

# **Australian Competition & Consumer Commission**

*Submission into the Draft Notice of the ACCC to revoke the notified  
tying arrangements of Co-Operative Bulk Handling*

# **Submission**

**W.A. Grains Group (Inc)  
December 2010**

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# CONTENTS

<b>Executive Summary.....</b>	<b>3</b>
<b>1.0 Introduction.....</b>	<b>5</b>
<b>2.0 Terms of Reference for Submission.....</b>	<b>5</b>
<b>3.0 Comment on Draft Notice.....</b>	<b>5</b>
<b>4.0 Summary.....</b>	<b>17</b>
<b>References.....</b>	<b>18</b>

**Australian Competition & Consumer Commission**  
***Submission into the Draft Notice of the ACCC to revoke the notified***  
***tying arrangements of Co-Operative Bulk Handling***

# **Submission**

**W.A. Grains Group (Inc)**  
**December 2010**

## **Executive Summary**

The WA Grains Group wrote to the ACCC on 4th June 2008 to support the implementation of Grain Express.

In July 2010 the WA Grains Group made a formal submission to the ACCC in its Review of Co-operative Bulk Handling – Grain Express.

In that submission the WA Grains Group have made the following points:

- In the absence of competition at port the net benefit or loss to the WA grains industry of Grain Express in a deregulated grain market cannot easily be established as there is nothing to compare the system with.
- Domestic outturn by road charges have increased by 293% over pre Grain Express.
- Domestic outturn by rail charges have increased from \$5.70/tonne to \$11.00/tonne (93% increase) in the first two years of Grains Express.
- In the first two years of Grain Express the charges to export grain rose in the order of \$6.00/tonne (approximately 12%) over pre Grains Express.
- The cost to use the CBH system to store grain for the domestic market has increased over pre Grain Express due to the increase in domestic outturn charges.
- CBH have increased FOB charges in the order of 45%.
- Australian FOB costs are in the order of four times dearer than the United States; 3.5 times more expensive than Germany and France and 10% dearer than the Ukraine.
- CBH have introduced a new deadline of March 1<sup>st</sup> for the nomination of domestic grain outturn from a domestic bin. The March 1<sup>st</sup> deadline was not communicated to growers. If a grower wishes to outturn grain, he/she may not be able to do so because the grain has been physically shifted “closer to port” which in the case of some locations this is away from the domestic market increasing freight costs.
- In 2009 CBH downgraded malt barley to feed barley without proof to the growers that the grain had lost quality. Growers lost between \$55 and \$89/tonne through the downgrade as the letter of impending action sent to growers by CBH caused a reaction in the malt and feed grain market.

- CBH have substantially altered the structure of charges for CBH services in the life of Grain Express claiming financial benefits to growers. The benefit is not a reduction in charges just a redistribution as to the way charges are made.
- CBH's Grain Service Agreement dictates that CBH want the outturn of grain pre September of the year following delivery. CBH use "cliff face" storage fees and the threat to invoke Section 24 of the Grain Service Agreement to achieve this aim. This action is about "clearing the decks" of grain leading up to the next harvest and is prohibitive of growers to operate stepped time sales strategies.
- CBH claims that it has rebated over \$8M to growers due to freight efficiencies. CBH claim that this is the first time that a rebate has been paid to growers. In fact rebates for freight were operational under the monopoly grain trading system; however the rebates were paid to pools and not directly to the growers.
- CBH claims that Grains Express prevents the arbitrage of freight by marketers in the grain trade through the use of Grains Express as the monopoly freight system. However at this point in time growers have not seen freight to port charges decrease with the claimed efficiencies produced through Grains Express. Freight rates have been held constant in the two years of Grain Express.
- Competition at port has the potential to see the development of alternate supply chains. If CBH warehouse facilities and Grain Express are indeed the panacea of grain storage and grain freight logistics then CBH and Grain Express will survive regardless of competition. Growers will support the CBH business model if it is in their best interest. If CBH do not deliver on their promises they will quickly find that grower loyalty is not as strong as it used to be. In today's world, price and service is how you capture and maintain market share.

In this submission WAGG wishes to support the draft notice of the ACCC dated 6<sup>th</sup> December 2010 to remove the notified tying arrangements under Notification no N93439.

