within, or removal from the Port Terminal Facility of the Bulk Wheat; and
- (b) after 14 days have passed since the ETA contained in the Vessel Nomination, CBH may remove or reposition Bulk Wheat at its discretion and the Customer shall pay all reasonable costs incurred by CBH.

### 8 ADDITIONAL INFORMATION AND SERVICES

**Service Description:** CBH may also provide additional information or services over and above the standard information and services that CBH has agreed to provide under this Agreement.

- (a) CBH will provide the Customer with an estimate of its costs and any additional terms and conditions required in order to provide additional information or services. Costs may either be a lump sum or in accordance with normal hourly rates.
- (b) The Customer agrees to pay CBH's costs in providing any additional information or services requested by the Customer.
- (c) The decision of CBH whether to provide any additional information or services requested by the Customer will be at CBH's absolute discretion unless it is required to provide such additional information by any law.

### 9 PAYMENT

#### 9.1 Fees and Charges

- (a) In consideration for any Services provided by CBH to the Customer under this Agreement, the Customer agrees to pay CBH for all Services rendered in accordance with the charges set out in Schedule 1.
- (b) In particular, and without limiting the charges that may be levied under this Agreement the Customer agrees to pay:
  - (i) The Upfront Marketer Fee set out in Schedule 1 within 5 Business Days of the date of the CBH invoice for each tonne of Capacity that the Customer acquires in the:
    - (A) Harvest Shipping Period; and
    - (B) Annual Shipping Period;

- (ii) the relevant Auction Premium within 5 Business Days of the date of the CBH invoice for each tonne of Capacity acquired at an Auction;
  - (iii) the Export Fee in accordance with the provisions of clauses 7.10, 9.3 and 9.6 for:
    - (A) each tonne loaded onto a Nominated Vessel; or
    - (B) each tonne of Lost Capacity;
  - (iv) the Additional Storage Charges in accordance with the provisions of clause 6.7 for each tonne of Capacity to which the Additional Storage Charges relate; and
  - (v) the Capacity Transfer Fee in relation to each 1000 tonnes of Capacity transferred in accordance with the Port Terminal Rules.
- (c) The charges set out in Schedule 1 are a realistic assessment of the loss and damage that CBH will suffer as a result of a failure by the Customer to comply with their obligations under the Agreement and the Port Terminal Rules.
  - (d) CBH is entitled to retain the fees paid or to levy the charges payable as compensation by way of liquidated damages as a result of a failure by the Customer to comply with their obligations under the Agreement and the Port Terminal Rules.

## 9.2 Application for credit terms

- (a) If the Customer does not have an existing credit arrangement with CBH the Customer must provide CBH with a completed Credit Application Form at the same time as it executes this Agreement.
- (b) The Customer agrees that any credit provided by CBH is for business or investment purposes only and not for personal, domestic or household purposes.

## 9.3 Credit terms

- (a) If CBH agrees to provide credit terms to the Customer, then CBH reserves the right, in its absolute discretion, to:
  - (i) place or vary a limit on the amount allowed to be outstanding by the Customer at any time;
  - (ii) vary the credit terms by providing not less than 60 days' written notice of the new or varied credit terms;
  - (iii) refuse to extend further credit terms to the Customer; or
  - (iv) withdraw the Customer's credit terms.
- (b) It is the Customer's responsibility to request a credit limit increase if it is going to exceed the approved credit limit. Any refusal, withdrawal or exceeding of credit terms will result in the Services being provided on a prepaid basis.
- (c) If CBH has agreed to provide credit terms prior to the Commencement Date and has not withdrawn them prior to this Agreement then those credit terms will be deemed to continue on the terms and conditions set out in this clause 9.

## 9.4 Credit information

The Customer authorises CBH to provide information contained in the Credit Application Form and acquired as a result of the Customer's performance of this Agreement to any bank, credit reporting agency, debt collection agency, trade reference and any other person, business or company.

## 9.5 Invoicing

- (a) CBH will invoice the Customer for all charges payable in providing Services under this Agreement.

- (b) CBH will endeavour to issue invoices pertaining to bulk vessel shipments within 14 days of the vessel departure.
- (c) If GST is payable by CBH in respect of any Taxable Supply to the Customer under this Agreement, the Customer must pay any such GST (in addition to any other amounts payable under this Agreement).
- (d) CBH will provide the Customer with a tax invoice that complies with the GST Legislation.
- (e) All charges in this Agreement are expressed exclusive of GST.

#### 9.6 Payment terms

- (a) If credit terms are made available by CBH at its discretion, then the Customer must pay the amount set out in any invoice provided by CBH within 14 days of the date of the invoice.
- (b) If:
  - (i) credit terms are not made available to the Customer;
  - (ii) the Customer fails to make payment of an invoice in accordance with clause 9.6(a); or
  - (iii) CBH withdraws the provision of the credit terms to the Customer,
 then all existing invoices shall become immediately due and payable and the Customer must tender to CBH the charges for any Service prior to the performance of that Service.
- (c) CBH may, in its absolute discretion, suspend the provision of the Services (including credit) if the Customer fails to pay an invoice in accordance with clauses 7.10 and 9. The suspension of the Services is not a breach by CBH of its obligations under this Agreement and CBH may continue to suspend the Services until such time as the invoice has been paid.

#### 9.7 Certificates

A certificate signed by an authorised representative of CBH stating the amount owing to CBH by the Customer on any account whatsoever and all interest in respect thereof shall be a prima facie evidence of the amount owed to CBH by the Customer at the date of the certificate and shall be deemed correct unless the Customer proves otherwise.

#### 9.8 Interest on late payments

- (a) The Customer must pay interest on all amounts owing to CBH on any invoice that remains outstanding upon expiration of the due date expressed in the invoice at a rate 5% above the 90 day Bank bill rate offered by the Commonwealth Bank of Australia as at 31st October each year or as otherwise amended and notified to the Customer if there is a significant rise in this rate.
- (b) Interest will be calculated daily from the due date expressed in the invoice, until all amounts owing on the invoice, including interest, have been paid.
- (c) Payments by the Customer marked specifically for a particular invoice will be applied by CBH firstly in reduction of the interest outstanding and accruing on the invoice and then on any amount outstanding on the invoice.

#### 9.9 Cost recoverable

Any Loss or Damage incurred by CBH in recovering any outstanding monies shall be paid in full by the Customer prior to CBH resuming the provision of the Services.

#### 9.10 Set off

- (a) Any amounts owing by CBH or any of its Related Bodies Corporate to the Customer whether under this Agreement or otherwise, may, at the election of CBH, be set off (without prior notice) against any amounts owing by the Customer to CBH or any of its Related Bodies Corporate, whether under this Agreement or otherwise.

- (b) CBH holds the benefit of this clause and may exercise the rights under this clause on its own behalf and for and on behalf of each of its Related Bodies Corporate but nothing in this clause obliges such Related Bodies Corporate to perform any of the obligations of CBH under this Agreement.
- (c) CBH will give notice to the Customer of any set off performed under this clause.
- (d) The Customer is not entitled to set off amounts owing to CBH or any of its Related Bodies Corporate.

#### 9.11 Security

The Customer shall provide such security to CBH as CBH reasonably requires (including the execution of personal guarantees by the Customer's signatories to this Agreement, directors, shareholders or beneficiaries of the Customer).

### 10 LIEN AND RIGHT TO WITHHOLD BULK WHEAT

#### 10.1 Statutory Lien

CBH has, in priority to all other claims, liens or security, a lien over any Bulk Wheat received by it, in respect of any fees and charges payable to CBH in respect of that Bulk Wheat.

#### 10.2 Right to withhold Bulk Wheat

Notwithstanding any other term of this Agreement, CBH may, at its sole discretion, refuse to Outturn the Customer's Bulk Wheat if the Customer has not paid any amounts owing to CBH pursuant to clause 9.6.

### 11 DUE CARE AND DILIGENCE

- (a) CBH will comply with Good Operating Practices in the carrying out of its obligations under this Agreement.
- (b) The Customer will comply with Good Operating Practices in the carrying out of its obligations under this Agreement.

### 12 APPOINTMENT OF AN AGENT

#### 12.1 Notice and Obligations

The Customer may appoint an agent to undertake the day to day co-ordination of its operational Service requirements. The Customer must notify CBH immediately in writing upon the appointment of any such agent. Any such appointment will not in any way relieve the Customer of its obligations under this Agreement and accordingly any instruction from the appointed agent is, and will be deemed to be, an instruction of the Customer.

#### 12.2 Liability for Agent's Actions

The Customer agrees to accept full responsibility and to indemnify CBH for all actions, decisions and costs incurred or authorised by any agent appointed pursuant to clause 12.1 above when performing Services on behalf of the Customer under this Agreement.

### 13 CBH LIABILITY

#### 13.1 Liability for Shortfall at a Port Terminal Facility

- (a) Subject always to clauses 6.4(d), 13.1(b) and 13.8, CBH will be responsible and liable for any shortfall at a Port Terminal Facility if it cannot Outturn the Customer's Bulk Wheat Entitlement from the Port Terminal Facility to which the Customer's Bulk Wheat Entitlement relates.
- (b) CBH's liability for a shortfall in Bulk Wheat Entitlement pursuant to clause 13.1(a) will only extend (in the case of a shortfall in quantity), at the election of CBH, to either the:
  - (i) provision of sufficient grain of a similar type, variety and Grade from any Port Terminal

Facility to ensure the Customer's Bulk Wheat Entitlement is not diminished; or

- (ii) provision of financial compensation for the value of the Bulk Wheat shortfall to be determined at the Fair Market Price for such Bulk Wheat.

For the avoidance of doubt, there is no shortfall in the Customer's Bulk Wheat Entitlement if CBH is able to Outturn the Bulk Wheat Entitlement following any fumigation.

#### 13.2 Damage for Gross Negligence or Wilful Misconduct

Other than as set out in clause 13.7 and subject to clauses 13.3, 13.4 and 13.8, CBH will only be liable for loss and/or damage, which is caused by the Gross Negligence or Wilful Misconduct of CBH, its officers, employees or contractors.

#### 13.3 Liability Cap

Other than as set out in clauses 13.1 and 13.7, CBH's maximum liability to the Customer howsoever arising shall be limited to \$100,000 for any single event and limited to a maximum in aggregate of \$250,000 for the term of this agreement, however caused including Loss or Damage resulting from:

- (a) the negligence of CBH, its servants or agents; or
- (b) the breach of this Agreement by CBH, its servants or agents.

#### 13.4 Limitation of Bulk Wheat Loss and Damage

Except as provided for in clauses 13.1, 13.2 and 13.7, CBH will not be liable or responsible for any Loss or Damage (including Indirect or Consequential Loss) to the Bulk Wheat resulting from any variation in the quality of the Bulk Wheat resulting from:

- (a) the natural deterioration of Bulk Wheat over time;
- (b) the loss of germinative capacity of Bulk Wheat; or
- (c) the effects of the normal handling process on the Bulk Wheat held at, or transported within Port Terminal Facility.

#### 13.5 Limitation of Loss or Damage for delay

In the event of:

- (a) delays incurred in CBH Outturning the Bulk Wheat that are not caused by the Gross Negligence or Wilful Misconduct of CBH, its officers, employees or contractors;
- (b) delays due to the actions of third parties which are beyond the reasonable control of CBH;
- (c) delays in respect of the provision of information by CBH to the Customer pursuant to clause 6.3(b);
- (d) delays resulting from insect infestation of the Bulk Wheat,

and such delay causes any shortfall in Bulk Wheat Entitlement, then CBH's liability will only extend to the remedies provided in clause 13.1(b). CBH will not be liable for any other Loss or Damage caused by such delay.

#### 13.6 Contribution to loss

Where any express or implied term of this Agreement places on any Party (in this clause 13.6 "**Party A**") any duty of care the breach of which would, if the duty of care were imposed by the general law rather than by such express or implied term, constitute an actionable tort against any other Party (in this clause "**Party B**");

- (a) Party B has an obligation not to commit any negligent act or omission which contributes to any Loss or Damage it suffers or may suffer as a result by any breach by Party A of such express or implied terms; and



- (b) the liability of Party A for any such breach is limited to the direct and proximate Loss or Damage of Party B arising out of such breach, less the proportion of such Loss or Damage attributable to any breach by Party B of its obligations under clause 13.6(a).

The obligations imposed on a Party in this clause 13.6 in relation to any breach by Party A of the kind the subject to this clause are additional to, and not in derogation of, any obligation of Party B to mitigate its Loss or Damage in relation to such breach.

#### 13.7 Conditional exclusion of Statutory Liability

This Agreement excludes to the maximum extent permitted by law any warranty or condition implied by common law, practice or statute. However in the case of those warranties under statute which may not be excluded, including the *Trade Practices Act 1974 (Cth)*, CBH's liability for breach of such conditions or warranties shall, to the maximum extent permitted by law, be limited, in the sole discretion of CBH, to the lesser of:

- (a) in the case of Services:
  - (i) the re-supply of the relevant Service; or
  - (ii) the payment of the cost of re-supply of the relevant Service; and
- (b) in the case of goods (including Bulk Wheat provided under clause):
  - (i) the replacement of the goods or the supply of equivalent goods;
  - (ii) the repair of the goods;
  - (iii) the payment of the cost of replacing the goods or of acquiring replacement goods; or
  - (iv) the payment of the cost of having the goods repaired.

For the purposes of this clause 13.7, "relevant Service" shall mean the Service in relation to the quantity of affected Bulk Wheat only and does not mean the aggregate value of the relevant Service provided to the Customer.

#### 13.8 No Indirect or Consequential Loss

Notwithstanding anything else in this Agreement, CBH will not be liable to the Customer for any Indirect or Consequential Loss arising out of or in relation to the provision of Services by CBH pursuant to this Agreement.

#### 13.9 Indemnity and Release

The Customer hereby releases and indemnifies CBH in respect of all actions, claims and demands which may be instituted by the Customer against CBH in respect of the matters dealt with under clauses 13.4 and 13.8.

#### 13.10 Exclusion of warranties

CBH does not represent, warrant or guarantee that any Bulk Wheat received, acquired or Outturned for the Customer:

- (a) conforms to any specification as to Varietal Purity;
- (b) is free from the presence, at any level or concentration, of Pesticide Residue Contamination, Corynetoxins Contamination, Microbial Contamination, Heavy Metal Contamination or Natural Toxicant Contamination; or
- (c) is free from the presence, at any level or concentration, of Genetically Modified Organisms.

#### 13.11 Exclusion Clauses

Notwithstanding anything expressed in or implied by this Agreement, to the extent permitted by law CBH will not be liable to the Customer for any and all Loss or Damage caused by the negligence, breach of contract, breach of statutory duty or any other legal or equitable obligation of CBH, or

otherwise howsoever arising in connection with this Agreement from:

- (a) any variance in any specification as to Varietal Purity from the actual Varietal Purity of Bulk Wheat received or Outturned for the Customer;
- (b) the presence, in any Bulk Wheat received or Outturned for the Customer, at any level or concentration, of any Pesticide Residue Contamination, Corynetoxins Contamination, Microbial Contamination, Heavy Metal Contamination or Natural Toxicant Contamination; or
- (c) the presence, in any Bulk Wheat received or Outturned for the Customer, at any level or concentration of any Genetically Modified Organisms.

#### 13.12 Indemnity

Notwithstanding anything expressed in or implied by this Agreement, to the extent permitted by law the Customer shall indemnify, keep indemnified and hold harmless CBH from any and all Loss or Damage suffered by or claimed from CBH, whether caused by the negligence, breach of contract, breach of statutory duty or any other legal or equitable obligation of CBH, or otherwise howsoever arising in connection with this Agreement from:

- (a) any variance in any specification as to Varietal Purity from the actual Varietal Purity of Bulk Wheat received or Outturned for the Customer;
- (b) the presence, in any Bulk Wheat received or Outturned for the Customer, at any level or concentration, of any Pesticide Residue Contamination, Corynetoxins Contamination, Microbial Contamination, Heavy Metal Contamination or Natural Toxicant Contamination; or
- (c) the presence, in any Bulk Wheat received or Outturned for the Customer, at any level or concentration of any Genetically Modified Organisms.

### 14 INSURANCE AND RISK

#### 14.1 Insurance

- (a) CBH will, to the extent that it is reasonably practicable, take out and keep in force an insurance policy in respect to the risk of loss or damage to the Bulk Wheat whilst:
  - (i) it is held in the Port Terminal Facilities; and
  - (ii) during transit organised by CBH within the Port Terminal Facility.
- (b) CBH will advise the Customer if it cannot gain insurance coverage as detail above.

#### 14.2 Transfer of risk

Subject to clause 13, the risk of loss or damage to Bulk Wheat is transferred to the Customer at the point in time when the Bulk Wheat exits the Outturning spout of a Port Terminal Facility into a form of a Bulk Wheat transportation vessel.

### 15 FORCE MAJEURE EVENT

#### 15.1 Definition

An event of "**Force Majeure**" is any event or circumstance not within the reasonable control of the party affected by it (the "**Affected Party**"), including:

- (a) acts of God, including storms or cyclones, action of the elements, epidemics, landslides, earthquakes, floods, fire, road or rail closures due to washouts or impassability and natural disaster;
- (b) strikes, stoppages, restraints of labour, or other industrial disturbances;
- (c) acts of the public enemy, including wars which are declared or undeclared, blockades and insurrections;

- (d) riots, malicious damage, sabotage and civil disturbance;
- (e) accident (including accidental emissions of pollutants or hazardous substances), fire, explosion, radioactive contamination and toxic or dangerous chemical contamination;
- (f) the adverse application of any Australian laws or enforcement actions of any Commonwealth or State court or governmental agency not resulting from any wrongful act or omission of the Affected Party;
- (g) the refusal of or delay in obtaining any necessary consents from any government agency, provided that the Affected Party has acted in a timely manner in endeavouring to secure them;
- (h) the failure of, or the breakdown of or accident to, plant or machinery of any kind other than breakdowns or damage caused by the Gross Negligence of CBH;
- (i) the breach by any third party supplier of its obligations to supply goods or services to the Affected Party, provided that the Affected Party has acted in a timely manner in endeavouring to secure such supply, and provided that the Affected Party itself is not in breach of any relevant obligation; and
- (j) any production shutdown or interruption which is validly required or directed by the Commonwealth or State government or any governmental agency which is not due to the act or default of the Affected Party,

and which the Affected Party is not reasonably able to prevent or overcome, or the effects of which the Affected Party is not reasonably able to predict and take measures to avoid, by the exercise of reasonable technical and commercial diligence and prudence.

