

Exclusive Dealing Notification N93439.

Wally Newman, I farm at Newdegate 400Km SE of Perth for 50 years, I have served in local government for 22yrs, served on the board of CBH for 10yrs and have a keen interest in the welfare of my own and other communities.

I make this submission in my personal capacity as a grain producer and Shire councillor in Western Australia, not in my capacity as a director of Co-operative Bulk Handling Limited (CBH). The views set out in this submission are my own and do not constitute the official position of CBH.

I believe there are three very good reasons along with many others why CBH should be able to retain the Exclusive Dealing Notification N93439 which sustains the current form of Grains Express utilised by CBH as the most efficient logistics system devised in Australia.

The first reason is that CBH is a co operative and as such complies with many mandates that compels it to act in the best interests of communities as a servant of the many communities it serves.

The second reason is that our American counterparts being similar co operatives with less restrictions than CBH have exemption from the equivalent ACCC requirements through the Capper Volstead act. This puts CBH at a disadvantage by comparison when CBH has to compete against the same huge vertically integrated companies in the USA here in Australia. The American Government through the Capper Volstead Act encourages co operatives to protect its rural communities and farmers from exploitation by these very same companies that we in Australia are expected to compete with in an equitable manner.

Further exacerbating the situation is that the EU and USA grain growers receive huge farm subsidies from their Governments making a mockery of "Free Trade Agreements" and "Anti Dumping" provisions to ensure that there is no level playing field in international grain markets.

CBH complies with; The Co-operative Principles

A co-operative is an autonomous association of persons united voluntarily to meet their common economic, social, and cultural needs and aspirations through a jointly owned and democratically controlled enterprise. The co-operative principles are guidelines by which co-operatives put their values into practice.

Voluntary and Open Membership

Co-operatives are voluntary organisations, open to all persons able to use their services and willing to accept the responsibilities of membership, without gender, social, racial, political or religious discrimination.

Democratic Member Control

Co-operatives are democratic organisations controlled by their members, who actively participate in setting their policies and making decisions. Men and women serving as elected representatives are accountable to the membership. In primary co-operatives members have equal voting rights (one member one vote) and co-operatives at other levels are also organised in a democratic manner.

Member Economic Participation

Members contribute equitably to, and democratically control, the capital of their co-operative. At least part of that capital is usually the common property of the co-operative. Members usually receive limited compensation, if any, on capital subscribed as a condition of membership. Members allocate surpluses for any or all of the following purposes: developing their co-operative, possibly by setting up reserves, part of which at least would be indivisible; benefiting members in proportion to their transactions with the co-operative; and supporting other activities approved by the membership.

Autonomy and Independence

Co-operatives are autonomous, self-help organisations controlled by their members. If they enter into agreements with other organisations, including governments or raise capital from external sources, they do so on terms that ensure democratic control by their members and maintain their co-operative autonomy.

Education, Training and Information

Co-operatives provide education and training for their members, elected representatives, managers and employees so they can contribute effectively to the development of the co-operative. They inform the general public, particularly young people and opinion leaders about the nature and benefits of co-operation.

Co-operation Among Co-operatives

Co-operatives serve their members most effectively and strengthen the co-operative movement by working together through local, national, regional and international structures.

Concern for Community

Co-operatives work for the sustainable development of their communities through policies approved by their members.

*** Information provided by - International Co-operative Alliance - Information

CBH still complies with the;
Western Australia

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In 1971 CBH converted to a non trading co operative,

CBH is exempt from taxation under sections 50-1 and 50-40 of the Income Tax Assessment Act.

In short the act states; CBH will be entitled to exemption from income tax only if it is a society or association established for the purpose of promoting the development of Australian agricultural resources and is not carried on for profit or gain of its individual members. It is not a dispute that it is a "society or association".

On the 17th Dec 2010 The Full Federal Court handed down its decision on the ATO's appeal with respect CBH's tax exempt status in favour.

CBH is like no ordinary corporation where an investor or many investors purchase shares to transact business through a single entity for the profit of its shareholders.

CBH is a not for profit business for the provision of services and benefits to members or anyone who voluntarily uses the system. It is controlled by its members through a democratically elected board of directors, the majority of which must be elected from the membership with one man one vote.

CBH serves many communities throughout W.A. and in recent years the East coast providing services and benefits to the grains industry.