1/ WAGG's support of the ACCC in its notice to revoke notification N93439 lodged by Co-operative Bulk Handling Limited on the 11 June 2008.

2/ That WAGG agree that the notified tying arrangements substantially lessen competition in the market for grain transport in Western Australia and that the substantial anti-competitive detriments outweigh any public benefits resulting from the notified conduct.

- On the 13<sup>th</sup> December 2010 CBH Media Release, CBH announced that it plans to make an investment of up to \$175 million in rolling stock as part of a landmark decision to award its long-term grain rail contract to experienced United States Transportation group Watco Companies.
- This now makes CBH an active participant in the rail freight network which by leaving the notification in place will effectively directly exempt CBH from competition and we find this circumstance to be untenable.

3/ Make application to the ACCC that should a Final Notice be issued revoking notification N93439 that such a notice should be immediate and relate to all grain in the CBH system at the date of revocation.



## **1.0 Introduction**

The WA Grains Group (Inc) (WAGG) is a grower financed and grower driven group focused on delivering economic gain to growers.

The objects of WAGG are:

- i) To represent the Western Australian grain industry in the areas of production, marketing, plant breeding, agronomic development, storage and handling, processing, bio-security, transport and any other issues in order to promote, sustain and safe-guard the Western Australian grain industry in the longer term
- ii) To encourage profitable and sustainable production and marketing of the Western Australian grain crop.
- iii) To carry out, promote or assist in activities of any kind associated with the development, production, handling, processing, promotion and competitive services of Western Australian grain and its derivatives.

## **2.0 Terms of Reference for Submission**

WAGG presents this submission in response to the Australian Competition and Consumer Commission Draft Notice in respect of a notification lodged by Co-operative Bulk Handling dated the 6<sup>th</sup> December 2010.

WAGG specifically wishes to address three issues

1/ WAGG's support of the ACCC in its notice to revoke notification N93439 lodged by Co-operative Bulk Handling Limited on the 11 June 2008.

2/ That WAGG agree that the notified tying arrangements substantially lessen competition in the market for grain transport in Western Australia and that the substantial anti-competitive detriments outweigh any public benefits resulting from the notified conduct.

3/ Make application to the ACCC that should a Final Notice be issues revoking notification N93439 that such a notice should be immediate and relate to all grain in the CBH system at the date of revocation.

## **3.0 Comment on Draft Notice**

In the following section WAGG will highlight those points made by the ACCC that they either wish to reinforce or make comment on.

In order for this document to be read as a standalone document, WAGG has copied significant text from the Draft Notice Notification No N93439 of the 6<sup>th</sup> December 2010 in order for the submission to meet this objective.

## **Section 5. ACCC Assessment**

### **The notified tying arrangement**

**5.10.** Accordingly, in assessing the notified arrangements the ACCC has adopted the same approach as CBH and interested parties have in commenting on the arrangements. That is, the practical effect of the notified conduct, having regard to CBH's arrangements for outturning grain, is that once bulk grain that is intended to be exported from a port operated by CBH is stored at a CBH receival site it is, in effect, locked into the CBH system with CBH organising the transportation of the grain to port.

**WAGG :- Agree**

### **The scope of the ACCC's review of the notification**

**5.16.** Accordingly, CBH's notified conduct is forcing growers who use CBH's storage and handling facilities to also acquire transport services from CBH and thereby denying them the option of organising their own transport. This conduct, its effect on competition and the public benefits and detriments generated by it is the subject of the ACCC's review.

**WAGG :- Agree**

### **The counterfactual**

**5.50.** In this respect the ACCC notes that in South Australia Viterra Ltd (Viterra) provides up-country storage, transport, and port services. Viterra offers these services separately or as an integrated package and offers a bundling discount of approximately \$2 per tonne for the integrated package. Nonetheless, competing providers of stand alone transport are able to compete in this market and do so. This is discussed in greater detail at paragraphs 5.139 to 5.143.

**WAGG :- Agree**

### **Effect on competition**

**5.88.** Similarly, the notified tying arrangement does not appear to impact in any way on competition for the supply of receival, storage and handling services at port. Again, while CBH owns all the incumbent infrastructure, nothing in CBH requiring growers that use its up-country storage receival, storage and handling facilities to also use transport services provided by CBH prevents the development of other port facilities.

