



Australian
Competition &
Consumer
Commission

Decision

in respect of a notification lodged by

Cooperative Bulk Handling Ltd

Date: 8 September 2008

Notification no. N93439

Public Register no. C2008/946

**Commissioners: Samuel
Kell
Court
King
Martin
Walker**

Summary

Based on the information currently before it, the Australian Competition and Consumer Commission (ACCC) has decided not to revoke the exclusive dealing notification (N93439) lodged by Cooperative Bulk Handling Ltd (CBH) at this time. This means the protection from legal action for exclusive dealing conduct provided by the notification will continue, and CBH will be able to implement 'Grain Express' under this immunity.

The ACCC has reached this conclusion because it is not satisfied that the notified conduct will have the purpose, effect or likely effect of substantially lessening competition within the meaning of section 47 of the *Trade Practices Act 1974* (the Act).

The ACCC can review this decision at any time.

The notification process

Section 47 of the Act prohibits conduct known as exclusive dealing. Broadly, exclusive dealing involves one trader imposing restrictions on another's freedom to choose with whom, in what or where it deals.

Businesses may obtain immunity for conduct that might risk breaching the exclusive dealing provisions of the Act by lodging a 'notification' with the ACCC.

The ACCC may revoke a notification for exclusive dealing conduct (other than third line forcing conduct) if it is satisfied that the conduct has the purpose, effect or likely effect of substantially lessening competition and the likely benefit to the public will not outweigh the detriment to the public from the lessening of competition.

The notification

CBH lodged notification N93439 on 11 June 2008. CBH proposes to 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 only acquire transport services from CBH (through its nominated carrier).

The proposed arrangements are referred to as 'Grain Express.' The proposed arrangements may apply to growers and marketers of grain in Western Australia.

Further detail about CBH's notification is provided in Chapter 2 of this Decision.

ACCC's assessment

On the basis of information currently before it, the ACCC considers there are likely to be significant efficiency benefits as a result of the central coordination of grain storage, handling and transportation in Western Australia under the proposed Grain Express system.

The ACCC is not satisfied that the notified conduct has the purpose, effect or likely effect of substantially lessening competition within the meaning of section 47 of the Act for the following reasons:

- the proposed arrangements do not foreclose potential competitors to CBH from entering the market for grain receival, storage and handling
- growers and traders of grain are free to make their own arrangements in respect of the transportation of grain from the farm gate to end user point, or from a Destination Site to end user point
- the proposed arrangements may stimulate competition in the market for the relevant CBH transport contracts by providing greater certainty in respect of transport volumes
- acquirers and marketers of grain will continue to be able to take advantage of niche marketing opportunities and
- CBH's amended Ring Fencing Policy provides an adequate framework to limit the potential for information obtained by CBH to be transferred to and used anti-competitively by CBH's trading subsidiaries.

Therefore, in accordance with the statutory test, the ACCC does not propose to take any further action in respect of notification N93439 at this time. Protection from legal action provided by this notification commenced automatically when it was lodged on 11 June 2008.

CONTENTS

1. INTRODUCTION.....	1
2. BACKGROUND TO THE NOTIFICATION	2
THE NOTIFYING PARTY.....	2
THE WESTERN AUSTRALIAN GRAIN INDUSTRY	2
THE WESTERN AUSTRALIAN GRAIN SUPPLY CHAIN	3
CHANGES TO WHEAT MARKETING LEGISLATION	4
3. THE NOTIFICATION.....	6
4. STATUTORY TEST	7
5. INTERESTED PARTY SUBMISSIONS	8
6. ACCC ASSESSMENT	11
THE RELEVANT MARKETS	11
PUBLIC DETRIMENTS	12
ACCC’s conclusion on whether the conduct has the purpose or effect of substantially lessening competition.....	22
PUBLIC BENEFITS	22
7. CONCLUSION.....	29

LIST OF ABBREVIATIONS

AWB	AWB Ltd
CBH	Cooperative Bulk Handling Ltd
DAFF	Australian Government Department of Agriculture, Fisheries and Forestry
Grain Pool	Grain Pool Pty Ltd
the Act	<i>Trade Practices Act 1974</i>
The Wheat Act	<i>Wheat Export Marketing Act 2008</i>

1. Introduction

- 1.1 The Australian Competition and Consumer Commission (ACCC) is the Australian Government agency responsible for administering the *Trade Practices Act 1974* (the Act). A key objective of the Act is to prevent anti-competitive arrangements or conduct, thereby encouraging competition and efficiency in business, resulting in greater choice for consumers in price, quality and service.
- 1.2 Section 47 of the Act prohibits conduct known as exclusive dealing. Broadly, exclusive dealing involves a trader imposing restrictions on another person's freedom to choose with whom, in what or where it deals.
- 1.3 Businesses may obtain immunity for conduct that might risk breaching the exclusive dealing provisions of the Act by lodging a 'notification' with the ACCC in accordance with subsection 93(1) of the Act. Once validly lodged, immunity for the notified conduct commences immediately, except in the case of third line forcing conduct.
- 1.4 The ACCC may revoke a notification (other than in the case of third line forcing conduct) if it is satisfied that the conduct described in the notification has the purpose, effect or likely effect of substantially lessening competition, and in all the circumstances:
 - the conduct has not resulted or is not likely to result in a benefit to the public, or
 - the benefit will not outweigh the detriment to the public by a lessening of competition resulting from the conduct.
- 1.5 The exclusive dealing notification process is transparent involving public registers and interested party consultation. Where the ACCC proposes to revoke a notification, it must first issue a draft notice setting out its reasons and providing an opportunity for interested parties to request a conference.

2. Background to the notification

The notifying party

- 2.1. Cooperative Bulk Handling Ltd (CBH) was founded in 1933 as a grower owned co-operative. It currently has approximately 5 150 shareholders that are growers of grain in Western Australia.¹ As well as the grain storage and logistics arm, CBH 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.
- 2.2. CBH's main objectives are set out in its Memorandum of Association:²
- to establish, maintain and conduct any schemes or system for handling wheat and/or other grain in bulk or otherwise
 - to receive, handle, transport, grade, classify and store wheat and or/other grain and
 - to 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.
- 2.3. Provisions in the *Bulk Handling Act 1967* (WA) place restrictions on the manner in which CBH can use its income or property. In effect, these provisions require CBH to apply any income or profit to the objectives of the company and prevents the distribution of income to shareholders.

The Western Australian grain industry

- 2.4. Western Australian grain production is characterised by significant seasonal variability. Since 2000, the grain crop has been marked by two major droughts in 2000/01 and 2006/07. The Western Australian grain crop for 2008/09 is forecast to be approximately 11.4 million tonnes, or approximately 31 per cent of Australia's total grain crop. The predominant grain grown in Western Australia is wheat, with a forecast harvest for 2008/09 of 8.3 million tonnes. This is followed by Barley (2.1 million tonnes), Canola (0.7 million tonnes) and Lupins (0.3 million tonnes).³

¹ CBH Notification N93439, supporting submission, page 14.

² CBH Notification N93439, supporting submission, pages 14 -15.

