



CBH Port Access

Submission in support of a proposed access undertaking under Part IIIA of the Competition and Consumer Act 2010

Public version

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Executive Summary

- A. Co-operative Bulk Handling Limited (**CBH**) has put forward this submission and proposed undertaking to the Australian Competition and Consumer Commission (**ACCC**) in accordance with the access undertaking provisions in the Competition and Consumer Act 2010 (Cth) (**CCA**) in order to replace CBH's existing undertaking which expires on 30 September 2014. This submission is made against the current legislative background of possible regulatory change in this industry.
- B. CBH has essentially retained the provisions of the previous access undertaking for a period of 3 years to 30 September 2017. CBH has however, introduced a proposal to offer long term agreements (**LTAs**) for a period of 3 years with the ensuing increased commercial certainty arising from the longer term arrangements, giving CBH the confidence to forecast that it should be able under the new arrangements, to make approximately 15 million metric tonnes of capacity available (increased from approximately 12.7 million tonnes), across its four port terminals in Western Australia.
- C. In light of the Proposed Undertaking, and the improved commercial certainty that would be provided by the LTA process, CBH is investigating its ability to make further investments and increase capacity to 18 million metric tonnes per annum.
- D. The proposed LTA arrangements will still involve a guaranteed capacity of 5 million metric tonnes for non LTA capacity with a minimum of 34% of capacity offered for such near term capacity at each of its port terminals. CBH's analysis and historical data shows that this capacity should be more than sufficient to meet demand from customers for non long term capacity. CBH has also built a process of checks and balances including an auction process, to seek to ensure that the capacity allocation process for near term and long term capacity, is more efficient than under the current access undertaking.
- E. The LTA arrangements and the revisions to the Proposed Undertaking will provide exporters with greater certainty in terms of planning and will allow them and CBH to have increased certainty in investing in the grain export industry in Western Australia, to the benefit of Western Australian growers and the Western Australian economy as a whole.

1. Introduction

1.1 Purpose of submission

CBH makes this submission in support of its Varied Port Terminal Services undertaking (**Proposed Undertaking**) submitted to the ACCC under section 44ZZA of the CCA.

The Proposed Undertaking is intended to meet CBH's obligations under the Wheat Export Marketing Act 2008 (Cth) (**WEMA**) to have an access undertaking in place in relation the provision of port terminal services to bulk wheat exporters.

The Proposed Undertaking will govern access to port terminal services for bulk wheat exporters for the period from 1 October 2014 to 30 September 2017.

The Proposed Undertaking has regard to the possible delay in relation to the proposed mandatory prescribed Code of Conduct ("**Code**") in relation to bulk wheat port terminal services that was anticipated to commence in October 2014, as well as the Productivity Commission's Final Report on the National Access Regime released by the Australian Treasurer in February 2014. In these circumstances, CBH has included provisions which allow CBH to request the ACCC's approval to withdraw the Proposed Access Undertaking pursuant to Government amendments and policy including the proposed Code.

As the Proposed Undertaking largely builds upon the existing undertaking that has been accepted by the ACCC, this submission focuses on the changes in the Proposed Undertaking.

1.2 Structure of submission

This submission is divided into a number of parts as follows;

1. Introduction
2. Regulatory Regime and relevant history
3. Proposed Undertaking features
4. Benefits of Proposed Undertaking
5. Marketplace information
6. Key Documents
7. Appendix 1 – Port Terminal Rules
8. Appendix 2 – Port Terminal Services Agreement
9. Appendix 3 – Proposed Undertaking
10. Appendix 4 – Proposed Capacity

1.3 Conclusion

CBH believes that the Proposed Undertaking will promote increased certainty for exporters, users of CBH's export terminals and will provide CBH with increased certainty in investing in its export wheat terminals and expansions. This will be to the benefit of Western Australian growers and to the Western Australian economy as a whole.

2. Regulatory regime and relevant history

2.1 WEMA

In 2008 the partial deregulation of the wheat export market was begun with WEMA. In the first step of what was proposed to be a managed process towards full deregulation, the ability to export wheat was relaxed and additional exporters could apply to be accredited. In 2010, the Productivity Commission released its report¹ in wheat export marketing arrangements noting:

"In the draft report, the Commission expressed the view that the access undertakings should be unchanged between now and 30 September 2014, unless all parties agree proposed changes are beneficial. However, the Commission now considers such a condition could unnecessarily limit the ability of parties to improve the current undertakings, or the ACCC's capacity to act where necessary to promote competition (box 5.5). Rather, changes should be made where there are strong reasons for doing so. (For example, to allow the use of auctions to allocate capacity where this is seen as desirable, or to improve an existing auction system). It is still important to avoid 'unnecessary' changes to the undertakings to prevent parties incurring additional future compliance and administrative costs in relation to the undertakings. Should the ACCC wish to make significant changes to the undertakings, it should provide stakeholders with plenty of advance notice."²

In 2012, the deregulation process was further enhanced with the recognition that there was no longer a need for a specialist wheat export accreditation authority and Wheat Exports Australia was wound up. However, at this time the requirement that vertically integrated wheat exporters have an access undertaking in place was not removed from WEMA.

Currently, following an extensive industry process where industry participants discussed and agreed the potential details of a voluntary industry code, the amendments to WEMA required a mandatory industry code under the CCA to be implemented prior to the withdrawal of the requirement to have access undertakings. Despite further industry discussions on the details of a mandatory industry code no actual code has yet been proposed. Speculation exists that details of a mandatory Port Access Code could yet be imposed by Government prior to the expiry of CBH's current access undertakings. If that occurs, then the requirement for the Proposed Undertaking may drop away. If a code is not prescribed prior to the Proposed Undertaking being accepted there may be potential for duplicate regulation which would be an onerous and potentially inconsistent requirement on CBH.

However, to the extent that it is able, CBH has drafted the Proposed Undertaking in a manner that should not be inconsistent with the previously agreed principles surrounding the potential Code, whilst still meeting the requirements of the CCA in relation to access undertakings.

CBH also notes the recent Final Productivity Commission Report on the National Access Regime released by the Commonwealth Treasurer. While the Report will not be considered until after the so called "Root and Branch" review of Australian competition law, the Report does provide some insight into the nature and breadth of access regulation. CBH believes that the Report points to a continuing trend to be mindful of the cost efficiency of access regulation including in relation to wheat export terminals and for regulation to be light handed except in the case of clear market failure and the existence of natural monopoly market characteristics.

2.2 Bulk Handling Act 1967 (WA)

CBH is subject to the Bulk Handling Act 1967 (WA) and is required to provide access to services at both up-country sites and ports. Any failure to offer access without reasonable grounds would result in CBH breaching the Bulk Handling Act. CBH therefore submits that against a general requirement

¹ Productivity Commission 2010, Wheat Export Marketing Arrangements, report no. 51, Canberra (PC Report)

² PC Report page 191

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that it provide access to services to customers, it is constrained in relation to any situation when it could decline access to exporters from Western Australia. Against such a general background CBH believes that the proposal for a light handed undertaking similar to that in the Proposed Undertaking is appropriate and consistent with the interests of both CBH as the infrastructure owner and its potential customers.

2.3 Constraints on CBH

CBH is subject to considerable existing as well as increasing constraints in relation to its provision of Port Terminal Services, including:

1. CBH's primary incentive is to maximise throughput and ensure that Australian wheat exports remain efficient and competitive in the global market for the benefit of its cooperative members;
2. the almost all access seekers are global grain traders and sophisticated purchasers³ (or are backed by global grain traders or sophisticated purchasers) who are well resourced and have countervailing power;
3. the large international grain companies and large customers are potentially and actually investing in new, and expansion of, competing facilities;
4. the levels of competition in the various markets for the storage, handling and marketing of bulk wheat;
5. CBH is owned by growers who are collectively and individually active and have every incentive to ensure the supply chain is efficient and beneficial for their respective farming businesses;

2.4 CBH's Existing undertaking and the Proposed Undertaking

CBH has had an undertaking in place since October 2009 and there have been few issues associated with the undertaking. In particular, CBH notes that generally exports have flowed smoothly and it is noticeable that few disputes have arisen, and in particular, no breaches of capacity allocation requirements have been recorded.

Throughout the course of CBH's undertakings some negotiation of non-price terms by wheat exporters has occurred though in the main the standard service is accepted by all exporters. These negotiations have been performed in accordance with the process contained in the undertaking as amended by agreement between the parties. No instances of disputes leading to an arbitration have been recorded to date.

During the existence of CBH's prior undertakings, there has been little to no take up, of delivery to port of wheat from supply chains other than the CBH supply chain. CBH has received small deliveries of wheat by exporters direct to its port facilities (in the order of a few thousand tonnes), as well as a few thousand tonnes of lupins and canola notwithstanding that neither of CBH's prior undertakings require this. Accordingly to date, there has been little to no demand by non-CBH supply chains to access CBH port terminal facilities.

In these circumstances, CBH's Proposed Undertaking largely builds on its existing undertaking approved by the ACCC subject to the changes indicated in this submission.

2.5 About CBH

CBH is a co-operative incorporated under the *Co-operatives Act 2009 (WA)* as a non-distributing co-operative with approximately 4300 grower members based in WA. Membership in the co-operative is open to those who satisfy the membership criteria:

³ Eg Glencore, Cargill, GrainCorp, Bunge, Louis Dreyfus, Toepfer, Emerald (Sumitomo), Mitsui, Vittol, Plum Grove (Mitsui, Seaboard Corporation, Salim Group), Queensland Cotton (Olam).

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To establish Active Membership of the Co-operative:

- a Member must have delivered grain to the Co-operative in the same delivery title in either of the last two seasons;
- the aggregate of all grain deliveries made to the Co-operative by a Member in a single delivery title over the past three seasons must be no less than 600 tonnes; and
- the Member must have had an involvement in the actual production of the grain delivered and not merely be the deliverer for the purposes of receiving the financial proceeds from delivered grain.

Active members may participate in the election of the directors of the co-operative and nine of the twelve directors are directly elected by those Active members in elections run by the WA Electoral Commission. Each director sits for a 3 year term before being required to be returned by the members. The elected directors then choose up to 3 directors with special skills to sit on the board to ensure that the CBH Board has the appropriate balance and skills. Each of the directors with special skills is ratified by the members at the next annual general meeting. Having a board elected by growers provides a significant constraint on the conduct of CBH and ensures that maintaining a competitive market for grower's grain is not harmed.

3. Proposed Undertaking features

3.1 Capacity allocation structure

CBH's Proposed Undertaking has 3 elements to the initial allocation of capacity. The first is the LTA process which provides exporters with longer term commercial certainty on their exports, the second is the auction process which allocates all remaining capacity and the third is the spare capacity allocation.

CBH is currently forecasting that it will be able to make available approximately 15 million metric tonnes of capacity across its four port terminals if its Proposed Undertaking is accepted given the increased certainty arising from the Proposed Undertaking. CBH is willing to fix that as a minimum capacity allocation for each of the 3 years of its Proposed Undertaking.

Under this process no more than 10 million metric tonnes of capacity would be available to be acquired through the LTA process. The remainder of capacity (including anything not taken up in the LTA process), being a minimum of 5 million metric tonnes, would be available for acquisition in the auction. Finally, anything not taken up in the LTA process or auction process, would be available at selected times during the year through the spare capacity process, or first-in first served process.

In light of the Proposed Undertaking and the commercial certainty provided by the LTA process, CBH is also investigating the ability to expand its capacity to 18 million metric tonnes per annum. If this can be confirmed prior to the commencement of the LTA process, then available LTA capacity may be larger in later years. If this cannot be confirmed in time for the LTA process, then it will be made available in the auction process in subsequent years, providing further assurance that small to medium exporters will continue to be well serviced in capacity. In any event, the capacity profile for each port and shipping window is set out in Attachment A.

3.2 LTA

Under the Proposed Undertaking CBH will enter into agreements with customers for the provision of Port Terminal Services on a long term basis. This will likely be for a period of 3 years. CBH's preference is for a period of 3 years as this will provide additional certainty to CBH to enable continued investment in the supply chain.

The key features of the Long Term Agreements (LTA) under the Proposed Undertaking are as follows:

- Guaranteed available capacity for near term acquisition in an auction capacity allocation system
- Tradability of capacity acquired under LTA's
- Ability to re-position capacity during the year
- No forced pro-rating of capacity in any given Quarter
- Spread across quarters and ports
- Open to all CBH customers

3.2.1 Guaranteed available capacity for near term acquisition

As part of this process CBH will ensure that there is a minimum of 34% of capacity offered at each of its port terminals in an auction system substantially the same as the current auction system. This minimum capacity offering will be by port terminal by shipping window. For example, if CBH has offered for acquisition 200,000 tonnes of capacity in a shipping window, not less than 64,000 tonnes of this will be available in near term agreements.

The data/analysis presented in section 4, illustrates that customers who are unlikely to take up the LTA will have more than sufficient capacity even if customers who do take up LTA capacity completely absorb all available LTA capacity. For risk related reasons associated with entering into

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a long term take or pay agreement, CBH considers that it is unlikely that all capacity that could be acquired in an LTA will in fact be acquired. In this instance there is likely to be remaining capacity following entry into LTA's that will then be auctioned.

In addition there are sufficient safeguards built into the process if there are demands by customers in excess of the available long term capacity allocations. One such safeguard provides CBH the discretion to defer the LTA arrangements for one year, before attempting to reach a commercially rational position in the following year. However, that demand may still provide a signal for further investment as has occurred with the long term contracts implemented at the Port of Newcastle in New South Wales in relation to coal export terminals.

In addition, any additional port capacity brought on by CBH through additional investments will be auctioned. Accordingly, with CBH's aim to increase its port terminal throughput capacity to 18 million metric tonnes per annum this would result in an additional 3 million tonnes being available for auction in any year. Even if all available LTA capacity in 2014 was allocated, that LTA capacity allocated would only represent 57% of CBH's total capacity.

3.2.2 No forced pro-rating of capacity

In order to avoid detrimental consequences of inefficient and uneconomical small parcels of capacity, additional industry costs in determining pro-rated capacity acceptability and trading capacity and to reduce incentives for customers to over estimate the quantum of demand for capacity, CBH has adopted different rules to those previously seen. If any given Quarter, or any month within a Quarter (relevant "window"), is oversubscribed, and following discussions between CBH and relevant participants, LTA participants do not wish to reduce or relocate their demand, then each oversubscribed window will revert to be auctioned.

In addition, the potential for the allocation to revert to the auction where demand for LTA capacity exceeds supply in a Quarter, it will incentivize LTA participants to spread their LTA application in both a geographic and a timing sense. To do otherwise will risk having the priority months auctioned whilst having capacity in lower demand months allocated. CBH considers that this will encourage more conservative and rational behavior by those seeking LTA capacity.

Following discussions with customers on the Proposed Undertaking and the introduction of LTA's CBH has taken on board that feedback and modified its proposal to add an interim step following receipt of all LTA applications. Instead of CBH merely reverting all oversubscribed Quarter's and months, CBH will discuss the demand profile with customers and offer them an opportunity to rearrange or reduce their LTA application. As soon as a sufficient number of moves or reductions have been made by customers so that the overall demand profile falls within the LTA capacity limits, CBH will allocate the LTA capacity to all applicants.