**5.89.** Further, as noted, CBH's access undertaking requires it to offer export outloading services at port at the same price regardless of whether the exporter uses Grain Express or accesses the port directly. Therefore, parties that do not want to use CBH's up-country storage or transport facilities are not disadvantaged in terms of access to port facilities.

**WAGG :- Disagree** because CBH have control of all bulk grain export facilities in WA and:-

- CBH have increased FOB charges in the order of 45% since 2008.

- Australian FOB costs are in the order of four times dearer than the United States; 3.5 times more expensive than Germany and France and 10% dearer than the Ukraine.

#### **Market for grain transport in Western Australia**

**5.97.** CBH states that it engages in competitive, open market tender processes to ensure that it receives a competitive freight rate. CBH argues that this ensures an open and transparent process for road transporters to compete (i.e. competition for the market, rather than competition in the market) and is a well developed tool that provides CBH, growers, marketers and transporters real value. CBH considers that its competitive tender processes for road and rail services promote rather than lessen competition and provide a stable foundation for transport companies to efficiently invest in infrastructure.

**WAGG :-** Disagree - The Rail Freight Tender document is not open and transparent in that members of the public were not able to peruse the scope of the document. WAGG tried to obtain a copy of the tender document in a public meeting where Max Johnson stated in the forum that WAGG was able to gain a copy of the Tender document. Below shows the subsequent response.

**EXCLUDED FROM PUBLIC REGISTER**





- On the 13<sup>th</sup> December 2010 CBH Media Release, CBH announced that it plans to make an investment of up to \$175 million in rolling stock as part of a landmark decision to award its long-term grain rail contract to experienced United States Transportation group Watco Companies.
- This now makes CBH an active participant in the rail freight network which by leaving the notification in place will effectively directly exempt CBH from competition and we find this circumstance to be untenable.

**5.124.** The notified tying arrangement prevents growers and marketers from exercising the second of these options, utilising CBH's up-country storage facilities while acquiring transport services independently of CBH.

**WAGG :- Agree**

**5.132.** The ACCC considers that there is a distinction between the market in which transport providers compete to provide bulk services to CBH and the market in which CBH then on-sells these services to growers. Specifically, there can be competition to supply bulk transport services to CBH without there being competition for the supply of transport services to customers who use CBH's upcountry storage facilities.

**WAGG :- Agree**

**5.137.** However, in Western Australia the notified tying arrangement allows CBH to leverage its market power in supplying up-country receival, storage and handling services to prevent this competition occurring.

**WAGG :- Agree**

**5.147.** That is to say, regardless of whether users of CBH's up-country storage facilities would chose alternative transport providers if they were free to do so, the ability to do so, arising from the contestability of the market, would provide a competitive tension that would constrain CBH's pricing behaviour. This competitive tension is foreclosed by the notified arrangement.

**5.148.** While under the scenario argued by Frontier most growers would likely continue to acquire transport services from CBH, they would be able to independently test the market and compare CBH's terms to those otherwise available, thereby placing a competitive discipline on CBH. There would also likely be greater transparency in CBH's charges with charges for each customer more directly linked to the cost of providing services to that customer. The cross subsidisation that Frontier suggests currently occurs from customers whose grain costs less to store, handle and move to customers whose grain costs more to store, handle and move, would cease.



**5.149.** In this respect, most interested parties that object to the notified arrangement argue that they would likely continue to use CBH on most occasions to transport grain even if they were not required to do so, but that the opportunity to explore alternative options and make this decision for themselves would provide a competitive tension.

**WAGG :-** Agree 5.147, 5.148 & 5.149.

**5.152.** The ACCC is of the view that the significant competitive advantage that CBH already enjoys by virtue of its market power in up-country storage is further entrenched by the exclusive arrangement whereby users of its up-country storage facilities are also required to acquire transport services from it. Without this restriction CBH would be constrained by actual entry or the potential for competition for the provision of transport services.

**WAGG :-** Agree

**5.156.** The ACCC is satisfied that the tying arrangement substantially lessens competition for the supply of grain transport services in Western Australia.