³ ABARE, *Australian Crop Report*, 17 June 2008, page 1.

- 2.5. For the 2008/09 winter grain crop, the total area to be cultivated in Western Australia is forecast to be approximately 7.3 million hectares.⁴ Western Australian grain growers are, on average, three times larger in terms of land under crop than their eastern state counterparts.⁵ The PGA Western Graingrowers 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.⁶
- 2.6. Western Australian grain growers have, on average, higher farm incomes and rates of return than eastern state grain growers. This is partially attributable to higher crop yields and the larger size of farms in Western Australia.⁷
- 2.7. Approximately 90 per cent of the Western Australian grain crop is exported. This is in contrast with eastern states, where 50 per cent of the grain crop is exported.⁸ Japan is the largest recipient of Western Australian grain, closely followed by Indonesia and South Korea.⁹

The Western Australian grain supply chain

- 2.8. The Western Australian grain supply chain currently comprises the following components:¹⁰
- Production – growers produce grain on medium to large scale farms.
 - Transport from farm gate to silo – growers arrange for road transport between the farm gate and country storage and handling facilities (Receival Points).
 - Sale/acquisition of grain to marketer – growers choose from a range of options for selling their grain. Marketers acquire grain at Receival Points.
 - Trading and accumulation – grain is traded and accumulated in a secondary market.
 - Country storage and handling – grain is unloaded at Receival Points where it is sampled, analysed, weighed, graded, stored and fumigated.
 - Bulk freight – marketers and CBH contract with rail and road providers to transport grain from the Receival Point to the port or container loading facilities for export or the domestic market, as instructed by marketers.
 - Port storage and handling – bulk grain is stored for export at four major port terminals (discussed in further detail below).

⁴ ABARE, *Australian Crop Report*, 17 June 2008, page 15.

⁵ PGA Western Graingrowers, *Submission to the Senate Rural and Regional Affairs Transport Committee*, April 2008, page 4.

⁶ Ibid.

⁷ Australian Natural Resources Atlas, *Agriculture – Grains Industry – Australia*, November 2007.

⁸ CBH Notification N93439, supporting submission, page 6.

⁹ Department of Agriculture and Food (WA), *WA Grain Industry*, 2007, page 7.

¹⁰ CBH Notification N93439, supporting submission, page 11.

- Container loading and handling – grain may be loaded into containers for export or shipment to the domestic market.
- Export marketing – marketers contract with overseas grain buyers and arrange for shipping of bulk or container grain to the required foreign ports.

2.9. The Western Australian grain belt is roughly divided into four distinct zones (Kwinana, Albany, Geraldton and Esperance), each served by a port. In general, grain harvested in each zone will be exported through the corresponding port.¹¹ The capacity of each port and the annual approximate average volume of grain exported through each port is outlined in Table 4.1.¹²

Table 4.1 Total storage capacity and approximate average annual export volume for Western Australia grain ports

Port	Total storage capacity (tonnes)	Average Annual Grain Export Volume (tonnes)
Kwinana	1,013,900	6,000,000
Geraldton	1,066,600	2,000,000
Albany	474,000	2,000,000
Esperance	826,000	1,500,000

Changes to wheat marketing legislation

- 2.10. The enactment of the *Wheat Export Marketing Act 2008* (the Wheat Act) on 1 July 2008 has heralded significant changes in the manner in which bulk wheat is exported from Australia. Prior to 1 July 2008, the export of bulk wheat was almost exclusively directed through the single desk, controlled by the Australian Wheat Board (AWB) through its subsidiary Australian Wheat Board International Ltd (AWBI).
- 2.11. In order to export bulk wheat, an exporter now must be accredited by a new industry regulator, Wheat Exports Australia. The Wheat Export Accreditation Scheme under the Wheat Act provides that a potential exporter is not eligible for accreditation unless, among other things, Wheat Exports Australia is satisfied that the company is fit and proper.

¹¹ CBH Notification application N93439, supporting submission Appendix 1, Synergies Economic Consulting, *Benefits of Grain Express*, May 2008, page 13.

¹² Compiled by the ACCC from CBH Notification N93439, Supporting Submission Appendix 1, Synergies Economic Consulting, *Benefits of Grain Express*, May 2008, page 13 & Single Vision Grains Australia, *Transport Infrastructure Issues Paper One*, January 2007, page 26.

- 2.12. In addition, the Wheat Act requires that until 1 October 2009, accredited exporters that operate bulk grain terminals must publish terms and conditions for access to its port terminal by other accredited wheat exporters. For the period after 1 October 2009, these exporters must enter into an access undertaking under Part IIIA of the Trade Practices Act agreeing to provide access to the port terminal to accredited wheat exporters. The undertaking must be approved by the ACCC.
- 2.13. The ACCC notes that its assessment of the Grain Express exclusive dealing notification is separate from and should not be taken to be indicative of any future assessment of an access undertaking given by CBH under Part IIIA of the Trade Practices Act.
- 2.14. Non-bulk wheat, which is stored in bags or containers, has not been regulated, other than meeting quarantine and Customs requirements and was not controlled by AWB. In 2006-07 approximately 877 000 tonnes of non-bulk wheat was exported from Australia, representing 8.7 per cent of total wheat exports.¹³

¹³

Allen Consulting Group, *Competition in the export grain supply chain (Report to AWB Ltd)*, March 2008, page 21.

3. The notification

The notified conduct

- 3.1. CBH lodged notification N93439 on 11 June 2008. CBH proposes to 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 only acquire transport services from CBH (through its nominated carrier).

The proposed arrangements are referred to as **‘Grain Express’**.

Mechanics of the notified conduct

- 3.2. Under Grain Express, CBH will offer grain receipt, storage and handling services to growers and marketers on the condition that CBH will arrange for haulage of that grain to the point where it is outturned from CBH's custody. Growers and marketers will be restricted to 15 sites where they will be able to outturn grain from CBH's custody. The 15 sites will be known as Destination Sites. A list of the Destination Sites is provided at Attachment A to this Decision.
- 3.3. The proposed arrangements will be implemented in CBH's contracts with both growers (who acquire receipt and storage services from CBH) and marketers (which may acquire storage and handling services).
- 3.4. A comparison of the proposed Grain Express system and how grain currently moves through the Western Australian supply chain is provided below:
- Under current arrangements, a grower delivers grain to one of CBH's 193 Receipt Points. Under Grain Express, each grower will still be responsible for transporting grain to the Receipt Point.
 - Under current arrangements, in most cases growers nominate an acquirer of their grain at the Receipt Point, usually a marketer. Under Grain Express, growers will not be required to make a nomination immediately at the Receipt Point. Rather, grain will be received by CBH and the grower will have 21 days to electronically nominate its chosen acquirer and marketing arrangement.
 - Under current arrangements, acquirers of grain can have it outturned at any of the 193 Receipt Points where grain can be delivered. Under Grain Express, the acquirer of the grain can only have their grain entitlements outturned at any one of the 15 Destination Sites. Growers will still be able to outturn grain from the Receipt Point where it has been warehoused.