3.2.3 Tradability of capacity acquired under LTA's

CBH will permit tradability of LTA capacity following the first auction of each Season. That is, if a customer has LTA capacity in relation to the 2014/2015 year then following the first auction of 2014/15 season capacity, customers may trade any LTA Capacity in relation to the 2014/2015 season in no different manner than customers who purchased capacity in the auction. In this manner CBH has endeavored to ensure that LTA participants can trade capacity to other participants who may value the capacity more highly than the LTA participant, thus ensuring that capacity acquired through the LTA process which cannot be used will not be wasted. For additional detail on the operation of the secondary market during the course of the current and prior undertakings see Table 3 - Secondary Market in section 4.5.2 of this submission. It is clear from that information that the secondary market can reallocate the capacity of an entire LTA customer if necessary.

3.2.4 Ability to re-position

After the first auction has taken place, both LTA capacity and auction capacity may be traded and/or repositioned as per existing rules. As is currently the case prior to an auction on the release of the auction catalogue, repositioning requests will not be accepted until the auction result has been declared. This provides certainty of the capacity to be included in the auction. Following the

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declaring of the auction result, CBH advises customers that the repositioning ability will recommence, normally from 9:00 am on the next business day.

In this instance, by allowing repositioning on the same rules as auction capacity, CBH has provided a mechanism for the trade to mitigate some of the seasonal harvest risk associated with grain, whilst at the same time preserving the guaranteed available capacity for each auction and ensuring that LTA customers cannot block out windows prior to non-LTA customers having the opportunity to acquire capacity in the window of their choice.

Further, the operation of the repositioning rules is such that if LTA capacity is moved out of a window, the gap in capacity will be:

- auctioned;
- available for other customers to reposition capacity into; or
- capable of being acquired through the spare capacity allocation process.

3.2.5 Spread across quarters

As part of the LTA capacity, CBH is seeking customers to commit to a minimum of 3 quarters of the year as the spread requirements will act as a damper on volatility of exports across the year. Without this, CBH would potentially face very large swings in utilisation from month to month and quarter to quarter. However, CBH is not proposing to put in place overly prescriptive rules in an effort to ensure that LTA's remain commercially attractive and flexible to meet the varying needs of CBH customers.

As such CBH's spread rules merely require that a LTA applicant have no more than fifty percent (50%) of their demand in a single quarter, with their next largest quarter having no more than thirty percent (30%) of their demand.

A customer is not permitted to apply for more than fifty percent (50%) of overall LTA capacity, nor more than fifty percent (50%) of the LTA capacity at any month at any Port.

In addition, the Proposed Undertaking does not require customers to focus on any particular number of port terminals. Customers will be free to place their LTA demand where they consider appropriate, subject to the rules requiring a spread amongst quarters as well as not requesting more than 50% of all LTA capacity or LTA capacity in a month. This removal of a minimum requirement at any port terminal provides the maximum flexibility for customers by permitting them to allocate as few as one vessel a year a port. However, ultimately if customers place all their shipping requirements at a single port, the port will be oversubscribed and revert to an auction. It is therefore in the interests of customers' as a whole to spread their utilization across port terminals as they currently do in order to obtain the additional certainty to them provided by the LTA arrangements as further explained in section 3.2.7.

3.2.6 Open to all CBH customers

CBH's Proposed Undertaking is available to all customers providing they comply with the relatively few rules contained in the undertaking. CBH's customers exist in both the bulk wheat export market as well as other export grain markets and the differentiation that has arisen as a result of the wheat export deregulation has led to some inefficiencies. It is therefore in CBH's interests to provide a system that can be used for either bulk wheat or other grains. CBH notes that as has occurred with other bulk wheat exporters, there are efficiency benefits in allowing non-discriminatory rules that permit some customers to make a long term commitment to CBH's system.

Since the customers that are likely to take up long term capacity are those that acquire the majority of the wheat crop in each of the last five seasons, the proposed arrangements are in the interests of the majority of the current users of CBH's port terminal services and services by way of the port terminal facility.



The rules do not preclude others from applying for long term capacity, nor are those customers who are less likely to take up long term capacity prejudiced in any way as they would still have access to capacity being auctioned, or alternatively, could acquire capacity from customers with long term capacity. As a result of the ability to trade long term capacity, the overall allocative efficiency of the capacity allocation system will not be adversely affected by the Proposed Undertaking.

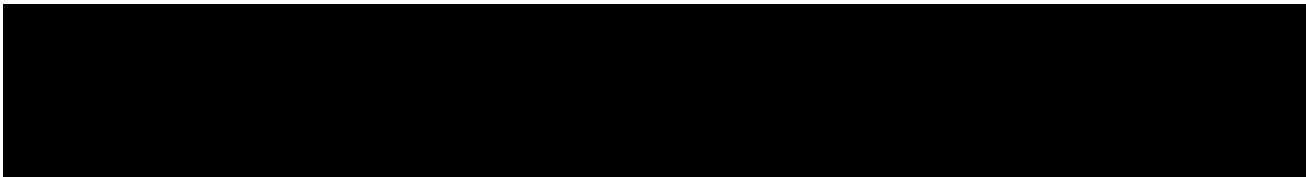
In this regard, the amount of capacity remaining to meet the demand of non-LTA customers is significantly greater than the average annual demand in both aggregate and percentage terms. As can be seen from Figure 9 in section 5.2, the average annual demand of likely non-LTA customers only totals approximately 725,000 tonnes or less than 7 percent of exports.

3.2.7 Longer term certainty

By offering a 3 year term with capacity booked for 3 years, CBH permits its customer to make a long term commitment to acquiring grain (including wheat) from WA growers. This will permit CBH's exporting customers to seek out international customers who are also looking for security of supply and thereby potentially obtaining premiums over the spot market.

Longer term certainty also provides a customer with the increased ability to invest in either accumulation networks, grower relationships, up country sites or logistics with the certainty of access over the entire period of the LTA. This will reduce the risk that a customer may acquire capacity in one year but not the next. Importantly, it also permits CBH to invest in these areas as well as its own port terminal facilities thereby providing a greater incentive to encourage productive efficiency.

Greater certainty of demand provides CBH greater confidence in making investment decisions into potential major maintenance programs at its port terminals. Examples of potential investments directly at port terminal facilities which LTAs will facilitate include:



Ultimately, investment by CBH results in additional jobs and expenditure in predominantly rural centres in Western Australia. The increased certainty in volumes provided by the LTAs will assist CBH in committing to this infrastructure investment.

3.2.8 Maximum take up

No customer can apply for more than 50% of the LTA capacity offered during the LTA capacity allocation process. This limit is consistent with the existing make up of customers of CBH. To have a lower cap would ultimately be discriminatory against existing users, which would have the adverse result of forcing CBH's trading division to acquire a higher percentage of its capacity in the auction process, thereby potentially overheating the auction. This would not be advantageous to the overall acceptance of the solution among industry. In addition, no Customer can apply for more than 50% of LTA capacity in a month, again preventing an LTA customer from blocking out a shipping window / month.

3.3 Auctions

CBH does not propose any major changes to the auction process to how it was run during the 2013/14 season. The auction take place later in the year than current and would be closer to a period when reasonable demand certainty was available and hence booking capacity was not as speculative. This would then allow a flexible response to global grain market dynamics for participants in the auction process.

All customers with a valid agreement with CBH would be able to participate in the auction. Each auction would have its own auction rebate, thereby permitting a minimum degree of certainty to the potential auction rebate.

CBH envisages that with the removal of the majority of the large customers demand through the LTA process, that all parties participating in the auction will have a greater homogeneity of demand (in both spread and quantum) which should make for smoother and more efficient auctions

Accordingly, CBH anticipates that the auction experience for small to medium exporters should generally be better as a result.

3.4 Pricing

3.4.1 Non discrimination between LTA and auction capacity pricing

CBH proposes to retain the same pricing per tonne of capacity utilised to load vessels irrespective of the manner by which a customer acquires the capacity. Due to the differences in the timing of the acquisition of capacity there will be differences in when a party pays the up-front marketer fee. In effect this will mean that there is a time value of money to take into account. However, aligning the payment of the up-front marketer fee with the capacity acquisition is necessary to ensure that speculation is discouraged and that capacity is not hoarded by customers without any financial cost (and also that CBH is not disadvantaged by reason of providing a long term commitment).

It is proposed that in year 1, LTA customers would immediately pay the up-front marketer's fee in respect of all LTA capacity acquired in the first season (ie 2014/15 in the first year of the Proposed Undertaking). Then each June CBH would invoice the customer for the next year's worth of up-front marketer's fees for all LTA capacity held for each subsequent season. If a customer failed to pay the up-front marketer's fee in accordance with the invoice, CBH may elect to terminate the LTA contract and release any capacity into the auction.

Payment of the up-front marketer's fee for auction capacity acquired would remain in accordance with current processes.

3.4.2 Publication of pricing

Consistent with current arrangements, CBH must publish on an annual basis the prices and standard terms for standard Port Terminal Services. The Proposed Undertaking does not require prior regulatory approval to the price of the services. The reasons why this is appropriate are explained below.

Annual publication of pricing for standard Port Terminal Services is appropriate because:

- it provides transparency in the provision of Port Terminal Services which facilitates *ex post* monitoring to confirm CBH has not engaged in discriminatory pricing and promotes efficient negotiation and timely agreement on the terms of access to the port terminal by competitors operating in the market for services provided by CBH;
- access seekers are well resourced and have the knowledge, experience and resources to assess and negotiate terms and conditions of access;
- as there are up to 20 ports nationally involved, and a range of divergent business and operating models used by CBH and other bulk handlers in providing Port Terminal Services, it is not

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practicable to undertake a uniform price determination exercise for each port in an attempt to determine an efficient price in advance of such negotiations; and

- to the extent disputes may arise, access seekers will have clear and ready recourse to binding arbitration.

In the context of the way that CBH has and continues to provide access to Port Terminal Services for the export of bulk wheat, the regulatory costs of undertaking *ex ante* regulation of prices outweighs the benefits. This is particularly the case given that:

- the legislative framework of the WEMA itself leans towards light-handed regulation as evidenced by the continuous disclosure rules which are cast as an obligation to publish only;
- there is a history of open access on reasonable terms and conditions;
- CBH businesses are volume-driven and there is no incentive to turn away customers with volume, but rather an incentive to encourage increased throughput volumes;
- Port Operators have historically faced wheat exporters with considerable countervailing power and will continue to do so;
- the commitment in the Undertaking not to discriminate between wheat exporters ensures that a Port Operator cannot charge other wheat exporters monopoly prices to subsidise its own wheat export business. Furthermore, as Australian wheat exporters (including the Port Operators' wheat export businesses) face a competitive global market for bulk wheat, this imposes a constraint on the maximum price that a Port Operator can charge its own bulk wheat exporting business. Any attempt to charge a monopoly price for Port Terminal Services will lead to a reduction in wheat exports, and or reduced revenue for growers;
- the threat of arbitration and/or heavier-handed regulation is a powerful disincentive against monopoly pricing (to the extent that is possible in the first place); and
- growers are constantly questioning supply chain costs.

3.4.3 Publication of Standard Terms is appropriate

CBH's proposed Standard Terms for the provision of the Port Terminal Services is annexed as **Attachment C**. Those terms incorporate the Port Terminal Rules. The Proposed Undertaking requires CBH to offer the Port Terminal Services on those terms and at the Reference Prices in response to a request from an accredited marketer. This mechanism provides certainty and transparency.

Flexibility is achieved through the ability of access seekers to negotiate terms through the process specified in the Proposed Undertaking, and any changes from the Standard Terms are subject to non-discrimination principles. The Port Schedules specify the service definition by reference to the infrastructure present at each port.

The Proposed Undertaking does not preclude an access seeker requesting non-standard services or amendments to the Standard Terms. If there is a request for non-standard services, the Applicant is required to negotiate in good faith with the availability of binding arbitration should negotiations fail.

LTA customers will have certainty of contractual terms for three years once they have signed up. In addition, it is CBH's intention that the Standard Terms will remain constant for three years and that CBH will not have to revise them other than for small changes to be consistent with regulatory and legislative changes and such changes will occur in accordance with existing processes.

3.5 Key features of the Proposed Undertaking

3.5.1 Capacity management

As noted previously, there is generally excess capacity at each export grain terminal operated by CBH, except for short periods of peak demand. The ports operate through port allocations being given in accordance with published non-discriminatory protocols.

There are two key mechanisms for capacity management on which the Access Undertaking relies:

- the Port Terminal Rules; and
- the shipping stem,

both of which are in the public domain.

The Proposed Undertaking obliges CBH to publish these documents and therefore CBH is subject to oversight by customers as a result of the WEMA and by the ACCC under the Proposed Undertaking.

The continuous disclosure rules under the WEMA require a current statement setting out the Port Operator's policies and procedures for managing demand for the Port Terminal Service (including policies and procedures relating to the nomination and acceptance of ships to be loaded using the Port Terminal Service).

As discussed above, CBH is obliged to publish the shipping stem which includes information concerning the nomination and scheduling of vessels for each port and which is updated on a daily basis.

In both cases, this provides transparency regarding the operation of the port and the port allocation and enables wheat exporters to ensure that the Applicant is complying with its obligations under the Port Terminal Rules and management of the shipping stem.

The approach to capacity management and scheduling that is adopted in the Proposed Undertaking is designed to strike an appropriate balance between:

- the need to ensure non-discrimination in relation to operational matters such as the priority of trucks and trains into unloading facilities, the mobilisation of staff to attend to grain movements within port facilities and the movement and loading of vessels in the shipping stem; and
- the need for the Port Operator to maintain some degree of appropriate flexibility in relation to port rules so that operational decision making does not become mired in administrative complexity or victim to gaming by access seekers.

The starting point for this analysis is the principles of non discrimination that are prominent in the Proposed Undertaking (see clauses 6.4, 9.2, 9.3 and 9.4). The Proposed Undertaking contains clearly expressed and mandatory non discrimination requirements, which may be applied directly to the conduct of CBH. Importantly, these non discrimination principles apply both to the negotiation of terms and conditions of access and also at the day to day operational level of decision making in relation to capacity management and scheduling.

A number of inherent safeguards exist to ensure these obligations will be complied with. The Port Terminal Rules themselves are required to be published by the Port Operator. This provides access seekers and potential access seekers with the opportunity to object to any current provisions of the Port Terminal Rules or to any changes to the Port Terminal Rules once made. Operational decisions are subject to a dispute resolution process under the Standard Terms.

Many of the operational decisions which will be subject to the rules take place in a public and transparent manner, both as a consequence of the disclosure requirements introduced under the WEMA, and as a result of the fact that scheduling and queuing, particularly of trucks, takes place in view of other users of the port facilities. Were the Port Operator to operationally favour the trading business in relation to the shipping stem, that conduct would be detectable and likely to give rise to public complaint. Since the initial requirement to publish shipping stem information, CBH has been

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asked on a frequent basis to explain changes to the stem. It has also been audited for compliance. Intense scrutiny is already applied to shipping stem decisions by an informed market and.

The Port Terminal Rules has been drafted for the purpose of the Proposed Undertaking in an environment in which continuing substantial changes are occurring at multiple levels of the export wheat industry. Against this background, it is unrealistic to expect a Port Operator to have comprehensively and finally determined the precise form of its Port Terminal Rules such that they would require no amendment for the duration of the Proposed Undertaking. Accordingly, it is essential for the efficient operation of facilities that Port Operators have a mechanism to amend Port Terminal Rules where appropriate, and without having to provide a new or amended Proposed Undertaking.