**WAGG :-** Agree

**5.160.** The ACCC notes that during the 2009/10 harvest no grower in Western Australia outturned grain up-country and transported it directly to port. The way CBH's arrangements are structured, including the notified tying arrangement, essentially locks the grain into CBH's system.

**WAGG :-** Agree - Anticompetitive by association

**5.177.** If the ACCC does decide to issue a final notice revoking CBH's notification the imposition of the domestic outturn fee would be subject to the provisions of the Act. In particular section 46(1) of the Act prohibits businesses that have substantial market power from taking advantage of that power for the purpose of eliminating or substantially damaging a competitor, preventing the entry of a person into a market or deterring or preventing a person from engaging in competitive conduct in a market.

**5.178.** If the ACCC does decide to revoke the notification, and concerns arise that the manner in which the fee was being applied was impeding potential competitors of CBH from supplying relevant services to growers, the ACCC would likely examine these concerns.

**WAGG :-** Agree 5.177 & 5.178

- Domestic outturn by road charges have increased by 293% over pre Grain Express.

- Domestic outturn by rail charges have increased from \$5.70/tonne to \$11.00/tonne (93% increase) in the first two years of Grains Express.

**5.190.** The ACCC remains of the view, as expressed in its original decision about the notification, that CBH's 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 subsidiary. In particular, the policy includes an independent dispute resolution process and an annual independent compliance audit.

**5.191.** In December 2009 CBH provided the ACCC with the results of its second annual Ring Fencing & Policy Compliance Agreed Upon Procedures Report, developed by CBH's appointed external auditor, Ernst & Young. The report noted two minor exceptions to the ring fencing procedures one of which CBH argued would be rectified in 2010 by moving CBH Operations to a new building away from CBH Grain and the other which was beyond CBH's control and which CBH argued was not material to the protection of information confidentiality.

**5.270.** The ACCC does not consider that the notified tying arrangement significantly impacts competition in the market for grain trading in Western Australia. While CBH has a significant presence in grain trading through its subsidiaries CBH has in place ring fencing policies which the ACCC considers provides an adequate framework to limit the potential for information obtained by CBH to be transferred and used anti-competitively by its trading subsidiary.

**WAGG :- Disagree** – While we have no hard evidence, anecdotal evidence such as CBH Grain moving back into CBH main offices in some regional areas as well as clear statements at CBH meetings that CBH is “about marketing” provide some evidence of the perceived lack of independence at a grass roots level. Furthermore the companies are subsidiaries and hence have the same board and same CEO. By association we find it hard to believe that the two subsidiaries will not share key information available only to the CBH group of companies. As such we see the ongoing association as a conflict of interest.

#### **Conclusion on whether the conduct has the purpose or effect of substantially lessening competition**

**5.197.** However the ACCC considers that the notified arrangement allows CBH to leverage its market power in supplying up-country receipt, storage and handling services to foreclose any possibility of competition to supply transport services to customers who use CBH's up-country storage facilities. In doing so the ACCC considers that the tying arrangement substantially lessens competition for the supply of transport services and generates a substantial public detriment.

**5.198.** In effect, by virtue of the notified arrangement CBH is the monopolist supplier of transport services to most Western Australian grain growers.

5.199. Regardless of whether users of CBH's up-country storage facilities would choose alternative transport providers if they were free to do so, the ability to do so, arising from the contestability of the market, would provide a competitive tension that would constrain CBH's pricing behaviour. This competitive tension is foreclosed by the notified arrangement.

**WAGG :-** Agree 5.197, 5.198 & 5.199

#### **Public benefits**

5.236. In this respect, the notified tying arrangement does maximise the volume of grain processed through CBH's system. That is, it forces those users who may otherwise elect to arrange alternative transport to acquire transport through CBH, thereby contributing to the fuller realisation of those benefits that are tied to the volume of grain transported by CBH.

5.237. However, if a product can be jointly produced more cheaply, and the bundled sale price reflects these costs savings, then customers would not need to be forced to buy it. Rather, they would do so of their own accord.

**WAGG :-** Agree 5.236 & 5.237

5.240. In this respect, the argument that economies of scope among bundled products creates cost efficiencies supports CBH bundling storage, handling and transport services to offer an appropriate, broadly cost-reflective discount on the bundle. However, it does not support the *compulsory tying* of products where some customers would otherwise prefer to buy them separately even after taking account of an appropriate bundling discount.