- Currently, the acquirer of the grain arranges for its transport from the Receival Point to its destination, be that to port for export or to a mill for domestic processing. Under Grain Express, CBH will negotiate agreements to acquire bulk grain haulage services from the current rail transport operator in Western Australia, the Australian Railroad Group (ARG), and road haulage carriers. CBH will use the road or rail freight services it acquires to move grain in its system between the Receival Point and, depending on the requirements of the owner of the grain, one of the 15 Destination Sites.
 - Under current arrangements, marketers quote prices payable to growers on a port basis and will generally deduct freight charges from the grower's grain payments. Under Grain Express, once a grower has nominated a marketing option, CBH will arrange transport to the nominated Destination Site and invoice the Grower for its service to that point. The marketer will be charged storage and handling fees for the grain in relation to the Destination Site where it is outturned.
- 3.5. The proposed arrangements are set out in further detail in CBH's supporting submission to the notification lodged on 11 June 2008.

4. Statutory Test

- 4.1. CBH submits that the proposed arrangements can be characterised as conduct of a kind described in section 47(2) of the Act. As previously mentioned, for notifications involving exclusive dealing conduct other than third line forcing, immunity commences automatically from the date the notification is validly lodged.
- 4.2. The ACCC accepts that the proposed arrangements can be characterised as conduct of a kind described in section 47(2) of the Act.
- 4.3. The ACCC assesses notifications involving exclusive dealing conduct other than third line forcing by applying the public interest test outlined in section 93(3) of the Act. Under this test, the ACCC may move to revoke CBH's notification if it is satisfied that the conduct has the purpose, effect or likely effect of substantially lessening competition and in all the circumstances:
- the conduct has not resulted or is not likely to result in a benefit to the public; or
 - any benefit to the public that has resulted or is likely to result from the conduct would not outweigh the detriment to the public constituted by any lessening of competition resulting from the conduct.

5. Interested party submissions

- 5.1. The ACCC invited submissions in relation to the Grain Express proposal from approximately 130 potentially interested parties including grain marketers, government, grower groups and transport providers.
- 5.2. The ACCC received public submissions in support of Grain Express from the following interested parties:
- AD & SE Duncan
 - Asciano
 - Australian Western Railroad Pty Ltd
 - DB & N Wallace
 - Department of Planning and Infrastructure (WA)
 - Elders Toepfer Grain Pty Ltd
 - Emerald Group Pty Ltd
 - GrainCorp Operations Ltd
 - Grain Pool Pty Ltd
 - Lempriere Grain
 - Millross Grains
 - Minister for Agriculture and Food (WA)
 - Minister for Planning and Infrastructure (WA)
 - National Agricultural Commodities and Marketing Association – WA Inc
 - Noble Resources Australia Pty Ltd
 - PGA Western Graingrowers
 - ProFarmer Australia Pty Ltd
 - RB Harrington Farms
 - Thompson & Redwood Produce Supplies
 - Western Australian Farmers Federation
 - Westfeeds Pty Ltd
 - Westnet Rail
- 5.3. The Australian Government Department of Agriculture, Fisheries and Forestry (DAFF) acknowledged the potential efficiency benefits likely to result from Grain Express. It also highlighted a number of key issues that it considers are critical to the ACCC's assessment of Grain Express.

- 5.4. The following points are intended to provide a brief overview of the key points interested parties raised in support of the Grain Express proposal. In particular, interested parties submit that Grain Express:
- will reduce transport costs for parties in the supply chain through central coordination
 - prevents fragmentation of the transport task, in particular leakage from rail transport to road transport
 - creates certainty of volume for rail and road operators
 - speeds up grain receipt and reduces unnecessary storage opening
 - reduces unnecessary fumigations
 - gives growers a better marketing system in respect of time and marketing options and
 - makes better use of port storage, reducing demurrage and encouraging dispatch.
- 5.5. The ACCC received public submissions opposing Grain Express from the following interested parties:
- AWB Ltd
 - Institute of Public Affairs
 - Milne Agrigroup
- 5.6. The following points are intended to provide a brief overview of the key concerns that interested parties raised in opposing the Grain Express proposal. In particular, interested parties submit that Grain Express will:
- reduce growers options to segregate grain and take advantage of niche marketing opportunities
 - reduce competition in the road transport market through foreclosing road grain transport contracts for extended periods of time
 - limit the ability of grain traders to trade in the secondary grain accumulation market
 - differentiate between marketers and growers in relation to their ability to outturn grain
 - inefficiently support and subsidise a rail system which is uncompetitive with road transport
 - reduce competition in the market for the containerisation of grain by enabling CBH to favour its containerisation facility, the Metro Grain Centre

- enable CBH to favour its grain trading subsidiaries, Grain Pool and AgraCorp, through transferring sensitive commercial information that will enable the subsidiaries to obtain a competitive advantage over other marketers.
- 5.7. Complete copies of all public submissions are available from the ACCC's website (www.accc.gov.au) and by following the links to 'Public Registers' and then 'Authorisations and Notifications Registers.'

6. ACCC Assessment

- 6.1. In examining the benefits and detriments flowing from the notified conduct, the ACCC has considered all of the relevant information provided by CBH and interested parties.

The relevant markets

- 6.2. To assist with the assessment of the purpose, effect or likely effect of the notified conduct on competition, it is helpful to consider the relevant markets affected by the notified conduct.

The notifying party's submission

- 6.3. CBH submits that the relevant markets affected by the Grain Express proposal are the:
- markets for the supply of country grain receipt, storage and handling services in Western Australia, or alternatively, in each of the four port zones in Western Australia
 - markets for the supply of bulk grain road haulage services in Western Australia, or alternatively, in each of the four port zones in Western Australia
 - markets for the supply of bulk grain rail haulage services in Western Australia, or alternatively, in each of the four port zones in Western Australia and
 - grain trading markets, which may include:
 - (a) a market in Western Australia for the acquisition and supply of wheat, and
 - (b) the market in Western Australia for the acquisition and supply of coarse grains.

The ACCC's conclusion

- 6.4. For the purposes of this Decision, the ACCC will consider the relevant markets from a whole of Western Australia perspective, as opposed to analysing each individual port zone.
- 6.5. As well as considering the markets for road and rail grain haulage services, the ACCC also considers that inter-modal competition between road and rail is a significant factor influencing the overall market for grain transport in Western Australia.