#### 15.2 Exemption from Force Majeure

The lack of funds or inability to use any funds will not constitute Force Majeure.

#### 15.3 Relief from performance and liability

Subject to clause 15.6, an Affected Party will be excused from performance of and will not be liable to the other party for any failure in carrying out any of its obligations under this Agreement if and only to the extent and for the time that it is prevented in whole or in part from doing so by Force Majeure.

#### 15.4 Actions during Force Majeure Events

An Affected Party claiming the benefit or protection of Force Majeure will:

- (a) promptly give written notice to the other party of the occurrence and circumstances in respect of which the claim of Force Majeure arises;
- (b) take all reasonable steps to ameliorate and remedy the consequences of that occurrence without delay;
- (c) maintain regular communication with the other party to describe what is being done to remedy the Force Majeure; and
- (d) resume performance in full of its obligations under this Agreement as soon as reasonably practicable,

but the settlement of strikes, lockouts, or other industrial disputes or disturbances which constitute Force Majeure will be entirely within the discretion of the Affected Party and the Affected Party may refrain from settling the strike, lockout or dispute or may settle it at such time and on such terms as it considers to be in its best interests.

#### 15.5 Termination

If the Affected Party is relieved from performance and liability in accordance with clause 15.3 due to Force Majeure for a period exceeding 60 days, either party may terminate this Agreement with immediate effect by written notice to the other party.

## 15.6 Payments by the Customer

Despite any other provision of this Agreement, the occurrence of Force Majeure affecting the Customer will not relieve the Customer of the obligation to pay any amounts owing under this Agreement in relation to Services performed by CBH prior to notice being given in accordance with clause 15.4(a), including but not limited to the payment of the charges set out in Schedule 1 as modified from time to time by CBH.

## 16 TITLE TO BULK WHEAT

- (a) Subject to the terms of this Agreement, CBH is a bailee for reward of any Bulk Wheat received from, on behalf of, or for the account of, the Customer, that is within CBH's power, possession, custody or control.
- (b) Subject to clause 10, the proprietary interest in Bulk Wheat is vested in the person who, for the time being, is entitled to obtain it from the stocks held by CBH or under CBH's control.

## 17 PORT TERMINAL FACILITY ACCESS

### 17.1 Access Procedure

In order to protect the safety of the Customer's employees, agents or contractors and that of CBH's employees, agents, contractors and invitees:

- (a) if the Customer wishes to visit a Port Terminal Facility, then the Customer must give a minimum of 2 Business Days notice to the CBH Customer Account Manager stating the date the Customer wishes to attend, the identity of the Customer's representative and the purpose of the visit;
- (b) CBH may, in its absolute discretion, refuse or reject any visitation request or propose alternative times and/or places for the visit; and
- (c) subject to clause 17.2, the Customer shall not attend at any CBH Port Terminal Facility without receiving the prior consent of the Customer Account Manager for each visit and shall not enter or stay on the Port Terminal Facility without appropriate CBH supervision.

### 17.2 Public Reception

If a CBH Port Terminal Facility has a public reception, then clause 17.1(c) is modified to the extent necessary to allow the Customer to proceed directly following the commonly accepted route to the public reception but does not allow the Customer to proceed to any other part of the Port Terminal Facility without appropriate supervision.

### 17.3 Port Terminal Facility Safety

Whilst on a Port Terminal Facility, the Customer agrees to:

- (a) follow all reasonably necessary directions of CBH personnel, including departure from the Port Terminal Facility;
- (b) not create any hazard, or cause any contamination, on the Port Terminal Facility; and
- (c) procure that its employees, agents or contractors comply with this clause 17.3.

## 18 CONFIDENTIALITY

### 18.1 General obligation

Subject to clauses 18.2 and 18.3, this Agreement and all information exchanged between the parties under this Agreement or during the negotiations preceding the signing of this Agreement is confidential to the party which provided it and may not be disclosed to any person except:

- (a) by a party to the legal and other professional advisers, auditors and other consultants ("**Consultants**") and employees of:
  - (i) that party; or

- (ii) that party's Related Bodies Corporate;
- (b) to another party with the consent of the party which first supplied the information;
- (c) if the information is at the time lawfully in the possession of the proposed recipient of the information through sources other than a party;
- (d) to the extent required by any law or by the lawful requirement of any governmental agency having jurisdiction over the party or its Related Bodies Corporate;
- (e) to the extent required by a lawful requirement of any stock exchange having jurisdiction over a party or its Related Bodies Corporate;
- (f) if necessary or commercially desirable to be disclosed in any prospectus or information memorandum to investors or proposed or prospective investors:
  - (i) for an issue or disposal of any shares in a party or its Related Bodies Corporate;
  - (ii) for an issue of debt instruments of a party or a party's Related Body Corporate; or
  - (iii) for the purposes of a party obtaining a listing on Australian Stock Exchange Limited of any shares;
- (g) if the information is at the time generally and publicly available other than as a result of breach of confidence by the party wishing to disclose the information or those to whom it proposes to disclose it;
- (h) if necessary or commercially desirable to be disclosed to an existing, or bona fide proposed or bona fide prospective:
  - (i) financier;
  - (ii) financier of a party or of any of its Related Bodies Corporate; or
  - (iii) rating agency in respect of a party or of any of its Related Bodies Corporate;
- (i) if necessary or commercially desirable to be disclosed to any bona fide proposed or prospective:
  - (i) transferee of an interest in any Bulk Wheat; or
  - (ii) financier of such transferee providing or proposing or considering whether to provide relevant financial accommodation;
- (j) if necessary or commercially desirable to be disclosed to consultants or employees of any of the persons referred to in clause 18.1(h) or 18.1(i); or
- (k) if CBH is required under the Undertaking or under the Port Terminal Rules to publish Port Grain Holdings.

## 18.2 Conditions

- (a) In the case of a disclosure under clause 18.1(a) or 18.1(b) and, where appropriate, under clause 18.1(d), 18.1(e) or 18.1(f), the party wishing to make the disclosure must inform the proposed recipient of the confidentiality of the information and the party must take customary precautions to ensure that the proposed recipient keeps the information confidential.
- (b) In the case of a disclosure under clause 18.1(h), 18.1(i) or 18.1(j) (in the case of consultants only), the party wishing to make the disclosure must not make any disclosure unless:
  - (i) in the case of a disclosure under clause 18.1(h) or 18.1(i), the proposed recipient has first entered into and delivered to the parties a confidentiality undertaking in a form acceptable to all parties; and

(ii) in the case of a disclosure under clause 18.1(j), the principal or employer of the proposed recipient has first entered into and delivered to the parties a confidentiality undertaking in a form acceptable to all parties which shall incorporate a warranty by the principal or employer of the proposed recipient that the proposed recipient is under an obligation of confidentiality to the principal or employer and that the principal or employer will enforce that obligation to the fullest extent that the law allows upon being called upon to do so by any of the parties.

(c) The Customer consents to CBH publishing Port Grain Holdings pursuant to clause 18.1(k). The Customer acknowledges that whilst CBH will only disclose Port Grain Holdings, such disclosure to the public in accordance with this clause 18 may enable third parties to identify the quantities of grain stored by a Customer at a Port using this information in conjunction with other publicly available information including the shipping stem published in accordance with the Port Terminal Rules and the WEMA.

### 18.3 Notice to other Parties

Each party must:

- (a) promptly inform all other parties of any request received by that party from any person described in clause 18.1(d) to disclose information under clause 18.1(d);
- (b) inform all other parties as soon as reasonably practicable after information is disclosed by the party under clause 18.1(d); and
- (c) not disclose any information under clause 18.1(e) unless all other parties have been informed of the proposed disclosure.

### 18.4 Indemnities

Subject to clause 13, each party indemnifies each other party against any costs, losses or damages suffered by that other party arising out of or in connection with any disclosure by the first-mentioned party of information in contravention of this clause 18.

### 18.5 Binding nature of confidentiality obligations

The obligations of confidentiality imposed by this clause 18 survive the termination of this Agreement and any person who ceases to be a party continues to be bound by those obligations.

## 19 DISPUTE RESOLUTION

### 19.1 Disputes

- (a) Save for any dispute arising under the Auction Rules which shall be dealt with in accordance with the provisions of the Auction Rules all disputes arising out of or in connection with this Agreement or the Port Terminal Rules shall be dealt with in accordance with the provisions of this clause 19.
- (b) A dispute shall be referred to the Customer's Manager and the CBH Operations Manager - Logistics for resolution. The CBH Operations Manager - Logistics and the Customer's Manager shall meet or confer at least once within 24 hours of the notification of the dispute to discuss the dispute and attempt to resolve the dispute.
- (c) Where the dispute relates to invoiced Services, the Customer is to inform the CBH Operations Manager - Logistics immediately, and before the due date of that invoice.
- (d) Any dispute relating to a breach of the terms and conditions of this Access Agreement shall not, of itself, amount to a dispute relating to a breach of the Undertaking or the rules forming part of the Undertaking,

### 19.2 Escalation of Dispute – Executive Panel

If no resolution of the dispute can be reached in accordance with clause 19.1, within seven (7) days of the dispute being notified to the other party, each party shall refer the dispute to the General Manager - Operations of CBH and the CEO of the Customer (or such person designated by the Customer as having authority equivalent to that of a CEO) (the "**Executive Panel**"). The Executive

Panel:

- (a) will meet at least once at a time mutually convenient no later than 2 Business Days after the dispute has been referred to it; and
- (b) may decide on the methods and procedure by which it will resolve the dispute, which may include the obtaining of expert advice.

### 19.3 Payment of invoices pending resolution of a dispute

Notwithstanding anything in this Agreement, the Customer is not entitled to withhold payment of the undisputed amount of any invoice. If the Customer cannot provide a reasonable estimate of the disputed amount the Customer will not be entitled to withhold any payment.

### 19.4 Arbitration

#### (a) Referral to arbitration

- (i) If the Dispute is not resolved within ten Business Days after being referred to the Executive Panel under clause 19.2, either of the parties may give notice to the other party to refer the Dispute to Arbitration in Western Australia by a single arbitrator appointed by agreement of the parties or if they fail to agree within ten Business Days, an arbitrator appointed by the President of the Western Australian Chapter of the Institute of Arbitrators and Mediators of Australia (**IAMA**) acting on the request of either party.
- (ii) CBH must notify the ACCC of the details of any Dispute which has been referred to arbitration. CBH must provide the arbitrator's final determination to the ACCC.
- (iii) If the Customer serves notice under clause 19.4(a)(i), that notice will also include an agreement by that Customer to:
  - (A) pay any amounts determined in accordance with clause 19.4 (f); and
  - (B) indemnify the arbitrator from any claims made against the arbitrator arising in connection with the performance by the arbitrator of its duties under this clause 19, such indemnity excluding circumstances where the conduct of the arbitrator constitutes wilful negligence, or is dishonest or unlawful conduct.
- (iv) CBH must pay any amounts determined in accordance with clause 19.4 (f) and will indemnify the arbitrator from any claims made against the arbitrator arising in connection with the performance by the arbitrator of its duties under this clause 19, such indemnity excluding circumstances where the conduct of the arbitrator constitutes wilful negligence, or is dishonest or unlawful conduct.
- (v) The arbitrator will not proceed with the arbitration unless and until the Customer has agreed to pay the arbitrator's costs as determined under clause 19.4(f).

#### (b) Arbitration procedure

- (i) Unless CBH and the Customer agree otherwise, the arbitration must be conducted in private.
- (ii) A party may appoint a person, including a legally qualified person, to represent it or assist it in the arbitration.
- (iii) The arbitrator will when conducting the arbitration:
  - (A) observe the rules of natural justice but is not required to observe the rules of evidence;
  - (B) proceed as quickly as is possible and consistent with a fair and proper assessment of the matter;
  - (C) while having the right to decide on the form of presentations, encourage a written presentation by each party with exchange and with rebuttal opportunities and questioning by the arbitrator;
  - (D) call on any party the arbitrator believes necessary to give evidence;
  - (E) decide how to receive evidence and consider the need to keep evidence confidential and the need to protect the confidentiality of the arbitration process;

- (F) present its determination in a draft form to the parties and hear argument from the parties before making a final determination; and
  - (G) hand down a final determination in writing which includes all its reasons for making the determination and findings on material questions of law and fact, including references to evidence on which the findings of fact were based.
- (iv) The arbitrator may at any time terminate arbitration (without making an award) if it thinks that:
- (A) the notification of the Dispute is vexatious;
  - (B) the subject matter of the Dispute is trivial, misconceived or lacking in substance; or
  - (C) the party who notified the Dispute has not engaged in negotiations in good faith.
- (c) Matters which arbitrator must take into account

In deciding a Dispute the arbitrator will take into account the principles, methodologies and provisions set out in the Undertaking, in particular clauses 6.4 and 6.5;

- (d) Confidentiality
- (i) The arbitrator must take all reasonable steps to protect the confidentiality of information that a party has identified is confidential or commercially sensitive.
  - (ii) The arbitrator may require the parties to comply with rules and orders aimed at protecting the confidentiality of information provided by the parties, including:
    - (A) requiring each party to give confidentiality undertakings to the other party and their external advisers; and
    - (B) limiting access to confidential information to specified individuals subject to confidentiality undertakings provided by those individuals.
  - (iii) The arbitrator may make confidential and non-confidential versions of its determination and limit access to the confidential versions to specific individuals.
  - (iv) For the purpose of clarity, the entire dispute resolution process outlined in this clause 19 remains subject to clause 18.
- (e) Effect of arbitrator's determination
- (i) The determination of the arbitrator will be final and binding subject to any rights of review by a court of law.
  - (ii) Except where the determination or direction is subject to a review by a court of law, if a Customer does not comply with a determination or direction of the arbitrator, then CBH will no longer be obliged to provide services under this Agreement for that Customer.
  - (iii) Except where the determination or direction is subject to a review by a court of law, CBH will comply with the lawful directions or determinations of the arbitrator.
  - (iv) The arbitrator shall have the discretion to determine that an arbitration determination shall take effect from the date of the determination, the date upon which the dispute was notified or the date of this Agreement.
  - (v) During any dispute process the parties must continue to comply with their obligations and exercise their rights under this Agreement.
- (f) Arbitrator's costs

The arbitrator's costs and the costs of the parties to the arbitration will be borne by the parties in such proportions as the arbitrator determines. Each party may make submissions to the arbitrator on the issue of costs at any time prior to that determination.

## 20 ENTIRE AGREEMENT

- (a) This Agreement constitutes the entire Agreement between the parties. Each party warrants and covenants to the other that there are no written or oral statements, representations,



undertakings, covenants or agreements between the parties, express or implied, except as provided for in this Agreement.

- (b) This Agreement may only be amended or varied:
  - (i) by agreement in writing signed by both parties expressly amending this Agreement;
  - (ii) pursuant to the variation procedure prescribed in the Undertaking; or
  - (iii) by operation of law
- (c) Unless the context otherwise requires, a reference to this Agreement shall include a reference to this Agreement as amended or varied from time to time.
- (d) Notwithstanding that CBH from time to time produces operational guidelines to assist customers, nothing in those guidelines shall be deemed to impliedly or expressly amend anything in this Agreement and if there is any inconsistency between any guidelines and a term of this Agreement, the terms of this Agreement shall prevail.

## 21 NOTICES

### 21.1 Types of Notices

Except as provided in clause 21.2, all notices of any kind and all statements, forecasts, advices, policy statements, procedures manuals, guidelines and the like, and all invoices given or made under this Agreement (each a "**Communication**") shall be:

- (a) in writing in the English language;
- (b) marked for the attention of the appropriate person; and
- (c) delivered by hand to the address of the addressee, or sent by ordinary letter post (airmail if posted to or from a place outside Australia) or hand delivery by a reputable courier service to the address of the addressee, or sent by facsimile to the facsimile number of the addressee.

### 21.2 Operational and Urgent Notices

Where this Agreement expressly so provides, and in those cases or categories of cases where the parties agree in writing, notices of a day to day operational nature or notices given in an operational emergency may be given orally and confirmed in writing. The parties shall also agree upon protocols, contact points and contact telephone numbers for dealing with matters which require urgent action in the administration of this Agreement, and shall ensure that lists of up-to-date contact points and telephone numbers are exchanged as and when required to ensure the currency of those lists.

### 21.3 Notice Takes Effect

Subject to clause 21.4, a Communication takes effect from the later of:

- (a) the time it is actually received; and
- (b) any later time specified in the Communication.

### 21.4 Deemed Receipt

For the purposes of this Agreement:

- (a) a Communication delivered by hand to the address of a party shall be deemed to be received if it is handed (with or without acknowledgment of delivery) to any person at that address who, in the reasonable judgment of the person making the delivery (upon making appropriate enquiries), appears to be and represents himself as a manager or officer of the party to whom the Communication is addressed;
- (b) a Communication which is posted is deemed to be received by the party to whom the Communication is addressed on the second Business Day after the day of posting;
- (c) a Communication sent by facsimile transmission which is transmitted:

- (i) prior to 4 p.m. on a Business Day shall be deemed to have been received by the party to whom it is addressed on that Business Day; and
- (ii) after 4 p.m. on a Business Day shall be deemed to have been received by the party to whom it is addressed on the first Business Day following the date of transmission; and
- (iii) the production of the transmission report or a printout of a transmission log generated by the sender's facsimile machine (or other facsimile transmission device) showing successful uninterrupted facsimile transmission of all pages of the relevant Communication to the facsimile number of the party to whom it is addressed and proof of confirmation by physical delivery or mailing as provided above shall constitute evidence of receipt of that facsimile transmission; and
- (d) a Communication given orally under clause 21.221.2 shall be deemed to have been received when first given orally.

#### 21.5 Change of Address

A party may at any time, by notice given to the other parties to this Agreement, designate a different person, street address, postal address, electronic mail address or facsimile number for the purpose of Communications pursuant to this clause 21.

#### 21.6 Electronic Mail

- (a) The parties agree, that in the absence of evidence to the contrary, an electronic mail message sent by a party to the electronic mail addresses notified by the parties shall be deemed to be received on the day after the day that the electronic mail message is recorded as having been sent by the sender's computer server.
- (b) Messages relating to the following subjects will not be valid if sent by electronic mail:
  - (i) termination of this Agreement;
  - (ii) disputes;
  - (iii) change of address, phone number, fax number or electronic mail address.

