



Australian
Competition &
Consumer
Commission

Co-operative Bulk Handling Limited

Port Terminal Services Access Undertaking

Draft Decision

6 August 2009



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Glossary

ABB	ABB Grain Ltd
ACCC	Australian Competition and Consumer Commission
AGEA	Australian Grain Exporters Association
ARTC	Australian Rail Track Corporation
AWE	accredited wheat exporters
BHC	bulk handling company
CBH	Cooperative Bulk Handling Ltd
ESCOSA	Essential Services Commission of South Australia
ETA	estimated time of arrival
GIAV	Grain Industry Association of Victoria
GrainCorp	GrainCorp Operations Ltd
GTA	Grain Trade Australia
MGC	Metro Grain Centre (CBH)
MSA	Maritime Services (Access) Act 2000
mt	million tonnes
NCC	National Competition Council
PTR	Port Terminal Rules
SAFF	South Australian Farmers Federation Grains Industry Committee
TPA	<i>Trade Practices Act 1974 (Cth)</i>
WEA	Wheat Exports Australia
WEMA	<i>Wheat Export Marketing Act 2008 (Cth)</i>

1 Executive summary

This draft decision details the Australian Competition and Consumer Commission's (ACCC's) preliminary assessment of the proposed Undertaking lodged by Cooperative Bulk Handling Ltd (CBH) on 14 April 2009 for consideration under Division 6 of Part IIIA of the *Trade Practices Act 1974* (Cth) (TPA). The proposed Undertaking relates to the provision of access to services for the export of bulk wheat at four grain terminals operated by CBH in Western Australia. These terminals are:

- Albany;
- Esperance;
- Geraldton; and
- Kwinana;

CBH's proposed Undertaking provides for, amongst other matters:

- a publish/negotiate/arbitrate model in relation to price and non-price terms (rather than including prices or a detailed pricing methodology in the undertaking);
- obligations regarding non-discrimination in the provision of port terminal services;
- obligations regarding port terminal capacity management, including the shipping stem, and
- ring-fencing obligations setting out restrictions on information flows.

It is important to note that CBH states that its proposed Undertaking will only apply to those customers who wish to acquire port terminal services on a stand alone basis - i.e. it will not apply to those customers who acquire port terminal services as part of a bundled service. This is discussed in the Scope chapter of this draft decision.

Broadly, the ACCC's draft decision covers the following issues relevant to the ACCC's assessment of CBH's proposed Undertaking:

- Background, Objectives, Structure ;
- Term and variation;
- Scope;
- Publish/negotiate/arbitrate;
- Indicative Access Agreement;
- Non-discrimination;

- Ring-fencing;
- Capacity management; and
- Other Issues (KPIs, publication of information)

The ACCC reviewed all sections of CBH’s proposed Undertaking and assessed whether, overall, the proposed Undertaking was appropriate, having regard to the matters set out in section 44ZZA of the TPA. In making that assessment the ACCC has drawn on:

- CBH’s proposed Undertaking, its initial supporting submission and other submissions it has provided to the ACCC;
- submissions from interested parties on CBH’s proposed Undertaking; and
- the ACCC’s own research as referenced in this Draft Decision document.

ACCC Draft Decision

The ACCC has reached a view that it would not accept CBH’s proposed Undertaking in its current form. The following discussion summarises the key issues considered in the draft decision and highlights those areas where the ACCC considers that the approach proposed by CBH is not appropriate having regard to the matters in section 44ZZA(3) of the TPA. In a number of cases the ACCC has suggested ways that CBH could address the issues identified.

Relevance of the context in which the proposed Undertaking has been assessed

The specific clauses of the proposed Undertaking have been assessed having regard to the matters specified under section 44ZZA(3) of the TPA, taking into account the wider context within which CBH has submitted the proposed Undertaking (which, as discussed in the Legislative Framework chapter of this draft decision, fall for consideration within the scope of the matters set out in section 44ZZA(3)).

In particular, the ACCC considers that the following matters (amongst others) to be relevant to the assessment of the proposed Undertaking:

- the objective of Part IIIA of the TPA of promoting the economically **efficient operation of, use of and investment in facilities** by which port terminal services are provided – thereby promoting competition in the wheat export industry and the overall supply chain;
- the objectives of the ‘Access Test’ embodied in the *Wheat Export Marketing Act 2008* (Cth) (**the WEMA**), and, in particular, the objective of ensuring that vertically integrated bulk handling companies provide **fair and transparent access** to their facilities to other accredited exporters;
- the transitional nature of the wheat export industry, having moved from a single wheat exporter to 23 accredited wheat exporters in 12 months;

- the legitimate business interests of CBH in being able to run its port terminal facilities with a sufficient degree of flexibility and without unduly prescriptive regulation so as to maintain an efficient supply chain;
- the interests of access seekers such that CBH should provide access to port terminal services in a fair and non-discriminatory manner
 - noting also that the pricing principles in section 44ZZCA of the TPA provide that access price structures should not allow a vertically integrated provider to set terms and conditions that discriminate in favour of its downstream operations, except to the extent that the cost of providing access to other operators is higher;
- whether the proposed Undertaking provides for **sufficient certainty and clarity** in its terms, effect and operation so that access seekers are able to understand and enforce their rights;
- the risk and undesirability of imposing regulation that is not appropriate at a time when the industry is newly liberalised and in transition;
- CBH's incentive to run its operations in a fair and transparent manner arising from the threat of potentially more prescriptive regulation in two years time (that is, in future access undertakings) if required; and
- the object of Part IIIA to provide a framework and guiding principles to encourage a consistent approach to access regulation in each industry.

It is noted that certain of the factors listed above are not the actual 'matters' listed under section 44ZZA(3) of the TPA,¹ but rather fall for consideration within the scope of the relevant matters under section 44ZZA(3).

In having regard to the objectives of the WEMA, the ACCC specifically acknowledges Parliament's recognition that the promotion of competition may potentially be limited by anti-competitive conduct associated with port terminal facilities, and that the inclusion of the access test demonstrates a clear intention to legislate measures to mitigate the possibility of such conduct undermining the broader intent of the legislation.

In having regard to the WEMA, the ACCC has not conducted a comprehensive market analysis in relation to each of the ports that will be subject to the proposed Undertaking to assess whether they should be subject to access regulation. Rather, the role of the ACCC in this context is to decide whether the Undertaking proposed by CBH is appropriate. The ACCC considers that Parliament has expressed a clear intention to require port terminal operators to provide access undertakings to mitigate

¹ Other than the first two matters, which the ACCC considers are relevant pursuant to section 44ZZA(3)(e) of the TPA.

the potential for anti-competitive harm, and it is in that context that the ACCC must consider the appropriateness of those undertakings as provided.

The ACCC recognises that, as CBH has submitted, it is clear that the intention of the WEMA is that the proposed Undertaking should apply only to services offered at port.

In this regard, the ACCC notes that the Explanatory Memorandum to the WEMA dismissed calls to extend the access test to cover up-country services, stating that:

Up-country facilities do not display natural monopoly characteristics as they have low barriers to entry and there are already a number of competitors in the industry who provide up-country storage services.²

The Explanatory Memorandum goes on to note that an extension of the access arrangements to up-country storage facilities would ‘impose an excessive regulatory burden’.³ Further, the Second Reading Speech of the WEMA provides:

The Senate inquiry also identified concerns in relation to the potential for bulk-handling companies to restrict access to up-country storage facilities in a similar manner to concerns in relation to port facilities.

It is unclear from the evidence presented to the Senate inquiry whether the problem would necessarily arise, and if so, the extent of legislation that would be required to correct it.

If the highest level of regulation were to be imposed on the more than 500 up-country facilities, there is no doubt that this would create increased compliance costs which would almost certainly be directly passed back to growers.

The government will, therefore, continue to monitor the ability of exporters to access up-country storage facilities.

Let me say here, if any problems are identified then the government will take steps to remedy the situation including, if necessary, the development of a code of conduct.⁴

Nevertheless, the ACCC is cognisant of the submissions made calling for the proposed Undertaking to be extended to include services offered at CBH’s up-country storage and handling facilities. Many of these submissions stated that it was artificial to draw a distinction between services offered at port and those offered up country.

However, the ACCC, in this process, has not formed any views on the competitiveness of the supply of up-country storage and handling services. As set out in the Legislative Framework chapter, the ACCC does not consider that its role in this process was to conduct a thorough assessment of the state of competition in the entire bulk wheat export supply chain.

It is the ACCC’s view that, given the clear express intention of the WEMA, and having regard to the risk and undesirability of imposing regulation that is not

² Explanatory Memorandum, *Wheat Export Marketing Bill 2008*, p. 13.

³ Explanatory Memorandum, *Wheat Export Marketing Bill 2008*, p. 14.

⁴ House of Representatives, *Votes and Proceedings, Hansard*, Thursday 29 May 2009, pp. 76–77.

appropriate at a time when the industry is newly liberalised and in transition, the ACCC considers that it is appropriate pursuant to section 44ZZA(3) of the TPA that the scope of the proposed Undertaking be limited to services at port.

The ACCC notes, however, that providing access at the port creates incentives for other parts of the supply chain to be as efficient as possible, as access to the port would facilitate dissatisfied customers taking the option of bypassing CBH's upcountry facilities.

General approach to pricing and other terms and conditions

Given the circumstances in which CBH has submitted its proposed Undertaking, the ACCC is of the view that a prescriptive regulatory approach including ex ante price setting is not warranted at this time, and that a less prescriptive publish-negotiate-arbitrate approach is appropriate.

However, in order for the publish-negotiate-arbitrate framework to be appropriate, the ACCC is of the view that it needs to be underpinned by a robust set of mechanisms giving effect to the publication, negotiation and arbitration procedures. Clarity about the terms and conditions for access that are on offer by CBH is an important consideration in this respect. Further, given that CBH is vertically integrated, adequate non-discrimination obligations and appropriate transparency measures are also appropriate.

The ACCC is of the view that appropriate non-discrimination measures should prohibit CBH discriminating in favour of itself except to the extent that the cost of providing access to other operators is higher, as per section 44ZZCA of the TPA. As a transparency measure to support this, appropriate measures would require CBH to publish a single set of prices for port terminal services, which may include differentiated prices for different circumstances (ie. for different processes for testing of grain depending on where it has been stored – but only where these processes are justifiable with regard to hygiene, quality or associated factors), provided those circumstances are transparently stated and the pricing differences are justified on the basis of different costs.

The ACCC is of the view that these underpinning measures would allow access seekers to commercially negotiate with CBH in a framework where both parties know that prices, terms and conditions may be subject to arbitration by the ACCC or a private arbitrator, applying the pricing principles in section 44ZZCA of the TPA and general non-discrimination requirements.

It is also relevant to note that CBH's proposed Undertaking is for a limited duration, and should the publish-negotiate-arbitrate framework prove not to be effective, the ACCC may adopt a more prescriptive method in any future access undertaking assessments.

The ACCC also notes the Port Terminal Rules, which are not terms of access but rather general procedures for operational management of the ports, including how capacity allocation/nomination of shipping slots occurs. The ACCC is of the view that it is in the legitimate business interests of CBH, and indeed in the interests of

efficiency in the overall supply chain, that CBH has sufficient flexibility to run its day-to-day operations without unduly prescriptive oversight. The ACCC also notes that it is in the interests of the access seekers, and of competition in downstream markets, that these operations are conducted on a non-discriminatory basis, in a manner that is clear and transparent, and with recourse to adequate and swift dispute resolution procedures in the event of dispute between CBH and access seekers. It is therefore the ACCC's view that any changes to the Port Terminal Rules occur with adequate notice and consultation – but not necessarily be subject to the variation procedures in section 44ZZA(7) of the TPA. The ACCC notes that should such processes prove unsatisfactory, the port terminal protocols may in future need to be the subject of more prescriptive processes.

In relation to ring-fencing, the ACCC notes that CBH is already subject to ring-fencing arrangements arising from the ACCC's decision not to revoke a 'notification' from CBH relating to a component of its Grain Express product in 2008. CBH's ring-fencing rules in its proposed Undertaking differ in some respects from the ring-fencing arrangements which form part of CBH's Grain Express exclusive dealing notification. For instance, the Grain Express ring-fencing policy provides for a more robust complaints handling/resolutions process than the process provided in its proposed Undertaking.

The ACCC is therefore of the view that the ring-fencing rules in CBH's proposed Undertaking would not, in their current form, serve as an effective safeguard against anti-competitive discrimination in the provision of port terminal services.

However, ring-fencing is just one tool that can be used to protect against anti-competitive discrimination.

Were CBH's proposed Undertaking amended to contain robust non-discrimination and no hindering access clauses, fair and transparent port terminal protocols and an indicative access agreement (as well as measures to deal with the potential for information about port terminal services to be used to the advantage of CBH's wheat exporting arm – such as the publication measures described in the Other Issues chapter), then, in the circumstances, it would not be necessary for CBH to include ring-fencing measures in its undertaking at this particular point in time.

In forming this view, the ACCC has taken into account the transitional nature of the industry and the possibility that any ring-fencing measures that were implemented at this point in time could need to be revised in the near future in accordance with any regulatory changes (either to extend or reduce the regulation to which CBH is subject). The ACCC considers that this would be an undesirable outcome in that it could impose unnecessary regulatory costs during a time of industry transition.

The ACCC has also taken into account the short duration of CBH's proposed Undertaking and will closely monitor the effectiveness of its undertaking in ensuring against anti-competitive discrimination during its operation.

The ACCC notes that, once the regulatory framework to which CBH is subject is more certain, any future undertaking submitted by CBH may need to include robust ring-fencing rules which cover CBH's port operations.

It is important to note that the ACCC's approach taken to ring-fencing in assessing this particular access undertaking is not indicative of the approach to ring-fencing that the ACCC would be likely to take in relation to other regulated industries. The approach taken on this occasion reflects the factors outlined above, and in particular, that the industry is still transitioning from having a single desk responsible for the export of wheat in mid-2008 to the current situation of having 23 wheat exporters accredited to export wheat from Australia, and that the arrangements can be revisited in two years.

Finally, it is also important to note that the ACCC's approach to CBH's ring-fencing measures in this draft decision has no bearing on the need for CBH to continue compliance with the ring-fencing arrangements it agreed to adhere to in conjunction with the ACCC's decision not to revoke the 'notification' relating to a component of the Grain Express product.

CBH's agreement to comply with these ring-fencing measures formed an important part of the ACCC's decision not to revoke the notification. Accordingly, the ACCC does not accept CBH's position that ring-fencing measures provided to the ACCC in conjunction with the current access undertaking assessment can apply in substitution for those arrangements referred to in CBH's Grain Express notification to the ACCC

The ACCC therefore notes that, overall, its views and recommendations about the appropriateness of the measures in the proposed Undertaking are less prescriptive than they might otherwise be in relation to longer term undertakings in other industries.

The ACCC has provided its draft views throughout on provisions that would not be appropriate, and alternatives that might be more appropriate.

The ACCC's views on particular sections of the proposed Undertaking are summarised as follows:

Background, Objectives and Structure

Background section

It is not necessary for the ACCC to form a view on the appropriateness of the background section pursuant to section 44ZZA(3) given that it is merely descriptive and places no obligations on CBH.

Objectives

The objectives section, critical to the operation of the proposed Undertaking, is not appropriate pursuant to section 44ZZA(3) given concerns with the following particular objectives:

- "The recovery of all reasonable costs associated with the granting of access to the Port Terminal Services" (clause 2.2(e)(i)(A)); and

- “The Port Operator’s ability to meet its own or its Trading Division’s reasonably anticipated requirements for Port Terminal Services” (clause 2.2(e)(i)(D)).

Structure

The structure section of the proposed Undertaking is not appropriate pursuant to section 44ZZA(3) given concerns with:

- The reference to specific terms and conditions being set out in the Port Schedules (clause 3.1(b)(ii));
- The reference to using ‘reasonable endeavours’ to procure (clause 3.3).

Commencement, term and variation

Commencement

The commencement clause is not appropriate pursuant to section 44ZZA(3) given it does not clarify that the Undertaking may commence for the purposes of passing the access test under the WEMA at a different time from its commencement date under the TPA.

Term

The three year term of the proposed Undertaking is not appropriate pursuant to section 44ZZA(3) given the transitional state of the industry (i.e. CBH’s proposed term is slightly too long). In coming to this view the ACCC also took into account the desirability of having consistent bulk wheat port access regulation arrangements across Australia (noting that ABB and GrainCorp have proposed two year terms for their Undertakings).

Withdrawal and variation

It is not necessary for the ACCC to form a view on the appropriateness of the withdrawal and variation clauses pursuant to section 44ZZA(3) given that they are merely descriptive.

Extension

The extension clause of the proposed Undertaking is not appropriate pursuant to section 44ZZA(3) given that clause 3.6(a) refers to submitting an undertaking ‘at least three months’ before the expiry of the proposed Undertaking. This is inconsistent with the statutory obligation in section 44ZZBC of the TPA for the ACCC to use reasonable endeavours to make a decision on an access undertaking application within 6 months.

Scope

In the present circumstances, it is appropriate that CBH’s proposed Undertaking applies only to wheat (rather than all grains).

In the present circumstances, it is appropriate that CBH's proposed Undertaking applies only to port terminal services (rather than including up-country services).

It is not appropriate that CBH's proposed Undertaking only applies to port terminal services when they are not bundled with other CBH services.

It is not appropriate that CBH's proposed Undertaking expressly excludes "fumigation of grain as a preventative measure".

The drafting of the scope of the proposed Undertaking is not appropriate because it lacks clarity. In relation to the drafting of the scope of the proposed Undertaking:

- it would be appropriate for the definition of Port Terminal Services to be amended to make it clear that the lists of port terminal services in Schedules 3 – 6 are not exhaustive;
- it would be appropriate for the Schedules 3 – 6 to expressly include 'cargo accumulation';
- it would be appropriate for clause 5.4(d) (regarding sharing of efficiency savings) to be removed given its lack of clarity.

It is not necessary for CBH's proposed Undertaking to expressly provide for access to port terminals by employees of superintendence companies.

Publish, negotiate, arbitrate mechanism

The ACCC is of the view that, in the present circumstances, it is appropriate that CBH's proposed Undertaking adopts a publish-negotiate-arbitrate approach (rather than providing for ex ante price regulation). In forming this view, the ACCC has had regard to the transitional state of the industry and the relatively short duration of the proposed Undertaking.

The ACCC considers, however, that the drafting of the publish-negotiate-arbitrate component of the proposed Undertaking is not appropriate. The ACCC considers it is more likely to be appropriate for the proposed Undertaking to:

- include an indicative access agreement setting standard terms for access to the service;
- require CBH to publish a single set of prices for port terminal services, which may include differentiated prices for different circumstances (i.e., for different processes for testing of grain depending on where it has been stored – but only where these processes are justifiable with regard to hygiene, quality or associated factors), provided those circumstances are transparently stated and the pricing differences are justified on the basis of different costs;
- require CBH to publish prices within a timeframe that allows sufficient opportunity for access seekers to negotiate non-standard terms and prices;
- provide appropriate holding over arrangements to ensure access seekers are not delayed in obtaining access by reason of engaging in a negotiation with CBH on non-standard terms or prices, or by reason of resolving a dispute with CBH pursuant to the processes in the proposed Undertaking;

- address the issues identified by the ACCC in the discussion above regarding the timeframes and lack of clarity and certainty in the drafting of the proposed Undertaking, as well as the disproportionate discretion of the access provider;
- not include a ‘pre-condition’ to invoking the dispute resolution process, as currently included in clause 7.3(c);
- provide that when a Dispute is referred to arbitration, it is referred to the ACCC in the first instance;
- provide a mechanism by which the ACCC may consider whether or not it wishes to arbitrate the Dispute;
- provide for the Dispute to be arbitrated by the ACCC if it so chooses, or for the Dispute to be arbitrated by a private arbitrator if the ACCC so chooses;
- permit the ACCC to conduct an arbitration adopting the processes and having regard to the matters set out in Part IIIA of the TPA if it chooses to be the arbitrator; and
- require a private arbitrator, if appointed, to keep the ACCC informed of the progress of the arbitration, including timelines and processes for making submissions; and
- allow the ACCC to make submissions in relation to an arbitration conducted by a private arbitrator.

Indicative Access Agreement

Inclusion of an Indicative Access Agreement

CBH’s approach of not including an Indicative Access Agreement in its proposed Undertaking is not appropriate. It results in a lack of certainty and clarity for potential access seekers and is, therefore, not in the interest of persons who might want access to the service.

Including an Indicative Access Agreement in the proposed Undertaking would:

- provide a clear starting point for negotiations between an access seeker and CBH (and is therefore critical to ensuring access seekers can effectively negotiate with CBH); and
- ensure that the costs of negotiation and/or arbitration are not excessive.

It is important to note that inclusion of an indicative access agreement in the proposed Undertaking does *not* mean that access seekers and CBH are precluded from negotiating around the Indicative Access Agreement (either by commercial agreement or by utilising the Negotiation and/or Arbitration provisions in the proposed Undertaking).

The ACCC is seeking submissions on whether CBH’s 2009–10 Port Terminal Services Agreement provided to the ACCC on 4 August 2009 and annexed to this draft decision at Annexure A would form an appropriate basis for an Indicative Access Agreement.

Variation of an Indicative Access Agreement

CBH's approach of retaining discretion to unilaterally vary its "Standard Terms" (i.e. which are likely to be similar to an Indicative Access Agreement) is not appropriate (even with the requirement that variations be consistent with clauses 2 and 6.4 of the proposed Undertaking). It results in a lack of certainty and clarity for potential access seekers and undermines the benefits of inclusion of an Indicative Access Agreement in the proposed Undertaking.

It would be more appropriate for the variation provisions in section 44ZZA(7) of the TPA to apply to variations of the Indicative Access Agreement. This does not preclude parties from negotiating non-standard terms that vary from those in the Indicative Access Agreement.

Non-discrimination

It is appropriate that CBH's proposed Undertaking includes non-discrimination and no hindering access clauses.

However, the precise non-discrimination and no hindering access clauses proposed by CBH are not appropriate given the lack of clarity about their interpretation. Further, the drafting of the non-discrimination clauses does not ensure that they will prohibit CBH from discriminating in favour of its own trading business.

The ACCC has made recommendations in the Non-Discrimination chapter about changes that could be made to the non-discrimination clauses and no hindering access clauses to make them sufficiently robust to protect against anti-competitive self-preferential treatment by CBH. For the avoidance of doubt, the non-discrimination clause should protect against (amongst other matters) the ability of CBH to anti-competitively discriminate between wheat exporters on the basis of where grain was stored (ie. whether it was stored in CBH's up-country storage and handling network, a third party storage network or on-farm).

The ACCC seeks submissions on whether it would be appropriate for CBH's proposed Undertaking to provide for an annual audit procedure of compliance with the proposed Undertaking's non-discrimination clause.

Ring-fencing

In relation to ring-fencing, the ACCC notes that CBH is already subject to ring-fencing arrangements arising from the ACCC's decision not to revoke a 'notification' from CBH relating to a component of its Grain Express product in 2008. CBH's ring-fencing rules in its proposed Undertaking differ in some respects from the ring-fencing arrangements which form part of CBH's Grain Express exclusive dealing notification. For instance, the Grain Express ring-fencing policy provides for a more robust complaints handling/resolutions process than the process provided in its proposed Undertaking.

The ACCC is therefore of the view that the ring-fencing rules in CBH's proposed Undertaking would not, in their current form, serve as an effective safeguard against anti-competitive discrimination in the provision of port terminal services.

However, ring-fencing is just one tool that can be used to ensure against anti-competitive discrimination.

Were CBH's proposed Undertaking amended to contain robust non-discrimination and no hindering access clauses, fair and transparent port terminal protocols and an indicative access agreement (as well as measures to deal with the potential for information about port terminal services to be used to the advantage of CBH's wheat exporting arm – such as the publication measures described in the Other Issues chapter), then, in the circumstances, it would not be necessary for CBH to include ring-fencing measures in its undertaking at this particular point in time.

In forming this view, the ACCC has taken into account the transitional nature of the industry and the possibility that any ring-fencing measures that were implemented at this point in time could need to be revised in the near future in accordance with any regulatory changes (either to extend or reduce the regulation to which CBH is subject). The ACCC considers that this would be an undesirable outcome in that it could impose unnecessary regulatory costs during a time of industry transition.

The ACCC has also taken into account the short duration of CBH's proposed Undertaking and will closely monitor the effectiveness of its undertaking in ensuring against anti-competitive discrimination during its operation.

The ACCC notes that, once the regulatory framework to which CBH is subject is more certain, any future undertaking submitted by CBH may need to include robust ring-fencing rules which cover CBH's port operations.

It is important to note that the ACCC's approach taken to ring-fencing in assessing this particular access undertaking is not indicative of the approach to ring-fencing that the ACCC would be likely to take in relation to other regulated industries. The approach taken on this occasion reflects the factors outlined above, and in particular, that the industry is still transitioning from having a single desk responsible for the export of wheat in mid 2008 to the current situation of having 23 wheat exporters accredited to export wheat from Australia, and that the arrangements can be revisited in two years.

Finally, it is also important to note that the ACCC's approach to CBH's ring-fencing measures in this draft decision has no bearing on the need for CBH to continue compliance with the ring-fencing arrangements it agreed to adhere to in conjunction with the ACCC's decision not to revoke the 'notification' relating to a component of the Grain Express product.

CBH's agreement to comply with these ring-fencing measures formed an important part of the ACCC's decision not to revoke the notification. Accordingly, the ACCC does not accept CBH's position that ring-fencing measures provided to the ACCC in conjunction with the current access undertaking assessment can apply in substitution for those arrangements referred to in CBH's Grain Express notification to the ACCC.

Capacity Management

It is not appropriate that CBH's proposed Undertaking does not include its policies and procedures for managing demand for the Port Terminal Services (including policies and procedures relating to the nomination and acceptance of ships to be loaded using the Port Terminal Service) (together, Port Terminal Rules, or PTRs), given that these documents set out the key processes by which CBH will allocate and manage port terminal capacity.

However, the ACCC considers it desirable that CBH has the flexibility to run its operations in an efficient manner. However, access seekers must have a sufficient degree of notice about amendments and it should be made clear that any variations will be subject to the non-discrimination clauses in the Undertaking. It is also desirable that the PTRs include a swift dispute resolution mechanism.

In the interests of retaining flexibility and efficiency, the ACCC would be prepared for the variation mechanism to be based on a robust industry consultation process rather than a formal ACCC consultation process. The ACCC will, however, closely monitor the success of this variation method and will take its findings into account in any future review of access undertakings.

To ensure that the PTRs that have been varied can be enforced, a provision should be included in the Undertaking that obliges CBH to comply with the PTRs (as varied from time to time). In addition, a provision should be included in the undertaking that states that any variations to the PTRs are subject to the non-discrimination provisions of the undertaking.

The ACCC notes that CBH has provided the ACCC with three draft versions of its PTRs. The ACCC seeks submissions on CBH's latest draft of its PTRs, provided to the ACCC on 31 July 2009 and annexed to the draft decision at Annexure B.

Other Issues

Publication of stocks of grain at port

It is not appropriate that CBH's proposed Undertaking does not include an obligation to publish stocks of grains at port.

Such an obligation would address concerns raised by interested parties that port operators have the potential to restrict access to port for bulk wheat services by exhausting the port terminal's capacity in favour of other grains.

For the avoidance of doubt, this obligation would not extend to publication of up-country information. This is because, as set out in the Scope chapter of this draft decision, it is the ACCC's view that CBH's approach of limiting its proposed Undertaking to port terminal services (and by extension, information about its port operations) is appropriate in the circumstances.

Publication of key port terminal information

As set out in the Ring-Fencing chapter, the ACCC considers that it is appropriate that arrangements be provided for in the proposed Undertaking to address the potential for CBH's marketing arm to misuse port terminal information to its advantage.

The ACCC considers that the appropriate approach to dealing with this issue would be for the proposed Undertaking to require publication of key port terminal information (such as cargo nomination applications) on the shipping stem a short time after its receipt by CBH. This would increase transparency of nominations that have been made and lessen the opportunity for CBH's marketing arm to misuse key port terminal information. It is important to note that any such discriminatory conduct would be prohibited by a robust non-discrimination clause, such as that recommended by the ACCC in the Non-Discrimination chapter.

Publication of key service standards

It is not appropriate that CBH's proposed Undertaking does not include an obligation to report on a number of key service standards.

Such reporting would provide a degree of transparency around the level of service being provided to wheat exporters and assist potential access seekers in assessing the appropriateness of the price offered for a service.

Conclusion

The ACCC's draft decision is that it should not accept the proposed Undertaking proffered by CBH on 16 April 2009 in its current form.

The ACCC has provided its draft views throughout on provisions that would not be appropriate, and alternatives that might be more appropriate.

2 Procedural overview

Summary

The ACCC is seeking submissions on its draft decision not to accept CBH's proposed Undertaking and the reasons for its draft decision.

In particular, the ACCC seeks views on:

- whether, if the ACCC's recommendations were adopted by CBH in a revised Undertaking, the revised proposed Undertaking would be appropriate;
- whether CBH's proposed standard terms and conditions of access to port terminal services (at Annexure A to this draft decision) would form an appropriate Indicative Access Agreement (if attached to a revised undertaking submitted by CBH); and
- whether CBH's revised Port Terminal Rules (at Annexure B) to this draft decision) would be appropriate (if attached to a revised undertaking submitted by CBH).

Submissions are due by 5:00pm on Thursday, 3 September 2009 to:

Mr Anthony Wing
General Manager
Transport and General Prices Oversight
ACCC
GPO Box 520
MELBOURNE VIC 3001

Email: transport@acc.gov.au

2.1 CBH's proposed Undertaking

Under Division 6 of Part IIIA of the TPA, the Australian Competition and Consumer Commission (ACCC) may accept an undertaking from a person who is, or expects to be, the provider of a service, in connection with the provision of access to that service.

The ACCC received an access undertaking (**the proposed Undertaking**) from CBH on 14 April 2009 for consideration under Division 6 of Part IIIA. The proposed Undertaking relates to the provision of access to services for the export of bulk wheat at grain terminals operated by CBH in Western Australia.

CBH has submitted the proposed Undertaking in accordance with legislative requirements under the WEMA, further details of which are set out below in the Legislative Framework chapter. Two other parties, ABB Grain Ltd (**ABB**) and

GrainCorp Operations Ltd (**GrainCorp**), have also submitted access undertakings to the ACCC and the ACCC has also published draft decisions in respect of those applications.

2.2 Submissions from CBH

During the current process, in addition to the initial supporting submission provided by CBH on 14 April 2009 in conjunction with the proposed Undertaking, the ACCC sought and received further information from CBH as follows:

- On 19 May 2009 CBH provided the ACCC with its proposed 2009/10 shipping capacity allocation plan.
- On 2 June 2009 the ACCC requested further information from CBH in relation to various matters raised in CBH's initial supporting submission, and in relation to various clauses of the proposed Undertaking.
- On 29 June 2009 CBH provided a response to the ACCC's information request, the ACCC's Issues Paper and third party submissions made during the public consultation.
- On 31 July 2009 CBH provided a revised version of its Port Terminal Rules.
- On 4 August 2009 CBH provided a revised version of its 2009–10 Port Terminal Services Agreement.

2.3 Public consultation process to date

The TPA provides that the ACCC may invite public submissions on an access undertaking application.⁵

The ACCC published an Issues Paper on 29 April 2009 inviting submissions on the proposed CBH Undertaking, as well as on the proposed ABB and GrainCorp Undertakings. The ACCC directly advised approximately 80 stakeholders, including accredited wheat exporters, grain growers, farming organisations and state regulatory bodies of the public consultation process.

As part of the public consultation process the ACCC also held meetings in several capital cities during May 2009 to allow interested parties the opportunity to discuss relevant matters with the ACCC in person. Meetings were held as follows:

- 7 & 8 May 2009: Brisbane
- 11 & 12 May 2009: Sydney
- 18 & 19 May 2009: Adelaide
- 25 & 26 May 2009: Perth

⁵ *Trade Practices Act 1974* (Cth) s 44ZZBD(1).

- 22 & 28 May 2009: Melbourne

Submissions received

The ACCC received public submissions from the following parties in relation to the proposed CBH Undertaking:

Australian Grain Exporters Association (AGEA) – submissions received 11, 18 and 29 May 2009

AGEA is a representative body of exporters of Australian grain, formed in 1980 to promote their philosophy that competition, represented by open and contestable markets, is the most effective and efficient means of delivering the maximum benefits to the grains industry, and the community as a whole.

Members of the AGEA are active participants in both domestic and export grain markets, with a particular focus on providing efficient access to international markets. Members of AGEA are Bunge Global Markets Australia Pty Ltd, Cargill Australia Limited, Louis Dreyfus Australia Pty Ltd, Glencore Grain Pty Ltd, Noble Grain Australia Pty Ltd and AC Toepfer International (Australia) Pty Ltd.⁶

Albany Port Authority – submission received 19 May 2009

The Albany Port Authority is a WA owned port authority, established under the *Port Authorities Act 1999* (WA).

Department of Agriculture and Food, WA – submission received 25 May 2009

The Department is part of the Western Australian government and is responsible for matters involving agriculture and food.

SGS Agricultural Services – submission received 27 May 2009

SGS provides inspection, testing, certification and verification services to ensure that products, services and systems across a range of industries meet quality, safety and performance standards and specifications.⁷

Intertek – submission received 29 May 2009

Intertek is commodities and products testing company, carrying on a wide range of testing, inspection and certification services across a number of different industries.⁸

Riverina (Australia) Pty Ltd – submission received 29 May 2009

Riverina is an accredited wheat exporter under the WEMA.

Western Australian Farmers Federation (Inc) – submission received 29 May 2009

WAFarmers is the Western Australia's largest rural lobby group. WAFarmers represents its more than 4,000 members in relation to issues affecting wool, meat, dairy, grains, horticulture, pastoral and bees.⁹

⁶ <http://www.agea.com.au/default.asp?ID=223>.

⁷ http://www.au.sgs.com/agriculture_au?lobId=17163.

⁸ Intertek, *Submission in relation to proposed access undertakings*, 29 May 2009, p. 6.

Pastoralists and Graziers Association of WA (Inc) – submission received 2 June 2009

The PGA is a non-profit industry organisation established in 1907 that represents primary producers in the pastoral and agricultural regions of Western Australia. The PGA states that it represents around 1200 progressive grain growers who believe in the benefits of competition and the reduction of government regulation within the industry.¹⁰

Grain Industry Association of Victoria – submission received 4 June 2009

The GIAV is the representative body for key participants in the grain industry supply chain in Victoria. Its membership includes grain marketers and trades, grain brokers, end-user processors such as millers, maltsters and stockfeed manufacturers, as well as bulk handling companies, seed specialists, grain transport operators and container packers.¹¹

New South Wales Farmers Association – 10 June 2009

The NSW Farmers Association represents the interests of the majority of commercial farming operations throughout New South Wales. It states that through its commercial, policy and apolitical lobbying activities it provides a link between farmers, government and the general public.¹²

2.4 Confidential submissions

The ACCC notes that it received some confidential submissions as part of its consultation, from both CBH and from third parties. In this regard, the ACCC notes that a party may request that the ACCC not make the whole or part of a submission available for confidentiality reasons.¹³ The ACCC acknowledges the need for a balance between allowing parties to submit relevant information on a confidential basis, where that information is commercially sensitive, and the need to allow parties whose legitimate interests may be adversely affected by an administrative decision the opportunity to respond to relevant material. In the current context, the ACCC considers that this balance is adequately found by giving weight to comments made in public submissions, and considering comments made in confidential submissions only where such comments are relevant, determinative of a particular issue and contribute considerations not already dealt with in a public submission. In this regard, limited weight has been given to confidential submissions made on this process.

The ACCC also notes that several submissions have made allegations that CBH has engaged in conduct that may raise issues under the prohibitions on anti-competitive conduct under Part IV of the TPA. In the context of the current Part IIIA assessment, the ACCC has not formed any views on the legitimacy or otherwise of these allegations. To the extent that claims have raised concerns under restrictions on anti-

⁹ <http://www.waff.org.au/>

¹⁰ Pastoralists and Graziers Association, *Submission in relation to proposed CBH access undertaking*, 29 May 2009, para 1.1, p. 1.

¹¹ Grain Industry Association of Victoria, *Submission in relation to proposed access undertakings*, 1 June 2009, p. 1.

¹² NSW Farmers Association, *Submission in relation to proposed access undertakings*, June 2009, p. 3.

¹³ *Trade Practices Act 1974* (Cth) s 44ZZBD(5).

competitive conduct in Part IV of the TPA, these matters are being assessed by the ACCC's Enforcement and Compliance Division.

2.5 Indicative timeline

Under the TPA, the ACCC must use its best endeavours to make a decision on an access undertaking application within 6 months of the day it received the application, or within any further, extended period if the ACCC so decides.¹⁴ The ACCC is therefore obliged to use its best endeavours to make a final decision on the proposed Undertaking by 16 October 2009, or such further period as the ACCC decides.

The ACCC acknowledges, however, that CBH is required to have an access undertaking in place from 1 October 2009 in order to meet the accreditation requirements of the WEMA.

The ACCC therefore aims to make a final decision on CBH's proposed Undertaking by the end of September 2009, if not withdrawn earlier.

However, CBH has indicated it may withdraw this Undertaking and resubmit a revised Undertaking, taking into account public submissions made in relation to the ACCC's views on what might be appropriate in this reasons for the Draft Decision, and public submissions made on the indicative access agreement and port terminal rules for 2009/10 subsequently provided. If so, the ACCC will aim to make a final decision on any revised Undertaking as soon as possible, and preferably by the end of September 2009. However, this will still be subject to when CBH lodges any revised Undertaking and how effectively it has taken these matters into account.

2.6 Consultation on the draft decision

The ACCC invites submissions from interested parties on its draft decision not to accept the proposed CBH Undertaking.

In particular, the ACCC seeks views on:

- whether, if the ACCC's recommendations were adopted by CBH in a revised Undertaking, the revised proposed Undertaking would be appropriate;
- whether CBH's proposed standard terms and conditions of access to port terminal services (at Annexure A to this draft decision) would form an appropriate Indicative Access Agreement (if attached to a revised undertaking submitted by CBH); and
- whether CBH's revised Port Terminal Rules (at Annexure B) to this draft decision) would be appropriate (if attached to a revised undertaking submitted by CBH).

¹⁴ *Trade Practices Act 1974* (Cth) s 44ZZBC(1).

Making a submission

Submissions must be forwarded by 5:00pm on **Thursday, 3 September 2009** to:

Mr Anthony Wing
General Manager
Transport and General Prices Oversight
ACCC
GPO Box 520
MELBOURNE VIC 3001

Email: transport@acc.gov.au

Submissions are to be sent preferably by email, in Microsoft Word or other text readable document form.

Confidentiality of submissions

As indicated above, the ACCC acknowledges the need for a balance between permitting the provision to a regulator of relevant information on a confidential basis, where that information is commercially sensitive, and the need to allow parties whose legitimate interests are likely to be affected by an administrative decision the opportunity to respond to relevant material.

However, the ACCC strongly encourages parties who intend to provide submissions on the ACCC's draft decision to make public submissions. Unless a submission, or part of a submission, is marked confidential, it will be published on the ACCC's website and may be made available to any person or organisation on request. The sections of submissions that are claimed to be confidential should be clearly identified.

2.7 Further information

The proposed CBH Undertaking and other relevant materials, including supporting submissions from the CBH and public submissions by interested parties, are available on the ACCC's website at www.acc.gov.au by following the links to 'For regulated industries' and 'Wheat Export,' or via the following link:
<http://www.acc.gov.au/content/index.phtml/itemId/868799>

If you have any queries about any matter in relation to the ACCC's process, or to any matters raised in this draft decision, please contact:

Ms Sarah Sheppard
Director
Transport & General Prices Oversight, Wheat Access Section
Ph: (03) 9290-1992
Email: sarah.sheppard@acc.gov.au
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3 Legislative Framework

Summary

In assessing the appropriateness of CBH's proposed Undertaking, the ACCC has had regard to the matters specified under s44ZZA(3) of the TPA. In particular, the ACCC has considered:

- the objectives of the 'access test' embodied in the *Wheat Export Marketing Act 2008* and, in particular, the objective of ensuring that vertically integrated bulk handling companies provide **fair and transparent access** to their facilities to other accredited exporters;
- whether the proposed Undertaking provides **for sufficient certainty and clarity** in its terms, effect and operation;
- the legitimate business interests of the bulk handlers in being able to run their port terminal facilities with a sufficient degree of flexibility and without undue prescriptive regulation so as to maintain an efficient supply chain;
- the objective of promoting competition in the wheat export industry;
- the desirability of having consistent bulk wheat port access regulation arrangements across Australia;
- the risk and undesirability of imposing regulation that is not appropriate at a time when the industry is newly liberalised and in transition;
- the need to balance the legitimate business interests of CBH with the interests of access seekers; and
- that price discrimination in favour of CBH's trading operations should not occur except to the extent that the cost of providing access by CBH to other users is higher than provision of the service to itself.¹⁵

It is noted that the factors listed above are not the actual "matters" listed under section 44ZZA(3) of the TPA,¹⁶ but rather fall for consideration within the scope of the relevant matters under section 44ZZA(3) of the TPA.

¹⁵ NB. This factor, explained below at 1.8, is consistent with the pricing principles in section 44ZZCA of the *Trade Practices Act*. These pricing principles must be taken into account by the ACCC in deciding whether or not to accept an access undertaking under Division 6 in accordance with s 44ZZA(3)(ab).

¹⁶ Other than the first two matters, which the ACCC considers are relevant pursuant to section 44ZZA(3)(e) of the *Trade Practices Act*.

3.1 Part IIIA of the Trade Practices Act

The legislative framework for the ACCC's consideration of the proposed Undertaking is set out in Part IIIA of the TPA.