5.241. That is to say, most of the pro-competitive effects of CBH tendering for the supply of transport services on an aggregate basis can be achieved without the compulsory tying arrangement.

**WAGG :-** Agree 5.240 & 5.241

5.245. However, once growers have been participating in the arrangement for a period of time, as they have been forced to in this instance since the notification was lodged in 2008, the benefits of the bundled approach should be apparent such that, if the arrangements generate a genuine benefit to the grower relative to organising their own transport, there should be no need to force them to continue to participate in the arrangement.

**WAGG :-** Agree - CBH has already had the value of protection under the notification for 3 harvest periods i.e. 2008/09, 2009/10 and 2010/11.

**5.249.** The ACCC does not consider that requiring growers whose grain can be more efficiently transported, by virtue of their location, volumes or otherwise, being forced to participate in an arrangement so as to cross subsidise growers whose grain is more costly to transport constitutes a public benefit

**WAGG :-** Agree – This does not happen with fertiliser, stock/wool transport and therefore creates a market distortion.

**5.252.** As discussed at paragraph 2.9 Western Australian grain production is characterised by significant seasonal variability. For example in 2009/10 the grain crop was 12.4 million tonnes. In 2010/11 it is forecast to be 9.7 million tonnes. The variability caused by seasonal factors has a far more significant impact on volumes transported than would any variability created by some growers choosing not to use CBH's transport services if they had the option not to do so. The fact that the transport task supplied by CBH is able to accommodate the major variability in volumes caused by seasonal factors suggests that the comparatively smaller additional variability that would be introduced if growers were able to elect not to use CBH's transport services would not be a significant issue.

**WAGG :-** Agree

**5.258.** For example, as previously noted, there was significant congestion in the CBH system during the 2008/09 harvest. CBH was, by virtue of the notified arrangement, responsible for managing this congestion. However, through the notified tying arrangement CBH was able to shift a substantial proportion of the risk associated with congestion (e.g. shipping delays, demurrage costs and surge charges resulting from the need to deploy additional assets to meet shipping schedules) on to growers and exporters. The ACCC considers that this shifting of risk weakens CBH's incentive to efficiently deal with congestion and to develop strategies for better management of such risks in the future.

**WAGG :-** Agree

**5.260.** If the tying arrangement were removed, CBH would be exposed to the risk that it would lose business to other suppliers unless it was able to convince users that it is best placed to manage congestion problems. CBH's incentives to manage congestion would then be more strongly aligned with those of users who bear the cost of congestion.

**WAGG :-** Agree



5.268. That is not to say that the notified tying arrangement does not generate some public benefits. However, the ACCC considers that CBH has overstated these benefits. Most of the significant benefits of the Grain Express system result from CBH making available a bundled storage, handling and transport service, not from CBH forcing growers to use all parts of the service.

**WAGG :- Agree**

### **Balance of public benefits and detriments**

The following paragraphs 5.271 to 5.294 are building ACCC's case and as such WAGG have left their comment until after paragraph 5.294.

5.271. Further, the ACCC does not consider that requiring users of CBH's up-country storage and handling facilities to also acquire transport services from it distorts competition for the supply of receival, storage and handling services. While CBH has market power in the market for grain, receival, storage and handling, this is largely as a result of the existing market structure whereby CBH owns almost all necessary infrastructure to supply these services. The notified tying arrangement does not significantly impact on the ability for other providers to set up competing services at this level of the supply chain.

5.272. Similarly, the notified tying arrangement does not significantly affect the ability for alternative supplier of bundled whole of supply chain storage, handling and transport services to compete with CBH. While CBH has a competitive advantage over other suppliers seeking to provide a whole of supply chain service in bulk this is primarily a consequence of CBH's incumbency and established supply network rather than the notified tying arrangement.

5.273. Further, while the notified arrangement prevents transport providers from competing directly to supply stand alone transport services to users who store grain with CBH, they are still able to compete to supply these users in aggregate on the terms on which CBH decides to acquire these services. That is, the notified arrangement also maintains competition for the market to supply bulk transport services to CBH.