### 22 **ASSIGNMENT**

#### 22.1 General Prohibition

Neither party may assign, transfer or otherwise dispose of all or any part of its rights or obligations under this Agreement without the prior written consent of the other party.

#### 22.2 Deed of Covenant

The assignee must enter into a deed of covenant with the party whose consent is sought, acknowledging that party's rights under this Agreement and undertaking by way of novation to observe and perform all the assignor's obligations under this Agreement. Such deed of covenant shall be prepared by the party whose consent is sought in such reasonable form as that party requires, but at the expense of the assignor. The deed shall be stamped by and at the expense of the assignor.

### 23 **WAIVER**

- (a) No right under this Agreement shall be deemed to be waived except by notice in writing signed by each party.
- (b) No default or delay on the part of any party exercising any of its rights or obligations under this Agreement shall operate as a waiver of any such right or obligation under this Agreement.

## 24 NO PARTNERSHIP

- (a) Nothing contained in this Agreement will be deemed or construed by the Customer or CBH or by any third party as creating the relationship of partnership, principal and agent, or joint venture.
- (b) No relationship between the Customer and CBH other than that of bailor and bailee upon the conditions and provisions in this Agreement will be created by the payment of any money under this Agreement, any other conditions or provision in this Agreement or any act of the Customer or CBH.

## 25 GOVERNING LAW AND JURISDICTION

### 25.1 Governing law

This Agreement shall be governed by and construed in accordance with the laws of the State of Western Australia.

### 25.2 Jurisdiction

Each Party irrevocably submits to and accepts generally and unconditionally the non-exclusive jurisdiction of the courts and appellate courts of Western Australia.

## 26 ATTORNEYS

Each individual signing this Agreement on behalf of a party warrants that the individual has been duly authorised to execute this Agreement and to bind that party on whose behalf the individual is signing.

## 27 SUB-CONTRACTING

CBH may in its sole and absolute discretion:

- (a) sub-contract the whole or any part of the Services; or
- (b) otherwise engage any person to undertake any part of the Services on CBH's behalf, without notice to the Customer.

## 28 SEVERANCE

If any term or other part of this Agreement is or becomes for any reason invalid or unenforceable at law, the remainder of this Agreement shall continue to be valid and enforceable and such term or other part of this Agreement shall be severed or modified without affecting the remainder of this Agreement.

## 29 RE-NEGOTIATION OF TERMS

### 29.1 Change in Law

- (a) Subject to clauses 29.1(c) and 29.2, if at any time during the Term:
  - (i) the costs to CBH of operating and maintaining the Port Terminal Facility for the purposes of supply of the Port Terminal Services under this Agreement and otherwise complying with its obligations under this Agreement are increased to a material extent ("**Increased Costs**"); and
  - (ii) the Increased Costs are a result of the enactment or promulgation of any new Act of Parliament or regulation or the amendment of any existing Act or regulation by a Government Agency relating to the management or protection of the environment or the health and safety of workers, including any tax on the emission of carbon, sulphur or nitrogen compounds (a "**Change in Law**"),

then CBH shall be entitled to increase the price paid by the Customer under this Agreement for the provision of Port Terminal Services as may be necessary to offset those Increased Costs. In any such case, CBH shall provide the Customer with a statement

providing such information as is necessary to demonstrate:

- (iii) the causal relationship between the Change in Law and the Increased Costs referred to;
  - (iv) the reasonableness and necessity of the measures taken by CBH to comply with the Change in Law; and
  - (v) the nature and extent of any increase in the price paid by the Customer under this Agreement for Port Terminal Services necessary to offset the Increased Costs referred to.
- (b) A statement by CBH under clause 29.1(a)(ii) shall be deemed to constitute a request by CBH for a variation of this Agreement and shall be dealt with as a request for a variation under the terms of the Undertaking.
- (c) CBH shall not be entitled to seek any increase under clause 29.1(a) in the price paid by the Customer under this Agreement for Port Terminal Services to the extent that the Increased Costs are a consequence in whole or in part of a failure by CBH to operate and maintain any Port Terminal Facility in accordance with Good Operating Practices.

## 29.2 Income and payroll taxes

Each Party shall be liable for its own income tax and payroll tax levied now or at any time in the future by any Government Agency, whether or not they affect the cost to that Party of complying with its obligations under this Agreement.

**Signed** for and on behalf of **Co-operative Bulk Handling Limited** (ABN 29 256 604 947) in the presence of:

\_\_\_\_\_  
Signature of Witness

\_\_\_\_\_  
Name of Witness in full

**Signed** for and on behalf of **xxx** (ABN xxx in the presence of:

\_\_\_\_\_  
Signature of Witness

\_\_\_\_\_  
Name of Witness in full

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Name

\_\_\_\_\_  
Position

\_\_\_\_\_  
Signature of authorised representative

\_\_\_\_\_  
Name

\_\_\_\_\_  
Position

## SCHEDULE 1

### Payment

All charges payable pursuant to this Agreement are to be paid in accordance with clause 9 of this Agreement. As set out in clause 10, CBH has the discretion not to Outturn Bulk Wheat until all outstanding fees and charges have been paid.

The Charges Schedule outlines the CBH Board of Directors approved Port Terminal Services Charges which will be altered only by the CBH Board.

The charges outlined apply from the 1<sup>st</sup> October 2009 to 31<sup>st</sup> October 2010.

All prices are quoted in AUD and are exclusive of GST.

### **General Service Charges**

<b>1.</b>	<b>Annual Registration Fee</b>	<b>\$525.00 pa</b>
This charge applies for the initial and on-going access to all services offered by CBH that forms part of the charges listed in this schedule and in the relevant Grain Services and/or Port Terminal Services Agreements.		
The fee will apply once upon signing and return of the relevant Agreement/s.		

<b>2.</b>	<b>Overdue Payment Interest</b>	
Interest may be charged on overdue invoices, at the discretion of CBH.		
The rate will be set annually at 31 <sup>st</sup> October and amended more frequently where there is a significant increase in interest rates, at a rate of 5% above the current 90 day bank bill rate offered by the Commonwealth Bank of Australia or as specified in any other trading agreement signed by both the Customer and CBH.		

### **Bulk Export Capacity & Port Outloading Service Charges**

<b>3.</b>	<b>Upfront Marketer Fee</b>	<b>\$3.00 p/t</b>
This is a non-refundable fee applied to each tonne of grain where a Customer obtains Capacity through the Harvest Period EOI, Annual Period Port Capacity Auctions or through the Spare Capacity Bookings.		

<b>4.</b>	<b>Export Fee</b>	<b>\$14.10 p/t</b>
The Export Fee covers the provision of Port Terminal Services as described in the Port Terminal Services Agreement and applied to each tonne of grain that is loaded onto a vessel or considered Lost Capacity.		

<b>5.</b>	<b>Capacity Transfer Fee</b>	<b>\$0.05 p/t</b>
<p>This fee is applied where a Customer who has acquired export Capacity through the EOI, Auction or Spare Capacity processes, wishes to transfer some or all of that Capacity to another CBH Customer.</p> <p>Transfers can be requested using the Shipping Capacity Transfer Form available on LoadNet® for Marketers™.</p>		

<b>6.</b>	<b>Additional Port Storage Fee</b>	<b>As below</b>	
<p>Additional Port Storage Fees will apply in instances of late ship arrivals and/or any residual grain left in port after shipment.</p>			
<b>Late Shipment</b>		7th day after the end of the Shipping Window	\$3.00 p/t
Where a vessel has not commenced loading within the nominated Shipping Window due to reasons detailed in Section 6.7 (b) of the Port Terminal Services Agreement and grain is held in the Port Terminal Facility until the vessel is loaded or cancelled, the following charges will apply		14th day after the end of the Shipping Window	\$3.00 p/t
<b>Residual Grain</b>		1-3 days	free
Where there is any residual grain following loading of the Customer's vessel and this grain is left on the Port Terminal Facility until it is outturned by the Customer.		4-7 days	\$0.50 p/t
		8 days +	\$0.95 p/t

<b>7.</b>	<b>Shipping Relocation Fee</b>	<b>Kwinana Terminal</b>	<b>\$2.30 p/t</b>
		<b>Geraldton, Albany, Esperance Terminals</b>	<b>\$4.00 p/t</b>
<p>This charge may apply if a cargo for a nominated vessel is held at the Port Terminal Facility due to a cancellation or delay and needs to be relocated to allow the Port Terminal to continue to operate.</p>			

<b>8.</b>	<b>Outloading Fee</b>		<b>\$2.00 p/t</b>
		<b>Mobilisation</b>	<b>\$1000</b>
<p>This charge applies to each tonne of residual or contaminated Bulk Wheat that is outturned from the Port Terminal Facility into road or rail transport. It is charged per tonne with a minimum mobilisation charge of \$1000.</p>			

<b>9.</b>	<b>Wharfage fees</b>	<b>\$1.20 p/t</b>
<p>Wharfage charges are applied to Port services at Kwinana only to cover the costs associated with maintaining the Kwinana Jetty owned by CBH.</p> <p>For shipments at other ports, the relevant Port Authority will charge the Customer/shipper directly and should be contacted for relevant charges.</p>		

<b>10.</b>	<b>Shipping Agency fees</b>	<b>\$750.00</b>
<p>This fee applies where the Customer requests CBH to attend to the shipping documentation for their nominated vessel/s.</p> <p>The charge will apply per shipment per port.</p>		

<b>11.</b>	<b>3<sup>rd</sup> Party Port Access</b>	<b>\$2450 per vessel</b>
<p>This charge will apply to the Customer if they request a representative to have access to the berth or terminal and it is deemed necessary by CBH to have terminal staff in attendance. This fee will be waived if the representative stays onboard the vessel during loading. This charge does not cover representatives collection samples during loading.</p>		

<b>12.</b>	<b>3<sup>rd</sup> Party Quality Inspection</b>	<b>\$2450 per vessel</b>
<p>Charge will apply if the Customer requests an independent representative be allowed to take samples for the duration of the vessel during loading.</p>		

### ***Fumigation Charges***

<b>13.</b>	<b>Remedial Fumigation Services</b>	<b>\$1.00 p/t</b>
<p>CBH offers standard Remedial Fumigation Services in the form of cylinderised phosphine for application to the grain where insects have been detected in grain delivered to the Port Terminal Facility.</p> <p>Any other fumigation requirements should be discussed with CBH in line with Section 6.4 (b) of the Port Terminal Services Agreement and a quotation for application will be provided upon request.</p>		

<b>14.</b>	<b>Fumigation Statements</b>	<b>Per Port</b>	<b>\$82.50</b>
<p>Where a Customer requests a statement of fumigation for grain fumigated whilst in CBH store.</p>			



## Sample Charges

<b>14.</b>	<b>Ship Sample Fees</b>	<b>Per grade ≤3kg</b>	<b>\$115.50</b>
		<b>Per kg &gt; 3kg</b>	<b>\$11.55</b>

Upon request by the Customer, CBH will collect samples whilst the ship is loading.

At no charge CBH will collect a 2kg per hatch and/or 5kg per batch sample, and anything additional to this will be charged to the Customer.

Ship Sample collection should be requested on the Customers Cargo Outturn Request or Vessel Nomination Form available on LoadNet® for Marketers™.

Charges do not include freight or courier costs. The Customer must organise a courier or other means to pick up the sample/s from the Port Terminal Facility.

<b>15.</b>	<b>Cargo Sample Fee</b>	<b>Per sample ≤100kg</b>	<b>\$346.50</b>
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Cargo samples are samples of grain from the terminal designated for a particular cargo which is collected before the vessel commences loading.

Cargo Samples should be requested on the Customers Cargo Outturn Request or Vessel Nomination Form available on LoadNet® for Marketers™.

Charges do not include freight or courier costs.

<b>16.</b>	<b>Sample Reassessment Fee</b>	<b>Per sample</b>	<b>\$400.00</b>
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If a pre-delivery sample has been submitted for assessment as per Section 5.2 of the Port Terminal Services Agreement and subsequently rejected due to residual presence of chemicals and/or other contaminants, the Customer must re-submit a representative pre-delivery sample from

- a) grain from the same storage source that has been cleaned or otherwise treated to remove the contaminant for further re-assessment in order to continue deliveries from that grain source; or
- b) a substitute storage source in order to commence deliveries from that substitute source

The sample will then be assessed and the Customer will be required to pay the charges.

## SCHEDULE 2

### Auction Premium Rebate

The Auction Premium Rebate shall be calculated based on the following formula:

$$APR = \left( \frac{TAPR - TAC}{TTSAC} \right) \times TTSC$$

Where:

APR is amount of the Auction Premium Rebate paid to the Customer

TAPR is the total Auction Premiums received by CBH during the Term including any interest earned by CBH on those Auction Premiums

TAC is the Total Auction Costs

TTSAC is the total tonnes of grain shipped from all four Port Terminal Facilities by all CBH Customers using Capacity acquired in the Auctions during the Term.

TTSC is the total tonnes of Bulk Wheat shipped by CBH on behalf of the Customer using Capacity acquired in the Auctions during the Term under this Agreement.

# Schedule 3

## Port Terminal Rules



# Port Terminal Rules

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# Port Terminal Rules

## 1 Interpretation

### 1.1 Definitions

In these Port Terminal Rules unless the context otherwise requires:

**Access Agreement** means an agreement entered into between a Customer and the Port Operator containing provisions relating to the supply of Port Terminal Services to a Customer by the Port Operator.

**Accumulation Plan** means a plan for the delivery of Grain to a Port Terminal Facility in order to accumulate a cargo for shipping.

**Advised Harvest Capacity** means the total Harvest Capacity estimated by the Port Operator to be available pursuant to **rule 4.3(a)**.

**Annual Shipping Period** means the period 16 January to the next 31 October as modified from the Port Operator from time to time prior to 31 August for the coming Year.

**Annual Shipping Period Capacity** means Capacity during the Annual Shipping Period.

**AQIS** means the Australian Quarantine Inspection Services.

**Assembly Window** has the meaning given in **rule 16(a)**.

**Arrived** means the time at which a vessel arrives at the waiting area designated from time to time by the relevant port authority for the Port Terminal Facility (whether or not it sets anchor), is ready to proceed to berthing and has presented a Notice of Readiness. **Arrives** and **Arrival** have a corresponding meaning.

**Auction** means the sale by auction of Capacity for the Annual Shipping Period.

**Auction Premium** means any additional amount paid by the Customer for Capacity which is in excess of the start price for Capacity within a Lot in the Auction.

**Auction Rules** means the rules of that name published by the Port Operator from time to time attached as **Schedule 1** to the Port Terminal Rules .

**Bulk Wheat** means wheat for export from Australia other than wheat that is exported in a bag or container that is capable of holding not more than 50 tonnes of wheat.

**Business Day** means a day that is not a Saturday, Sunday or gazetted public holiday in Western Australia.

**Capacity** means the capacity of a Port Terminal Facility, to put grain on board a vessel at a Port Terminal Facility during a Shipping Window, measured in tonnes.



**Capacity Transfer Fee** means the fee of that name prescribed in an Access Agreement or GSA.

**Charter Party** means the agreement between the owner of a vessel and the party hiring the vessel for use of the vessel in transporting a cargo.

**Core Capacity** means the Capacity of each Port Terminal Facility calculated in accordance with the process set out in **rule 4.2(a)**

**Core Lots** means Lots that are available at Auction to all Customers, but excluding Surge Lots.

**Customer** means a customer of the Port Terminal Operator that has entered into an Access Agreement or GSA with the Port Operator and includes a User.

**Demurrage** means the defined level of damages paid to a vessel owner for the delays in loading or discharging the vessel after the Laytime has expired. It is customarily expressed in US dollars per day or portion thereof.

**Direct to Port Delivery Declaration Form** means the form substantially in the form attached at **Schedule 2**.

**Direct to Port Sample Declaration Form** means the form substantially in the form attached at **Schedule 3**

**ETA** means the estimated time of Arrival.

**ETC** means estimated time of commencement of loading.

**Export Fee** means the fee of that name prescribed in an Access Agreement or GSA.

**Forecast Submission Period** means 1 September to 10 September within each Year.

**Grace Period** means a period of 14 days that commences on the day following the last day of the Shipping Window.

**Grade** means, in relation to Grain, the grade of the Grain actually delivered to the Port Terminal Facility

**Grain** means all grains (including Bulk Wheat), pulses and oil seeds.

**Grain Entitlement** means the Customer's entitlement under the Bulk Handling Act or an Access Agreement or GSA to the possession of Grain in the Port Operator's custody .

**Grain Services Agreement (GSA)** means an agreement between an exporter, trader or marketer of Grain and the Port Operator that includes provisions for the supply of storage & handling services in relation to any Grain but does not include Port Terminal Services in relation to Bulk Wheat.

**Grower** means a grower of grain who as part of their farming business delivers Grain to a Port.

**GSA Capacity** means Capacity acquired or sought to be acquired by a GSA Customer under a GSA.

**Harvest Capacity** means Capacity during the Harvest Shipping Period.

**Harvest Shipping Period EOI** means an expression of interest containing all the information specified in **rule 5.2(b)** .

**Harvest Shipping Period** means 1 November to 15 January as modified from the Port Operator from time to time prior to 31 August for the coming Year.

**Laycan** means the earliest date on which Laytime can commence and the latest date, after which the charterer can opt to cancel the Charter Party.

**Laytime** means the amount of time that a charterer has to load a vessel before the vessel is deemed to be on Demurrage

**Lost Capacity** has the meaning given to it in **rule 12**.

**Lot** means the Capacity within a Shipping Window at a Port that is offered to Customers at Auction.

**Nominated Tonnage** means the tonnage of Grain to be shipped in a particular Nominated Vessel and notified to the Port Operator in accordance with these Port Terminal Rules.

**Nominated Vessel** means a vessel nominated by the Customer and notified to the Port Operator in accordance with these Port Terminal Rules.

**Notice of Readiness** or **NOR** means a valid notice of readiness served by the owner of the Nominated Vessel pursuant to the Nominated Vessel Charter Party stating, amongst other things, that the Nominated Vessel is ready to load in all respects (including physically and legally).

**Outload** means to remove Grain from a Port Facility to another location by means other than Outturning to a vessel.

**Outturning** means to cause Grain to physically leave the Port Operator's custody at a Port Terminal Facility and is deemed to occur when the Grain exits the delivery spout into a Grain shipping vessel at which point physical possession of the Grain passes from the Port Operator to the Customer or a third party authorised by the Customer.