Part IIIA was inserted into the TPA in 1995 by the *Competition Policy Reform Act 1995* (Cth) and provides three main mechanisms to facilitate access to services provided by means of infrastructure:

- via declaration of a service (under section 44H) and arbitration (under section 44V);
- through the provision of access undertakings and access codes (under sections 44ZZA and 44ZZAA respectively); and
- via a decision that a State or Territory access regime is effective (under section 44N).

Access undertakings

Division 6 of Part IIIA provides that a provider of a service (or a person who expects to be the provider of a service) may give an undertaking to the ACCC in connection with the provision of access to the service. An undertaking may specify the terms and conditions on which access will be made available to third parties. The ACCC may accept the undertaking if it thinks appropriate to do so having regard to the matters set out in section 44ZZA(3). If the ACCC accepts the undertaking, the provider is required to offer third party access in accordance with the undertaking. An access undertaking is binding on the access provider and can be enforced in the Federal Court upon application by the ACCC.

3.2 Matters in section 44ZZA

Section 44ZZA(3) provides that the ACCC may accept an access undertaking, if it thinks it appropriate to do so, having regard to the following matters:

- the objects of the Part IIIA of the TPA;
- the pricing principles specified in section 44ZZCA of the TPA;
- the legitimate business interests of the provider of the service;
- the public interest, including the public interest in having competition in markets (whether or not in Australia);
- the interests of persons who might want access to the service;
- whether the undertaking is in accordance with an access code that applies to the service; and

- any other matters that the ACCC thinks are relevant.¹⁷

This part of the document discusses in a general sense how the ACCC proposes to have regard to these matters in making its decision under section 44ZZA(3) in relation to the proposed Undertaking. The discussion in this chapter is general in the sense that it largely does not refer to specific clauses of the proposed Undertaking, but rather constitutes a consideration of the wider context within which the proposed Undertaking exists, and which underpin the more specific analysis of particular proposed clauses. Subsequent chapters consider specific clauses of the proposed Undertaking by reference to this foundational discussion, and refer again to matters in section 44ZZA(3) as relevant.

The discussion in this chapter does not consider each of the matters listed in section 44ZZA(3) in the same order as those matters are listed in that section. Instead, the matters are listed in the following order:

1. any other matters that the ACCC thinks are relevant;
2. the objects of Part IIIA;
3. the public interest, including the interest in having competition in markets (whether or not in Australia);
4. the legitimate business interests of the provider (that is, CBH);
5. the interests of access seekers;
6. the pricing principles in section 44ZZCA; and
7. whether the undertaking is in accordance with an access code that applies to the service.

This re-ordering is simply designed to make the discussion easier to follow; it should not be interpreted as the ACCC placing a particular weight on a matter by virtue of its position in the discussion.

The ACCC notes as a general comment that section 44ZZA(3) describes matters to which the ACCC is required to have regard, not criteria of which the ACCC must be satisfied. The ACCC therefore does not consider that ‘satisfaction’ of a particular ‘criterion’ under section 44ZZA(3) leads to a conclusion that a proposed access undertaking should be accepted. The test under section 44ZZA(3) is whether the Commission considers it “appropriate” to accept the undertaking, having regard to the matters in section 44ZZA(3).

3.3 Any other matters the ACCC thinks are relevant

Section 44ZZA(3)(e) of the TPA provides that, in deciding whether to accept an undertaking, the ACCC may have regard to any other matters it thinks are relevant.

For the reasons outlined below, the ACCC thinks it appropriate for it to have regard to the following matters:

¹⁷ *Trade Practices Act 1974* (Cth) s 44ZZA(3).

- the *Wheat Export Marketing Act 2008* (Cth) (**the WEMA**), and the intention of Parliament in enacting that legislation; and
- the extent to which the proposed Undertaking is clear and certain.

The ACCC acknowledges that subsection (e) comes at the end of the list of matters to which the ACCC has regard in deciding whether to accept an undertaking. However, the matters arising under subsection (e) are discussed here as it covers the WEMA, which provides context to the ACCC's consideration as a whole.

The Wheat Export Marketing Act

The WEMA came into effect on 1 July 2008. Section 24 of that Act relevantly requires that, for the period after 1 October 2009, in order for a person that provides port terminal services to also hold or maintain accreditation to export bulk wheat, there must be in operation, under Division 6 of Part IIIA of the TPA, an access undertaking relating to the provision of access to port terminal services for purposes relating to the export of wheat. It is therefore pursuant to section 24 of the WEMA that CBH has proffered the proposed Undertaking to the ACCC.

Regulatory scheme established by the WEMA

Section 3 of the WEMA states that the objects of the Act are to promote the development of a bulk wheat export marketing industry that is efficient, competitive and advances the needs of wheat growers, and to provide a regulatory framework in relation to participants in the bulk wheat export marketing industry.

In relation to the second objective, the WEMA sets up a system for the regulation of Australian bulk wheat exports, establishing an accreditation scheme for exporters and a regulatory body, Wheat Exports Australia (**WEA**), to administer the scheme. Under the WEMA, parties without WEA accreditation are prohibited from exporting wheat in bulk from Australia, and parties seeking accreditation as bulk wheat exporters must be determined by the WEA to be 'fit and proper' having regard to certain criteria.

The WEMA therefore replaces the previous 'single desk' marketing arrangements for bulk wheat exports with a system that allows multiple accredited firms to export bulk wheat from Australia. As stated in the Explanatory Memorandum:

'The [WEMA] will introduce competition into the bulk wheat export industry. Rather than forcing growers to sell their wheat through a single exporter they will be able to choose from a number of accredited exporters as well as domestic outlets.'¹⁸

The 'access test' in the WEMA

The WEMA further provides that parties seeking bulk wheat export accreditation that also provide 'port terminal services' must satisfy an 'access test.'

¹⁸ Explanatory Memorandum, *Wheat Export Marketing Bill 2008* (Cth), p. 3.

A 'port terminal service' is defined to mean a service (within the meaning of Part IIIA of the TPA) provided by means of a port terminal facility, and includes the use of a port terminal facility.¹⁹ A 'port terminal facility' is defined as:

'...a ship loader that is:

- (a) at a port; and
- (b) capable of handling wheat in bulk;

and includes any of the following facilities:

- (c) an intake/receival facility;
- (d) a grain storage facility;
- (e) a weighing facility;
- (f) a shipping belt;

that is:

- (g) at the port; and
- (h) associated with the ship loader; and
- (i) capable of dealing with wheat in bulk.²⁰

The 'access test' is outlined in section 24 of the WEMA and, in summary, provides that:

- *for the period between 1 July 2008 and 30 September 2009*: accredited exporters who operate bulk wheat terminals at ports are required to publish a statement on their website outlining the terms and conditions on which they will allow other accredited exporters access to their port terminal facilities (unless, at the relevant time, there is in force a decision under Part IIIA of the Act that a State or Territory regime is an 'effective access regime' and that regime provides for access to the port terminal service for purposes relating to the export of wheat); and
- *for the period on or after 1 October 2009*: exporters that provide port terminal services will be required to have a formal access undertaking pursuant to Part IIIA of the TPA accepted by the ACCC (or that there be in force a decision under Part IIIA of the TPA that a State or Territory regime is an 'effective access regime' and that regime provides for access to the port terminal service for purposes relating to the export of wheat).

Under the 'access test' providers of port terminal services must also comply with 'continuous disclosure rules' set out in subsection 24(4) of the WEMA. In summary, the continuous disclosure rules require the provider of port terminal services to publish on their website:

- their policies and procedures for managing demand for port terminal services (commonly termed 'Port Loading Protocols' or 'Port Terminal Rules'); and
- a statement, updated daily, setting out, amongst other things, the name of each ship scheduled to load grain using port terminal services, the estimated date on

¹⁹ *Wheat Export Marketing Act 2008* (Cth) s 5.

²⁰ *Wheat Export Marketing Act 2008* (Cth) s 5.

which grain will be loaded into the ship, the date on which the ship was nominated and the date on which the nomination was accepted (this statement is commonly termed the ‘Shipping Stem’).

The rationale for accreditation of bulk wheat exporters and the ‘access test’

The Explanatory Memorandum to the WEMA compares the options of retaining the single desk for bulk wheat exports (option A) and introducing a scheme for accreditation of bulk wheat exporters (option B). It was considered that option B would:

- significantly increase the marketing options for growers;
- mean that more buyers will be competing for wheat, thereby helping growers get a price that reflects market forces;
- force marketers to improve the services they provide to growers to secure supplies of wheat;
- create the opportunity for potential exporters to compete in the export wheat market, which would be likely to drive innovation in marketing, research and development;
- more effectively manage the risk of market lock out; and
- as a result of increased competition, drive supply chain efficiencies in grain marketing.²¹

It was acknowledged, however, that under option B the benefits of the reform may be mitigated if ‘...bulk handling companies (and potential exporters) deny other potential exporters reasonable access to critical handling and storage infrastructure.’²² The Report of the Senate Standing Committee on Rural and Regional Affairs and Transport on the exposure draft of the WEMA includes discussion of these concerns:

‘It was argued that bulk handling and storage facilities throughout Australia are owned and controlled by a limited number of companies. Concerns were raised that, in the event that some or all of these companies became accredited exporters under the proposed legislation, they may be in a position to limit access to these facilities by other exporters.’²³

The Committee also considered the extent to which such concerns could be dealt with under provisions of the TPA, noting that views from witnesses and submitters on the effectiveness of existing powers under the TPA ‘varied greatly.’²⁴ In providing its view on the issue, the Committee said:

²¹ Explanatory Memorandum, *Wheat Export Marketing Bill 2008* (Cth), p. 12-13.

²² Explanatory Memorandum, *Wheat Export Marketing Bill 2008* (Cth), p. 8.

²³ Parliament of Australia, Senate Standing Committee on Rural and Regional Affairs and Transport, *Report on the Wheat Export Marketing Bill 2008 Exposure Draft*, para 3.93.

²⁴ Parliament of Australia, Senate Standing Committee on Rural and Regional Affairs and Transport, *Report on the Wheat Export Marketing Bill 2008 Exposure Draft*, para 3.127.

‘While the committee notes that provisions exist under the TPA to address anti-competitive practices, careful consideration needs to be given to the extent to which these provisions offer practical remedies to the concerns raised during this inquiry.’²⁵

In the Explanatory Memorandum to the WEMA, it was noted that, under option B, a potential exporter having difficulty gaining access to port terminal services could apply to the National Competition Council (NCC) for a declaration that the port terminal facility was essential infrastructure as a means of obtaining access. It was noted, however, that this could involve long timeframes.²⁶

It was therefore considered that an ‘option C’, involving the introduction of a scheme of accreditation for wheat exports, plus a mechanism for allowing access to port terminal facilities, would be appropriate.²⁷

The Explanatory Memorandum notes that while the lodgement of an access undertaking will involve costs to the port terminal operator, it will ensure access to port facilities, which will in turn allow marketers to participate effectively in the export of bulk wheat and provide increased choice to growers in their marketing options.²⁸

ACCC’s views

The ACCC therefore considers that the regulatory scheme established by the WEMA, and the rationale for the inclusion of the access test in the statute are, under section 44ZZA(3)(e), matters relevant to the current decision.

In particular, the ACCC acknowledges that the intention of Parliament to promote competition in the export of bulk wheat has various dimensions, including:

- the promotion of competition between marketers for the acquisition of bulk wheat from growers;
- the promotion of competition between exporters for the export of wheat from Australia; and
- the concomitant promotion of competition for associated products and services, such as supply chain services and grower services.

The ACCC further acknowledges Parliament’s recognition that the promotion of competition in the form described may potentially be limited by anti-competitive conduct associated with port terminal facilities, and that the inclusion of the access test demonstrates a clear intention to legislate measures to mitigate the possibility of such conduct undermining the broader intent of the legislation.

²⁵ Parliament of Australia, Senate Standing Committee on Rural and Regional Affairs and Transport, *Report on the Wheat Export Marketing Bill 2008 Exposure Draft*, para 3.144.

²⁶ Explanatory Memorandum, *Wheat Export Marketing Bill 2008* (Cth), p. 8 & 13.

²⁷ Explanatory Memorandum, *Wheat Export Marketing Bill 2008* (Cth), p. 8.

²⁸ Explanatory Memorandum, *Wheat Export Marketing Bill 2008* (Cth), p. 13.

The ACCC notes the intention of Parliament in including the access test in the WEMA:

‘This clause [that is, containing the access test] is intended to ensure that accredited exporters that own, operate or control port terminal facilities provide *fair and transparent access* to their facilities to other accredited exporters. The test aims to avoid regional monopolies unfairly controlling infrastructure necessary to export wheat in bulk quantities, to the detriment of other accredited exporters. All accredited exporters should have access to these facilities while allowing the operators of the facilities to function in a commercial environment.’²⁹

The ACCC therefore considers it relevant, and consistent with the intentions of Parliament, to have regard to the extent to which the proposed Undertaking provides for ‘fair’ access to port terminal services. The ACCC considers that in the current context, ‘fair access’ ought largely to be equated with non-discriminatory access, reflecting the desirability of ensuring that access to port terminal services is, on the whole, provided on a non-discriminatory basis except where there is a legitimate reason for differential treatment.

The ACCC also considers it relevant, and consistent with the intentions of Parliament, to have regard to the extent to which the proposed Undertaking provides for transparency in relation to the provision of access to port terminal services. That said, the ACCC notes as a general statement that the desirability of transparency ought to be balanced against the desirability of protecting commercially sensitive or otherwise confidential information.

The ACCC notes that CBH has recognised these concepts of fairness and transparency in its supporting submissions:

‘**Non-discrimination:** CBH must provide access in accordance with price and non-price terms that include efficiency, fairness and transparency as central elements.’³⁰

‘Non-discriminatory access is a key feature of the Undertaking.’³¹

Other matters

The ACCC also considers it relevant that the proposed Undertaking provide for sufficient certainty and clarity in its terms, effect and operation, so as to:

- enable the access provider and access seekers to be sufficiently aware of their respective rights and obligations, and thereby avoid unnecessary costs, monetary or otherwise, when utilising the processes set by the proposed Undertaking;

²⁹ Explanatory Memorandum, *Wheat Export Marketing Bill 2008* (Cth), p. 31, emphasis added.

³⁰ Co-operative Bulk Handling Limited, *Submission to the ACCC*, 14 April 2009, para 1.6(b), p. 3, emphasis in original.

³¹ Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, para 27.2, p. 53.

- enable the mediator and/or arbitrator appointed pursuant to the proposed Undertaking to quickly and effectively resolve any dispute that may arise between an access seeker and the access provider; and
- enable the ACCC to quickly and effectively resolve any potential enforcement concerns that may arise regarding potential non-compliance with the proposed Undertaking by CBH.

CBH acknowledges the desirability for certainty in its supporting submission:

‘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.’³²

3.4 The objects of Part IIIA

The objects of Part IIIA are to:

- promote the economically efficient operation of, use of and investment in the infrastructure by which services are provided, thereby promoting effective competition in upstream and downstream markets; and
- provide a framework and guiding principles to encourage a consistent approach to access regulation in each industry.³³

CBH’s submissions

CBH submits that:

‘...the access arrangements (as already exist and now expanded and more fully documented in the Undertaking) promote the economically efficient use of, and investment in, bulk wheat export terminals, and also promote competition in upstream and downstream markets by giving industry confidence that the transition to deregulation will not be hindered by port access issues arising from anti-competitive behaviour;’³⁴

CBH also submits that:

‘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 fully established although an assumption to that effect appears to underlie the inclusion of the access test in the WEMA.

CBH considers that there is scope for new entry, and there is some potential for inter-port competition. Given that CBH has historically provided access

³² Co-operative Bulk Handling Limited, *Submission to the ACCC*, 14 April 2009, para 6.5, pp. 40-41.

³³ *Trade Practices Act 1974* (Cth) s 44AA.

³⁴ Co-operative Bulk Handling Limited, *Submission to the ACCC*, 14 April 2009, para 1.7(a), p. 5.

to its services in the absence of a formal access undertaking, the Commission should accept an undertaking that requires CBH to publish reference prices for a set of standard services without those forming part of the undertaking. This approach would protect investment incentives and promote economically efficient investments in Port Terminal Facilities.³⁵

Objects of Part IIIA – promotion of efficiency and competition

The ACCC considers that economic efficiency has three components.

Productive efficiency refers to the efficient use of resources within each firm such that all goods and services are produced using the least cost combination of inputs.

Allocative efficiency refers to the efficient allocation of resources across the economy such that the goods and services that are produced in the economy are the ones most valued by consumers. It also refers to the distribution of production costs amongst firms within an industry to minimise industry-wide costs.

Dynamic efficiency refers to the efficient deployment of resources between present and future uses such that the welfare of society is maximised over time. Dynamic efficiency incorporates efficiencies flowing from innovation leading to the development of new services, or improvements in production techniques.

The ACCC notes that its present role is to decide whether or not it is appropriate to accept the proposed Undertaking having regard to the matters in section 44ZZA(3) of the TPA.

It is not the ACCC's role in the current context to re-evaluate the policy considerations of government that led to the removal of the single desk, nor to assess the rationale of the access test. As outlined above, the ACCC acknowledges the objects of the WEMA to promote the development of a bulk wheat marketing industry that is efficient, competitive and advances the needs of wheat growers, and the rationale for including the access test as a measure against the potential for port facility operators to frustrate the competitiveness of that industry. The ACCC is therefore not assessing the *need* for an undertaking in the first place but rather the appropriateness of the proposed Undertaking, having regard to the matters in section 44ZZA(3).

There is no requirement in Division 6 of Part IIIA that requires the ACCC to be satisfied, prior to accepting an access undertaking proffered pursuant to that Division, that it is uneconomical to duplicate the facility by means of which the service the subject of the undertaking is provided.³⁶ In particular, the matters listed in section 44ZZA(3) of Division 6 do not require the ACCC to have regard to whether or not it

³⁵ Co-operative Bulk Handling Limited, *Submission to the ACCC*, 14 April 2009, para 6.1, p. 39.

³⁶ This concept is relevant to Division 2 of Part IIIA of the TPA which sets out a mechanism by which parties may seek to have certain services declared. Section 44G(2) of the TPA provides that the NCC cannot recommend to the Minister that a service be declared unless it is satisfied of various matters, including '...that it would be uneconomical for anyone to develop another facility to provide the service.'

is uneconomical to duplicate the particular facility. Therefore, even absent the existence of the WEMA, the ACCC considers it is not its role in assessing an undertaking provided under Division 6 of Part IIIA to determine whether the facility to which the undertaking relates is uneconomical to duplicate, nor whether the facility would otherwise meet the requirements for declaration under Division 2.

The ACCC therefore does not consider that its role in the current context is to thoroughly assess the state of competition in the bulk wheat export industry and evaluate whether access undertakings are justified (such as by reason of the port terminal facilities being uneconomical to duplicate). Instead, the ACCC considers that Parliament has expressed a clear intention to require port terminal operators to provide access undertakings to mitigate the potential for anti-competitive harm, and it is in that context that the ACCC must consider the appropriateness of those undertakings as provided.

The ACCC nonetheless considers it appropriate, in having regard to the matters in section 44ZZA(3)(aa) and (b) of Part IIIA, to have some regard to the competitive environment in which the services the subject of the undertaking are provided. That is, section 44ZZA(3)(aa), by referring to the objects of Part IIIA, recognises the promotion of the economically efficient operation of, use of and investment in infrastructure, thereby promoting competition in upstream and downstream markets, while section 44ZZA(3)(b) refers to the public interest, including the public interest in having competition in markets (whether or not in Australia).

Objects of Part IIIA – a consistent approach to access regulation

Section 44AA(3)(b) of the TPA states that an object of Part IIIA is to provide a framework and guiding principles to encourage a consistent approach to access regulation in each industry.

In this particular instance, the ACCC notes that the undertaking provided by CBH is one of three undertakings that have been proposed by three bulk handling companies that, taken together, cover services provided by means of facilities at seventeen grain export terminals around Australia. Further, the undertakings have been proffered to the ACCC pursuant to a Commonwealth scheme designed to introduce competition into the bulk wheat export industry.

In this context, the ACCC acknowledges differences in the circumstances of each bulk handler, including differences in the services provided by means of a particular facility, and the extent to which such differences may influence the ACCC's consideration of the appropriateness of the undertaking proposed by that bulk handler.

The ACCC also acknowledges, however, the desirability of encouraging a consistent approach to access regulation, as recognised in section 44AA(b) of the TPA, and considers that, to the extent possible and appropriate, the Undertaking proposed by CBH ought to maintain consistency with the undertakings proposed by the other bulk handlers.

3.5 The public interest

Section 44ZZA(3)(b) requires the ACCC to have regard to the public interest, including the public interest in having competition in markets (whether or not in Australia).

CBH submissions

CBH submits that:

‘...the public interest and the interests of access seekers is served by CBH continuing to provide access to Port Terminal Services to accredited wheat exporters but under more fully documented arrangements which ensure certainty, transparency and non-discrimination such that the public and access seekers can be confident of a successful transition from a single desk to competition in the export of bulk wheat.’³⁷

CBH also submits 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, regulation arises not from a declaration process, a contravention of Part IV of the TPA or a Productivity Commission (PC) review. Regulation arises prior to a PC review in an environment 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.

In the circumstances, and given that more extensive regulation may be adopted at the option of the Commonwealth, CBH submits that the Undertaking represents a prudent approach.’³⁸

ACCC’s views

Section 44ZZA(3)(b) reflects the reference in the Part IIIA objects to the promotion of effective competition in upstream and downstream markets, as discussed above. Therefore, in having regard to this matter, the ACCC again notes the previous discussion regarding the rationales for the WEMA and the access test. However, the public interest also encompasses broader considerations.

Relevantly, the ACCC also considers it appropriate to have regard to the transitional state of the bulk wheat export industry. In addition to the comments above, CBH submits that:

³⁷ Co-operative Bulk Handling Limited, *Submission to the ACCC*, 14 April 2009, para 1.7(d), pp. 5-6.

³⁸ Co-operative Bulk Handling Limited, *Submission to the ACCC*, 14 April 2009, para 6.4, p. 40.

‘The industry is in transition – the relatively short term of the Undertaking means that the ACCC retains the option of imposing more intrusive regulation in the future in the unlikely event that it should be necessary.’³⁹

The ACCC recognises that the replacement of the single desk for bulk wheat exports with multiple accredited exporters is a significant change to Australia’s bulk wheat export industry. Experience in dealing with multiple exporters competing in the high volume bulk wheat industry is currently limited to a single season only. To the extent that parties have commented on problems within the industry in the first season following deregulation, the ACCC recognises that certain of those comments likely derive from teething problems as the industry adapts to the changes.

In this context the ACCC recognises the risk and undesirability of imposing regulation that is not appropriate at a time when the industry is newly deregulated and in transition, and the associated risk of distorting the effective development of competition and efficiency in that industry. The ACCC considers it would not be in the public interest for such an outcome to occur. The ACCC notes, in this regard, that CBH’s proposed Undertaking has a short term of three years.

3.6 The legitimate business interests of the provider

Section 44ZZA(3)(a) requires the ACCC to have regard to the legitimate business interests of the provider, in this case CBH.

CBH submissions

CBH submits that:

‘...the access arrangements will promote CBH’s legitimate business interest in providing access on price and non-price terms and conditions that ensure that it receives at least a return on investment that is commensurate with risk.’⁴⁰

CBH submits that it has the following legitimate business interests:

- ‘CBH should be subject to regulatory compliance measures and costs that appropriately reflect the nature and size of its business and the seriousness of competition concerns giving rise to its regulation;
- CBH should not be required to subsidise the Port Terminal Service with efficiencies generated by its other business activities;
- 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 purpose of efficiency.’⁴¹

³⁹ Co-operative Bulk Handling Limited, *Submission to the ACCC*, 14 April 2009, para 1.4, p. 3.

⁴⁰ Co-operative Bulk Handling Limited, *Submission to the ACCC*, 14 April 2009, para 1.7(c), p. 5.

⁴¹ Co-operative Bulk Handling Limited, *Submission to the ACCC*, 14 April 2009, para 6.3, pp. 39-40.

ACCC's views

When having regard to the legitimate business interests of the access provider the ACCC considers whether particular terms and conditions in the proposed Undertaking are sufficient and necessary to maintain those interests. The ACCC agrees with CBH's propositions about its legitimate business interests.

Potentially relevant to this criterion, is that, if the ACCC does not accept CBH's proposed Undertaking by 1 October 2009, the marketing arm of CBH is likely to lose accreditation under the WEMA to export bulk wheat.

While acknowledging that loss of accreditation is likely to have adverse commercial consequences for CBH, the ACCC does not consider that such an adverse consequence necessarily outweighs other matters to which the ACCC is having regard in deciding whether it is appropriate to accept the proposed Undertaking. For example, the ACCC does not consider that the loss of accreditation is likely to justify the ACCC accepting the proposed Undertaking where the ACCC takes the view that the proposed Undertaking does not appropriately give effect to the objectives of the WEMA.

That said, the ACCC is making every effort to ensure its assessment of CBH proposed Undertaking is carried out in a timely manner to alleviate the extent to which the consequences of failing to meet the 1 October 2009 deadline may need to be taken into account by the ACCC.

In this regard, the ACCC notes that ACCC staff began engaging with CBH in March 2008 about the need to ensure that sufficient time (i.e. at least 6 months, if not longer) was allowed for the ACCC's assessment of the proposed Undertakings.

Despite this, the ACCC did not receive the proposed Undertaking until 14 April 2009 but are still endeavouring to accommodate the timing set by CBH as much as possible.

3.7 The interests of access seekers

Section 44ZZA(3)(c) requires the ACCC to have regard to the interests of persons who might want access to the service.

CBH submission

CBH submits that:

‘Under the Undertaking, CBH will continue to provide access to Port Terminal Services to any accredited wheat exporter that meets reasonable prudential requirements. Such users are adequately protected by the requirement to publish pricing for standard services, the obligations not to discriminate and the detailed negotiate/arbitrate mechanisms.

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 Undertaking provides all of these elements.⁴²

ACCC's views

This criterion is counterpoised to the 'legitimate business interests of the provider' criterion. While the two criteria may appear to be in conflict with each other, over the long term any conflict is likely to be ameliorated. That is, it is in access seekers' long-term interest that prices and returns are sufficient to provide the incentives needed to induce the access provider to invest in and adequately maintain services.

To assess the interests of access seekers the ACCC has conducted a public consultation process on the proposed Undertaking, during which the ACCC sought and received comments from a range of participants in the bulk wheat export industry. The ACCC considers that submissions made during the public consultation by actual and potential access seekers are relevant in having regard to section 44ZZA(3)(c). Public submissions provided by interested parties are available on the ACCC's website.

In summary, the ACCC notes that a number of common matters raised by third parties in submissions concerned:

- the degree of transparency around allocation of shipping capacity, including the criteria used to determine positions on the shipping stem, and the ability of exporters to obtain a shipping slot;
- the acceptance of grain at port that has not come from the port operators' own storage and handling network;
- the possibility of effectively bypassing the port operators' up-country storage and handling facilities;
- the availability of information on grain stocks; and
- the reasonableness of terms and conditions of access to supply chain services.

The ACCC notes that this list is a high level summary only of matters raised during the public consultation and is not indicative of matters that the ACCC considers would need to be addressed by the proposed Undertaking.

3.8 The pricing principles in section 44ZZCA

The ACCC is required to have regard to the pricing principles specified in section 44ZZCA of the TPA, which provides as follows:

'The pricing principles relating to the price of access to a service are:

- (a) that regulated access prices should

⁴² Co-operative Bulk Handling Limited, *Submission to the ACCC*, 14 April 2009, para 6.5, pp. 40-41.

- (i) be set so as to generate expected revenue for a regulated service or services that is at least sufficient to meet the efficient costs of providing access to the regulated service or services; and
 - (ii) include a return on investment commensurate with the regulatory and commercial risks involved; and
- (b) that the access price structures should:
 - (i) allow multi-part pricing and price discrimination when it aids efficiency; and
 - (ii) not allow a vertically integrated access provider to set terms and conditions that discriminate in favour of its downstream operations, except to the extent that the cost of providing access to other operators is higher; and
- (c) that access pricing regimes should provide incentives to reduce costs or otherwise improve productivity.⁴³

ACCC's views

The pricing principles are intended to assist in the achievement of the objects of Part IIIA by 'providing effective market signals for the efficient use of existing resources and for future investment in infrastructure'.⁴⁴

Pricing principle (a): Recovery of efficient costs

Part IIIA does not prescribe a particular methodology for setting an access price. Rather, pricing principle (a) aims to address the motive for regulating access prices (monopoly pricing) whilst not deterring investment.⁴⁵

The explanatory memorandum states that the 'starting point to achieving efficient use of infrastructure' is for the price of access to equal the cost of providing an additional unit of the service.

Pricing principle (b): Pricing structure

Part IIIA does not prescribe a particular access price structure that must be used in an undertaking. However, pricing principle (b) refers to two specific price structures: multi-part pricing and price discrimination.

Multi-part pricing typically involves an up-front price to access the network, plus a per-unit or usage price. Price discrimination occurs where, for instance, individual access users are charged a different price for the same service.

Pricing principle (b) provides that a price structure should allow multi-part pricing and price discrimination but only when it aids efficiency.

⁴³ *Trade Practices Act 1974* (Cth) s 44ZZCA.

⁴⁴ Revised Explanatory Memorandum, *Trade Practices Amendment (National Access Regime) Bill 2006* (Cth), p. 64.

⁴⁵ Revised Explanatory Memorandum, *Trade Practices Amendment (National Access Regime) Bill 2006* (Cth), p. 65.

In particular, where an access provider is vertically integrated, price discrimination in favour of the access provider's own operations should not occur (except when the cost of provision by the provider to other users is higher than provision of the service to itself).

Pricing principle (c): Productivity

Pricing principle (c) refers to the desirability for access pricing regimes to provide incentives for infrastructure providers to make productivity gains without prescribing the specific mechanisms.⁴⁶

The ACCC notes that the proposed Undertaking submitted by CBH does not propose ex ante pricing regulation, and instead proposes a 'publish-negotiate-arbitrate' approach, under which CBH is obliged to publish prices at a certain time.

Accordingly, the ACCC is not, in this context, assessing the appropriateness of pricing for port terminal services.

However, the ACCC considers that the pricing principles are nonetheless relevant in the sense that they provide guidance on the appropriateness of any pricing discrimination envisaged by the proposed Undertaking. It is the ACCC's view that, in accordance with pricing principle (b), price discrimination in favour of CBH's own operations should not occur except when the cost of provision by CBH to other users is higher than provision of the service to itself.

3.9 Whether the undertaking is in accordance with an access code

Section 44ZZAA of the TPA provides that an industry body may give a written code to the ACCC setting out rules for access to a service.⁴⁷ The ACCC may accept the code, if it thinks it appropriate to do so having regard to matters set out in section 44ZZAA(3).⁴⁸ An 'industry body' means a body or association (including a body or association established by a law of a State or Territory) prescribed by the regulations for the purposes of section 44ZZAA.⁴⁹

In having regard to this matter in the current context, the ACCC notes that there is currently no access code in place that applies to the service that is the subject of the proposed Undertaking.

⁴⁶ Revised Explanatory Memorandum, *Trade Practices Amendment (National Access Regime) Bill 2006* (Cth), p. 67.

⁴⁷ *Trade Practices Act 1974* (Cth) s 44ZZAA(1).

⁴⁸ *Trade Practices Act 1974* (Cth) s 44ZZAA(3).

⁴⁹ *Trade Practices Act 1974* (Cth) s 44ZZAA(8).

4 Industry Background

Summary

This chapter sets out an overview of the grains industry in Western Australia.

4.1 Cooperative Bulk Handling Ltd

CBH is a bulk handling company that was founded in 1933 as a grower owned cooperative. It currently has approximately 5150 shareholders that are grain growers in Western Australia.

CBH is vertically integrated across the grain industry. As well as its significant grain storage and logistics arm, it has a significant presence in grain trading through its subsidiaries, Grain Pool Pty Ltd (Grain Pool) and AgraCorp Pty Ltd (AgraCorp). Recently, CBH has expanded into grain processing through investments in South East Asian flour mills. In addition, CBH owns and operates Esperance, Geraldton, Albany and Kwinana ports in Western Australia.

As set out in its memorandum of association, CBH's main objectives are to:

- establish, maintain and conduct any schemes or systems for handling wheat and/or other grain in bulk or otherwise
- receive, handle, transport, grade, classify and store wheat and or/other grain
- carry on either in conjunction with or separately from the above objectives, any business or businesses that may be conveniently carried on by CBH or may promote, assist or be conducive to the objectives of CBH.⁵⁰

Background information on the grain industry in Western Australia is presented below.

4.2 Structure of the wheat industry in Western Australia

There are approximately 4800 growers in Western Australia. Those growers generally transport their grain (generally by road) from the point of production to country storage and handling facilities owned by CBH.⁵¹

Western Australia is the largest grain producing state in Australia, accounting for approximately 35 per cent of total Australian grain production and between 45 and 74 per cent of Australian wheat exports.⁵² The grain industry contributed

⁵⁰ Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 7.

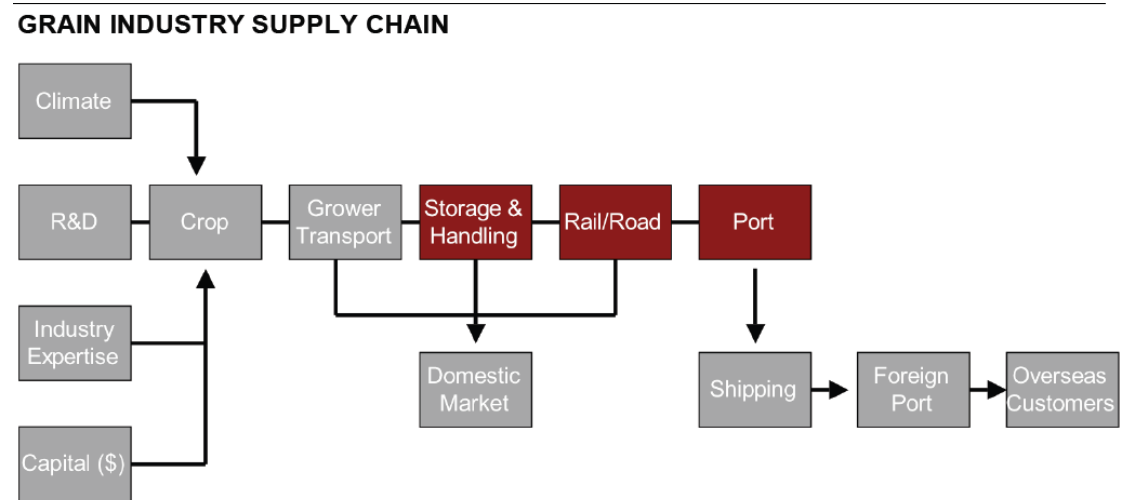
⁵¹ Co-operative Bulk Handling Limited, *Submission to the ACCC*, 14 April 2009, para 2.2(a), p. 8.

⁵² Allen Consulting Group (2008) *Competition in the Export Grain Supply Chain*, March, p. 64.

approximately 45 per cent of Western Australia’s gross value of agricultural production in 2004-05, which is approximately 14 per cent of the total gross value of agriculture production across Australia.⁵³ Over the period 2005-06, grains represented approximately 54 per cent of the total value of Western Australian agricultural and fishery exports.⁵⁴

Figure 1.2.1 sets out the grain supply chain for Western Australia and includes primary inputs (climate, research and development, industry expertise and capital), grain production, transportation (road, rail and ship), storage and handling and the domestic and foreign markets.⁵⁵

Figure 1.2.1: Grain industry supply chain



Source: Ernst & Young (2008)

Ernst & Young (2008), in Allen (2008).

The following sections expand on some of the key segments of the supply chain.

4.2.1 Grain production

Western Australian grain growers are, on average, three times larger in terms of land under crop than their eastern state counterparts. The PGA estimates that CBH receives 50 per cent of its wheat from less than 500 growers, or less than 10 per cent of all Western Australian wheat growers.⁵⁶

Western Australia produces around 41 per cent of wheat in Australia, which accounted for roughly 68 per cent of total state production on average in the five years to 2007-08.⁵⁷ The area planted to wheat in Western Australia in 2008-09 is estimated

⁵³ ABS (2006) *2004-05—Value of Agricultural Commodities Produced*, p. 7.

⁵⁴ Department of Agriculture and Food WA (2007) *Western Australia’s Agri-Food and Fibre Industry Outlook*, p. 26.

⁵⁵ Allen Consulting Group (2008) *Competition in the Export Grain Supply Chain*, March, p. 11.

⁵⁶ PGA Western Graingrowers (2008) *Submission to Senate Inquiry into Wheat Marketing Legislation*, April, p. 4.

⁵⁷ ABARE (2009) *Australian Crop Report*, report no. 150, June 2009.

at around 4.9 million hectares. Total wheat production is estimated at about 8.9 mt for 2008-09, around 3 mt more than what was produced in the previous season.⁵⁸

The Western Australian grain industry is dominated by wheat (74 per cent), barley (21 per cent) and oats (5 per cent of total grain production).⁵⁹ The major grain production areas in Western Australia are Kwinana (50 per cent), Geraldton (27 per cent), Albany (14 per cent) and Esperance (9 per cent).⁶⁰

Approximately 81 per cent of the Western Australian grain crop is exported.⁶¹ This is in contrast with the eastern states, where around 50 per cent of the grain crop is exported. This high dependence on exports is, in the case of wheat for example, a result of the relatively small domestic market in Western Australia and ‘strong overseas demand’.⁶²

The Western Australian grain belt can be divided into the following four distinct zones, each served by a port.

- Geraldton zone comprises the area surrounding the Geraldton port and includes the regional centres of Mingenew, Mullewa and Morawa.
- Kwinana zone comprises the largest area of the Western Australian grain belt, stretching from Kwinana in the west to Southern Cross in the east, and from Narrogin in the south to Wubin in the north. It is served by the Kwinana port to the south of Perth.
- Albany zone covers the south-west corner of Western Australia from Hyden an
- Newdegate in the north-east to Albany in the south and Bunbury in the west. This zone includes the regional centres of Katanning, Lake Grace and Albany.
- Esperance zone comprises the south-east grain belt, the area north of Esperance and surrounding Salmon Gums.⁶³

Figure 1.2.2 shows the location of CBH’s storage network and ports in Western Australia.

⁵⁸ ABARE (2009) *Australian Crop Report*, report no. 150, June 2009.

⁵⁹ Allen Consulting Group (2008) *Competition in the Export Grain Supply Chain*, March, p. 64.

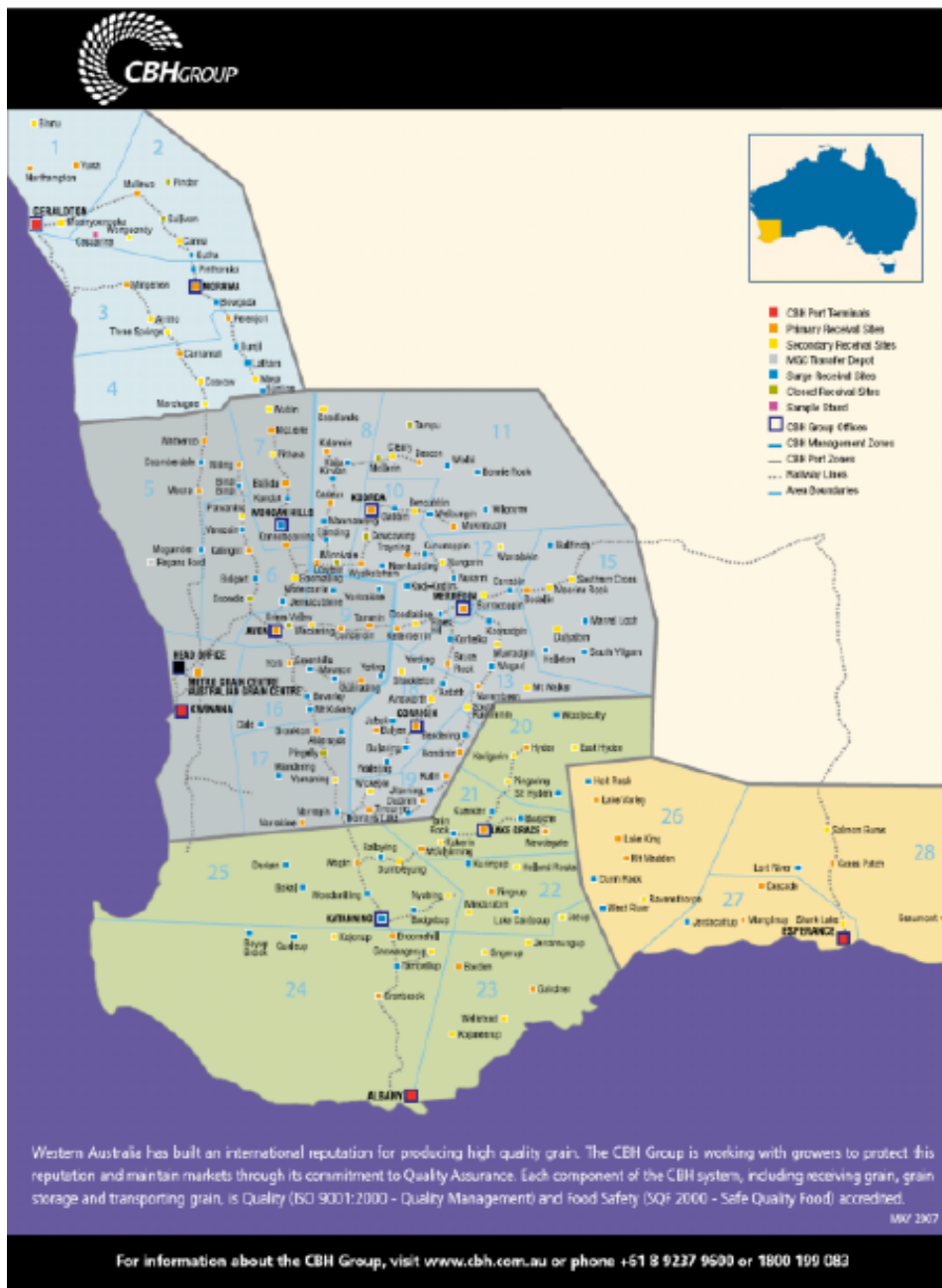
⁶⁰ Allen Consulting Group (2008) *Competition in the Export Grain Supply Chain*, March, p. 64.