5.274. However, the notified tying arrangement forecloses opportunities for transport suppliers to compete with CBH to supply stand alone transport services other than in bulk and on terms that support CBH's interests as a bulk acquirer of these services. Growers are denied the opportunity to acquire these services directly on terms that best reflect their specific individual transport needs.

5.275. Denying growers this option would be unlikely to raise competition concerns if there was a competitive market for up-country receival, storage and handling services. Users that did not wish to use transport services provided by CBH could elect to bypass the CBH supply chain entirely and deliver their grain directly to port.

5.276. However, as noted, CBH has significant market power in the market for the supply of grain receipt, storage and handling services in Western Australia. The ACCC considers that the notified tying arrangement allows CBH to leverage this market power to substantially lessen competition in the market for grain transport services in Western Australia.

5.277. In this respect, the ACCC considers that there is a distinction between the market in which transport providers compete to provide bulk services to CBH and the market in which CBH then on-sells these services to growers. Specifically, there can be competition to supply bulk transport services to CBH without there being competition for the supply of transport services to customers who use CBH's upcountry storage facilities. That is, while bidding to supply transport services to CBH is competitive it does not necessarily follow that growers who use CBH's up-country storage facilities are able to acquire transport services on competitive terms. In respect of the current arrangement, growers who use CBH's up-country storage facilities have no choice in respect of acquiring transport services (i.e. there is no competition to supply transport services to customers who use CBH's up-country storage facilities). The notified tying arrangement prevents this competition occurring.

5.278. In other Australian states parties supply up-country storage services as well as transport services, both separately from each other and as an integrated bundle, with the integrated bundle provided at a discount to the stand alone services. This discount likely reflects the economies of scope in supplying a bundled package.

5.279. Moreover, stand-alone transport service providers operate in competition with vertically integrated service providers in other states. However, in Western Australia the notified tying arrangement allows CBH to leverage its market power in supplying up-country receipt, storage and handling services to prevent this competition occurring.

5.280. If faced with the threat of alternative transport providers directly supplying services to growers, CBH would have an incentive to offer its transport service on terms that were at least as attractive as rival transport providers. In practice economies of scope in CBH's operations may be such that the efficient price of the transport component of a bundled storage, handling and transport services is at a level that is uneconomical for standalone transport providers to match. However, this may not universally be the case and just being faced with the threat of competition would promote competitive outcomes.

5.281. This is because regardless of whether users of CBH's up-country storage facilities would choose alternative transport providers if they were free to do so, the ability to do so, arising from the contestability of the market, would provide a competitive tension that would constrain CBH's pricing behaviour. This competitive tension is foreclosed by the notified arrangement.

5.282. Most interested parties that object to the notified arrangement argue that they would likely continue to use CBH on most occasions to transport grain if they were not required to do so, but that the opportunity to explore alternative options and make this decision for themselves would provide a competitive tension.

5.283. Therefore the ACCC is of the view that the significant competitive advantage that CBH already enjoys by virtue of its market power in supplying receipt, storage and handling services is further entrenched by the exclusive arrangement whereby users of its up-country storage facilities are also required to acquire transport services from it. Without this restriction CBH would be constrained by actual entry or the potential for competition for the provision of transport services.

**5.284. The ACCC considers that the absence of this competitive tension, by virtue of the notified tying arrangement, substantially lessens competition in the market for grain transport in Western Australia.**

5.285. The ACCC considers that bundling of grain storage, handling and transportation services has the potential to generate significant public benefits in the operation of the Western Australian grain supply network. Economies of scope in production mean that coordination of the grain freight task, coupled with logistics planning, can allow grain to be transported throughout Western Australia in a more efficient manner, delivering significant savings.

5.286. However, if a product can be jointly produced more cheaply, and the bundled sale price reflects these cost savings, then customers would not need to be forced to buy it. Rather, they would do so of their own accord.

5.287. Grain is transported efficiently and cost effectively to port in other states, often as a bundled service similar to CBH's arrangement, without forcing growers to acquire all relevant storage, handling and transport services from a single supplier.