Public Detriments

Effect on Competition

Market for grain receival, storage and handling services in Western Australia

- 6.6. The ACCC understands that CBH controls approximately 95 per cent of grain receival, storage and handling infrastructure in Western Australia.¹⁴ Further, approximately 95 per cent of the Western Australian grain crop is exported through CBH's port facilities.¹⁵ 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.
- 6.7. One component of the grain handling market is the containerisation of grain for export. Approximately 8 per cent of grain in Australia is currently exported in containers with the remainder exported in bulk.¹⁶
- 6.8. While historically lower than in eastern states, growers in Western Australia are increasingly using on-farm storage to store harvested grain due to technological advances and cost reductions in the necessary equipment.¹⁷

Competition issues in relation to the proposed conduct

- 6.9. CBH has a significant presence in the market for the containerisation of grain through the Metro Grain Centre (MGC), located at Forrestfield near Perth. A potential issue of concern for some interested parties is that Grain Express will enable CBH to gain an unfair competitive advantage over competitors in the containerisation of grain. It was suggested to the ACCC that this could be achieved by cross subsidising containerisation at the expense of bulk loading, thereby undercutting competing containerisation businesses. Further, certain interested parties claim that the restricted list of Destination Sites under Grain Express may prevent CBH's competitors from viably obtaining grain from the CBH network for their own operations.
- 6.10. Interested parties also raised the concern that the Grain Express proposal will further entrench CBH's dominant position in the market for grain receival, storage and handling services in Western Australia - potentially preventing other storage and handlers from entering the market.

¹⁴ Official Committee Hansard, Standing Committee on Rural and Regional Affairs and Transport, Perth, 31 March 2008, page 17.

¹⁵ IBIS World Industry Report, *Grain Storage in Australia: I6701*, 18 October 2007, page 19.

¹⁶ Allen Consulting Group, *Competition in the export grain supply chain (Report to AWB Ltd)*, March 2008, page 21.

¹⁷ PGA Western Graingrowers, *Submission to the Senate Rural and Regional Affairs Transport Committee*, April 2008, page 8.

CBH's response to the competition issues raised

- 6.11. In respect of the containerisation of grain, CBH submits that Grain Express will have a 'neutral' impact on the majority of container packers.¹⁸ Further, CBH adds:

...the majority of the container packers are located in the Perth metropolitan area, the grain availability from destination sites (both MGC and up-country domestic Destination sites) would not affect these packers or the owners of grain who want to use them.¹⁹

- 6.12. In respect of the selection of Destination Sites, CBH submits that they were chosen in a non-discriminatory fashion based on extensive surveys with CBH customers and historical data on outturn volumes.²⁰ In this regard, CBH submits that the grain 'drawn down' from the CBH network traditionally comes from the outturn sites that have been selected as Destination Sites under Grain Express.²¹

- 6.13. CBH also submits that it is committed to review the location of the Destination Sites based on market demand and input from customers.²² In this regard, CBH states:

CBH does not consider that Grain Express should negatively impact on any potential storage and handling competitor given the effort that CBH has taken to select Destination Sites in addition to its willingness to consider amendments where circumstances justify it.²³

- 6.14. CBH submits that Grain Express will not prevent new entrants from building competitive storage or port loading facilities.²⁴ CBH further notes that Grain Express will not prevent marketers from outturning grain from CBH's custody and making their own transport and port loading arrangements.²⁵

¹⁸ CBH letter to the ACCC, *Annexure B – Response to ACCC request for further information*, 11 August 2008, page 3.

¹⁹ Ibid.

²⁰ CBH letter to the ACCC, *Annexure B – Response to ACCC request for further information*, 11 August 2008, page 2.

²¹ Ibid.

²² Ibid.

²³ Ibid.

²⁴ CBH Notification N93439, supporting submission, page 76.

²⁵ Ibid.

ACCC's conclusion

- 6.15. The ACCC considers that the use of on-farm storage by farmers in Western Australia will provide a competitive constraint on the potential for CBH to exercise market power through the proposed arrangements. The demand for the traceability in respect of niche grain, lower implementation costs and a desire to bypass CBH facilities has seen the use of on-farm storage grow as an alternative storage option for Western Australian farmers. This is supported by PGA Western Graingrowers submission to the Senate Inquiry into Wheat Marketing Legislation:

there is an increase in both on-farm storage (both permanent silos and temporary 'sausages') and storage owned by other commercial operators. Whilst the total volumes are small, particularly compared to CBH, it is a certainty that any failures by CBH will result in more storage being constructed.²⁶

- 6.16. The ACCC notes that there are higher levels of competition in respect of the market for grain receipt, storage and handling in the eastern states compared to Western Australia. In particular, New South Wales and Victoria have seen competitors to the previously dominant bulk handling companies emerge, such as AWB Grainflow.
- 6.17. In assessing the reasons for the lack of competition in grain storage in Western Australia, the Western Australian Economic Regulation Authority's (ERA) 2008 draft report on the *Grain Marketing Act 2002* (WA) concluded that the lack of investment in grain infrastructure, other than CBH, was partially attributable to the regulated nature of the grains industry in Western Australia.²⁷ The ACCC considers that with the recent deregulation of wheat marketing and the pending deregulation of coarse grain marketing, there is greater potential for competitors to CBH to enter the Western Australian market for grain receipt, storage and handling.
- 6.18. In respect of containerisation of grain, the ACCC is advised that the majority of container packers are located close to and currently use the MGC Destination Site. As such, the ACCC considers the proposed arrangements are unlikely to have an adverse impact on their business.²⁸

²⁶ PGA Western Graingrowers, *Submission to the Senate Rural and Regional Affairs Transport Committee*, April 2008, page 8.

²⁷ Economic Regulation Authority (WA), *Draft Report: Review of the Grain Marketing Act 2002*, 7 April 2008, page 63.

²⁸ CBH letter to the ACCC, *Annexure B – Response to ACCC request for further information*, 11 August 2008, page 2.

6.19. Further, the ACCC notes CBH's assurance that:²⁹

- it will review the location of Destination Sites in the future based on domestic market demand, harvest conditions and input from its customers, with the potential to change the location of Destination Sites.
- it selected the Destination Sites following an extensive review of the services provided by CBH to the domestic market. This review assessed the size of the Western Australian grain market, grain types, where the grain was grown and where the grain is outturned from the CBH network. It also took into account transporters' issues about turn around times and travel times from Perth to get a daily outturn requirement.
- it is willing to consider any reasonable request from customers in the short term to outturn efficiently sized parcels of grain at non-Destination Sites.

6.20. For the reasons set out above, the ACCC considers it unlikely that the proposed arrangements will result in a substantial lessening of competition in the market for grain receipt, storage and handling in Western Australia.

Market for grain transport in Western Australia

Road transport

6.21. According to a recent industry paper, approximately 42 per cent of grain in Western Australia is transported by road.³⁰ The ACCC understands that the percentage of road's share differs between grain growing regions of Western Australia. In general, the closer the growing region is to the destination, in most cases the port, the more likely it will be transported by road. The market for hauling grain by road appears to be competitive as evidenced by CBH submitting that five separate entities will be contracted under the proposed arrangements.³¹

6.22. The ACCC also understands that road transport is also used for export grain when rail is not available and when rail is unable to meet short term demands, such as in bumper export seasons and peak shipping demand periods.³²

Rail transport

6.23. The ACCC understands that rail transports 58 per cent of the total grain task in Western Australia and 65 per cent of the export grain task respectively.³³ As with road, the percentage of grain that rail transports differs between grain growing regions.

²⁹ Ibid, pages 2 and 4.

³⁰ Single Vision Grains Australia, *Transport Infrastructure Issues Paper Two*, January 2007, page 8.