⁶¹ Co-operative Bulk Handling Limited, *Submission to the ACCC*, 14 April 2009, para 2.2(a), p. 9.

⁶² Department of Agriculture and Food WA (2007) *Western Australia’s Agri-Food and Fibre Industry Outlook*, pp. 31-33.

⁶³ Co-operative Bulk Handling Limited, *Submission to the ACCC*, 14 April 2009, para 2.2(b), pp. 9-10.

Figure 1.2.2: Western Australia storage network and ports



Source: CBH (2009).

For each of the major grain production areas in Western Australia, the Kwinana region accounts for approximately 50 per cent of total grain production, while the Geraldton region produces 27 per cent, the Albany region 14 per cent, and Esperance region 9 per cent.⁶⁴

4.2.2 Up-country storage and handling

In Western Australia, up-country receival sites are served by road, narrow gauge rail, and/or standard gauge rail. Of the 193 up-country receival sites throughout Western

⁶⁴ Allen Consulting Group (2008) *Competition in the Export Grain Supply Chain*, March, p. 64.

Australia, 42 are serviced exclusively by road. There are 28 'road to rail' sites, where ARG contracts road carriers to handle the first leg of the journey to port.⁶⁵ However, the Western Australian grain storage and handling system and the location of grain receival sites are built around the rail network.

Approximately 95 per cent of the Western Australian grain crop is exported through CBH's port facilities.⁶⁶ Grain receival, storage and handling infrastructure that is not controlled by CBH is made up of small locally based private operators and on-farm storage.

CBH's country grain receival points vary in size, capacity and capability, from:

- remote, small capacity receival points served by road and narrow gauge rail (satellite and secondary sites)
- larger 'primary sites,' closer to ports and served by road, dual or standard gauge rail
- Metro Grain Centre, a unique purpose-built receival point and container loading facility, served by road and rail.

4.2.3 Transportation

The market for grain transport involves competition between two modes of transport, road and rail. The average haul distance for Western Australian grain on rail is 290 km, almost double the average haul from road sites. Of the total farm to port (and domestic consumer) task, rail currently accounts for approximately 70 per cent of all net tonne kilometres. However, road has been increasing its share of the overall Western Australian grain transport task over the past ten years and this is predicted to continue in the medium term.⁶⁷

Each of the four port zones has a different arrangement with regard to the transport infrastructure that exists:

- Kwinana port is served almost exclusively by rail. A dual gauge rail line operates from Northam to Kwinana.
- A single narrow gauge line running from Hyden serves the Albany port, which is also served by road access. However, the Albany terminal is placed on a narrow site that creates some restrictions on concurrent access by road and rail.
- Geraldton port is served by two main narrow gauge rail lines as well as main roads from Mullewa, Morawa and Mingenew. A high proportion of deliveries to the Geraldton port (approximately 20 per cent) are direct grower deliveries.
- Esperance is predominantly served by road with Growers delivering 40 per cent of total production direct to the port of harvest. Only 14 per cent of grain harvested

⁶⁵ CBH Notification N93439 (2008) *Supporting Submission*, p. 23.

⁶⁶ IBIS World Industry Report (2007) *Grain Storage in Australia: I6701*, 18 October, p. 19.

⁶⁷ CBH Notification N93439 (2008), *Supporting Submission*, p. 63.

in this zone is delivered to port by rail. Rail links are on standard gauge track mainly used for non-grain haulage purposes. There are two sites served by rail in this zone.

Rail

Rail transports 65 per cent of the export grain task in Western Australia.⁶⁸ The percentage of rail's share differs between the four grain growing 'zones'.

In Western Australia, the above-rail (rolling-stock) components of the rail network are 100 per cent owned by ARG. The below-rail components (standard and narrow gauge track) are controlled by Westnet Rail through a 49 year lease.

The Western Australia Grain Freight Network comprises about 2800 route kilometres of track in the south-west of Western Australia—consisting of about 500 km of standard gauge mainline and 2300 km of narrow gauge grain branch and main lines.⁶⁹

A 2008 review of Western Australia's grain freight network highlighted that grain movements on the standard gauge rail are highly efficient, benefiting from good terrain, heavy rail and direct route to port. Alternatively, the narrow gauge network requires lighter axle loads, has poorer gradients and is less direct to port.⁷⁰

Road

Approximately 35 per cent of export grain in Western Australia is transported by road.⁷¹ In addition to the rail network outlined above, the Western Australian grain freight network consists of a local government provided road feeder network and a state government provided feeder and parallel road network.⁷² As with rail, the percentage of road's share of the grain haulage task differs between grain growing regions of Western Australia. In general, the closer the growing region is to the port, the more likely it will be transported by road.

CBH has commented that a substantial proportion of growers that are within 100 km of one of the four ports deliver grain direct to port by road. The Western Australian Strategic Grain Infrastructure Study estimates that farm to port deliveries comprise 19 per cent of receivals at port. In poor or average seasons, the incidence of direct to port deliveries generally increases. Approximately 30 receival sites in Western Australia are designated 'road to rail' sites under the pre-Grain Express freight agreement. Grain received at these sites is transported by road to the nearest rail link by the rail operator.

⁶⁸ Single Vision Grains Australia (2007) *Transport Infrastructure Issues Paper Two*, January, p. 8.

⁶⁹ Department of Planning and Infrastructure WA (2008) *Submission to the NTC Rail Productivity Review Issues Paper (August 2008)*, October, p. 7.

⁷⁰ Grain Infrastructure Group (2008) *Western Australia's Grain Freight Network Review*, March, p. 9.

⁷¹ Single Vision Grains Australia (2007) *Transport Infrastructure Issues Paper Two*, January, p. 8.

⁷² Department of Planning and Infrastructure WA (2008) *Submission to the NTC Rail Productivity Review Issues Paper (August 2008)*, October, p. 7.

4.2.4 Port terminals

There are four export grain terminals in Western Australia—namely Kwinana, Geraldton, Albany and Esperance.

The Kwinana Grain Terminal is Western Australia’s primary grain export facility, shipping more than half of the WA’s export grain. The terminal receives grain from nearly 120 country receival points. It can receive grain at 4000 tonnes per hour (tph) and has a current storage capacity of more than 1 mt. Ships can be loaded at 5000 tph.⁷³

Grain is delivered to the Geraldton Grain Terminal by road and rail from 23 receival points. The Terminal currently has a grain storage capacity of 295 000 tonnes and a ship loading speed of 2000 tonnes per hour.

Grain is received at the Albany Grain Terminal by road and rail from the 42 receival points in the Albany zone. The terminal can receive grain from road at 2000 tph and from rail at 800 tph. Ships can be loaded at 1600 tph.

Grain is mainly received at the Esperance Grain Terminal by road from CBH’s 15 receival points in the Esperance zone. Only two receival points, Grass Patch and Salmon Gums, are connected by rail to the terminal.

4.3 Grain Express – notification to the ACCC

The ACCC notes that last year the ACCC was asked to consider elements of CBH’s grain storage, handling and transportation arrangements between its up-country receival sites and its ports – known as ‘Grain Express’.

The ACCC was involved because elements of the Grain Express system potentially raise concerns under the exclusive dealing provisions of the Trade Practices Act.

Broadly, exclusive dealing involves one trader imposing restrictions on another’s freedom to choose with whom or where it deals. Businesses receive automatic immunity from legal action for exclusive dealing conduct by lodging a ‘notification’ with the ACCC. The ACCC can only remove the immunity if it decides that the conduct substantially lessens competition and is not in the public interest.

CBH lodged a notification in June last year.

The notified conduct covers the requirement under the Grain Express system that, while grain is in CBH’s custody, its transportation will be arranged and coordinated by CBH. CBH uses both road and rail freight services to move grain in its system.

It is important to note that CBH’s Grain Express notification only relates to the bundling of up-country storage and handling services with transportation to port, while the grain remains in its system. It does not cover the bundling of CBH’s port services with its up-country storage, handling and transportation services.

⁷³ All the following statistical data on WA ports is derived from the CBH Group’s website at <http://www.cbhoperations.com.au/grainopsindex.html>.

In making its decision not to revoke the notification, based on the information before it at the time, the ACCC stated:

...

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

- the proposed arrangements do not foreclose potential competitors to CBH from entering the market for grain receipt, storage and handling
- growers and traders of grain are free to make their own arrangements in respect of the transportation of grain from the farm gate to end user point, or from a Destination Site to end user point
- the proposed arrangements may stimulate competition in the market for the relevant CBH transport contracts by providing greater certainty in respect of transport volumes
- acquirers and marketers of grain will continue to be able to take advantage of niche marketing opportunities and
- CBH's amended Ring Fencing Policy provides an adequate framework to limit the potential for information obtained by CBH to be transferred to and used anti-competitively by CBH's trading subsidiaries.⁷⁴

The ACCC can only remove the immunity provided by the Grain Express notification if it is satisfied that the conduct has the purpose or effect of substantially lessening competition and in all the circumstances:

- the conduct has not resulted or is not likely to result in a benefit to the public; or
- any benefit to the public that has resulted or is likely to result from the conduct would not outweigh the detriment to the public constituted by any lessening of competition resulting from the conduct.

Should the ACCC receive information that the notified conduct may be substantially lessening competition and that the arrangement is not delivering the claimed efficiency benefits, it may review the notification.

4.4 Industry structure—CBH submissions

According to CBH, the wheat export supply chain in Western Australia is characterised by:

- a large number of growers, who determine what crops and crop varieties they will grow and the persons to whom they will sell those crops
- an incumbent storage and handling supplier (CBH) that is owned in a cooperative formed by those growers

⁷⁴ Australian Competition and Consumer Commission, *Decision in respect of a notification lodged by Cooperative Bulk Handling*, 8 September 2008, p. ii.

- a number of competing logistics services providers
- a large number of grain marketers, many of whom are substantial vertically integrated multi-national corporations which compete for sales of wheat at a global level and own flour milling businesses.⁷⁵

The ACCC's Issues Paper and information request to CBH included questions on industry structure. CBH's responses to some of these questions are set out below.

To what extent are bulk wheat Exporters able to switch between different ports at different locations around Australia, including between different States?

CBH considers that there is limited ability for bulk wheat Exporters to switch between WA ports. There is even less ability to switch between any WA port and ports in South Australia, Victoria and New South Wales. CBH does not comment in relation to switching between ports on the Eastern seaboard.

Are there any limitations that prevent bulk wheat Exporters from switching between ports (such as different grain types, infrastructure constraints, freight differentials?)

Once grain has been acquired, it is likely that the port of departure for export has already been determined. However, for the reasons outlined above, this fact does not mean that there is no substitution or competitive tension between the services offered by different port terminal operators. The locus of this aspect of competition is at the point of acquisition of grain.

CBH does not apply different treatment, terms or conditions in relation to grain based solely on its place of origin. Different States may have different crop results in any given year, so if exporters seek a particular grade of wheat, that grade may be more available or cheaper in one State than another. So, to the ability of Exporters to respond to higher port terminal costs in a port area by acquiring grain in another area may be limited by the cost and availability of grain in that area.

What is the likelihood of a new entrant establishing a new port terminal to compete with the Port Operators? What would be the likely timing and cost of such a new terminal? What factors would limit the establishment of a new terminal?

It is also clear in Western Australia that it is possible to construct additional infrastructure outside the port terminal including non-port terminal services, that will have a constraining effect on port terminals. These developments, such as intermodal links and storage facilities to directly alleviate the creation of "bottlenecks" in the storage and transport elements of the supply chain, indirectly alleviate the "bottlenecks" at port terminal facilities.

For example, the Western Australian government is considering the development of a new intermodal freight terminal in Kwinana which will include an increased capacity for containerised export grain in addition to the existing intermodal terminal at Forrestfield.

⁷⁵ Co-operative Bulk Handling Limited, *Submission to the ACCC*, 14 April 2009, para 4, p. 20.

It is possible for Exporters to consider access to or investment in these intermodal terminals as a means of enhancing their ability to maximise efficiency in their own supply chains upstream of the port terminal facilities themselves.

There is some degree of substitutability at the Albany, Bunbury and Geraldton ports where facilities exist for the export of woodchips.⁷⁶

CBH also makes the following points about the differences between the grain industry in WA and in other states:

CBH's Access Undertaking is offered in a substantially different operational and legal context from what exists in other States. The main differences are:

- CBH is required to comply with provisions of the Bulk Handling Act 1967 (WA) (Bulk Handling Act), which require CBH to perform certain functions and establish a grain entitlement framework which defines CBH's obligation to Outturn grain on the request of warrant holders;
- CBH deals with a higher proportion of export grain and a lower proportion of domestic grain;
- CBH owns a higher proportion of the country storage facilities in Western Australia;
- in part as a consequence of the above factors, CBH successfully introduced a fully integrated supply chain solution, Grain Express and notified the relevant conduct to the ACCC; and
- the ACCC did not reject the notification and recognised the efficiencies generated by Grain Express.

Because of these factors, the interaction between the Port Terminal Service offered under the Undertaking and the Grain Express Service requires particular focus. For the reasons stated in this part of the submission, CBH considers that the substantial efficiencies generated in the Grain Express project can and should be preserved following the introduction of the Undertaking.⁷⁷

CBH goes on to make the following submissions:

The WA export grain supply chain

The Western Australian supply chain for export grain comprises the following functions:

- production – Growers produce grain on medium and large scale farms in the Western Australian grain belt;
- transport from farm gate to silo – Growers arrange for road transport between the farm gate and CBH's country Receival Points;
- sale/acquisition of grain to Exporter – Growers choose from a range of options in selling their grain. Exporters acquire grain at the Receival Point;
- trading and accumulation – grain, like most other commodities, is traded and accumulated in a secondary market, as traders seek to derive value or manage risk by acquiring, accumulating and trading grain;

⁷⁶ Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, pp. 35-37.

⁷⁷ Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 4.

- storage and handling – grain is unloaded at Receival Points, sampled, analysed, weighed, graded, stored and fumigated then loaded for transport;
- bulk freight – Exporters and CBH contract with rail and road providers to transport grain from the Receival Point to the port, the container loading facilities (such as those at the Metro Grain Centre (MGC)) or the domestic market, as instructed by traders or domestic end users;
- port storage and handling – bulk grain is accumulated for export at four major port terminals in Western Australia (Kwinana, Geraldton, Albany and Esperance) and loaded onto ships;
- container loading & handling – grain may be loaded into containers for export or shipment to domestic suppliers;
- export marketing – Exporters contract with overseas grain buyers and arrange for shipping of bulk or container grain to the required foreign ports.

CBH as a bulk handler serving Growers located across a large and largely remote area has developed its receival and storage infrastructure network on the basis that receival and storage of grain is maintained at sites local to producers in up-country locations. As grain is required for export, it is transported from the up-country sites and accumulated for loading onto ships at the port terminals.

Storage of grain (except for the purposes of transitory accumulation of cargoes of grain for loading onto ships) is maintained at up-country Receival Points, rather than port terminals, as land acquisition, and storage and receival infrastructure construction and maintenance costs are in general terms significantly lower at the numerous up-country sites rather than the limited availability premium location port sites.

The Western Australian grain belt is roughly divided into four port zones, each served by the Geraldton port, the Kwinana port, the Albany port and the Esperance port.

The grain supply chain is largely geared toward grain exports, and the structure of storage and handling, transport and marketing arrangements reflects this.

Under the current arrangements, the flow of information, instructions and documents is complex, and varies according to the type of grain, and the identity and approach of Exporters.⁷⁸

CBH makes the following submissions about grain entitlement and custody:

CBH offers grain receival services for particular grains at particular sites. Not all sites may be geared to receive all grains or grades of grain at all times during the harvest. CBH configures its sites ahead of harvest, using a combination of the crop estimate information provided by Growers, close consultation with Grower elected bin representatives and the information provided by export Customers (including forward shipping plans). For example, a particular area may be projected to yield predominantly barley and canola at one stage of the harvest, and then yield wheat at a later stage. The site serving that area may therefore be set up to initially receive barley and canola, and then wheat – but that site may not offer a service to receive lupins. Growers in that area who have harvested lupins will be told in advance the location of the nearest site offering to receive lupins.

A truckload of grain, once delivered to storage, is inevitably commingled with other loads of similar grade grain already received into storage. In this way, grain has some similarity to gas or fluids. It is neither efficient, nor possible, for a warrant holder to insist that CBH deliver the same grain to the warrant holder at port as was delivered by the Grower at the country Receival Point.

⁷⁸ Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, pp. 5-6.

The Bulk Handling Act and Bulk Handling Regulations recognise this in two ways:

- an Exporter is not entitled to delivery of the same grain that was delivered to CBH by a Grower. Instead, as section 44 provides, the warrant holder is entitled to “receive an equivalent weight of grain of the type corresponding with, and of a grade at least equal to, that in respect of which the warrant was issued”.
- Regulation 20 provides that before 1 March in any year, CBH shall deliver grain to the point nominated by the warrant holder. It also states that CBH “is not obliged to deliver grain from the particular point of receipt as shown on the warrant”.

Any requirement for separation creates the inherent potential for lost capacity and inefficiency. This is due to the space required between parcels in horizontal or bulkhead storage, and the lost capacity of silo storage. This lost capacity in CBH’s storage facilities is referred to as “loss by division”. It represents a substantial potential inefficiency (or potentially an inability to cope with the entire harvest) for CBH if its infrastructure is under-utilised due to unnecessary division. As is discussed below in relation to transport, any ability of exporters to require the movement of particular parcels of grain to occur in an ad-hoc or uncoordinated fashion increases the incidence of capacity waste, particularly in country sites. This cost is ultimately borne by Growers.⁷⁹

Many market participants fundamentally confuse or misstate the true nature of their rights to grain in the possession of CBH. For example, the AGEA Submission states, at 3.24:

“BHCs’ storage and handling agreements allow BHCs to move AWEs’ grain between sites without permission while requiring that AWEs bear the costs and delay associated with the unauthorised movement. An example where this has occurred is referred to in one of AGEA’s Confidential Submissions.”

Leaving aside the inherent unfairness of making such an allegation in public but concealing the purported detail and evidence from the person against whom it is made, this statement is based on a false premise. When an Exporter acquires grain from a Grower and that grain is in CBH’s custody, the grain is commingled with other grain of an equivalent grade. At that point, it is impossible to assert control over the movement of any specific grain. Rather, an Exporter may assert the right to have grain of an equivalent grade and quantity outturned at the nominated destination site upon request.

Commingled stacks of grain are self-evidently essential to the efficiency of the supply chain because, during harvest, CBH is receiving a constant flow of grain deliveries from Growers and each Grower may delay making a decision in relation to the marketing of the grain delivered until they are ready to, or required to, sell it. Segregating the grain according to the identity of the exporter at up-country sites would render harvest operations unworkable and create substantial reduction in storage capacity, or “loss by division” because multiple stacks take substantially greater storage capacity than a single stack.

The same efficiency considerations apply to the use of transport infrastructure in moving grain to port. If Exporters are able to require grain movements to occur in terms of their claims to ownership of specific grain parcels, what results is ad hoc, uncoordinated movement of small volumes of differentiated grain. As the Synergies Economic Consulting Report in support of the Grain Express notification concludes, efficiencies from unit train (i.e. homogenous cargo) grain movements are substantial and valuable.

Finally, the ability to move grain toward port at its discretion during harvest enables CBH to keep country sites “open”. If CBH had to wait for instructions from warrant holders to move grain, country sites would fill up earlier in the harvest and deliveries to those sites would be refused. This would add cost and inconvenience for Growers who would have to drive further to an “open” site to deliver grain and it reduces the efficiency of the entire supply chain.

⁷⁹ Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, pp. 5-6.

These efficiency issues were compounded when the WEMA deregulated export bulk wheat exporting. Faced with the largest export task and geographically dispersed infrastructure, CBH had to find a way to coordinate grain movements efficiently.⁸⁰

CBH explains the rationale for “Grain Express” in the following way:

Grain Express is a complete and coordinated transport, storage and handling solution offered to grain Growers and Exporters, both for the domestic and export markets in relation to wheat and coarse grains.

The purpose of Grain Express was to facilitate coordination of grain movements to enhance efficiency in the system as a whole. Individual grain exporters, which previously arranged transport for themselves, used their control of transport to prevent or hinder CBH from:

- moving grain away from country sites to keep sites open;
- moving grain in efficient unit trains;
- moving grain for the efficiency of the supply chain as a whole, rather than in the interest of a particular Exporter; and
- Outturning grain of equivalent grade to satisfy a warrant holder’s entitlement rather than attempting to deliver the actual grain delivered by the Grower.

Grain Express addressed these problems by placing CBH in control of grain movements. This could only occur if CBH became the contracting party for transport between country storage and port.

The key elements of Grain Express are:

- open access to the CBH storage and handling network;
- a centrally coordinated structure for freight agreements;
- a bundled receival, storage, handling, logistics and transport service;
- flexible and effective receival conditions;
- efficient Outturning of grain at defined Destination Sites, including ports;
- transparent freight, storage and handling fees for Growers and Exporters;
- transparent queuing and shipping arrangements;
- clarified grain entitlements of Growers and Exporters;
- quality management services to derive value from information; and
- an extensive Grower services call centre.

Under Grain Express, CBH negotiated agreements to acquire bulk grain haulage services from ARG and road haulage carriers. CBH use the freight services it acquires to move grain in its system between the Receival Point and, depending upon the requirements of the Grower and Exporter:

- one of 10 larger grain storage and loading facilities, where grain may be Outturned by the Grower or Exporter (Destination Sites);

⁸⁰ Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, pp. 9-10.

- the MGC (which is also an Destination Site), where grain may be loaded into containers or Outturned for domestic supply;
- one of the four port storage and loading facilities (which are also Destination Sites).

CBH provides grain receival, storage and handling services to Growers and Exporters on the condition that, CBH will arrange for haulage of that grain to the point where it is Outturned from CBH's custody, which may be done at any of the 5 Destination Sites selected by Growers or Exporters.

This condition is implemented in CBH's contracts with both Growers (who acquire receival and storage services from CBH) and Exporters (which acquire storage and handling services) under Grain Express.

Under Grain Express, Growers are not required to make a nomination immediately at the Receival Point. Rather, grain will be received by CBH and the Grower will subsequently nominate its chosen acquirer and marketing arrangement at the time of its choice.

That choice is usually made electronically, via CBH's LoadNet® system, which lists each of the marketing options offered by the various grain Exporters. The various marketing options will include different estimates of transport costs and marketing returns for grain, depending upon the point at which the Exporter expects to Outturn grain or load it onto a vessel for export. For example, a marketing option may be offered for grain at the nearest Destination Site, or at the relevant downstream port.

Under Grain Express, transfer of grain entitlement to Exporters does not necessarily occur at the moment grain is delivered at the Receival Point. Instead, each marketing choice on LoadNet® provides for a specific point at which the Exporter will Outturn the grain. When the Grower nominates a choice of marketing option and Outturn point, the Exporter becomes entitled to Outturn grain at the nominated Destination Site at that time.

There are 5 export Destination Sites (including the 4 port terminals and the MGC). While Growers are able to Outturn grain from a Receival Point where they have warehoused grain, Exporters are only be able to Outturn their grain entitlements at a Destination Site. Domestic Users will be able to outturn at relevant up-country receival sites after harvest and CBH will rebate 100% of the freight differential between the nomination site and the outturn site (except in the case of movements from MGC to Kwinana where the exporter will still bear the costs of transport between MGC and Kwinana).

Under Grain Express, once a Grower has nominated a marketing option, CBH arranges transport to the nominated Destination Site and invoices the Grower for its services (including a distinct and transparent freight charge) to that point. CBH does not add a profit margin to freight costs. The Exporter is charged storage and handling fees for the grain in relation to the Destination Site where it is Outturned.

CBH performs a range of tests of grain at the Receival Point and at other stages in the Supply Chain. The information obtained through the testing process is valuable in understanding the quality and other attributes of grain in CBH's system. Testing of grain at the Receival Point provides Growers with a detailed record of the grain they have delivered and also provides Exporters with a quality profile of:

- quality profile of their grain entitlement; and
- the total quality profile of all stocks of grain acquired.

The value provided from grain quality information is an important matter for Growers, CBH and Exporters. Exporters seek to match quality and specification of grain with particular markets.

CBH has a significant investment in quality management by establishing:

- the Australian Grain Centre in 2003 which is a nationally accredited testing laboratory; and
- a farm integrated quality program, which is an on-farm quality assurance program built to meet the internationally recognised SQF code, and is fully HACCP compliant.

CBH recognises that Exporters want site level quality information for marketing purposes. However, it does not necessarily follow that it is appropriate for an Exporter to assert control over specific grain parcels or to “mine” co-mingled stacks in order to obtain a greater share of high quality grain than the Exporter has paid for.

To effectively manage the stack access and quality issues and balance logistics efficiency with marketing value derivation, an important component of Grain Express is a quality management plan with the following elements:

Exporters will be provided with:

- full quality (as tested at receipt), grade and quantity information for each parcel of grain delivered to their entitlement;
- weighted average quality of that Exporter’s stock by grain and grade at each Destination Site, that will be adjusted based on all transactions in and out of Destination Sites.

Stakeholders are provided with total tonnes received (on a zone and whole-State basis) by grain and grade and its weighted average quality profile.

Exporters may request further testing data (not tested at receipt), subject to payment of a fee and CBH’s information flow policy, which prohibits CBH from disclosing Exporters’ confidential stock information.

Under Grain Express, CBH delivers at the nominated Destination Site (most commonly, at port) grain to a specification nominated by a Exporter, provided that the Exporter has sufficient stock of equivalent grain and provided sufficient time before the Outturn is required. In order to achieve this, CBH maintains a rolling profile of the Exporter’s grain entitlement, updating the profile as grain is acquired by that Exporter and Outturned to that Exporter’s specification. Unless it does so under the reservation policy referred to below, Exporters will not generally be able to request the movement of particular parcels of grain under Grain Express. However, they will be able to use information about the quality profile of their grain entitlements to derive value in niche markets.

Exporters are able to request the movement of particular qualities of grain if engaging in the quality management plan process under Grain Express. Exporters may request CBH to provide a particular quality of grain which will result in CBH reserving internally a stack of grain in order to meet the quality requirements of an Exporter. This ensures that the grain in the reserve stack is then delivered to that Exporter at the Destination Site.

CBH endeavours to meet quality requests in accordance with Exporters’ pro rata entitlement to grain of that quality.

To ensure that the right balance is struck between Supply Chain efficiency and niche marketing requirements, CBH as part of its Grain Express service:

- has appointed a logistics quality manager, who is responsible for meeting quality specifications; and
- works with Exporters to develop quality management plans.

Under Grain Express, CBH is the head contractor for transport services required to transport grain in CBH’s custody from country storage to port and between CBH sites. From the carriers’

perspective, this provides a simplified contractual position and the path of instructions and information. Instead of dealing with several parties (and potentially in excess of 20 accredited Exporters following the revocation of AWB's monopoly position), carriers only need to negotiate with CBH.⁸¹

The following diagrams summarise the ownership, movement and custody of grain in Grain Express.

Figure 1. - Ownership, custody and movement in Grain Express: Example 1 – Grower chooses price at Destination Site

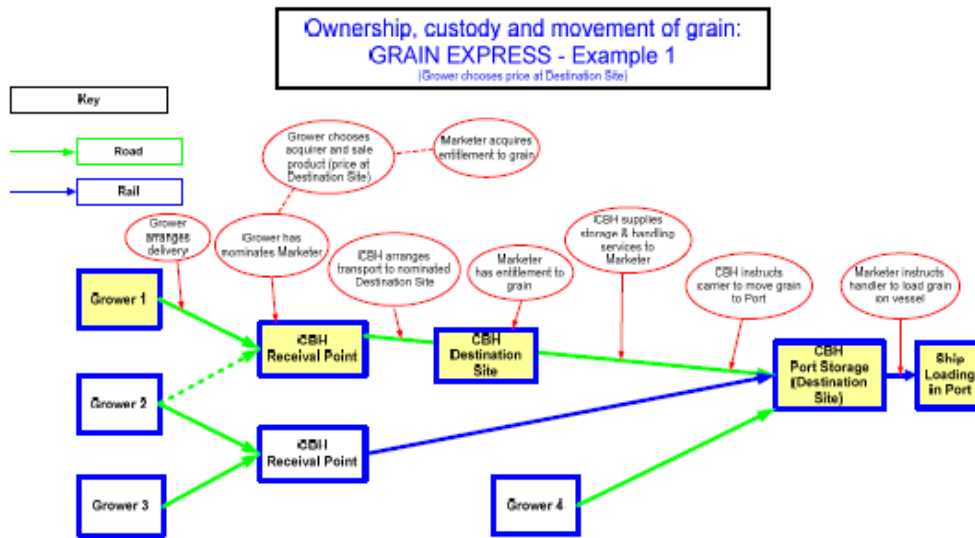
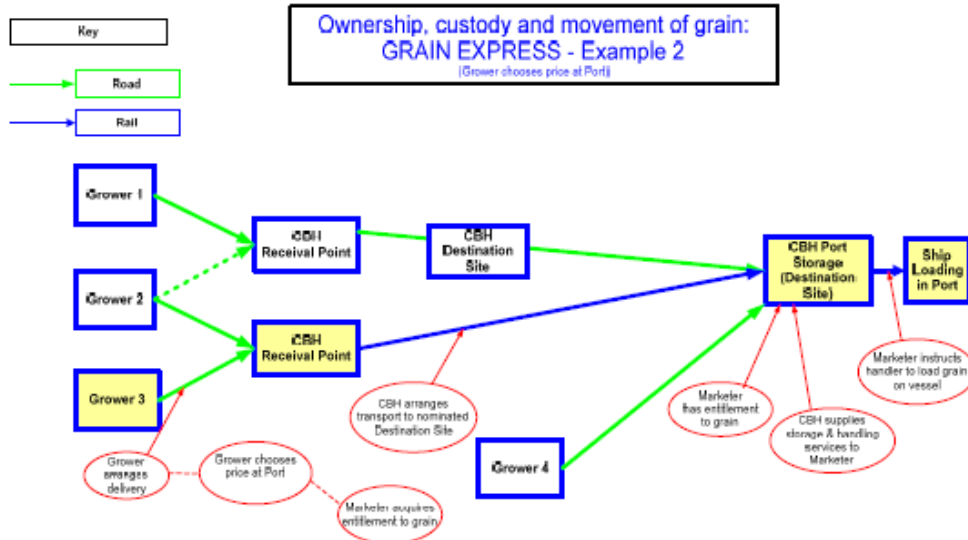


Figure 2. - Ownership, custody and movement in Grain Express: Example 2 – Grower chooses price at Port



⁸¹ Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, pp. 10-15.

4.5 Regulatory regimes

In addition to its obligations under the Memorandum, the Articles and the Cooperative Act, CBH submits that it has a number of obligations under the *Bulk Handling Act 1967 (WA)* (Bulk Handling Act) and Bulk Handling Act Regulations 1967 (WA) (Bulk Handling Regulations). These obligations, as highlighted in CBH's Port Terminal Services Access Undertaking, are summarised below:⁸²

- CBH must receive all grain tendered to it that meets the requisite standards: Bulk Handling Act, section 42, and Bulk Handling Regulations, regulation 13
- CBH must determine the grade of the grain tendered to it and inform the person tendering the grain of CBH's determination: Bulk Handling Act, sections 6A and 43(2)
- on receipt of the grain tendered to it, CBH must cause the grain to be weighed and issue a weighbridge ticket for the grain to the person tendering the grain: Bulk Handling Act, section 36(1)
- CBH must issue a warrant for the grain tendered to it: Bulk Handling Act, section 37(1)
- CBH must deliver the grain to the receival point or port in the State as required by the person who is entitled to the grain under the warrant: Bulk Handling Regulations, regulation 20
- The holder of the warrant issued under Bulk Handling Act section 37(1) must take delivery of the grain by 30 September next following the receipt of the grain by CBH: Bulk Handling Act, section 45(1)
- If the holder of the warrant issued under Bulk Handling Act section 37(1) does not take delivery of the grain by 30 September next, CBH can sell the grain, deduct its costs from the funds realised from the sale and pay the net proceeds from the sale to the warrant holder: Bulk Handling Act, section 45(2), and Bulk Handling Regulations, regulation 26
- CBH must insure all grain in its custody or under its control: Bulk Handling Act, section 11.

Sections 35A(b), (c) and (d) of the *Bulk Handling Act 1967 (WA)* also place restrictions on the manner in which CBH can use its income or property. These sections provide that:

- (b) all income and property of the Company [that is, CBH] shall be applied, subject to this Act, towards the objects of the Company as set out in clause 2 of its memorandum of association and not otherwise.

⁸² Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, pp. 7-8.

- (c) the directors of the Company may set aside out of the profits of the Company such sums as they think fit as reserves for application, in the discretion of those directors, in meeting contingencies or in achieving any other purpose that is, under the memorandum or articles of association of the Company but subject to this Act, a proper purpose for the application of profits of the Company;
- (d) where any reserves set aside pursuant to paragraph (c) are not immediately required for application in accordance with that paragraph, they may, in the discretion of the directors of the Company, be applied in the business of the Company or in furthering, subject to this Act, the objects of the Company as set out in clause 2 of its memorandum of association, paying off or reducing some or all of its debentures for the time being outstanding, or liquidating any other indebtedness of the Company or they may be invested in such investments as those directors think fit.

CBH submits that Section 19 of the Bulk Handling Act is especially relevant in relation to port access. This section provides that:

Subject to this Act and the regulations, the Company shall allow a person, on payment of the prescribed charges, the use of any bulk handling facilities and equipment controlled by it at ports in the State.

5 Background, Objectives and Structure section for the proposed Undertaking

Summary

Background section

It is not necessary for the ACCC to form a view on the appropriateness of the background section pursuant to section 44ZZA(3) given that it is merely descriptive and places no obligations on CBH.

Objectives

The objectives section, critical to the operation of the proposed Undertaking, is not appropriate pursuant to section 44ZZA(3) given concerns with the following particular objectives:

- “The recovery of all reasonable costs associated with the granting of access to the Port Terminal Services” (clause 2.2(e)(i)(A)); and
- “The Port Operator’s ability to meet its own or its Trading Division’s reasonably anticipated requirements for Port Terminal Services” (clause 2.2(e)(i)(D)).

Structure

The structure section of the proposed Undertaking is not appropriate pursuant to section 44ZZA(3) given concerns with:

- The reference to specific terms and conditions being set out in the Port Schedules (clause 3.1(b)(ii));
- The reference to using ‘reasonable endeavours’ to procure (clause 3.3).

5.1 CBH’s proposed Undertaking

5.1.1 Background section of the proposed Undertaking

CBH’s proposed Undertaking includes the following background section:⁸³

- A The Port Operator operates the Port Terminal Facilities.
- B The Port Terminal Facilities provide services relating to the export of Bulk Wheat and other commodities.
- C The Port Operator has historically provided access to services provided by the Port Terminal Facilities to third parties under open access policies.

⁸³ Co-operative Bulk Handling Limited, *Port Terminal Services Access Undertaking*, 14 April 2009, p. 1.

- D The Port Operator or its Related Body Corporate has applied to become an Accredited Wheat Exporter under the *Wheat Export Marketing Act 2008* (Cth).
- E Under section 24 of the WEMA, a person who is also the provider of one or more port terminal services (as defined under that Act) must satisfy the ‘access test’ to be eligible for accreditation to export bulk wheat.
- F The ‘access test’ under the WEMA requires:
- (a) the person to comply with the Continuous Disclosure Rules in relation to a port terminal service; and
 - (b) either there is:
 - i. an access undertaking in operation (under Division 6 Part IIIA of the Trade Practices Act 1974) relating to the provision to Accredited Wheat Exporters of access to the port terminal service for purposes relating to export of Bulk Wheat; or
 - ii. a decision in force that a regime established by a State or Territory for access to the port terminal service is an effective access regime (under Division 2A Part IIIA of the TPA) and under that regime Accredited Wheat Exporters have access to the port terminal service for purposes relating to the export of Bulk Wheat.
- G The Port Operator has submitted this Undertaking to the ACCC for approval under Part IIIA of the TPA for the purpose of satisfying the ‘access test’.

5.1.2 Objectives of the proposed Undertaking

At clause 2 CBH states that the proposed Undertaking has the following objectives:

- a. providing a framework to manage negotiations with Applicants for access to services provided by certain facilities at the Port Terminal Facilities in relation to export of Bulk Wheat;
- b. establishing a workable, transparent, non-discriminatory and efficient process for lodging and processing Access Applications;
- c. providing a non-discriminatory approach to pricing under which the Port Operator publishes reference prices and terms and conditions for the provision of certain standard services annually;
- d. operating consistently with the objectives and principles in Part IIIA of the TPA and the Competition Principles Agreement;
- e. reaching an appropriate balance between:
 - i. the legitimate business interests of the Port Operator, including:
 - A. the recovery of all reasonable costs associated with the granting of access to the Port Terminal Services;
 - B. a fair and reasonable return on the Port Operator’s investment in the Port Terminal Facility commensurate with its commercial risk;
 - C. the Port Operator’s business interests relating to the export of grain other than Bulk Wheat and to the export of non-grain commodities using the Port Terminal Facilities; and

- D. the Port Operator's ability to meet its own or its Trading Business' reasonably anticipated requirements for Port Terminal Services;
- ii. the interest of the public, including:
 - A. ensuring efficient use of resources; and
 - B. the promotion of economically efficient investment, use and operation of the Port Terminal Facilities; and
- iii. the interests of Applicants wanting access to the Port Terminal Services, including providing access to the Port Terminal Services:
 - A. on non-discriminatory price and non-price terms; and
 - B. in a transparent, open, efficient and non-discriminatory manner;
- f. providing an efficient, effective and binding resolution process in the event that the Port Operator and the Applicant are unable to negotiate a mutually acceptable Access Agreement; and
- g. in accordance with the objective in s44AA(b) of the TPA, providing for a uniform approach to access to the Port Terminal Services at the different Port Terminal Facilities to the extent practicable having regard to the different characteristics of the Port Terminal Facilities.

5.1.3 Structure of the prospered Undertaking

The structure section of CBH's proposed Undertaking is set out at clause 3 as follows:

3.1 Components

- (a) This Undertaking applies in relation to access to Port Terminal Services provided by means of Port Terminal Facilities at the Ports. The Port Terminal Facilities are geographically separate and have different physical and operating characteristics and modes of operation.
- (b) Accordingly, this Undertaking comprises:
 - i. these General Terms (and schedules) which apply to Port Terminal Services provided by means of each Port Terminal Facility; and
 - ii. the specific Port Schedules which describe:
 - A. the Port Terminal Services provided by means of a Port Terminal Facility; and
 - B. any specific terms and conditions on which access will be offered to the Port Terminal Services provided by means of that Port Terminal Facility,

and apply only to Port Terminal Services provided by means of that particular Port Terminal Facility.

3.2 Priority

The terms of a Port Schedule will prevail over the General Terms to the extent of any inconsistency between them.

3.3 Obligation to procure

If the performance of an obligation under this Undertaking requires a Related Body Corporate of the Port Operator to take some action or refrain from taking some action, the Port Operator must use reasonable endeavours to procure that Related Body Corporate to take that action or refrain from taking that action.

5.2 CBH's supporting submissions

CBH submits that that the objectives to its proposed Undertaking are largely derived from the TPA and the WEMA.⁸⁴

5.3 Submissions received

5.3.1 Australian Grain Exporters Association

AGEA states that the objectives clause is 'a mere statement of intent', highlights the BHCs' 'inevitable conflict of interest' and 'may be used to condone discriminatory behaviours by the BHCs'.⁸⁵ AGEA submits that this point is demonstrated at clauses 2(e)(i)(A) and (D) which refer to the legitimate business interests of the BHCs, including 'recovery of reasonable costs' and their ability 'to meet its own or its Trading Divisions' reasonably anticipated requirement for Port Terminal Services'.⁸⁶

AGEA submits that the objectives clause defines the objectives of the proposed access undertakings using nebulous concepts like "operating consistently with", "reaching an appropriate balance", "fair and reasonable return ... commensurate with ... commercial risk", "the interest of the public" and so on. AGEA submits that there is no tangible basis upon which to assess actual compliance.⁸⁷

AGEA states that it is impossible to assess the appropriateness of the structure of the proposed Undertaking because it does not contain or refer to the prices or terms and conditions on which access will be provided. On this basis, AGEA states 'it is impossible to say whether specific terms and conditions relating to a particular Port Facility should be permitted to override General Terms'.⁸⁸

⁸⁴ Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 44.

⁸⁵ Australian Grain Exporters Association, *Submission to Port Terminal Services Access Undertakings*, 29 May 2009, p.16.

⁸⁶ Australian Grain Exporters Association, *Submission to Port Terminal Services Access Undertakings*, 29 May 2009, p.16.

⁸⁷ Australian Grain Exporters Association, *Submission to Port Terminal Services Access Undertakings*, 29 May 2009, p.16.

⁸⁸ Australian Grain Exporters Association, *Submission to Port Terminal Services Access Undertakings*, 29 May 2009, p.17.

AGEA submits that clause 3.3 is unsatisfactory in that it enables CBH, or its related entities to avoid their obligations under the proposed Undertaking. AGEA states.⁸⁹

If a related entity is required to take or refrain from taking some action under the proposed access undertaking, the related entity should be a party to the undertaking or the BHCs should be obliged to procure the related entity to take or refrain from taking action. A 'reasonable endeavours' obligation is not sufficient. There should also be an obligation for the BHCs to indemnify any party that suffers loss or damage as a result of the breach.