5.288. In this respect, the argument that economies of scope among bundled products creates cost efficiencies supports CBH bundling storage, handling and transport services to offer an appropriate, broadly cost-reflective discount on the bundle. However, it does not support the *compulsory tying* of products where some customers would otherwise prefer to buy them separately even after taking account of an appropriate bundling discount.

5.289. Accordingly, the ACCC does not consider that the forced tying arrangement the subject of CBH's notification is necessary to the realisation of many of the benefits resulting from CBH offering a bundled storage, handling and transport service.



5.290. The ACCC considers that the notified arrangement may generate efficiencies in the receipt of grain at port export terminals, particularly in periods of high demand where there is potential for congestion in the system. In these circumstances, a fragmented freight task with individual growers and markets delivering to port in an uncoordinated manner would be likely to exacerbate any congestion issues.

5.291. However, the notified tying arrangement is not the only instrument for managing the allocation of capacity in times of congestion. For example, CBH could auction delivery slots and allow the pricing mechanism to encourage individual growers to coordinate freight movements to port or spread deliveries to port more evenly throughout the day in peak periods. It is therefore not clear that the notified tying arrangement is conferring significant public benefits that could not be realised from a market-based solution.

5.292. Further, while the notified tying arrangement may assist CBH to manage congestion problems, it could also potentially exacerbate congestion problems during large harvests. CBH is, by virtue of the notified arrangement, responsible for managing congestion in the system. However, through the notified tying arrangement CBH is able to shift a substantial proportion of the risk associated with congestion (e.g. shipping delays, demurrage costs and surge charges resulting from the need to deploy additional assets to meet shipping schedules) on to growers and exporters. This shifting of risk weakens CBH's incentive to efficiently deal with congestion and to develop strategies for better management of such risks in the future.

5.293. It may be that CBH is nevertheless still best placed to manage such risk by virtue of its position in the market. However, the tying arrangement forces users to accept CBH's management of congestion risks, even when they believe they could better manage this risk in a manner that involves removing their grain from the CBH system (utilising the services of another transport provider) and are willing to bear all relevant costs.

**5.294. On balance, the ACCC considers that the notified tying arrangement substantially lessens competition in the market for grain transport in Western Australia and that the substantial anti-competitive detriments outweigh any public benefits resulting from the notified conduct.**

5.295. Accordingly, the ACCC proposes to revoke the notification.

**WAGG :- Agree 5.271 -5.295 with particular emphasis on 5.284 and 5.294.**



## **Timing of revocation**

**5.299.** CBH submits that any decision to revoke the notification should not come into effect until prior to the 2011/12 harvest season. CBH argues that this approach would enable the disruptive effects of such a decision to be most effectively managed in the interests of all supply chain participants. Specifically:

- CBH and other supply chain participants could conduct harvest planning on an informed basis
- CBH would be in a position to submit a new Undertaking, amended Port Terminal Services Agreement and Port Terminal Rules, taking into account the substantial changes in supply chain structure that a revocation would cause and
- contracts with third parties could be negotiated in an environment of certainty for both parties.

**WAGG :-** Disagree. Revocation notice should be immediate and relate to all grain in the CBH system at the date of revocation.

## **4.0 Summary**

1/ WAGG's support of the ACCC in its notice to revoke notification N93439 lodged by Co-operative Bulk Handling Limited on the 11 June 2008.

2/ That WAGG agree that the notified tying arrangements substantially lessen competition in the market for grain transport in Western Australia and that the substantial anti-competitive detriments outweigh any public benefits resulting from the notified conduct.

3/ Make application to the ACCC that should a Final Notice be issues revoking notification N93439 that such a notice should be immediate and relate to all grain in the CBH system at the date of revocation.

The WA Grains Group wishes to thank the ACCC for the opportunity to provide input into the Draft Notice in respect of a notification lodged by Cooperative Bulk Handling Ltd.

The WA Grains Group is happy to engage in further conversation in support of the information provided in this document.

## **10. References**

Australian Competition and Consumer Commission (2010) "Draft Notice in respect of a notification lodged by Cooperative Bulk Handling Ltd" 6<sup>th</sup> December 2010 Notification number N93439, Public Register Number C 2008/946

WA Grains Group (2010) "Submission – Review of Co-operative Bulk Handling – Grains Express" July 2010.

**Submission sent to**  
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