**Phase 1 Auction** means the first Auctions of Capacity for the Annual Shipping Period in each year.

**Phase 2 Auction** means the Auctions of Capacity remaining after allocation of Capacity in the Phase 1 Auction for the Annual Shipping Period in each year.

**Port** means the ports of:

- (a) Albany;
- (b) Esperance;
- (c) Geraldton; and
- (d) Kwinana.

**Port Terminal Facility** means a ship loader and associated infrastructure that is:

- (i) at a Port;

- (ii) capable of handling Bulk Wheat; and
  - (iii) owned, operated or controlled by the Port Operator,
- including:

- (iv) an intake/receival facility;
- (v) a grain storage facility;
- (vi) a weighing facility; and
- (vii) a shipping belt;

that is:

- (viii) at the port; and
- (ix) associated with the ship loader; and
- (x) capable of dealing with wheat in bulk.

**Port Terminal Services** means the services provided by means of the Port Terminal Facilities which enable an Accredited Wheat Exporter to export Bulk Wheat through the Port Terminal Facilities, including:

- (a) unloading and receival 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;
- (b) sampling by the Port Operator of a User's Bulk Wheat received and Outturned, to check for visible evidence of the presence of chemical residue, insect activity and live insects or other contaminants, and providing the User with a composite shipping sample of the User's Bulk Wheat;
- (c) weighing by the Port Operator of a 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;
- (d) 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; and
- (e) fumigation in response to evidence of insect infestation;
- (f) accumulating and assembling Bulk Wheat for the purpose of loading cargo onto a vessel scheduled to arrive at the Port Terminal Facility;
- (g) administrative and logistics services required for shipping nomination, acceptance, booking and cancellation;
- (h) access to inspectors from the AQIS, for inspection of the User's Bulk Wheat received and held at the Port Terminal Facilities; and
- (i) Outturning by the Port Operator of a User's Bulk Wheat received at the Port Terminal Facility, and loading onto the User's nominated vessel.

**Port Terminal Service Charges** means the charges payable for Port Terminal Services provided by the Port Operator under an Access Agreement.

**Product** means all Grain or other commodities or materials handled by the Port Operator through the Port Terminal Facilities.

**Relevant Surveys** means all relevant surveys required to be conducted on the Nominated Vessel before it can be loaded with Grain, including, but not limited to a structural survey of the Nominated Vessel and surveys conducted by AQIS.

**Season** means the period between 1 October of one year and the next 30 September.

**Services Forecast** has the meaning given in **rule 3**.

**Shipping Capacity Register** means the register maintained and held by the Port Operator in order to record allocations of and entitlement to Capacity.

**Shipping Stem Policy** means the policy prescribed in **rule 13**.

**Shipping Slot** means the nominal dates for loading of vessels during a Shipping Window.

**Shipping Window** means a half month period of between 14 and 16 days within which a Customer may nominate a vessel to arrive at a Port Terminal Facility for loading of a cargo for which the Customer has been allocated Capacity under these Port Terminal Rules.

**Spare Capacity** means:

- (i) for the Harvest Shipping Period, the additional Capacity remaining unallocated following submission by Customers of Harvest Shipping Period EOIs for the relevant Shipping Window at the Allocation Date;
- (ii) for the Annual Shipping Period, the Capacity remaining where Capacity awarded at Auction does not exceed the Capacity for the relevant Shipping Window forecast by the Port Operator in accordance with **rule 4.2**; and

any Capacity that may otherwise become available..

**Spare Capacity Allocation** means the allocation of Spare Capacity remaining after allocation of Capacity:

- (iii) following submission of Harvest Shipping Period EOIs in the Harvest Shipping Period under **rule 5**; and
- (iv) following completion of the Phase 1 Auctions and Phase 2 Auctions in the Annual Shipping Period under **rule 6**.

**Spare Capacity Booking Form** means the form of that name published by the Port Operator from time to time.

**Surge Capacity** means the Capacity of each Port Terminal Facility calculated in accordance with the process set out in **rule 4.2(b)**

**Surge Lots** means Lots:

- (i) available at Auction to all Customers; and
- (ii) which utilise the Port Operator's receipt, storage and handling resources other than and in addition to the Port Terminal Services.

**TBA** means to be advised.

**Transfer of Shipping Capacity Form** means the form of that name published by the Port Operator from time to time.

**Undertaking** means the Undertaking offered by CBH in favour of the Australian Consumer and Competition Commission in accordance with the provisions of the *Wheat Export Marketing Act 2008 (Cth)*.

**User** means a person who has entered into an Access Agreement with a Port Operator in relation to Bulk Wheat.

**Vessel Nomination** means a nomination of a vessel to ship the Nominated Tonnage on a Nominated Vessel within a Shipping Window held by the Customer under the Access Agreement or GSA.

**Vessel Nomination Form** means the form available from the Port Operator or on the Port Operator's LoadNet® for Marketers website on which all bulk export requests are to be made.

**Website** means the website operated by the Port Operator from time to time and at the commencement of these rules means [www.cbh.com.au](http://www.cbh.com.au).

**Year** means 1 November to 31 October.

## 1.2 Interpretation

- (a) Other defined terms have the meanings given to them in the Undertaking, unless the context otherwise requires.
- (b) Reference to a **rule** is a reference to a rule contained within these Port Terminal Rules.

## 2 Accuracy and completeness of information

- (a) Information provided by a Customer under these Port Terminal Rules must be accurate and complete in all material regards.

## 3 Services Forecast

- (a) Prior to the commencement of each Year, within the Forecast Submission Period each Customer must submit to the Port Operator a forecast of the Customer's exporting requirements for the following Year, including the following details:
  - (i) expected gross tonnage of Bulk Wheat;
  - (ii) expected gross tonnage of Grain other than Bulk Wheat;

- (iii) expected tonnage of Grain to be delivered to the Port by the Customer pursuant to a GSA;
- (iv) expected tonnage of Bulk Wheat to be delivered to the Port by the Customer pursuant to storage & handling or supply chain arrangements other than those supplied by the Port Operator pursuant to a GSA; and
- (v) expected shipping programme

for each Access Agreement or GSA, as the case may be (**Services Forecast**).

## 4 Capacity

### 4.1 Capacity Lots

The Port Operator shall allocate Capacity in Lots of a specified number of tonnes in a particular Shipping Window.

### 4.2 Criteria and process for estimating available Capacity

- (a) In calculating the Capacity and Core Capacity to be allocated under these rules, the Port Operator shall:
  - (i) estimate the size and characteristics (including geographic distribution) of the upcoming harvest;
  - (ii) review the past performance of the Port Terminal Facilities in loading vessels in high demand periods;
  - (iii) consider the efficient deployment of labour and other resources in Port Terminal Facilities over the Year;
  - (iv) take into account the Services Forecast in order to estimate:
    - (A) the likely shipping requirements of Customers;
    - (B) the supply chain arrangements likely to be used to get Grain to the Port Operator's Port Terminal Facilities;
  - (v) estimate the likely distribution of the transport task between road and rail in each port zone; and
  - (vi) 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.
- (b) In calculating the Surge Capacity to be allocated under these rules, the Port Operator shall:
  - (i) estimate the extent to which Capacity in excess of Core Capacity may be made available if supply chains deliver Grain at a more accelerated pace than would be expected in normal operating conditions; and

- (ii) assess the likelihood that supply chains will deploy additional resources to deliver Grain at a more accelerated pace than would be expected in normal operating conditions.

#### **4.3 Publication of available Capacity**

The Port Operator shall publish on its website:

- (a) On or before 15 September each year, the proposed amount of Harvest Capacity it intends to offer for each of its Port Terminal Facilities for the following Harvest Shipping Period (**Advised Harvest Capacity**);
- (b) On or before 15 October each year, the proposed amount of Core Capacity it intends to offer for each of its Port Terminal Facilities for the following Annual Shipping Period; and
- (c) No later than 5 Business Days before each monthly Phase 2 Auction, the proposed amount of Surge Capacity it intends to offer for each of its Port Terminal Facilities on a rolling monthly basis during the Annual Shipping Period.

## **5 Capacity allocation for the Harvest Shipping Period**

### **5.1 Invitation to submit Harvest Shipping Period EOIs**

On or before 15 September each year, the Port Operator shall publish on its website an invitation to Customers to submit Harvest Shipping Period EOIs.

### **5.2 Applying for Harvest Capacity**

- (a) A Customer wishing to secure Harvest Capacity may submit a Harvest Shipping Period EOI on or before 23 September.
- (b) A Harvest Shipping Period EOI must include the following information:
  - (i) the Port Terminal Facility/s at which Capacity is required;
  - (ii) the amount of Capacity required;
  - (iii) the maximum lift-by window;
  - (iv) the type and grade of Grain;
  - (v) any multi-port requirements;
  - (vi) the supply chain arrangements to be used to deliver the relevant Grain to the Port Terminal Facility (ie, whether serviced under a GSA or another supply chain solution not provided under a GSA).
- (c) Customers shall not be required to obtain Grain Entitlement prior to making an application.
- (d) the Port Operator shall, on 1 October or the next Business day after 1 October (**Allocation Date**) allocate Harvest Capacity to Customers during the Harvest Shipping Period by the following process:

- (i) if the Harvest Capacity available in a Shipping Window is equal to or greater than the total Harvest Capacity requested in Harvest Shipping Period EOIs submitted by the Allocation Date, the Port Operator will allocate the requested Harvest Capacity to the relevant Customers;
- (ii) if the Harvest Capacity available in a Shipping Window is less than the Harvest Capacity requested in Harvest Shipping Period EOIs submitted by the Allocation Date, the Port Operator shall allocate the available Harvest Capacity to each relevant Customer by reducing the relevant Harvest Shipping Period EOIs in proportion to the total Harvest Capacity requested for that Shipping Window by all Customers who have submitted a Harvest Shipping Period EOI by the Allocation Date in accordance with the following formula:

$$RHCA_{(Cust)} = \frac{HSPEOI_{(Cust)} \times AHC}{\sum HSPEOI_{(AllCust)}}$$

Where:

RHCA<sub>(Cust)</sub> = the Revised Harvest Capacity Allocated to a Customer for a Shipping Window.

HSP EOI<sub>(Cust)</sub> = the Harvest Capacity for which the Customer has submitted a Harvest Shipping Period EOI for a Shipping Window.

AHC = Advised Harvest Capacity for a Shipping Window.

HSP EOI<sub>(All Cust)</sub> = the sum of all Harvest Shipping Period EOIs by Customers for a Shipping Window.

- (e) The Port Operator shall inform Customers of the Harvest Capacity they have been allocated by serving a notice (**Harvest Allocation Notice**) within 5 Business Days of the Allocation Date;
- (f) A Harvest Allocation Notice shall include details of:
  - (i) the summary and particulars of the Harvest Capacity allocated to the Customer for each Shipping Window; and
  - (ii) the sum payable by the Customer to the Port Operator in accordance with the Access Agreement or GSA in respect of which the Customer will receive the Capacity.
- (g) Following the allocation of Harvest Capacity on completion of the Harvest Shipping Period EOI process in 2009/10 the Port Operator will consider whether to extend the Annual Shipping Period Capacity allocation process to cover the Harvest Shipping Period in subsequent years.



- (h) The Port Operator will in considering whether to extend the Annual Shipping Period Capacity allocation process take into account the benefits and costs of extending the Annual Shipping Period Capacity allocation process for the allocation of Harvest Capacity and the likelihood of demand exceeding supply in a significant number of Shipping Windows during the Harvest Period.
- (i) If the Port Operator determines that it is appropriate to extend to extend the Annual Shipping Period Capacity allocation process to cover the Harvest Shipping Period the Port Operator will comply with the procedure for Variation of the Port Terminal Rules set out in clause 10 of the Undertaking.
- (j) Harvest Shipping Period Spare Capacity shall be made available under the following process:
  - (i) the Port Operator shall publish on its website a statement of the total Spare Capacity available;
  - (ii) Customers may submit a Spare Capacity Booking Form to the Port Operator up to 30 days before the end of the Harvest Shipping Period or, if earlier, no later than 30 days before the first day of the relevant Shipping Window ; and
  - (iii) Spare Capacity shall be allocated on a first come-first served basis.
- (k) The notification to the Customer of Spare Capacity shall include details of:
  - (i) the summary and particulars of the Spare Capacity allocated to the Customer for each Shipping Window; and
  - (ii) the sum payable by the Customer to the Port Operator in accordance with the Access Agreement or GSA in respect of which the Customer will receive the Capacity.

## 6 Annual Shipping Period Port Terminal Services

### 6.1 Acquiring Capacity in Annual Shipping Period

- (a) Annual Shipping Period Capacity allocation shall be conducted in 3 stages:
  - (i) a Phase 1 Auction;
  - (ii) a Phase 2 Auction; and
  - (iii) a Spare Capacity Allocation.
- (b) The date and time each Auction is scheduled to be held and a schedule of the Capacity on offer at each Auction shall be published by the Port Operator on the auction system website [www.portcapacity.com](http://www.portcapacity.com) not less than 5 Business Days prior to the date of commencement of the Auction.

- (c) Each Auction will be held in accordance with the Auction Rules and according to the Auction Timeline, which must be published by the Port Operator on or before 15 September (with the 2009/2010 Auction Timeline being annexed to these rules as **Schedule 4**).
- (d) By no later than 5 Business Days after completion of each Phase 1 Auction and each Phase 2 Auction, a Customer must nominate the supply chain arrangements to be used to deliver the relevant Grain to the Port Terminal Facility (ie, whether serviced under a GSA or another supply chain solution not provided under a GSA).

## **6.2 Phase 1**

- (a) Phase 1 consists of two Auctions:
  - (i) one for Core Capacity during the period 16 January to 30 June;
  - (ii) one for Core Capacity during the period 1 July to 31 October.
- (b) Phase 1 Auctions must be held on or before 1 November.
- (c) Any Capacity comprised in Lots that are passed in at the Phase 1 Auction will be included in the Core Capacity in the Phase 2 Auctions.

## **6.3 Phase 2**

- (a) Phase 2 consists of monthly Auctions held in each month during the period 1 November to 30 July.
- (b) Any Capacity comprised in Lots that are passed in at the Phase 2 Auction will become available as Spare Capacity.

## **6.4 Spare Capacity Allocation:**

- (i) If:
  - (A) a period of not less than 5 Business Days has passed from the end of the last Phase 2 Auction prior to the commencement of the relevant Shipping Window; and
  - (B) there is Spare Capacity for the relevant Shipping Window, the Port Operator shall publish on its website a statement of the total Spare Capacity available in the relevant Shipping Windows.
- (ii) Customers may submit a Spare Capacity Booking Form to the Port Operator at any time up to 30 days before the first day of the relevant Shipping Window that Spare Capacity is available for.
- (iii) A Customer must nominate at the time of making any application for Spare Capacity during the Annual Shipping Period the supply chain arrangements to be used to deliver the relevant Grain to the Port Terminal Facility (ie, whether serviced under a GSA or another supply chain solution not provided under a GSA) in order to use the Spare Capacity applied for.
- (iv) Subject to the availability of Spare Capacity, the Port Operator shall by no later than 30 days before the first day of the relevant

Shipping Window (**Spare Capacity Allocation Date**) allocate Spare Capacity to Customers on a first-come first-served basis within 2 Business Days of receiving the Spare Capacity Booking Form.

- (v) The notification to the Customer of Spare Capacity shall include details of:
  - (A) the summary and particulars of the Capacity allocated to each Customer for each Shipping Window;
  - (B) in each case whether the Capacity is Core Capacity or Surge Capacity; and
  - (C) the sum payable by the Customer to the Port Operator in accordance with the Access Agreement or GSA in respect of which the Customer will receive the Capacity.

## 7 Trading Capacity

- (a) Customers may trade or transfer Capacity that they have acquired provided that:
  - (i) Customers that have nominated to service their acquired Capacity with a supply chain solution not provided under a GSA may trade that Capacity with each other; and
  - (ii) customers who have nominated to service their acquired Capacity under a GSA may trade that Capacity with each other;but
  - (iii) Customers that have nominated to use a supply chain solution not provided under a GSA to service their acquired Capacity may not trade that Capacity for Capacity that another Customer has nominated to be serviced under a GSA; and
  - (iv) Customers that have nominated to service their acquired Capacity under a GSA may not trade that Capacity for Capacity that another Customer has nominated to be serviced with a supply chain solution not provided under a GSA.
- (b) For the avoidance of doubt, any purported trade or transfer of Capacity that does not comply with **rule 7 (a)** shall be of no effect.
- (c) All transfers must be:
  - (i) proposed using the Transfer of Shipping Capacity Form; and
  - (ii) signed by the transferor and transferee,prior to submission to the Port Operator.
- (d) All transfers of Harvest Shipping Period Capacity must be completed no later than 8 days prior to the first day of the relevant Shipping Window.

- (e) All transfers of Annual Shipping Period Capacity must be completed no later than 30 days prior to the first day of the relevant Shipping Window.
- (f) Subject to the transferor complying with their obligations under this rule, the Port Operator shall immediately sign a copy of the Transfer of Shipping Capacity Form and provide a copy to the transferor and transferee and amend the Shipping Capacity Register to record the details of the transfer.
- (g) The Customer transferring Capacity must pay the Port Operator the Capacity Transfer Fee payable by the Customer to the Port Operator in accordance with the Access Agreement or GSA under which the Capacity is to be transferred.
- (h) For the avoidance of doubt, no transfer shall be effective until approved by the Port Operator.

## 8 Port Operator's Obligations following acquisition of Capacity

- (a) The Port Operator is not obliged to load Grain onto a vessel if:
  - (i) the Customer has not obtained or delivered the relevant Grain Entitlement;
  - (ii) the Customer has not complied with the requirements under **rules 9 and 10**; and
  - (iii) the Customer's Nominated Vessel:
    - (A) has not arrived within the Shipping Window for the relevant Port Terminal Facility; or
    - (B) has not passed the Relevant Surveys.
- (b) Upon the later of the allocation of Spare Capacity or the allocation of a Shipping Window, Customers will be required to nominate vessels into those Shipping Windows in accordance with these Port Terminal Rules.

## 9 Nominating Vessels for Shipping Windows during the Harvest Shipping Period

### 9.1 Nominating Vessels for Shipping Windows

- (a) The provisions of this **rule 9** apply in relation to nomination of vessels for Shipping Windows during the Harvest Shipping Period in addition to the provisions of **rule 10**.
- (b) In the case of inconsistency between the provisions of this **rule 9** and the provisions of **rule 10**, the provisions of this **rule 9** shall apply.