5.3.2 Riverina

Riverina submits that clause 2.2(e)(i)(D) should be deleted as it encourages:

- (i) the consideration of the Trading Division as something other than another user of Port Terminals and Port Terminal Services; and
- (ii) discriminatory treatment between other Users of Port Terminals and Port Terminal Services and [CBH's] Trading Division.⁹⁰

Further, Riverina submits that the body of the proposed Undertaking should prevail over the Schedules and be the primary reference point for understanding the terms of the Undertaking offered which will be binding once finalised.⁹¹

In relation to clause 3.3, Riverina submits that if a body corporate of CBH is required to do something pursuant to the proposed Undertaking then it should be a party to the proposed Undertaking.⁹²

5.4 ACCC's view

5.4.1 Background to the proposed Undertaking

Given that the background section of the proposed Undertaking is merely descriptive and does not place any obligations on CBH, it is not necessary for the ACCC to consider whether it is appropriate pursuant to section 44ZZA(3).

5.4.2 Objectives of the proposed Undertaking

Unlike the background section, the objectives section is critical to the working of the proposed Undertaking.

⁸⁹ Australian Grain Exporters Association, *Submission to Port Terminal Services Access Undertakings*, 29 May 2009, p. 17.

⁹⁰ Riverina (Australia) Pty Ltd, *Submission in relation to proposed GrainCorp and CBH access undertakings*, 29 May 2009, p. 13. Note that while the clause references used by Riverina in this part of its submission relate to GrainCorp's proposed Undertaking, Riverina informed the ACCC that its submission relates to both GrainCorp and CBH.

⁹¹ Riverina (Australia) Pty Ltd, *Submission in relation to proposed GrainCorp and CBH access undertakings*, 29 May 2009, p. 13. Again, note that while this submission of Riverina's refers to GrainCorp rather than CBH, Riverina informed the ACCC that its submission relates to both GrainCorp and CBH.

⁹² Riverina (Australia) Pty Ltd, *Submission in relation to proposed GrainCorp and CBH access undertakings*, 29 May 2009, p. 13.

The objectives section ties into key clauses of the proposed Undertaking in the following manner:

- the first non-discriminatory access clause (6.4) provides that CBH must not provide access on ‘different terms’ unless such terms are, inter alia, ‘consistent with the objectives of this Undertaking set out in clause 2’;⁹³ and
- it is proposed that any variations to the Port Terminal Rules must be consistent with the objectives section.⁹⁴

The ACCC considers that the objectives section, as a whole, is not appropriate having regard to matters at section 44ZZA given its concerns with the following particular objectives:

“The recovery of all reasonable costs associated with the granting of access to the Port Terminal Services” (clause 2(e)(i)(A))

The ACCC considers that the reference to ‘reasonable costs’ at clause 2(e)(i)(A) is ambiguous with respect to what costs an access provider may recover through charges levied on the access seeker. Further, it is not clear whether allowing for recovery of ‘all reasonable costs’ would be in accordance with the pricing principles at 44ZZCA (which make reference to ‘efficient costs’ rather than ‘reasonable costs’).

The ACCC considers that this ambiguity does not appropriately balance the legitimate business interests of CBH with the interests of access seekers, nor does it provide for sufficient certainty and clarity in the terms of the proposed Undertaking.

The ACCC is of the view that this objective is more likely to be appropriate pursuant to section 44ZZA(3) of the TPA if the word ‘efficient’ is substituted for ‘reasonable’.

“The Port Operator’s ability to meet its own or its Trading Divisions’ reasonably anticipated requirements for Port Terminal Services” (clause 2(e)(i)(D))

The ACCC considers that the interpretation of clause 1.2(e)(i)(D) in the context of an access undertaking (rather than in relation to a Part IIIA arbitration) is unclear and that it is likely that difficulties would arise in determining the proper application of this clause. It is noted that the use of the term ‘reasonably anticipated requirements’ in section 44W of the TPA is referring to “an existing user” (i.e. any existing user, not just the access provider).

One interpretation of the clause could be that CBH intends to reserve and set aside its own or its Trading Division’s ‘reasonably anticipated requirements’ for port capacity and then provide access to third parties for the remaining capacity. This could allow CBH to significantly promote the interests of CBH above those of potential access seekers in a manner that is neither in the interests of potential access seekers, or in the broader public interest, including the public interest in having competition in markets.

⁹³ Co-operative Bulk Handling Limited, *Port Terminal Services Access Undertaking*, 14 April 2009, clause 6.4(a)(ii)(C).

⁹⁴ Co-operative Bulk Handling Limited, *Port Terminal Services Access Undertaking*, 14 April 2009, clause 9.2(b)(i)(A).

This interpretation of the clause runs counter to the objectives of the WEMA and particularly the objective of ensuring ‘fair’ access to port terminal services.

Given the ambiguity over the interpretation of this provision, another concern with this clause is that it does not provide for sufficient certainty and clarity in the terms of the proposed Undertaking.

5.4.3 Structure of the proposed Undertaking

The ACCC considers that the structure section is not appropriate having regard to matters at section 44ZZA(3) given its concerns with the following particular objectives:

Specific terms and conditions in the Port Schedules (clause 3.1(b)(ii))

The ACCC is of the view it is not appropriate for the Port Schedules to include any ‘specific terms and conditions on which access will be offered’.

The terms and conditions on which access is offered are set out in the standard terms offered to accredited wheat exporters. Having other terms and conditions in the Port Schedules is likely to create confusion and uncertainty about the terms of access (even with the operation of clause 3.2 – setting out that the terms of a Port Schedule will prevail over the General Terms to the extent of any inconsistency).

It is the ACCC’s view that, instead, the terms and conditions of access should *all* be clearly set out in the standard terms offered to accredited wheat exporters.

The ACCC considers that this will not cause any issues for CBH because, despite clause 3.1(b)(ii), its Port Schedules do not appear to include any specific terms or conditions.

Using ‘reasonable endeavours’ to procure (clause 3.3)

The ACCC considers that if another body was required to act (or not act) in a certain manner by the proposed Undertaking, then that party should be a party to the proposed Undertaking.

However, the ACCC considers that inclusion of the obligation to procure clause is nonetheless appropriate in the unlikely case that it is required.

However, an obligation to use ‘reasonable endeavours’ does not appropriately balance the legitimate business interests of CBH with the interests of access seekers, who require more certainty that the terms of the proposed Undertaking will be carried out.

It is the ACCC’s view that the words ‘use reasonable endeavours to’ should be removed from this clause to strengthen the obligation to procure.

6 Term of, and variation to, proposed Undertaking

Summary

Commencement

The commencement clause is not appropriate pursuant to section 44ZZA(3) given it does not clarify that the Undertaking may commence for the purposes of passing the access test under the WEMA at a different time from its commencement date under the TPA.

Term

The three year term of the proposed Undertaking is not appropriate pursuant to section 44ZZA(3) given the transitional state of the industry (i.e. CBH's proposed term is slightly too long). In coming to this view the ACCC also took into account the desirability of having consistent bulk wheat port access regulation arrangements across Australia (noting that ABB and GrainCorp have proposed two year terms for their Undertakings).

Withdrawal and variation

It is not necessary for the ACCC to form a view on the appropriateness of the withdrawal and variation clauses pursuant to section 44ZZA(3) given that they are merely descriptive.

Extension

The extension clause of the proposed Undertaking is not appropriate pursuant to section 44ZZA(3) given that clause 3.6(a) refers to submitting an undertaking 'at least three months' before the expiry of the proposed Undertaking. This is inconsistent with the statutory obligation in section 44ZZBC of the TPA for the ACCC to use reasonable endeavours to make a decision on an access undertaking application within 6 months.

6.1 CBH's proposed Undertaking

6.1.1 Commencement and Term

The proposed Undertaking is expressed to commence on 1 October 2009.⁹⁵

The proposed Undertaking provides for expiration on the earlier of 30 September 2012, or when the ACCC consents to CBH withdrawing the Undertaking in

⁹⁵ Co-operative Bulk Handling Limited, *Port Terminal Services Access Undertaking*, 14 April 2009, clause 4.1.

accordance with Part IIIA of the TPA, including under clause 4.3 of the Undertaking (which provides for ‘early withdrawal,’ as described below).⁹⁶

6.1.2 Withdrawal & variation of the proposed Undertaking

The proposed Undertaking provides that CBH may seek the approval of the ACCC to the withdrawal of the Undertaking if:

- a. CBH or a Related Body Corporate ceases to be an Accredited Wheat Exporter under the WEMA; or
- b. the WEMA is amended such that an Accredited Wheat Exporter is no longer required to have in place an access undertaking under Part IIIA of the TPA in relation to access to any of the Port Terminal Services for the purposes of obtaining or maintaining accreditation under that Act.⁹⁷

In terms of variation, the proposed Undertaking provides that CBH may seek the approval of the ACCC for variation via the removal of the Port Terminal Services provided at a particular Port on the occurrence of:

- a. the disposal of the Port Terminal to a person who is not a Related Body Corporate of CBH and CBH ceases to operate or control the Port Terminal Facility; or
- b. if there is in force under Division 2A Part IIIA of the TPA a regime established by a State or Territory for access to services provided at the Port Terminal, and under that regime Accredited Wheat Exporters have access to Port Terminal Services (or services substantially similar to the Port Terminal Services) for purposes relating to the export of Bulk Wheat.⁹⁸

The proposed Undertaking also provides, in relation to variation, that CBH may seek the approval of the ACCC to vary the Undertaking if CBH is of the opinion that circumstances have changed such that the Undertaking:

- a. is no longer commercially viable for CBH or becomes inconsistent with the objectives set out in clause 2; or
- b. is no longer consistent with the Continuous Disclosure Rules as a result of changes to the WEMA.⁹⁹

The proposed Undertaking also provides that, prior to seeking the approval of the ACCC for a variation of this kind,¹⁰⁰ CBH will first consult with Users and Applicants regarding the proposed variation.¹⁰¹

⁹⁶ Co-operative Bulk Handling Limited, *Port Terminal Services Access Undertaking*, 14 April 2009, clause 4.2.

⁹⁷ Co-operative Bulk Handling Limited, *Port Terminal Services Access Undertaking*, 14 April 2009, clause 4.3.

⁹⁸ Co-operative Bulk Handling Limited, *Port Terminal Services Access Undertaking*, 14 April 2009, clause 4.4.

⁹⁹ Co-operative Bulk Handling Limited, *Port Terminal Services Access Undertaking*, 14 April 2009, clause 4.5.

¹⁰⁰ That is, per clause 4.5(a), where CBH is of the opinion that circumstances have changed such that the undertaking is no longer commercially viable or becomes inconsistent with the objectives; or

6.1.3 Extension of the proposed Undertaking

Clause 4.6 proposes a mechanism for extension of the proposed Undertaking in certain circumstances. In summary, this clause provides:

- a. At least three months before the expiry of the Undertaking, CBH will submit to the ACCC a written statement outlining whether or not it intends to submit a new undertaking to the ACCC for its consideration.
- b. If CBH intends to submit a new undertaking to the ACCC, CBH will also apply to the ACCC for an extension of the expiring Undertaking.
- c. The application for extension would include a proposed extension period which, in CBH's view, 'reasonably estimates the time it would take for [CBH] to formulate a new undertaking and have that undertaking take effect following approval by the ACCC.'¹⁰²

It is proposed that if CBH does not propose to submit to the ACCC a new undertaking, then the steps at paragraphs (b) and (c) are not applicable.¹⁰³ It is also proposed that nothing in clause 4.6 (regarding the extension of the Undertaking) prevents CBH from submitting a new undertaking to the ACCC at any time during the term of current Undertaking.¹⁰⁴

6.2 CBH's submissions

In its submission, CBH notes that the proposed term of the Undertaking is 3 years, and submits that the term is appropriate:

'...because of the rapidly changing structure and operation of the export wheat supply chain. At this early point in the deregulation process, it is difficult to predict the future dynamics of the industry. In addition, the 2010 Productivity Commission review may conclude that there is no compelling case for the continued inclusion of the access test in the WEMA.'¹⁰⁵

CBH reiterates this position in its supplementary submission,¹⁰⁶ but notes that it would be efficient and appropriate for each of the proposed Undertakings (i.e., those proposed by CBH, ABB and GrainCorp) to have the same expiry date.¹⁰⁷

that the undertaking is no longer consistent with the Continuous Disclosure Rules as a result of changes to the WEMA.

¹⁰¹ Co-operative Bulk Handling Limited, *Port Terminal Services Access Undertaking*, 14 April 2009, clause 4.5(b).

¹⁰² Co-operative Bulk Handling Limited, *Port Terminal Services Access Undertaking*, 14 April 2009, clause 4.6(c).

¹⁰³ Co-operative Bulk Handling Limited, *Port Terminal Services Access Undertaking*, 14 April 2009, clause 4.6(d).

¹⁰⁴ Co-operative Bulk Handling Limited, *Port Terminal Services Access Undertaking*, 14 April 2009, clause 4.6(e).

¹⁰⁵ Co-operative Bulk Handling Limited, *Submission to the ACCC*, 14 April 2009, para 5.2, p. 31.

¹⁰⁶ Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, para 12.2, p. 45.

¹⁰⁷ Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, para 12.2, p. 46.

CBH also submits that the proposed Undertaking is provided to satisfy the access test in the WEMA, and as result proposes that CBH may seek its withdrawal in the circumstances described above.¹⁰⁸ In its supplementary submission, CBH clarifies that the purpose of including an express reference to seeking ACCC approval to withdraw or vary the proposed Undertaking was to disclose that such an application might be made in appropriate circumstances. CBH states that it would not object if this aspect of the proposed Undertaking were required to be removed.¹⁰⁹

In its supplementary submission, CBH states that consultation with Users and Applicants regarding any proposed variation to the Undertaking would include:

- preparing, publishing and providing Users/Applicants with a consultation document on the proposed variation;
- arranging and requesting written submissions and face to face consultations with Users/Applicants and interested third parties;
- publishing a summary of responses to the proposed variation and making any appropriate changes to the proposed variation (or not, as the case may be), and seeking further submissions and consultations on any amendments;
- submitting the proposed variation to the ACCC.¹¹⁰

6.3 Submissions received from third parties

6.3.1 Australian Grain Exporters Association¹¹¹

Term

The Australian Grain Exporters Association (AGEA), in its submission of 29 May 2009, suggested that the proposed two year term of CBH's undertaking is unacceptable to wheat exporters and unlikely to promote efficient investment. AGEA submits that wheat exporters 'need the comfort of knowing that their investment is protected by guaranteed access to port terminal services for at least five years.'¹¹²

AGEA submits that the CBH undertaking should operate for a minimum of five years and have a common expiry date with the undertakings of the other bulk handlers.¹¹³

¹⁰⁸ Co-operative Bulk Handling Limited, *Submission to the ACCC*, 14 April 2009, para 5.2, p. 31.

¹⁰⁹ Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, para 14.2, p. 46.

¹¹⁰ Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, Schedule 2, pp. 77-78.

¹¹¹ The ACCC notes that AGEA's submission of 29 May 2009 was made in relation to all three bulk handlers. In summarising AGEA's submission, the ACCC interprets references to 'the bulk handlers,' 'the BHCs' and 'the Port Operators' as references to CBH in circumstances where the AGEA submission is commenting on aspects common to all three of the undertakings.

¹¹² Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 7.1, p. 18.

¹¹³ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, Schedule 1, para D2(i), p. 40.

Early withdrawal and variation

In relation to the variation of the proposed Undertaking, AGEA submits that:

- a. the circumstances in which CBH may seek to vary the access undertaking are broader than the TPA;¹¹⁴
- b. the provider of an access undertaking is adequately protected by section 44ZZA(7) of the TPA,¹¹⁵ and it is unnecessary for the undertaking to specify the circumstances in which CBH may seek the ACCC's approval to withdraw or vary the undertaking, as this is covered by that section;¹¹⁶
- c. 'it is not appropriate for the undertaking to specify the circumstances in which the ACCC may (or may not) consent to a variation of an access undertaking as this may fetter the ACCC's statutory discretion';¹¹⁷
- d. If the undertaking is to contain a term regarding variation, that term should be consistent with section 44ZZA(7) of the TPA.¹¹⁸

AGEA also notes that the undertaking proposes that CBH may seek variation of the undertaking if the Port Terminal is disposed to a person who is not a Related Body Corporate of CBH, and CBH ceases to operate or control the Port Terminal Facilities at that Port Terminal. AGEA submits that '[a]ny disposal of a port terminal service that is the subject of an access undertaking should be strictly on terms that access to those services continues.'¹¹⁹

Extension

AGEA submits that there is a 'mismatch' between what is proposed in the CBH undertaking in relation to extension of the undertaking and what is specified in section 44ZZBC(1) of the TPA in terms of extension to an access undertaking. AGEA submits that the bulk handlers should be required to submit a statement outlining their intention to provide a new undertaking at least six months prior to the expiry of the existing undertaking, and to submit a new undertaking not less than six months before the expiry of the undertaking.¹²⁰

AGEA also submits that it is appropriate that the undertaking applies only to new Access Agreements.¹²¹

¹¹⁴ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 7.2, p. 18.

¹¹⁵ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 7.2, p. 18.

¹¹⁶ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, Schedule 1, para D2(iii), p. 40.

¹¹⁷ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 7.2, p. 18.

¹¹⁸ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, Schedule 1, para D2(iv), p. 40.

¹¹⁹ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 7.3, p. 18.

¹²⁰ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 7.4, p. 18.

¹²¹ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, Schedule 1, para D2(v), p. 40.

6.3.2 Pastoralist's & Grazier's Association of WA (Inc)

The Pastoralist's & Grazier's Association of WA (**the PGA**) notes that the CBH Undertaking is proposed to expire on the earlier of 30 September 2012 or when the ACCC consents to its withdrawal, while the ABB and GrainCorp Undertakings are proposed to expire on the earlier of 30 September 2011 or when the ACCC consents to its withdrawal. The PGA submits that the '...disparity between the Port Service Operators should be unified.'¹²²

The PGA also submits that the proposed three year term of the CBH Undertaking '...is also unlikely to promote efficient investment from any competitor with regards to upcountry facilities.'¹²³

6.3.3 Western Australian Department of Agriculture and Food

The Western Australian Department of Agriculture and Food (**DAFWA**) submits that '...the undertakings of the Bulk Handlers should all expire together, preferably in 2012. This will allow a single review of the operation of the undertakings over the period and the need for their continuation.'¹²⁴

6.4 ACCC's views

6.4.1 Term

Section 44ZZBA(1) of the TPA provides:

- (1) If the Commission accepts an access undertaking or an access code, it comes into operation at:
 - (a) If, within 21 days after the Commission publishes its decision, no person has applied to the [Australian Competition] Tribunal for review of the decision – the end of that period; or
 - (b) If a person applies to the Tribunal within that period for review of the decision and the Tribunal affirms the decision – the time of the Tribunal's decision.

However, section 24(3) of the WEMA provides:

- (2) For the purposes of paragraph (2)(c) [regarding whether a person passes the access test at a particular time]:
 - (a) assume that subsection 44ZZBA(1) of the *Trade Practices Act 1974* had never been enacted; and
 - (b) assume that an access undertaking comes into operation at the time when the ACCC publishes its decision to accept the undertaking.

¹²² Pastoralists and Graziers Association of WA, *Submission in relation to proposed CBH access undertaking*, 29 May 2009, para 4.13, p. 9.

¹²³ Pastoralists and Graziers Association of WA, *Submission in relation to proposed CBH access undertaking*, 29 May 2009, para 4.14, p. 9.

¹²⁴ Department of Agriculture and Food Western Australia, *Submission in relation to proposed CBH access undertaking*, 18 May 2009, p. 3.

The Explanatory Memorandum to the WEMA explains that this clause was included to clarify that the ACCC's decision to accept an access undertaking is sufficient to pass the access test. The Explanatory Memorandum goes on to state that:

...This contrasts with section 44ZZBA of the *Trade Practices Act 1974* which provides for appeal processes before an undertaking comes into force. Subclause 24(3) of the Bill does not prevent appeals against the ACCC's decisions from taking place, but means that the access test is passed once the ACCC approves an undertaking. This has been done to eliminate the possibility of a third party delaying the accreditation of a port terminal service provider through vexatious use of the legal process. A port terminal service provider should not be disadvantaged by such appeals if it has acted in good faith and provided an access undertaking that is satisfactory to the ACCC...

Given the interaction between section 44ZZBA(1) of the TPA and section 24(3) of the WEMA, the ACCC considers it is not appropriate for the proposed Undertaking to simply specify that it commences on 1 October 2009.

It would be more likely to be appropriate if the clause specified that this was the commencement date for the purposes of section 24 of the WEMA.

In relation to the term of CBH's proposed Undertaking, the ACCC is of the view that having an undertaking with a short duration is appropriate. In taking this view the ACCC notes the transitional state of the bulk wheat export industry and the desirability of avoiding the imposition of regulation that is not appropriate on a newly deregulated industry, which would not be in the public interest. The ACCC notes that, given the transitional state of the industry, access arrangements that are appropriate now may not be appropriate in several years time. The ACCC considers that three years would be slightly too long a term and that a shorter term of two years would better mitigate these risks.

In this regard, the ACCC has also taken into account the desirability of having consistent bulk wheat port access regulation arrangements across Australia (noting that ABB and GrainCorp have proposed two year terms for their Undertakings).

6.4.2 Withdrawal and variation

Section 44ZZA(7) of the TPA states that an access provider may withdraw or vary an undertaking at any time, but only with the consent of the ACCC. Further, the ACCC may consent to a variation of the undertaking if it thinks appropriate, having regard to the matters in section 44ZZA(3).¹²⁵

The ACCC considers that, in light of section 44ZZA(7), it is unnecessary for the proposed Undertaking to specify the particular circumstances in which CBH may seek the withdrawal or variation of the proposed Undertaking. The ACCC considers that the clauses CBH has proposed are merely indicative of the circumstances in which variation or withdrawal may be sought, and in no way fetter the discretion of the ACCC in relation to those matters as provided under the TPA.

¹²⁵ *Trade Practices Act 1974* (Cth) s 44ZZA(7).

Therefore, it is not necessary for the ACCC to form a view on the appropriateness of the withdrawal and variation clauses pursuant to section 44ZZA(3) given that they are merely descriptive.

6.4.3 Extension

Section 44ZZBB of the TPA provides, in relation to the extension of access undertakings:

- (1) If an access undertaking is in operation under section 44ZZBA (including as a result of an extension under this section), the provider of the service may apply in writing to the Commission for an extension of the period for which it is in operation.
- (2) The provider of the service must specify in the application a proposed extension period.
- (3) The Commission may, by notice in writing, extend the period for which the undertaking is in operation if it thinks it appropriate to do so having regard to the matters mentioned in subsection 44ZZA(3). The notice must specify the extension period.¹²⁶

The ACCC considers that, in light of section 44ZZBB, it is unnecessary for the proposed Undertaking to specify the particular circumstances in which CBH may seek the extension of the proposed Undertaking. The ACCC considers that the clauses CBH has proposed are merely indicative of what CBH may do in seeking an extension, and in no way fetter the discretion of the ACCC in relation to those matters as provided under the TPA.

Furthermore, it is the ACCC's view that clause 3.6(a) of the proposed Undertaking is not appropriate pursuant to section 44ZZA(3). This clause refers to CBH submitting a statement regarding whether or not it intends to submit a new undertaking at least three months before the expiry of the proposed Undertaking. The ACCC considers that, in light of the statutory obligation in section 44ZZBC of the TPA for the ACCC to use reasonable endeavours to make a decision on an access undertaking application within 6 months of receiving the application, or such longer period, the reference to 3 months in clause 3.6(a) creates confusion and is not appropriate. The ACCC also notes that it is not possible to foresee whether CBH will wish to submit a different undertaking in the future, or the length of time it would take for the ACCC to consider such undertaking, and it is therefore not appropriate to attempt to anticipate such time frames in the current proposed Undertaking.

¹²⁶ *Trade Practices Act 1974* (Cth) s 44ZZBB(1) – (3), note omitted.

7 Scope

Summary

In the present circumstances, it is appropriate that CBH's proposed Undertaking applies only to wheat (rather than all grains).

In the present circumstances, it is appropriate that CBH's proposed Undertaking applies only to port terminal services (rather than including up-country services).

It is not appropriate that CBH's proposed Undertaking only applies to port terminal services when they are not bundled with other CBH services.

It is not appropriate that CBH's proposed Undertaking expressly excludes "fumigation of grain as a preventative measure".

The drafting of the scope of the proposed Undertaking is not appropriate because it lacks clarity. In relation to the drafting of the scope of the proposed Undertaking:

- it would be appropriate for the definition of Port Terminal Services to be amended to make it clear that the lists of port terminal services in Schedules 3 – 6 are not exhaustive;
- it would be appropriate for the Schedules 3 – 6 to expressly include 'cargo accumulation';
- it would be appropriate for clause 5.4(d) (regarding sharing of efficiency savings) to be removed given its lack of clarity.

It is not necessary for CBH's proposed Undertaking to expressly provide for access to port terminals by employees of superintendence companies.

7.1 CBH's proposed Undertaking

CBH's proposed Undertaking applies to access to Port Terminal Services provided by means of its Port Terminal Facilities located at Albany, Esperance, Geraldton, and Kwinana. Port Terminal Services are defined in the proposed Undertaking as:

Port Terminal Services means the services in relation to Bulk Wheat described in the Port Schedules provided by means of a Port Terminal Facility, and includes the use of a Port Terminal Facility.¹²⁷

CBH further outlines the nature of Port Terminal Services stating that subject to the Port Schedules they may include:

¹²⁷ Co-operative Bulk Handling Limited, *Port Terminal Services Access Undertaking*, 14 April 2009, clause 5.2.

- a. intake and receival services;
- b. storage and handling services;
- c. ship nomination, acceptance, booking, cancellation and cargo accumulation; and
- d. ship loading.¹²⁸

CBH's proposed Undertaking also sets out the meaning of Port Terminal Facility:

- a) **Port Terminal Facility** means a ship loader that is:
 - i) at a Port; and
 - ii) capable of handling Bulk Wheat;
 and includes any of the following facilities:
 - iii) an intake/receival facility;
 - iv) a grain storage facility;
 - v) a weighing facility; and
 - vi) a shipping belt;
 that is:
 - vii) at the Port; and
 - viii) associated with the ship loader; and
 - ix) capable of dealing with Bulk Wheat.
- b) The Port Terminal Facilities at each Port are described in the relevant Port Schedules.

The proposed Undertaking also seeks to clarify what is not covered by the Undertaking, stating:

...

- (b) To avoid doubt, this Undertaking does not apply:
 - i) to access to services not being Port Terminal Services in relation to Bulk Wheat provided by the Port Operator; or
 - ii) in relation to other facilities owned by the Port Operator which are part of the grain supply chain, such as up country receival and accumulation facilities; or
 - iii) to fumigation of grain as a preventative measure; or
 - iv) to the transportation of Bulk Wheat to port; or

¹²⁸ Co-operative Bulk Handling Limited, *Port Terminal Services Access Undertaking*, 14 April 2009, clause 5.3.

- v) to grains which are not wheat; or
- vi) to wheat which is not Bulk Wheat.¹²⁹

CBH's proposed Undertaking provides more detail on the Port Terminal Facilities and Port Terminal Services on a port by port basis in Schedules 3 to 6. The schedules cover factual information about the facilities, and further detail on the services provided at each port, including:

- Receival;
- Sampling;
- Weighing;
- Storage; and
- Out-turning services.¹³⁰

7.2 CBH's supporting submissions

CBH states that the proposed Undertaking only covers bulk wheat and port terminal services as required by the WEMA, and states that that Parliament resolved not to include up-country receival points in the WEMA.¹³¹ CBH states that Port Terminal Services are defined in clause 5.1(b) of the proposed Undertaking which in turn refers to the Port Schedules.¹³²

CBH seeks to clarify two particular features of its Port Terminal Service definition. It states:

- The Port Terminal Service is for the purpose of cargo accumulation for export only; and
- The Port Terminal Service is a segregated service. The Undertaking does not allow or require CBH to co-mingle the wheat of an access seeker with the wheat of other users.¹³³

CBH states that it is appropriate to limit 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 Facility.¹³⁴

CBH states that it will offer a segregated service, as opposed to a co-mingled service because:

¹²⁹ Co-operative Bulk Handling Limited, *Port Terminal Services Access Undertaking*, 14 April 2009, clause 5.4(b).

¹³⁰ Co-operative Bulk Handling Limited, *Port Terminal Services Access Undertaking*, 14 April 2009, Schedules 3-6.

¹³¹ Co-operative Bulk Handling Limited, *Submission to the ACCC*, 14 April 2009, p. 2.

¹³² Co-operative Bulk Handling Limited, *Submission to the ACCC*, 14 April 2009, p. 31.

¹³³ Co-operative Bulk Handling Limited, *Submission to the ACCC*, 14 April 2009, p. 31.

¹³⁴ Co-operative Bulk Handling Limited, *Submission to the ACCC*, 14 April 2009, p. 32.

a service that involves the co-mingling of grain with grain of other users (including CBH's Grain Express customers) is a service provided by facilities other than the Port Terminal Facilities'.¹³⁵

In addition, CBH states that it may not be in a position to verify the condition of grain brought to the terminal by an access seeker and that, by segregating the access seekers' grain, reduces the risk of contaminating its facilities or other customers' grain. CBH states that this segregated service offers discretion for access seekers wishing to offer their customers grain of particular origin or narrow specification.

CBH states that the proposed Undertaking will not apply to those customers that use the Grain Express system. It states:

Exporters that acquire the Grain Express Service will not acquire Port Terminal Services under the Undertaking but will agree the terms of their services with CBH independent from the Undertaking process.¹³⁶

CBH considers that if an access undertaking were to be the 'exclusive means' by which it may provide services using its port terminal facilities, it would effectively require CBH to:

- refuse to allow customers to negotiate terms outside the Undertaking process, even if both parties wish to do so;
- substantially change CBH's existing contractual arrangements for Grain Express customers;
- substantially change the delivery of services to Grain Express customers by reducing the ability of CBH to treat grain stocks held in country and port locations as part of a single system from which customers' grain entitlements and Outturn request may be satisfied; and
- separate its port terminal operations from its country functions.

Further, CBH considers that such as position:

- would significantly decrease the efficiency of the WA export grain supply chain;
- is inconsistent with:
 - the ACCC's reasoning in deciding not to revoke CBH's Grain Express notification;
 - the intended purpose of the 'access test' in section 24 of the WEMA;
 - recent reasoning of the High Court in relation to the distinction between infrastructure facilities and the services provided by means of those facilities;
 - the Bulk Handling Act 1967 (WA); and

¹³⁵ Co-operative Bulk Handling Limited, *Submission to the ACCC*, 14 April 2009, p. 32.

¹³⁶ Co-operative Bulk Handling Limited, Further submission to the ACCC, 29 June 2009, p. 22.

- the express objects of Part IIIA of the Trade Practices Act (Cth) (TPA).¹³⁷

CBH considers that the standard terms and conditions offered pursuant to the proposed Undertaking differ from the terms and conditions of the Grain Express services, ‘only to the extent that the Grain Express Services encompasses different services’. Further, CBH states that the ‘Port Terminal Service offered under the Undertaking is substantially different from the Grain Express Services and must therefore be supplied on terms that differ from the Grain Express terms to the extent of those differences’.¹³⁸

CBH also states if its Grain Express customers were required to acquire port terminal services via the proposed Undertaking, ‘the effect of that requirement is to prohibit CBH from offering an integrated service’. CBH considers that this requirement exceeds the scope of regulation that was introduced by the WEMA.

CBH states that it is not appropriate to provide ‘preventative fumigation’ pursuant to the proposed Undertaking, stating that it falls outside the definition of Port Terminal Services in the WEMA.¹³⁹ As the port storage facilities are specifically for the purposes of cargo accumulation, CBH states that it is more appropriate to undertake preventative fumigation at the point grain is first delivered into storage and handling infrastructure. Further CBH states that the correct application of phosphine takes approximately 28 days and it would be inefficient to tie up port storage facilities while this process was occurring.¹⁴⁰

In response to the question in the ACCC’s Issues Paper about how the proposed Undertaking would interact with other grains exported via CBH’s port terminals, CBH states:

The proposed undertaking is not expected to directly impact [on] the export of grains other than bulk wheat at CBH’s terminals. However, CBH’s proposed Capacity Allocation System will apply to all grain exports. As has been the case since it was first in operation, the shipping stem includes vessels for grain other than wheat. There are some non-grain vessels included within the shipping stem operating independently out of the ports (except for Kwinana) that CBH cannot prevent from berthing at those ports. When those vessels are at berth they displace the berth slots available for grain vessels and CBH is as a consequence prevented from loading grain. Accordingly CBH requires some flexibility to attempt to mitigate the impact of the berthing of those other vessels. It is not appropriate that those non-grain vessels are subject to the Undertaking.¹⁴¹

In relation to access to ports by superintendence and inspection companies, CBH states that the proposed Undertaking is not concerned with providing physical access to the port terminal for non-wheat exporting third parties.¹⁴²

¹³⁷ Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 22.

¹³⁸ Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 23.

¹³⁹ Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 47.

¹⁴⁰ Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 47.

¹⁴¹ Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, pp. 75-76.

¹⁴² Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 90.

7.3 Submissions received

7.3.1 Australian Grain Exporters Association

AGEA submits that the scope of the proposed Undertaking should not be limited to services at port and not limited to only bulk wheat. AGEA states that upstream facilities cannot feasibly be separated from port terminal services and notes that currently the port operator provides both port services and upstream services under a single contract.¹⁴³ AGEA states:

It is artificial to try to compartmentalise port terminal services from the upstream services when such services are all provided by the same company and under the same contract.¹⁴⁴

AGEA submits that as the proposed Undertaking only covers bulk wheat, port operators have the potential to restrict access to port by exhausting the port terminal's capacity in favour of other grains.¹⁴⁵

AGEA submits that the service definition must include 'all services provided by means of the port terminal facilities to which the undertaking applies, as well as the use of the port terminal facilities'.¹⁴⁶ Further, AGEA states that the service definition must identify the geographical parameters of the port terminal facilities and include all service provided within that area. It states that the geographical boundaries should at least begin at the point where the wheat arrives and include every other point until the wheat is loaded into the ship's hold.¹⁴⁷ However, AGEA points out the limitations of defining the service on geographical lines, providing an example of where storage facilities at some ports in Western Australian and South Australia ports are located outside the geographical confines of the port.¹⁴⁸

AGEA sets out in detail what it considers must be included in the service definition:

- i) daily intake to port by grade;
- ii) information of stock on hand at port;
- iii) port capacity;
- iv) stock movements back out of port (prior consultation with marketer in question);

¹⁴³ Australian Grain Exporters Association, *Submission to Port Terminal Services Access Undertakings*, 29 May 2009, p. 4.

¹⁴⁴ Australian Grain Exporters Association, *Submission to Port Terminal Services Access Undertakings*, 29 May 2009, p. 9.

¹⁴⁵ Australian Grain Exporters Association, *Submission to Port Terminal Services Access Undertakings*, 29 May 2009, p. 10.

¹⁴⁶ Australian Grain Exporters Association, *Submission to Port Terminal Services Access Undertakings*, 29 May 2009, p. 19.

¹⁴⁷ Australian Grain Exporters Association, *Submission to Port Terminal Services Access Undertakings*, 29 May 2009, p. 19.

¹⁴⁸ Australian Grain Exporters Association, *Submission to Port Terminal Services Access Undertakings*, 29 May 2009, p. 20.

- v) managing port-related stock swaps;
- vi) weighing of wheat upon receipt by BHCs and again upon outturn onboard vessel;
- vii) unloading;
- viii) storage;
- ix) fumigation and management—quality of grain is to be maintained at the same level as when it was delivered to the BHCs “quality in = quality out” over the rail;
- x) segregating/blending as directed by AWE;
- xi) accumulating;
- xii) elevating to ship;
- xiii) sampling of wheat upon receipt by BHCs and again upon outturn onboard vessel;
- xiv) loading, stowing and trimming;
- xv) access by independent superintendent/surveyor;
- xvi) documentation evidencing the process;
 - A. weight
 - B. quality
 - C. AQIS compliance
- xvii) managing vessel nominations and shipping stem on a timely basis;
- xviii) notifying problems and respond to request from marketers on a timely basis e.g. daily report on quality loaded.¹⁴⁹

AGEA notes that CBH seeks to exclude "fumigation of grain as a preventative measure" from the scope of its Undertaking. AGEA submits that “CBH cannot exclude fumigation services where such services are provided within the geographic confines of a port terminal facility.”¹⁵⁰

AGEA also states that at the time of making its submission it was unclear whether CBH intended to exclude Grain Express from the terms of the access undertaking.

¹⁴⁹ Australian Grain Exporters Association, *Submission to Port Terminal Services Access Undertakings*, 29 May 2009, pp. 19-20.

¹⁵⁰ Australian Grain Exporters Association, *Submission to Port Terminal Services Access Undertakings*, 29 May 2009, p. 20.

AGEA states that if CBH seeks to exclude Grain Express from the proposed Undertaking it requests the opportunity to make further submissions on this issue.¹⁵¹

7.3.2 Department of Agriculture and Food (WA)

The Department of Agriculture and Food (WA) submits that it is strongly of the view that CBH's proposed Undertaking should cover all grains, not just wheat.¹⁵² It states that the WA Government is in the process of removing restrictions on exports of barley, lupins and canola from WA and that, hence, those grains will be in a similar position to wheat in regard to alternative exporters having equitable access to CBH's port handling facilities.

7.3.3 The Western Australian Farmers Federation (Inc)

The Western Australian Farmers Federation (WAFarmers) submits that:

While the Undertaking is not required to, and does not, relate to any part of the export grain supply chain other than "Port Terminal Services", as a grower organisation it is important for us to note that a failure in coordination of grain accumulation from an up-country site or sites will impact on out-loading and vessel prioritisation.

It is to this end that WAFarmers supports the continuation of CBH's pivotal logistical role and believes that the prospect of new entrants establishing new port terminals would be detrimental to Western Australian growers' 'bottom line'.¹⁵³

The Western Australian Farmers Federation questions the need for the proposed Undertaking, stating:

WAFarmers believes that Section 24(i) of the Wheat Export Marketing Act already provides for disclosure and transparency and the fact that CBH is already bound by the State Government's Bulk Handling Act to provide access on [a] fair and reasonable basis to its infrastructure under Section 19 [which provides] 'Subject to this Act and the regulations, the Company shall allow a person, on payment of the prescribed charges, the use of any bulk handling facilities and equipment controlled by it at ports in the State.'

As any costs will eventually find their way back to growers, with due respect, WAFarmers questions the requirement for an expensive Port Terminal Access Test when obligations are already fulfilled by compliance [with] the Wheat Export Marketing Act and Bulk Handling Act.

The incentive to provide open access under the Acts and constraints on anti-competitive conduct means that further intrusive and prescriptive regulation is not necessary. Such an approach will add unnecessary costs which will be ultimately passed on to exporters and growers and make CBH less competitive relative to the other handling companies around Australia and the world.¹⁵⁴

¹⁵¹ Australian Grain Exporters Association, *Port Terminal Services Access Undertakings*, 29 May 2009, p. 10.

¹⁵² Department of Agriculture and Food Western Australia, *Submission in relation to proposed CBH access undertaking*, 18 May 2009, covering letter.

¹⁵³ The Western Australian Farmers Federation (Inc), *Submission in relation to proposed CBH access undertaking*, 29 May 2009, p. 1.

¹⁵⁴ The Western Australian Farmers Federation (Inc), *Submission in relation to proposed CBH access undertaking*, 29 May 2009, p. 2.

7.3.4 Pastoralists & Graziers Association

The Pastoralist & Graziers Association of WA (Inc) (PGA) submits that “[t]he scope of the proposed Undertaking by CBH should not be limited to services at the port terminal, as up country services are an integral part of the grain logistics system, and the export of bulk wheat.”¹⁵⁵

In this regard PGA submits:

CBH is a monopoly provider of port terminal services in Western Australia. CBH also owns the majority of Western Australia’s grain storage and hauling infrastructure. There are no alternative providers of port terminal services within a distance that make them commercially viable competitors.

Port terminal services are but one part of the services necessary for access to bulk wheat export markets. Competition in bulk wheat export markets requires that any bulk handler provide access to *all* of the services provided by facilities which are upstream from and separate to port terminal facilities. It is artificial to seek to compartmentalise port terminal services from the upstream services when such services are all provided by the same company and under the same contract. The PGA acknowledges that section 24 of the [WEMA] is only directed at port terminal services. This fact should not be allowed to deflect the underlying commercial reality that in Western Australia both upstream and port terminal services are provided by CBH.

In Western Australia some of the port terminal services are provided by facilities which are upcountry from the port terminal facilities. The PGA holds that the upcountry activities of the port operator are closely related and cannot feasibly be separated from port terminal services. CBH is the monopoly provider of port terminal services and the monopoly provider of upstream and downstream services.

The absence of alternative port terminal facilities and upcountry storage and handling services means that Western Australian growers are constrained in using Grain Express, which may exacerbate CBH’s monopoly position.

The absence of alternative upcountry receival sites and port terminal facilities in Western Australia means that growers are disadvantaged as competition in upcountry services is limited due to the control of the port terminal services by CBH. The Undertaking does not ensure that growers are not disadvantaged due to a lack of competition through the provision by CBH of upstream services which are part of the port terminal service.¹⁵⁶

The PGA submits that port terminal services are but one part of the services necessary for access to bulk wheat export markets. It submits that other necessary services include:

- Receival from growers by rail or truck;
- Grading;
- Fumigation;
- Sampling;

¹⁵⁵ Pastoralists and Graziers Association, *Submission in relation to proposed CBH access undertaking*, 29 May 2009, para 4.3, p. 6.

¹⁵⁶ Pastoralists and Graziers Association, *Submission in relation to proposed CBH access undertaking*, 29 May 2009, pp. 2-3.