In the same way investors come together to purchase shares in a corporation for scale of operation to reap rewards which the individual investors could not do in there own right, growers through CBH have the ability to come together to gain the scale of operation to minimise costs which they could not do in their own right.

One of the key benefits of growers coming together to achieve this scale of operation is Grains Express. It is without doubt the most efficient grains logistics system anywhere in the world. Output to the ports is optimised, grain movements are minimised, out loading of storages is optimised reducing the need for re fumigation and subsequently less detrimental effects on the environment and the most competitive transport modes with a preference for rail are used. The combination of all the Grains Express components benefits all communities with the least amount of community impacts, minimum carbon footprint and minimum environmental impacts.

On average 95% of the grain handled by CBH is for export, the price of these grain products is set by international grain markets. The only influence CBH can effect prices for its users of the system is to minimise the costs in the supply chain through reducing storage, handling, logistics and marketing costs. The users of the system are the sole financial beneficiaries after these supply chain costs have been deducted from the original export price of the grain.

CBH today has exemption from the ACCC to enable Grains Express to operate for the benefit of growers and our communities. In the 1920s American growers were given legal exemption from the Sherman Anti Trust Act (which are similar laws to that of the ACCC) through the granting of the Capper Volstead Act. Information on the act as follows;

ANDREW VOLSTEAD Before leaving Congress, spearheaded passage of legislation less memorable than the Volstead Act, but of immense significance to his constituency, and to farmers nationally. The Capper-Volstead Act — which is still in effect — enabled farmers to form combines without fear of prosecution under the Sherman Antitrust Act. Volstead explained at the time: "Business men can combine by putting their money into corporations, but it is impractical for farmers to combine their farms into similar corporate forms. The object of this bill is to modify the laws under which business organizations are now formed, so that farmers may take advantage of the form of organization that is used by business concerns."

Source:

Andrew Volstead'))"
nor/volstead.htm"lawzone.com

href="http://www.lawzone.com/half-

<http://www.uwcc.wisc.edu/info/capper.html>

The Capper-Volstead Act: Opportunity Today and Tomorrow

In Commemoration of the 75th Anniversary of the Capper-Volstead Act

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I. Introduction

The year 1997 marks the 75th anniversary of the Capper-Volstead Act², signed into law on February 18, 1922 by President Warren Harding.³ The Capper-Volstead Act has been called the "Magna Carta" of cooperatives in the agriculture industry, and the act has played and continues to play a vital role in enabling agricultural producers⁴ to collectively process, prepare, handle and market their products. Farmers have increasingly used the cooperative model of business organization because they have found it well suited to their economic and social needs, and the significance of the Capper-Volstead Act has grown accordingly. The legal protection from prosecution under the antitrust laws provided by the Act has allowed agricultural cooperatives to grow and prosper -without such protection a wide range of cooperative activities would be hampered or prohibited outright.

II. Cooperatives and Capper-Volstead - Early History

The cooperative itself, as a form of association for farmers, has played a part in American history for almost two hundred years. Far before the National Grange movement of 1871 to 1876, a group of Connecticut Dairy Farmers organized a cooperative association to market their milk and milk products as early as 1804.⁵ However, the first federal legal protection that specifically allowed farmers and agricultural producers to cooperate in joint activities was enacted much later, in Section 6 of the Clayton Act of 1914.⁶ Even so, it was not until 1922 that the true font of protection for collective action by farmers, the Capper-Volstead Act, was enacted by Congress, to provide specific legal protection to farmers from prosecution under the antitrust laws.

The primary purpose of the Capper-Volstead Act was to empower farmers and agricultural producers to market, price and sell their products through cooperative means. The title of the Act is illustrative of its intent: "An Act To Authorize Associations of Producers of Agricultural Products." 7 U.S.C. 291, 292 (1996). (emphasis added). By granting farmers the legal right to pool their bargaining and marketing resources, the Act attempted to place farmers on an equal footing with the large corporate buyers (called "agribusinesses") that purchased their raw agricultural products. In fact, Senator Capper stated that the purpose of the bill "is to give to the farmer the same right to bargain collectively that is already enjoyed by corporations." 62 Cong. Rec. 2057 (1922). The drafters of the Act accomplished this purpose by giving farmers a defined set of legal protections for collective bargaining and marketing of their products.