However, it is appropriate for any changes to the Port Terminal Rules to be made in accordance with the non-discrimination principles embodied in the Proposed Undertaking, to be made publicly and for decisions in relation to Port Terminal Rules to be subject to an appropriate dispute resolution process. All of these measures are embodied in the Proposed Undertaking.

3.5.2 Service definition

The definition of the Port Terminal Service is in clause 5.1(b) of the Proposed Undertaking which in turn refers to the Port Schedules. The Port Terminal Service has two particular features warranting further explanation:

- the Port Terminal Service is for the purpose of cargo accumulation for export only; and
- the Port Terminal Service is most efficient if it involves co-mingling. The Proposed Undertaking allows CBH to co-mingle the wheat of an access seeker with the wheat of other users, in certain circumstances as set out in the Port Terminal Services Rules.

The limitation of the storage service to cargo accumulation purposes is a response to the export focus of the WEMA and the limited storage capacity of the Port Facilities. Storage for purposes other than cargo accumulation may occur in other locations, including on-farm storage facilities.

When deliveries to a port terminal come from outside of CBH's supply chain, CBH may not be in a position to verify the condition of grain brought to the terminal by an access seeker. For grain delivered by the CBH supply chain, CBH knows the identity of the grower, has detailed quality and fumigation status of the grain and has coordinated the movement of the grain to port. For grain brought to port by an access seeker, CBH has no such knowledge or assurance. Segregation of the grain reduces CBH's risk of contaminating its facilities or other customers' grain, if delivered grain is contaminated or of reduced quality. Contaminated grain in CBH's conveyor system has the potential to close a port terminal while facilities are cleaned. This imposes costs on CBH and other users of the facilities, some of which costs (such as damage to reputation) may not be calculable or readily compensable. In order to maximize efficiency CBH reserves the right to co-mingle grain and to charge service fees in order to test or weigh the grain to allow co-mingling where the grain is from outside of the CBH network.

3.5.3 Non-discriminatory access

Under the Proposed Undertaking, CBH must provide access in accordance with price and non-price terms that include efficiency, fairness and transparency as central elements.

CBH must not discriminate⁴ between access seekers in favour of its own operations. This principle applies not only in the context of access negotiations (clause 6.4) but in the context of operational decision-making in the performance of an access agreement (clause 9.2, 9.3 and 9.4).

⁴ Operationally, the Proposed Undertaking recognises that decisions must be taken that will necessarily advantage one user over another in the context of that decision alone. However, the Proposed Undertaking provides a mechanism for preventing preferential self-dealing and ensuring decisions are made on objectively verifiable commercial factors.

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In relation to the negotiation of price and non-price terms and conditions, the starting point is the published standard terms and conditions for Port Terminal Services. To the extent that additional costs have to be incurred, or efficiency savings made when providing services to users, the Proposed Undertaking provides that these cost variations are to be reflected in the published prices available to Applicants and users. This approach is consistent with the pricing principles set out in section 44ZZCA of the CCA.

The Undertaking also recognises that it can be appropriate for Port Terminal Services to be provided to different users on differentiated terms, reflecting the particular requirements of each user. Again, this approach is consistent with the pricing principles set out in section 44ZZCA of the CCA and promotes efficiency in the use of Port Terminal Services.

The non-discriminatory nature of existing access to the Port Terminal Services is evidenced by the number of wheat exporters which are active participants in the wheat export market and the lack of any substantive disputes in relation to the operation of the Port Terminal Services..

3.6 Key CCA criteria for the proposed undertaking

3.6.1 The objects of Part IIIA of the CCA

To the extent that Port Terminal Facilities cannot be economically duplicated, an undertaking to provide access to services from those facilities on transparent and non-discriminatory terms would promote the economically efficient use of those facilities and promote competition in vertically related markets, thereby promoting the objects of Part IIIA.

However, the assumption that Port Terminal Facilities cannot be economically duplicated has not been borne out notwithstanding that an assumption to that effect appears to underlie the inclusion of the access test in the WEMA. The recent Final Report of the Productivity Commission highlights concerns in this sector that the standard national competition principles relating to access were not first considered.

CBH considers that there is not only scope for new entry, but that new entry has occurred⁵ and there is potential for inter-port competition in grain flows.

In this situation, the extent and nature of access undertaking requirements warrants reconsideration, at the very least the granting of greater flexibility to CBH. CBH submits that the Proposed Undertaking, and in particular the LTA aspects, will promote the economically efficient operation of, use of and investment in bulk wheat export terminals and thereby promote effective competition in upstream and downstream markets.

3.6.2 The pricing principles specified in section 44ZZCA of the CCA

The Proposed Undertaking continues to require that access to Port Terminal Services be provided on non-discriminatory terms. It has provisions specifically prohibiting CBH from discriminating in favour of its own business. These provisions are in the same form as prior undertakings as well as undertakings offered by similar port terminal operators.

This, together with a binding dispute resolution process, will continue to ensure that CBH provides access at prices which generate expected revenue for Port Terminal Services that is at least sufficient to meet the efficient costs of providing access to the Port Terminal Services, including a return on investment commensurate with risk.

The dispute resolution process provides a mechanism for pricing to be tested and, if appropriate, amended in order to ensure cost-reflective and non-discriminatory pricing. However, the reality is that pricing is broadly in line with equivalent terminals in other states when the totality of services is considered.

⁵ See section 5.1 of this submission.

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Accordingly, the published pricing in relation to CBH's prior undertakings has demonstrated that CBH is not primarily focused on increasing the price for Port Terminal Services in order to obtain disproportionate returns. Accordingly there should not be any reluctance by the ACCC to continue to permit CBH to have the flexibility to set its pricing in or around August each year on the basis of a non-discriminatory approach outlined in the Proposed Undertaking. Such an approach minimises the impact of regulation on CBH and is consistent with the Pricing Principles set out in CCA section 44ZZCA.

3.6.3 The legitimate business interests of the provider

CBH believes that the following legitimate business interests of CBH are relevant to the ACCC in assessing the Proposed Undertaking:

- CBH should be subject to regulatory compliance measures and costs that appropriately reflect the nature and size of its business and the extent of competition concerns in practice, giving rise to the nature and extent of its regulation;
- CBH should not be required to subsidise the Port Terminal Service with efficiencies generated by its other business activities;
- CBH should be permitted to reach longer term agreements with customers in order to achieve a measure of certainty over future revenue flows and achieve appropriate returns from additional investment;
- CBH should be entitled to impose appropriate measures to address risks and costs flowing from the provision of the regulated service; and
- CBH should be able to maintain operational flexibility in order to respond to changing circumstances for the purposes of efficiency.

CBH has never unreasonably refused access to its Port Terminal Facilities. In relation to its services generally, CBH is required to give access and to receive grain by the Bulk Handling Act and CBH operates infrastructure that has a large fixed component such that it is in CBH's interests to attract as much grain as possible to increase throughput in order to minimize those costs.

As a co-operative, CBH's goal is to deliver benefits to its members and this is directly relevant to assertions that it has incentive to engage in inefficient practices such as discrimination. CBH discriminating against exporters would be in direct conflict with its obligation to its members. CBH grower members pay the real price of supply chain inefficiency in the form of reduced returns from grain that becomes less competitive in a global market. The significance of CBH's co-operative structure should not be understated.

3.6.4 The public interest

CBH believes that the public interest is served by a prudent approach to regulation that:

- appropriately considers the practicalities of prescriptive regulation, the burden of compliance on export industries and the risk of regulatory error;
- promotes the economically efficient investment in Port Terminal Services;
- incorporates measures that are reasonably proportionate to the competition concerns giving rise to regulation.

In this case, the relevant regulation arises not from a declaration process, a contravention of Part IV of the CCA or a Productivity Commission review. The regulation continues notwithstanding the Productivity Commission review following a period of sweeping industry change and in an export industry that is important to the national interest. In these circumstances, the risk of detriment from regulatory error or disproportionate compliance costs is clear and present. Further, it remains to be seen whether the Commonwealth will revoke the requirement of an access undertaking in favour of a more uniform application of a code of conduct.

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In the circumstances, and given that less extensive regulation may well be adopted at the option of the Commonwealth as part of the proposed Code, CBH submits that the Proposed Undertaking represents a balanced approach. In substance, history shows competition concerns have been tested and shown to be low given the lack of utilization of the prior undertaking's dispute resolution processes by industry participants, which are well resourced and informed.

3.6.5 The interests of persons who might want access to the service

CBH has consulted extensively with customers and potential customers over the last 5 years and has conducted meetings in relation to the Proposed Undertaking in order to ensure that industry is generally accepting of the Proposed Undertaking and LTA arrangements prior to providing them to the ACCC. Further, CBH will continue to provide access to Port Terminal Services to any wheat exporter that meets reasonable prudential requirements. Existing users and potential users are both adequately protected by the requirement to publish pricing for standard services, the obligations not to discriminate and the detailed negotiate/arbitrate mechanisms. It is also important to recognize that there are significant disparities between users of the wheat export services provided by the port terminal facilities including CBH's own trading and marketing division. As a long standing significant user of CBH's facilities, any access undertaking cannot be tilted against CBH's trading division.

Further, it is important to note that CBH's trading division is forced to compete against other exporters in the global market for the sale and shipment of grain. It is unlikely any of the vertically integrated exporters would allow CBH's trading division an equivalent level of access to equivalent facilities overseas. In addition, CBH notes that Bunge has access to services from its own port terminal facilities at Bunbury, Western Australia that it does not appear obliged to provide access to.

If access to Port Terminal Services is tilted against CBH's trading division this will not aid increased competition in the global grain market. Ultimately such a course will increase the concentration of the major global wheat exporters, leading to a decrease in competition for WA grower's wheat.

CBH considers that ultimately access seekers want certainty – certainty of terms, certainty of price fairness, certainty of non-discrimination and the certainty of disciplined processes for negotiation and dispute resolution. The Proposed Undertaking provides all of these elements.

3.6.6 Regulatory change amendments

CBH has sought to include a provision which allows CBH to apply to the ACCC for the withdrawal or amendment of the Proposed Undertaking if a Code is implemented or another change in Government policy occurs which affects the operation of access to CBH's Port Terminals. The intention behind this is to provide CBH with greater certainty in addressing regulatory change, reduce the extent of regulatory costs arising from such change, retain for the ACCC an appropriate oversight in relation to those proposed changes, and to give CBH the opportunity to avoid duplicative regulation.

CBH is already concerned that elements of the administration of the WEMA are creating an unlevel playing field for competition between businesses and these regulatory distortions should be avoided.

4. Benefits of Proposed Undertaking

4.1 Encouragement of investment in infrastructure through additional commercial certainty

The Proposed Undertaking while largely retaining the existing provisions adds, through the LTA arrangements, increased commercial certainty for both CBH and customers to invest in the port terminal facilities as well as upcountry infrastructure.

The proposed changes will provide CBH with a greater long term understanding of demand signals and industry participants certainty of likely access requirements. This provides CBH with improved incentives to make further investments to increase capacity at its ports. Increasing the capacity whilst providing additional checks and balances to avoid excessive volatility in demand from month to month is more efficient and in the legitimate business interests of CBH. There is demand to increase capacity in key months, especially for large harvest years, but such increase poses threats of significant periods of no utilisation in small harvest years. It is not in the interests of a reasonable port operator to have a facility that does not operate for extended periods of a year, as this results in difficulty retaining staff together with higher unit costs.

In addition to the impact on port facilities, allowing this discussion and long term commitment to occur, provides incentives to CBH to make additional commitments in related markets including the provision of grain transport from CBH sites to CBH ports and investments in CBH up-country sites that will facilitate increased grain outloading capabilities to meet the increased port capacity offered. These benefits are not limited to CBH, with increased certainty on port access potentially allowing CBH's customers to invest in an expansion of up-country supply chain capabilities to move grain from CBH sites (or their own sites) to CBH ports.

Further, any increase in throughput capacity at a port terminal will ultimately result in an increased ability for exporters of WA grain to access the global market at a time of increased premiums. Therefore allowing capacity allocation processes that encourage further investment by the port terminal provider will have benefits in related markets and permit WA growers to potentially receive higher prices. Figure 1 shows the volatility in the wheat price over time from Kwinana and how increasing exports in a given month when prices are high can produce benefits for WA growers in customers can capture those higher prices.

Preventing CBH from offering LTA's whilst such an option remains open to its unregulated competitors increases the regulatory distortion that CBH is subject to as a result of the WEMA obligation on CBH to have an access undertaking in place.

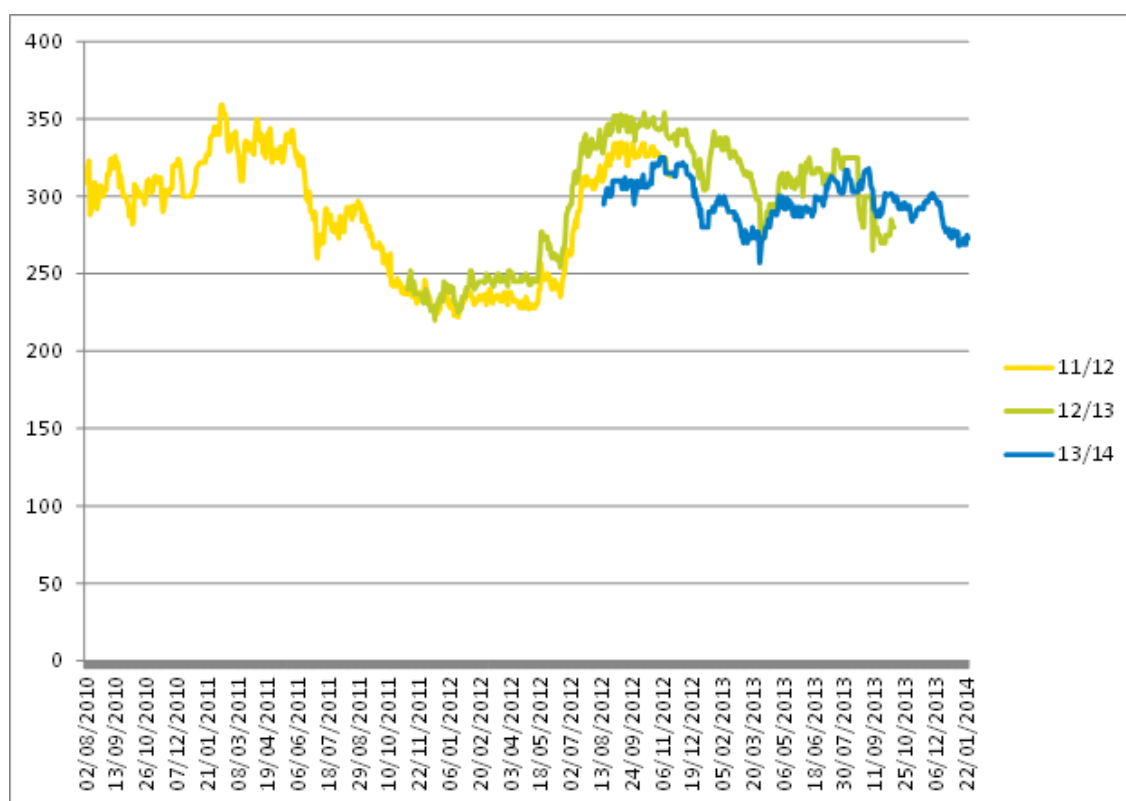


Figure 1 - Kwinana APW2 pricing over time

4.2 Certainty of marketing

Exporters will also benefit from LTA's as their increased certainty of access will allow longer term marketing plans for key customers through the ability to provide consistent exports at specific ports and months. Consistent access may, for instance, encourage marketers, shippers or end users to implement a regular cargo service to take grain from Western Australia to its destination.