- Storage;
- Segregation and/or blending;
- Weighing services;
- Rail and road transport services which transport the wheat from storage to the port terminal facility; and
- Shipping belts and ship loaders.¹⁵⁷

7.3.5 Riverina

Riverina submits that it supports the submission made the WA Department of Agriculture and Food that the Standard Port Terminal Services Protocol should apply to all grains and no be limited to wheat.¹⁵⁸

7.3.6 Grain Industry Association of Victoria

The Grain Industry Association of Victoria (GIAV) (who provided a submission relating to all three bulk handlers) submits that the scope of the proposed Undertaking should not be limited to services at the port terminal, but should also cover rail and road access.¹⁵⁹ GIAV states that it is often ‘upstream access’ issues—for instance transport to port, and the capacity of the bulk handler to load transport at its up country facilities—that are the constraining factor on export capacity.¹⁶⁰

GIAV also submits that the undertaking should apply equally to parties who use the port operators up-country services and those that do not.¹⁶¹

7.3.7 New South Wales Farmers Association

The NSW Famers Association (who provided a submission relating to all three bulk handlers) notes that the proposed Undertaking does not cover up-country storage and handling facilities and is concerned that ‘a lack of regulation has possibly led to the deterioration of competition, and therefore higher fees and charges which are inevitably passed on to the industry’.¹⁶²

7.3.8 SGS Australia

SGS states that superintendence and inspection companies ‘play a vital role in facilitating trade by assisting their clients to mitigate the substantial risk taken on by

¹⁵⁷ Pastoralists and Graziers Association, *Submission in relation to proposed CBH access undertaking*, 29 May 2009, pp. 4-5.

¹⁵⁸ Riverina (Australia) Pty Ltd, *Submission in relation to proposed GrainCorp and CBH access undertakings*, 29 May 2009, p.4.

¹⁵⁹ Grain Industry Association of Victoria, *Submission in relation to proposed access undertakings*, 1 June 2009, p. 1.

¹⁶⁰ Grain Industry Association of Victoria, *Submission in relation to proposed access undertakings*, 1 June 2009, p. 1.

¹⁶¹ Grain Industry Association of Victoria, *Submission in relation to proposed access undertakings*, 1 June 2009, p. 2.

¹⁶² NSW Farmers Association, *Submission in relation to proposed access undertakings*, June 2009, p. 5.

parties buying and selling large quantities of grain'.¹⁶³ SGS submits that Australian port operators are generally very restrictive in granting access to superintendence companies at loading, and is concerned that the 'continuation of such policies will jeopardize Australia's place in the international market in the future'.¹⁶⁴

7.3.9 Intertek

Intertek submits that some port operators unnecessarily restrict the rights of exporters and customers to appoint an independent superintendent to supervise the loading of a vessel, and collect samples and monitor quality. Intertek submits that superintendent companies need access to maintain a chain of custody on samples; and conduct testing and monitor the quality of cargo during loading.¹⁶⁵ Intertek states that there appears to be a disparity among the port operators in the grain industry and those in other industries, such as oil and chemical plants, that permit greater access to their ports.¹⁶⁶

7.4 ACCC's views

This section sets out the ACCC's views as to whether the services definition in the proposed Undertaking is appropriate having regard to the matters in section 44ZZA(3) of the TPA.

7.4.1 Scope of the proposed service definition

Appropriate that the proposed Undertaking relates only to wheat

The ACCC accepts CBH's submissions that it is appropriate that the proposed Undertaking applies only to wheat.

The ACCC recognises that, as CBH has submitted, it is clear that the intention of the WEMA is that the proposed Undertakings should apply only to wheat.

This is because section 24 of the WEMA requires that, for the period after 1 October 2009, in order for a person that provides port terminal services to also hold or maintain accreditation *to export bulk wheat*, there must be in operation, under Division 6 of Part IIIA of the TPA, an access undertaking relating to the provision of access to port terminal services for *purposes relating to the export of wheat* (our emphasis).

The ACCC also considers that limiting the scope of the Undertaking to wheat reduces the risk and undesirability of imposing regulation that is not appropriate at a time when the industry is newly liberalised and in transition.

However, the ACCC recognises that limiting the proposed Undertaking to wheat has the potential to create a number of issues in the grains industry.

First, limiting the proposed Undertaking to wheat leaves open the possibility that different port terminal rules could apply for wheat than apply for other grains.

¹⁶³ SGS Australia, Submission in relation to proposed access undertakings, 26 May 2009, p. 1.

¹⁶⁴ SGS Australia, Submission in relation to proposed access undertakings, 26 May 2009, p. 3.

¹⁶⁵ Intertek, *Submission in relation to proposed access undertakings*, 29 May 2009, p. 5.

¹⁶⁶ Intertek, *Submission in relation to proposed access undertakings*, 29 May 2009, p. 5.

In this regard, it is very encouraging that CBH has submitted that its proposed Capacity Allocation System will apply to all grain exports. The ACCC considers that this approach will alleviate any possibility of inconsistency between protocols that apply to wheat and those applying to other grains.

The second issue is one raised by AGEA, that given the proposed Undertaking relates only to wheat, port operators have the potential to restrict access to port by exhausting the port terminal's capacity in favour of other grains.¹⁶⁷

While the ACCC has no evidence to suggest that such behaviour would be likely to occur, the ACCC recognises that providing a greater level of transparency over stocks at port would assist access seekers and would alleviate the potential for port operators to engage in this behaviour. Accordingly, in the Other Issues chapter the ACCC sets out its view that publication of stocks at port (all grains) would be an appropriate part of any revised proposed Undertaking.

The ACCC also notes that if an access seeker experiences access issues in relation to access the port terminal services for the export of wheat, that have been influenced in some way by decisions made about other grains, that the access seeker could seek to arbitrate on that access issue or enforce the non-discrimination clause in the proposed Undertaking.

Appropriate that the proposed Undertaking relates only to services offered at port

The ACCC also accepts CBH's submissions that it is appropriate that the proposed Undertaking applies only to services offered at port (not up-country).

The ACCC recognises that, as CBH has submitted, it is clear that the intention of the WEMA is that the proposed Undertakings should apply only to services offered at port.

In this regard, the ACCC notes that the Explanatory Memorandum to the WEMA dismissed calls to extend the access test to cover up-country services, stating that:

Up-country facilities do not display natural monopoly characteristics as they have low barriers to entry and there are already a number of competitors in the industry who provide up-country storage services.¹⁶⁸

The Explanatory Memorandum goes on to note that an extension of the access arrangements to up-country storage facilities would 'impose an excessive regulatory burden'.¹⁶⁹ Further, the Second Reading Speech of the WEMA provides:

The Senate inquiry also identified concerns in relation to the potential for bulk-handling companies to restrict access to up-country storage facilities in a similar manner to concerns in relation to port facilities.

¹⁶⁷ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, p. 10.

¹⁶⁸ Explanatory Memorandum, *Wheat Export Marketing Bill 2008*, p. 13.

¹⁶⁹ Explanatory Memorandum, *Wheat Export Marketing Bill 2008*, p. 14.

It is unclear from the evidence presented to the Senate inquiry whether the problem would necessarily arise, and if so, the extent of legislation that would be required to correct it.

If the highest level of regulation were to be imposed on the more than 500 up-country facilities, there is no doubt that this would create increased compliance costs which would almost certainly be directly passed back to growers.

The government will, therefore, continue to monitor the ability of exporters to access up-country storage facilities.

Let me say here, if any problems are identified then the government will take steps to remedy the situation including, if necessary, the development of a code of conduct.¹⁷⁰

Nevertheless, the ACCC is cognisant of the large number of submissions made calling for CBH's proposed Undertaking to be extended to include services offered at CBH's up-country storage and handling facilities. Many of these submissions stated that it was artificial to draw a distinction between services offered at port and those offered up country.

The ACCC is aware that in WA the vast majority of exporters use CBH's 'Grain Express' bundled service for the export of their wheat. The ACCC notes PGA's submission that in Western Australia both upstream and port terminal services are provided by CBH (which differs from other states where there are at least some competing up country storage and handling networks). Given this, there may be some benefits to the proposed Undertaking applying to CBH's up-country storage and handling facilities and well as to the ports.

However, the ACCC, in this process, has not formed any views on the competitiveness of the supply of up-country storage and handling services. As set out in the Legislative Framework chapter, the ACCC does not consider that its role in this process was to conduct a thorough assessment of the state of competition in the bulk wheat export supply chain.

It is the ACCC's view that, given the clear intention of the WEMA, and having regard to the risk and undesirability of imposing regulation that is not appropriate at a time when the industry is newly liberalised and in transition, the ACCC considers that it is appropriate pursuant to section 44ZZA(3) of the TPA that the scope of the proposed Undertaking be limited to services at port.

Not appropriate not to cover port terminal services when bundled with other services

As outlined above, CBH states that the proposed Undertaking will only apply to those customers who wish to acquire port terminal services on a stand alone basis - i.e. it will not apply to those customers who acquire port terminal services as part of a bundled service. CBH makes several arguments as to why it considers that it would not be appropriate to require it to offer the port terminal service component of Grain Express pursuant to the Undertaking.

¹⁷⁰ House of Representatives, *Votes and Proceedings, Hansard*, Thursday 29 May 2009, pp. 76-77.

One argument CBH makes is that if the Undertaking ‘included’ Grain Express customers, it would prevent access seekers and CBH negotiating and agreeing to non-standard terms.

This assertion by CBH is incorrect. An access undertaking does not prevent parties from agreeing to whatever terms and conditions they like. To the contrary, commercial agreement is encouraged. An access undertaking can be considered as an ‘avenue of last resort’. It sets out the *minimum* terms and conditions that an access provider offers to provide to an access seeker. There is nothing to prevent parties from agreeing to different terms and conditions of access.

CBH also submits that requiring the proposed Undertaking to apply to bundled services would ‘prohibit CBH from offering an integrated service’ and ‘significantly decrease the efficiency of the WA export grain supply chain’.

The ACCC considers that these submissions reflect a misunderstanding of the nature of a Part IIIA access undertaking.

An access undertaking relating to one component of a supply chain does not, in any way, prevent an access provider from offering a bundled service. It simply means that if an access seeker is not satisfied with the terms offered to it in relation to the *port terminal services* component of the bundle, it can use the negotiation and arbitration provisions of the undertaking to try to improve its terms and conditions of access in relation to *that component* only. Accordingly there is no reason why providing the ACCC with an access undertaking covering all port terminal services would stop CBH from continuing its ‘pivotal logistical role’¹⁷¹ in WA. In fact, promoting competition in alternative up-country supply chains would be likely to provide incentives on CBH to become more efficient.

CBH also argues that requiring the proposed Undertaking to apply to bundled services would be contrary to the intended purpose of the ‘access test’ in section 24 of the WEMA.

To the contrary, the ACCC considers that it would in fact be inconsistent with the access test in the WEMA to have an access undertaking that only applied to the stand-alone port terminal service (particularly given that the vast majority of access seekers in WA use the bundled Grain Express product).

The ACCC considers that the intent of the WEMA was to implement an access regime that covered *all* bulk wheat exports through a given port terminal. Simply because port terminal services are being offered as part of a bundled product does not alleviate the fact that they are port terminal services, as defined in the WEMA.

Another argument CBH makes is that requiring the proposed Undertaking to cover bundled offers would be inconsistent with the ACCC’s reasoning in deciding not to revoke CBH’s Grain Express notification.

¹⁷¹ As described by the Western Australian Farmers Federation (Inc), *Submission in relation to proposed CBH access undertaking*, 29 May 2009, p. 1.

By way of background, the ACCC notes that last year the ACCC was asked to consider elements of CBH's grain storage, handling and transportation arrangements between its up-country receival sites and its ports – known as 'Grain Express'.

The ACCC was involved because elements of the Grain Express system potentially raise concerns under the exclusive dealing provisions of the Trade Practices Act.

Broadly, exclusive dealing involves one trader imposing restrictions on another's freedom to choose with whom or where it deals. Businesses receive automatic immunity from legal action for exclusive dealing conduct by lodging a 'notification' with the ACCC. The ACCC can only remove the immunity if it decides that the conduct substantially lessens competition and is not in the public interest.

CBH lodged a notification in June last year.

The notified conduct covers the requirement under the Grain Express system that, while grain is in CBH's custody, its transportation will be arranged and coordinated by CBH. CBH uses both road and rail freight services to move grain in its system.

It is important to note that CBH's Grain Express notification only relates to the bundling of up-country storage and handling services with transportation to port, while the grain remains in its system. It does not cover the bundling of CBH's port services with its up-country storage, handling and transportation services.

In making its decision not to revoke the notification, based on the information before it at the time, the ACCC stated:

...

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

- the proposed arrangements do not foreclose potential competitors to CBH from entering the market for grain receival, storage and handling
- growers and traders of grain are free to make their own arrangements in respect of the transportation of grain from the farm gate to end user point, or from a Destination Site to end user point
- the proposed arrangements may stimulate competition in the market for the relevant CBH transport contracts by providing greater certainty in respect of transport volumes
- acquirers and marketers of grain will continue to be able to take advantage of niche marketing opportunities and
- CBH's amended Ring Fencing Policy provides an adequate framework to limit the potential for information obtained by CBH to be transferred to and used anti-competitively by CBH's trading subsidiaries.¹⁷²

¹⁷² Australian Competition and Consumer Commission, *Decision in respect of a notification lodged by Cooperative Bulk Handling*, 8 September 2008, p. ii.

The ACCC can only remove the immunity provided by the Grain Express notification if it is satisfied that the conduct has the purpose or effect of substantially lessening competition and in all the circumstances:

- the conduct has not resulted or is not likely to result in a benefit to the public; or
- any benefit to the public that has resulted or is likely to result from the conduct would not outweigh the detriment to the public constituted by any lessening of competition resulting from the conduct.

Should the ACCC receive information that the notified conduct may be substantially lessening competition and that the arrangement is not delivering the claimed efficiency benefits, it may review the notification.

The ACCC does not accept that a decision that it would not be appropriate for CBH's proposed Undertaking to only cover a stand-alone port terminal service is inconsistent with its decision not to revoke CBH's Grain Express Notification.

As set out above, the conduct was notified because of concerns it could have breached section 47 of the TPA. The notification only relates to the bundling of up-country storage and handling services with transportation to port, while the grain remains in its system. It does not cover the bundling of CBH's port services with its up-country storage, handling and transportation services.

The statutory requirement in the WEMA to provide the ACCC with an access undertaking relating to access to port terminal services is quite a different matter from, and not inconsistent with, the ACCC's decision not to revoke the Grain Express notification.

Therefore, the ACCC considers that it is not appropriate that the proposed Undertaking does not cover all bulk wheat exporters acquiring port terminal services from CBH—regardless of what other services they may acquire from CBH, and in what form the services are acquired.

Not appropriate to expressly exclude “fumigation of grain as a preventative measure”

The ACCC does not accept CBH's arguments that “fumigation of grain as a preventative measure” ought to be expressly excluded from the scope of its proposed Undertaking.

The ACCC accepts submissions made by AGEA and the PGA that fumigation is an essential part of port terminal services. While it may be the case that not all fumigation of grain is appropriate at port, it is unclear precisely how the term “preventative measure” would be interpreted in this context.

Accordingly, the ACCC does not consider that clause 5.4(b)(iii) (i.e. a blanket exclusion of fumigation as a preventative measure) of CBH's proposed Undertaking is appropriate.

Drafting of the scope lacks clarity

Aside from proposing that its Undertaking not apply to bundled services, the ACCC recognises that CBH has attempted to draft the scope of its proposed Undertaking to be consistent with the service definition in the WEMA. Nevertheless the ACCC nevertheless considers that the drafting of the scope of CBH's proposed Undertaking lacks clarity and is therefore not appropriate pursuant to section 44ZZA(3).

The definition of Port Terminal Service in the WEMA is:

Port terminal service means a service (within the meaning of Part IIIA of the *Trade Practices Act 1974*) provided by means of a port terminal facility, and includes the use of a port terminal facility.¹⁷³

A Port Terminal Facility is defined in the WEMA the following manner:

“Port Terminal Facility” means a ship loader that is:

- (a) at a Port Terminal; and
- (b) capable of handling Bulk Wheat;

and includes any of the following facilities:

- (c) an intake/receival facility;
- (d) a grain storage facility;
- (e) a weighing facility;
- (f) a shipping belt;

that is:

- (g) at the Port Terminal; and
- (h) associated with the ship loader; and
- (i) capable of dealing with Bulk Wheat.¹⁷⁴

Clause 5.1(b) – amendments to make it clear that the lists of port terminal services in Schedules 3 – 6 are not exhaustive

The ACCC considers that the current drafting of the scope of CBH's proposed Undertaking risks inadvertently excluding relevant services.

It is not clear whether the elements of the service described in the Schedules 3 – 6 are intended to be exhaustive. That is, clause 5.1(b) provides that port terminal services ‘means the services described in the Port Schedules’ (emphasis added). This drafting leaves the services definition open to an interpretation that the specified elements of the service in Schedules 3 – 6 may be an exhaustive list.

¹⁷³ *Wheat Export Marketing Act 2008* (Cth) s 5.

¹⁷⁴ *Wheat Export Marketing Act 2008* (Cth) s 5.

Therefore, for the avoidance of doubt, the ACCC is of the view that the service description should include drafting such that any services necessarily required by access seekers to port terminal services are captured. This could be achieved by the substitution of clause 5.1(b) with the following:

Port Terminal Services means the services described in Schedules 3 – 6 in relation to Bulk Wheat provided by means of a Port Terminal Facility, and includes the use of a Port Terminal Facility and the use of all other associated infrastructure necessary to allow an Accredited Wheat Exporter to export Bulk Wheat through that Port Terminal.

Schedules 3-6 – inclusion of ‘cargo accumulation’

The ACCC is of the view that it would be appropriate for cargo accumulation services to be explicitly included within the scope of the Undertaking.

The ACCC accepts arguments made by AGEA that cargo accumulation is an essential part of port terminal services. The ACCC considers that a transparent cargo accumulation procedure is an important element of the port terminal service, as the potential costs to the industry could be significant if the cargo accumulation process is poorly managed.

The ACCC notes that the exclusion of ‘cargo accumulation’ from Schedules 3 – 6 may have been inadvertent given that clause 5.3(c) of the proposed Undertaking includes a reference to ‘cargo accumulation’ (although the ACCC understands that clause 5.3 is merely illustrative in nature).

Removal of clause 5.4(d) – irrelevant to scope

The ACCC notes that under the heading “What this Undertaking does not cover”, clause 5.4(d) provides:

Nothing in this Undertaking requires the Port Operator or Related Body Corporate to share efficiency savings or benefits from the operation of a separate integrated supply chain service whether or not the integrated supply chain service utilises the Port Terminal Facilities.

The ACCC considers that the rationale for, and implications of, clause 5.4(d) are not clear.

The ACCC is of the view that inclusion of this clause in the context of defining the scope of the Undertaking introduces an unnecessary degree of uncertainty for access seekers and is therefore not appropriate.

Not necessary for CBH’s proposed Undertaking to expressly provide for access to employees of superintendence companies

The ACCC notes that several submissions called for increased access to ports for employees of superintendence companies.

The ACCC accepts that there may be benefits in allowing employees of superintendence companies to access port terminals, particularly in relation to improving the transparency of port operations.

However, the proposed Undertaking is an undertaking to provide access to port terminal services to *accredited wheat exporters*. It is not an undertaking to provide access to employees of superintendence companies.

The ACCC notes that a failure of CBH to allow an accredited wheat exporter to bring an employee of a superintendence company into the port terminal area could be an issue dealt with by negotiation or arbitration (see the Publish, Negotiate, Arbitrate chapter of this draft decision).

Regardless of the merits of providing access to employees of superintendence companies to port terminals, this issue is outside the scope of the intention of the access test.

8 Publish/Negotiate/Arbitrate

Summary

The ACCC is of the view that, in the present circumstances, it is appropriate that CBH's proposed Undertaking adopts a publish-negotiate-arbitrate approach (rather than providing for ex ante price regulation). In forming this view, the ACCC has had regard to the transitional state of the industry and the relatively short duration of the proposed Undertaking.

The ACCC considers, however, that the drafting of the publish-negotiate-arbitrate component of the proposed Undertaking is not appropriate. The ACCC considers it is more likely to be appropriate for the proposed Undertaking to:

- include an indicative access agreement setting standard terms for access to the service;
- require CBH to publish a single set of prices for port terminal services, which may include differentiated prices for different circumstances (i.e., for different processes for testing of grain depending on where it has been stored – but *only* where these processes are justifiable with regard to hygiene, quality or associated factors), provided those circumstances are transparently stated and the pricing differences are justified on the basis of different costs;
- require CBH to publish prices within a timeframe that allows sufficient opportunity for access seekers to negotiate non-standard terms and prices;
- provide appropriate holding over arrangements to ensure access seekers are not delayed in obtaining access by reason of engaging in a negotiation with CBH on non-standard terms or prices, or by reason of resolving a dispute with CBH pursuant to the processes in the proposed Undertaking;
- address the issues identified by the ACCC in the discussion above regarding the timeframes and lack of clarity and certainty in the drafting of the proposed Undertaking, as well as the disproportionate discretion of the access provider;
- not include a 'pre-condition' to invoking the dispute resolution process, as currently included in clause 7.3(c);
- provide that when a Dispute is referred to arbitration, it is referred to the ACCC in the first instance;
- provide a mechanism by which the ACCC may consider whether or not it wishes to arbitrate the Dispute;
- provide for the Dispute to be arbitrated by the ACCC if it so chooses, or for the Dispute to be arbitrated by a private arbitrator if the ACCC so chooses;
- permit the ACCC to conduct an arbitration adopting the processes and having regard to the matters set out in Part IIIA of the TPA if it chooses to be the arbitrator; and

- require a private arbitrator, if appointed, to keep the ACCC informed of the progress of the arbitration, including timelines and processes for making submissions; and
- allow the ACCC to make submissions to an arbitration conducted by a private arbitrator.

The ACCC seeks views on:

- The dispute resolution provisions in CBH's proposed Standard Terms for 2009/2010 (attached to this Draft Decision at **Annexure A**).

8.1 CBH's proposed Undertaking

The CBH Undertaking proposes a 'publish-negotiate-arbitrate' model for dealing with the publication of prices and terms, negotiating for access and resolving disputes. The key relevant clauses are 6, 7 and 8 of the proposed Undertaking, though other clauses are also relevant.

8.1.1 Obligation to publish price and non-price terms

Clause 6.1 obliges CBH, by no later than 30 September each year, for access to each of its Port Terminal Service, to publish 'Reference Prices' and 'Standard Terms.' If CBH has not published by that time at the commencement of the proposed Undertaking, it must publish within 15 Business Days of commencement. Unless varied, the Reference Prices and Standard Terms must apply at least until 30 September of the next year.

8.1.2 Access, Standard Terms and Standard Services

Clause 6.2 provides that the 'Port Terminal Services' for each Port are set out in the relevant Port Schedules. Further, clause 6.2(b) provides that, unless otherwise specified in a Port Schedule, access to a Standard Port Terminal Service (and CBH's obligation to enter into an Access Agreement for them) will only be offered for a term expiring no later than 30 September of the year following the year in which the Standard Terms were first published, subject to appropriate 'holding over' provisions.

Clause 6.1(f) provides that if an Applicant seeks access to non-standard Port Terminal Services, CBH and the Applicant may negotiate different prices and non-price terms.

Clause 6.3 provides that parties may agree to include terms in an agreement applying to services other than Port Terminal Services, but that the Undertaking only applies to the terms relating to the provision of Port Terminal Services.

Clause 6.4 provides that if an Applicant requests a Standard Port Terminal Service, CBH must *offer*, in accordance with clause 7, that Service at the Reference Prices for that Service applicable at that time. Clause 7 sets out the negotiation process (see below). Clause 7.7(b)(i) reiterates that CBH must offer the Standard Terms to the Applicant where the Applicant requests access to a Port Terminal Service, subject to the Applicant satisfying the Prudential Requirements (see below).

Clause 6.4 goes on to provide that CBH must not *provide access* on terms and conditions which are different from the Standard Terms and Reference Prices, or

which differ between Applicants/Users, except in certain circumstances. Per clause 6.4, CBH may provide access on different terms where those terms are:

- consistent with the objects of the proposed Undertaking;
- offered on an arm's length commercial basis; and
- commercially justifiable, taking into account the 21 matters listed in clause 6.5.

Clause 7.7 reiterates that, subject to clauses 6.4 and 6.5, CBH may offer amended Standard Terms to reflect terms which CBH considers reasonably necessary or desirable to accommodate a request for access to a service other than a Port Terminal Service. Further, clause 7.7 states that CBH may agree changes to the Standard Terms requested by the Applicant.

Clause 7.7(a) provides that the granting of access is finalised by the execution of an Access Agreement. Clause 7.7(c) provides that once the Applicant has notified CBH that it is satisfied with the terms and conditions of the Access Agreement as drafted, CBH will, as soon as reasonably practicable, provide a final Access Agreement (or if applicable, an amendment to an existing Access Agreement) to the Applicant for execution. Clause 7.7(d) provides that if CBH offers an Access Agreement and the Applicant accepts the terms and conditions offered in that Access Agreement, CBH and the Applicant will execute the Access Agreement. The clause states that the parties will use reasonable endeavours to comply with this clause as soon as practicable.¹⁷⁵

8.1.3 Negotiating for access

Good faith negotiations

Clause 7.1 of the Undertaking provides that CBH will negotiate in good faith for the provision of access to Port Terminal Services.

Confidentiality

Clause 7.2 relates to confidentiality during the negotiation process. It provides that if a party provides 'Confidential Information' to the other party as part of the negotiation process, the party receiving that information will treat it as secret and confidential, as the property of the provider, and will not use the information for any purpose other than that which the provisions of the Undertaking allow. A party may disclose the Confidential Information to the extent necessary for the provision of advice from legal advisors, financiers, accountants or other consultants, provided those persons are under a legal obligation not to disclose the information. The confidentiality obligation is reiterated in clause 7.3(b).

Provision of information by CBH to Applicant

Clause 7.4(a) provides that, if requested by the Applicant, CBH will provide the Applicant with information related to access to the Port Terminal Services that may

¹⁷⁵ Co-operative Bulk Handling Limited, *Port Terminal Services Access Undertaking*, 14 April 2009, clause 7.7(d).

be reasonably required by the Applicant in relation to the Access Application. CBH will provide this information subject to:

- CBH not disclosing any information which would breach a confidentiality obligation or which it considers is commercially sensitive in relation to its own operations; or
- the Applicant paying the reasonable costs incurred by CBH in obtaining information that is not ordinarily and freely available to CBH.

Under clause 7.4(a)(ii)(B), CBH may also refuse an information request if it is unduly onerous, or the expense and resources required to provide the information is disproportionate to the benefit to be obtained from the information.

Access application, acknowledgement and commencement of negotiations

Clause 7.5(a)(i) provides that requests for access to Port Terminal Services are to be submitted in the form of an Access Application, which is set out at Schedule 1. The form requires the Applicant to provide 'request details,' being season; applicant's application type and business category; and 'applicant details', being company name; ACN/ABN; website; address; contact details; details of authorised company representative, including authorisation; and duration of the agreement sought. The form also requires the Applicant to provide 'indicative export tonnage'. Clause 7.5(a)(ii) provides that an Applicant may seek initial meetings with CBH to discuss the application and seek clarification on the process as outlined in the Undertaking, or the information requirements of the form.

Parties will commence negotiation to progress towards an Access Agreement as soon as reasonably possible following CBH's acknowledgement of receipt of an Access Application.¹⁷⁶ Clause 7.5(b) requires CBH to acknowledge receipt of the Application within five Business Days of receipt, or such longer period as required if CBH requires additional information regarding, or clarification of, the Application. If CBH seeks further information or clarification, it must advise the Applicant of the additional information or the clarification within five Business Days of receipt of the Application. Upon receiving the required information or clarification, CBH will provide written acknowledgement of the receipt of the completed Access Application within five Business Days. The 'Negotiation Period' commences upon CBH's acknowledgement of the application.¹⁷⁷

Negotiation, 'pre-conditions' to negotiation and ceasing negotiation

Clause 7.4(b) provides that:

- CBH reserves the right to negotiate only with Applicants who comply with the requirements and processes set out in the Undertaking, and that if an Applicant does not comply and CBH considers that such non-compliance is material, CBH is not obliged to continue negotiations with the Applicant;

¹⁷⁶ Co-operative Bulk Handling Limited, *Port Terminal Services Access Undertaking*, 14 April 2009, clause 7.6(a).

¹⁷⁷ Co-operative Bulk Handling Limited, *Port Terminal Services Access Undertaking*, 14 April 2009, clause 7.6(b).

- the Applicant must be an Accredited Wheat Exporter;
- CBH may require, at any time, the Applicant to demonstrate that it can meet the Prudential Requirements (see further below), and CBH may refuse to commence negotiations, or may cease negotiations, with an Applicant if they do not meet or are unable to demonstrate that they meet the Prudential Requirements;
- CBH may at any time refer a request for access to the arbitrator if CBH is of the view that the Applicant's request is frivolous in nature, or that the Applicant is not negotiating in good faith. If the arbitrator determines that the request is frivolous, then CBH will be entitled to cease negotiations, and will not be obliged to comply with the proposed Undertaking in respect of the request, and may apply to the arbitrator for an order for the Applicant to pay CBH's reasonable costs incurred in relation to the request for access.

Clause 7.4(b)(iv) provides that if CBH refuses to negotiate for the reasons described at points 1 or 3 above, then within 10 Business Days of the decision to refuse to negotiate, CBH must explain in writing to the Applicant the reasons for the refusal.

Clause 7.6 provides that CBH will be entitled to cease negotiations upon the cessation of the 'Negotiation Period,' which will occur upon:

- a. CBH believing that the negotiations are not progressing in good faith towards the development of an access agreement within a reasonable time period;
- b. CBH receiving evidence confirming that the Applicant no longer satisfies the Prudential Requirements;
- c. the execution of an Access Agreement;
- d. written notification from the Applicant that it no longer wishes to proceed with its Access Application; or
- e. the expiration of three months, or if an extension is agreed upon, at the end of that extended period.

Clause 7.4(b)(vi) states that if the Applicant considers that CBH has unreasonably refused to commence or unreasonably ceased negotiations under clause 7.4(b), then that matter will constitute a Dispute which must be dealt with in accordance with clause 8.

Clause 7.6(b)(v) states that if CBH receives evidence confirming that the Applicant no longer satisfies the Prudential Requirements, it will advise the Applicant of the evidence and issue a notice of intent to end the Negotiation Period, to become effective ten Business Days after the issue of the notice. CBH will be required to provide the Applicant with written reasons for its decision to end the Negotiation Period.

Prudential requirements

Clause 7.4(b)(iv) stipulates that to meet the Prudential Requirements, the Applicant must:

- be solvent; and

- the Applicant, or a Related Body Corporate, must not be currently, or have been in the previous two years, in ‘Material Default,’ meaning any breach of a fundamental or essential term, or repeated breaches of any of the terms of an Access Agreement, or any agreement for the provision of services by CBH;¹⁷⁸ and
- be able to demonstrate to CBH that it has a legal ownership structure with a sufficient capital base and assets of value to meet the actual or potential liabilities under an Access Agreement, including demonstrated timely payment of access charges and payment of insurance premiums and deductibles under the required policies of insurance, or otherwise provides Credit Support.

8.1.4 Pre-arbitration dispute resolution

Clause 7.3(c) provides that, if at any time during the negotiation process a dispute arises between the parties which, after reasonable negotiation, the parties are unable to resolve, then either party may seek to resolve the dispute in accordance with the process in clause 8.

Clause 7.6(d) provides that, if both CBH and the Applicant comply with clause 7.1 but fail to execute an Access Agreement before the cessation of the Negotiation Period, that matter will constitute a Dispute which either party may refer to arbitration under clause 8.

Clause 8.1(a) of the Undertaking provides for ‘Disputes’ to be resolved in accordance with clause 8, unless expressly agreed otherwise. ‘Dispute’ in this sense is defined as a bona fide dispute between CBH and an Applicant/User arising under the proposed Undertaking.¹⁷⁹ Clause 8.1(b) states that Disputes in relation to an executed Access Agreement will be dealt with under the provisions of that Access Agreement.

Clause 8.1(c) states that by 31 July of each year, CBH will report to the ACCC on any material Disputes in relation to an Access Agreement and any material Disputes raised by Applicants, Users or CBH in the last 12 months, which will include the details of any resolution and the status of unresolved matters.

Clause 8.1(a) goes on to provide that either party to a Dispute may give the other party a ‘Dispute Notice’ specifying the Dispute and requiring it to be dealt with under clause 8. The parties are required to use ‘reasonable endeavours acting in good faith’ to settle the Dispute as soon as practicable.

Clause 8.2 states that within five Business Days of a party giving the other party a Dispute Notice, senior representatives from each party are to meet and use reasonable endeavours acting in good faith in order to resolve the Dispute by joint discussions.

Clause 8.3(a) provides that if a Dispute is not resolved via discussion between senior representatives, then within 10 Business Days after the date of the Dispute Notice and if the parties agree, they can attempt to resolve the Dispute by mediation. Clause

¹⁷⁸ Co-operative Bulk Handling Limited, *Port Terminal Services Access Undertaking*, 14 April 2009, clause 1.1.

¹⁷⁹ Co-operative Bulk Handling Limited, *Port Terminal Services Access Undertaking*, 14 April 2009, clause 1.1.

8.3(b) states if the parties agree to attempt to resolve the dispute by mediation, the Dispute will be referred to the Chief Executive Officers of the parties involved who will attempt to resolve the Dispute, including by informal mediation. Clause 8.3(c) states if the dispute is not resolved within 10 Business Days of being referred to CEOs, the Dispute will be referred to formal mediation. If the parties are unable to agree upon a mediator within 10 Business Days, on the request of either party the Dispute will be referred to a mediator appointed by the President of the Western Australian Chapter of the Institute of Arbitrators and Mediators of Australia (IAMA). Clause 8.3(d) sets out matters in relation to the conduct and costs of the mediation.

8.1.5 Arbitration

Referral to arbitration

Clause 8.3(a)(ii) provides that, if after senior representatives have discussed the Dispute, the parties do not wish to resolve the Dispute by mediation, either party may, by notice in writing to the other and the arbitrator, refer the Dispute to arbitration. A Dispute may also be referred to arbitration:

- if the Dispute is not resolved by joint discussion under clause 8.2;
- at any time after the appointment of the mediator under clause 8.3(c).¹⁸⁰

Under clause 8.4(b), CBH must notify the ACCC of the details of any Dispute which has been referred to arbitration and provide the ACCC with the arbitrator's final determination. Clause 8.4(d) requires CBH to indemnify the arbitrator from any claims made against it arising out of the performance of its duties under clause 8, except for certain conduct, and pay costs.

Clause 8.4(c) provides that if the Applicant serves notice of a Dispute, the notice will also include an agreement by that Applicant to:

- pay any of the costs of the arbitration as determined by the arbitrator under clause 8.10; and
- indemnify the arbitrator from any claims made against the arbitrator arising from the performance of its duties under clause 8, except for certain conduct.

Selection of arbitrator

Clause 8.5(a) provides that the arbitration must be conducted by an arbitrator appointed by agreement of the parties.

Clause 8.5(b) requires that within two Business Days of the parties agreeing to an arbitrator, CBH must notify the ACCC.

Under clause 8.5(c) within five Business Days of receiving the notice, the ACCC may give notice to the parties of its objection if the ACCC forms the view on reasonable grounds that the original arbitrator appointed by the parties is either not independent

¹⁸⁰ Co-operative Bulk Handling Limited, *Port Terminal Services Access Undertaking*, 14 April 2009, clause 8.4(a).

or appropriately qualified. If the ACCC issues such a notice, the parties must nominate an alternative arbitrator and notify the ACCC of the identity and qualifications of the arbitrator within two Business Days of the parties agreeing to an arbitrator. If the ACCC does not provide notice within five Business Days of the parties giving notice of the appointment of a substitute arbitrator, the arbitrator appointed by the parties stands.

Alternatively, under clause 8.5(d), if the parties fail to agree on an arbitrator within the later of 10 Business Days of the referral to arbitration or 10 Business Days of the ACCC giving notice of its objection to the choice of the arbitrator, either party may request the ACCC to appoint an arbitrator, which must not be the ACCC.

Termination of arbitration

Clause 8.6(d) provides that the arbitrator may at any time terminate the arbitration without making an award if it thinks that:

- the notification of the Dispute is vexatious;
- the subject matter of the Dispute is trivial, misconceived or lacking in substance;
or
- the party who notified the Dispute has not engaged in negotiations in good faith.

Conduct of the arbitration

Clause 8.6 outlines the arbitration procedures, though clause 8.5(e) provides that the arbitration will not proceed unless and until the Applicant has agreed to pay the arbitrator's costs as determined under clause 8.10. Clause 8.6 provides:

- the arbitration must be conducted in private, unless the parties agree otherwise, and subject to the involvement of and disclosures to the ACCC;
- parties may appoint representatives, including those with legal qualifications, to represent or assist in the arbitration;
- the arbitrator will:¹⁸¹
 - observe the rules of natural justice, but is not required to observe the rules of evidence;
 - proceed as quickly as is possible and consistent with a fair and proper assessment;
 - encourage written presentations by the parties with rebuttal opportunities and questioning by the arbitrator;
 - call on any party the arbitrator believes necessary to give evidence;

¹⁸¹ Co-operative Bulk Handling Limited, *Port Terminal Services Access Undertaking*, 14 April 2009, clause 8.6(c).

- permit the ACCC, on request, to make submissions to the arbitrator on matters relevant to the Dispute;
- decide how to receive evidence and submissions and consider confidentiality issues;
- present a draft determination and hear argument from the parties before making a final determination; and
- hand down a written final determination including reasons, findings of law and fact, and references to evidence on which findings of fact were based.

Matters the arbitrator must take into account

Clause 8.7(a) provides that, in deciding a Dispute, the arbitrator will take into account:

- ‘the principles, methodologies and provisions set out in this Undertaking, in particular clauses 6.4 and 6.5’;¹⁸²
- the objectives and principles in Part IIIA of the TPA and the Competition Principles Agreement;
- the benefit to the public from having competitive markets;
- any guidance published, or submissions provided, by the ACCC; and
- any other matter the arbitrator thinks appropriate.

Clause 8.7(b) provides that, in making its determination, the arbitrator:

- may deal with any matters referred to in section 44V of the TPA;
- will not make a decision which would have any of the effects described in section 44W of the TPA; and
- will take into account the matters referred to in section 44X of the TPA.

Other matters – confidentiality, costs and effect of decision

Clause 8.8 requires the arbitrator to take all reasonable steps to protect the confidentiality of information that a party has identified is confidential or commercially sensitive. The clause goes on to permit the arbitrator to require the parties to comply with confidentiality regimes, and to make confidential and public versions of its determinations, and limit access to the confidential version. Clause 8.8(d) states that the entire dispute resolution process remains subject to the confidentiality clause at clause 7.2.

¹⁸² Co-operative Bulk Handling Limited, *Port Terminal Services Access Undertaking*, 14 April 2009, clause 8.7(a)(i).

Clause 8.10 provides that the arbitrator's costs and the costs of the parties to the arbitration will be borne by the parties in such proportions as the arbitrator determines, and the parties may make submissions on the issue of costs prior to that determination.

Clause 8.9 states that the arbitrator's determination is final and binding subject to any rights of review by a court of law. If an Applicant does not comply with the arbitrator's determination or direction, CBH is no longer obliged to continue negotiations regarding the provision of access for that Applicant,¹⁸³ except where the determination or direction is subject to review by a court of law. CBH will comply with the lawful directions or determinations of the arbitrator except where the determination or direction is subject to a review by a court of law.¹⁸⁴

8.2 CBH submissions

8.2.1 Initial submission of 14 April 2009

CBH's initial submission focuses largely on why a negotiate-arbitrate model is appropriate rather than an *ex ante* pricing approach, and CBH makes few comments regarding the appropriateness of particular proposed negotiate-arbitrate clauses. CBH does note, however, that the negotiation arrangements in the proposed Undertaking are similar to those in the ARTC Interstate Access Undertaking, though without an Indicative Access Proposal and with the provision of independent arbitration rather than arbitration by the ACCC. CBH submits that the ACCC will still be given an oversight role in that it could veto the chosen arbitrator and appoint another arbitrator if the parties are unable to agree and participate in the arbitration process.¹⁸⁵

CBH submits that publication of pricing is appropriate

In general, CBH submits that annual publication of pricing for standard Port Terminal Services is appropriate because:

- it provides transparency in the provision of Port Terminal Services;
- it facilitates *ex post* monitoring to ensure CBH does not engage in discriminatory pricing;
- it promotes efficient negotiation and timely agreement on the terms of access;
- access seekers are well resourced and are able to assess and negotiate terms and conditions of access;
- it is not practicable to undertake a uniform price determination for each port; and

¹⁸³ Co-operative Bulk Handling Limited, *Port Terminal Services Access Undertaking*, 14 April 2009, clause 8.9(b).

¹⁸⁴ Co-operative Bulk Handling Limited, *Port Terminal Services Access Undertaking*, 14 April 2009, clause 8.9(c).

¹⁸⁵ Co-operative Bulk Handling Limited, *Submission to the ACCC*, 14 April 2009, p. 35.

- the proposed Undertaking provides for arbitration.¹⁸⁶

CBH also submits that in the context of CBH providing access to Port Terminal Services in the past and presently, the regulatory costs of undertaking *ex ante* price regulation outweighs the benefits, particularly given that:

- the legislative framework of the WEMA itself leans towards light-handed regulation;
- ‘there is a history of open access on reasonable terms and conditions’;
- CBH has an incentive to maximise throughput at its terminals;
- ‘Port Operators’ have historically faced wheat exporters ‘with considerable countervailing power and will continue to do so’;
- the proposed Undertaking contains a non-discrimination obligation;
- Australian wheat exporters may substitute overseas supply chains with Australia in response to any attempt by CBH to charge a monopoly price for Port Terminal Services, leading to a reduction in wheat exports and reduced revenue for growers;
- the threat of arbitration and/or heavier-handed regulation is a powerful disincentive against monopoly pricing (to the extent it is possible in the first place); and
- growers are constantly questioning supply chain costs.¹⁸⁷

CBH submits also that the provision of Port Terminal Services is subject to a substantial level of regulatory oversight by Wheat Exports Australia and the ACCC, and will also be the subject of a detailed review by the Productivity Commission.¹⁸⁸ CBH further submits that the cooperative structure of CBH acts a constraint.¹⁸⁹

CBH provided further details on some of these arguments:

(1) Cooperative structure is a constraint

CBH submits that it is a grower-owned co-operative governed by the *Companies (Co-operative) Act 1943* (WA) and by its Memorandum of Association and Articles of Association. CBH submits that because of this, its primary motivation is to act in the interests of grain producers by ensuring a reliable and cost-effective grain storage and handling service, and to use its income to establish and conduct systems for handling grain in bulk, rather than pay dividends to shareholders. CBH submits that its culture, operations and decision-making are driven by the requirement to provide grain storage and handling services to grain growers, rather than to maximise profits and

¹⁸⁶ Co-operative Bulk Handling Limited, *Submission to the ACCC*, 14 April 2009, p. 33.

