

**WAFARMERS RESPONSE TO DRAFT NOTICE WITH RESPECT TO  
COOPERATIVE BULK HANDLING LIMITED (CBH) EXCLUSIVE  
DEALING NOTIFICATION N93439**

**PREPARED FOR**

**THE AUSTRALIAN COMPETITION AND CONSUMER COMMISSION**

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The Western Australian Farmers Federation (Inc) (WAFarmers) represents over 4,000 members, the majority of whom grow wheat as a component business.

As having the largest, by far, membership base of any rural lobby group in Western Australia, WAFarmers is confident that they are truly representative of this State's grain producers, and as such welcomes the opportunity to address the Australian Competition and Consumer Commission (ACCC) regarding the Draft Notice issued on December 6, 2010, to revoke the exclusive dealing notification lodged by Cooperative Bulk Handling Ltd (CBH).

At the outset, WAFarmers wishes to make clear that it understands that the ACCC is not reviewing CBH offering storage, handling and transport supply chain services as a bundled service, but rather that it is reviewing the notified compulsory tying arrangement whereby CBH requires parties that use its storage and handling services to also use CBH's transport services.

On page (vii) of its Draft Notice the ACCC states that "it does not consider that the forced tying arrangement the subject of CBH's notification is necessary to the realization of many of the benefits resulting from CBH offering a bundled storage, handling and transport service" yet the ACCC fails to outline which of the many benefits it is referring to, and which benefits would be excluded if the notification were to be revoked.

Central to the following argument is that Grain Express, as made possible by virtue of the exclusive dealing notification lodged by CBH in 2008, is a logistics, or storage and handling **system**, and as such the inter-relatedness of the components of this system are almost impossible to look at exclusively.

The Business Dictionary defines a 'system' as being an: *"Organized, purposeful structure regarded as a 'whole' consisting of interrelated and interdependent elements (components, entities, factors, members, parts etc.). These elements continually influence one another (directly or indirectly) to maintain their activity and the existence of the system, in order to achieve the common purpose the 'goal' of the system."*

One of the keys underpinning the Grain Express system is the certainty that CBH currently has with respect to the requirements of the system, and therefore, the best way to manage the system. By altering or removing any aspect of the system, it would therefore stand to reason that the system is no longer 'whole' and therefore the argument can be made as to whether the common purpose, or the goal of the system can in fact be achieved.

Without evidence to support the notion that specific benefits pertaining to a specific system can be guaranteed outside of such a system, there can be no guarantee that such benefits will exist outside of the system, which has huge implications on the notion of benefits, or likely benefits. Cumulative benefits under an existing system are tangible and can be quantified however cumulative implications under a 'new' system, which is

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effectively the result of introducing external parties in the role of arranging transport, can only be speculations, and it is in this area that the organisation urges the ACCC to be cautious and dogmatic in its approach.

WAFarmers understands that the ACCC may revoke the immunity afforded by a notification, like the one lodged by CBH, at any stage if it is satisfied that the conduct has the purpose, effect or likely effect of **substantially lessening competition** and the **likely benefit** from the conduct **will not outweigh** the anti-competitive detriment to the public.

***WAFarmers strongly urges the ACCC to reconsider its proposal to revoke the exclusive dealing notification lodged by CBH given that it does not substantially lessen competition, and that the likely benefits far outweigh any anti-competitive detriments to the public.***

***In addition, WAFarmers acknowledges the vitally important role that the ACCC plays in stimulating competition however trusts that the ACCC has the required understanding of the WA grains industry so that ideology does not outweigh practicality in this difficult decision.***

***While the ACCC has the obligation to stimulate competition, and while this perceived competition may be workable and good in other industries, with respect to the grain logistics system in WA the advantages derived from an organised and efficient grain logistics system far outweigh the advantages of perceived competition and as such exceptions should be granted especially due to the unique Western Australian grains industry environment whereby:***

- ***CBH is a grower owned and controlled co-operative working for the best outcome for growers and the industry and as such should be exempt from certain 'antitrust' laws (as is the case under the Capper Volstead Act protecting producers of agricultural products in the United States of America)***
- ***The massive grain freight task is uniquely and predominately export focused.***

#### **Grains Express does not constitute a SUBSTANTIAL lessening in competition**

WAFarmers seriously questions the merit of the ACCC's decision to revoke the exclusive notification given that, by their own admission in the Draft Notice the ACCC acknowledges on pages (iv) and (v) that the ACCC considers that requiring growers who use CBH's storage and handling serves to only acquire transport services from CBH:

1. **DOES NOT** significantly impact on competition in the market for grain trading in WA

2. **DOES NOT** significantly lessen competition in the market for receival, storage and handling services in WA
3. **DOES NOT** appear to inhibit the development of alternative up-country receival, storage and handling facilities
4. **DOES NOT** significantly affect the ability for alternative suppliers of bundled whole of supply chain storage, handling and transport services to compete with CBH.
5. **MAINTAINS COMPETITION** to supply bulk transport services to CBH

In addition, the ACCC has acknowledged that CBH's ring fencing policy provides an adequate framework to limit the potential for information obtained by CBH to be transferred and used anti-competitively by its subsidiary.