Further, some global customers may not wish to contract to receive supplies on a long term basis from exporters operating out of Western Australia as they may be aware that those exporters have no certainty that they can acquire port capacity. In this case if the Proposed Undertaking is accepted longer term contracts for the supply of wheat and other grains out of Western Australia can be entered into with a significantly lower execution risk.

4.3 Likely reduction in auction premium payments

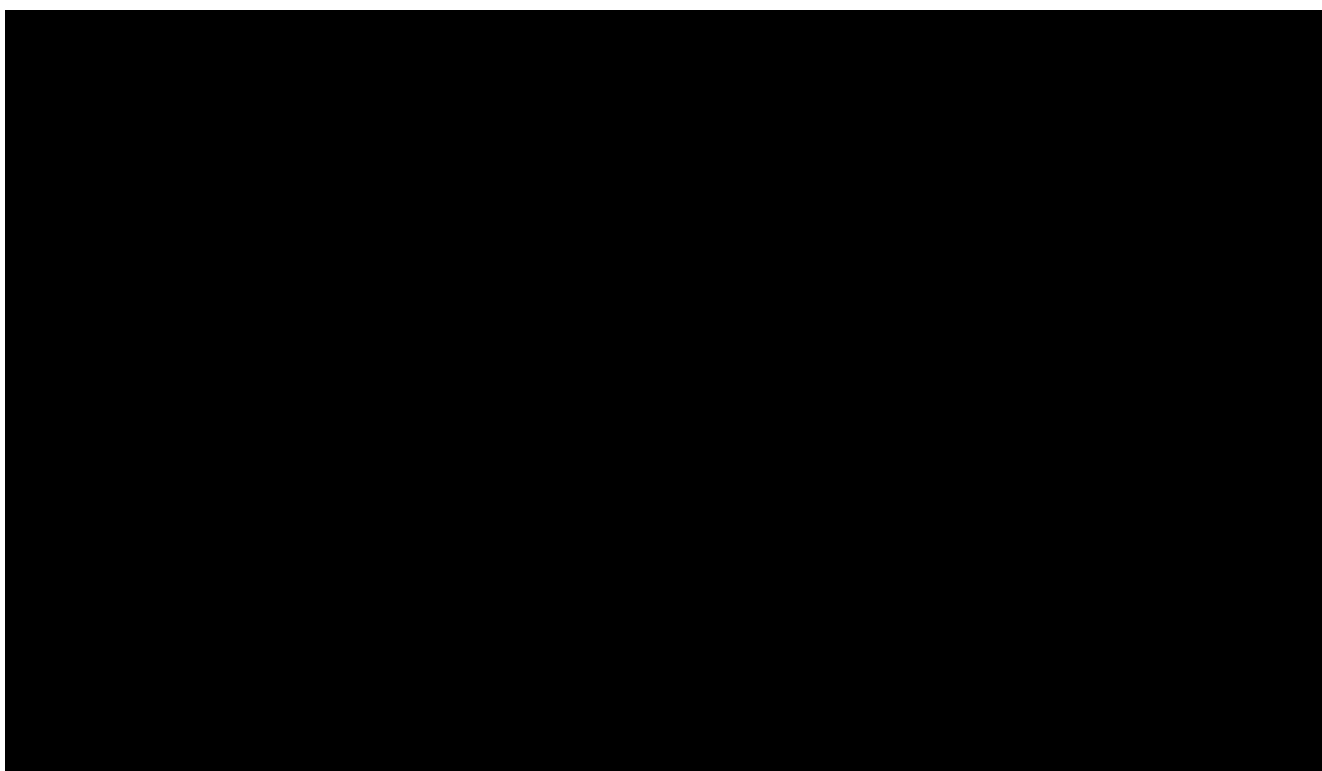
A key benefit of the LTA process is that CBH envisages a lower quantum of auction premiums will need to be retained by CBH. In prior years the scale of the auction premium retained by CBH has been significant. Although CBH does accrue interest on the funds retained, customers have commented that this is a significant issue and that they would like CBH to address this issue.

Whilst CBH has made some changes to try and reduce this impost of the auctions, further reductions in total quantum of auction premium retained, at least initially following auctions, is only possible by reducing the number of tonnes on which auction premium is paid. Moving auctions further forward will only increase the length of time that auction premiums are held for and would therefore not be acceptable solution for CBH or the industry generally.

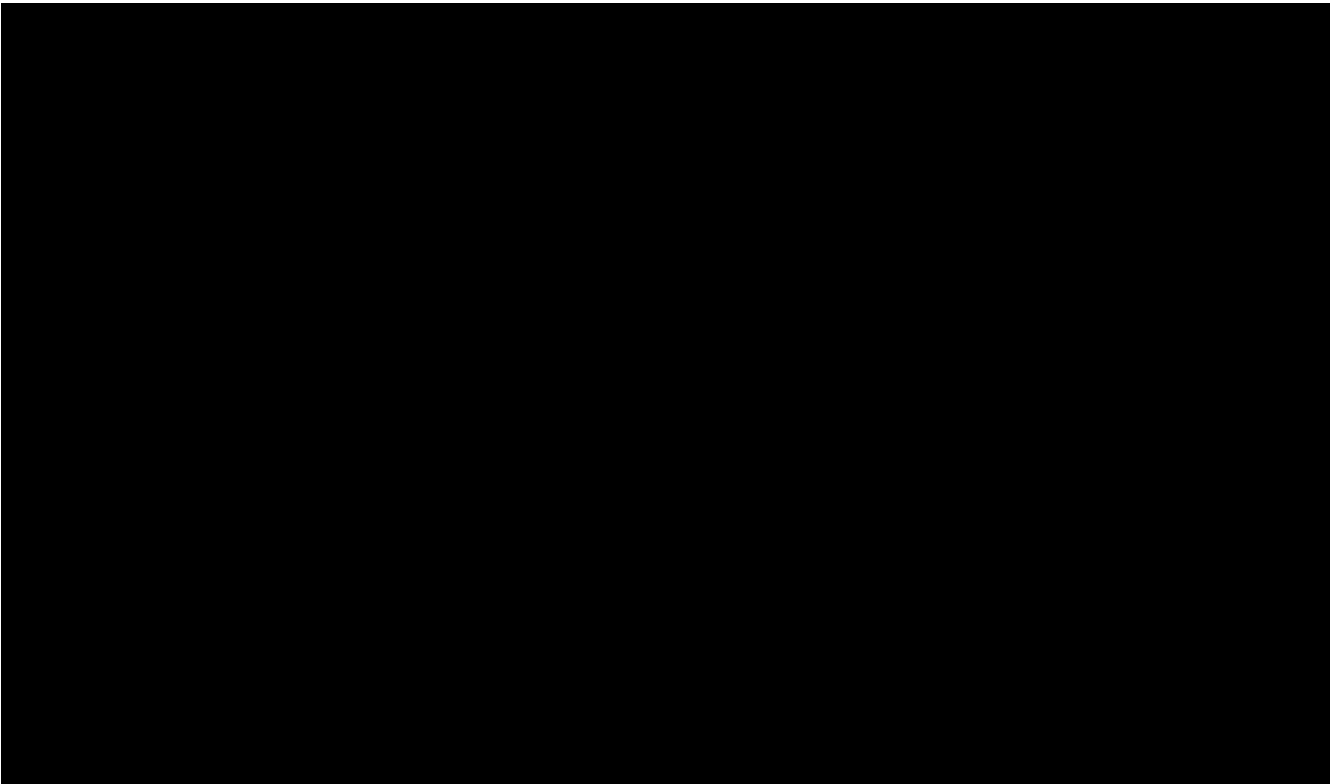
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Table 2 - Auction Premiums

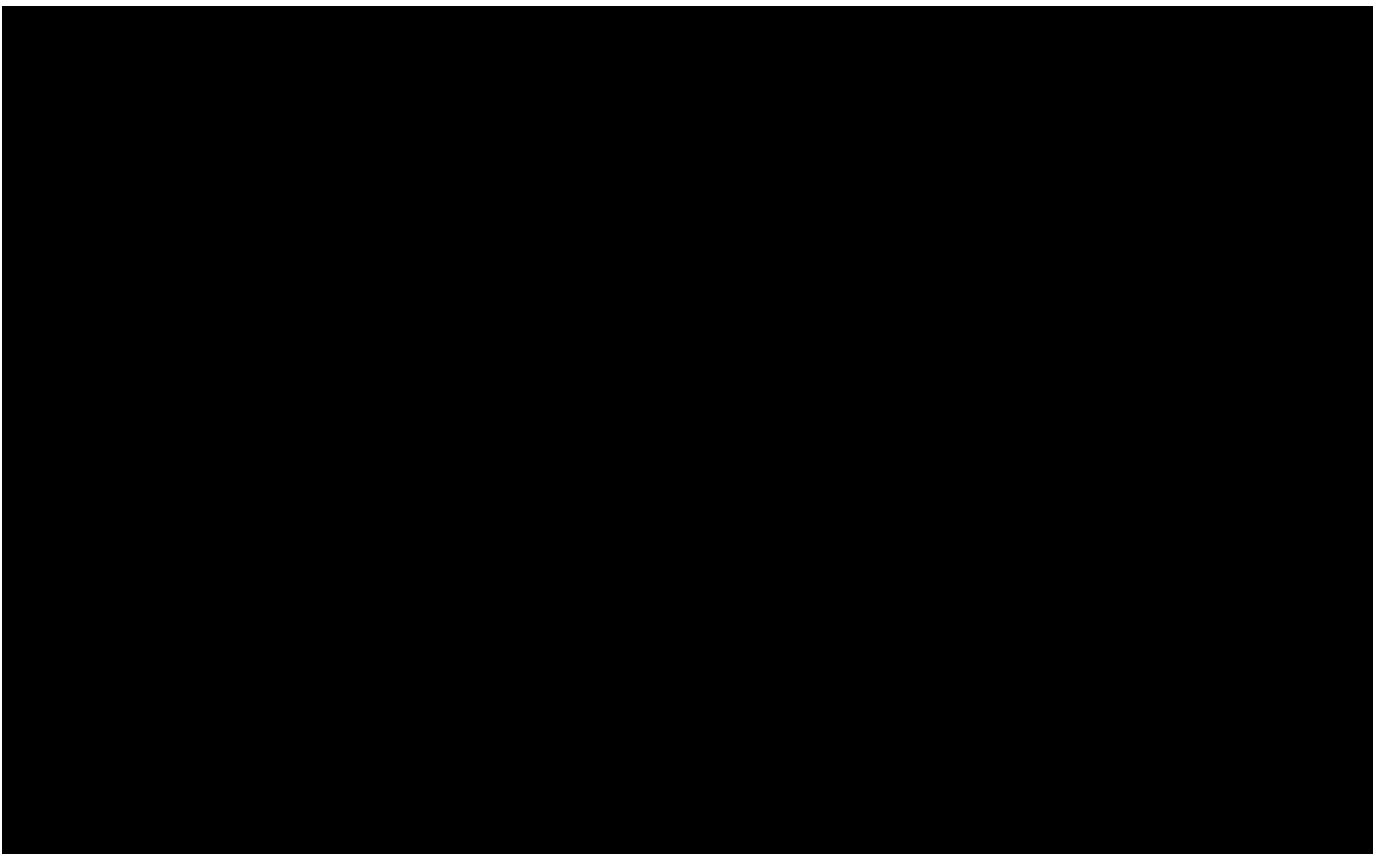
Season	Harvest Premium	Annual Premium	Total Premium
2009/10	n.a.	\$47,432,500 \$12,801,000 \$1,710,000 \$25,000 \$83,000	\$62,051,500
2010/11	\$0	\$ 112,500	\$112,500
2011/12	\$ 5,723,500	\$98,228,000 \$19,260,500	\$123,212,000
2012/13	\$12,628,000	\$178,660,500 \$664,500 \$517,500	\$192,470,500
2013/14	n.a.	\$46,132,500.00 \$2,392,500 \$3,664,000 \$917,000	\$52,189,000



An examination of Figure 2 shows a generally low utilisation by the small to medium sized shippers in a year where auction premiums fell away significantly in later auctions leading to significant disparity in the effective auction premium rebate between later auction participants and earlier auction participants. This was a larger than normal harvest and yet average premiums were significantly lower in later auctions. In contrast, Figure 3 demonstrates a low demand year where both demand and premiums were low.

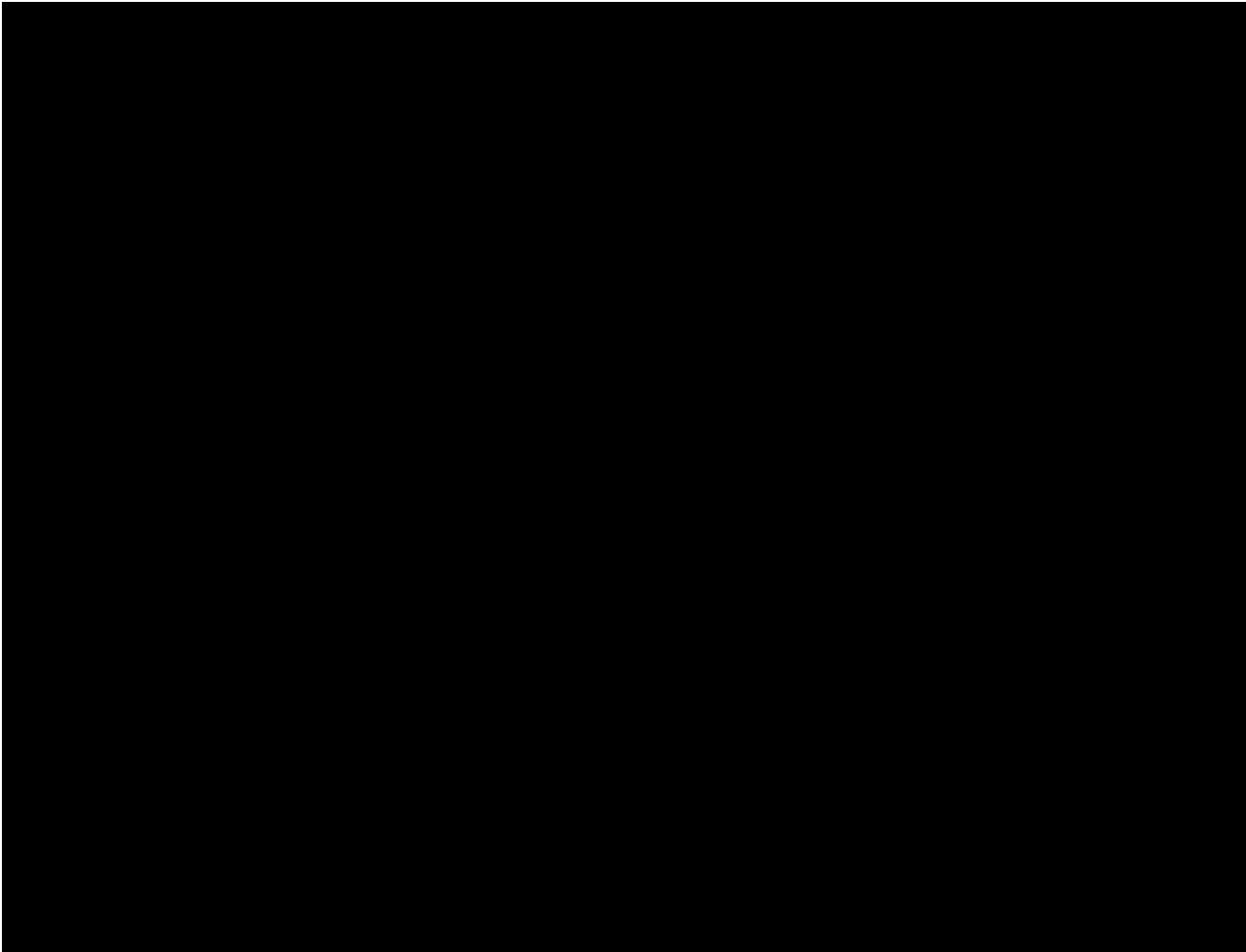


However in 2011/12, a large harvest and significant demand resulted in generally high auction premiums with the classic demand profile shape. In this season's auctions there was a significant collection of auction premiums with a total of \$123,212,000 paid in by industry.