¹⁸⁷ Co-operative Bulk Handling Limited, *Submission to the ACCC*, 14 April 2009, p. 33.

¹⁸⁸ Co-operative Bulk Handling Limited, *Submission to the ACCC*, 14 April 2009, p. 18.

¹⁸⁹ Co-operative Bulk Handling Limited, *Submission to the ACCC*, 14 April 2009, p. 3.

distribute returns to shareholders.¹⁹⁰ CBH reiterates these points in its supplementary submission.¹⁹¹

(2) Regulatory constraints

CBH submits that it has obligations under the *Bulk Handling Act 1967* (WA) and associated regulations that mean that it is already legislatively bound to allow other parties access to its ports.¹⁹² CBH reiterates these points in its supplementary submission.¹⁹³

CBH submits that it is also constrained by the threat of heavier-handed regulation if it is found to have acted inappropriately, including via the Productivity Commission review of the WEMA.¹⁹⁴

(3) Throughput business

CBH submits that because the majority of costs associated with CBH's port terminals are fixed and sunk, there is a strong incentive for CBH to facilitate increased throughput at its ports. CBH submits that by maximising throughput, it can optimise the efficiency of its port operations, particularly where a port terminal is operating below capacity.¹⁹⁵ CBH reiterates these points in its supplementary submission.¹⁹⁶

In its further submission CBH acknowledges that vertical integration may create incentives to discriminate, but that CBH has different incentives due to its cooperative status and due to the ring fencing in place as a result of Grain Express. CBH also accepts that appropriate measures are required to address both the perception and potential reality of discrimination, and those measures are in place.¹⁹⁷

(4) Threat of new entry and container exports

CBH submits that the ability of 'Port Operators' to raise prices above efficient levels is constrained by the potential entry of new competing port facilities and from competition from container exports. CBH cites examples of new port terminals in South Australia and Victoria to illustrate this point, but not in Western Australia. In relation to Western Australia, CBH submits that while no actual new entry has occurred, media coverage indicates that preliminary steps toward new entry are taking place. CBH further submits that because of the high proportion of fixed and sunk costs involved in supplying Port Terminal Services, even small scale entry is capable of effectively constraining CBH. CBH submits it is strongly constrained by the threat of new entry, however small the entrant.¹⁹⁸ CBH reiterates these points in its supplementary submission.¹⁹⁹

¹⁹⁰ Co-operative Bulk Handling Limited, *Submission to the ACCC*, 14 April 2009, pp. 22-23.

¹⁹¹ Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, pp. 7-8.

¹⁹² Co-operative Bulk Handling Limited, *Submission to the ACCC*, 14 April 2009, pp. 23-24.

¹⁹³ Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, pp. 7-8.

¹⁹⁴ Co-operative Bulk Handling Limited, *Submission to the ACCC*, 14 April 2009, p. 30.

¹⁹⁵ Co-operative Bulk Handling Limited, *Submission to the ACCC*, 14 April 2009, pp. 24-25.

¹⁹⁶ Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 43.

¹⁹⁷ Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 74.

¹⁹⁸ Co-operative Bulk Handling Limited, *Submission to the ACCC*, 14 April 2009, pp. 25-26.

¹⁹⁹ Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 37.

CBH provided further information on this issue in its supplementary submission, but also stated that the issue of new entry:

‘... is not central to the assessment of the Undertaking because the Undertaking adopts a position that addresses all of the issues that would arise even if there were not realistic constraint from the threat of new entry.’²⁰⁰

CBH also submits that a ‘small but not insignificant portion’²⁰¹ of Australia’s wheat is exported in containers. CBH submits that while containerisation is not necessarily a realistic substitute for the purposes of exporting all wheat, it provides an alternative mechanism and therefore poses a pricing constraint to the Port Terminal Services.²⁰²

(5) Power of access seekers

CBH submits that a significant number of access seekers are vertically integrated multi-national companies with substantial experience in grain exports, supply chain logistics, global grain marketing and flour milling. CBH submits that these exporters have a ‘substantial degree of bargaining power’ and the ability to shift their supply sources (and crop investments) to wheat produced in other countries, or to refuse to trade with Grain Pool, if they feel dissatisfied with their treatment by CBH.

CBH submits these customers are also ‘well positioned to obtain and interpret the large amount of transparent information available,’ and to draw any concerns about the provision of the Port Terminal Services to the attention of the appropriate regulatory agencies.²⁰³

In its supplementary submission, CBH submits that while bulk wheat exporters have limited flexibility in Australia in choosing the source of grain to supply to the market, there is considerable choice at a global level. Further, CBH submits, any outcome that reduces returns to growers by making WA wheat less competitive will result in a response from CBH’s members, who are growers.²⁰⁴

8.2.2 Further CBH submission of 29 June 2009

(1) Publication of Standard Terms/Reference Prices

In its further submission, CBH submits that publication of standard terms and reference prices should occur earlier than the date set out in the undertaking as submitted, and proposes that the date be moved to 31 August 2009.²⁰⁵

(2) Timeframes in clause 6, 7 and 8

CBH submits that the timeframes suggested in the publish/negotiate/arbitrate clauses of the undertaking are appropriate because:

- they strike a balance between the need for CBH and the Applicant to engage in good faith negotiations, taking into account the need for all parties to consult with

²⁰⁰ Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 68.

²⁰¹ Co-operative Bulk Handling Limited, *Submission to the ACCC*, 14 April 2009, p. 26.

²⁰² Co-operative Bulk Handling Limited, *Submission to the ACCC*, 14 April 2009, p. 26.

²⁰³ Co-operative Bulk Handling Limited, *Submission to the ACCC*, 14 April 2009, p. 27.

²⁰⁴ Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 73.

²⁰⁵ Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 50.

advisers and stakeholders, the need for timely processing and the resolution of any conflict or disputes that may arise as part of the process;

- CBH may have to negotiate with up to 23 or more access seekers, which could prove to be very onerous and resource intensive for CBH;
- 5 CBH has modelled the negotiation and dispute resolution provision closely on provisions contained in similar undertakings that have been approved by the ACCC: in particular, the ARTC Interstate Access Undertaking and the Dalrymple Bay Coal Terminal access undertaking.²⁰⁶

(3) Holding over arrangements

In relation to the reference in clause 6.2(b) to ‘appropriate “holding over” provisions,’ CBH envisages that such provisions would:

- allow a reasonable period of time for the continued operation of an access agreement on the same terms and conditions, pending the completion of the negotiation for an amended or replacement access agreement or the resolution of any dispute (save for circumstances where a debt was due and owing and for CBH to continue to perform the agreement would lead to further bad debt risk for CBH); but
- providing an appropriate end date from which Users will be subject to the operation of any revised standard terms that may take effect in accordance with the provisions of the Undertaking.²⁰⁷

CBH further submits that the terms and conditions upon which access will be provided prior to the execution of an access agreement, such as where parties are involved in a dispute, will be the Standard Terms and Reference Prices current at the time that the Applicant proposes to access the services. CBH submits that if a dispute arises, CBH will not refuse supply and will agree to backdate the results of an arbitration determination to the commencement of service.²⁰⁸

(4) Application process

CBH submits that the timeframes for acknowledgement of an access application are included in order to facilitate early identification and clarification of any issues that need to be dealt with as a priority. CBH submits that the timeframes strike a balance between the need for CBH and the Applicant to engage in good faith negotiations, taking into account:

- the need for all parties to consult with advisers and stakeholders; and

²⁰⁶ Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 78. The ACCC has not accepted an access undertaking in relation to the Dalrymple Bay coal terminal. An access undertaking was, however, accepted by the Queensland Competition Authority, which is a different entity to the ACCC.

²⁰⁷ Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, pp. 79-80.

²⁰⁸ Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 81.

- the need for timely processing, and the resolution of any conflict or disputes that may arise as part of the process.²⁰⁹

Further to this, CBH suggests that the pre-submission meetings provided for under clause 7.5(a)(ii) are a means of ‘assisting to expedite the timescales.’²¹⁰

In relation to the proposed Access Application form in Schedule 1, CBH submits that ‘Customer Type’ refers to whether the customer is accredited, conditionally or unconditionally, by the WEA under the WEMA, while ‘Business Category’ refers to the nature of the Applicant as an exporter, trader, buyer, agent or otherwise describes their status.²¹¹

CBH submits that if an Applicant does not have a website, CBH will not refuse access. CBH submits that this requirement was intended as a means of CBH collecting information on an Applicant that is easily accessible and publicly available, while the absence of a website may, along with other factors, indicate that an Applicant is not a bona fide applicant.²¹²

CBH submits that if the Negotiation Period ceases, an Applicant will be entitled to make another application for access, and that all applications would be dealt with on the same basis but subject to Applicants making further applications and negotiating those applications in good faith.²¹³

(5) Information requests

In relation to CBH’s obligation under clause 7.4(a)(ii) to provide further information on request to assist negotiations and its discretion to refuse requests if ‘unduly onerous’ or ‘disproportionate’ CBH submitted that:

- in both cases, CBH would apply an objective test as to what in the circumstances would be considered unduly onerous or disproportionate by a regulator or tribunal in reviewing CBH’s appraisal or determination of the request; and
- in considering whether a request is unduly onerous or the expense is disproportionate to the benefit, CBH would take into account and apply the Objectives of the Undertaking set out in clause 2 and in particular, the balancing of the interests of the public, the interests of applicants seeking access and the legitimate business interests of CBH in providing the services and dealing with the request.²¹⁴

CBH submits that it is prepared to state an estimate of reasonable costs in obtaining information that is not ordinarily and freely available to it.²¹⁵

²⁰⁹ Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 56.

²¹⁰ Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 56.

²¹¹ Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 83.

²¹² Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 83.

²¹³ Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 83.

²¹⁴ Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, pp. 81-82.

²¹⁵ Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, pp. 54-55.

(6) Discretion to cease negotiations

CBH submits that the criteria in relation to its ability to cease negotiations with an Applicant under the Undertaking are clear and reasonable.²¹⁶ It submits that it is necessary for it to have the discretion not to negotiate with an Applicant if CBH considers the Applicant has not followed the process in the Undertaking because:

- CBH provides services to and is required to coordinate access among a number of access seekers or potential access seekers;
- CBH as the operator of the port terminal services in complying with its obligations under the proposed Undertaking must ensure that an appropriate balance is struck between protecting the interests of other Users or Applicants in respect of the provision of access to the port terminal services together with the interests of the public and CBH's legitimate business interests.²¹⁷

In determining whether Applicants are not following the processes, CBH submits it will take into account:

- the timeliness of compliance with the procedural steps outlined in the process;
- the Applicant's compliance with its other obligations set out in the proposed Undertaking;
- the reasonably anticipated consequences of failure by an Applicant to comply with the procedural requirements and other obligations under the proposed Undertaking in so far as those consequences may adversely effect other Applicants or potential Applicants; and
- the diversion of CBH's resources away from other Applicants in order to deal with the failure of individual Applicants to follow the procedural requirements and comply with obligations under the Undertaking.²¹⁸

CBH submits that in deciding if negotiations were not progressing in good faith towards the development of an Access Agreement within a reasonable time period under clause 7.6(b)(iv), it would take into account factors such as:

- the timeliness of compliance with the procedural steps outlined in the process; and
- the Applicant's compliance with its other obligations set out in the Undertaking.²¹⁹

(7) Prudential requirements

In relation to Prudential Requirements, CBH submits that it is entitled to ensure that it makes its own enquiries, as part of its commercial assessment (particularly with regard to solvency risk) of parties whom it conducts business with to ensure that they

²¹⁶ Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 55.

²¹⁷ Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 82.

²¹⁸ Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 82.

²¹⁹ Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 83.

are able to meet objective and prudent criteria to assist in determining whether it is commercially acceptable to enter into an agreement with that party.²²⁰

CBH submits that the WEA accreditation process alone does not necessarily provide any information to CBH that CBH can rely on in this regard. CBH submits that while the information may be accurate and complete at the time provided to the WEA, the information may be out of date by the time that CBH enters into a commercial arrangement with that entity. Further, CBH notes that the WEA has warned that its assessment of the financial solvency of an accredited wheat exporter is not a guarantee that the exporter will meet its financial obligations.²²¹

(8) Different terms to access seekers

In response to the ACCC's question as to whether the various factors CBH could take into account in deciding to offer different terms to different Applicants or Users were appropriate, CBH submits that the ability to offer different terms reflects the particular requirements of each user and that the approach was consistent with the pricing principles set out in section 44ZZCA of the TPA, and promoted efficiency in the use of Port Terminal Services.²²²

In response to the ACCC's question on what is the difference between 'amended Standard Terms' and 'different terms' as provided in the proposed Undertaking, CBH submits:

'The distinction is between under 7.7 (b)(ii) a service arrangement entered into between CBH and a third party for a service that is not regulated by the Undertaking, and under 6.4, for a service that is regulated by the Undertaking, but on different terms to the (regulated) Standard Terms.'²²³

(9) Definition of dispute and scope of dispute resolution mechanism

CBH submits that a 'bona fide' dispute, as referred to in clause 1.1, refers to a dispute has been brought in good faith and without fraud. CBH notes that the intent of adding the requirement for a bona fide dispute was to distinguish disputes that are vexatious, frivolous, an abuse of process or have been made in bad faith from those that are genuine and substantial evidence based disputes.²²⁴

In relation to clause 8.1(b), which provides that disputes in relation to an Access Agreement once executed will be dealt with under the dispute resolution mechanism in that Agreement, CBH submits that an allegation of discrimination had the potential to be a breach of the Undertaking itself, specifically clause 9.2, which prohibits discrimination in operational decision-making. CBH notes that clause 8.1(b) required amendment to clarify the inconsistency.²²⁵

²²⁰ Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 55.

²²¹ Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 55.

²²² Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, pp. 53-54.

²²³ Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 83.

²²⁴ Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, pp. 83-84.

²²⁵ Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 84.

CBH submits that through its professional advisers it has confirmed with the Institute of Arbitrators and Mediators of Australia (**IAMA**) that its involvement as a mediator as contemplated by the proposed Undertaking is workable.²²⁶

(10) Reporting material disputes to the ACCC

CBH submits that clause 8.1(c) proposes that only material disputes are to be reported to the ACCC on the basis that only disputes which relate the compliance with and performance of the obligations of the parties under the terms of the proposed Undertaking are relevant for the ACCC to consider in its role under the provisions of the WEMA.²²⁷

CBH also submits that any disputes arising in respect of Access Agreements and port terminal rules are material matters which would be reported to the ACCC. CBH submits that non-material disputes are likely to be disputes over insubstantial matters such as the payment of invoices, debt collection and matters that are resolved amicably and quickly with the agreement of the parties.²²⁸

(11) Arbitration

CBH submits that the IAMA had the capability and the available, suitably qualified persons to act as an arbitrator as required under the terms of the Undertaking.²²⁹

In relation to timeframes for the arbitration, CBH submits that under clause 8.4(b) it would notify the ACCC within 5 Business Days of the details of the dispute being referred to arbitration.²³⁰ CBH also submits that the duration and cost of an arbitration would depend on the complexity of the issues and the approach taken by the parties. CBH estimates that an arbitration should be completed in 1 to 2 months, and that if a dispute were unable to be resolved prior to the required date for services to commence, CBH would provide Port Terminal Services on the Standard Terms and Conditions and backdate the arbitration result to the entire contract period once the determination had been made.²³¹

In relation to compliance with determinations of the arbitrator, CBH submits that the question of whether an Applicant has complied with a determination or direction of an arbitrator could be referred to the arbitrator or if necessary, to a Court. CBH submits that whether a person has complied is a question of fact and reaching a conclusion as to whether there was non-compliance would be determined by evidence of the Applicant's compliance with the specific terms of any determination.²³²

CBH submits that the confidentiality provisions relating to the dispute resolution process set out in clauses 7 and 8 provide for the protection of confidentiality of information in respect of arbitration proceedings.²³³

²²⁶ Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 84.

²²⁷ Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 84.

²²⁸ Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 84.

²²⁹ Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, pp. 84-85.

²³⁰ Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 85.

²³¹ Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 51.

²³² Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 85.

²³³ Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 59.

CBH also submits that arbitration decisions should be back-datable under the proposed Undertaking.²³⁴

8.3 Other submissions received

8.3.1 Australian Grain Exporters Association (AGEA)²³⁵

Price and non-price terms

AGEA submits that price and non-price terms should be a part of the proposed Undertaking and must be published in advance of the commencement of the proposed Undertaking (or the expiry of the current terms), and that port protocols should also be part of the undertakings.²³⁶

Timing for publication

AGEA submits that requirement to publish standard terms and reference prices does not provide certainty and transparency unless publication occurs well in advance of the commencement of the proposed Undertaking. AGEA also submits that users need to know the terms and conditions on which the services will be provided in order to assess the reliability of the service, plan, budget and generally compete in the market.²³⁷

AGEA submits that the proposed Undertaking contemplates that price and non-price terms can be unilaterally imposed by the bulk handler as late as 15 business days after commencement of the proposed Undertaking, when the bulk handler's storage and handling agreements are also scheduled to commence.²³⁸ AGEA notes that Australian wheat exporters (AWEs) enter into forward sale contracts well before 1 October, with the export season beginning in earnest about the time that both the new storage and handling contracts and the proposed Undertaking are proposed to commence. AGEA submits that the consequence of providing the price and non-price terms 15 business days after they are due to commence would be that:

- a. AWEs would feel compelled to enter into contracts with the bulk handler without a proper opportunity to negotiate;
- b. AWEs will have to wait until they have negotiated access to the port terminal services before starting to look for export sales;
- c. grain marketers would be prevented from entering into wheat export sales contracts until the terms and conditions and pricing of port terminal services are provided, thus reducing the level of competition and the overall efficiency of the bulk wheat export market;

²³⁴ Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 51

²³⁵ AGEA provided three submissions to the ACCC: 11, 18 and 29 May 2009. This section largely draws upon the submission of 29 May 2009, which was the most substantial.

²³⁶ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 9.6, p. 24 & Schedule 1, para F2, p. 42.

²³⁷ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 9.6, p. 24.

²³⁸ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 9.2, p. 23.

- d. alternatively to (b), AWEs must decide whether to take the commercial risk of entering into export sales contracts before knowing whether they will be able to perform the contracts, as the bulk handler may block access to port terminal services;
- e. further to (d), grain marketers could be forced to enter into export wheat sales contracts without knowing the price or level of service available at port (such as when vessels will be called to berth and the wheat load rate, exposing AWEs to extensive demurrage claims and possibly rendering them in default of wheat sales contracts) and the associated key bulk handling services which need to be priced into those contracts.²³⁹

AGEA also submits that standard terms and references prices must be published by least 1 September.²⁴⁰

Negotiating for access

AGEA submits that AWEs do not have a realistic alternative supplier of port terminal services and have little, if any bargaining power. AGEA submits that the imbalance in market power has resulted in bulk handlers refusing to negotiate, imposing unfair terms and prices and discriminating against AWEs who do not accept the bulk handlers' standard terms and conditions.²⁴¹

AGEA submits that the proposed Undertaking does not provide a genuine framework for negotiations and exacerbate the imbalance in bargaining power because:

- the bulk handler not required to negotiate in good faith and reach agreement on the terms of access;
- the effect of offering terms and conditions immediately before 1 October is that AWEs know that if they do not execute the agreements, they will be denied access to bulk handling services;
- the application process and timeframes for conducting negotiations are slow and unwieldy;
- the dispute resolution mechanism does not provide for the speedy resolution of disputes; and
- the bulk handler is allowed to 'reserve the right to negotiate', 'refuse to negotiate' and to 'cease' negotiations in various circumstances.²⁴²

AGEA further submits that it is not appropriate that the proposed Undertaking includes such a number of grounds on which the bulk handler may cease negotiations with the Applicant because the dispute resolution process is lengthy and the right to cease negotiations could lead to AWEs incurring substantial losses over non-

²³⁹ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 9.5, pp. 23-24.

²⁴⁰ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 12.1, p. 29.

²⁴¹ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 11.1, p. 27.

²⁴² Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 11.2, p. 27.

performance of sales contracts. AGEA submits that the bulk handler should be required to negotiate on reasonable terms with any person that is an accredited wheat exporter.²⁴³

AGEA suggests that with the ability for the bulk handler to publish terms and conditions as little as one day before or up to 15 business days after the proposed Undertaking takes effect, and no limitation on the additional information that can be requested in relation to receiving an access application, it would likely be mid-October before negotiations regarding terms of access would begin.²⁴⁴ AGEA also submits that the timeframe for acknowledgements was not appropriate and would slow the negotiation process.²⁴⁵

AGEA submits that the wheat season traditionally runs from 1 October to 30 September of each year and that negotiations for forward sales contracts begin well before this period. AGEA submits that AWEs must therefore decide whether to take the commercial risk of entering into export sales contracts before knowing whether they will be able to perform the contracts, as the bulk handler may otherwise block access to port terminal services. Alternatively, an AWE would have to wait until it has negotiated access to the port terminal services, before starting to look for export sales.²⁴⁶

AGEA submits that the definition of Prudential Requirements in the proposed Undertakings is neither appropriate or necessary. AGEA submits that it is unnecessary for the bulk handler to require AWEs to satisfy additional 'Prudential Requirements' in the context of the requirements for accreditation as a wheat exporter under the WEMA.²⁴⁷ AGEA submits that once an AWE obtains accreditation under the WEMA, it should not be necessary for the bulk handler to enquire into the AWE's financial standing.²⁴⁸

Dispute Resolution

AGEA submits that the dispute resolution mechanism in the proposed Undertaking is inadequate as an effective mechanism for the speedy resolution of disputes.²⁴⁹ AGEA submits that for general disputes, the dispute resolution procedure must provide that:

- either party may notify the other party of a dispute;

²⁴³ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, Schedule 1 para H2 (iv), p. 44.

²⁴⁴ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 11.3, p. 27.

²⁴⁵ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, Schedule 1 para H2 (ix), p. 45.

²⁴⁶ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, Schedule 1 para H2 (ix), p. 45.

²⁴⁷ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 11.5, p. 28.

²⁴⁸ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, Schedule 1 para H2 (v), p. 45.

²⁴⁹ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 13.1, Schedule J2(i), p. 46.

- representatives of the parties must meet within 48 hours and endeavour to resolve the dispute;
- if the dispute cannot be resolved, either party may give notice to the ACCC that a dispute exists under the proposed Undertaking and may refer the dispute to arbitration, which is to be conducted by the ACCC;
- the arbitration must be conducted in accordance with arbitration rules to be specified in the proposed Undertaking, which must include an obligation to keep confidential any information disclosed during the arbitration;
- the arbitration must be heard and concluded within 14 days of the notice of referral to the ACCC and the ACCC must endeavour to make a determination within 14 days; and
- the bulk handler must take reasonable steps to mitigate loss, including continuing to provide port terminal services during, and pending the determination of, any dispute.²⁵⁰

AGEA also submits that the confidentiality provisions relating to dispute resolution do not sufficiently protect commercially sensitive information and that there should be an obligation on the parties and the arbitrator that the entire arbitration process is confidential, unless and only to the extent that both parties agree in writing otherwise.²⁵¹

8.3.2 Pastoralists and Graziers Association of WA (PGA)

The PGA submits that the failure to specify price and non-price terms in the proposed Undertaking and the restrictive definition of ‘port terminal services’ are sufficient reasons for the ACCC to not accept the undertaking.²⁵² The PGA submits that the proposed Undertaking is impossible to assess without specific prices or terms and conditions on which access to port terminal services will be provided.²⁵³

The PGA submits that the price and non-price terms must be published in advance of the commencement of the proposed Undertaking, as users need to know terms and conditions to assess the reliability of the service, plan, budget, and generally compete in the market.²⁵⁴

The PGA submits that there are presently no penalties if CBH fails to provide the standard terms before the proposed Undertaking is due to commence and therefore there it has no incentive to do so. The PGA submits that the consequences of CBH providing price and non-price terms after the commencement of the proposed Undertaking will be:

²⁵⁰ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 13.2, p. 30.

²⁵¹ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, Schedule 1 J2, pp. 46-47.

²⁵² Pastoralists and Graziers Association, *Submission in relation to proposed CBH access undertaking*, 29 May 2009, para 2.15(e), p. 4.

²⁵³ Pastoralists and Graziers Association, *Submission in relation to proposed CBH access undertaking*, 29 May 2009, para 4.43, p. 14.

²⁵⁴ Pastoralists and Graziers Association, *Submission in relation to proposed CBH access undertaking*, 29 May 2009, para 4.41, pp. 13-14.

- a. marketers having to wait until they have negotiated access to the port terminal services before starting to look for export sales;
- b. marketers being prevented from entering into wheat export sales contracts with growers until the terms and conditions and pricing of port terminal services are provided, thus reducing the level of competition and the overall efficiency of the bulk wheat export market;
- c. marketers being forced to enter into wheat export sales contracts without knowing the price or level of service available at port (such as when vessels will be called to berth and the wheat load rate, exposing themselves to extensive demurrage claims and possibly rendering them in default of wheat export sales contracts) and the associated key bulk handling services which need to be priced into those contracts, which may be reflect in prices offered to growers.²⁵⁵

8.4 ACCC's consideration

8.4.1 Introduction

The ACCC has identified the following issues as arising for consideration in relation to the proposed publish-negotiate-arbitrate component of the proposed Undertaking:

- the appropriateness of the publish-negotiate-arbitrate approach without ex ante price regulation, and the form in which prices are published;
- the absence of an indicative access agreement as part of the proposed Undertaking;
- the appropriateness of the timing for the publication of standard terms and reference prices;
- generally, the appropriateness of the timeframes proposed in various clauses and the degree of certainty and clarity provided in the drafting of various clauses;
- the appropriateness of the discretion afforded to CBH in the negotiation process;
- the appropriateness of the dispute resolution and arbitration processes, including for the selection of the arbitrator and conduct of the arbitration;
- the absence of appropriate 'holding over' arrangements.

Lack of consultation on rationale for various provisions

As a preliminary point, the ACCC notes that CBH did not provide comments in support of many of the clauses in the publish-negotiate-arbitrate component of the proposed Undertaking in its initial submission, and it was only in response to a request for information from the ACCC that CBH elaborated on why it considered its particular approach appropriate. CBH provided its public response to the ACCC's

²⁵⁵ Pastoralists and Graziers Association, *Submission in relation to proposed CBH access undertaking*, 29 May 2009, para 4.42, p. 14.

information request on 29 June 2009, and consequently CBH's further submissions have not yet been subject to public consultation.

The ACCC acknowledges that CBH's further submission in some instances provides further explanation, and therefore clarity, as to how many of the proposed clauses are intended to operate, and in other instances CBH has proposed to alter clauses of the proposed Undertaking in response to comments arising from the public consultation. While this is beneficial, the ACCC considers it also highlights deficiencies in the drafting of many clauses as they currently appear in the proposed Undertaking.

8.4.2 Appropriateness of publish-negotiate-arbitrate approach

CBH has proposed a 'publish-negotiate-arbitrate' approach in its proposed Undertaking, under which it would be obliged to publish price and non-price terms for access to the service, provide those terms to access seekers on a non-discriminatory basis, and then be subject to dispute resolution and arbitration procedures in the event of a dispute with an access seeker during negotiations for access. This model is different to an 'ex ante pricing' model that has previously been put forward in an access undertaking to the ACCC for assessment,²⁵⁶ where the undertaking sets a price or price methodology for the service to which it relates.

An issue for the ACCC is therefore whether the less prescriptive publish-negotiate-arbitrate approach put forward by the proposed Undertaking is by itself appropriate, or whether it is appropriate for the proposed Undertaking to include ex ante pricing regulation.

The ACCC notes that there is no requirement in Division 6 of Part IIIA that an access undertaking include price, and reiterates that the ACCC's role is to decide whether or not a proposed undertaking is appropriate, having regard to the matters in section 44ZZA(3).

In this particular case, there are some specific features of this industry at this time.

First, the ACCC reiterates its comments regarding the transitional state of the bulk wheat export industry. The ACCC acknowledges that in regulating the industry during a transitional phase there is a risk that regulation that is not appropriate may distort the effective development of that industry, and the ACCC considers that this risk is particularly pertinent to the regulation of prices. That is, the ACCC is mindful of the possibility that, despite best intentions, setting regulated prices for port terminal services at the current time may unnecessarily constrain the ability of the industry to develop and effectively respond to changing circumstances that are not foreseeable at the present, and that such an outcome would not be in the public interest. The ACCC also notes the planned Productivity Commission review of the WEMA, and statements by the government that it will monitor up-country developments.

Second, before the ACCC would consider a publish-negotiate-arbitrate framework appropriate, it would expect it to be underpinned by a robust set of mechanisms giving effect to the publication, negotiation and arbitration procedures. Given that

²⁵⁶ See for example the *ARTC 2002 Interstate Access Undertaking*, and the *ARTC 2008 Interstate Access Undertaking*.

CBH is vertically integrated, strong non-discrimination obligations and appropriate transparency measures would also be appropriate (see the Non-Discrimination chapter).

It should be noted that the ACCC has expressed the view elsewhere in this draft decision that appropriate non-discrimination measures should prohibit CBH discriminating in favour of itself except to the extent that the cost of providing access to other operators is higher, as per s.44ZZCA of the TPA. As a transparency measure to support this, appropriate measures would require prices to be transparently specified for a standard set of port terminal services to all parties, including CBH, with any special requirements due to different origin being separately enumerated and priced.

These underpinning measures would allow access seekers to commercially negotiate with CBH in a framework where both parties know that prices, terms and conditions may be subject to arbitration by the ACCC or a private arbitrator, applying the pricing principles in s.44ZZCA of the TPA and general non-discrimination requirements.

Third, the proposed Undertaking is for a limited duration. CBH is subject to the threat of more prescriptive regulatory requirements in any future Undertaking should the publish-negotiate-arbitrate framework not be effective. CBH will have a strong incentive to ensure that prices are commercially reasonable and non-discriminatory to avoid more costly and intrusive regulation in future (such as cost modelling for all its port terminals, ex ante pricing and prescriptive ring-fencing).

Finally, the proposed Undertaking covers six port terminals, and the proposed Undertakings of all three bulk handlers cover 17 port terminals altogether. Given the transitional state of the industry, it would be a significant cost burden on the industry to require ex ante cost modelling of 17 port terminals if only a few may prove the subject of an arbitration that would warrant cost modelling.

Therefore the ACCC considers it is likely to be appropriate for the proposed Undertaking to adopt a publish-negotiate-arbitrate approach rather than an ex ante regulated price approach, provided that the mechanisms giving effect to the publish-negotiate-arbitrate approach are robust. In this regard the ACCC reiterates its previous comments regarding the need for the proposed Undertaking to be certain and clear, and to provide for 'fair and transparent access' to access seekers. The ACCC considers that it is in the interests of access seekers, and consistent with the WEMA, for the publish-negotiate-arbitrate mechanism to be robust.

The ACCC wishes to emphasise that in reaching this view it is not suggesting that the absence of ex ante regulation of prices for port terminal services is likely to be appropriate in all circumstances. The ACCC is instead acknowledging that it is appropriate for the proposed Undertaking not to provide for ex ante pricing regulation given the circumstances at this particular time. The ACCC wishes to expressly recognise the possibility that ex ante price regulation may be appropriate for port terminal services in certain circumstances, and takes no view on what may be appropriate in relation to any subsequent undertaking proposed by CBH following the expiry of the current proposed Undertaking.

The ACCC notes as a general comment that the publish-negotiate-arbitrate clauses in the proposed Undertaking are to a large extent modelled on clauses contained in the access undertaking submitted by the Australian Rail Track Corporation (ARTC), and accepted by the ACCC on 30 July 2008. The ACCC considers the fact that it accepted as appropriate particular clauses in the ARTC access undertaking provides little support for a conclusion that similar clauses in the current context are appropriate, as the circumstances of the current proposed Undertaking and the ARTC Interstate Access Undertaking are clearly distinguishable. Significantly, the ACCC notes that the ARTC Access Undertaking included a regulated access price. The ACCC therefore considers that, as a general matter, it is appropriate for the publish-negotiate-arbitrate mechanism in the current context to be, in a sense, more ‘prescriptive’ than that in the ARTC Access Undertaking.

8.4.3 Absence of an indicative access agreement

Please refer to the discussion of this issue below in the Indicative Access Agreement chapter. In summary, the ACCC considers it is not appropriate that the proposed Undertaking does not include an indicative access agreement.

8.4.4 Timing for publication of standard terms and reference prices

The proposed Undertaking states that CBH may publish Standard Terms and Reference Prices for the season by no later than 30 September of each year,²⁵⁷ or within 15 Business Days of the commencement of the proposed Undertaking if not already published.²⁵⁸

In light of the ACCC’s view that the proposed Undertaking should include an indicative access agreement setting out non-price terms, the ACCC considers it likely to be appropriate that the obligation to publish be limited to an obligation only to publish prices.

The ACCC considers that any time for publication of prices must allow sufficient opportunity for access seekers to negotiate access agreements before those prices become effective, and in this regard also refers to the discussion below in relation to holding over arrangements. The ACCC considers that publication by no later than 30 September is not appropriate in this regard.

The ACCC notes that CBH has, in its supplementary submission to the ACCC, proposed a revision whereby it would publish by no later 31 August in the relevant year. The ACCC considers that publication by no later than this date is more likely to be appropriate.

The ACCC also considers it is not appropriate for CBH to publish prices within 15 Business Days of the commencement of the proposed Undertaking if it has not already published, particularly if non-price terms are to be already included in an indicative access agreement. The ACCC considers that publication three weeks after commencement of the proposed Undertaking creates uncertainty as to the prices that

²⁵⁷ Co-operative Bulk Handling Limited, *Port Terminal Services Access Undertaking*, 14 April 2009, clause 6.1(a).

²⁵⁸ Co-operative Bulk Handling Limited, *Port Terminal Services Access Undertaking*, 14 April 2009, clause 6.1(d).

are to apply, and the ACCC considers that a period of three Business Days is more likely to be appropriate.

8.4.5 General issues – negotiation, dispute resolution, arbitration

After the obligation to publish, the mechanism in the proposed Undertaking essentially contains three components, set out in clauses 7 and 8:

- a process for the negotiation of access agreement (‘negotiation component’);
- a dispute resolution procedure in the event of dispute between the access seeker and access provider during negotiations (‘dispute resolution component’); and
- the ability for resolution of the dispute to be escalated to arbitration (‘arbitration component’).

The ACCC considers that two general issues arise in relation to these components:

1. the specified timeframes are in some instances unnecessarily long, while in other instances are vague or non-existent, thereby providing scope for the negotiation, dispute resolution and arbitration processes to be frustrated or delayed; and
2. the drafting of numerous clauses lacks clarity and certainty.

(1) Timeframes

The ACCC considers that many of the timings proposed by CBH in clauses 7 and 8 are not appropriate. The ACCC considers that the timeframes are in some instances unnecessarily long, in others defined without sufficient clarity, while in other instances timeframes are absent altogether. The ACCC considers that this creates uncertainty, ambiguity and is not in the interests of access seekers or CBH.

In particular, the ACCC considers that:

- In relation to clause 7.4(a), the lack of any timeframes for the performance of obligations creates uncertainty and is not appropriate.
- In relation to clause 7.4(b)(iii), it is not appropriate that CBH may, at *any time, before or during the negotiation process*, require the Applicant to demonstrate that it can meet the Prudential Requirements. It is more likely to be appropriate that the proposed Undertaking specifies a particular point in time at which the Applicant must demonstrate that it can meet the Prudential Requirements, and a particular timeframe within which CBH must confirm that those requirements have or have not been met.
- In relation to clause 7.4(b)(v), it is not appropriate for CBH to have 10 Business Days to provide reasons for refusing to negotiate with an access seeker in the circumstances described. It is more likely to be appropriate for CBH to provide reasons to the access seeker at the time that CBH refuses to negotiate.
- In relation to clause 7.5(b)(i), it is not appropriate that CBH be permitted to take 5 Business Days to acknowledge receipt of an access application. The information

contained in an application is specified in Schedule 1 to the proposed Undertaking and includes matters such as company name, address, contact details etc, and the ACCC questions that CBH would need 5 Business Days to assess such information. The timings in clause 7.5(b)(iii) and (iv) are also not appropriate, although the ACCC acknowledges that CBH may in some circumstances require additional information from an access seeker (or clarification of information) in relation to the provision of access, particularly where access is sought on non-standard terms. The ACCC considers the timings in clause 7.5(b) are of particular concern as clause 7.6(b) provides that the ‘Negotiation Period’ under the proposed Undertaking – the ‘official’ period for negotiations – commences upon CBH acknowledging receipt of the Access Application. The discretion conferred pursuant to clause 7.5(b)(ii)-(iv) to seek further information/clarification therefore provides the access provider with the ability to delay the commencement of ‘official’ negotiation.

- In relation to clause 7.6(a), the reference to both parties commencing negotiations ‘as soon as reasonably possible to progress towards an Access Agreement’ lacks certainty and is therefore not appropriate. It is more likely to be appropriate for the reference to be to a specified period of time.
- In relation to clause 7.6(b)(iv), the reference to ‘a reasonable time period’ lacks certainty and is therefore not appropriate.
- In relation to clause 7.7(c) and (d), the references to ‘as soon as reasonably practicable’ and ‘reasonable endeavours to comply with this clause as soon as practicable’ respectively are not appropriate. The ACCC considers it is not appropriate that the potential for delay be created once the parties have essentially reached agreement on terms of access but prior to execution of the access agreement. It is more likely to be appropriate for these clauses to include short, specified timeframes.
- In relation to clause 8.3(c), the reference to ‘10 Business Days’ is not appropriate. It is more likely to be appropriate for this clause to refer to 5 Business Days, to reduce unnecessary delay and to create incentives for parties to resolve disputes quickly. Further, as it is difficult to determine how long it may take the IAMA to appoint a mediator, and for that mediation to commence, it is more likely to be appropriate for timeframes leading up to that stage to be shorter.
- In relation to clause 8.3(d), it is not appropriate that there is no specified timeframe for the conduct of the mediation, as this creates uncertainty.
- In relation to clause 8.4(b), it is not appropriate that there is no specified timeframe within which CBH must notify the ACCC, as this creates uncertainty. Please refer, however, to the discussion below: **Arbitration component – further issues**.

The ACCC notes CBH’s submission that the proposed timeframes are appropriate, but finds CBH’s supporting arguments unconvincing. In particular, the ACCC considers that CBH’s argument that negotiating with 23 access seekers may be onerous and

resource intensive for CBH difficult to reconcile with CBH's claim that it has a strong incentive to maximise throughput at its terminals (see above).

(2) Lack of clarity and certainty

The ACCC considers that the drafting of numerous provisions in clauses 6-8 lack clarity and certainty, making those clauses not appropriate. The ACCC acknowledges that in some instances CBH may have intended certain provisions to recognise or address legitimate considerations, but considers that the drafting of those provisions does not appropriately give expression to those considerations, and instead results in ambiguity and uncertainty.

The ACCC considers that clauses 6.1(f), 6.2(a), 6.4, 6.5 and 7.7 create significant ambiguity and uncertainty as to how one of the most fundamental obligations in the proposed Undertaking – to offer access – is intended to operate. The ACCC considers that the drafting of these clauses is repetitious (particularly 7.7) and convoluted – for example clause 6.4 is expressed as subject to clause 6.5, then clause 6.4(a)(ii)(D) refers to 'taking into account the matters set out in clause 6.5,' then clause 7.7 – which on one interpretation appears merely to repeat matters in clause 6.4 – is expressed also to be subject to clauses 6.4 and 6.5. The ACCC considers that in other instances the drafting lacks clarity – for example, clause 6.4(a)(i) refers to an obligation to 'offer' the Standard Port Terminal Service, whereas clause 6.4(a)(ii) refers to an obligation to 'not *provide access*,' without any sense of what the difference (if any) entails. Further, the ACCC considers that various provisions in clause 6.5 are vague – for instance, 'geographic and seasonal variations.'

The ACCC therefore considers it is more likely to be appropriate for the proposed Undertaking to provide greater certainty and clarity in relation to this key obligation.

The ACCC also considers:

- In relation to clause 7.4 (a)(ii)(B) and (C), the references to 'unduly onerous,' 'disproportionate to the benefit to be obtained from the information,' 'reasonable costs incurred' and 'information that is not ordinarily and freely available to the Port Operator' are not appropriate. The ACCC notes the further explanation of the terms 'unduly onerous' and 'disproportionate' provided by CBH in response to the ACCC's information request (see above), but considers that these responses only marginally improve the uncertainty and ambiguity. The ACCC considers it is more likely to be appropriate if terms in this clause are drafted with greater clarity and certainty.
- In relation to clause 7.4(b)(i), the reference to non-compliance that CBH believes is material is not appropriate because it appears to depend on CBH's subjective view at its absolute discretion.
- In relation to clause 7.4(b)(v), it is not appropriate that CBH provide reasons for refusing to negotiate only in certain circumstances, and it is more likely to be appropriate that CBH provides reasons for ceasing or refusing to negotiate in all circumstances, at the same time as it ceases or refuses to negotiate.