A collateral purpose behind the Act was to provide farmers who join together with a specific exemption from the antitrust laws. This legal protection is critically important to cooperatives, otherwise the federal and state antitrust laws would forbid most of the joint activities undertaken by farmers through cooperatives to market, price and sell their products. Congress first expressed its intent to create an antitrust exemption for agricultural cooperatives in Section 6 of the Clayton Act, enacted in 1914. This law states that "[N]othing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural or horticultural organizations..."⁷ 15 U.S.C. 17. However, though the Clayton Act recognized that cooperatives possessed a legal right to exist, the Act did not offer specific guidance as to the types of activities in which a cooperative organization might engage. To remedy this deficiency, Congress passed the Capper-Volstead Act of 1922, clarifying the activities covered by the act and extending the protection from the antitrust laws to a broader class (i. e.,

stock) of agricultural cooperatives.

The Capper-Volstead Act was one of the byproducts of the post-World War I era. In the 1920's, demand for agricultural products was down from its peak at the end of the war, and individual farmers found that in the thinning market, the agribusinesses held every advantage when they negotiated with farmers over the terms of sale. Even in modern times, when farmers operate as individuals in negotiating the terms of sale and the price of their goods, they are often in weak bargaining positions. It has been said that "Farmers are price takers, not price makers. They are often in a position of having but one or two buyers for their production; rarely do several buyers compete for what they produce." Ralph B. Bunje, Cooperative Farm Bargaining and Pricing Negotiations, U.S. Department of Agriculture Information Report Number 26, 40 (1980).

It is as true now as it was in the 1920's that a farmer may be at a grave disadvantage

when bargaining with an agribusiness that is much larger and has many more resources at its disposal. The agribusiness may negotiate with farmers in many different areas and in many different countries. Because of this, the agribusiness may have great flexibility in its ability to demand certain prices from a given farmer, and if it does not receive them, the agribusiness may refuse to do business to "punish" the offending farmer. On the other hand, the farmer may have only a few, or even only one, potential buyer for his product. This situation may force the farmer to take whatever price is offered. The ability to join together into cooperatives provides farmers with a way to equalize the bargaining equation.

A cooperative has been defined as "a corporation or association organized for the purpose of rendering economic services, without gain to itself, to shareholders or members who own and control it." *United States Grocers, Ltd. v. United States*, 186 F. Supp. 724, 733 (N.D. Cal. 1960). Cooperatives "render economic service," in part, by improving their members' bargaining positions. It has been said that cooperatives achieve this in four ways. Bunje, at 40-42. First, a cooperative, because it controls more product, cannot be dwarfed by an agribusiness as easily as an individual farmer, and can approach several different potential buyers in different areas because it has greater resources to contact and negotiate with them. This access to a larger number of outlets for members' products allows a cooperative to negotiate a higher price for its members.

Second, a cooperative can resist agribusiness tactics that delay negotiations on price until late in the growing cycle. Late in the season, the farmer may need to sell quickly ripening crops or to place other agricultural products in times of annual off-peak demand. A cooperative may be able to sell products over a greater period of time to reduce the "fire sale" atmosphere of a late-season negotiating session. A cooperative can also negotiate the terms of sale to shift more of the financial risk and burden onto the agribusiness rather than onto the farmer. Agribusinesses, when contracting with individual farmers, may attempt to delay payment until the end of the growing or production cycle, shifting all the risk onto the farmer. A cooperative can negotiate to share the financial risk between the members and the buyers through the use of its greater economic clout.

Third, a cooperative provides better forecasting and data collection for farmers to utilize in their negotiations. Many farmers do not have the time or resources to engage in detailed economic forecasting and data collection, and are forced to rely on the

agribusiness with whom they are contracting, often to their detriment. The increased information and forecasting ability of a cooperative allows members to examine factors such as: national price and demand levels, competition from other producing areas, and possible future fluctuations in price.

The last way that a cooperative improves its members' bargaining power is that it can help provide a guaranteed outlet for a farmer's product. For any agricultural product in a given market, there may be only a very few "outlets" for that product. Without such a guaranteed outlet, a farmer can be forced into disadvantageous terms for the conditions of sale or price simply to gain access to a buyer for his product.