³¹ CBH letter to the ACCC, *Annexure B – Response to ACCC request for further information*, 11 August 2008, page 18.

³² Grain Infrastructure Group, *Western Australia's Grain Freight Network Review*, March 2008, page 11.

³³ Single Vision Grains Australia, *Transport Infrastructure Issues Paper Two*, January 2007, page 8.

- 6.24. In Western Australia, the above-rail components (rolling stock) of the rail network are owned by the Australian Railroad Group. The below-rail components (standard and narrow gauge track) are controlled by Westnet Rail through a 49 year lease. Access rights to the below-rail assets are provided for via an access regime certified under Part IIIA of the Act.
- 6.25. A recent 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 rail network requires lighter axle loads, has poorer gradients and is less direct to port.³⁴

Inter – modal competition

- 6.26. Industry literature tends to frame discussion about the market for grain transport as that of competition between the two modes of transport, road and rail.³⁵ 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.³⁶
- 6.27. Competition between road and rail transport may be limited in certain circumstances, for instance, the availability of infrastructure and grain parcel sizes. In addition, the ACCC understands that rail's competitiveness with road is substantially influenced by the size of the grain crop. In poor seasons, the cost effectiveness of running rail services suffers.³⁷ The cost of operating rail services has a high fixed component due to significant infrastructure and maintenance costs, and the need to employ specialist labour. It is estimated that for the drought affected 2006/07 crop, only 25 per cent of grain train capacity was required.³⁸

Competition issues in relation to the proposed conduct

- 6.28. Under Grain Express, CBH will become the most significant purchaser of road and rail freight for the transportation of grain in Western Australia. In relation to road freight, a concern was raised with the ACCC that long term contracts for road freight would result in foreclosure of the market for those tenderers that were not successful. This could potentially result in a lessening of competition for the transportation of grain by road freight.
- 6.29. A number of interested parties also expressed concern that the proposed arrangements are intended to support rail for the transportation of grain at the expense of road. In particular, Grain Express will enable CBH to use network pricing to subsidise uncompetitive narrow gauge rail lines with the more efficient and profitable standard gauge rail lines.

³⁴ Grain Infrastructure Group, *Western Australia's Grain Freight Network Review*, March 2008, page 9.

³⁵ Single Vision Grains Australia, *Transport Infrastructure Issues Paper One*, January 2007.

³⁶ CBH Notification N93439, supporting submission, page 63.

³⁷ Single Vision Grains Australia, *Transport Infrastructure Issues Paper Two*, January 2007, page 14.

³⁸ Ibid.

- 6.30. In this regard, the Institute of Public Affairs submits that an objective of Grain Express is to:

...force grain to stay on rail despite its lack of price competitiveness and the unprofitability of the rail system. The result of this is growers...are required to prop up a rail system in need of significant investment and which is uncompetitive with road without subsidy.³⁹

- 6.31. Further, DAFF submits that, should the proposed arrangements result in more grain being transported by rail than would otherwise be the case, it could be against the intent of section 86A of the Wheat Act. In particular, DAFF submits this section was included in the Wheat Act 'for the purpose of avoiding particular modes of transport being imposed on members of the wheat export industry (ie forced use of road over rail).'⁴⁰

CBH's response to the competition issues raised

- 6.32. CBH submits that its interests are best served by promoting competition and efficiency in transport markets, In particular, it submits that:

CBH has no incentive to "shut out" road transporters because doing so would reduce CBH's options in future years.⁴¹

- 6.33. CBH adds that the tender system under the proposed arrangements will allow a regular opportunity for competition to occur for road contracts. Further, CBH highlights that the proposed arrangements will not cover transport from domestic outturns at Destination Sites to the end point and movements from the farm gate to CBH's Receival Points.⁴²

- 6.34. CBH, in response to the issue of the use of rail transport over road, asserts that its interests are best served by adopting the most efficient and sustainable solution for the transport task. CBH stresses that it:

...has no interest in rail business, beyond the capacity of the rail network to deliver efficient haulage services.⁴³

- 6.35. CBH notes that it is concerned about the leakage of the grain transport task from rail to road as it does not consider it possible or economic to perform the grain task without the rail network. CBH further adds that:

Leakage from rail to road would result in substantial environmental and social effects that are not taken into account in comparing the competitiveness of road and rail.⁴⁴

³⁹ Submission from the Institute of Public Affairs, 16 July 2008, page 19.

⁴⁰ Submission from Department of Agriculture, Fisheries and Forestry, 15 July 2008, page 2.

⁴¹ CBH letter to the ACCC, *Annexure A – CBH Response to issues raised by interested parties*, 11 August 2008, page 1.

⁴² Ibid.

⁴³ Ibid, page 10.

⁴⁴ Ibid.

6.36. Whilst noting that the proposed arrangements may adopt a network pricing model that supports narrow gauge lines, CBH is of the view that this is desirable from an economic, social and environmental perspective.⁴⁵ In addition, CBH submits that the majority of grain movements in Western Australia are on the narrow gauge network which connects a substantial proportion of the Western Australian wheat belt.⁴⁶

6.37. In this regard, CBH submits that by not using network pricing, the costs for 70 per cent of growers would increase, resulting in:

large areas of the Western Australian wheat belt becoming unviable and a reduction in export tonnages of grain.⁴⁷

6.38. Finally, CBH is of the view that Grain Express is not inconsistent with the intent of section 86A of the Wheat Act. In this regard, CBH submits that it might be possible to infer from Hansard that an objective of this section of the Wheat Act concerns the actions of government in promoting transport monopolies. In this regard, CBH notes that on 23 June 2008, the Minister for Agriculture stated that:

There was also a particular issue regarding transport and trying to make sure that state governments did not try and impose transport monopolies on the way grain is transported around the country.⁴⁸

6.39. In response, CBH submits:

Grain Express neither requires the legislative intervention of the State Government, nor does it create a transport monopoly. CBH will be free to contract with a range of transport providers and it is in its interests to preserve competition.⁴⁹

ACCC's conclusion

6.40. The ACCC considers that as a grower owned cooperative, CBH has an incentive to seek the lowest transport costs regardless of the mode of transport. Further, the nature of the proposed arrangements, where almost all grain is transported through contracts with CBH, will create a scenario where transport providers are primarily competing for known volumes. This may stimulate competitive tension for the contracts as transport operators will be provided with a greater degree of certainty in respect of transport volumes.

⁴⁵ Ibid, page 3.

⁴⁶ Ibid, page 2.

⁴⁷ Ibid, page 3.

⁴⁸ Ibid, page 13.

⁴⁹ Ibid, page 14.