**Areas of concern with respect to major anti-competitive concerns for the ACCC addressed**

The major anti-competitive concerns the ACCC raises with respect to the notified tying arrangement are that it:

1. **MAY** be stimulating excessive investment in on-farm storage of grain by growers who strongly prefer to make their own transport arrangements ... and **MAY** therefore be distorting competition between on-farm and off-farm storage.

In response to this claim, WAFarmers would argue that there is insufficient data to support this claim, as the last comprehensive survey conducted by the Australian Bureau of Agricultural and Resource Economics (ABARE) on this matter occurred back in 1998-99.

2. 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 interest as a bulk acquirer of these services and that 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.

In response to this claim, WAFarmers would argue that CBH has a competitive tender process already in place for road and rail services to obtain the best freight price on behalf of growers and marketers. At this point in time, CBH does not provide the transportation services, rather it arranges (as distinct from on-selling) these services, and because of the economies of scale can offer lower costs per tonne to growers, indeed in May, 2010, the efficiency improvements made possible by Grain Express resulted in a freight rebate of \$8 million to growers.

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It is this organisations understanding that CBH's road transport agreements are offered in an open market tender process that ensures an open and transparent process for road transporters to compete. As such, competition still exists and there is no evidence to suggest that over time, growers will be better off financially if they were to organise their own transportation. What would become apparent, however, is that without the current degree of certainty that exists in the CBH Grain Express System, CBH would have a decreased capacity to negotiate competitive freight rates on behalf of its grower members and a lack of certainty in respect of transport volumes may stifle competition for CBH transport contracts.

**Given that CBH is a grower owned and controlled co-operative, members of that co-operative are entitled to have the best freight rates negotiated on their behalf. Generations of Western Australian growers have already paid for CBH's infrastructure through Storage and Handling fees and CBH's reinvestment in infrastructure. It is therefore growers' entitlement to look to CBH to provide cost effective and efficient storage and handling services, including those of transportation, in the long term which are in the best interests of Western Australian growers.**

In addition, by its own admission, the ACCC acknowledges that *"in theory, growers are able to warehouse grain with CBH and then outturn it from CBH's custody which would enable them to make their own arrangements to transport grain to port ... however, the way CBH's arrangements are structured means that the process for outturning grain involves a number of significant costs and risks for growers"*. WAFarmers is aware that concerns have been raised by outside parties that the high costs associated with outturning grain, have been set by CBH as a deterrent to removing grain from the system and therefore, in effect, 'locking' it into the CBH system. This organisation believes that the practical fees associated with outturning grain for CBH are substantial, as outlined in their July 2010 submission, and would challenge such comments particularly given changes made to CBH's time-based storage charges.

### **Grains Express offers substantial public benefits**

#### **1 Public Safety**

If growers are free to choose their own method of transportation, there is no evidence to suggest that other transporters will show the same commitment to maximising the transportation of grain on rail as CBH has.

As you would be aware, CBH has recently reconfirmed its committed to delivering significantly greater value, efficiency and safety to grain growers and the grain industry by investing \$175 million, mainly in rolling stock, as part of its new partnership with Watco Companies.

The Strategic Grain Network Committee for Freight and Logistics Council of WA Report released in December, 2010, stated quite clearly in its Executive Summary that "CBH's freedom to manage cargo assembly for all traders under Grain Express allows it to manage stocks, bin operations and export demand via the best mix of road and rail transport assets at its disposal. Other exporters use trucking across the state's road network, which are not fit for the purpose."

In addition, the Western Australian Auditor General's 2009 Report on maintaining the State road network stated that the estimated cost of eliminating existing overdue maintenance to the road may exceed \$800 million, this does not include any road upgrades to make them suitable to haul grain on.

A 2010 Business Case submission to the WA Government prepared by Strategic design and Development (Sd & D) on behalf of the Department of Transport states that the routes down the escarpments into Perth are already the focus of residential attention to truck numbers, and the impact of the grain task being transferred from rail onto road would be readily recognised. It also noted that safety and amenity impacts in Wheatbelt townships would be very noticeable, with any increase in accident rates in these areas being readily traced to the grain industry and the rail rationalization decision by the State Government.

