



Australian Government

Department of Agriculture, Fisheries and Forestry

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The General Manager
Adjudication
Australian Competition and Consumer Commission
GPO Box 3131
Canberra ACT 2601

Submission Re: Co-operative Bulk Handling Limited - Notification - N93439

The Australian Government recently introduced new arrangements for the marketing of bulk wheat exports. The principal objective of the new policy is to increase choice for growers exporting wheat by increasing competition into the market place.

The success of the arrangements will depend on all accredited exporters being able to compete on a 'level playing field' and this is reflected in the legislation. For example, port terminal operators who seek accreditation must have access undertakings in place with the ACCC for those port terminals. The government recognised the potential for its policy objectives to be frustrated if some companies with control of bottleneck infrastructure were also to be accredited exporters, as those companies would be in a position to leverage their ownership of the infrastructure to their advantage in marketing wheat.

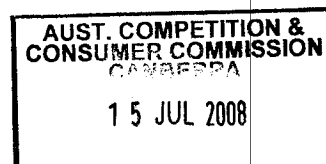
The scope for infrastructure providers to frustrate competition was raised during debate on the bills in Parliament and during the Senate Inquiry. During those debates the role of the ACCC in dealing with anti-competitive conduct was highlighted, and ACCC staff appeared before the Senate Inquiry.

The CBH notification needs to be considered in light of the recent policy changes and Grain Express' ability to either enhance or diminish the policy objectives.

The Department acknowledges the potential for improved efficiency of grain transport through Grain Express and the other advantages for growers. Of particular benefit is the 21 day period provided to growers to choose a marketing option from all of those on offer throughout the CBH network. This is a considerable improvement.

However, while Grain Express has the potential to deliver significant benefits it also has the potential to work in a manner that would frustrate the government's recent policy reforms. The notification acknowledges this potential and includes some measures to mitigate it from becoming reality (eg separation of Grain Pool Pty Ltd). The effectiveness of such measures – and the market's acceptance of them as effective – is crucial to determining whether Grain Express will provide the benefits claimed or result in a lessening of competition.

The Department asks that the ACCC consider the importance and necessity for such checks and balances to ensure preferential treatment is not exercised. The following comments are provided to assist with that process.



Transparency

The Department notes that CBH has expressed an intention to produce and publish market information. The Department considers transparency of this kind to be critical to the fair provision of services through Grain Express.

The exact nature and extent of information provision envisaged by CBH is not entirely clear. The Wheat Industry Expert Group (in its report on the provision of industry development functions) identified the importance of information being available to facilitate an effective market. To this end, it would be preferable for the provision of information to include the full publication, as far as privacy provisions allow, of quality and volume data by receival site – not only to Grain Express users, but also other prospective users.

The Department also recognises the importance of effectively ‘ring fencing’ the CBH Group’s marketing arms from CBH Ltd itself. It is imperative that appropriate checks and balances are put in place to ensure that the CBH, as a marketer, port terminal operator and operator of Grain Express, does not favour itself or its subsidiaries in its dealings. The full and transparent publication of information, as suggested above, is an important mechanism in addressing such concerns.

A requirement for a regular, independent audit of the robustness of the ‘ring-fencing’ arrangements or transparency of CBH’s bulk handling operations would also give the market more confidence that the ‘Chinese Walls’ were operating as claimed.

Niche products

The promotion and development of niche export products and markets is an important element of the wheat export marketing reforms. The Department notes CBH’s intention to appoint a logistics quality manager to balance supply chain efficiency and niche marketing requirements. This could involve the separation of specific grain intended for a particular market and preventing any co-mingling of that grain.

The creation of reserved stacks for particular quality requirements of marketers provides scope for the appropriate handling of niche products through Grain Express. The Department is aware of the need for a transparent and fair pricing structure to ensure the effectiveness of a ‘reserved stacks’ system. Although recognising that a premium will be involved, pricing which lacks fairness and transparency could potentially reduce the system’s appeal to, and feasible use by, growers and marketers developing niche export opportunities.

The Department is also concerned that it is not clear whether there is scope in the proposal for particular parcels of grain – as opposed to merely grain with equivalent quality characteristics – to be transported from growers to marketers where there is a need to do so in satisfying market requirements. For example, a market opportunity may present itself where ‘paddock to plate’ traceability is required.

Transport competition

The Department notes the potential for efficiency advantages associated with a centrally organised grain transport service. The Department is also mindful of the need for competition in this area.

The policy behind recent changes to Australia’s bulk wheat export marketing system has focussed on improving choice for growers and increasing competition in the industry. This included preserving the choice of transport options for growers and marketers. Section 86A of the *Wheat Export Marketing Act 2008* was inserted by Parliament specifically for the purpose of avoiding transport monopolies or prescriptive modes of transport being imposed upon members of the wheat export industry (i.e. forced use of rail over road).