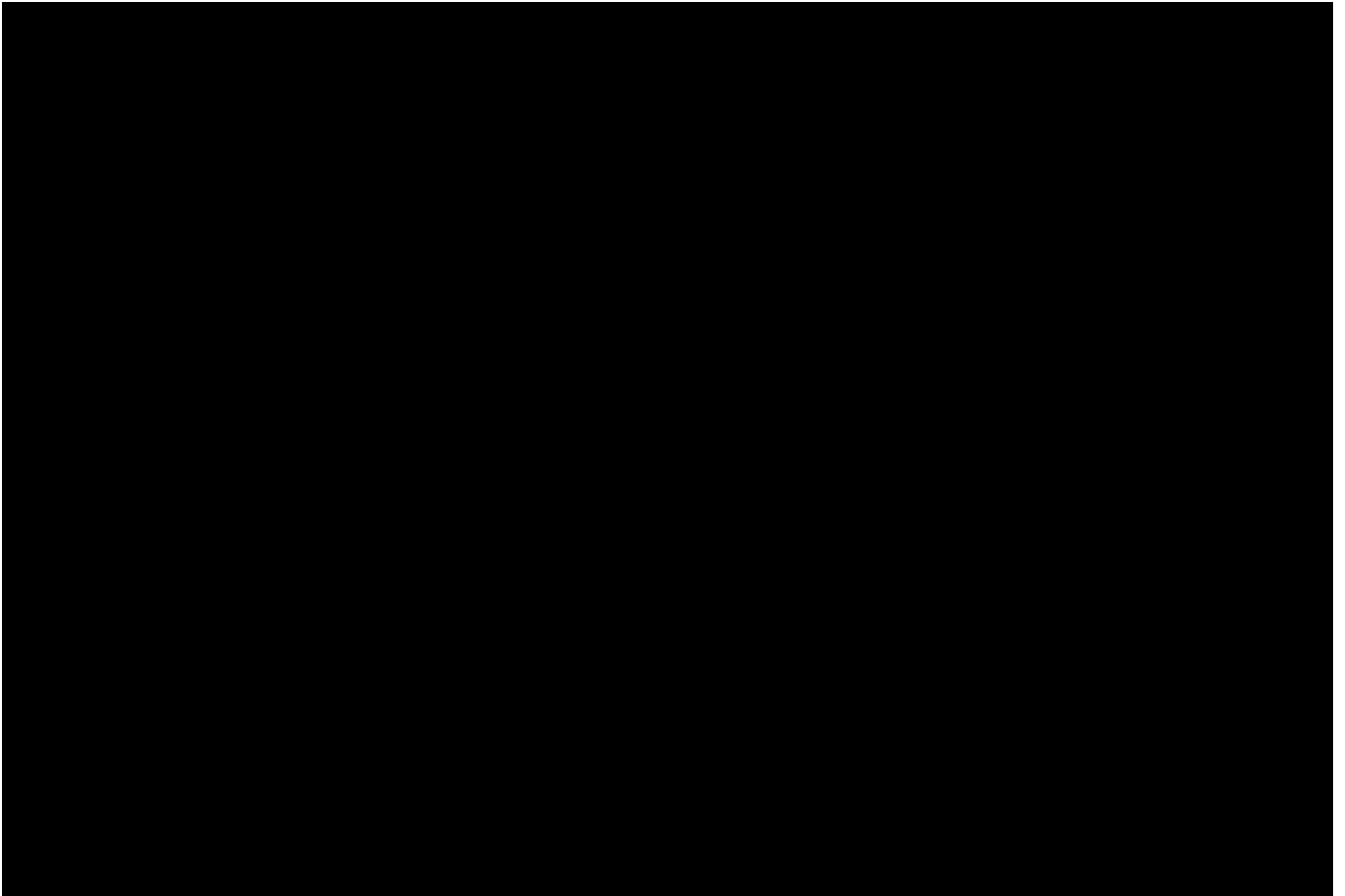


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In 2012/13 a smaller than average harvest resulted in record auction premiums being collected with \$192,470,500 being paid in by all exporters. This auction appeared to be characterised by numerous marketers endeavouring to increase market share.



Finally in 2013/14, a lower level of auction premiums being \$52,189,000 has been collected in the auctions run to date. Whilst an improvement on the prior years, it remains too high in the opinion of CBH. Each auction in the 2013/2014 season has its own auction premium rebate so the potential for gaming of the auction has been reduced.



If the Proposed Undertaking is implemented, CBH expects that the demand in auctions, particularly in low harvest years, will be effectively non-existent, with non LTA customers able to collect capacity either in the auction with little to no premium, at the last minute with spare capacity, or alternatively from LTA customers who wish to minimise their execution risk by selling off some or all of their LTA capacity.

In medium demand years (or average harvest years) demand in auctions should be low as total capacity will still significantly exceed harvest size. Accordingly, non-LTA customers will have sufficient available capacity to acquire in order to meet their demand. Even if all LTA capacity was taken up (which CBH does not expect), the capacity provided to LTA customers would be sufficient to meet all likely acquisitions by both LTA and non LTA customers. There would also be an additional approximate 50% extra capacity that would be auctioned creating significant incentives for willing LTA customers to enter binding commitments to sell LTA capacity post auction to ensure take or pay charges are not triggered.

Whilst CBH does not wish to see capacity acquired and unused, this same risk of overallocation presently exists in the auction system, where the industry can acquire more capacity than there is grain to be shipped.

4.4 Proposed Undertaking is a sensible way forward for the industry given current uncertainty

Progressing towards LTA agreements will be a further step in creating additional certainty in the wheat export industry in current times with the uncertain timing of the proposed Code. It is helped that the LTA agreements will facilitate future commercial investments based on additional commercial certainty and, in particular, potentially leading to bi-lateral agreements between the port operator and customers being consistent with more usual practice. CBH spends a significant amount of time describing to potential customers how the capacity allocation process and, in

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particular the auction process works. Most customers would prefer to be able to negotiate an agreement with CBH and then to perform against that agreement.

With the additional port terminal operators commencing in Western Australia, as in other jurisdictions, CBH envisages that a time will shortly come when complicated capacity allocation mechanisms are not seen to be required and will create more regulatory distortions than benefits. At present CBH faces real constraints from actual and potential competitors to retain tonnes in the network and minimise the impact of the significant fixed costs it has in its facilities, and even in opening its facilities each and every day.

4.5 Prior ACCC concerns

CBH has also analysed the ACCC's comments in relation to its approval of GrainCorp's LTA process as well as prior comments in relation to CBH's earlier and different baseload capacity process. As a result of that analysis, CBH has identified and taken into account the key concerns that the ACCC had in relation to those proposals based on public documents. CBH has sought to ensure that its Proposed Undertaking sufficiently addresses the concerns for the reasons set out below.

4.5.1 No shrinkage of available auction capacity

Under the Proposed Undertaking there is a guaranteed minimum capacity for auctions, which capacity can be seen to be significantly in excess of the current scale of the customers most likely to continue to use the auction. The shrinkage of auction capacity is no longer possible under the Proposed Undertaking.

In addition, any additional port capacity brought on by CBH through additional investments will be auctioned. Accordingly, with CBH's aim to increase its port terminal throughput capacity to 18 million metric tonnes per annum this would result in an additional 3 million tonnes being available for auction in any year. Even if all available LTA capacity in 2014 was allocated, that LTA capacity allocated would only represent 57% of CBH's total capacity.

4.5.2 Transferability mitigates against wasted or lost capacity

Given the Proposed Undertaking permits transfer of LTA this can no longer be a potential issue. Further the potential for transferability of LTA capacity will also impose a measure of reality to the auction and permit the market to have the capacity utilized by the exporter that most highly values it. As previously indicated, even in a year where there is a high demand for capacity, a LTA customer must either acquire the grain or the capacity to avoid a loss.

Further the secondary market for port terminal capacity appears to be functioning appropriately and without any significant barriers.

Table 3 - Secondary Market

Season	Tonnes transferred	Number of transfers
2009/2010	581,000	29
2010/2011	50,000	3
2011/2012	585,500	21
2012/2013	786,950	38
2013/2014 ⁶	512,945	18

⁶ 1 November 2013 to 31 December 2013

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4.5.3 No increased barriers to entry

There are no increased barriers to entry posed by the LTA capacity allocation process or the requirement for a minimum commitment of 600,000 metric tonnes. The LTA process merely provides a shipper the potential to export a cargo that is equivalent to a single panamax vessel (50,000 tonnes) per month at one port. Setting the qualification Feedback to CBH from customers is such that when bidding for capacity customers tend to work in multiples of 50,000 tonnes. Further details are set out in section 5.1.3.

Further, the Proposed Undertaking permits customers to acquire capacity off both other LTA customers and off auction participants. Therefore there is potential for the secondary market to re-adjust if a subsequent party requires additional capacity and would utilize that capacity more efficiently or productively than the LTA customer.

As noted in paragraph 3.2.6 allowing CBH to enter into LTAs with its customers will not prevent new entrants from acquiring capacity through the auction or whenever LTA offers are sought. In addition, with the significant amount of capacity that will be available at a minimum in the near term auction process, customers can gradually increase their acquisitions through the auctions (and the secondary market) in order to build to such a scale within the next 3 years to acquire LTA capacity at the next offering. The minimum near term capacity represents 34% of total capacity whilst average non LTA customer demand constitutes only 7% of actual exports or under 5% of total capacity offered. This means there is nearly a 7 times coverage of the current average annual demand by non LTA customers.

4.5.4 Similar or lower potential for LTA customers to bid up prices for auction capacity

In 2011 the ACCC indicated that it was concerned that it might be possible for customers acquiring capacity in an LTA allocation process would have a bidding advantage over those customers only acquiring capacity in an auction.

CBH submits that this perceived possible detriment does not arise in practice. It rests on the proposition that LTA customers can use LTA capacity to bid up the cost of shipping at peak periods as they can afford to pay a higher premium. This overlooks the fact that large customers can perform this exact same task under the auction presently by balancing out auction premiums in high demand months with auction premiums in low demand months. In fact most large shippers have been reasonably successful at performing this as Figure 28 shows.

Following allocation of LTA capacity and due to the spread requirements imposed by the application process, LTA customers will face a more significant task to balance out their net auction premium, meaning that their ability to bid up premiums will most likely be lower than current demands. This is due to the LTA customer already having capacity in lower demand months as a result of the spread requirements of the LTA process. In addition, there are likely to be fewer participants in the auction than currently, due to the fact that some customers will have acquired LTA capacity to meet their entire demand.

Any additional capacity to be acquired in the auctions at a higher than usual net auction premium will therefore decrease their trading margin or competitiveness in the grain accumulation market and increase the amount of risk accepted by the LTA customer.

As an LTA customer may already have capacity in the slot, the issue is whether or not the LTA customer has any unfair or inequitable competitive advantage over the non-LTA participant that it would not otherwise have due to its scale. Larger customers who are likely to take up LTA capacity, would still have the ability to balance off high and low demand periods to achieve a lower net premium for capacity under the auction. CBH submits that there is not a competitive disparity between LTA and non-LTA customers, it is between risk accepting and risk averse customers or between customers with deep pockets and those with limited resources.

Further, the increased amount of capacity being offered will help to prevent premiums from rising due to the increased supply of capacity. In high demand years this benefit will still be achieved and irrational behavior of LTA customers is less likely due to a number of reasons including:

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- LTA customers will have less capacity to balance their demand and associated net premium curve than they currently have in the auction.
- LTA customers will already have some capacity and therefore a “fear of being blocked” out will be less likely to influence behavior and willingness to pay higher premiums in a month. Paying higher premiums to ship, will increase a customer’s risk of default and lower margins over all shipments.

Ultimately, CBH considers that the major factors influencing whether a customer can better afford to compete for capacity in the auction will be matters like:

- the customer’s ability to acquire grain or sea freight from WA at a lower level; or
- the customer’s ability to procure higher prices for the sale of grain from WA; or
- the introduction of actual competition in the market for port terminal services.

5. Western Australian Industry Updates

5.1 Port Terminal

5.1.1 New entry

In this submission we have sought to bring out the additional current or future constraints on CBH's Port Terminals. New entry into the provision of Port Terminal Services has occurred at various locations throughout Australia, including:

- Queensland Bulk Terminals (Brisbane, Qld) – a Wilmar Gaviion company;
- Newcastle Agri Terminal (Newcastle, NSW) – joint venture with Glencore, Olam and CBH;
- Bunge Bunbury Port Terminal (Bunbury, WA) - Bunge; and
- Albany Port Terminal (Albany, WA) – Heilongjiang Feng Agricultural (**HFA**).

The fact that entry has occurred demonstrates that competition at port is possible and is not such a barrier as may have been anticipated by the ACCC several years ago. Therefore, an incumbent port operator faces a constraint on the manner in which it may act as a result of the potential for new entrants and this applies irrespective of the access requirements under WEMA.

In Western Australia, it can be seen that entry is possible and has in fact occurred, with both HFA and Bunge entering the market for the provision of Port Terminal Services.



Figure 7 - Bunge Bunbury Grain Silos

CBH assumes that the ACCC is familiar with the main participants in the grain exporting market in Western Australia, Australia and the broader global market. CBH has therefore not repeated this information but is willing to provide summaries on request.

5.1.2 Export grain task

The average harvest size since the 2002 season is shown below in Figure 8. Figure 8 demonstrates that there is considerable volatility in total harvest size with a slight increasing trend. Accordingly, whilst over time harvest size is slowly increasing CBH has not seen a similar increase in domestic usage, with the result that the increased volume of grain in a given year has to be exported.