- In relation to clause 7.5(ii), it is not appropriate that the clause merely recognises the ability of the Applicant to *seek* a meeting with CBH, as there is no obligation on CBH actually to have the meeting sought.
- In relation to clause 7.6(b)(v), it is not appropriate that this clause essentially repeats the Prudential Requirements matter referred to in clause 7.4(b)(iii).
- In relation to clause 8.1(a), it is not appropriate that the clause refers to parties using reasonable endeavours to settle the Dispute as soon as is practicable, in light of the specified timeframes in clause 8.
- In relation to clauses 8.3(a)(ii), it is not appropriate that this clause refers to providing a notice to the arbitrator, as it appears that in the circumstances contemplated by those clauses an arbitrator has not yet been appointed. Please refer, however, to the discussion below: **Arbitration component – further issues**.
- It is more likely to be appropriate that it is clearly specified that clause 8.3(d) applies to formal mediation conducted either by a mediator appointed by agreement between the parties, or as appointed by the President of the WA Chapter of the IAMA.
- It is more likely to be appropriate for the Access Application form in Schedule 1 to be amended in light of CBH’s further submission (see above).

8.4.6 Negotiation component – further issues

Disproportionate discretion on CBH

The ACCC considers that the negotiation component does not achieve an appropriate balance between the interests of the access provider and access seekers in that there is disproportionate discretion on the part of the access provider to refuse to negotiate, or to cease negotiations, with the access seeker. The ACCC considers that this discretion creates the potential for the negotiation process to be delayed or frustrated, and therefore creates uncertainty. The ACCC also considers that this discretion undermines the robustness of the negotiate-arbitrate mechanism as a whole.

The ACCC in particular notes:

- In relation to clause 7.4(a)(ii), the discretion that CBH has to refuse a request for information from an Applicant, including where the Applicant does not agree to pay ‘reasonable costs’ incurred by CBH (which, as noted above, is itself not appropriate).
- In relation to clause 7.4(b)(i), the discretion that CBH has not to negotiate with an Applicant if CBH considers the Applicant does not materially comply with the requirements and processes set out in the proposed Undertaking.
- In relation to clause 7.4(b)(iii) & (iv), and clause 7.6(b)(v), the discretion that CBH has to at any time, before or during the negotiation process, to require the Applicant to demonstrate that it meets the Prudential Requirements, and to cease

or refuse to commence negotiations if the Applicant does not meet those requirements (see further below).

- In relation to clause 7.4(b)(vii), the discretion that CBH has to refer an application to the arbitrator if CBH is of the view that the application is frivolous in nature or that the Applicant is not negotiating in good faith, and for CBH to seek reasonable costs.
- In relation to clause 7.5(b), the discretion that CBH has in relation to the acknowledgement of an Access Application, and to request further information or clarification from an Applicant (see also above).
- In relation to clause 7.6(b)(iv), the discretion that CBH has to cease negotiations if CBH believes that the negotiations are not progressing in good faith towards the development of an Access Agreement within a reasonable time period;
- The discretions effectively created by the uncertain time periods in clauses 7.6(a), and 7.7(c) and (d) (see above).

The ACCC considers that timeframes that are not appropriate and a lack of sufficient clarity and certainty, as described above, in some instances compound the problematic nature of certain of the areas of discretion set out above.

The ACCC notes that in some circumstances the proposed Undertaking permits the Applicant to refer a matter to the arbitrator if it believes CBH has exercised its discretion improperly, and allows for negotiations to recommence if the arbitrator finds CBH has acted improperly. The ACCC notes, however, that this avenue is expressly recognised in only some situations, not all, and even where it is provided, provides the access seeker only with the ability to continue negotiations at a future time if the arbitrator so orders. The ACCC considers it is more likely to be appropriate for the arbitrator to conclusively resolve the dispute if a matter is referred in this way, as requiring recommencement of negotiations creates opportunities for unnecessary delay.

Similarly, the proposed Undertaking provides few opportunities for the Applicant to refer a matter to the arbitrator if the Applicant is dissatisfied with the conduct of CBH.

The ACCC considers as a general matter that where the proposed Undertaking provides CBH with a discretion to refuse to negotiate, or cease or potentially otherwise delay or hinder negotiations, such discretion should be drafted with sufficient clarity and certainty to minimise the possibility of that discretion being misused. The ACCC also considers that any such discretion is more likely to be appropriate where it balances the interests of CBH with the interests of access seekers.

The ACCC considers that the clauses are not appropriate for the reasons stated, but acknowledges that CBH may have intended the discretions to recognise or address legitimate considerations. In particular, in relation to the Prudential Requirements, the ACCC acknowledges that it is likely to be appropriate for the proposed Undertaking to include some form of recognition that an access seeker must meet prudential requirements in order to obtain access, but that such a requirement should be drafted with greater certainty, and to better balance the interests of the access provider and

access seekers. The ACCC considers in particular that clauses 7.4(b)(iv)(B) and (C) as currently drafted are not appropriate, as they create too wide a discretion for CBH, lack clarity and create uncertainty.

The ACCC also considers that the proposed Undertaking does not appropriately recognise the ability of an access seeker to re-apply for access in circumstances where negotiations may cease and an Access Agreement has not been executed (for example, at the expiry of the 'Negotiation Period'). The ACCC notes CBH's submission that an Applicant would be able to submit a new application for access,²⁵⁹ and the ACCC considers that it is more likely to be appropriate for the proposed Undertaking to reflect this so as to provide greater clarity and certainty for access seekers.

Appropriate clauses

The ACCC considers that it is appropriate for the proposed Undertaking to include an obligation on CBH to negotiate in good faith, as recognised in clause 7.1. The ACCC would also expect that access seekers utilising the process in the proposed Undertaking would also act in good faith.

The ACCC also considers it appropriate that the proposed Undertaking provides a mechanism for dealing with confidential information that may be relevant to the negotiation, dispute resolution and arbitration process, as somewhat recognised by clauses 7.2, 7.3(b) and 8.8(d). The ACCC considers however that reiterating the obligation in clause 7.2 at clause 7.3(b) and then 8.8(d) creates unnecessary confusion and it is more likely to be appropriate that the proposed Undertaking contains a single clause dealing with confidentiality during the negotiation, dispute resolution and arbitration process. The ACCC considers it is also likely to be appropriate for the proposed Undertaking to provide for disclosure of confidential information to the mediator and arbitrator as relevant, and to the ACCC.

The ACCC considers it is appropriate for the proposed Undertaking to include clause 7.3(a), or something similar, to provide guidance on how the negotiation, dispute resolution and arbitration processes are intended to operate, as this provides clarity.

8.4.7 Dispute resolution component – further issues

Pre-condition to invoking dispute resolution mechanism

The ACCC notes that clause 7.3(c) of the proposed Undertaking provides that if, at any time during the negotiation process, a dispute arises between the parties which, after reasonable negotiation, the parties are unable to resolve to their mutual satisfaction, then either party may seek to resolve the dispute in accordance with the Dispute resolution process in clause 8.

The ACCC considers that clause 7.3(c) is not appropriate, as it effectively imposes a 'pre-condition' on the invocation of the dispute resolution mechanism by requiring the parties to engage in 'reasonable negotiation' prior to invoking clause 8. The ACCC considers that the term 'reasonable negotiation' lacks certainty and that clause

²⁵⁹ Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 83.

7.3(c) could potentially allow either the access seeker or the access provider to unnecessarily delay the timely resolution of the dispute.

Definition of dispute

The ACCC notes that the definition of ‘Dispute’ in clause 1.1 refers to a ‘bona fide’ dispute. The ACCC also notes that in its supplementary submission CBH explained that ‘bona fide’ referred to a dispute that had been brought in good faith and without fraud.²⁶⁰

The ACCC considers that it is likely to be appropriate for ‘Dispute’ to be defined to mean a ‘bona fide’ dispute, as this is a widely-known term, the use of which here is intended to prevent either the access seeker or the access provider invoking the dispute resolution process in relation to a frivolous or vexatious disputes. The ACCC considers it is not appropriate, however, for CBH to have discretion to decide what is and what is not, a bona fide dispute, as this does not adequately balance the legitimate business interests of CBH and the interests of access seekers.

Dispute resolution mechanism in the access agreement

The ACCC notes that clause 8.1(b) of the proposed Undertaking provides that any disputes in relation to an executed access agreement will be dealt with pursuant to the provisions of that agreement. The ACCC considers it is appropriate that this clauses limit the scope of the dispute resolution mechanism to ‘Disputes’ that arise during the negotiation of an Access Agreement. Once the parties have an access agreement, they have direct rights of enforcement in contract and need not revert to the proposed Undertaking. The ACCC notes CBH’s submission that an allegation of discriminatory conduct could be a breach of the proposed Undertaking itself, and that clause 8.1(b) requires amendment to clarify the inconsistency.²⁶¹

The ACCC cannot, however, reach a view on whether it is appropriate for disputes in relation to an executed Access Agreement to be dealt with under that Agreement, as such an agreement does not form part of the proposed Undertaking, and the ACCC therefore cannot reach a view on the appropriateness of the dispute resolution mechanism within it. Similarly, the ACCC considers that it cannot reach a view on the appropriateness of clause 8.1(c), which obliges CBH to report ‘material disputes’ in relation to an Access Agreement to the ACCC, without an indicative agreement forming part of the proposed Undertaking.

The ACCC notes, however, that CBH is proposing to include an indicative access agreement as part of a revised Undertaking, and a copy of that agreement is attached to this draft decision. The ACCC is therefore seeking submissions on whether the agreement, and the dispute resolution mechanism it proposes, are appropriate.

²⁶⁰ Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, pp. 83-84.

²⁶¹ Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 84.

8.4.8 Arbitration component – further issues

Selection of the arbitrator

The ACCC considers that clause 8.5 is not appropriate having regard to the public interest.

The ACCC considers it is more likely to be appropriate for the ACCC to have a role as arbitrator. The ACCC considers that clear public interest considerations arise in relation to the proposed Undertaking, and which may also arise in relation to certain Disputes between an access seeker and an access provider. In this regard the ACCC notes again the effect of the WEMA in reforming the arrangements for the export of bulk wheat from Australia via the introduction of competition, as well as the transitional state of the industry at present. The ACCC considers it would be better placed than a private arbitrator to have regard to these matters in arbitrating a dispute which raises such matters, particularly due to its experience in economic regulation and in arbitrating matters with public interest considerations.

The ACCC also considers that if the ACCC had a role as arbitrator in the proposed Undertaking, then that consideration would support the appropriateness of the overall publish-negotiate-arbitrate approach proposed by CBH. That is, if it were possible for the ACCC to arbitrate certain Disputes, the ACCC would thereby maintain an additional degree of oversight in relation to the proposed Undertaking, thereby enhancing the robustness of the dispute resolution mechanism.

The ACCC notes, however, the likelihood that not every Dispute that may arise in relation to the proposed Undertaking will warrant arbitration by the ACCC. While it is not possible for the ACCC predict, at this stage, the particular Disputes upon which it may or may not choose to arbitrate, it is possible that purely commercial or technical disputes with no public interest considerations may more appropriately be arbitrated by a private arbitrator.

The ACCC therefore considers it more likely to be appropriate for the proposed Undertaking to provide:

- that unless the parties otherwise agree, when a Dispute is referred to arbitration, it is referred to the ACCC in the first instance;
- to allow the ACCC to make submissions in relation to an arbitration conducted by a private arbitrator (the current drafting of the proposed Undertaking is unclear as to upon whose request the ACCC may make submissions); and
- for the Dispute to be arbitrated by the ACCC if it so chooses, or for the Dispute to be arbitrated by a private arbitrator if the ACCC so chooses.

The ACCC notes, of course, that the proposed Undertaking does not remove the ability of parties to resolve disputes to their mutual satisfaction by mediation or arbitration without recourse to the mechanism in the proposed Undertaking, if they agree to take that course.

Conduct of the arbitration

The ACCC considers that clause 8.7(a) is not appropriate as it lacks clarity and certainty, and to some extent replicates matters in clause 8.7(b). The ACCC considers it is nonetheless likely to be appropriate for the arbitration component to include the matters acknowledged in clause 8.7(a)(iv) and (v).

The ACCC considers that, in light of its view that it is more likely to be appropriate for the ACCC to have a role as arbitrator, it is also more likely to be appropriate for the arbitration component to provide for differences in the circumstances depending on whether the arbitrator is the ACCC or a private arbitrator. In particular, the ACCC considers that it is more likely to be appropriate for the proposed Undertaking:

- to require a private arbitrator to keep the ACCC informed of the progress of the arbitration, including timelines and processes for making submissions;
- to allow the ACCC to make submissions in relation to an arbitration conducted by a private arbitrator, rather than on request as proposed currently; and
- to permit the ACCC to conduct an arbitration in accordance with the provisions of Part IIIA of the TPA if it chooses to be the arbitrator.

The ACCC also considers that these matters would also support the appropriateness of the overall publish-negotiate-arbitrate approach proposed by CBH.

Appropriate clauses

The ACCC considers it is appropriate to allow either party unilaterally to refer the dispute to arbitration, as this provides a ‘check’ on the ability of either party to delay or frustrate the dispute resolution process. The ACCC also considers it appropriate for the arbitrator to take into account the matters listed in clause 8.6(d) as a check on the ability of either party improperly to refer a matter to arbitration.

8.4.9 Holding over arrangements

Clause 5.2(b) provides that access to a Port Terminal Service²⁶² will be offered for a period expiring no later than 30 September of the year following the year in which the Standard Terms were first published, subject to appropriate ‘holding over’ provisions. In response to a question from the ACCC asking what constitutes ‘appropriate holding over provisions,’ CBH explained that such provisions would:

- allow a reasonable period of time for the continued operation of an access agreement on the same terms and conditions, pending the completion of the negotiation for an amended or replacement access agreement or the resolution of any dispute (save for circumstances where a debt was due and owing and for CBH to continue to perform the agreement would lead to further bad debt risk for CBH); but

²⁶² And CBH’s obligation to enter into an Access Agreement for that/those service/s.

- providing an appropriate end date from which Users will be subject to the operation of any revised standard terms that may take effect in accordance with the provisions of the Undertaking.²⁶³

CBH further submits that the terms and conditions upon which access will be provided prior to the execution of an access agreement, such as where parties are involved in a dispute, will be the Standard Terms and Reference Prices current at the time that the Applicant proposes to access the services. CBH submits that if a dispute arises, CBH will not refuse supply and will agree to backdate the results of an arbitration determination to the commencement of service.²⁶⁴

The ACCC considers that the publish-negotiate-arbitrate mechanism is not appropriate as it does not adequately provide 'holding over' arrangements, being arrangements whereby an access seeker may obtain access to the service without an executed access agreement while they are negotiating for an access agreement pursuant to the proposed Undertaking. The ACCC considers that holding over arrangements are an important aspect of the negotiate-arbitrate approach and that it is not appropriate for an access seeker to be delayed in obtaining access because they are engaging in the negotiation process in the proposed Undertaking, including where the dispute resolution and arbitration processes are invoked. The ACCC considers that such an outcome creates uncertainty, is not in the interests of access seekers, and is unlikely to ensure that the proposed Undertaking provides fair and transparent access.

The ACCC considers that CBH's construction is not apparent on the face of the proposed Undertaking, and that it is more likely to be appropriate that the proposed Undertaking specifies with greater clarity and certainty the circumstances in which 'holding over' arrangements will apply, and how they will apply. The ACCC considers that CBH's further submission provides some additional clarity and certainty and it is likely be appropriate for those comments to be reflected in the proposed Undertaking.

The ACCC also considers it not appropriate for the proposed Undertaking to contain clause 4.7 as currently drafted. Clause 4.7 provides that the proposed Undertaking applies only to the negotiation of new Access Agreements (and the negotiation of access in addition to that already the subject of an Access Agreement), and that nothing in the proposed Undertaking can require a party to an existing Access Agreement to vary a term or provision of that agreement. The ACCC notes CBH's submission that it is appropriate that the proposed Undertaking applies only to new access agreements, as to do otherwise would create substantial interference with existing contractual obligations.²⁶⁵

The ACCC nonetheless considers that, on its face, this clause potentially prevents the application of the proposed Undertaking to Access Agreements for the 2009/10 season, on the basis that access seekers could sign agreements prior to the commencement of the proposed Undertaking, and then, by virtue of clause 4.7, be precluded from negotiating non-standard terms or prices. The ACCC considers that

²⁶³ Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, pp. 79-80.

²⁶⁴ Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 81.

²⁶⁵ Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 46.

this would be an unacceptable outcome, as it would essentially render the negotiate-arbitrate mechanism redundant for the first season.

The ACCC consider it is more likely to be appropriate for the proposed Undertaking to include a mechanism that ensures that the negotiate-arbitrate process is available to access seekers who wish to negotiate non-standard terms or prices for the 2009/10 season. The ACCC considers that an option in this regard could be the inclusion of a clause that obliges CBH to negotiate, as per the negotiate-arbitrate mechanism, variations to Access Agreements entered into prior to the commencement of the proposed Undertaking. Such a clause would not be intended to create commercial uncertainty for CBH through the potential variation of multiple contracts, but rather to create an incentive for CBH to negotiate access agreements as if the proposed Undertaking were in effect, and thereby avoid the problem of the potential circumvention of the negotiate-arbitrate mechanism.

8.4.10 Conclusion in relation to publish-negotiate-arbitrate component

The ACCC considers it is appropriate for the proposed Undertaking to adopt a publish-negotiate-arbitrate approach, and not provide ex ante price regulation, if the publish-negotiate-arbitrate component is robust. The ACCC considers, however, that the publish-negotiate-arbitrate component of the proposed Undertaking is not appropriate for the following reasons:

- The proposed publish-negotiate-arbitrate component lacks clarity and certainty. The ACCC considers that the drafting of numerous clauses is either vague, ambiguous, confusing or unnecessarily broad or restrictive, which is of itself not appropriate and which also creates uncertainty as to how the mechanism will operate in practice.
- The proposed publish-negotiate-arbitrate component does not appropriately address the interests of access seekers. The ACCC considers that many clauses of the proposed mechanism provide too great a discretion on the access provider to refuse to negotiate, or to cease negotiations once commenced, which has the potential to delay or frustrate the overall access application process. The opportunity for delay and frustration creates further uncertainty as to how the mechanism will operate in practice. The lack of certainty and clarity described above, and the absence of appropriate holding over arrangements are also not in the interests of access seekers.
- The proposed publish-negotiate-arbitrate component is not in the public interest. The ACCC considers it is not in the public interest to accept an access undertaking that lacks certainty and clarity, and that does not appropriately address the interests of access seekers. Further, the ACCC considers that the arbitration component in particular does not appropriately recognise public interest considerations, as outlined above.
- The proposed publish-negotiate-arbitrate component is not appropriate in the context established by the WEMA. The ACCC considers that the lack of clarity and certainty and failure to address the interests of access seekers are unlikely to ensure fair and transparent access to port terminal services.

The ACCC considers it is more likely to be appropriate for the proposed Undertaking to:

- include an indicative access agreement setting standard terms for access to the service;
- require CBH to publish a single set of prices for port terminal services, which may include differentiated prices for particular circumstances (i.e., for different processes for testing of grain depending on where it has been stored – but *only* where these processes are justifiable with regard to hygiene, quality or associated factors), provided those circumstances are transparently stated and the pricing differences are justified on the basis of different costs;
- require CBH to publish prices within a timeframe that allows sufficient opportunity for access seekers to negotiate non-standard terms and prices;
- provide appropriate holding over arrangements to ensure access seekers are not delayed in obtaining access by reason of engaging in a negotiation with CBH on non-standard terms or prices, or by reason of resolving a dispute with CBH pursuant to the processes in the proposed Undertaking;
- address the issues identified by the ACCC in the discussion above regarding the timeframes and lack of clarity and certainty in the drafting of the proposed Undertaking, as well as the disproportionate discretion of the access provider;
- not include a ‘pre-condition’ to invoking the dispute resolution process, as currently included in clause 7.3(c);
- provide that when a Dispute is referred to arbitration, it is referred to the ACCC in the first instance;
- provide a mechanism by which the ACCC may consider whether or not it wishes to arbitrate the Dispute;
- provide for the Dispute to be arbitrated by the ACCC if it so chooses, or for the Dispute to be arbitrated by a private arbitrator if the ACCC so chooses;
- permit the ACCC to conduct an arbitration adopting the processes and having regard to the matters set out in Part IIIA of the TPA if it chooses to be the arbitrator;
- require a private arbitrator, if appointed, to keep the ACCC informed of the progress of the arbitration, including timelines and processes for making submissions; and
- allow the ACCC to make submissions in relation to an arbitration conducted by a private arbitrator.

9 Indicative Access Agreement

Summary

Inclusion of an Indicative Access Agreement

CBH's approach of not including an Indicative Access Agreement in its proposed Undertaking is not appropriate. It results in a lack of certainty and clarity for potential access seekers and is, therefore, not in the interest of persons who might want access to the service.

Including an Indicative Access Agreement in the proposed Undertaking would:

- provide a clear starting point for negotiations between an access seeker and CBH (and is therefore critical to ensuring access seekers can effectively negotiate with CBH); and
- ensure that the costs of negotiation and/or arbitration are not excessive.

It is important to note that inclusion of an indicative access agreement in the proposed Undertaking does *not* mean that access seekers and CBH are precluded from negotiating around the Indicative Access Agreement (either by commercial agreement or by utilising the Negotiation and/or Arbitration provisions in the proposed Undertaking).

The ACCC is seeking submissions on whether CBH's 2009–10 Port Terminal Services Agreement provided to the ACCC on 4 August 2009 and annexed to this draft decision at Annexure A would form an appropriate basis for an Indicative Access Agreement.

Variation of an Indicative Access Agreement

CBH's approach of retaining discretion to unilaterally vary its "Standard Terms" (i.e. which are likely to be similar to an Indicative Access Agreement) is appropriate (even with the requirement that variations be consistent with clauses 2 and 6.4 of the proposed Undertaking). It results in a lack of certainty and clarity for potential access seekers and undermines the benefits of inclusion of an Indicative Access Agreement in the proposed Undertaking.

It would be more appropriate for the variation provisions in section 44ZZA(7) of the TPA to apply to variations of the Indicative Access Agreement. This does not preclude parties from negotiating non-standard terms that vary from those in the Indicative Access Agreement.

9.1 CBH's proposed Undertaking

CBH does not include its proposed standard terms and conditions of access to port terminal services (otherwise known as an Indicative Access Agreement) as part of its Undertaking.

The obligations on CBH to publish its Standard Terms are set out in the Publish, Negotiate, Arbitrate chapter.

In relation to variation of Standard Terms, clause 6.6 provides:

Variation to Reference Prices and Standard Terms

- (a) the Port Operator may vary the Reference Prices or the Standard Terms, provided that the amended Reference Prices and Standard Terms are consistent with **clause 6.4**²⁶⁶ and the objectives in **clause 2**.²⁶⁷
- (b) Any variation under **clause 6.6(a)** must be published at least 30 days prior to the date on which it is to become effective in the same locations as it publishes its Reference Prices and Standard Terms.
- (c) The Port Operator must provide the ACCC with copies of variations to the Reference Prices and Standard Terms promptly following publication.
- (d) To avoid doubt, any variations to the Reference Prices or Standard Terms does not automatically override the terms of existing Access Agreements.

9.2 CBH's supporting submission

CBH submits that it was not practical to include the Standard Terms in the proposed Undertaking because the industry generally works on an annual contracting basis and that incorporating the terms and conditions into the proposed Undertaking itself would remove the flexibility to deal with developments and emerging market efficiency incentives such as capacity booking mechanisms without obtaining consent to variation.

CBH also submits that it would create regulatory difficulty if any breach of contract were enforceable as a breach of the Undertaking.²⁶⁸

In relation to variation of Standard Terms, CBH submits that it envisages varying Standard Terms or Reference Prices pursuant to clause 6.6 of the proposed Undertaking only in very limited circumstances. CBH submits that it did not expect it would do so more than once in any year, if at all. CBH submitted that such circumstances may include:

- the imposition of any direct costs associated with changes in legislation (e.g. taxation, levies or any new or amended form and levels of taxation or levy); or
- unforeseeable changes in circumstances directly affecting the provision of the port terminal services;

²⁶⁶ The non-discriminatory access clause.

²⁶⁷ The objectives clause.

²⁶⁸ Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 52. The ACCC notes that the legal nature of the access undertaking and an executed access agreement are different. The access undertaking is Court enforceable under the *Trade Practices Act*, whereas an executed access agreement is enforceable under contract law.

- CBH has not varied its standard terms or prices during the course of the operational period of those terms or prices in the past.
- As the full impact of the changes to the regulatory framework, market adjustments and related consequences of the changes to the regulatory framework remain unclear, market participants do not have the same level of certainty that existed prior to the deregulation of the export wheat market and the coming into forces of the WEMA undertaking.²⁶⁹

9.3 Other submissions received

9.3.1 Australian Grain Exporters Association (AGEA)

AGEA submitted that CBH have provided draft standard terms and conditions but not prices. AGEA argues that CBH's draft terms and conditions are deficient as they are not binding.²⁷⁰

AGEA argued that the proposed access undertakings contemplate that the price and non-price terms can be unilaterally varied by CBH without negotiation with its customers. AGEA argued that the terms and conditions of access to port terminal facilities must comply with and, if not incorporated in the undertaking, be subordinate to the proposed access undertaking where necessary.²⁷¹ AGEA also argued for the inclusion of a list of particular terms to be included as part of the undertaking.²⁷²

AGEA argued that CBH should not be able to vary price and non-price terms except in clearly defined circumstances (such as a material adverse change) and provided both parties agree to the proposed changes. AGEA submit that the implementation of the amended terms should only take effect after six months' notice, in order to give wheat exporters time to adjust.²⁷³

9.3.2 Pastoralists and Graziers Association of WA

PGA, as with AGEA argued that CBH's draft terms and conditions are deficient as they are not binding.²⁷⁴ PGA also argued for a list of particular terms to be included as part of the undertaking, including a limited opportunity for CBH to vary price and non-price terms.²⁷⁵

²⁶⁹ Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 80.

²⁷⁰ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 9.1, p. 23.

²⁷¹ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 9.3, p. 23.

²⁷² Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 4.17(a)-(g), p. 12-13.

²⁷³ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 9.8, p. 24.

²⁷⁴ Pastoralist and Graziers Association, *Submission to the ACCC, Port Terminal Services Access Undertaking*, Co-Operative PGA submission, para 4.35, p.12.

²⁷⁵ Pastoralist and Graziers Association, *Submission to the ACCC, Port Terminal Services Access Undertaking*, Co-Operative PGA submission, para 4.40, p.13.

9.4 ACCC's views

9.4.1 Inclusion of an Indicative Access Agreement as part of the proposed Undertaking

The ACCC considers that the approach taken by CBH of not including an Indicative Access Agreement in the proposed Undertaking results in a lack of certainty and clarity for potential access seekers and is, therefore, not appropriate having regard to the matters set out in section 44ZZA(3) of the TPA.

Indicative Access Agreements are a common inclusion in access undertakings.²⁷⁶ They assist access seekers (through the negotiation and arbitration framework discussed in the Publish, Negotiate, Arbitrate chapter of this draft decision) to conclude a set of agreed access terms and conditions with the access provider. These terms and conditions are then embodied in a contractual relationship between the access provider and an access seeker (i.e. an Access Agreement).

Including an Indicative Access Agreement in the proposed Undertaking would provide a clear starting point for negotiations and is therefore crucial to ensure access seekers can effectively negotiate with CBH. Another key benefit of inclusion of the Indicative Access Agreement is to ensure that the costs of negotiation and/or arbitration are not excessive.

For the avoidance of doubt, it is important to note that inclusion of an indicative access agreement in the proposed Undertaking does *not* mean that access seekers and CBH are precluded from negotiating around the Indicative Access Agreement. There is nothing to stop CBH agreeing to different terms and conditions with access seekers, either by commercial agreement or via the negotiation/ arbitration framework in the proposed Undertaking. Nevertheless, an indicative access agreement serves the function of operating as a 'minimum offer' by the access provider.

Submissions sought

CBH provided a draft copy of its 2009–10 Port Terminal Services Agreement for to the ACCC on 14 April 2009 as an attachment to its supporting submission. However, this document was *not* provided to the ACCC as part of CBH's proposed Undertaking and has not been subject to public consultation.

The ACCC is seeking submissions on whether CBH's revised 2009–10 Port Terminal Services Agreement provided to the ACCC on 4 August 2009 and annexed to this draft decision at Annexure A would form an appropriate basis for an Indicative Access Agreement.

In making submissions, it is recommended that interested parties note the ACCC's views on the appropriateness of the proposed scope of CBH's access Undertaking (i.e. CBH's proposal that it applies only to a stand-alone port service). As the ACCC sets out in the Scope chapter of this document, the ACCC considers that limiting the

²⁷⁶ See, for example, the access undertaking submitted by the Australian Rail Track Corporation (ARTC), and accepted by the ACCC on 30 July 2008.

proposed Undertaking to a stand-alone port service is not appropriate taking into account the matters in section 44ZZA(3).

9.4.2 Variation of Standard Terms or Reference Prices

It is the ACCC's view that CBH approach to variation of the "Standard Terms" is not appropriate.

As noted above, the ACCC considers that it would be more appropriate for CBH's proposed Undertaking to include an Indicative Access Agreement as part of its undertaking.

The ability for CBH to unilaterally change the Indicative Access Agreement (even with the requirement for changes to adhere to clauses 6.4 and 2) would result in a lack of certainty and clarity for potential access seekers and undermine the benefits of inclusion of the Indicative Access Agreement in the undertaking.

In response to CBH's arguments regarding the possible creation of regulatory difficulty if any breach of contract were enforceable as a breach of the Undertaking the ACCC notes that the legal nature and status of the access undertaking and an executed access agreement are different. The access undertaking is Court enforceable under the Trade Practices Act, whereas an executed access agreement is enforceable by the parties under contract law.

The ACCC also understands that, in relation to standard terms and conditions of access, there is not as great a need for flexibility as is the case in relation to the port terminal rules (see the Capacity Management chapter). Further, the ACCC also notes that the parties are able to negotiate non-standard terms that vary from those in the Indicative Access Agreement.

For these reasons, and given the short term of the proposed Undertaking, the ACCC considers that it would be more appropriate for any variation of the Indicative Access Agreement to take place in accordance with the process under section 44ZZA(7) of the TPA.

10 Non-discrimination

Summary

It is appropriate that CBH's proposed Undertaking includes non-discrimination and no hindering access clauses.

However, the precise non-discrimination and no hindering access clauses proposed by CBH are not appropriate given the lack of clarity about their interpretation. Further, the drafting of the non-discrimination clauses does not ensure that they will prohibit CBH from discriminating in favour of its own trading business.

The ACCC has made recommendations in this chapter about changes that could be made to the non-discrimination clauses and no hindering access clauses to make them sufficiently robust to protect against anti-competitive self-preferential treatment by CBH. For the avoidance of doubt, the non-discrimination clause should protect against (amongst other matters) the ability of CBH to anti-competitively discriminate between wheat exporters on the basis of where grain was stored (ie. whether it was stored in CBH's up-country storage and handling network, a third party storage network or on-farm).

The ACCC seeks submissions on whether it would be appropriate for CBH's proposed Undertaking to provide for an annual audit procedure of compliance with the Undertaking's non-discrimination clause.

10.1 CBH's proposed Undertaking

The following are CBH's non-discrimination provisions within its proposed Undertaking:²⁷⁷

6.4 Non-discriminatory access

- (a) Subject to clause 6.5:
 - (i) if an Applicant requests a Port Terminal Service, the Port Operator must offer the Port Terminal Service on the Standard Terms and at the Reference Prices applicable from time to time to that Port Terminal Service in accordance with clause 7;
 - (ii) the Port Operator must not provide access to the Port Terminal Service Applicants or Users (including its own Trading Division) on terms and conditions which are different from:
 - (A) in the case of Port Terminal Services, the Reference Prices or Standard Terms; or
 - (B) in all cases, the price and non-price terms offered to another Applicant or User,

²⁷⁷ Co-operative Bulk Handling Limited, *Port Terminal Services Access Undertaking*, 14 April 2009, clause 6.4.

unless those different terms are:

- (C) consistent with the objectives of this Undertaking set out in clause 2; and
- (D) commercially justifiable taking into account the matters set out in clause 6.5; and
- (E) offered on an arms length commercial basis.

The non-discriminatory access clause set out above is expressed to be subject to the price and non-price terms provisions outlined in clause 6.5 of CBH's proposed Undertaking. Clause 6.5 sets out the basis upon which the price and non-price terms for the provision of access to Port Terminal Services might differ between different access seekers. The following is the list of matters CBH will have regard to in determining the price and non-price terms it offers:

For the purposes of this Undertaking, the price and non-price terms for the provision of access to Port Terminal Services to different Applicants or Users will be determined having regard to:

- (a) the economically efficient operation of the Port Terminal Facilities and the Port;
- (b) the Port Operator's legitimate business interests and investment in the Port Terminal Services, Port Terminal Facilities and the Port;
- (c) all costs that the Port Operator incurs or may incur in providing access, including any costs of extending the Port Terminal Services, but not costs associated with losses arising from increased competition in upstream or downstream markets;
- (d) the economic value to the Port Operator of any additional investment that the Applicant or Port Operator has agreed to undertake;
- (e) the interests of all persons who have rights to use the Port;
- (f) the operational and technical requirements necessary for the safe and reliable operation of the Port Terminal Services, the Port Terminal Facilities and the Port;
- (g) any differences in the costs of providing access to Port Terminal Services to different Applicants or Users;
- (h) the opportunity cost of accommodating the requirements of one Applicant or User compared to the requirements of one or more other Applicants or Users;
- (i) the provision of quality related services reasonably required by the Port Operator in respect of some Applicants or Users but not others, including security of Bulk Wheat integrity, testing of Bulk Wheat or Bulk Wheat classification, fumigation and protection requirements for Bulk Wheat;
- (j) the relative risk related to storing and handling different Bulk Wheat segregations for Applicants and Users;
- (k) available port capacity, including receipt, handling, storage and cargo accumulation capacity;
- (l) differences in types and grades of Applicants' or Users' Bulk Wheat;
- (m) differences in Applicants' or Users' Bulk Wheat volumes;
- (n) differences in periods of time during which access to Port Terminal Services is required by Applicants or Users;

- (o) differences in levels of Applicants' or Users' usage of Port Terminal Services;
- (p) differences in modes of receipt, storage or outturn including different transport modes to receive Bulk Wheat and different ship configurations;
- (q) geographic and seasonal variations;
- (r) minimisation of demurrage at a Port over a given period;
- (s) maximisation of throughput of Bulk Wheat and other commodities at a Port over a given period;
- (t) unless the Port Operator is offering segregated services at a Port, the ability to mix the same grade of Bulk Wheat owned by different owners and / or mix different grades of Bulk Wheat owned by the same or different owners; and
- (u) the credit risk of an Applicant or User.²⁷⁸

The non-discrimination clauses in CBH's Undertaking are also linked to the 'Objectives' provisions set in clause 2. For instance, the Port Operator can provide access to Applicants or Users (including its own Trading Division) on terms which differ from the Reference Prices or Standard Terms if those different terms are consistent with the objectives of the undertaking set out in clause 2 as follows:

2 Objectives

This Undertaking has the following objectives:

- (a) providing a framework to manage negotiations with Applicants for access to services provided by certain facilities at the Port Terminal Facilities in relation to export of Bulk Wheat;
- (b) establishing a workable, transparent, non discriminatory and efficient process for lodging and processing Access Applications;
- (c) providing a non discriminatory approach to pricing under which the Port Operator publishes reference prices and terms and conditions for the provision of certain standard services annually;
- (d) operating consistently with the objectives and principles in Part IIIA of the TPA and the Competition Principles Agreement;
- (e) reaching an appropriate balance between:
 - (i) the legitimate business interests of the Port Operator, including:
 - (A) the recovery of all reasonable costs associated with the granting of access to the Port Terminal Services;
 - (B) a fair and reasonable return on the Port Operator's investment in the Port Terminal Facility commensurate with its commercial risk;

²⁷⁸ Co-operative Bulk Handling Limited, *Port Terminal Services Access Undertaking*, 14 April 2009, clause 6.5.

- (C) the Port Operator's business interests relating to the export of grain other than Bulk Wheat and to the export of non grain commodities using the Port Terminal Facilities; and
 - (D) the Port Operator's ability to meet its own or its Trading Business' reasonably anticipated requirements for Port Terminal Services;
- (ii) the interest of the public, including:
- (A) ensuring efficient use of resources; and
 - (B) the promotion of economically efficient investment, use and operation of the Port Terminal Facilities; and
- (iii) the interests of Applicants wanting access to the Port Terminal Services, including providing access to the Port Terminal Services:
- (A) on non discriminatory price and non price terms; and
 - (B) in a transparent, open, efficient and non discriminatory manner;
- (f) providing an efficient, effective and binding resolution process in the event that the Port Operator and the Applicant are unable to negotiate a mutually acceptable Access Agreement; and
- (g) in accordance with the objective in s44AA(b) of the TPA, providing for a uniform approach to access to the Port Terminal Services at the different Port Terminal Facilities to the extent practicable having regard to the different characteristics of the Port Terminal Facilities.²⁷⁹

CBH also commits not to discriminate in making 'Operational Decisions.' CBH's proposed Undertaking states that Operational Decisions has the followings meaning:

[...] decisions made in the course of providing the Port Terminal Services including day to day decisions concerning scheduling, cargo accumulation decisions and ship loading.²⁸⁰

Clause 9.2(b) of CBH's proposed Undertaking states:

In making Operational Decisions relating to the provision of access to the Port Terminal Services, the Port Operator must:

make decisions:

- in a manner consistent the objects of this Undertaking;
- that are commercially justifiable, taking into account the matters referred to in clause 9.2(c); and

subject to clause 9.2(c), must not discriminate between Users or in favour of its Trading Business in providing Port Terminal Services.²⁸¹

²⁷⁹ Co-operative Bulk Handling Limited, *Port Terminal Services Access Undertaking*, 14 April 2009, clause 2.

²⁸⁰ Co-operative Bulk Handling Limited, *Port Terminal Services Access Undertaking*, 14 April 2009, clause 9.2(a).

²⁸¹ Co-operative Bulk Handling Limited, *Port Terminal Services Access Undertaking*, 14 April 2009, clause 9.2(b).

Clause 9.2(c) states:

The Port Operator's obligations under clause 9.2(b) will be read subject to the qualification that many Operational Decisions made relating to the provision of Port Terminal Services will necessarily involve conflicts of interests of users of the Port. Particularly when viewed in isolation, some decisions necessarily confer a relative disadvantage on one user of the Port and an advantage on others. The fact that an individual Operational Decision confers a relative disadvantage on one user of the Port or an advantage on another does not, of itself, mean that the Port Operator has breached this Undertaking.²⁸²

CBH states at 9.2(d) that, without limiting clause 9.2(c) or clause 6.5, the Port Operator may in making Operational Decisions:

give priority to vessels based on the lead time given between nomination and vessel ETA, the likely availability of sufficient Bulk Wheat at the Port prior to vessel ETA, the likely uncommitted storage capacity at the Port Terminal Facility and the uncommitted inloading capacity necessary to make a nominated vessel's nominated cargo tonnage;

take into account in particular the objectives of:

- minimising demurrage at the Port over a given period; and
- maximising throughput of Bulk Wheat and other commodities at the Port over a given period; and

vary a cargo assembly plan or queuing order for vessels as a result of:

- insufficient Bulk Wheat at the Port accumulated by the User necessary to make a User's nominated vessel's nominated cargo tonnage;
- variations in vessel arrival times;
- failure of vessels to pass surveys;
- stability and ship worthiness inspections;
- vessel congestion;
- variation in cargo requirements;
- lack of performance of freight providers;
- equipment failure;
- maintenance outages;
- weather preventing relevant activities at the Port Terminal Facilities;
- embargo, strike, lockout, or labour conditions impacting on the provision of the Port Terminal Services;
- any material breach by the user of the Port Terminal Services of the Access Agreement;
- the status of the accreditation of the user of the Port Terminal Services under the Access Agreement;

²⁸² Co-operative Bulk Handling Limited, *Port Terminal Services Access Undertaking*, 14 April 2009, clause 9.2(c).

- contamination of accumulated cargoes or contamination of loads; or
- a User not working a vessel or accumulating a cargo on a 24 hour/7 day basis where another User is able to do so.²⁸³

CBH's proposed Undertaking, at clause 9.3, also includes a 'No hindering access' provision, which states:

9.3 No hindering access

The Port Operator must not engage in conduct having a purpose of hindering access to the Port Terminal Services by any User in the exercise of a reasonable right of access.²⁸⁴

10.2 CBH's submissions

CBH notes that vertical integration may create incentives to discriminate. However, CBH advances the following factors which it states mitigate these incentives:

- CBH is non-profit making (i.e. any operating surplus is invested in services and infrastructure rather than paid to shareholders);
- its members (Growers) ultimately pay the cost of supply chain services;
- Discrimination drives up those costs by reducing efficiency;
- CBH and [GrainPool] are adequately ring-fenced as a result of Grain Express.²⁸⁵

CBH further submits that:

The principal objective of operating the Port Terminals is to efficiently handle the maximum volumes of grain that are capable of being handled by the Port Terminal facilities. Increased volumes of grain handled by use of the facilities leads to increased income in relation to the provision of those services and therefore a more efficient use of those resources, an improved return on capital and a net reduction in the overall cost to the owners and users of the services provided by CBH.²⁸⁶

CBH adds that the principle of non-discrimination '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)'.²⁸⁷

CBH further submits:

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 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 TPA.

²⁸³ Co-operative Bulk Handling Limited, *Port Terminal Services Access Undertaking*, 14 April 2009, clause 9.2(d).

²⁸⁴ Co-operative Bulk Handling Limited, *Port Terminal Services Access Undertaking*, 14 April 2009, clause 9.3.

²⁸⁵ Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 75.

²⁸⁶ Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 75.

²⁸⁷ Co-operative Bulk Handling Limited, *Submission to the ACCC*, 14 April 2009, para 5.5, p. 35. Note however, that CBH's proposed Undertaking does not include a clause 9.4.