The Department notes that CBH’s proposal may have an impact on transport competition and result in more grain travelling by rail than would otherwise be the case. Given Parliament’s recent

decision to insert section 86A into the *Wheat Export Marketing Act 2008* the ACCC may wish to consider the consistency of CBH's proposal with Parliament's express wish.

Monitoring of freight transactions

CBH has noted that there is currently a lack of transparency associated with the disclosure of the costs for transporting wheat to port destinations under various marketing options. It has indicated that under the Grain Express model, CBH will transparently bill growers for the movement of their grain to port and will not add a profit margin to the freight costs.

The Department notes that CBH has proposed that a 'Freight Fund' will be established and audited independently by an external auditor. This is a positive step and endorsed. CBH indicates that freight transactions will be transparent and an annual financial report, detailing the position of each year's freight collections and payments, will be provided to the National Agricultural Commodities Marketing Association, the Western Australian Farmers Federation and the Pastoralists and Graziers Association of Western Australia. The Department notes that any annual surplus from freight transactions will be deducted from freight rates over future years in a rolling manner.

Notwithstanding these arrangements, there may be the potential for CBH to secure windfall profits under the proposed system if a robust auditing mechanism is not in place. For example, growers may accept a marketing offer for a certain destination and be billed the freight costs to that point (eg. Geraldton port). However, a similar grade and volume of wheat may become available closer to the port destination and CBH may choose to utilise this latter volume instead. This would allow CBH to export the other grain to a different port. This means that there could be a discrepancy between what is charged for freight on such a consignment and what is actually paid if CBH decides to send it to a different location. The Department therefore agrees with CBH on the importance of a separate and independently audited 'Freight Fund', along with a detailed annual financial report showing the year's freight collections and payments.

Marketers lack of choice of outturn location

The Department notes that Grain Express will allow growers to outturn grain from a receival point where they have warehoused grain. However, marketers will only be allowed to outturn their grain entitlements at a 'destination site'. It is not clear why growers and marketers will be differentiated in this regard.

The ACCC may wish to consider the basis for treating marketers and growers differently, what it achieves and whether it is necessary for the efficient operation of Grain Express.

The Department is also concerned that accredited grower co-operatives may find themselves in an ambiguous position regarding where they can outturn grain under Grain Express. It is unclear whether co-operatives, which grow *and* market grain, would be able to outturn grain only at 'destination sites' as is the case for other marketers, or if they could also outturn at a receival point where they have warehoused grain. That is to say, will entities such as this be treated as growers or marketers for the purpose of possible outturn sites?

If a grower co-operative which marketed its own grain could outturn grain at receival points, but other marketers could outturn only at destination sites, a significant inequality is created between these two types of marketers.

Liability

The Department notes that CBH, not marketers or growers, will be responsible for transporting grain to outturn facilities on time and in-specification. This is particularly significant with regard to port terminal deliveries as the consequences associated with not meeting shipping schedules can be severe.

As Grain Express removes the logistics management of wheat from the marketer to CBH, it follows that the responsibility for delivering wheat to the outturn point on time and in-specification resides with CBH. It also follows that the consequences of failing to deliver wheat to the outturn point on time and in-specification should reside with CBH.

For example, if an exporter has nominated a vessel into the shipping stem for Geraldton to load on certain dates and has been accepted into the shipping stem by CBH, then if CBH fails to deliver the wheat it should bear the demurrage and other costs associated with failing to deliver the wheat.

While it could be argued that normal contract law would be sufficient to deal with this situation, it must be remembered that the exporter is having its ability to avoid this situation arising in the first place removed from it via Grain Express. In such circumstances the onus should be on the company making the notification. Normal contract law could take several years to resolve an issue, potentially to the detriment of the exporter who has had to bear the costs until the matter is finalised.

The Department considers that CBH should expressly accept all responsibility, and liability, for deliveries which do not meet marketers' specifications. This includes accepting liability for any lateness of deliveries and deviation from particular quality and quantity requirements of marketers. Without such a requirement there is scope for using Grain Express to disadvantage other market participants.

This requirement should be a condition of allowing the notification to stand.

Review

For the reasons outlined above, if the notification is allowed to stand then the Department considers that a review should be undertaken in the future to see whether it is operating as claimed.

Thank you for the opportunity to comment on the notification. The Department has only had limited time in which to look at CBH's Grain Express proposal and as such these comments should be viewed as preliminary. In addition, the significant deletions of commercial-in-confidence material from the proposal mean the Department can only comment on the basis of the public information. I trust this submission will be of assistance.

Yours sincerely



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