- 6.41. The ACCC also notes that CBH proposes to sign four to five year contracts with road transport providers for the transportation of grain.⁵⁰ The ACCC does not consider that the length of these contracts forecloses entry into the road grain transport market and, as mentioned above, may stimulate competition. Further, the ACCC notes that CBH estimates that one million tonnes per year will be transported outside of the arrangements from Destination Sites to the user's end point.⁵¹ Finally, the proposed arrangements will not cover the transportation of grain from the farm gate to a CBH Receival Site, or from the farm to the user's end point.
- 6.42. The ACCC notes there are high sunk costs involved before parties can enter the market to provide above rail services. The ACCC considers the coordination of the grain freight task through Grain Express is more likely to facilitate competitive entry in above rail services, by aggregating a potentially sufficient volume of rail freight to underwrite the investment required for a new party to enter.
- 6.43. Whilst the proposed arrangements contemplate a network pricing model for grain transport by rail, the ACCC notes this is similar to the current pricing model in place in Western Australia.⁵² The ACCC considers that the ability of growers and to a lesser extent, procurers of grain, to arrange transport outside of Grain Express, will provide sufficient competitive tension for CBH to maintain low prices. For example, under the proposed arrangements a marketer of grain is free to arrange the transport of their grain direct from the farm to their end point should they feel that CBH's transport prices are too high.
- 6.44. The ACCC is satisfied that the proposed arrangements do not constitute the implementation of a prescriptive mode of transport upon wheat marketers.
- 6.45. For the reasons set out above, the ACCC is not satisfied that the proposed arrangements will result in a substantial lessening of competition in the market for grain transport in Western Australia.

Market for grain trading in Western Australia

- 6.46. As previously mentioned, prior to 1 July 2008, the export of bulk wheat was controlled by AWB Ltd through its subsidiary AWBI. The enactment of the Wheat Act on 1 July 2008, ended AWB's monopoly and introduces an accreditation system for parties wanting to export bulk wheat. The accreditation system will be managed by Wheat Exports Australia (WEA), under a set of rules set down in the legislation.
- 6.47. CBH's grain trading subsidiary, Grain Pool, applied for accreditation with WEA on 4 July 2008.⁵³ CBH submits that it anticipates that over 40 parties will gain accreditation to export wheat in bulk.⁵⁴

⁵⁰ CBH letter to the ACCC, *Annexure B – Response to ACCC request for further information*, 11 August 2008, page 18.

⁵¹ CBH letter to the ACCC, *Annexure A – CBH Response to issues raised by interested parties*, 11 August 2008, page 1.

⁵² Single Vision Grains Australia, *Transport Infrastructure Issues Paper Two*, January 2007, page 29.

⁵³ Grain Pool Pty Ltd website, <http://www.grainpool.com.au/gpplindex.html>.

- 6.48. The market for the trading of coarse grains in Western Australia is dominated by Grain Pool. This is a result of the advantageous rights that Grain Pool is afforded for the bulk export of coarse grains from Western Australia under the *Grain Marketing Act 2002* (WA).

Competition issues in relation to the proposed conduct

- 6.49. As CBH has a significant presence in grain trading through its subsidiaries Grain Pool and AgraCorp, some interested parties submit there is a potential for an information advantage to exist within the CBH Group to the anti-competitive detriment of other grain traders. CBH recognised this potential for an information advantage to exist under the Grain Express proposal and developed a Ring Fencing Policy which it submits, alleviates any potential concerns.
- 6.50. However, a large number of interested parties expressed concern that the initial Ring Fencing Policy proposed by CBH did not provide enough safeguards to ensure that CBH would not share confidential information with its trading subsidiaries. Further, concern was expressed by interested parties that CBH would provide preferential terms and conditions to its trading subsidiaries to the detriment of other traders.
- 6.51. Concerns were also raised that the proposed arrangements would limit the ability of growers and exporters to exploit niche marketing opportunities for specific segregations of grain. In particular, it was suggested that this will occur as a result of grain being commingled in CBH storage facilities, preventing acquirers of grain from physically taking possession of the exact grain they purchased. It was also suggested in submissions to the ACCC that this would prevent the capture of grain characteristics such as geographical location and ‘bakeability’ that sell for a premium.

CBH’s response to the competition issues raised

- 6.52. In a meeting with CBH on 12 August 2008, the ACCC raised certain areas of concern in respect of its proposed Ring Fencing Policy. CBH subsequently provided revised versions of its Ring Fencing Policy to the ACCC on 18 and 22 August 2008. A copy of CBH’s revised Ring Fencing Policy is available from the ACCC’s website (www.accc.gov.au), by following the links to ‘Public Registers’ and then ‘Authorisations and Notifications Registers.’

- 6.53. Among other things, CBH amended its Ring Fencing Policy to now include:
- the appointment of a panel of independent arbiters to determine disputes in relation to compliance with the Ring Fencing Policy and
 - an annual independent audit of CBH's compliance with the Ring Fencing Policy, including an initial audit to be conducted within three months of the implementation of the policy.
- 6.54. In respect of niche grain marketing, CBH submits that there will not be any reduction in the number of grades or segregations provided to the market under Grain Express.⁵⁵ CBH further adds that under the *Bulk Handling Act 1967* (WA), holders of grain warrants have never been entitled to receive the exact grain that they purchased.⁵⁶ Rather they will continue to be entitled to receive the equivalent quality and quantity of grain.
- 6.55. CBH further submits that grain marketers are currently able to make specific storage requests for niche grain segregations with CBH, and will continue to be able to do so under Grain Express. In particular, CBH submits that:

Grain Express will not reduce the ability of marketers to derive value from marketing specific requirements. However, to the extent that marketers wish to segregate grain for such purposes, they are, and will be charged the cost of doing so. Other users of the system should not be required to fund the niche storage requirements of others.⁵⁷

ACCC's conclusion

- 6.56. The ACCC considers that CBH's amended Ring Fencing Policy provides an adequate framework to limit the potential for information obtained by CBH to be transferred to and used anti-competitively by CBH's trading subsidiaries. In particular, the ACCC notes that CBH has now introduced an independent dispute resolution process. The introduction of an annual independent compliance audit is another important feature of an effective ring fencing regime.
- 6.57. The ACCC also believes that the proposed arrangements should not prevent growers and marketers from taking advantage of niche opportunities for selling grain. The ACCC notes that the proposed grain commingling arrangements do not differ markedly from what has been in place and are consistent with CBH's regulatory requirements under the *Bulk Handling Act 1967* (WA). Further, CBH has committed to accommodating niche grain entitlements upon request, although at a higher price that reflects the extra cost of providing that service.

⁵⁵ CBH letter to the ACCC, *Annexure A – CBH Response to issues raised by interested parties*, 11 August 2008, page 5.

⁵⁶ Ibid, page 8.

⁵⁷ Ibid, page 5.

- 6.58. The ACCC notes that the proposed arrangements do not preclude growers or acquirers of grain from utilising individual storage and transport arrangements to capture niche quantities and qualities of grain should they not wish to place it in CBH storage.
- 6.59. For the reasons set out above, the ACCC is not satisfied that the proposed arrangements will result in a substantial lessening of competition in the market for grain trading in Western Australia.