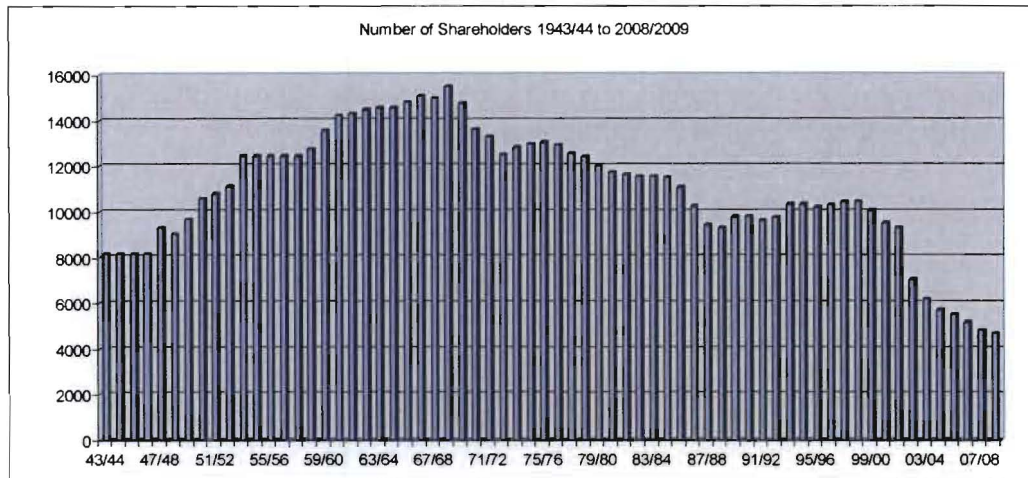
Clearly, the cooperative performs a vital role for farmers in selling their products, to say nothing of the efficiencies a cooperative can create in processing, preparing and handling agricultural products. These benefits are achieved by joint action -- the pooling of farmers' resources to achieve a common goal through cooperation, rather than by winner-take-all competition. However, as a prima facie matter, the

substitution of cooperation for competition in marketing, selling and pricing a product may be illegal under the antitrust laws. The antitrust laws function to prevent certain types of cooperation. It is only due to the Capper-Volstead Act that cooperatives largely have been immune to prosecution under the antitrust laws.

From the above I believe CBH clearly acts in the best interests of Australian communities on all counts. To be able to compete on similar terms with our equivalents in the USA against the very same companies operating here in Australia CBH needs similar exemptions for Grains Express as granted to co operatives in the USA to protect our rural communities from exploitation.

A third and final point should CBH lose Grains Express in its current form where buyers post a price and take possession of grain at port. Many growers in W.A. will be effected by a reduction of buyers prepared to post prices at all facilities in the CBH system. It could be said that buyers are being anti competitive because they will only post prices where they can make the maximum return on investment and that will severely limit the number of CBH facilities where growers have access to the full spread of buyers in W.A. Only growers close to ports or major grain centres are likely to have the full range of buyers posting a price. Growers in out lying areas removed from close proximity are unlikely to have the same choice of buyers as those closer to the major grain centres.

In closing Grains Express keeps profits in small communities which have been struggling financially for many years. From the graph below members of CBH Peaked in 1969 and now in 2010 are down to 4577.



Growers have been forced financially from the grains industry over many years due to poor margins and seasons. Grains Express improves growers margins, makes rural communities more viable and pleasant to live in with less impacts on other communities and the environment as it operates.

As a farmer it concerns me greatly that overseas multi national vertically integrated companies can move into Australia seemingly without question by our government regulators. At the same time Australian companies or individuals making any merger, acquisition, or service provision such as Grains Express have to be subject to approval of our ACCC or other government regulators. When will our regulators take a lead from such countries as Canada who vetoed BHP from taking over potash supplies to protect its own national interests and that of its people.

I only ask that Australian communities be treated similarly equal, fairly and our national interests are protected.

Regards, Wally Newman.

Further comment post the ACCC hearing in Perth on Thursday 20th Jan.

The suggested proposal put forward at the hearing that the winning tender of rail services to CBH being WATCO allow ARG to cherry pick the lucrative services that suit them is principally and financially flawed.

ARG had every opportunity to win the tender outright in a truly competitive tender process. I am sure ARG would have equal concern had they won the tender and others were able to come in afterwards taking out the lucrative services, leaving the not so lucrative or in some cases unprofitable services and leaving them to pick up what was left.

This makes a mockery of the competitive tender process if after the event suddenly all the costs presented during the process are put into total disarray because the task levels have been changed after you won the tender. If this were permitted any tenderer would have to build substantial costs into the tender to allow for such unknown

circumstances.

The current tender that has been recently won by WATCO would have to be re-tendered incorporating the new parameters and growers would almost certainly be paying more for their rail services providing they were still all available.