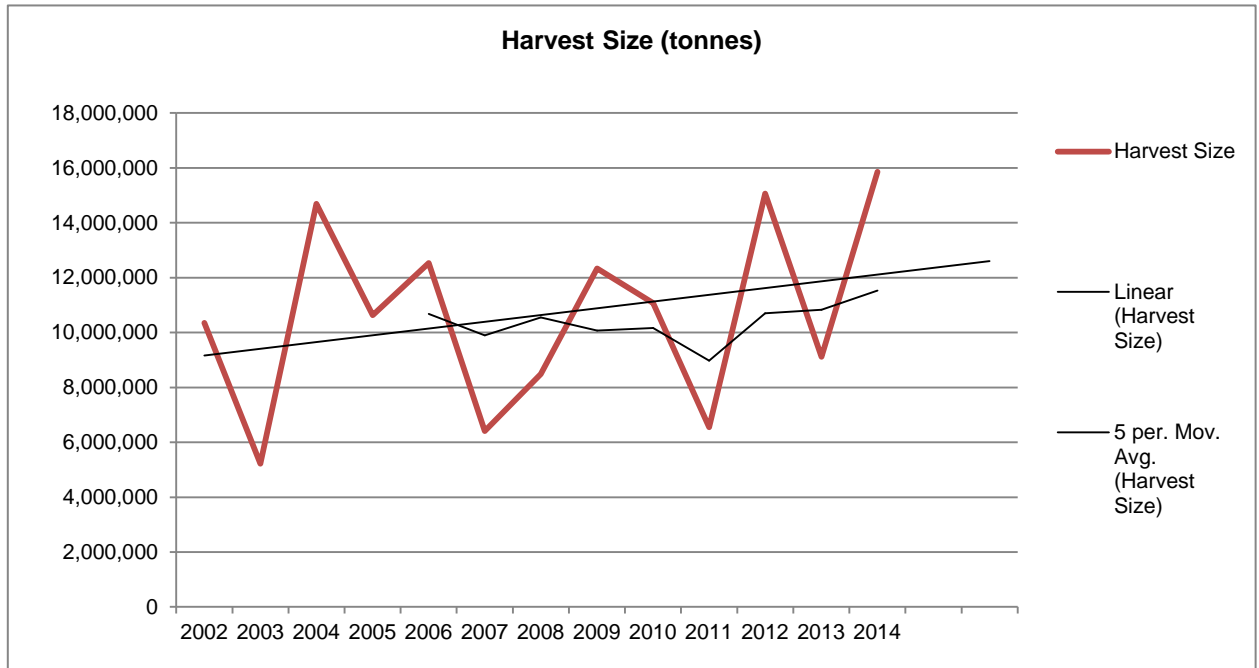


Figure 8 - WA harvest size in tonnes by year

With the deregulation of wheat exports in 2008, multiple exporters endeavoured to export at the time of major global demand, prior to the northern hemisphere crop being harvested around mid year. This was a contrast to the prior activities of the single desk operator which tended to export much more on a year round basis determined by the volume of wheat that it had to market together with its holding costs.

Therefore, there has been an increased pressure on the port terminal operators to export wheat between February and June. This has been reflected in auction premiums as set out in Figure 4 which shows the demand of the market in a large year and, in particular, the auction premium is reflective of the demand for certain shipment months. Further, this general demand for shipments between February and June is also apparent in Figure 10 and Figure 11, which represent average monthly shipments of two large exporters.

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Table 4 - Harvest size and capacity details

Season	Harvest size	Capacity offered	Capacity Acquired	Shipments
2003/2004	14,695,385	n.a.	n.a.	12,657,634
2008-2009	12,333,015	n.a.	n.a.	10,609,696
2009-2010	11,076,526	14,065,000	10,591,052	9,554,426
2010-2011	6,551,272	8,640,000	6,499,977	6,755,618
2011-2012	15,065,183	13,388,382	12,080,414	12,373,754
2012-2013	9,116,807	11,308,773	10,552,881	10,168,664
2013-2014 ⁷	15,853,812	13,350,139	12,707,396	2,006,355

5.1.3 Shipment size

In the last five years CBH has seen the average vessel size increase from approximately 27,000 tonnes to 39,000 tonnes. CBH considers that this will be a continuing trend as exporters look to take advantage of increasing efficiencies with larger vessels. Whilst there will continue to be smaller vessels used to take advantage of favourable freight opportunities and customer requirements, CBH is observing a trend to ship increased tonnages on each vessel.

Customer feedback indicates that the preferred shipment size is currently a panamax size vessel as this provides the most economic freight rate, subject always to the ability to pick up a favourable freight rate for smaller vessels or port restrictions requiring a smaller vessel. In addition, panamax loading is generally a more efficient usage of berth time as more grain is loaded onto a vessel per hour of berth occupation. This is because the time taken to berth a vessel and then following loading to depart the berth, is not appreciably different for different size vessels.

As an example, assume a vessel needs 5 hours to berth, survey and prepare for loading then loads at 2500 tonnes an hour and then requires 3 hours to prepare for departure. For a handy sized 25,000 tonne vessel this represents 18 hours on the berth, versus 28 hours for a panamax sized vessel loading 50,000 tonnes. The handy sized vessel therefore effectively loaded 1389 tonnes per hour against the panamax's 1785 tonnes per hour.

Given this feedback, the LTA minimum standard has a 600,000 tonne annual requirement which is the equivalent of one panamax vessel per month. On this basis the LTA minimum standard would appear to be reasonable on its face and not a barrier to take up by prospective customers. In any event, there is no prescription on the parcel size to acquire capacity in the LTA process, capacity can be shipped in smaller parcels if required or split and partially sold off.

The minimum near term capacity that will be auctioned includes parcels of a sufficient size in each month with a minimum of one panamax vessel sized portion of capacity at each port in low demand months. Further, a considerable number of two port vessels are loaded in Western Australia in each year. So whilst a minimum of 1 panamax vessel is available, that is not to say that those customers acquiring near term capacity wish to ship vessels of that size. Alternatively CBH also sees customers using capacity allocations from adjacent shipping windows to load a single vessel and that option would remain to a non-LTA customer to ensure that appropriate shipment sizes could be utilised.

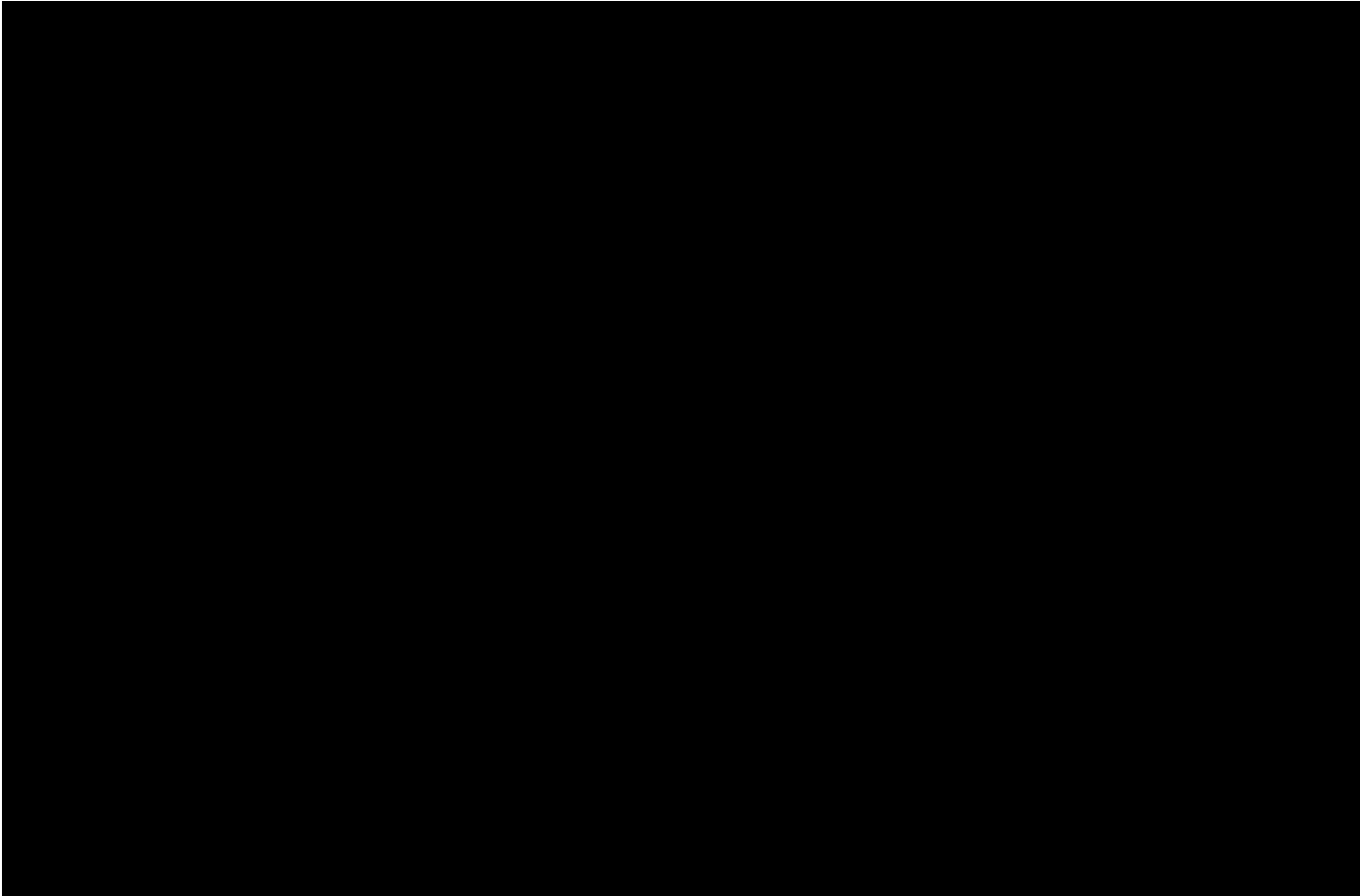
5.2 Export grain customers

CBH currently has 11 bulk wheat customers who are using its services. Set out in Figure 9 is a breakdown of the top 9 exporter's total export usage on an average basis over the last 5 years split between CBH's ports with one category showing the remainder of ad hoc cargoes.

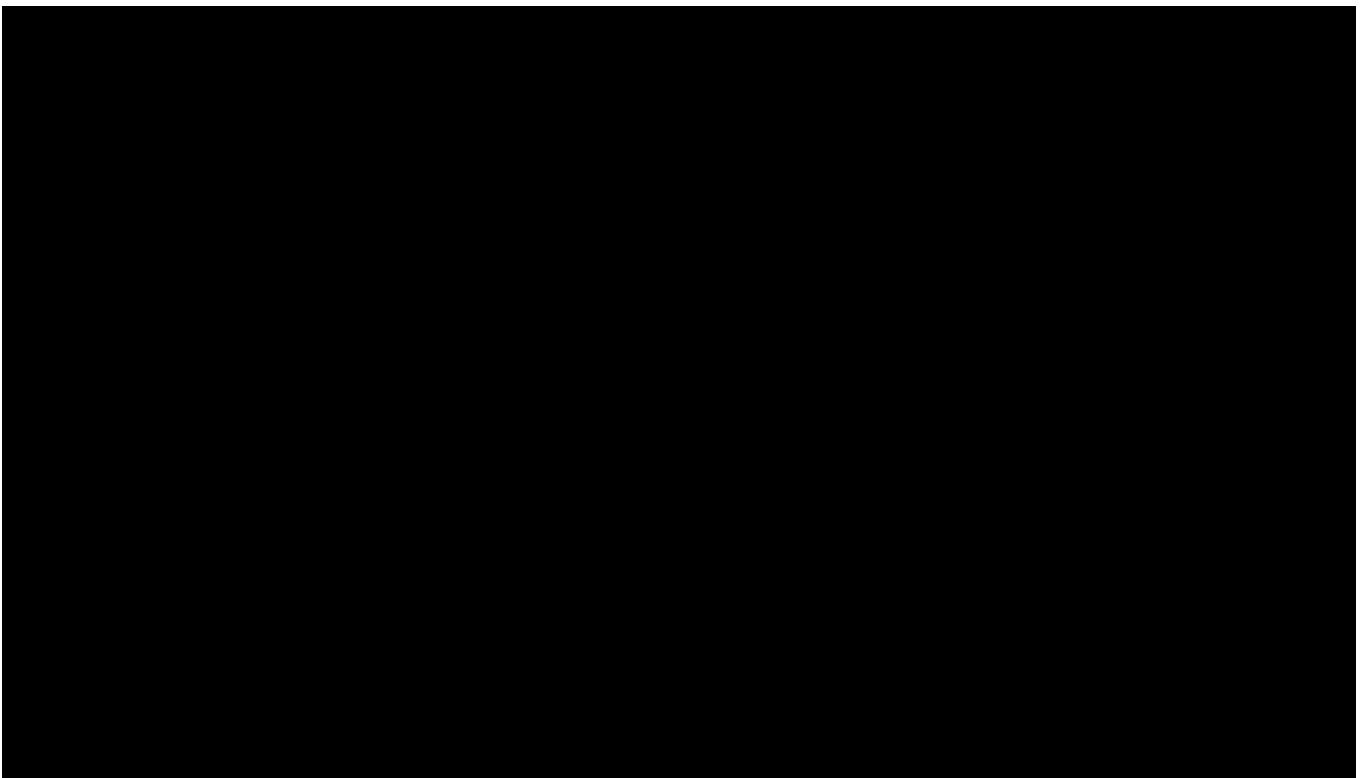
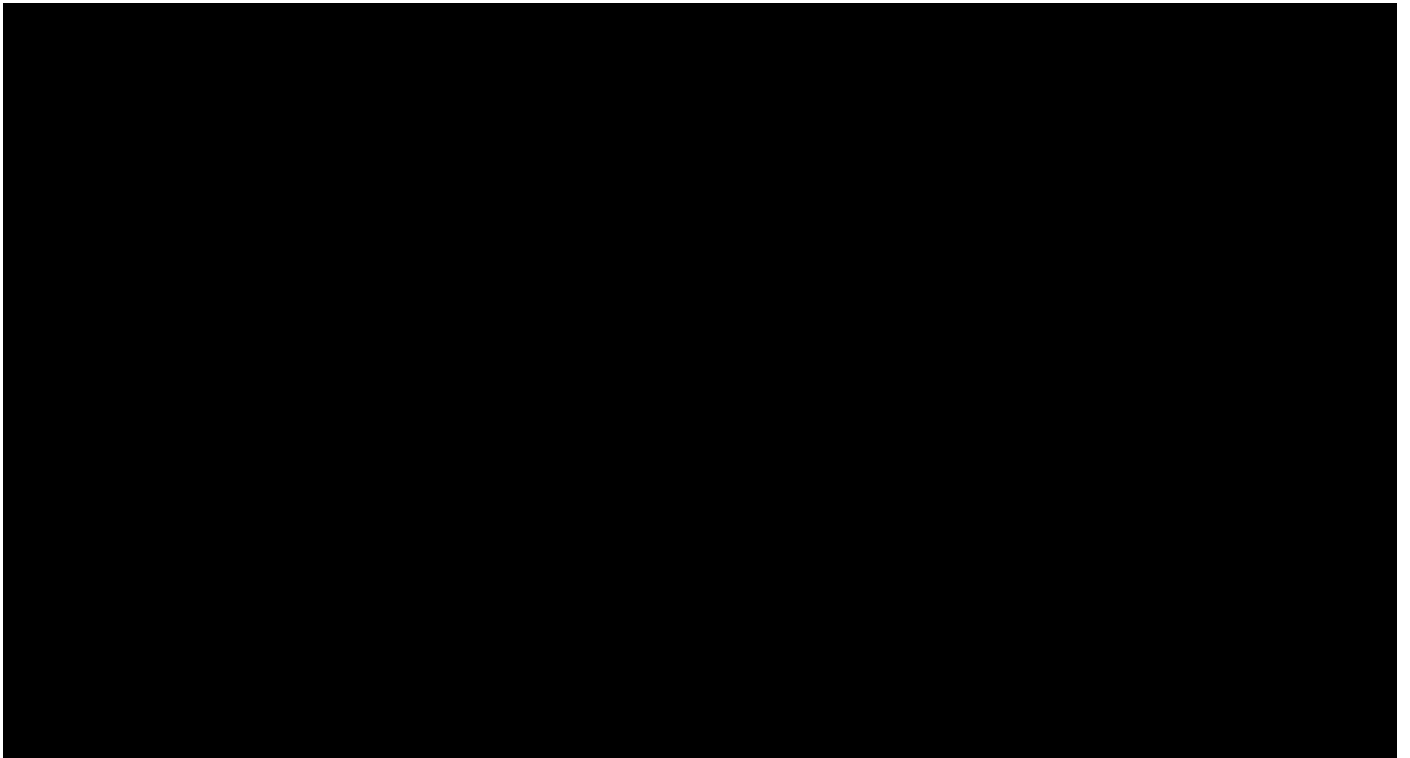
⁷ 1 November 2013 to 31 December 2013