State and Federal Governments have responded to the pleas of Western Australians by committing \$352 million over four years to the grain freight network at the recommendation of the Strategic Grain Network Committee who, as already noted, perceived CBH's Grain Express to be an integral part.

**In August, 2010, Westnet Rail (WNR), the below rail service provider for the CBH grain task reaffirmed its support for Grain Express, saying they believe that the benefits of the Grain Express system far outweigh any perceived threat to competition posed by the initiative. WNR added that the benefits of Grain Express derive from the coordination of the grain supply chain ensuring growers receive the most efficient and reliable path to market, that rail is a more efficient and cost effective option for grain transport than road for large volumes over long distances and that Grain Express ensures certainty of volume for rail and the lowest cost transport option for growers**

In addition, the Australian Governments Wheat Exports Australia recognizes the vital importance of rail as highlighted in a newsletter distributed in May 2009 which concluded:

- Rail transport is a high volume transport option and has economic, social, safety and environmental benefits.
- Ports are geared to receiving grain by rail not road, and grain delivered by rail allows storage times at port to be kept to a minimum however, competitive forces and a rationalization process within the grains industry has increased grain tonnage being transported by road.

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To think that the benefits of such arrangements could be undermined because of a lack of perceived competitiveness in the transport market is inconceivable. If the exclusive dealing notification were to be revoked, Western Australian road users deserve to be afforded some protection through Government regulation to ensure that rail freight for grain is maximised, as it currently is in the Kwinana zone where an average of 93% of all grain transported from rail sites in the zone is currently transported by CBH via rail where volume certainty has made rail competitive with road transport.

This organisation would query ACCC chairman Graeme Samuels comments in a media release dated December 6, 2010, that "grain is transported efficiently and cost effectively to port in other states" as this is not the feedback that this organisation has had from our eastern states counterparts.

To the contrary, an article in the Farm Weekly dated October 28, 2010, entitled *Price Difference Between WA and NSW freight "enormous"* read "figures have shown that it costs NSW growers about \$52 a tonne for freight and an additional \$36/t for storage and handling compared to WA growers who pay CBH about \$36 a tonne freight and \$27 storage and handling". (WAFarmers understands that the highest freight rate charged by CBH under grower freight reduction is around \$30 a tonne.)

This organisation would also comment that comparisons with the eastern states storage and handling system may not be appropriate given the difference in the size and destination of the grain freight task between Western Australia and the eastern states. Western Australia is the largest producer of wheat (40 per cent) and exports 90 percent of its crop while other states export between 35 per cent and 70 per cent of their production on average and in poor production years, some states export very little wheat. (Source Wheat Export Marketing Arrangements Productivity Commission Inquiry Report, July 2010.)

## **2 The Western Australian grain industry's current reputation and contribution to the State's economy is a public benefit that needs to be preserved**

**The Western Australian grains industry is the State's largest and most valuable agricultural sector contributing exports worth more than \$4.5 billion to the WA economy each year. Such export levels place the WA grains industry among the State's top export earners and the State needs to ensure that it maintains its strong international reputability.**

**One of the quickest ways to destroy this international reputability is in the area of biosecurity, which will be negatively impacted on if there is a decentralization of the current storage, handling and transport system. Currently, CBH manages the logistics in a way that allows bulk loads to be removed from bins and transported to port to cater to customer's requirements. This not only lowers the handling**

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**costs, as receival sites only need to be opened a limited number of times, but also decreases additional costs incurred through refumigation and most importantly, decreases risks with respect to phosphine resistance.**

If other transporters were to become involved, this would effectively remove the benefits of Grain Express with respect to biosecurity whereby individual shiploads could be accumulated by individual marketers, often from small grain parcels located around the network – and there is no guarantee that individual operators will maintain the same strict biosecurity regime CBH has maintained.

Under Grain Express, CBH is able to put in place an appropriate management of fumigation to address the risk of insect infestation and damage by treating grain with phosphine. Parcels of grain being stored under the fumigant must have the fumigant level maintained for a minimum period of 28 days with failure to do so potentially creating a risk of infestation or phosphine resistance. If a parcel under fumigant is required to be opened and a proportion of the grain outloaded for a particular requirement, as may be necessitated under an un-coordinated approach, a definite risk arises that a fumigant-resistant strain of insects will evolve. This has already been occurring in the Eastern States resulting in an increased reliance on fumigants which are much more toxic and less environmentally stable such as methyl bromide.