ACCC's conclusion on whether the conduct has the purpose or effect of substantially lessening competition

- 6.60. On the basis of the information before it, the ACCC is not satisfied that the notified conduct has the purpose, effect or likely effect of substantially lessening competition within the meaning of section 47 of the Act for the following reasons:
- the proposed arrangements do not foreclose potential competitors to CBH from entering the market for grain receipt, storage and handling
 - growers and traders of grain are free to make their own arrangements in respect of the transportation of grain from the farm gate to end user point, or from a Destination Site to end user point
 - the proposed arrangements may stimulate competition in the market for the relevant CBH transport contracts by providing greater certainty in respect of transport volumes
 - acquirers and marketers of grain will continue to be able to take advantage of niche marketing opportunities and
 - CBH's amended Ring Fencing Policy provides an adequate framework to limit the potential for information obtained by CBH to be transferred to and used anti-competitively by CBH's trading subsidiaries.

Public benefits

- 6.61. CBH submits that with the likely increase in the number of export wheat marketers following the deregulation of bulk wheat exports, central and efficient coordination of the grain supply chain is urgently required.⁵⁸
- 6.62. CBH considers the primary benefit to the public generated by the Grain Express proposal is the increased efficiency of the Western Australia grain supply chain network, which in turn, will have a direct and beneficial impact on Australia's grain exports.⁵⁹

⁵⁸ CBH Notification N93439, supporting submission, page 5.
⁵⁹ Ibid.

6.63. In particular, CBH submits that Grain Express will result in the following public benefits:⁶⁰

- (a) more efficient grain delivery and handling at grain Receival Points, including:
 - increased speed of receipt, leading to deferred capital expenditure and more efficient investment
 - better information on marketing options and a longer period for growers to make marketing decisions
 - reduced errors in nomination of marketing options by growers and
 - increased automation of the receipt process,
- (b) better coordination of storage and handling, including:
 - reduced opening of bulkhead storages
 - better use of its labour force (less mobilisations, reduced overtime and better rostering)
 - reduced loss by division and
 - reduced risk of phosphine resistance,
- (c) improved efficiency of the transport task, including:
 - enhanced rail efficiency as a result of increased use of unit trains
 - below rail cost savings through better utilisation, such as possible deferred capital expenditure
 - certainty of volume on rail
 - insurance risk sharing
 - simplified operational interface between the carrier and CBH
 - better negotiation capacity of CBH
 - greater transparency of transport costs to growers and
 - a real likelihood of preserving the viability of the rail network,
- (d) enhanced port efficiency, including:
 - better utilisation of infrastructure and
 - reduced demurrage,
- (e) dynamic efficiency gains, which improve the prospect of efficient investment in infrastructure in the future, and
- (f) better marketing decisions for growers and marketers.

⁶⁰

Ibid, pages 79 – 80.

- 6.64. Further, CBH submits that Grain Express will better align the incentives of the suppliers of supply chain services with growers. In this regard, CBH claims that as a grower-owned cooperative, it has a clear incentive to reduce supply chain costs.⁶¹
- 6.65. CBH is of the view that without Grain Express, it is unlikely that the above mentioned benefits could be achieved. This is because:
- the efficiencies rely on the coordination function being assumed by a single entity
 - the best entity to perform that function is the one in physical possession of the grain, which has a complete set of information over the entire supply chain and
 - without the bundling element of Grain Express, marketers are likely to continue to acquire freight themselves. With multiple marketers the freight task is fragmented and the coordination task is unachievable.

Submissions from interested parties

- 6.66. Both the Western Australian Minister for Planning and Infrastructure and Minister for Agriculture and Food expressed support the Grain Express proposal. In particular, the Minister for Planning and Infrastructure, the Hon Alannah MacTiernan, submitted that:

It is a concern to the State Government that, in the face of emerging trends associated with the deregulation of grain marketing, there could be a significant leakage of tonnes from the rail network which is currently the most efficient such network in the nation.⁶²

- 6.67. Similarly, the Minister for Agriculture and Food, the Hon Kim Chance, stated that Grain Express:

...allows competition in the marketing of grain while at the same time imposing a protocol to maintain an efficient supply chain.⁶³

- 6.68. In addition, the ACCC notes that the Western Australian Department for Planning and Infrastructure and the Department of Agriculture and Food jointly commissioned an independent consultant to assess the Grain Express proposal. Subject to the ability of CBH to continue to negotiate the detail of the Grain Express proposal with its customers, the consultant report endorses Grain Express as the 'most appropriate basis for future export grain supply chain co-ordination in Western Australia'.⁶⁴

⁶¹ Ibid, page 80.

⁶² Submission from the Hon Alannah MacTiernan, Minister for Planning and Infrastructure, 20 June 2008, page 1.

⁶³ Submission from the Hon Kim Chance, Minister for Agriculture and Food, 11 June 2008, page 1.

⁶⁴ Strategic Design and Development, *Review of Grain Supply Chain Co-ordination Models*, May 2008, page 9.

- 6.69. The Australian Government Department of Agriculture, Fisheries and Forestry (DAFF) considers there is potential for improved efficiency of grain transport under Grain Express and other benefits for growers. For instance, DAFF submits:

Of particular benefit is the 21 day period provided to growers to choose a marketing option from all those on offer throughout the CBH network. This is a considerable improvement.⁶⁵

- 6.70. Having said this, DAFF also notes that the successful deregulation of bulk wheat exports is dependent on accredited exporters being able to compete on a level playing field under Grain Express.

- 6.71. The Western Australian Farmers Federation (WA Farmers) agrees that with the deregulation of bulk wheat exports:

...the need for improved efficiencies in the grain supply chain is imperative and Grain Express has the potential to deliver a transparent highly competitive environment for all participants in the supply chain.⁶⁶

- 6.72. Similarly, Grain Pool Pty Ltd (Grain Pool) considers Grain Express will create supply chain efficiencies. It claims that the problems in the current grain supply chain arise from the absence of a 'nominated party to clearly control the complex grain logistics chain in Western Australia.'⁶⁷ It believes that without Grain Express, if multiple bulk wheat exporters each make their own transport arrangements and attempt to move their grain to port during the upcoming harvest, it is difficult to see how the supply chain could operate efficiently.

- 6.73. In particular, Grain Pool believes that Grain Express will result in the following efficiencies:⁶⁸

- more flexible and effective receival conditions, which will increase delivery speed, reduce clerical errors and provide growers with a better environment to decide upon grain marketing options
- better transport coordination, including increased use of unit trains and
- transparent queuing and shipping arrangements.

- 6.74. Conversely, AWB Ltd (AWB) submits that the 'introduction of a system-wide bundling arrangement to protect the West Australian rail network is not warranted.'⁶⁹ AWB submits that as long as rail is efficient and competitive, the aggregation of demand does have benefits from a transport costs perspective. However, these benefits are only relevant to the port zones where rail is the major transport mode, such as Albany and Kwinana. There does not appear to be the same need to protect rail use in the Esperance and Geraldton zones.

⁶⁵ Submission from the Australian Government Department of Agriculture, Fisheries and Forestry, 15 July 2008, page 1.

⁶⁶ Submission from the Western Australian Farmers Federation, 3 June 2008, page 1.

⁶⁷ Submission from Grain Pool Pty Ltd, 10 July 2008, page 1.

⁶⁸ Ibid.

⁶⁹ AWB Ltd submission, 23 July 2008, page 6.