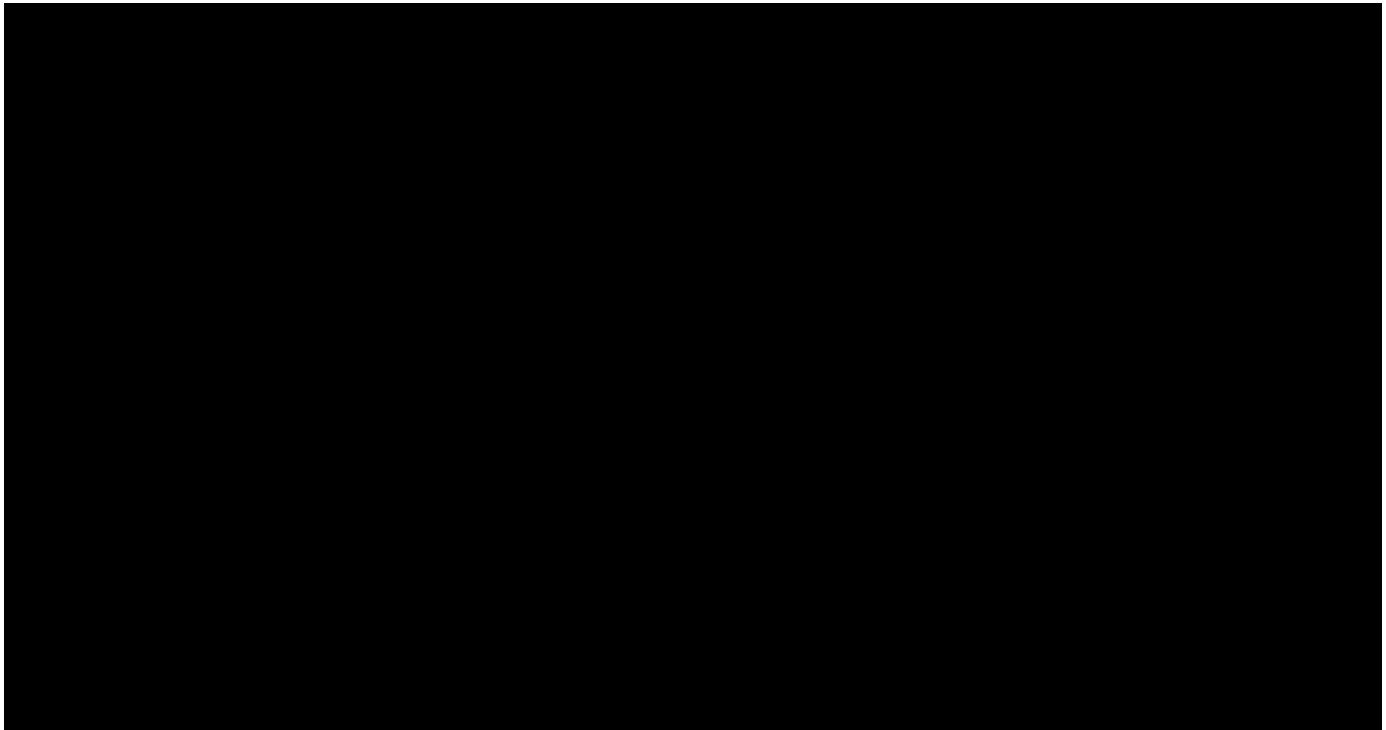
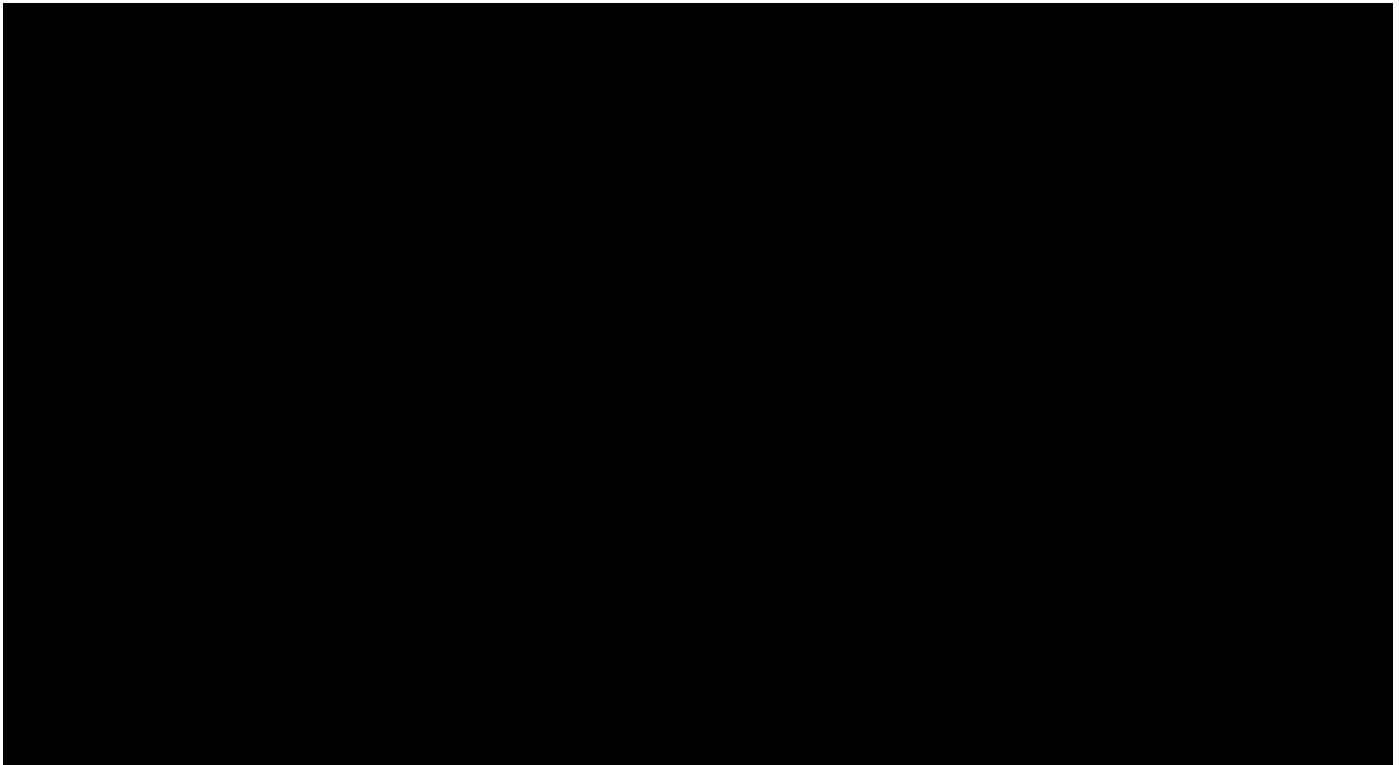
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As can be seen the majority by number and volume split their exports across 3 or 4 ports and only one exporter has more than 50% of their volume at one port. Accordingly, CBH expects exporters to utilise more than one port when acquiring capacity in a long term agreement. For this reason CBH does not expect that the minimum shipment volume will be problematic for customers as they are able to split it across CBH's four ports as they see fit, subject the spread over the quarters. In particular, were CBH to adopt a 300,000 tonne minimum per port (as was done in the GrainCorp LTA's), gaining exposure on a long term basis to all four CBH ports would require a minimum commitment of 1.2 million tonnes per annum.



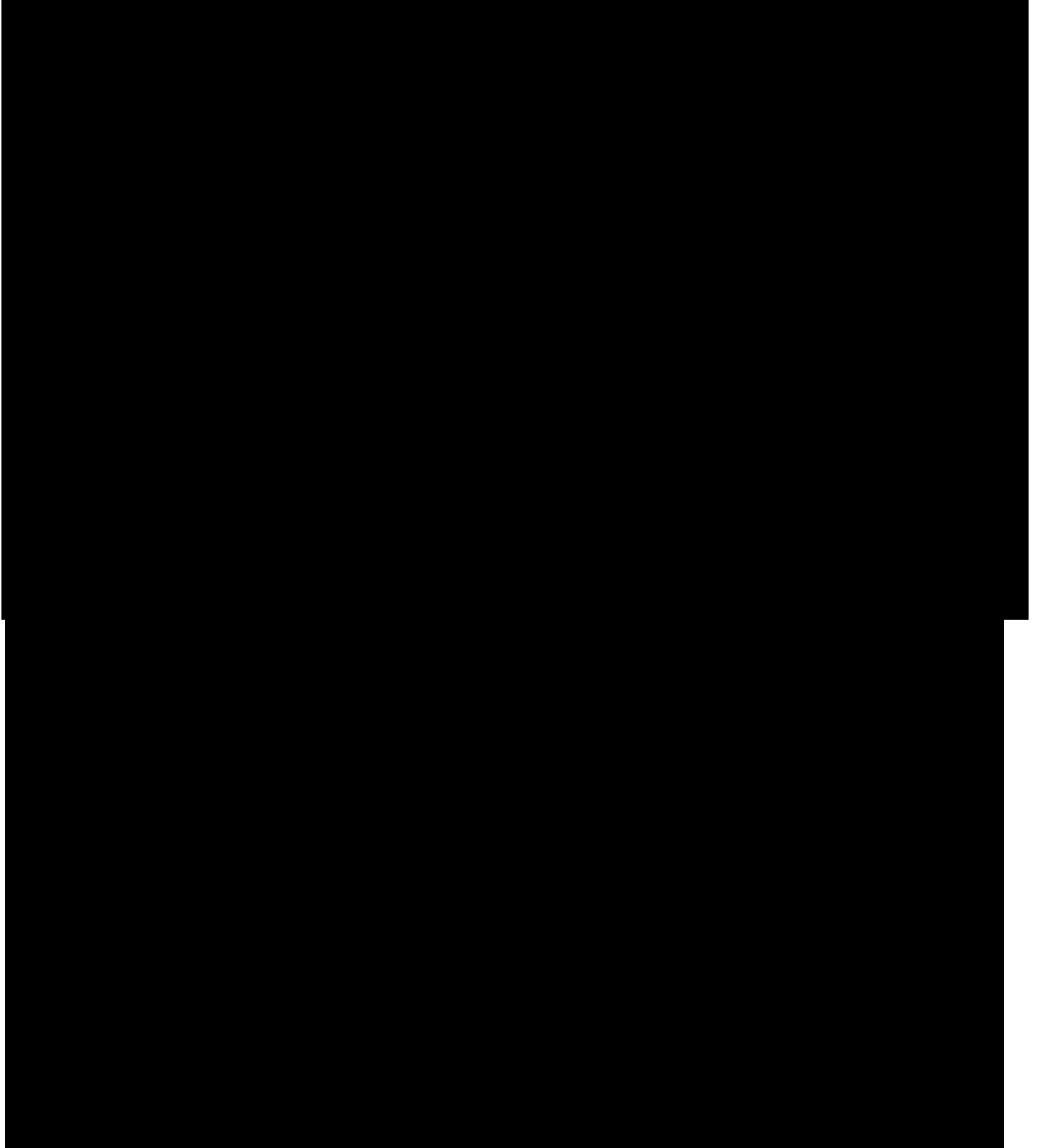
In each of the four seasons shown below the top four exporters have acquired between 80 and 88 percent of all capacity acquired (notwithstanding that in some years there was still capacity that had not been acquired) and shipped between 79 and 96 percent of all grain passing through CBH port facilities.





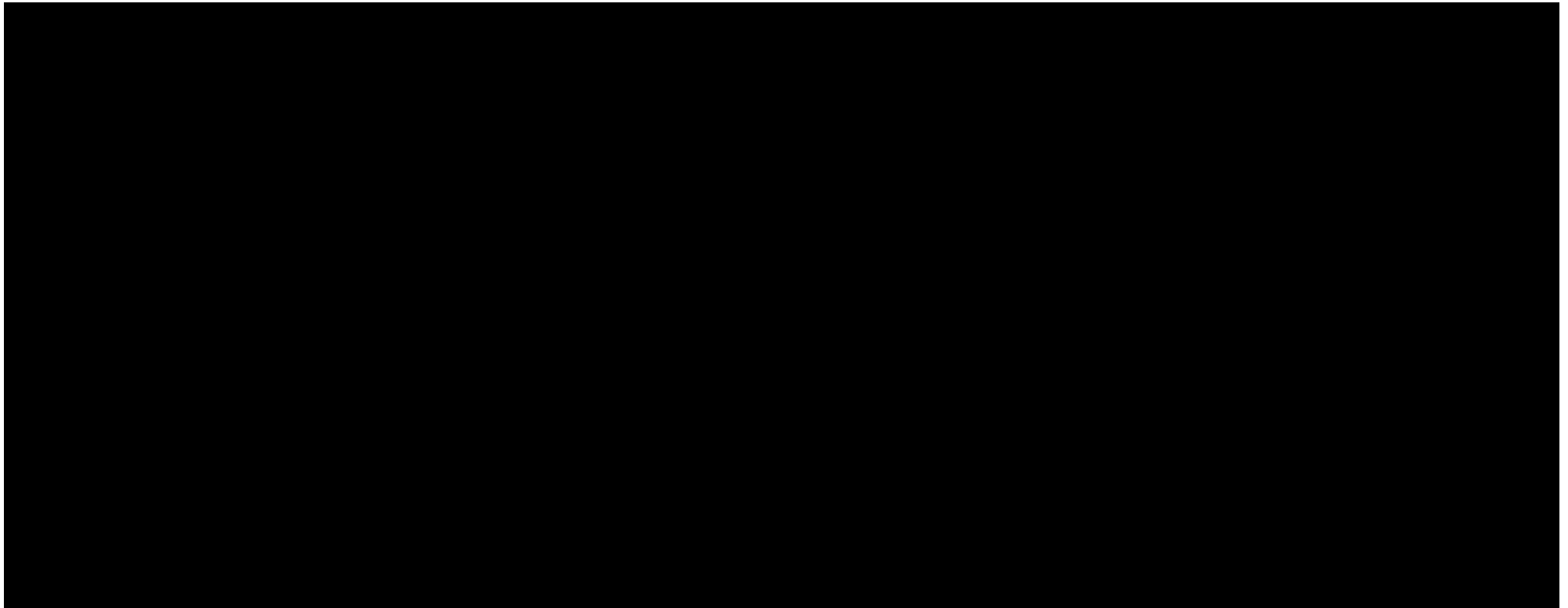
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Set out below are graphs showing the average exports by customer over the course of the year. Customers likely to utilise the LTA process have consistent shipments in across the year in a number of ports. Whilst the following are reasonable indicators of potential usage of the LTA process they cannot be definitive. Some customers who have smaller shipment profiles or parcels split between ports may have been influenced by auction conditions or grain entitlement issues. For this reason, CBH has endeavoured to create a system that is not overly prescriptive so as to accommodate a wide range of shipment scenarios.