In a media release issued by the Department of Agriculture and Food WA, *Don't compromise WA phosphine resistance status*, dated November 23, 2010, Department of Agriculture and Food senior research officer Rob Emery said phosphine resistance was minimal in Western Australia, unlike the Eastern States because "WA farmers have worked really hard for years to minimise phosphine resistance and as a result there have only been a few cases of strong resistance reported," and that "This gives our grain a unique edge, as it can be marketed as free from pests and contact chemicals, unlike in the Eastern States, which has moderate to severe resistance."

In a Farm biosecurity editorial feature dated April 13, 2010, grain industry silo storage specialist, Chris Newman, DAFWA, was quoted as saying that the reason for the difference between phosphine resistance in the eastern states as compared to Western Australia is "most likely due to the gas-tight sealing in the central storage system by CBH, and the response by silo manufacturers to seal silos."

### **Industry benefits**

**As the ACCC would be aware, to a large extent the Western Australian grains industry has been overwhelmingly supportive of the Grain Express System. The majority of the players in this industry are focused on the benefits derived for the whole of industry, that being the long-term efficiency and effectiveness of the supply chain, as opposed to the focus of a few players who are motivated by deriving benefits only to themselves.**



**Of the 44 submissions received by the ACCC in 2010 in relation to the review of the CBH exclusive dealing notification, only eight were opposed to the retention of the notification, and as such, opposed to Grain Express, including an eastern states rail haulage operator and three significant grain handlers / marketers presumably looking for market share in Western Australia.**

**This would serve to support WAFarmers claims in previous submissions that the people and organisations who wish to see significant changes to Grain Express and to CBH have motives based in seeking a level of direct profit from the logistics chain in handling and moving grain to port. This amounts to cherry picking CBH's most advantageous sites and will have the effect of increasing costs for all the other growers. CBH as a grower owned and controlled non-profit cooperative should not be damaged by people and companies that seek to profit from its demise.**

There is nothing preventing new entrants such as these from building competitive storage or port loading facilities, except perhaps the substantial financial investment in grain infrastructure that this would require, an investment which as mentioned earlier, has been already made by the grain producers of this state.

There has been no forthcoming statements or evidence to suggest that new players in the WA grain industry will be able to bring more benefits to either the supply chain or the industry, to the contrary, there is more uncertainty as to the impacts they would have on a system which has been proven to yield benefits as an entire system. These benefits include, but are not limited to:

- A simple logistics system which has been proven to have worked
- Efficiencies gained through co-ordination of transport services resulting in faster turnaround times and the ability of CBH's ports to be run at full capacity without suffering degraded performance as a result of inefficient ad hoc movements;
- The ability of growers to access all marketers and marketing options regardless of what site they deliver to and the associated outturn costs of grain from that site.
- The ability of CBH to run a quality optimisation system for growers allowing growers to receive the full value for their grain
- Streamlined cargo accumulation through a centralised system as opposed to individual and multiple users
- On behalf of its shareholders, CBH is able to strive to reduce supply chain costs by maintaining bulk movements.

- Reduction of the risk associated with offering freight rate certainty
- Increased competition between rail and road;
- Reduced chances of inefficient entry into the transport market
- Prevented CBH from incurring costs to set up systems to handle an option that the ACCC agrees is unlikely to be used

There is no doubt that for those who understand the logistics system, and use the logistics system, there is overwhelming support to retain the system.

As argued previously, WAFarmers would urge the ACCC to be mindful that changes to one aspect of the system, in this case introducing multiple unknown variables in terms of transport services, will impact on all aspects of the system and the purpose for which it was designed.

If it is the ACCC's intention to revoke the exclusive dealing notification, this should be done with the thorough understanding that not one of the interdependent benefits originally obtained under the Grain Express System can be assumed to continue to benefit either the WA grains industry or the public. This is because the 'system' will no longer exist – it will have been inherently and inextricably destroyed due to the lack of certainty which will furthermore be infused within it, and which underpinned the system's ability to perform in the first place.

### **Summary**

Grain Express is a logistics system and as such the interrelatedness of the components of the system and the impacts on benefits are impossible to quantify exclusively.

Given that CBH is a grower owned and controlled co-operative, members of that co-operative are entitled to have the best freight rates negotiated on their behalf.

Grain Express ensures certainty of volume for rail and the lowest cost transport option for growers.

The Western Australian grains industry needs to ensure that it maintains its strong international reputability especially with respect to biosecurity.

The Grain Express System benefits the whole of industry and ensures the long-term efficiency and effectiveness of the supply chain.