- 6.75. Further, AWB submits that Grain Express will not improve current inefficiencies in the grain supply chain. In particular, Grain Express will not overcome restrictive rail siding capacity and insufficient out loading speed at country receival sites. For example, of the 200 CBH sites, only 28 have a rated out loading capacity greater than 400 tonnes per hour. The average out loading rate of the majority of CBH sites is around 300 tonnes per hour. Further, 25 of CBH's receival sites cannot take more than 25 rail wagons at a time.⁷⁰
- 6.76. As previously mentioned, CBH submits that it is concerned about the potential leakage from rail to road because it does not consider it is possible, or economic, to perform the grain freight task without the rail network. It submits that the consequences of abandoning parts of the rail network include: the remaining sections of the rail network becoming unprofitable to maintain; the road network requiring additional funding from government, a negative road safety impact for rural communities and increased greenhouse gas emissions from trucks.⁷¹
- 6.77. To further support its view, CBH refers to the Grain Infrastructure Group's (comprising the Western Australian Department for Planning and Infrastructure, Australian Railroad Group, AWB and CBH) study of grain infrastructure. The report stated:
- ...a cohesive rail network will become increasingly essential to handle peak harvests and maintain export competitiveness.⁷²
- 6.78. Regarding the grain transport task across port zones, CBH submits that there is a significant rail task in the Geraldton zone. Only 3 of the 22 up-country receival sites are connected via rail. However, in the last few years the Geraldton zone has been significantly affected by drought. CBH anticipates that a return to average crop sizes would mean a significant rail task on the narrow gauge lines.⁷³
- 6.79. In addition, CBH submits there is a significant standard gauge rail task in the Esperance zone. It notes that there is 350 000 tonnes of capacity at Salmon Gums and Grass Patch.⁷⁴

⁷⁰ Ibid, pages 6 – 7.

⁷¹ CBH letter to the ACCC, *Annexure A – CBH Response to issues raised by interested parties*, 11 August 2008, page 10.

⁷² Grain Infrastructure Group, *Western Australian Grain Infrastructure Study*, March 2008, section F.1 of appendix 2, page 8.

⁷³ CBH letter to the ACCC, *Annexure A – CBH Response to issues raised by interested parties*, 11 August 2008, page 18.

⁷⁴ Ibid.

- 6.80. Regarding AWB's submission that Grain Express will not improve the current inefficiencies in the supply chain, CBH notes that Grain Express primarily addresses the need for central coordination of the grain logistics function. However, CBH believes that a more effectively coordinated supply chain under Grain Express will ensure the investment certainty that is required for CBH to continue investing in upgrading the loading capacities at its up-country loading facilities.⁷⁵ CBH also believes that Grain Express provides investment certainty for transport service providers and government to continue to upgrade the Western Australian grain supply network.⁷⁶
- 6.81. CBH notes that since 1999 it has invested over \$500 million into the grain storage network.⁷⁷ CBH also notes that the previous rail agreement (the Western Australian Export Grain Handling Agreement), between the Australian Railroad Group, CBH, AWB, the Pastoralists and Graziers Association and the Western Australian Farmers Federation, included an investment mechanism to upgrade the rail loading capacity at selected facilities to 1000 tonnes per hour. CBH submits that throughout the wheat belt, 22 sites were upgraded with additional capital provided by CBH to link the rapid rail loading facilities to the storage sites.⁷⁸ CBH submits that it will continue to invest in upgrading its infrastructure at certain Receiving Sites under Grain Express.

ACCC's conclusion

- 6.82. The ACCC considers the Grain Express proposal is likely to generate efficiencies in the operation of the Western Australian grain supply network as claimed by CBH. In particular, the ACCC considers that Grain Express has the potential to deliver significant efficiency benefits through coordination of grain storage, handling and transportation in Western Australia. Coordination of the grain freight task, coupled with logistic planning, can ensure that grain is transported throughout Western Australia in a more efficient manner, delivering significant savings.
- 6.83. In the absence of Grain Express, the ACCC is of the view that deregulation may result in a larger number of traders organising their own transportation in isolation. Without coordination, resultant smaller parcels of grain are more likely to be transported by road at a higher overall cost.

⁷⁵ Ibid, page 19.

⁷⁶ Ibid.

⁷⁷ Ibid, page 20.

⁷⁸ Ibid.

- 6.84. The ACCC notes that the Western Australian Department for Planning and Infrastructure strongly supports Grain Express as a means of ‘promoting the efficient and complimentary use of the land transport modes without hindering intra-modal competition.’⁷⁹ Further, it submits that:

Our analyses show that in order to attract future investment in critical infrastructure there needs to be some certainty that the infrastructure will be used and that tonnes do not flow from the rail network to the road network.⁸⁰

- 6.85. The ACCC is also of the view that more efficient coordination of grain movement under Grain Express is likely to provide greater certainty for investment to upgrade facilities along the grain supply network, including rail and Destination Sites.
- 6.86. The ACCC considers the ability of growers and marketers to bypass CBH’s storage and handling facilities, in the event they are dissatisfied with freight rates, places competitive pressure on CBH, and should ensure that potential efficiencies and savings under Grain Express are achieved and flow through to growers and marketers.
- 6.87. Further, to the extent that Grain Express results in a reduced number of trucks on country roads, thereby reducing the potential for accidents, the ACCC considers this to be a benefit to the public.

⁷⁹ Submission from the Western Australian Department for Planning and Infrastructure, 30 May 2008, page 2.

⁸⁰ Ibid.

7. Conclusion

- 7.1 As previously outlined, the ACCC will revoke an exclusive dealing notification (for conduct other than third line forcing) when it is satisfied that the conduct has the purpose or effect of substantially lessening competition and the public benefits would not outweigh the anti-competitive detriments resulting from the substantial lessening of competition.
- 7.2 On the basis of information currently before it, the ACCC considers there are likely to be significant efficiency benefits as a result of the central coordination of grain storage and handling and transportation in Western Australia under the proposed Grain Express system.
- 7.3 For the reasons outlined in Chapter 6 of this Decision, the ACCC is not satisfied that the notified conduct has the purpose, effect or likely effect of substantially lessening competition within the meaning of section 47 of the Act.
- 7.4 Accordingly, the ACCC does not intend to revoke exclusive dealing notification N93439 at this time. Legal immunity conferred by this notification commenced on the day it was validly lodged with the ACCC by CBH on 11 June 2008.
- 7.5 As with any notification, the ACCC may act to remove the immunity afforded by this notification at a later stage if it is satisfied that it has the purpose or effect of substantially lessening competition and the benefit to the public from the conduct does not outweigh the anti-competitive detriment to the public from the substantial lessening of competition.

ATTACHMENT A

Location of Destination Sites under Grain Express:

Albany Zone

Albany Terminal
Borden
Cranbrook
Wagin

Esperance Zone

Esperance Terminal

Kwinana Zone

Avon
Brookton
Calingiri
Kwinana Terminal
Merredin
Metro Grain Centre
Narrakine

Geraldton Zone

Carnamah
Geraldton Terminal
Mingenew