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Figure 20 to Figure 27 demonstrates that different customers use the system in different ways. For instance, Figure 20 to Figure 23 show there is a consistent significant shipping by likely LTA customers over a long period of time that would indicate a valid basis for their desire to have longer term capacity on a more even spread. Alternatively, likely non LTA customers have different shipping patterns as shown in Figure 24 to Figure 27 which may indicate a continuing desire to acquire capacity in a more targeted fashion through the auction.



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5.3 Comparison to other supply chains

5.3.1 Comparison to Graincorp long term customer arrangements

In order to be of assistance to the ACCC, CBH has set out below the similarities and differences between CBH's proposed arrangements and GrainCorp's long term customer arrangements as approved by the ACCC.

Table 9 - Comparison with GrainCorp LTA

	Graincorp	CBH
Amount subject to PLTAS	Up to 60% via Port Long Term Agreements (PLTA) over a 3 year period (reduced from 5). Total annual capacity of GrainCorp is around 12 million metric tonnes	Up to 66% of total capacity to be offered with CBH declaring specific capacity targets for each year of a LTA. Total annual capacity from 4 ports is around 15 million metric tonnes.
	At least 40% of capacity per month per port will remain available to all exporters on an annual basis.	At least 34% of capacity per annum and by shipping window will remain available.
	Maximum amount allowed 2 million metric tonnes (~18%) per customer.	Maximum amount allowed per customer 50% of total offered long term capacity– otherwise would reduce CBH's trading divisions existing volume. However, note that WA shipping volumes whilst potentially being volatile are between 6 and 13 million metric tonnes per annum currently and therefore exceed those of GrainCorp on a regular basis. Capping at anything less than 50% of LTA capacity would discriminate against CBH's trading division. CBH is also mindful of the Productivity Commission's Final Report which noted that the wheat access arrangements had not taken into account developing the long term needs of the facility provider.
Considerations – No discrimination in favour of port owner	No discrimination in favour of own trading arm and not to hinder access to its port terminals.	No discrimination in favour of own trading operations and not to hinder access to its port terminals.
Requirements of PLTAS – consideration of effect of PLTAS	At least 30,000 tonnes of capacity each month for 10 months per year at category A ports, 5 months at Category B ports and 3 months at Category C ports.	At least 600,000 shipped over 12 months with shipments in at least 3 of 4 Quarters. Each of CBH's ports have a tonnage throughput that is equivalent to or larger than GrainCorp Category A ports, therefore the minimum take up is similar to the uptake if Customers wished to have capacity at two ports

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	Graincorp	CBH
		yet allows a customer to obtain capacity at all four ports which is more consistent with CBH customers' shipping practices. If CBH adopted the same requirements as in the GrainCorp PLTA process to obtain long term capacity at all four CBH ports would require a minimum commitment of 1.2 million tonnes.
Transferability	Transferability of PLTA tonnage	Transferability of LTA tonnage and re-positioning post auction subject to normal rules.
Consideration of purpose behind PLTA	Reasonable access to those not on PLTA. Historical export data provided.	The LTA will see investment and increasing export volumes to the benefit of WA and WA growers. LTAs provide contractual / commercial certainty in making longer term investments to facilitate increased grain exports from WA. Reasonable access is provided to those not on LTAs. Historical export data has been provided that supports the allocation.
History and Dynamic Factors	Exporters likely to take up made up 90% of exports. ACCC commented as to the specifics of their decision to the Graincorp situation. Degree of competitive constraint (other port operators, domestic use of wheat and container (non bulk wheat) exports).	Exporters likely to take up LTAs account for ~93% of average exports will allow more capacity to be available. New port terminal development is occurring in WA which is a competitive constraint on CBH. LTAs significantly provide increased investment through commercial certainty.

5.3.2 Coal supply chains in NSW

The ACCC's decisions in relation to the long term coal authorisations in the Hunter Valley highlight the benefits of long term contracts to investment and commercial certainty. CBH is seeking to secure this type of commercial certainty.

5.3.3 Detrimental impact on export facility owner

The inability of CBH to access its own infrastructure in circumstances where it is not proposing to impede other exporters is a significant inefficiency and detriment to CBH continuing to invest in expanding its port terminal facilities.

CBH is concerned that there is now reasonable inconsistency in the application of the WEMA rules to particular export facilities depending on their extent of integration with the uplift facility/conveyor. CBH believes that this has created an inefficient distortion at both port and the export supply chain as the unregulated facility owner can discriminate in its favour as the regulated CBH facility is not able to compete.

6. Key documents

6.1 Port Terminal Rules

The Port Terminal Rules cater for all capacity allocation (near term and long term) and is summarised below and contained in Attachment B.

6.1.1 Part A –Structure of the Rules

Part A of the Rules sets out:

- (a) the contents and structure of the Rules;
- (b) how CBH will allocate capacity to Customers;
- (c) the criteria that CBH's will use to estimate Total Capacity; and
- (d) the way in which CBH publishes information concerning Capacity.

6.1.2 Part B - Long Term Capacity Allocation

Part B sets out the process and rules for:

- (a) how CBH determines the amount of Long Term Capacity allocated and offered to Customers;
- (b) the eligibility requirements for Customers wishing to acquire Long Term Capacity;
- (c) the manner in which CBH may allocate Long Term Capacity, including the process for the situation where aggregate Long Term Capacity Offers made by all Customers exceeds the Total Long Capacity offered; and
- (d) the way in which Customers must submit a Long Term Annual Shipment Schedule (LTASS) and the consequences of failing to do so.

6.1.3 Part C – Near Term Capacity Allocation

Part C sets out the process and rules in relation to:

- (a) acquiring Near Term Capacity (capacity not allocated as Long Term Capacity) via Auction or as Spare Capacity;
- (b) the way in which any Passed-in Capacity is offered to Customers; and
- (c) the way in which any Spare Capacity is offered to Customers;

6.1.4 Part D - Capacity dealing, Nominations and Stem Handling

Part D sets out the process and rules in relation to:

Trading and Repositioning Capacity

- (a) how a Customer may trade Capacity that it has acquired with other Customers;
- (b) how a Customer may reposition acquired Capacity to other Shipping Windows;

Port Operator's obligations following acquisition of Capacity

- (c) CBH's rights and obligations in respect to loading grain on to vessels for Customers who have acquired Capacity;

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(d) the way in which CBH may acquire allocated Capacity back from Customers;

Nominating Vessels for Shipping Windows during the Harvest Shipping Period

(e) the manner in which Customer's must nominate vessels for Shipping Windows during the Harvest Period;

Nominating Vessels for Shipping Windows

(f) the process for cargo accumulation, pre-delivery testing, sampling, unloading, weighing, fumigation and grain handling at Port for Customers with Grain Services Agreements with CBH;

Vessel Nominations

(g) the detail that must be provided by a Customer when nominating a vessel;

(h) the manner in which CBH may accept or reject a vessel nomination;

(i) the manner in which a Customer may amend a vessel nomination;

Lost Capacity and Tolerance

(j) how CBH will determine whether Capacity is to be regarded as 'Lost Capacity' within both the Harvest and Annual Shipping Periods;

(k) detail as to the amount of tolerance on capacity that CBH may permit and how that effects a determination as whether capacity may be regarded as 'Lost Capacity';

Shipping Stem Policy

(l) how CBH will prioritise the loading of vessels at Port;

(m) the manner in which adjustments to the shipping stem may be made;

(n) CBH's discretion to accept vessel nominations;

(o) publication of Capacity available at each Port Terminal Facility in accordance with the Access Undertaking;

(p) publication of information regarding Capacity acquired at Auction; and

Storage Priority, Port and Delivery Queue Policy

(q) manner in which storage, port and delivery queues will be managed and priority allocated between Customers;

6.1.5 Part E – General Matters

Part E sets out general legal clauses in relation to:

(r) accuracy and completeness for information provided by Customers;

(s) the procedure to follow in the event there is a Customer complaint of dispute; and

(t) interpretation and definitions used in the Rules;

Part F – Auction Rules

Schedule 1 – Not Used

Schedule 2 – Sample Direct to Port Declaration Form

Schedule 3 – Sample Direct to Port Sample Declaration Form

Schedule 4 – Not Used

Schedule 5 – Reposition Matrix and Timeline

6.2 Port Terminal Services Agreement

Caters for both short and long term capacity and is summarised below and contained in Attachment C. The Agreement is substantially the same as the agreement currently in use and offers the potential simplicity of a single port based agreement.

6.2.1 Sections 1 - 3 – Interpretation / Definitions

Sections 1 - 3 of the PTSA set out:

- (a) the term of the PTSA;
- (b) general termination provisions contents and structure of the Rules;
- (c) how CBH will allocate capacity to Customers;
- (d) the definitions; and
- (e) the legal interpretation provisions.

6.2.2 Section 4 – Port Terminal Rules

Customers agree to be bound by the Port Terminal Rules.

6.2.3 Sections 5 – 8 Services

Section 5 – sets out the availability and manner in which CBH will provide Grain Receival Services at Port.

Section 6 – sets out the availability and manner in which CBH will provide Grain Storage Services at Port.

Section 7 – sets out the availability and manner in which CBH will provide Outturning Services at Port.

Section 8 – sets out the availability and manner in which CBH will provide additional information and services at Port.

6.2.4 Section 9 - Payment

Section 9 – sets out the manner in which fees and charges will be applied and payment levied by the Customer. It also sets out how Customers may apply for credit and the relevant set out and security provisions. Some modifications have been made to cater for Long Term Agreements

6.2.5 Section 10 – Lien and right to withhold grain

Section 10 sets out CBH's rights in respect to:

- (a) the statutory lien it holds over grain received from the Customer;
- (b) the right to withhold or refuse to outturn grain;
- (c) the Personal Property Securities Act.

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6.2.6 Section 11 – Due Care and Diligence

Section 11 sets out CBH's obligation to exercise due care and diligence in carrying out its obligations under the PTSA;

6.2.7 Section 12 – Appointment of an Agent

Section 12 has the effect of providing the Customer with the right to appoint an agent to undertake the day to day co-ordination of its operational service requirements.

6.2.8 Section 13 – CBH Liability

Section 13 sets out provisions dealing with CBH's liability, in particular in relation to:

- (a) shortfall of grain at a Port Terminal Facility;
- (b) damage for gross negligence or wilful misconduct;
- (c) liability caps;
- (d) grain loss and damage
- (e) loss or damage for delay;
- (f) contribution to loss
- (g) exclusions of statutory liability; and
- (h) indirect or consequential loss.

Section 13 also sets out the relevant indemnities and exclusions which apply as between the Customer and CBH.

6.2.9 Sections 14 -16 Insurance, Risk, Force Majeure and Title

Section 14 sets out the relevant insurance obligations and the point at which risk is transferred to the Customer.

Section 15 sets out the definition of a Force Majeure Event and the parties rights and obligations in respect to events of Force Majeure.

Section 16 sets out CBH and the Customer's rights and interests in respect to title and the grain delivered to CBH.

6.2.10 Section 17 – Port Terminal Facility Access

Section 17 provides for procedures to govern Site Access and safety while accessing CBH sites.

6.2.11 Section 18 – Confidentiality

Section 18 sets out the relevant confidentiality provisions

6.2.12 Section 19 – Dispute Resolution

Section 19 prescribes the process and procedure to govern any dispute arising under the PTSA, Port Terminal Rules or Auction Rules.

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6.2.13 Sections 20 to 29 (inclusive) – General

Section 20 – 29 (inclusive) set out the general legal terms applicable to the agreement (i.e. in relation to governing law, assignment, notices etc).

Schedule 1 sets out the reference to the relevant fees and charges applicable to the PTSA.

Schedule 2 will set out the relevant allocated Long term capacity to respective Customers.

Schedule 3 – sets out the formula applicable to the Auction Premium Rebate

Schedule 4 is a table setting out the definition of 'Grain' and the particular type of grain delivered by a Customer.

6.3 Access Undertaking

The Proposed Undertaking is substantially similar to the 2011 Access Undertaking and contained as Attachment D.

6.3.1 Non discrimination

The Proposed Undertaking maintains the same robust non discrimination clauses that the ACCC has approved in the two prior undertakings. Under this provision contained in clause 6.2 CBH is not permitted to discriminate between customers in favour of its Trading Business.

In addition, as in previous undertakings, the ACCC retains the ability to require an audit of CBH's compliance with the non-discrimination provision pursuant to clause 6.3 of the Proposed Undertaking.

6.3.2 No hindering

The Proposed Undertaking also maintains the same requirement on CBH not to hinder access outlined in clause 10.8 that has been in the previous two undertakings.

Attachment A – LTA Capacity spread

LTA Ratio	Nov-Jan		Feb - Apr		May - Jul		Aug - Oct		Total	
	66%		66%		66%		66%		66%	
Zone	Total	LTA	Total	LTA	Total	LTA	Total	LTA	Total	LTA
Kwinana	1,200	792	2,100	1,386	1,800	1,188	1,200	792	6,300	4,158
Geraldton	800	528	1,200	792	900	594	800	528	3,700	2,442
Albany	600	396	1,050	693	750	495	600	396	3,000	1,980
Esperance	500	330	1,050	693	600	396	500	330	2,650	1,749
	3,100	2,046	5,400	3,564	4,050	2,673	3,100	2,046	15,650	10,329

Zone	NOV			DEC			JAN			FEB			MAR			APR			MAY			JUN			JUL			AUG			SEP			OCT			TOTAL LTA
	LTA	LTA	LTA	LTA	LTA	LTA	LTA	LTA	LTA	LTA	LTA	LTA	LTA	LTA	LTA	LTA	LTA	LTA	LTA	LTA	LTA	LTA	LTA	LTA	LTA	LTA	LTA	LTA	LTA	LTA	LTA	LTA	LTA				
Kwinana	264	264	264	264	264	264	462	462	462	462	462	462	396	396	396	396	396	396	264	264	264	264	264	264	264	264	264	264	264	264	264	264	264	4,158			
Geraldton	176	176	176	176	176	176	264	264	264	264	264	264	198	198	198	198	198	198	176	176	176	176	176	176	176	176	176	176	176	176	176	176	176	2,442			
Albany	132	132	132	132	132	132	231	231	231	231	231	231	165	165	165	165	165	165	132	132	132	132	132	132	132	132	132	132	132	132	132	132	132	1,980			
Esperance	110	110	110	110	110	110	231	231	231	231	231	231	132	132	132	132	132	132	110	110	110	110	110	110	110	110	110	110	110	110	110	110	110	1,749			
	682	682	682	682	682	682	1,188	1,188	1,188	1,188	1,188	1,188	891	891	891	891	891	891	682	682	682	682	682	682	682	682	682	682	682	682	682	682	682	10,329			

Attachment B – Proposed Port Terminal Rules

Attachment C – Proposed Port Terminal Services Agreement

Attachment D – Proposed Port Access Undertaking