## 9.2 Nomination prior to ETA

- (a) Vessel Nominations must be made no later than 22 days prior to the Nominated Vessel's ETA which must be no later than the last day of the Shipping Window.
- (b) The Port Operator may waive compliance with **rules 10.1(b)** and **10.1(f)** during the Harvest Shipping Period provided that the Customer makes a declaration contained in the Direct to Port Delivery Declaration Form in respect of each load of Grain delivered to the Port Terminal Facility.

## 9.3 Readiness of cargo

No later than 48 hours prior to the ETA, the Customer must have physically accumulated or obtained Grain Entitlement equivalent to or greater than the Nominated Tonnage for each Grade to be loaded onto the Customer's Nominated Vessel.

# 10 Nominating Vessels for Shipping Windows

## 10.1 Non-GSA Cargo

### (a) Cargo Accumulation

- (i) Following receipt of a notice from a Customer of an intended shipment (a **Vessel Nomination Form**) within a Shipping Window that is nominated to be serviced by a supply chain other than under a GSA (**Non-GSA Cargo**), the Port Operator must:
  - (A) request an Accumulation Plan from the Customer;and
  - (B) allocate the Customer a shipping date in accordance with the Shipping Stem Policy.
- (ii) A Vessel Nomination Form in relation to a Shipping Window must be provided no later than 30 days prior to the ETA of the vessel actually nominated to be loaded in the Vessel Nomination.
- (iii) The Customer must at the time of submitting the Vessel Nomination Form for a Non-GSA Cargo provide to the Port Operator:
  - (A) a pre-delivery sample of grain from each source of grain to be delivered to the Port Terminal Facility ; and
  - (B) a declaration that the pre-delivery sample is a representative sample of both the Grain to be delivered and the treatment of the Grain and is not misleading.
- (iv) The Customer must propose an Accumulation Plan in relation to a Non-GSA Cargo detailing:

- (A) whether deliveries of Grain to a Port Terminal Facility for export are to be made by road or rail, subject to the operational capabilities of the Port Terminal Facility to receive such deliveries; and
    - (B) the timetable for deliveries to the Port Terminal Facility; fitting in with pre-planned deliveries.
  - (v) The Port Operator and the Customer shall negotiate in good faith toward an agreed Accumulation Plan.
  - (vi) If an Accumulation Plan cannot be agreed within 3 Business Days, the Customer may lodge a Compliance Complaint under **rule 17**.
  - (vii) If deliveries are made by road from a farm during the Harvest Shipping Period (or such other period as published by Main Roads WA), all loads must comply with the requirements of the Harvest Mass Management Scheme published by the Port Operator on its Website and in force for the 2009/10 Year.
  - (viii) All road vehicles delivering Grain to a Port must be registered with the Port Operator and the Port Operator is not obliged to receive Grain from a road vehicle in excess of its relevant mass limits prescribed by the Harvest Mass Management Scheme.
- (b) Pre-delivery testing**
- (i) The Customer must collect and deliver to the Port Operator pre-delivery samples of any Non-GSA Cargo;
  - (ii) The Port Operator must receive pre-delivery sample test results for Non-GSA Cargo prior to the delivery of Grain to the Port Terminal Facilities, so as to:
    - (A) confirm the Grain type and other characteristics of the Grain to be delivered;
    - (B) check for the presence of chemicals and other contaminants; and
    - (C) check for the presence of insect activity and live insects,to minimise the risk of cross contamination whilst the Grain is held by the Port Operator at the Port Terminal Facilities.
- (c) Sampling**
- (i) The Port Operator will sample Grain delivered at the Port Terminal Facility, using Port Operator sampling facilities operated by personnel of the Port Operator who will:
    - (A) visually inspect the Grain for obvious signs of contaminants as it exits the vehicles; and
    - (B) sample the Grain unloaded into the grid as it is elevated on the way to storage,

and in all cases, the Port Operator will provide the Customer with a record of the results of the sampling.

- (ii) The Port Operator will not sample Grain for Grade or quality or on any other basis except as set out in **rule 10.1(c)(i)** above.

**(d) Unloading**

- (i) The Port Operator will provide access to the Port Terminal Facilities to road vehicles and rail vehicles (where such facilities exist at the Port Terminal Facilities) for the purpose of Customers unloading deliveries of Grain from the vehicles, for Grain export accumulation.
- (ii) Access to the Port Terminal Facilities for unloading Grain will be provided by way of:
  - (A) road or rail vehicle access (where such facilities exist at the Port Terminal Facilities) including access to roadways, rail track, passing loops and sidings located within the Port Terminal Facilities; and
  - (B) unloading through a grid capable of accepting deliveries by road or rail (where such facilities exist at the Port Terminal Facilities).
- (iii) Where vehicles containing the Customer's Grain arrive at the Port Terminal Facilities as scheduled (or within a reasonable time before or after the scheduled time, so that it can be unloaded to comply with the scheduled time) the Port Operator must use all reasonable endeavours to ensure that the vehicles are unloaded at a rate (commensurate with the type, condition and volumes of the Grain) that enables the Customer's Nominated Vessel to be loaded at its ETA, but not greater than the maximum receival rating of the relevant grid.

**(e) Weighing**

All Grain delivered to the Port Terminal Facilities for unloading must be weighed using the Port Operator's weighing facilities operated by personnel of the Port Operator who must:

- (i) record the gross and tare weights of the road vehicles containing the loads of Grain; or
- (ii) at the Port Operator's discretion where the Port Terminal Facilities have such facilities, batch weigh the Grain unloaded from rail vehicles into the grid,

and in all cases, the Port Operator must provide the Customer with a weighbridge ticket or other statement certifying the weight and quantity of Grain delivered, and confirming the name of the person in whose name the Grain is delivered based on the information contained in the Customer's Direct to Port Delivery Declaration Form and Direct to Port

Sample Declaration Form provided to the Port Operator at or prior to the delivery of each load of Grain at the Port Terminal Facility.

**(f) Fumigation**

The Customer must provide the Port Terminal Operator with a Fumigation Statement detailing all chemicals applied to the Grain for a Non-GSA Cargo prior to delivery at the Port Terminal Facility, in relation to:

- (i) all Grain delivered after 1 February in a Season; and
- (ii) all Grain that is not of the current Season.

**(g) Grain handling**

All delivery and unloading points, including any discharge grids, storage locations, and the movement of Grain following discharge will be nominated and determined by the Port Operator in its sole discretion, acting in accordance with the Port Terminal Rules.

**10.2 GSA Cargo**

- (a) In accumulating a cargo of Grain except Bulk Wheat serviced under a GSA (**GSA Cargo**):
  - (i) Customers must provide a Vessel Nomination to the Port Operator no later than 22 days prior to the last day of the Shipping Window.
  - (ii) The ETA of the Nominated Vessel must be no later than the last day of the Shipping Window.
  - (iii) All Vessel Nominations will be input into the Port Operator's shipping interface contained on LoadNet® for Marketers™ system.
  - (iv) At the time the Vessel Nomination is provided to the Port Operator, the Customer must have full Grain Entitlement for the cargo outlined in the Vessel Nomination.

**11 Vessel Nominations**

**11.1 Details**

- (a) When making a Vessel Nomination, Customers must provide the following vessel nomination and handling instruction details to the Port Operator by entry into the Port Operator's shipping interface in LoadNet® for Marketers™:
  - (i) maximum nominated tonnage (including Master's discretion);
  - (ii) destination details;
  - (iii) product description (commodity type and other characteristics);
  - (iv) ETA;
  - (v) discharge port;



- (vi) shipping agency;
  - (vii) vessel part loading;
  - (viii) de-ballasting requirements;
  - (ix) ship loading sequence plan (subject to **rule 11.1(c)(ii)**);
  - (x) vessel details (including beam, Arrival and departure drafts, dry-weight, vessel type/class, hold and hatch details, net and gross capacities);
  - (xi) cargo details (including batch reference, load tolerance range, total load tonnage);
  - (xii) stevedore details (subject to **rule 11.1(c)(iii)**);
  - (xiii) vessel name (subject to **rule 11.1(c)(i)**);
  - (xiv) Capacity Contract Reference number; and
  - (xv) any other details necessary for the Port Operator to process the Vessel Nomination.
- (b) All Vessel Nominations must:
- (i) provide a vessel ETA that is within the relevant Shipping Window for which the Customer has Capacity of the relevant type; and
  - (ii) provide Laycans less or equal to 14 days, have ownership of cargo and provide port, grades, quality and tonnage details.
- (c) The Port Operator recognises it may not be possible to provide:
- (i) a named vessel with over 22 days lead time, so a TBA nomination will be acceptable as long as the above criteria have been met and a vessel name is provided by no later than 15 days before the ETA;
  - (ii) a shiploading sequence plan with over 22 days lead time, so a TBA response for this category will be acceptable until no later than 48 hours before the ETA; and
  - (iii) stevedore details with over 22 days lead time, so a TBA response for this category will be acceptable until no later than 48 hours before the ETA.

## **11.2 Acceptance of Vessel Nominations**

- (a) The Port Operator will, within 2 Business Days of receiving a Vessel Nomination, notify the Customer whether it accepts or rejects a Vessel Nomination that contains all the information required in rule 11.1 provided that:
- (i) the ETA of the Nominated Vessel is within a Shipping Window for which the Customer has Capacity of the relevant type;
  - (ii) in the case of GSA Cargo, the Customer has full Grain Entitlement for the cargo outlined in the Vessel Nomination; and

- (iii) the Customer is not in Material Breach of its Access Agreement.
- (b) A Material Breach by a Customer of its Access Agreement is a breach which:
  - (i) in the reasonable opinion of the Port Operator, is not capable of being remedied; or
  - (ii) the Customer has failed to remedy after being given at least 14 days written notice by the Port Operator to do so if the Customer:
    - (A) does not pay its debts as and when they fall due;
    - (B) commits an act of bankruptcy;
    - (C) enters into a composition or arrangement with its creditors or calls a meeting of creditors with the view to entering into a composition or arrangement;
    - (D) has execution levied against it by creditors, debenture holders or trustees under a floating charge;
    - (E) takes or has taken or instituted against it any actions or proceedings, whether voluntary or compulsory, which have the object of or which may result in the winding up or bankruptcy of the Customer (except, in the case of a corporation, for the purposes of a solvent reconstruction);
    - (F) has a winding up order made against it or (except for the purposes of a solvent reconstruction) passes a resolution for winding up;
    - (G) is a party to the appointment of or has an administrator, official manager, receiver, receiver/manager, provisional liquidator or liquidator appointed to the whole or part of its property or undertaking; or
  - (iii) repudiates the Access Agreement.
- (c) If the Port Operator rejects a Vessel Nomination it will provide details of the reasons behind the rejection of the Vessel Nomination at the time it notifies the Customer of the rejection.

### **11.3 Amendment of Vessel Nominations**

- (a) The Port Operator may permit the amendment of a Vessel Nomination by a Customer if the Customer:
  - (i) provides written details including reasons justifying the requested amendment; and
  - (ii) those reasons relate solely to matters beyond the reasonable control of the Customer and were not contributed to by the Customer;

and:

- (iii) would not be inconsistent with the Non-discrimination and No Hindering Access provisions of the Undertaking;
- (iv) is to assist achievement of:
  - (A) minimising demurrage at the Port over a given period; or
  - (B) maximising throughput at the Port over a given period;
- (v) does not prejudicially alter the outcome or adversely affect other Customers participating in the Harvest Shipping Period EOI or Annual Shipping Period Auctions;
- (vi) would not result in other Customers incurring materially greater demurrage than would be the case if the amendment had not been accepted.

#### **11.4 Additional Charges**

Additional charges may be payable to the Port Operator to cover the Port Operator's reasonable costs incurred where a Customer requests amendments to the Vessel Nomination.

## **12 Lost Capacity**

### **12.1 Harvest Shipping Period**

- (a) Where, following acceptance by the Port Operator of a Vessel Nomination in respect of Harvest Capacity:
  - (i) a Customer's vessel Arrives outside of the Shipping Window but within the Grace Period; or
  - (ii) the Customer acquires or accumulates Grain Entitlement sufficient to load the vessel within the Grace Period and the Customer's Vessel has Arrived,

the Port Operator will use its reasonable endeavours to load the vessel.

- (b) Where following acceptance by the Port Operator of a Vessel Nomination in respect of Harvest Capacity:
  - (i) a Customer's vessel has not Arrived within the Grace Period; or
  - (ii) the Customer does not have full Grain Entitlement within 48 hours of the ETA of the Nominated Vessel,

the Harvest Capacity shall be treated as Lost Capacity and the Customer shall pay the fees specified as payable for Lost Capacity in the Access Agreement.

- (c) Where:
  - (i) the Customer does not submit and have accepted by the Port Operator a Vessel Nomination for Harvest Capacity more than 22 days before the last day of the Grace Period; or

- (ii) the Customer does not ship all acquired Harvest Capacity within the Harvest Shipping Period, then:

the Customer will be regarded as not to have shipped the Grain in the relevant Shipping Window and the Harvest Capacity shall be treated as Lost Capacity and the Customer shall pay the fees specified as payable for Lost Capacity in the Access Agreement.

## 12.2 Annual Shipping Period

- (a) Where, following acceptance by the Port Operator of a Vessel Nomination in respect of Annual Shipping Period Capacity:

- (i) a Customer's vessel Arrives outside of the Shipping Window but within the Grace Period; or
- (ii) the Customer acquires or accumulates Grain Entitlement sufficient to load the vessel within the Grace Period and the Customer's Vessel has Arrived,

the Port Operator will use its reasonable endeavours to load the vessel.

- (b) Where:

- (i) the Customer does not submit and have accepted by the Port Operator a Vessel Nomination more than 22 days before the last day of the Grace Period; or
- (ii) the Customer's Nominated Vessel does not Arrive within the Grace Period; or
- (iii) in the case of a GSA Cargo, the GSA Customer does not obtain the full Grain Entitlement for the cargo at the time of Vessel Nomination; or
- (iv) in the case of a Non-GSA Cargo , the PTSA Customer does not obtain the full Grain Entitlement for the cargo at the time of Arrival of the Nominated Vessel,

the Customer will be regarded as not to have shipped the Grain in the relevant Shipping Window and the Capacity shall be treated as Lost Capacity and the Customer shall pay the fees specified as payable for Lost Capacity in the Access Agreement.

## 13 Shipping Stem Policy

### 13.1 Prioritising Loading of Vessels

The Shipping Stem is ordered by the Estimated Time of Commencement of Loading (**ETC**). In allocating or adjusting an ETC to a Customer the Port Operator shall have regard to (in order of decreasing importance):

- (a) the ETA of a vessel if the ETA is within the Shipping Window for which Capacity is being utilised and the Vessel actually Arrived within its Shipping Window;

- (b) the Nomination Date of the Vessel Nomination;
- (c) the Nomination Time of the Vessel Nomination;
- (d) changes in the ETA of a vessel (including those that would take it outside of the Shipping Window for which Capacity is being utilised);
- (e) changes in the expected Accumulation Plan of a vessel for a GSA Cargo or departures from an agreed Accumulation Plan for a Non-GSA Cargo; and
- (f) loading a vessel whose cargo remains at Port but which failed to Arrive prior to the last day of the Shipping Window.

### 13.2 Adjustments to the Stem

- (a) The Port Operator may amend the Shipping Stem at the request of a Customer only if accepting the request:
  - (i) would not be inconsistent with the Non-discrimination and No Hindering Access provisions of the Undertaking;
  - (ii) is for the purpose of:
    - (A) minimising demurrage at the Port over a given period; or
    - (B) maximising throughput at the Port over a given period;
  - (iii) does not prejudicially alter the outcome or adversely affect other Customers participating in the Shipping Stem;
  - (iv) would not result in other Customers incurring materially greater demurrage than would be the case if the request had not been accepted.

### 13.3 Discretion to Accept Vessel Nominations

The Port Operator may accept a Vessel Nomination that does not comply fully with the requirements of **rule 11** provided that such an action:

- (i) would not be inconsistent with the Non-discrimination and No Hindering Access provisions of the Undertaking;
  - (ii) is for the purpose of:
    - (A) minimising demurrage at the Port over a given period; or
    - (B) maximising throughput at the Port over a given period;
  - (iii) does not prejudicially alter the outcome or adversely affect other Customers participating in the Shipping Stem;
  - (iv) would not result in other Customers incurring materially greater demurrage than would be the case if the request had not been accepted.
- (b) a Vessel Nomination accepted under this **rule 13.3** shall in all cases have a lower priority than a Vessel Nomination that does comply fully with the requirements of **rule 11**.

#### **13.4 Other Information**

The Shipping Stem shall provide information about the total Capacity in relation to a Shipping Window and the amount of Capacity currently allocated.

### **14 Storage Priority Policy**

The Port Operator shall allocate the use of storage capacity in a Port Terminal to meet the order of vessels contained in the Shipping Stem from time to time having regard to the Shipping Stem Policy.

### **15 Port Queue Policy**

#### **15.1 Allocating Priority**

- (a) The port queue is the berthing priority for each vessel that has Arrived at a Port Terminal Facility and is waiting to be loaded.
- (b) Berth priority for vessels is determined by:
  - (i) cargo accumulation status; and
  - (ii) the time of Arrival of a vessel and its relationship to the Shipping Window of the Vessel Nomination;
- (c) The Port Operator will not call a vessel in to berth until the full cargo is ready for loading at the Port Terminal Facility and the Customer has full Grain Entitlement for the cargo unless it is necessary in the reasonable opinion of the Port Operator for the efficient operation of the Port Terminal Facility.

#### **15.2 Non compliant vessels**

- (a) Customers' vessels must pass all Relevant Surveys within 24 hours of berthing.
- (b) The Port Operator may require Customers to move their vessel from the berth if it fails survey in accordance with **rule 15.2(a)** and the non-compliant vessel is holding up the berth from another vessel.
- (c) where a vessel fails any Relevant Surveys it returns to its original priority once it has passed the Relevant Surveys .

#### **15.3 Multi porting**

The Port Operator recognises vessels which have received part Grain cargo from a previous call (multi port) at another Western Australian port. If this is applicable, then the actual Arrival date at the first port of call is used to establish its priority in the port berthing queue.

### **16 Delivery Queue Policy**

- (a) Each Customer will be allocated an Assembly Window for Non-GSA Cargo once they have a confirmed Vessel Nomination and ETA, during

which time the Customer will be permitted to deliver loads of Grain to the Port Terminal Facility for the purposes of Export Accumulation (**Assembly Window**).

- (b) The Port Operator allocates Assembly Windows in order to meet the facilitated order of vessels contained in the Shipping Stem from time to time having regard to the Shipping Stem Policy.
- (c) Assembly Windows will be allocated at Kwinana all Year round and at Geraldton, Albany and Esperance outside of the Harvest Shipping Period. During the Harvest Shipping Period at Geraldton, Albany and Esperance, Customer's Grain delivery vehicles will be required to queue for services along with other vehicles seeking access.
- (d) Customers delivering Bulk Wheat for a non-GSA Cargo may not access a delivery queue at a Port Terminal Facility until it has been provided with an Assembly Window by the Port Operator.
- (e) Provided that a Customer arrives at the relevant Port Terminal Facility within their Assembly Window, the Customer's priority in the delivery queue will be determined by the time that they arrived at and joined the delivery queue.
- (f) The Port Operator may require Customers to move a vehicle of theirs from a delivery queue if the vehicle breaks down or is rejected in accordance with the terms and conditions of the Access Agreement or these Port Terminal Rules and the non-compliant vehicle is holding up the delivery queue for other vehicles.

## 17 Complaints and Dispute Resolution

### 17.1 Complaints Resolution process

- (a) If a Customer considers that the Port Operator has not complied with any provisions of the Port Terminal Rules, they may lodge a complaint with the Risk and Compliance Coordinator of the Port Operator (**Compliance Complaint**).
- (b) The Compliance Complaint must:
  - (i) be in writing, including by email to [compliance@cbh.com.au](mailto:compliance@cbh.com.au) or by facsimile to (08) 9322 3942 addressed to the Risk and Compliance Coordinator;
  - (ii) be notified promptly and in any event by no later than 4.00 pm Western Australian Standard Time on the next business day following the day on which the circumstances giving rise to the complaint occurred;
  - (iii) contain details of:
    - (A) the facts and reasons relied upon by the Customer as the basis of the complaint, including the anticipated or actual loss, cost or expense and time or operational impacts of the

- non-compliance and the names of any representatives, agents or employees of the Customer and Port Operator involved;
- (B) the provisions of the Port Terminal Rules relevant to the alleged non-compliance; and
  - (C) the proposed terms of the decision that the Customer seeks
- (c) A Compliance Complaint must be referred to:
- (i) the Port Operator's General Manager of Operations;
  - (ii) the Port Operator's General Counsel; and/or
  - (iii) the Port Operator's Group CEO.
- (d) The Port Operator must use its best endeavours to respond to the Customer within one business day following receipt of the Dispute Notice (**Complaint Response**). The Complaint Response must notify the Customer whether the Port Operator will change its decision and, if not, it must provide written reasons for the Port Operator's decision.
- (e) If the Customer is not satisfied by the Complaint Response, or if the Port Operator fails to respond to the Compliance Complaint within one Business Day of its receipt, the Customer may serve written notice on the Port Operator within one business day of receipt of the Complaint Response, or within one business day of when the Complaint Response was due (**Escalation Notice**).
- (f) Upon receipt of the Escalation Notice, the Port Operator must use all reasonable endeavours to arrange a meeting between the Port Operator's General Manager of Operations and the Customer within two Business Days of receipt of the Escalation Notice. Where the Port Operator's General Manager of Operations is unavailable for such a meeting within the timeframe specified, the Port Operator will make available a suitable alternative authorised representative (**Alternate**) to meet with the Customer within two Business Days of receipt of the Escalation Notice. The meeting may take place either face to face or by telephone to assist in expediting the determination of the complaint.
- (g) At the meeting, the Port Operator's General Manager of Operations (or Alternate) and the Customer will discuss the subject of the Compliance Complaint and Complaint Response and use all reasonable endeavours to reach an agreed outcome. Where an agreed outcome cannot be reached, the Port Operator's General Manager of Operations (or Alternate) will make a final written decision including reasons for the decision in relation to the Complaint Notice and notify the decision to the Customer within one Business Day of the meeting (**Decision Notice**).
- (h) In considering the Compliance Complaint and providing the Complaint Response and any Decision Notice, the Port Operator must take into



account the circumstances of the complaint and the details set out in the Complaint Notice and, acting reasonably and in good faith, reach a decision that is consistent with the Port Terminal Rules and the Undertaking.

Schedule 1



tradeslot

# SHIPPING CAPACITY ACCESS ALLOCATIONS

## AUCTION RULES

Version 2.0

7<sup>th</sup> August 2009

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## 1 Preamble

The following auction rules govern the obligations of parties in the conduct of an online auction. The auction rules for a specific auction are those rules located on the auction system website at the time of the auction. It is the responsibility of the individual bidder to ensure they understand and/or seek appropriate legal advice on the auction rules.

## 2 Tradeslot registered bidder agreement

Upon completion and submission of the Registered Bidder Agreement (and for all bidding conducted by the bidder while certified/authorised under those details), bidders are deemed to have accepted, and are bound by, the auction rules, as amended and varied in accordance with the Undertaking.

## 3 Bidder qualification

All entities wishing to participate in the auction (potential bidders) are required to apply for and be assessed as qualified bidders. To qualify as a bidder, entities are required to have signed an Access Agreement.

## 4 Bidder registration

Qualified bidders will be set up by Tradeslot as users of the auction system. Application to become a registered bidder requires acceptance of the terms and conditions of the Tradeslot Registered Bidder Agreement and participation in the training sessions provided by Tradeslot.

## 5 Training and system testing

To enable qualified bidders to participate in the auction process, Tradeslot and CBH shall provide training, including the running of "mock" auctions for qualified bidders to familiarise themselves with the auction system. Tradeslot shall also assist with system testing for qualified bidders prior to commencement of the Auctions.

## 6 Shipping capacity access auction system

In order to participate in an auction, registered bidders must log on to the dedicated auction system website, [www.portcapacity.com](http://www.portcapacity.com)

Registered bidders are issued a single system account user name and password via email, with which to access the system for purposes of the Auction. Registered bidders provide their account log on details to others entirely at their own risk. Bids entered by parties or advisors who have been granted access by a registered bidder are deemed to be bids of that bidder and are binding on that bidder.

The auction system website server is hosted within a secure third party hosting facility. Tradeslot independently manages the auction.

Tradeslot provides a telephone based help desk service during the auction. The Tradeslot help desk number is +61 3 8624 0000.

## 7 Auction format

### 7.1 Online auction

All bids in the auction are submitted electronically via the internet during the lot bidding period. The auction is conducted in a simultaneous, multi-round, ascending clock auction format.

### 7.2 Simultaneous auction format

All lots in the auction catalogue for the auction are contested simultaneously. Bidding on all lots commences at the date and time of the auction start (lot bidding period start) and ends when bidding on all lots ends (all lots are at or below capacity). Bidders have the opportunity to submit bids on all lots. All lots stay open until the end of the auction event. When the auction closes, all lots close simultaneously.

### 7.3 Multi round auction format

Lots are offered for bidding over a series of separate, pre-scheduled activity rounds. The auction can span multiple days with scheduled breaks between days.

Activity processing periods are scheduled after each activity round end and prior to the start of the activity pause period. These periods serve to aggregate bids from all bidders and determine whether the auction continues into another round. During activity processing periods all bidding activity is suspended.

Activity pause periods (or auction breaks) can be scheduled between activity rounds. Unlike activity processing periods, however, auction data will be viewable and proxy bids for future rounds can be set.

### 7.4 Ascending clock auction format

In the ascending clock auction format capacity in one lot is being offered at a per tonne uniform price across all bidders. Bidders indicate how much capacity they would purchase in that lot at that uniform price per tonne.

The first round uniform price begins at a start price defined as the upfront marketers fee plus auction premium (the auction premium typically starts at

\$0.00). As long as total demand for one lot is higher than total supply, the uniform price increases by one increment each round. With every new round bidders are asked to submit a new volume bid at the new price per tonne.

Bidders may change their bid at any time during the round. The submitted bid current at the time the round finishes is the bid processed for that round.

## 7.5 Auction schedule

The auction schedule, including the date and time of all auction phases is determined by CBH who will publish the auction schedule prior to the auction start on the auction system website, accessed at [www.portcapacity.com](http://www.portcapacity.com)

CBH will also publish the auction catalogue of lots to be included in the scheduled auction prior to the auction start.

CBH may alter the auction schedule by notifying qualified bidders of the revised auction schedule, and publishing the revised auction schedule prior to the previously published auction start.

## 8 Event and round timing

The server time on the auction system website is the official time clock for all activities associated with the auction. Australian Western Standard time (WST) will be displayed.

The time remaining in each round, known as the round time, will be displayed during bidding periods. In each round, the round timer counts backwards towards zero. When zero is reached, bidding is stopped and the system processes all bids of the closed round activity processing period and may start an activity pause period. During an activity pause period the system displays the time remaining till the live bidding process resumes.

Round length can be flat (all rounds have the same duration) or can be set round by round. CBH will advise bidders prior to the auction event of the round timing.

The auction does not have a scheduled end time but CBH anticipates the auction to run no longer than five business days. If necessary, the auction schedule will include breaks without bidding activity (activity pause period).

## 9 Auction pricing

All auction pricing is in Australian Dollars for each lot delivered to the specified delivery point for each bidder.

All auction and bid pricing is exclusive of Goods and Services Tax (GST), per tonne of capacity. The system will display total committed dollars and total confirmed capacity.

Goods and Services Tax (GST) will be included upon invoicing of the capacity won for that bidder.

## 9.1 Clock price

The clock price for each lot will be displayed as an exact price per tonne. As long as total demand exceeds total supply the clock price will increase by one bid increment (as defined prior to the auction) at the beginning of each new round. Bidders will express bids in terms of capacity (minimum increment 1,000 mt) requested at that price per tonne. Round-by-round price increments can be flat (same increments for all rounds) or can differ between rounds. CBH will inform bidders about bid increments prior to the auction event.

If at the end of a round, total demand matches total supply or falls below total supply, the clock price stays constant in the next round. Other lots with total demand exceeding total supply increase in price by one increment. The auction rounds continue until demand in all lots is equal or less than supply.

The payable amount per tonne is a uniform price – when capacity of one lot is awarded, all successful bidders will pay the same (uniform) price per tonne of capacity (mt). The uniform price is determined as follows:

Upfront Marketers fee + Auction bid price + Surge fee (if applicable)

The clock price will be displayed lot by lot to allow direct comparison between per tonne lot pricing.

## 9.2 Start prices

The opening clock price per lot is based on the Upfront Marketers Fee plus any Surge Fees (if applicable) set by CBH prior to the auction.

## 10 Registration period

The registration period is the period before the first activity round where bidders are able to log in to the system and update contact details and email addresses online on the bidder profile page. They are also able to view the auction catalogue (lot information) and submit proxy bids (see next section).

## 11 Auction bidding activity

### 11.1 Bids

Bids on lots can only be submitted

- during an activity round; or
- as a proxy bid during an activity round or during the registration period.

Bidders can submit multiple bids during each activity round.

Valid bids submitted in previous activity rounds during the auction cannot be withdrawn by the bidder under any circumstances. The last valid bid placed in the previous activity round is binding on the bidder.

## **11.2 Starting the lot bidding period**

The lot bidding period for all lots commences at the date and time of the auction start. The lot bidding period continues subject to the scheduling of activity rounds.

The lot bidding period for a given lot ends at the end of the overall auction and lot award.

## **11.3 Valid bid**

Bidders can bid for up to 100% of the total capacity in a given lot. The system will reject bids for more than 100% of the lot volume.

The minimum increment for a bid is 1,000 mt. The system will not allow fractions of the minimum increment.

Total capacity requested across all lots in a round cannot exceed the total capacity requested in the previous round (total capacity rule). The system does not accept a bid that would bring the total capacity to exceed last round's total capacity. This means that the aggregate capacity bid represents the maximum aggregate capacity that may be bid in following rounds. As the auction progresses Bidders may change the way that they allocate their maximum aggregate capacity between lots but may not exceed the aggregate capacity bid for in the first round.

## **11.4 Activity round length**

Activity rounds last for a given duration of time, which is set by CBH before the auction begins. Activity round time can be flat (uniform across all rounds) or can be set round-by-round.

The time remaining to adjust bids in each current activity round is indicated on the screen by the round timer. Activity rounds are advanced when the round timer reaches zero.

## **11.5 Advancing activity rounds**

At the end of each activity round there will be a round processing period. During this period the system will calculate the aggregate demand for each lot by adding together the capacity demanded by all valid bids and proxy bids.

The aggregate demand of the previous round will be displayed in the system. Past round data can also be viewed and downloaded from the Bid History section of the system.

### **(a) Aggregate demand exceeds supply**

If the aggregate capacity demanded is greater than the capacity supplied in a lot, the round will advance with the clock price

- remaining at \$0.00 (from round 1 to round 2)
- increased by one price increment (from round 2 to 3 and following).

### **(b) Aggregate supply exceeds demand**

If the aggregate demand for a lot is less than or equal to the aggregate supply for that lot and the auction event is not closing, the lot



progresses into the next round without increasing the price per tonne.

Activity rounds continue to advance until all lots have aggregate demand less than or equal to aggregate supply. At this point, the overall auction event closes.

## **11.6 Lot Award**

A given capacity volume within each lot is awarded to one or more winning bidders at the close of the auction event.

The clock price per lot at the end of the auction determines the payable price per tonne.

The award of a lot may be subject to grievance proceedings.

## **11.7 Overshoot**

When, at the end of the auction event aggregate demand in one lot is less than supply it creates left over capacity, or overshoot. In the case of overshoot

- the volume that has been bid for will be allocated at the uniform price reached for the given lot
- the excess supply (the volume that has not been assigned) may be offered at a subsequent auction.

## **11.8 Passing in capacity**

If a lot is not awarded as there have been no bids for the lot at the end of the entire auction event, the capacity within that lot will be passed in and may be offered at a subsequent auction or through booking spare capacity after the relevant phase 2 auction.

## **11.9 Disruption to an auction**

If the auction system fails at the server, or there is any unexpected disruption to services prior to auction start, the auction will be re-scheduled. All qualified bidders will be notified of the rescheduling of the auction.

If the system fails, or there is any unexpected disruption to services after the auction start and during the lot bidding period, the status of competition for all lots, reverts to that existing at the end of the activity round immediately prior to the disruption. The auction recommences as soon as the problem is rectified, and as scheduled by CBH.

If a given bidder is disconnected from the system during the lot bidding period due to individual system or connection failure, the bidder can continue to participate in the auction indirectly if proxy bids have been submitted. The Tradeslot help desk is not authorized or technically able to submit bids on behalf of bidders.

## **12 Placement of Proxy Bids**

Proxy bids are bids placed before the beginning of an activity round or before the beginning of the auction during the registration period. Bidders can but are not

obliged to, set volume bids in anticipation of round clock prices. Proxy bids can be deleted or over-written during the registration period and at any time during activity rounds.

Proxy bidding is highly recommended as a safety net to ensure bidders stay in the bidding process even if they are temporarily disconnected from the system. This is particularly important as the auction rules prohibit the Tradeslot help desk from placing bids or proxy bids on behalf of bidders even in the case of internet connection issues.

## **12.1 Proxy bids and activity rules**

Proxy bids are subject to activity rules. Proxy bids will not be accepted by the system if a volume bid is higher than the bid of the previous round.

## **12.2 Over-writing proxy bids during the auction**

During the auction round, a bidder may elect to replace a pre-determined proxy bid with a lower volume (or higher provided that the total aggregate capacity limit is not exceeded) live bid.

The bidder will be asked to confirm or cancel this decision. Should they confirm to overwrite their pre-determined proxy bid, all existing proxy bids for that given lot that are greater than the overwriting live bid will be reduced to the volume of the overwriting live bid. Existing proxy bids for the given lot that are less than the overwriting live bid will remain unchanged.

If the live bid that overwrites an existing proxy bid is higher than the proxy, the bid will be accepted for that round without affecting the proxy setting for future rounds.

## **12.3 Auction Member Queries**

A Query is where an Auction Member seeks clarification of a rule or process in connection with the Auction.

All queries from a Bidder are to be directed to the Tradeslot helpdesk.

## **12.4 Auction Member Grievance**

A Grievance is where an Auction Member wishes to lodge a formal complaint with respect of the Auction.

A Bidder must indicate the intent to lodge a grievance with the Tradeslot helpdesk during the execution of the Auction.

Grievances lodged after the auction has ended will not be considered.

# **13 Post auction**

## **13.1 Invoicing**

Following the auction end, confirmation to winning bidders, of lot award and corresponding charges are included into the Invoice and issued electronically.

Bidders are normally notified of the lot award via email within two (2) business days after the end of the auction.

## 13.2 Publication of results

CBH will publish the end price and % capacity sold within each lot at the end of the auction. The results of the auction will not disclose winning bidders or information allowing the identification of individual bidders.

If a grievance is submitted, winning bidders will be notified that their lot award is provisional until the grievance is determined by the Auction Review Committee. Confirmation of lot award to winning bidders will be made after determination of the grievance by the Auction Review Committee.

## 13.3 Grievance procedure

The grievance procedure aims to provide a framework for raising and dealing with grievances which arise from the relevant online auction. It aims to provide an efficient, clear, fair and accessible mechanism for dealing with problems which arise and for ensuring that the determination of any grievances, and the online auction itself, has been conducted properly.

The grievance shall be determined having regard to the following factors only:

- the application of the auction rules;
- the bidder agreement between the aggrieved bidder and Tradeslot;
- the aggrieved bidder's participation in the online auction;
- the operation of the technical auction system;
- any oral submissions made by the aggrieved bidder related to the above factors;
- any recommendations made by the Auction Review Committee; and
- any other factor that the Auction Review Committee considers appropriate in its absolute discretion, provided that notice of such consideration is given to the relevant aggrieved bidder(s).

If a bidder indicated their intent to lodge a grievance during the auction with the Tradeslot helpdesk, the grievance and any supporting documentation must be lodged by 5.00 pm on the first business day following the auction end. Bidders are to submit grievances to the Tradeslot auction manager either electronically or by facsimile as follows:

- Electronically at: [auctionmanager@tradeslot.com](mailto:auctionmanager@tradeslot.com)
- By facsimile at: (03) 9621 1811

Grievances will be determined the Auction Review Committee.

CBH, Tradeslot and each aggrieved bidder have the right to maintain as confidential the grievance, application of the grievance procedure and the determination of the grievance.

Each bidder authorises and consents to the use of any personal information provided in connection with these auction rules for the purposes set out

herein, subject only to the Privacy Act 1988 (Cth) and any other applicable legislation. Without limiting the forgoing, such information may be used by the Auction Review Committee as reasonably necessary to determine any grievance.

## **14 Auction Review Committee**

### **14.1 Responsibility**

The Auction Review Committee is responsible for the oversight of the Auction process. Its primary goal is to ensure the Auction proceeds in an orderly and fair manner. As a result of this goal the Auction Review Committee is charged with investigating any outcomes that it believes may contravene the operations of a fair and equitable market.

### **14.2 Structure**

The voting members of the Auction Review Committee will comprise a mix of risk oversight skills, auction knowledge and independence as follows:

- CBH Group Chief Risk Officer (or representative) – Chairman
- Representative of Tradeslot
- One representative chosen by the trade from an accounting firm

A quorum is established when all voting members (or their representatives) are present.

A representative of CBH Operations may be invited to attend but does not carry a vote.

Auction Review Committee Meetings shall be held at the end of each auction and as required during each auction. Minutes shall be recorded and where necessary reports presented to the meeting.

### **14.3 Responsibility**

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### **14.4 Powers**

The powers of the Auction Review Committee will include but are not limited to:

- Enforcing a trading halt to the Auction process
- Querying Bidders regarding trading activity and outcomes
- Cancelling auction trades during the auction and prior to validation
- Suspend/cancel Bidder registration
- Validating the Auction

- Recommending improvements to the Auction process

## 15 Communication of Decisions

The Auction Review Committee will make available its decisions and the background to its decisions to the party that lodged the grievance. The decisions of the Auction Review Committee will be made publicly available where that information is not market sensitive, confidential or in breach of relevant regulations. Where necessary the decisions will also be communicated to the ACCC with supporting rationale and information.

## 16 Limitation of liability and indemnity

### 16.1 Limitation of liability

CBH and Tradeslot hereby exclude, to the fullest extent permitted by law, all liability to bidders arising out of or otherwise in connection with the participation by bidders in the auction including, without limiting the foregoing, any liability:

- for failure of the system prior to the auction start;
- for failure of the system during the lot bidding period;
- for failure by the system to accept a valid bid;
- for errors in the submission of proxy bids;
- for errors in the reserve price for a lot;
- for any capacity limit of a bidder, whether such limits are nominated by a bidder or otherwise;
- for interruption of any other kind to access to the online auction website;
- for loss or delay in the receipt by a bidder of any electronic notification from CBH;
- for loss or delay in the receipt by CBH of any electronic notification from a bidder;
- for indirect, incidental, special or consequential damages whether or not the bidder knows of the possibility of such damage or such damage was otherwise foreseeable;
- for loss of profits or savings (actual or anticipated) and loss of goodwill, whether or not the bidder knows of the possibility of such damage or such damage was otherwise foreseeable; and
- contributed to directly or indirectly by the bidder's acts or omissions;

except to the extent that such liability arises from acts or omissions of CBH that are negligent or unlawful or which amount to wilful misconduct.

## 16.2 Indemnity

Each bidder indemnifies CBH and Tradeslot, its officers, employees and agents, from and against any claim, action, liability, loss, damage, cost, charge, expense, outgoing, payment, diminution in value or deficiency of any kind or character arising directly or indirectly from any:

- Breach by the bidder of these auction rules; or
- Acts or omissions (including any negligence, unlawful conduct or wilful misconduct) by the bidder arising out of or otherwise in connection with the bidder's participation in the online auction.

## Schedule 2

### Direct to Port Delivery Declaration Form

- (a) The Customer warrants and represents that:
  - (i) grain being tendered at the Port will not:
    - (A) include any Contaminant
    - (B) be in breach of the Bulk Handling Act 1967 (WA) or Bulk Handling Act Regulations 1967 (WA);
  - (ii) it owns any grain tendered for delivery by it or on its behalf;
  - (iii) all of the grain in a Delivery has been or is only contained in equipment, bags, farm implements, farm storages and bulk grain motor bodies that have:
    - (A) not contained any grain product prior to containing grain of this current Season and are free from insects and vermin; or
    - (B) previously contained a grain product, but have been freed of all such grain product and is free from insects and vermin;
  - (iv) any vehicle that has previously transported non-grain or contaminated grain products:
    - (A) is clean, dry and free of remaining materials and odours from previous loads;
    - (B) has been washed under high pressure prior to delivering any grain; and
    - (C) has the details of previous loads disclosed on the relevant form;
  - (v) if any of the grain has been treated with substances for the control of insects, details of the substances and application of those substances has been provided in writing to CBH and the use of any other chemical in the process of planting, growing and storage of the grain has been in accordance with the levels prescribed in any relevant legislation and also in accordance with the usage instructions;
  - (vi) none of the grain in a delivery is a Genetically Modified Organism (unless declared in writing to, and approved in writing by, CBH before the Delivery enters the Port Terminal Facility);

- (vii) any information provided to CBH in a delivery form is true and correct and not misleading or deceptive or likely to mislead or deceive; and
- (viii) in the case of grain delivered during the Harvest Shipping Period and without a pre-delivery sample being tendered by the Customer, all of the grain in a delivery was grown between the May and September immediately prior to the Current Season.



# Schedule 3

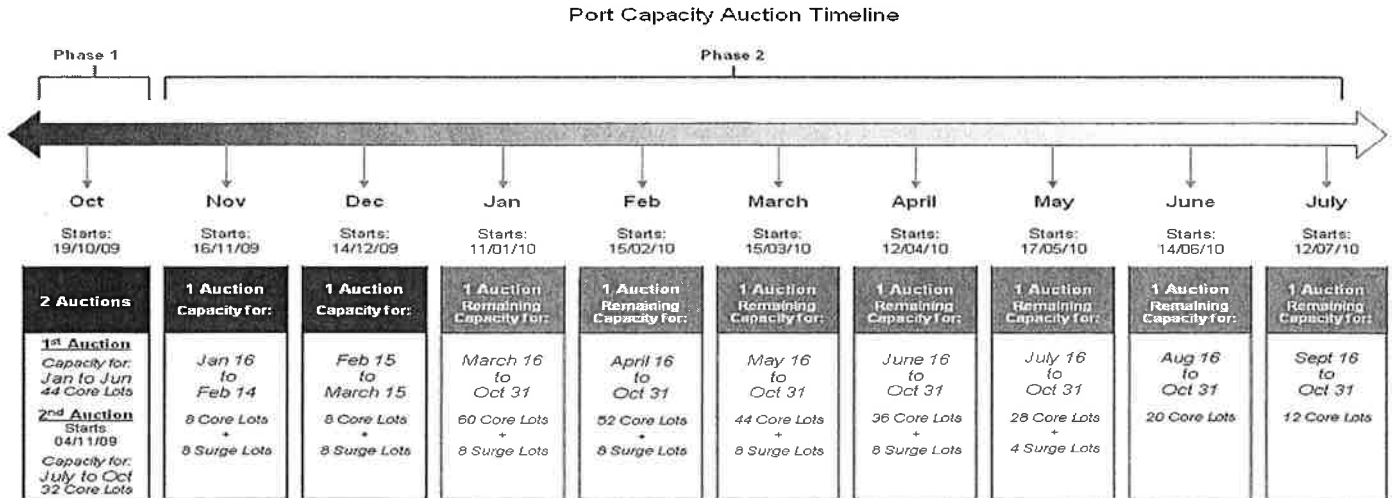
## Direct to Port Sample Declaration form

The Customer warrants and represents that:

- (a) grain being provided as a pre-delivery sample is a true and correct representative sample that has not been manipulated or created in order to produce an misleading or deceptive assessment of the quality of the grain to be delivered to the Port Operator; and
- (b) the grain is representative of all storages from which grain to be delivered to the Port Terminal Facility will be drawn.

# Schedule 4

## Auction Timeline



Note: Capacity remaining within lots will be re-auctioned in subsequent auctions.

Lot = ½ month capacity by Port.

## Schedule 4

### Port Terminal Facility - Geraldton

#### 1 Location

The Geraldton port terminal is located in the Western Australian city of Geraldton, which is approximately 428km north of Perth. The port terminal address is Corner Marine Terrace and Crowther Street, Geraldton WA 6530.

#### 2 Port Terminal Facilities

- (a) The Port Terminal Facilities consist of the conveyors, elevators, sample rooms, grids, batch weighers, ship loaders and site roads owned by the Port Operator and contained in the shaded areas below.



- (b) Grain receipt

- (i) 1 x 200 tonne weighbridge and 2 x 120 tonne weighbridges (located at west end depot).
- (ii) 1 x 1,000 tonne per hour road receipt bin and 4 x 500 tonne per hour road receipt bins across the port facility.
- (iii) 1 x 1,000 tonne per hour rail receipt station with associated rail line.

- (iv) 17 dust control systems.
  - (v) 55 grain conveyors with 7 associated grain elevators.
- (c) Grain storage
- (i) The total grain storage capacity is 295,000 tonnes.
  - (ii) 24 x 2,200 tonne reinforced concrete vertical cells (current capacity is 1400 tonnes, until cell restoration is complete in 2011).
  - (iii) 14 x 500 tonne star cells with associated working house.
  - (iv) 14 x 10,000 tonne steel silos with self-discharging base and associated working house.
  - (v) 1 x 95,200 tonne capacity reinforced concrete horizontal storage cell.
- (d) Inload capacity
- (i) Rail
    - (A) The port terminal has one rail receipt station, which can also be used for road receipts when it is not being used by rail. The rail receipt station is rated to receive grain at 1,000 tonnes per hour by rail or by road.
    - (B) The grid into which the grain is received can discharge at a minimum of 400 tonnes per hour, up to 1,000 tonnes per hour. The rate of discharge is dependent upon the silo to which the grain is to be discharged.
    - (C) Various factors reduce the ability of the rail receipt station to receive grain at its rated capacity. These include:
      - (1) operational constraints and the need to handle multiple segregations, which adds time when changing between grains and grades;
      - (2) the physical configuration of rail wagons moving into the port terminal;
      - (3) external factors beyond the Port Operator's control, for example a rail provider's locomotive breakdown; and
      - (4) the Port Operator having to weigh grain on receipt using its batch weighers.
  - (ii) Road
    - (A) The port terminal has 5 road receipt stations. One is rated to receive grain at 1,000 tonnes per hour. The other 4 receipt stations are rated to receive grain at 500 tonnes per hour. In total, the Geraldton port terminal can receive grain by road at a maximum of 3,000 tonnes per hour.
    - (B) The 1,000 tonne per hour grid can discharge grain at a minimum of 400 tonnes per hour, up to 1,000 tonnes per

hour. The other 4 receival stations operate on a grid valve system, and can discharge grain at between 400 and 450 tonnes per hour.

(e) Ship loading capacity

The Geraldton port terminal has 2 luffing ship loaders, each rated to a loading capacity of 1,000 tonnes per hour. The operational capacity of the ship loaders averages between 950 and 1,400 tonnes per hour, depending on the following factors:

- (i) hatch changes – changing from one hatch to another affects loading rates, because of the time required to raise, move and lower the ship loaders into the required hatch. Hatch changes are necessary to keep the vessel stable during loading;
  - (ii) trimming hatches – loading rates are reduced to ‘half feed’ when the grain comes close to filling a hatch. This is to prevent over-filling and allow instead for hatches to be level filled;
  - (iii) filling weep holes and bulkheads – loading rates are also reduced to half feed when filling weep holes to allow flow to fill these areas. Due to the relatively light weight of grain (as compared with iron ore, for example) hatches must be filled to the highest level to achieve the maximum weight, and ensure there is no wasted space in the hatch;
  - (iv) ballast discharge – some ships are not designed to discharge stabilising water tanks at the same rate as the ship loaders can load grain. In these cases, grain loading stops to allow the ship time to discharge ballast;
  - (v) draught surveys – towards the end of the ship loading, grain flow from the loaders is stopped to allow the ship’s captain to check the ship’s draught. This is to ensure that the tonnage being loaded will allow the ship to sail and arrive at the discharge port;
  - (vi) initial loading of large ships – due to the steep angle and height of the ship loaders which is necessary when loading larger ships, there is a reduced feed rate to avoid spillage. As the ship loading continues and the ship becomes lower in the water, the ship loaders can be lowered and feed rates increased;
  - (vii) grain changes and separations in hatches – when changing from loading one grain type to another, all weighers, belts and loaders must be cleaned before the second grain type can be loaded. Loading will also stop if a physical separation of grain is required in the ship’s hatches; and
  - (viii) weather – grain cannot be loaded on ships in rain or high winds.
- (f) Associated system control and communication networks, Site office, ablution and workshop facilities.

- (g) The port terminal is accredited to the international standard ISO 9001 and HACCP Codex Alimentarius.

# Schedule 5

## Port Terminal Facility - Kwinana

### 1 Location

The Kwinana port terminal is located in the Kwinana industrial area of Western Australia, approximately 40km south Perth. The port terminal address is Rockingham Beach Road, Kwinana Beach WA 6167.

### 2 Port Terminal Facilities

- (a) The Port Terminal Facilities consist of the conveyors, elevators, sample rooms, grids, batch weighers, ship loaders and site roads owned by the Port Operator and contained in the shaded areas below. The rail loop is also included, but not the land surrounding the loop.



- (b) (b) Grain receival
- (i) 1 x 4,000 tonne per hour rail receival station with associated rail loop.
  - (ii) 76 grain conveyors with 14 associated grain elevators.
  - (iii) 34 x dust control systems.

- (iv) 1 x 160 tonne certified weighbridge.
- (c) Grain storage
  - (i) The total grain storage capacity is 1,013,900 tonnes.
  - (ii) 144 x 2,350 tonne reinforced concrete vertical cells with associated working house (due to high level sensors and purge capacity, the operational capacity of these cells is 2,200 tonnes each).
  - (iii) 104 x 500 tonne star cells with associated working house (due to high level sensors and purge capacity, the operational capacity of these cells is 450 tonnes each).
  - (iv) 1 x 285,800 tonne and 1 x 238,100 tonne capacity reinforced concrete horizontal storage cells with associated working house (the capacity of these cells is based on one grain type – when segregated, storage capacity in these cells is reduced).
  - (v) 4 x corrugated galvanised steel open bulkheads with a total capacity of 120,100 tonnes, comprised of:
    - (A) O1: 30,100 tonnes
    - (B) O2: 40,000 tonnes;
    - (C) O3: 23,000 tonnes;
    - (D) O4: 27,000 tonnes.
- (d) Inload capacity
  - (i) Rail
    - (A) The port terminal has 1 rail receival station, which is comprised of 2 receival grids. The rail receival grids can also be used for road receivals. When shipping demand requires, rail accumulation tonnage is supplemented with road receivals. The receival grids are rated to receive grain at 4,000 tonnes per hour by rail, and 700 tonnes per hour by road.
    - (B) Operational constraints and the need to handle multiple grain segregations severely impact the port terminal's ability to achieve the rated rail receival capacity of 4,000 tonnes per hour. For example, changing the receival facilities to swap between receiving two grades of wheat takes 15-30 minutes. The process involves emptying the receival grid, purging the receival lines and moving trippers in the seventh floor workhouse. Changing the receival facilities to swap from receiving wheat to lupins can take 20-40 minutes, as this process additionally requires the grid to be blown down and the receival elevators to be air blasted.
    - (C) The physical configuration of rail wagons for discharge can also affect the ability of the receival station to operate at maximum capacity. This is because the grain discharges



from the wagons into the grid at a slower pace than the conveyors are able to remove it. The trains move slowly for set ups and the train must be stationary to allow the Port Operator to open wagons with the rail gun.

- (D) Various other factors reduce the ability of the rail receipt station to receive grain at its rated capacity. These include:
  - (1) operational constraints and the need to handle multiple segregations, which adds time when changing between grains and grades;
  - (2) the physical configuration of rail wagons moving into the port terminal;
  - (3) external factors beyond the Port Operator's control, for example a rail provider's locomotive breakdown; and
  - (4) the Port Operator having to weigh grain on receipt using its batch weighers.

(ii) Road

The port terminal does not have permanent dedicated road inloading facilities but may employ temporary drive-over grids in dry weather. Road receipts made through the rail receipt station reduce rail discharge rates by 25% to 50%. As a result of reducing the available discharge conveyors for the discharge of rail, they are discharged using the same conveyor belts and cannot be run together.

(e) Ship loading capacity

- (i) Ship loading occurs between 0730 and 2230, because :
  - (A) ships need time to empty their ballast. Due to the fast loading rate at Kwinana, some ships cannot empty their ballast tanks fast enough, so they are allocated time from 2230 and 0730 to catch up; and
  - (B) as part of the Port Operator's environmental commitments to keep dust and noise to a minimum for residents, the Port Operator does not load ships at the port terminal 24 hours per day.
- (ii) 4 x 2,500 tonne per hour travelling and luffing ship loaders (only 2 can be used simultaneously) with associated batch weighing and sampling systems. The ship loaders are fed by 4 conveyor belts, each with a loading capacity of 1,250 tonnes per hour. Because the ship loaders are dual fed (that is, 2 conveyors feed 1 loader), ships can be loaded at full capacity through less infrastructure.
- (iii) 291 metre long ship loading berth with associated access jetty.

- (iv) A number of factors influence the port terminal's ability to achieve its maximum shipping capacity of 5,000 tonnes per hour. These include:
  - (A) hatch changes – changing from one hatch to another affects loading rates, because of the time required to raise, move and lower the ship loaders into the required hatch. Hatch changes are necessary to keep the vessel stable during loading;
  - (B) trimming hatches – loading rates are reduced to 'half feed' when the grain comes close to filling a hatch. This is to prevent over-filling and allow instead for hatches to be level filled;
  - (C) filling weep holes and bulkheads – loading rates are also reduced to half feed when filling weep holes to allow flow to fill these areas. Due to the relatively light weight of grain (as compared with iron ore, for example) hatches must be filled to the highest level to achieve the maximum weight, and ensure there is no wasted space in the hatch;
  - (D) ballast discharge – some ships are not designed to discharge stabilising water tanks at the same rate as the ship loaders can load grain. In these cases, grain loading stops to allow the ship time to discharge ballast;
  - (E) draught surveys – towards the end of the ship loading, grain flow from the loaders is stopped to allow the ship's captain to check the ship's draught. This is to ensure that the tonnage being loaded will allow the ship to sail and arrive at the discharge port;
  - (F) initial loading of large ships – due to the steep angle and height of the ship loaders which is necessary when loading larger ships, there is a reduced feed rate to avoid spillage. As the ship loading continues and the ship becomes lower in the water, the ship loaders can be lowered and feed rates increased;
  - (G) grain changes and separations in hatches – when changing from loading one grain type to another, all weighers, belts and loaders must be cleaned before the second grain type can be loaded. Loading will also stop if a physical separation of grain is required in the ship's hatches; and
  - (H) weather – grain cannot be loaded on ships in rain or high winds.
- (f) Associated system control and communication networks, Site office, ablution and workshop facilities.
- (g) The port terminal is accredited to the international standard ISO 9001 and HACCP Codex Alimentarius.

# Schedule 6

## Port Terminal Facility - Albany

### 1 Location

The Albany port terminal is located in the Western Australian city of Albany, which is approximately 420km south east of Perth. The port terminal address is Princess Royal Drive, Albany WA 6330.

### 2 Port Terminal Facilities

- (a) The Port Terminal Facilities consist of the conveyors, elevators, sample rooms, grids, batch weighers, ship loaders and site roads owned by the Port Operator and contained in the shaded areas below. The sample sheds related to harvest activity are within the shaded area, but are not included in the Port Terminal Facilities.



- (b) Grain receipt
- (i) 2 x 140 tonne weighbridges with associated hut.
  - (ii) 2 x 700 tonne per hour and 3 x 400 tonne per hour road receipt grids.
  - (iii) 1 x 700 tonne per hour road receipt grid (which only services one particular 113,000 tonne capacity storage cell).

- (iv) 1 x 2000 tonne per hour rail receipt station with associated rail line.
  - (v) 12 x dust control systems.
  - (vi) 59 grain conveyors with 16 associated grain elevators (some are task specific, such as for discharging by rail or shipping).
- (c) Grain storage
- (i) The port terminal's total storage capacity is 474,000 tonnes.
  - (ii) 2 x 2,200 tonne and 5 x 1300 reinforced concrete vertical cells and 6 x 500 tonne star cells with associated working house.
  - (iii) 24 x 2,300 tonne reinforced concrete vertical cells.
  - (iv) 12 x 500 tonne star cells.
  - (v) 10 x 10,000 tonne reinforced concrete silos with bottom rake discharge.
  - (vi) 10 x 6,000 tonne steel silos with self discharge base.
  - (vii) 1 x 120,000 tonne and 1 x 113,000 tonne capacity reinforced concrete horizontal storage cells.
- (d) Inload capacity
- (i) Rail
    - (A) The port terminal has 1 rail receipt station, which can also be used for road receipts (when not in use for rail receipts). The rail receipt station is rated to receive grain at 2,000 tonnes per hour by rail, and 1,000 tonnes per hour by road.
    - (B) To receive grain by rail at 2,000 tonnes per hour, the rail receipt station must have two lines and two storage cells available for use. Additional staff are also required to discharge at this maximum rate. The rate of discharge is also dependent upon the silo to which the grain is to be discharged. For example, if the grain is to be discharged to either the 500 or 2,000 tonne cells, the discharge rate from the rail receipt station is only 400 tonnes per hour. On average, wheat is discharged from the rail receipt station at around 1,300 tonnes per hour
    - (C) Various factors reduce the ability of the rail receipt station to receive grain at its rated capacity. These include:
      - (1) operational constraints and the need to handle multiple segregations, which adds time when changing between grains and grades;
      - (2) the physical configuration of rail wagons moving into the port terminal;

- (3) external factors beyond the Port Operator's control, for example a rail provider's locomotive breakdown; and
  - (4) the Port Operator having to weigh grain on receipt using its batch weighers.
- (ii) Road
  - (A) The port terminal has 6 road receipt stations. There are 2 stations rated to receive grain at 700 tonnes per hour, 3 stations rated to receive grain at 400 tonnes per hour and 1 station rated to receive grain at 700 tonnes per hour (this station is at Annexe 2, which is a different area of the port).
  - (B) The number of grids that can be used simultaneously largely depends on the rail, shipping and transferring activities being carried out at the same time. The control system only allows a set number of grain flows to be set up at once. For example, if shipping a 4-way blend of grain, 8 flows are required (4 flowing into the weigher, 4 flowing out) leaving only 4 flows for other activities.
  - (C) Once storage space begins to reach its capacity, both storage options and flow path options reduce. The number of road pits available for use may also reduce. Segregating grain will increase the likelihood of this.
  - (D) The rail grid is rated at 1000 tonnes per hour for road discharge. The 3 road grids are rated at 700 tonnes per hour. However, the actual discharge rate achieved is around 500 tonnes per hour, which is the maximum rate at which a truck can discharge 3 trailers.
- (e) Ship loading capacity
  - (i) The Albany port terminal has 3 luff and swing ship loaders with associated batch weighing and sampling systems, each with a rated loading capacity of 1,000 tonnes per hour. While any 2 ship loaders can be used simultaneously, the actual load rate achieved is on average 1,500 tonnes per hour.
  - (ii) A number of factors influence the port terminal's ability to achieve its maximum shipping capacity of 2,000 tonnes per hour. These include:
    - (A) hatch changes – changing from one hatch to another affects loading rates, because of the time required to raise, move and lower the ship loaders into the required hatch. Hatch changes are necessary to keep the vessel stable during loading;
    - (B) trimming hatches – loading rates are reduced to 'half feed' when the grain comes close to filling a hatch. This is to

prevent over-filling and allow instead for hatches to be level filled;

- (C) filling weep holes and bulkheads – loading rates are also reduced to half feed when filling weep holes to allow flow to fill these areas. Due to the relatively light weight of grain (as compared with iron ore, for example) hatches must be filled to the highest level to achieve the maximum weight, and ensure there is no wasted space in the hatch;
  - (D) ballast discharge – some ships are not designed to discharge stabilising water tanks at the same rate as the ship loaders can load grain. In these cases, grain loading stops to allow the ship time to discharge ballast;
  - (E) draught surveys – towards the end of the ship loading, grain flow from the loaders is stopped to allow the ship's captain to check the ship's draught. This is to ensure that the tonnage being loaded will allow the ship to sail and arrive at the discharge port;
  - (F) initial loading of large ships – due to the steep angle and height of the ship loaders which is necessary when loading larger ships, there is a reduced feed rate to avoid spillage. As the ship loading continues and the ship becomes lower in the water, the ship loaders can be lowered and feed rates increased;
  - (G) grain changes and separations in hatches – when changing from loading one grain type to another, all weighers, belts and loaders must be cleaned before the second grain type can be loaded. Loading will also stop if a physical separation of grain is required in the ship's hatches; and
  - (H) weather – grain cannot be loaded on ships in rain or high winds.
- (f) Associated system control and communication networks, Site office, ablution and workshop facilities.
  - (g) The port terminal is accredited to the international standard ISO 9001 and HACCP Codex Alimentarius.

# Schedule 7

## Port Terminal Facility - Esperance

### 1 Location

The Esperance port terminal is located in the Western Australian city of Esperance, which is approximately 721km south-east of Perth. The port terminal address is Corner Harbour Road and Esplanade, Esperance WA 6450.

### 2 Port Terminal Facilities

- (a) The Port Terminal Facilities consist of the conveyors, elevators, sample rooms, grids, batch weighers, ship loaders and site roads owned by the Port Operator and contained in the shaded area in figure 1 below.
- (b) The weighbridge and access roads at Chadwick, approximately 3km from the Esperance port terminal, also form part of the Port Terminal Facilities, and are contained in the shaded area in figure 2 below.

Figure 1



Figure 2



- (c) Grain receipt
  - (i) 5 road receipt bins:
    - (A) 2 x 800 tonne per hour;
    - (B) 2 x 200 tonne per hour; and
    - (C) 1 x 500 tonne per hour.
  - (ii) 1 x 800 tonne per hour rail receipt station with associated rail line.
  - (iii) 15 dust control systems.
  - (iv) 47 grain conveyors with 12 associated grain elevators,
  - (v) 1 x 180 tonne weighbridge located at the Chadwick depot.
- (d) Grain storage
  - (i) The port terminal's total storage capacity is 249,400 tonnes.
  - (ii) 8 x 5,000 tonne steel silos.
  - (iii) 8 x 2,100 tonne concrete silos.
  - (iv) 10 x 6,000 tonne steel silos with self discharging base and associated working house.
  - (v) 101,600 tonne capacity reinforced concrete horizontal storage cell.
  - (vi) 31,000 tonne capacity corrugated galvanized steel circular storage cell.
- (e) Inload capacity
  - (i) Rail
    - (A) The port terminal has 1 rail receipt grid, which can also be used for road receipts. The rail receipt grid is rated to receive grain at 800 tonnes per hour by rail and by road.
    - (B) The operational capacity of the rail receipt grid, and the rate at which it is able to receive grain, depends upon the type of grain being received and the destination silo of that grain. The following rates are based on wheat receipts:
      - (1) 800 tonnes per hour when grain moving to 10 x 6,000 tonne cells;
      - (2) 400 tonnes per hour when grain moving to 8 x 5,000 tonne cells;
      - (3) 250 tonnes per hour when grain moving to 8 x 2,100 tonne cells;
      - (4) 500 tonnes per hour when grain moving to horizontal storage; and
      - (5) 500 tonnes per hour when grain moving to circular storage.



- (C) Various factors reduce the ability of the rail receipt station to receive grain at its rated capacity. These include:
  - (1) operational constraints and the need to handle multiple segregations, which adds time when changing between grains and grades;
  - (2) the physical configuration of rail wagons moving into the port terminal;
  - (3) external factors beyond the Port Operator's control, for example a rail provider's locomotive breakdown; and
  - (4) the Port Operator having to weigh grain on receipt using its batch weighers.
- (ii) Road
  - (A) The port terminal has 5 road receipt stations:
    - (1) Grids 1 & 2 can receive grain at 800 tonnes per hour;
    - (2) Grids 3 & 4 can receive grain at 200 tonnes per hour; and
    - (3) Grid 5 can receive grain at 500 tonnes per hour.
  - (B) The road receipt grids are limited to servicing specific storages within the port terminal:
    - (1) Grids 1 & 2 fill can fill anywhere within the terminal and are used as the main discharge grids;
    - (2) Grids 3 & 4 are used to fill the small concrete cells and annexe; and
    - (3) Grid 5 fills part of the annexe and circular storage.
- (f) Ship loading capacity
  - (i) The Esperance port terminal has 7 fixed shipping spouts, with a combined total rated loading capacity of 2,500 tonnes per hour, with associated batch weighing and sampling systems. The port terminal has the ability to load ships using 2 spouts loading into 2 hatches simultaneously, with each being able to load 1,250 tonnes per hour (depending on grain type and cargo position in the terminal). The Port Operator endeavours to position cargo so that ships can be loaded at the maximum rate. However, vessel requirements and weather delays must be taken into account. Given these restrictions, the port terminal aims to achieve an overall 1,800 tonnes per hour loading rate.
  - (ii) Ship loading rates at the port terminal are affected by the following factors:
    - (A) hatch changes – changing from one hatch to another affects loading rates, because of the time required to raise, move and lower the ship loaders into the required hatch. Hatch

changes are necessary to keep the vessel stable during loading;

- (B) trimming hatches – loading rates are reduced to ‘half feed’ when the grain comes close to filling a hatch. This is to prevent over-filling and allow instead for hatches to be level filled;
  - (C) filling weep holes and bulkheads – loading rates are also reduced to half feed when filling weep holes to allow flow to fill these areas. Due to the relatively light weight of grain (as compared with iron ore, for example) hatches must be filled to the highest level to achieve the maximum weight, and ensure there is no wasted space in the hatch;
  - (D) ballast discharge – some ships are not designed to discharge stabilising water tanks at the same rate as the ship loaders can load grain. In these cases, grain loading stops to allow the ship time to discharge ballast;
  - (E) draught surveys – towards the end of the ship loading, grain flow from the loaders is stopped to allow the ship’s captain to check the ship’s draught. This is to ensure that the tonnage being loaded will allow the ship to sail and arrive at the discharge port;
  - (F) initial loading of large ships – due to the steep angle and height of the ship loaders which is necessary when loading larger ships, there is a reduced feed rate to avoid spillage. As the ship loading continues and the ship becomes lower in the water, the ship loaders can be lowered and feed rates increased;
  - (G) grain changes and separations in hatches – when changing from loading one grain type to another, all weighers, belts and loaders must be cleaned before the second grain type can be loaded. Loading will also stop if a physical separation of grain is required in the ship’s hatches; and
  - (H) weather – grain cannot be loaded on ships in rain or high winds.
- (g) Associated system control and communication networks, Site office, ablution and workshop facilities.
  - (h) The port terminal is accredited to the international standard ISO 9001 and HACCP Codex Alimentarius.

## Schedule 8– Auditor

### 1 Appointment of Auditor

- (a) If, at any time during the term of this Undertaking, the ACCC issues a notice under **clause 6.3(a)** of the Undertaking, the Port Operator must, within 5 Business Days, advise the ACCC in writing of the identity of the person that it proposes to appoint as the Auditor, together with such information or documents (including the proposed terms of engagement) that the ACCC requires to assess the skill and independence of the Auditor.
- (b) The Proposed Auditor must be a person who has the relevant skill to perform the role of Auditor and is independent of the Port Operator. Without limitation, an Auditor is not independent if he or she:
- (i) is a current employee or officer of the Port Operator or a Related Body Corporate of the Port Operator;
  - (ii) has been an employee or officer of the Port Operator or a Related Body Corporate of the Port Operator in the past 36 months;
  - (iii) in the opinion of the ACCC, holds an interest in the Port Operator or a Related Body Corporate of the Port Operator;
  - (iv) has within the past 36 months been a professional adviser to the Port Operator or a Related Body Corporate of the Port Operator;
  - (v) has a contractual relationship, or is an employee or contractor of a firm or company that has a contractual relationship, with the Port Operator or a Related Body Corporate of the Port Operator;
  - (vi) is a supplier, or is an employee or contractor of a firm or company that is a supplier, of the Port Operator or a Related Body Corporate of the Port Operator; or
  - (vii) is a customer, or is an employee or contractor of a firm or company that is a customer, of the Port Operator or a Related Body Corporate of the Port Operator

save that an Auditor that has been appointed by the Port Operator for the purposes of preparing an audit report to WEA (to comply with a requirement by WEA) or for the purposes of preparing an audit report to the ACCC (to comply with the audit requirements in respect of the exclusive dealing notification N93439 lodged by the Port Operator) shall not be considered as being not independent by reason of having been so appointed or having prepared such audit reports.

- (c) If, within 5 Business Days of receipt by the ACCC of the information or documents from the Port Operator referred to in **paragraph 1(a)** of this

**Schedule 8**, or such further period as required by the ACCC and notified to the Port Operator:

- (i) the ACCC does not object to the Proposed Auditor, the Port Operator must appoint the Proposed Auditor as Auditor as soon as practicable thereafter (but in any event within 5 Business Days) on terms approved by the ACCC and consistent with the performance by the Auditor of its functions under this Undertakings and forward to the ACCC a copy of the executed terms of appointment of the Auditor; or
- (ii) the ACCC does object to a Proposed Auditor, the Port Operator must as soon as practicable (but in any event within 5 Business Days) appoint a person identified by the ACCC at its absolute discretion as the Auditor on terms approved by the ACCC and consistent with the performance by the Auditor of its functions under this Undertaking.

## 2 Scope of the audit

- (a) The Port Operator must, within 30 Business Days of the date on which the Auditor is appointed in accordance with **paragraph 1(c)** of this **Schedule 8**, provide to the ACCC a written report from the Auditor in relation to the Port Operator's compliance with its obligations under **clause 6.2(a)** of the Undertaking.
- (b) The Port Operator must provide to the Auditor any information or documents requested by the Auditor that the Auditor reasonably considers necessary and relevant for fulfilling its obligations in relation to compliance by the Port Operator with its obligations under **clause 6.2** of the Undertaking or for reporting to or otherwise advising the ACCC.
- (c) The Port Operator must procure the Auditor to provide information or documents or access to the ACCC, as required by the ACCC to ensure compliance with the Undertaking.
- (d) In complying with the obligations in **paragraph 2** of this **Schedule 8**, the Port Operator must:
  - (i) take any steps directed by the ACCC in relation to any matter arising from the report of the Auditor referred to in **paragraph 2(a)** of this **Schedule 8** within 10 Business Days of being so directed (or such longer period agreed with the ACCC);
  - (ii) direct its personnel, including directors, managers, officers, employees and agents to act in accordance with the obligations set out in this **paragraph 2** of this **Schedule 8** and ensure such personnel are aware of the Auditor and its role; and
  - (iii) provide access, information and/or documents required by the Auditor.

- (e) The Port Operator must maintain and fund the Auditor and must indemnify the Auditor for reasonable expenses and any loss, claim or damage arising from the proper performance by the Auditor of functions required to be performed by the Auditor under this Undertaking.

### 3 Limits on the audit process

- (a) The ACCC must not require the Port Operator to appoint an Auditor to undertake an audit in relation to the Port Operator's compliance with its obligations under **clause 6.2** of the Undertaking more than twice in each 12 month period during the term of the Undertaking.
- (b) If:
  - (i) within the period of 3 months prior to the date on which the ACCC issues any notice under **clause 6.3** of the Undertaking, the Port Operator has submitted an audit report to WEA (to comply with a requirement by WEA) ("WEA Audit Report") or to the ACCC (to comply with the compliance audit requirements in respect of the exclusive dealing notification N93439 lodged by the Port Operator) ("**Compliance Audit Report**");
  - (ii) the Compliance Audit Report was prepared by a person that satisfies the criteria for independence set out in **paragraph 1(b)** of this **Schedule 8**; and
  - (iii) the Compliance Audit Report addresses the Port Operator's compliance with its obligations under **clause 6.2** of the Undertaking,

the Port Operator may provide the Compliance Audit Report to the ACCC, and the ACCC will may accept a Compliance Audit Report in satisfaction of the requirement for the Port Operator to provide an audit report to the ACCC in accordance with **paragraph 2(a)** of this **Schedule 8**.

- (c) For the avoidance of doubt, the ACCC will not be required to accept the Compliance Audit Report in satisfaction of the requirement for the Port Operator to provide an audit report to the ACCC in accordance with **paragraph 2(a)** of this **Schedule 8** if the ACCC (acting reasonably) considers that the matters set out in **paragraphs 3(b)(i)-(iii)** of this **Schedule 8** are not satisfied in respect of the Compliance Audit Report.