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 TPA and promotes efficiency in the use of Port Terminal Services.²⁸⁸

In relation to clause 6.5 of the proposed Undertaking and the matters which CBH will have regard to in providing Port Terminal Services, CBH submits that:

In summary, CBH proposes that any decision will be based on a consideration of **all** of the matters listed in clause 6.5 **and** only where such a decision is consistent with the Objectives of the Undertaking set out in clause 2. CBH does not propose that any one of the matters of itself would be capable of providing commercial justification, however in determining how those different terms will be constituted, CBH will consider relevant information and evidence available to CBH from internal and public sources, together with any information or evidence from Applicants or Users and assess the weight to be given to the matters listed based on the robustness and veracity of the information and evidence provided.

Such information or evidence may include audited financial information, independently verified statistical information, professional advice from suitably qualified advisers, such as economic consultants, legal advisers or financial advisers and other materials from verifiable and reputable sources.²⁸⁹

CBH submits that, while there are a number of factors which constrain it, the proposed Undertaking has been drafted ‘as if CBH had an incentive and opportunity to discriminate’.²⁹⁰

CBH states that should bulk wheat exporters believe that CBH has engaged in discriminatory conduct in relation to the provision of port terminal services, then recourse to the complaint and dispute resolution mechanism in the CBH ring-fencing policy is one option for the exporter.²⁹¹

In relation to its non-discriminatory access clause, CBH submits:

Non-discriminatory access is a key feature of the Undertaking. CBH must provide access in accordance with price and non-price terms that include efficiency, fairness and transparency as central elements; it must not discriminate between access seekers, or in favour of its own operations.²⁹²

Further, CBH submits that should GrainPool (CBH’s Trading Business) seek access under the Undertaking then it will be ‘treated in exactly the same manner as any other applicant’ in accordance with the non-discriminatory access clause at 6.4 and factoring in the commercial considerations at clause 6.5.²⁹³

In relation to the making of day-to-day decisions, CBH submits:

²⁸⁸ Co-operative Bulk Handling Limited, *Submission to the ACCC*, 14 April 2009, para 5.5, p. 35.

²⁸⁹ Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 79.

²⁹⁰ Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, para 4.1, p. 38.

²⁹¹ Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 74.

²⁹² Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, para 27.2, p. 53.

²⁹³ Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 79.

Operationally, the Undertaking recognises that decisions must be taken that will necessarily advantage one user over another in the context of that decision alone. However, the Undertaking provides a mechanism for preventing preferential self-dealing and ensuring decisions are made on objectively verifiable commercial factors.²⁹⁴

CBH states that it ‘considers that incentives and opportunities to engage in discriminatory conduct on an operational level are limited’.²⁹⁵ However, CBH states that ‘it also recognises the importance of non-discriminatory principles and outcomes to multiple stakeholders involved in bulk wheat export including the ACCC, the Federal Government, prospective access seekers, grain growers and the public at large’.²⁹⁶

CBH states that, given the importance of non-discriminatory access:²⁹⁷

the Undertaking contains clearly expressed and mandatory non discrimination requirements, which may be applied directly to the conduct of the Port Operator. 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.

CBH states that the ‘inclusion of non-discrimination principles in operational decision-making effectively enables discriminatory conduct to be enforced as a breach of the Undertaking’.²⁹⁸

10.3 Submissions received from interested parties

10.3.1 Australian Grain Exporters Association (AGEA)

In relation to CBH’s proposed non-discriminatory access clause, AGEA states that the provisions within CBH’s non-discriminatory access clause actually have the effect of providing a justification for discrimination (rather than ensuring against it).²⁹⁹

AGEA notes the link between CBH’s non-discriminatory access clause and the ‘objectives’ clause of the Undertaking. To this end, AGEA submits that:

‘CBH clause 6.4 gives BHCs complete discretion to decide whether discrimination is consistent with the objectives of the undertaking and therefore justified. The objectives of the undertaking include reaching an appropriate balance between factors including BHCs’ own “*legitimate business interests*”, “*recovery of all [of their] reasonable costs*” and their “*ability to meet [their] own or [their] Trading Divisions’ reasonably anticipated requirements for Port Terminal Services*”. BHCs’ conflict of interest would inevitably result in BHCs deciding to discriminate in its price and non-price terms in favour of its own interests or its Trading Divisions’.³⁰⁰

²⁹⁴ Co-operative Bulk Handling Limited, *Submission to the ACCC*, 14 April 2009, n 3, p. 4.

²⁹⁵ Co-operative Bulk Handling Limited, *Submission to the ACCC*, 14 April 2009, para 5.7, p. 36.

²⁹⁶ Co-operative Bulk Handling Limited, *Submission to the ACCC*, 14 April 2009, para 5.7, pp. 36-37.

²⁹⁷ Co-operative Bulk Handling Limited, *Submission to the ACCC*, 14 April 2009, para 5.7, p. 37.

²⁹⁸ Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, para 6.1, p. 26.

²⁹⁹ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 10.1, p. 25.

³⁰⁰ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 10.2, p. 25.

AGEA also notes the way in which CBH has linked the non-discriminatory access clause to clause 6.5 – which relates to price and non-price terms. AGEA submits that:

...this clause provide a non-exhaustive list of factors justifying discrimination on the price and non-price terms on which access to port terminal services will be provided. The factors set out in clause 6.5 [...] lack certainty and allow BHCs to favour their own interests.³⁰¹

The following paragraphs outline AGEA's views on the list of CBH considerations found at clause 6.5:

(a) CBH clause 6.5(b) refers to BHCs' *"legitimate business interests and investment"* and provides a self-serving justification to adjust price and non-price terms in favour of its own interests;

(b) CBH clause 6.5(e) refers to *"the interests of all persons who have rights to use the Port Terminal"*, but there is no obligation for all rights to be afforded equal weight;

(d) CBH clause 6.5(k) refer to *"available Port Terminal capacity, including receipt, handling, storage and cargo accumulation capacity"*: in most cases, BHCs control all of these elements and BHCs should not be entitled to discriminate on the occurrence of elements that it controls;

(e) CBH clause 6.5(p) refers to *"differences in modes of receipt, storage or outturn including different transport modes to receive Bulk Wheat and different ship configuration"*, which suggests that discrimination may occur in the event that non-BHC services are used;

(f) CBH clause 6.5(r) refer to *"minimisation of demurrage at the port over a given period"*: this clause suggests that discrimination and the calling of vessels to berth out of order might be permitted according to which vessel has the highest demurrage rate. It is unclear how this clause would operate because demurrage rates ordinarily are confidential between the parties to the vessel charter party and BHCs should not be privy to vessel demurrage rates. In any event, a AWE's ability to negotiate a low demurrage should not result in that AWE being penalised by having another vessel being given priority at berthing, because it has a higher demurrage rate.³⁰²

The following paragraphs, taken from AGEA's submission, are AGEA's views regarding CBH's non-discrimination commitments in the context of CBH making Operational Decisions:

The BHCs' discretion to make Operational Decisions is too wide and subjective. AWEs need the certainty of knowing shipping slots will be available. The Port Protocols should clearly define the obligations to accept vessel nominations. If AWEs fail to get wheat to port by the load date, AWEs forfeit the booking fee and BHCs' interests are protected.

CBH clause 9.2(d)(i) entitles BHCs to make Operational Decisions to give priority to vessels based on the *"lead time given between nomination and vessel ETA and likely availability of sufficient Bulk Wheat at the Port Terminal prior to vessel ETA"*. BHCs control the movement and accumulation of wheat at port.

CBH clause 9.2(d)(ii) provides opportunities for BHCs to restrict access to port terminal services and is vague and uncertain.

(a) In relation to CBH clause 9.2(d)(ii)(A), in the normal course of events, BHCs are not aware of the AWE's vessel demurrage rate. In any event, a AWE's ability to negotiate a

³⁰¹ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 10.4, p. 25.

³⁰² Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 10.4, pp. 25-26.

low demurrage should not result in that AWE being penalised by having another vessel being given priority at berthing, because it has a higher demurrage rate.

(b) In relation to CBH clause 9.2(d)(ii)(B), as BHCs controls the movement and accumulation of wheat at port, it is within its means to show that the throughput of bulk wheat is maximised by loading its vessels in priority to other AWEs.³⁰³

CBH clause 9.2(d)(iii) provides BHCs with very broad entitlements to vary a cargo assembly plan or queuing order of a vessel. BHCs control the movement and accumulation of wheat at port facility (CBH clause 9.2(d)(iii)(A)). BHCs should not be entitled to vary a cargo assembly plan or queuing order as a result of vessel congestion (CBH clause 9.2(d)(iii)(A)).³⁰⁴

10.3.2 Pastoralists and Graziers Association of WA (PGA)

In relation to the ability of CBH to discriminate in favour of its trading arm, GrainPool, PGA submits:

CBH exercises its monopoly power by discriminating in favour of their trading division GrainPool, which disadvantages competition by imposing unfair terms and conditions and restricting Australian wheat exporters' access to port terminal services, through the allocation of shipping slots [being] based on entitlements. As allocations are decided by CBH based on entitlement, pooling operations are favoured over non pooling entities due to volume. This may force growers into using pooling operations. [CBH's proposed] Undertaking will not prevent this behaviour continuing, to the detriment of efficiency and competition in the Australian wheat export market, reducing prices and limiting choice for Western Australian growers.³⁰⁵

The PGA submits that the ACCC should not accept CBH's proposed Undertaking.

10.3.3 Grain Industry Association of Victoria (GIAV)

The GIAV (who made its submission in relation to CBH as well as GrainCorp) submits that wheat exporters are currently discriminated against when delivering grain to CBH's ports from 'private/third party upcountry facilities'.³⁰⁶

On this issue, GIAV submits:

While recognising that section 24 of the Wheat Export Marketing Act is only directed at port terminal services, this should not deflect the underlying commercial reality that both upstream and port terminal services are provided by the same entity or related entities.

The BHCs' have demonstrated in their agreements, pricing and discussion that they intend to leverage their position at the ports to protect their upcountry system.³⁰⁷

³⁰³ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 15.5, pp. 33-34.

³⁰⁴ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 15.6, p. 34.

³⁰⁵ Pastoralists and Graziers Association, *Submission in relation to proposed CBH access undertaking*, 29 May 2009, para 2.14, pp. 3-4.

³⁰⁶ Grain Industry Association of Victoria, *Submission in relation to proposed access undertakings*, 1 June 2009, p. 2.

³⁰⁷ Grain Industry Association of Victoria, *Submission in relation to proposed access undertakings*, 1 June 2009, pp. 1-2.

10.3.4 NSW Farmers Association

The NSW Farmers Association (who made its submission in relation to CBH as well as GrainCorp) submits that CBH charges more at its ports if ‘the grain has not come from a related upcountry storage facility’.³⁰⁸ On this issue, the NSW Farmers Association states:

There appears to be a growing potential for dominant vertically integrated business models to create a lack of incentive for investment in alternative bulk storage and logistic paths to port for both themselves or others who are forced to use ‘their loading facilities and therefore ‘voluntar[il]y’ meet ‘ their access conditions.’³⁰⁹

10.4 ACCC’s views

Appropriate to include a non-discrimination clause in the proposed Undertaking

The ACCC is of the view that it is appropriate that CBH’s proposed Undertaking includes a non-discriminatory access clause obligating it to not discriminate against access seekers in favour of its affiliated trading business.

A robust non-discriminatory access clause is an important regulatory tool that can be used to constrain the behaviour of a vertically integrated owner of a key infrastructure facility. This is because many of the benefits of access to infrastructure can be lost if measures are not put into place to control potential anti-competitive leverage into related markets.

While a number of interested parties providing submissions on this process have raised allegations of current or past discriminatory conduct by CBH in favour of its trading arm, it is important to note that the ACCC, in its assessment of CBH’s proposed Undertaking, has not formed any views on the legitimacy or otherwise of these claims. To the extent that claims have raised concerns under restrictions on anti-competitive conduct in Part IV of the TPA, these matters are being assessed by the ACCC’s Enforcement and Compliance Division.

In the current process assessing the appropriateness of the proposed Undertaking pursuant to section 44ZZA(3) of the TPA, the need for a robust non-discriminatory access clause is highlighted by examining the intent of the WEMA. Clause 24 of the Explanatory Memorandum to the WEMA states:

This clause is intended to ensure that accredited exporters that own, operate or control port terminal facilities provide fair and transparent access to their facilities to other accredited exporters. The test aims to avoid regional monopolies unfairly controlling infrastructure necessary to export wheat in bulk quantities, to the detriment of other accredited exporters. All accredited exporters should have access to these facilities while allowing the operators of the facility to function in a commercial environment.³¹⁰

³⁰⁸ NSW Farmers Association, *Submission in relation to proposed access undertakings*, June 2009, p. 5.

³⁰⁹ NSW Farmers Association, *Submission in relation to proposed access undertakings*, June 2009, p. 5.

³¹⁰ Explanatory Memorandum, *Wheat Export Marketing Bill 2008* (Cth), p. 31.

As set out in the Legislative Framework chapter, the ACCC is of the view that, in the current context, ‘fair’ access ought largely to be equated with non-discriminatory access, reflecting the desirability of ensuring that access to port terminal services is, on the whole, provided on a non-discriminatory basis except where there is a legitimate reason for differential treatment.

In this regard, the ACCC recognises that a service provider may engage in price discrimination where it aids efficiency.³¹¹ In fact, price discrimination may be an essential tool to enable a network owner to recover the legitimate costs of its investment. It is likely to promote the following objectives:

- ensuring efficient use of the network;
- reducing the average price on the network; and
- minimising the risk-adjusted cost of capital.

This is recognised in the pricing principles specified in section 44ZZCA of the TPA, which provides as follows:

‘The pricing principles relating to the price of access to a service are:

- (a) that regulated access prices should
 - (i) be set so as to generate expected revenue for a regulated service or services that is at least sufficient to meet the efficient costs of providing access to the regulated service or services; and
 - (ii) include a return on investment commensurate with the regulatory and commercial risks involved; and
- (b) that the access price structures should:
 - (i) allow multi-part pricing and price discrimination when it aids efficiency; and
 - (ii) not allow a vertically integrated access provider to set terms and conditions that discriminate in favour of its downstream operations, except to the extent that the cost of providing access to other operators is higher; and
- (c) that access pricing regimes should provide incentives to reduce costs or otherwise improve productivity.³¹²

However, as set out in the Legislative Framework chapter, the ACCC is of the view that, while there is a place for price discrimination, this should only occur in specified circumstances, that is, where the cost of providing access to other operators is higher. Therefore, price discrimination in favour of CBH’s trading operations should not occur except to the extent that the cost of provision of services to other users is higher than provision of the service to itself.

The particular non-discrimination clauses proposed by CBH are not appropriate

³¹¹ *Trade Practices Act 1974* (Cth) s 44ZZCA(b)(i).

³¹² *Trade Practices Act 1974* (Cth) s 44ZZCA.

Clauses 6.4 (and 6.5)

As the ACCC explains in the Indicative Access Agreement chapter, the ACCC considers that it is not appropriate that CBH's proposed Undertaking does not include in its proposed Undertaking the minimum standard terms and conditions upon which it undertakes to offer access to its port terminal services.

As set out in the Indicative Access Agreement chapter, the ACCC considers that it would be appropriate for this standard terms and conditions to form a part of CBH's proposed Undertaking.

With minimum standard terms in the Undertaking, these terms will be binding and therefore the scope for discrimination in offering port terminal services via access agreement negotiations will be significantly reduced.

Nevertheless, the ACCC considers that it is still appropriate that CBH has included a non-discrimination clause that applies in relation to 'non-standard' terms and conditions of access, to ensure that such terms and conditions comply with the principles of non-discriminatory access.

However, the ACCC considers that the particular non-discrimination clause put forward by CBH at clause 6.4 is not appropriate having regard to the matters in section 44ZZCA(3). A simpler non-discrimination clause (as set out later in this chapter) is likely to be more appropriate.

Clause 6.4 is to be read subject to clause 6.5, which provides a wide range of caveats on the non-discrimination obligation. Read together, the ACCC is of the view that this non-discrimination clause will not achieve the objective of prohibiting CBH from discriminating in favour of its own business.

In particular, the ACCC is of the view that the following provisions at clause 6.5 are not appropriate and do not constitute legitimate grounds for discrimination:

- (c) all costs that the Port Operator incurs or may incur in providing access, including any costs of extending the Port Terminal Services, but not costs associated with losses arising from increased competition in upstream or downstream markets;*

The ACCC considers that the reference to 'all costs' is not appropriate given that the pricing principles at section 44ZZCA make reference to 'efficient costs' rather than 'all costs'.

- (d) the economic value to the Port Operator of any additional investment that the Applicant or Port Operator has agreed to undertake;*

The ACCC is of the view that this clause lacks clarity and is therefore not appropriate. For instance, it is not clear what type of investment this clause relates to. In addition, it is not clear what type of investment an 'Applicant' would agree to undertake.

- (h) the opportunity cost of accommodating the requirements of one Applicant or User compared to the requirements of one or more other Applicants or Users;*

The ACCC does not agree that opportunity cost (what is foregone by employing resources in their current use rather than the most valuable alternative use) is a relevant commercial justification for CBH to discriminate.

It is possible that ‘opportunity cost’ considerations by CBH might allow it to charge for the opportunity cost of wheat received via an alternative up-country storage and handling facility. This would clearly constitute an unreasonable justification for discrimination and is contrary to the objective of the WEMA of promoting competition in the wheat export industry.

(j) the relative risk related to storing and handling different Bulk Wheat segregations for Applicants and Users;

The ACCC believes that it would be standard commercial practice to include the cost of risk in the standard terms and conditions of access.

Non-discrimination clauses should be designed to proscribe anti-competitive conduct which favours an affiliated entity of the service provider. This type of clause is not appropriate to be included in a non-discrimination clause.

(n) differences in periods of time during which access to Port Terminal Services is required by Applicants or Users;

The ACCC considers that this clause is not appropriate because it is likely that CBH would have significant discretion over the ‘periods of time’ during which access seekers can access port terminal services. As a result, it is difficult to see how this clause could form legitimate grounds for discrimination. The ACCC is of the view that this clause does not appropriately balance the legitimate business interests of the provider with the interests of persons who might want access to the service.

(p) differences in modes of receipt, storage or outturn including different transport modes to receive Bulk Wheat and different ship configurations;

The ACCC is of the view that this clause is not appropriate. This clause, as currently drafted, lacks clarity and provides CBH with scope to discriminate based on subjective determinations on why different modes of receipt, storage and outturn would necessitate discrimination.

(q) geographic and seasonal variations;

The ACCC considers that this clause is not appropriate as it lacks clarity. For instance, it is unclear what criteria would CBH use in applying this clause.

(r) minimisation of demurrage at the port over a given period

The ACCC is of this view that this clause is also not appropriate as it lacks clarity. For instance, it is unclear who this clause refers to, and why, as AGEA notes in its submission, a wheat exporter who negotiates a lower demurrage rate should be penalised for this.

(s) maximisation of throughput of Bulk Wheat and other commodities at the port over a given period;

The ACCC considers that this clause is not appropriate as it lacks sufficient clarity and provides CBH with a level of discretion that is not appropriate. For instance, it is unclear how CBH would determine that discriminating against access seekers would in effect maximise throughput. Further, there is a lack of clarity around what the term ‘over a given period’ refers to.

(u) the credit risk of an Applicant or User;

The ACCC is of the view that clauses relating to ‘the credit risk of an Applicant or User’ are more appropriately included in section 7 of CBH’s proposed Undertaking – ‘Negotiating for Access’. Credit risk matters are an ex ante consideration and generally would be dealt with in relation to negotiation for access. It is unclear why it would need to be used as a justification for discriminating against particular Applicants or Users.

In relation to the other matters within 5.5:

- (a) the economically efficient operation of the Port Terminal Services, the Port Terminal Facilities and the Port Terminal;
- (b) the Port Operator's legitimate business interests and investment in the Port Terminal Services, Port Terminal Facilities and the Port Terminal;
- (e) the interests of all persons who have rights to use the Port Terminal;
- (f) the operational and technical requirements necessary for the safe and reliable operation of the Port Terminal Services, the Port Terminal Facilities and the Port Terminal;
- (g) any differences in the costs of providing access to Port Terminal Services to different Applicants or Users;
- (i) the provision of quality related services reasonably required by the Port Operator in respect of some Applicants or Users, but not others including security of Bulk Wheat integrity, testing of Bulk Wheat or Bulk Wheat classification, fumigation and protection requirements for Bulk Wheat;
- (k) available Port Terminal capacity, including receipt, handling, storage and cargo accumulation capacity;
- (l) differences in types and grades of Applicants’ or Users’ Bulk Wheat;
- (m) differences in Applicants’ or Users’ Bulk Wheat volumes;
- (o) differences in levels of Applicants’ or Users’ usage of Port Terminal Services; and
- (t) unless the Port Operator is offering segregated services at a Port Terminal, the ability to mix the same grade of Bulk Wheat owned by different owners and / or mix different grades of Bulk Wheat owned by the same or different owners;

it is unclear why CBH considers it is necessary for them to be expressly mentioned as caveats to the non-discrimination clause. These factors appear to relate to normal commercial reasons for differentiating between services provided to different access seekers (although the precise meaning of some of the factors is unclear).

As noted above, a robust non-discrimination clause aims to prevent discrimination by the bulk handler against access seekers *in favour* of its affiliated businesses (except to the extent that the cost of provision of services by CBH to other access seekers is higher than provision of the service to itself).

Treating access seekers differently purely because of legitimate commercial factors will *not* be caught by a properly drafted non-discrimination clause.

Clauses 9.2(b)(ii) and 9.2(d) – Non-discrimination in making Operational Decisions

The ACCC is of the view that it is appropriate for CBH to include a non-discrimination clause in relation to its operational decisions.

CBH's non-discrimination provision at clause 9.2(b)(ii) is to be read together in conjunction with another clause (in this case, the qualification at clause 9.2(c)). Further, in the making of Operational Decisions, CBH's proposed Undertaking provides for (at clause 9.2(d)) the matters at clause 6.5 to be taken into consideration.

Clause 9.2(d) provides a range of justifications for prioritising vessels and varying cargo assembly plans.

The ACCC is of the view that, read together with clauses 6.5 and 9.2(d), the non-discrimination clause in 9.2(b)(ii) would not achieve the objective of prohibiting CBH from 'discriminating in favour of its own business'.

This is because, as explained above, clause 6.4 sets out an inappropriately broad and unclear list of caveats to the non-discrimination clause. Further, clause 9.2(d) also sets out a number of other justifications for prioritising vessels.

As a general point (without commenting on the appropriateness of the factors in clause 9.2(d)), the ACCC considers that it is not appropriate that clause 9.2(d) contains provisions relating to prioritising vessels and varying cargo assembly plans. Similar provisions are set out in CBH's port terminal rules. For the sake of clarity, all provisions regarding capacity management should be set out in the port terminal rules (which the ACCC, as noted in the Capacity Management chapter, considers should be attached to the proposed Undertaking).

Clause 9.2 of CBH's proposed Undertaking is discussed further in the Capacity Management chapter of this draft decision.

A more appropriate non-discrimination clause

The ACCC notes that non-discrimination clauses applicable in other regulated industries tend to be significantly less complex than the non-discrimination clauses set out in CBH's proposed Undertaking.

For instance, in relation to regulated gas pipelines, the National Gas Law states that a covered service provider providing light regulation services must not engage in price discrimination other than price discrimination ‘that is conducive to efficient service provision’.³¹³

The ACCC considers that non-discrimination obligations would be better addressed via a single clause. That is, the ACCC takes the view that it would be more appropriate that clauses 6.4 and 9.2 be combined to create a single non-discriminatory access clause.

In addition, the ACCC is of the view that a clearer and more concise non-discriminatory access clause is more likely to be appropriate. For example, for the reasons set out above, the ACCC is more likely to consider appropriate the following type of non-discrimination clause:

CBH must not discriminate in providing port terminal services

In providing access to Port Terminal Services, CBH must not discriminate between different Applicants or Users (including its own Trading Division) in favour of its own Trading Division except to the extent that the cost of providing access to other Applicants or Users is higher.

For the avoidance of doubt, the non-discrimination clause should protect against (amongst other matters) the ability of CBH to anti-competitively discriminate between wheat exporters on the basis of where grain was stored (ie. whether it was stored in CBH’s up-country storage and handling network, a third party storage network or on-farm).

No hindering access clause on its current terms is not appropriate

In relation to the ‘No hindering access’ clause at 9.3, the ACCC considers that it is appropriate that such a clause be included in CBH’s proposed Undertaking. Such a clause is consistent with the objective of the WEMA of ensuring that vertically integrated bulk handling companies provide fair and transparent access to their facilities to other accredited exporters.

However, the ACCC is of the view that the drafting of clause 9.3 is not appropriate as the terms of the clause would likely prove difficult to interpret. In particular, the ACCC considers that the phrase ‘in the exercise of a reasonable right of access’ is ambiguous and the implications of the phrase for the operation of the clause are unclear.

The ACCC notes that clause 9.3 of CBH’s proposed Undertaking partially reflects s44ZZ of the Act – ‘Prohibition on hindering access to declared services’, which states:

Prohibition on hindering access to declared services

- (1) The provider or a user of a service to which a third party has access under a determination, or a body corporate related to the provider or a user of the service, must not engage in

³¹³ *National Gas (South Australia) Act 2008* (SA) Schedule, National Gas Law, clause 136.

conduct for the purpose of preventing or hindering the third party's access to the service under the determination.

- (2) A person may be taken to have engaged in conduct for the purpose referred to in subsection (1) even though, after all the evidence has been considered, the existence of that purpose is ascertainable only by inference from the conduct of the person or from other relevant circumstances. This subsection does not limit the manner in which the purpose of a person may be established for the purposes of subsection (1).
- (3) In this section, a user of a service includes a person who has a right to use the service.³¹⁴

The ACCC notes that s44ZZ(2) explains the concept of ‘for the purpose of preventing or hindering the third party’s access’. In order to promote certainty and clarity for access seekers, the ACCC considers that clause 9.3 of CBH’s proposed Undertaking would be more appropriate if it reflected the terms of s44ZZ of the Act.

Enforcement of non-discrimination commitments

The ACCC notes AGEA’s submission that it would be appropriate for CBH’s proposed Undertaking to provide for an annual audit procedure of compliance with the Undertakings non-discrimination clause.

The ACCC agrees that such a procedure would assist in the enforcement of the non-discrimination provision and seeks submissions on whether such a procedure would be appropriate taking into account the matters in section 44ZZA(3).

³¹⁴ *Trade Practices Act 1974 (Cth)*, s 44ZZ.

11 Ring-Fencing

Ring-fencing is one tool that can be used, in conjunction with robust non-discrimination and no hindering access clauses, fair and transparent port terminal protocols and an indicative access agreement to protect against anti-competitive discrimination.

The ACCC notes that CBH is already subject to ring-fencing arrangements arising from the ACCC's decision not to revoke a 'notification' from CBH relating to a component of its Grain Express product in 2008. CBH's ring-fencing rules in its proposed Undertaking differ in some respects from the ring-fencing arrangements which form part of CBH's Grain Express exclusive dealing notification. For instance, the Grain Express ring-fencing policy provides for a more robust complaints handling/resolutions process than the process provided in its proposed Undertaking.

The ACCC is therefore of the view that the ring-fencing rules in CBH's proposed Undertaking would not, in their current form, serve as an effective safeguard against anti-competitive discrimination in the provision of port terminal services.

However, were CBH's proposed Undertaking amended to contain robust non-discrimination and no hindering access clauses, fair and transparent port terminal protocols and an indicative access agreement (as well as measures to deal with the potential for information about port terminal services to be used to the advantage of CBH's wheat exporting arm – such as the publication measures described in the Other Issues chapter), then, in the circumstances, it would not be necessary for CBH to include ring-fencing measures in its undertaking at this particular point in time.

In forming this view, the ACCC has taken into account the transitional nature of the industry and the possibility that any ring-fencing measures that were implemented at this point in time could need to be revised in the near future in accordance with any regulatory changes (either to extend or reduce the regulation to which CBH is subject). The ACCC considers that this would be an undesirable outcome in that it could impose unnecessary regulatory costs during a time of industry transition.

The ACCC has also taken into account the short duration of CBH's proposed Undertaking and will closely monitor the effectiveness of its undertaking in ensuring against anti-competitive discrimination during its operation.

The ACCC notes that, once the regulatory framework to which CBH is subject is more certain, any future undertaking submitted by CBH may need to include robust ring-fencing rules which cover CBH's port operations.

It is important to note that the ACCC's approach taken to ring-fencing in assessing this particular access undertaking is not indicative of the approach to ring-fencing that the ACCC would be likely to take in relation to other regulated industries. The approach taken on this occasion reflects the factors outlined above, and in particular, that the industry is still transitioning from having a single desk responsible for the export of wheat in mid 2008 to the current situation of having 23 wheat exporters accredited to export wheat from Australia; and that the arrangements can be revisited in two years.

Finally, it is also important to note that the ACCC's approach to CBH's ring-fencing measures in this draft decision has no bearing on the need for CBH to continue compliance with the ring-fencing arrangements it agreed to adhere to in conjunction with the ACCC's decision not to revoke the 'notification' relating to a component of the Grain Express product.

CBH's agreement to comply with these ring-fencing measures formed an important part of the ACCC's decision not to revoke the notification. Accordingly, the ACCC does not accept CBH's position that ring-fencing measures provided to the ACCC in conjunction with the current access undertaking assessment can apply in substitution for those arrangements referred to in CBH's Grain Express notification to the ACCC.

11.1 CBH's proposed undertaking

CBH's Undertaking includes Information and Operational Segregation Rules (ring-fencing rules) at Schedule 2 of its proposed Undertaking³¹⁵. Given that these rules are fairly extensive, a summary (rather than the entirety of the rules) has been set out below.

Application

Clause 2 provides that the ring fencing rules 'apply in substitution for the ring-fencing arrangements referred to in the Port Operator's Grain Express notification to the ACCC'.³¹⁶

Organizational structure

Clause 3 provides:

- (a) The Port Operator organisational structure includes its:
 - (i) Chief Executive Officer (CEO), Chief Operating Officer (if any) and Board;
 - (ii) Operations Business; and
 - (iii) Support Services Staff.
- (b) Any Trading Business must be operationally distinct from the Port Operator and its Other Business Units, and must be managed by its own Board and management structure.
- (c) Each of the General Managers of the Operations Business and the Trading Business may report directly to the CEO (or COO) and Board, but the Operations Business and the Trading Business shall otherwise be operated as distinct businesses.
- (d) The functions and responsibilities of the Operations Business include
 - (i) planning, maintenance and operations of upcountry receival and storage facilities;

³¹⁵ Co-operative Bulk Handling Limited, *Port Terminal Services Access Undertaking*, 14 April 2009, Schedule 2, p. 28-35.

³¹⁶ Co-operative Bulk Handling Limited, *Port Terminal Services Access Undertaking*, 14 April 2009, Schedule 2, p. 28.

- (ii) management of road and rail freight contracts and arrangements;
- (iii) gathering and managing information on grain quality, quantity and grade;
- (iv) negotiation and management of storage and handling agreements with marketers;
- (v) management and operation of the Metro Grain Centre;
- (vi) management, maintenance and operation of port storage and ship loading facilities; and
- (vii) provision of crop forecasting and information services to growers.

Separation of business units

Clause 4 provides:

The Port Operator must implement measures to ensure that:

- (a) its Trading Business is organisationally and operationally separate from its Other Business Units; and
- (b) its Trading Business does not carry out any Port Terminal Services.

Separation of work areas

Clause 5 provides:

The Port Operator must ensure that its Trading Business and its Other Business Units have separate work areas. The Port Operator must not permit employees of its Trading Business (other than Support Services Staff) to enter a work area of the Operations Business Unit except where such access is for the purpose of arm's length dealings regarding the provision of services to the Trading Business.

Separation of employees

Clause 6 provides:

(a) The Port Operator must ensure that employees, other than Support Services Staff, who are involved in the operations of the:

- (i) Operations Business are not also simultaneously involved in the operations of the Trading Business; and
- (ii) Trading Business are not also simultaneously involved in the operations of the Operations Business.

(b) In respect of:

- (i) a previous Trading Business employee (other than Support Services Staff); and
- (ii) a previous Third Party Trader employee,

who was involved in any trading or marketing of Bulk Wheat and who commences employment with the Operations Business, the Port Operator must not permit that

person to be involved in any activities regarding an Access Application by the Trading Business or the Third Party Trader respectively:

(iii) for a period of three months commencing on the date that person ceases employment with the Trading Business or the Third Party Trader; or

(iv) if at the date of that person ceasing employment with the Trading Business or the Third Party Trader, the Operation Business was considering an Access Application by the Trading Business or the Third Party Trader, until the later of either the Access Application being withdrawn, an Access Agreement being executed, or the making of an arbitration determination regarding the Access Application,

whichever is the later.

(c) A previous Operations Business employee (other than Support Services Staff) who commences employment with the Trading Business must not be involved in any activities regarding an Access Application for a period of three months commencing on the date that person ceased employment with the Operations Business.

Accounting separation

Clause 7 provides:

(a) The Port Operator must make arrangements, including the preparation of procedures and policies, to effectively ensure that it maintains audited separate accounts and accounting arrangements for the Trading Business, so as to give a true and fair view of the costs relating to the Trading Business as distinct from other costs incurred by the Port Operator.

(b) Without limiting item 7(a), the accounts and records of the Trading Business must be kept in a way that enables all income, expenditure, assets and liabilities relating to the carrying out of its business activities and operations to be properly recorded and distinguished from the other income, expenditure, assets and liabilities of the Port Operator and its Related Bodies Corporate.

(c) Without limiting the ACCC's powers under these ring fencing rules or otherwise, the Port Operator must provide the ACCC with such documents, including copies of the procedures and policies described in this item 7, as the ACCC may reasonably request when directing an audit under item 13, for the purpose of ascertaining whether the Port Operator is complying with its obligations under this item 7.

Information technology access controls and information flows

Clause 8 provides:

(a) The Port Operator must establish, maintain and enforce appropriate controls regarding access to information technology systems, such that Third Party Confidential Information may be accessed only by:

- (i) employees of the Operations Business; and
- (ii) Support Service Staff.

(b) Subject to item 8(c), the Operations Business must not:

- (i) disclose Third Party Confidential Information to other entities, including its own Related Bodies Corporate and their employees;
- (ii) use Third Party Confidential Information for the purpose of substantially damaging the Third Party to whom the Third Party Confidential Information relates

or conferring upon the Trading Business an unfair competitive advantage over any Third Party in the marketing of Bulk Wheat; or

(iii) allow other entities, including its own Related Bodies Corporate and their employees, to access Third Party Confidential Information in the Port Operator's possession.

(c) The Operations Business may disclose:

(i) to a Third Party, Third Party Confidential Information that solely relates to that Third Party's Bulk Wheat; or

(ii) subject to item 8(d), to any person, information concerning the grade, quality, quantity, location or attributes of Bulk Wheat received by the Port Operator (Receival Specific Information), provided that the Receival Specific Information is either aggregated to such an extent that, or stripped of the identity of the parties to which the information relates so that, the recipient of the aggregated or deidentified information without access to the pre-aggregated or pre-deidentified Receival Specific Information would not be capable of identifying information specific to any particular Third Party.

(d) Item 8(c)(ii) shall not apply to prohibit the Operations Business from disclosing Third Party Confidential Information amongst its employees, advisors and contractors on a need to know basis.

(e) The Operations Business must maintain a current register of all persons who use its Bulk Wheat management database.

(f) The Operations Business must not allow the Trading Business' employees to access Third Party Confidential Information through Operations Business' databases

Third Party Confidential Information is defined as:

Third Party Confidential Information means information exchanged between a Third Party and the Operations Business (or any of their nominated representatives) that:

(a) is information of the Third Party which is by its nature confidential or which is designated by the Third Party as being confidential;

(b) relates to a Third Party's entitlement to or interest in any Bulk Wheat delivered to or held in the custody of the Port Operator, unless authorised to be disclosed by the Third Party;

(c) relates to the origin, grade, quality, quantity, location or attributes of Bulk Wheat owned by the Third Party; but excludes information that:

(d) is required to be disclosed under the WEMA;

Outsourcing

Clause 9 provides:

If the Operations Business or the Trading Business arranges for another entity to perform any of its functions or operations, it must ensure that the entity complies with these ring fencing rules as if it were the Operations Business or the Trading Business, as the case may be.

Policies, procedures and systems

Clause 10 provides:

(a) The Port Operator must establish, maintain and comply with auditable policies, procedures and systems for the purpose of ensuring compliance with the Port Operator's obligations under these ring fencing rules.

(b) The policies, procedures and systems must include, without limitation, policies, procedures and systems:

(i) for the maintenance of a register and records of the Port Operator's employees which must identify the name of each employee (including the executive officer or officers to whom employees report either directly or indirectly), their position, and confirmation of whether they are Support Services Staff, employees involved in the Operations Business, or employees involved in the conduct of any Trading Business;

(ii) for the transfer of employees between the Trading Business and the Other Business Units which complies with items 6(b) and 6(c);

(iii) governing access to the information technology systems of and information about the Operations Business;

(iv) for the flow of information between the Operations Business and the Trading Business, and from the Operations Business and the Trading Business to the Port Operator's directors, officers and senior management;

(v) for the treatment of Third Party Confidential Information;

(vi) for the outsourcing of any functions or operations of the Operations Business;

(vii) for the training of employees about the obligations imposed on the Port Operator and under these ring fencing rules; and

(viii) for dealing with any complaints made by a Third Party in connection with a reasonably founded and credible belief that the Port Operator has not complied with these ring fencing rules.

Employee training

Clause 11 provides:

(a) The Port Operator's employees will be made aware that:

(i) a failure to comply with the Port Operator's obligations under these ring fencing rules may constitute a disciplinary offence and expose both the employee and the Port Operator to penalties for a breach of the TPA or the WEMA; and

(ii) they should contact the Port Operator's legal department if they have any concerns regarding these ring fencing rules, including their application to any particular conduct, or the employee's adherence to them.

(b) The Port Operator will provide and publish information and guidance to its employees to ensure, so far as is reasonably practicable, that they are made aware of their obligations under these ring fencing rules.

(c) The Port Operator will provide training to its employees who:

(i) deal directly with Third Parties;

(ii) are involved directly in providing Third Parties with access to Port Terminal Services; and

(iii) have access to Receival Specific Information;

to ensure, so far as is reasonably practicable, that they are made aware of their obligations under these ring fencing rules.

(d) If any Port Operator employee is knowingly involved in conduct that breaches these ring fencing rules, or any specific process created to implement these ring fencing rules, then without prejudice to any other action that the Port Operator may be required by law to take, or shall otherwise think appropriate:

(i) the conduct of that employee will be taken into account in relation to their performance appraisal and remuneration review; and

(ii) that employee shall receive such training as determined by the Port Operator's compliance manager.

(e) The Port Operator will make its employees aware that engaging in deliberate conduct in repeated or serious breach of these ring fencing rules will be grounds for dismissal.

Complaints handling

Clause 12 provides:

(a) If a Third Party considers on reasonable and credible grounds that the Port Operator has not complied with these ring fencing rules, they may lodge a written complaint (including detailed grounds and supporting evidence for the complaint) with the CEO of the Port Operator Group.

(b) A complaint must be referred to:

(i) the Operations Business' General Manager;

(ii) the Port Operator Group General Counsel; or

(iii) the Port Operator's compliance officer.

(c) The Port Operator must conduct an internal investigation of the complaint, to determine whether there has been a compliance failure by the Port Operator.

(d) If that investigation concludes that the Port Operator has committed a breach of these ring fencing rules, the Port Operator must:

(i) inform the complainant of that finding; and

(ii) if the Port Operator (acting reasonably) considers that the breach has:

(A) given rise to substantial financial loss to the complainant; or

(B) conferred an unfair substantial competitive advantage on any User; or

(C) occurred more than once in any three year period;

the Port Operator must appoint an appropriately qualified external auditor to conduct a review of the breach and an investigation of the Port Operator's compliance with the relevant ring fencing rules.

(e) The auditor will compile a report identifying:

- (i) whether the Port Operator has complied with the ring fencing rules that were the subject of the investigations described in items 12(c) and 12(d)(ii);
- (ii) if the auditor determines that the Port Operator has not complied with these ring fencing rules, state the particulars of the noncompliance;
- (iii) state the process adopted for the review; and
- (iv) provide recommendations for appropriately addressing the compliance failure.

Audit

Clause 13 provides:

- (a) The Port Operator's compliance with these ring fencing rules, and the Port Operator's related processes and procedures, must be audited by an independent auditor at such times as the ACCC may reasonably direct, but not more than once in any 12 month period.
- (b) The Port Operator must select the independent auditor and must notify the ACCC of the appointment (including the auditor's name and qualifications).
- (c) The auditor shall review:
 - (i) records of any complaints;
 - (ii) the Port Operator's compliance with these ring fencing rules;
 - (iii) all relevant policies or procedures implemented under or otherwise relating to these ring fencing rules; and
 - (iv) any other issues relevant to the Port Operator's compliance with the principles and obligations under these ring fencing rules.
- (d) The auditor's report must be provided to the ACCC and include:
 - (i) recommendations for any necessary improvements in the Port Operator's policies or processes and any response by the Port Operator to those recommendations; and
 - (ii) a report on the Port Operator's past compliance with any recommendations previously made by an auditor in respect of these ring fencing rules.

11.2 CBH's submissions

CBH states that the 'provision of Port Terminal Services provides the relevant Port Operator with very limited (and only a very partial picture of) the sales arrangements of the relevant customer'³¹⁷ and states that the Port Operator will not have any information about:

- (i) the identity of the ultimate customer (unless there is a monopoly buyer at the relevant destination port). This is particularly the case as grains are often traded several times while they remain in the logistics or delivery chain;
- (ii) the price at which, or other terms on which, the wheat was sold;

³¹⁷ Co-operative Bulk Handling Limited, *Submission to the ACCC*, 14 April 2009, para 4.9, p. 29.

- (iii) the date on which the exporter won the tender, or entered into the contract, to supply the wheat;
- (iv) whether the exporter is fulfilling the entire customer order from wheat exported from that port (or whether the exporter is supplementing the order from wheat exported from any other port around the world);
- (v) whether the grains exported will be blended with any other grains at another location after export;
- (vi) each of the other arrangements that the exporter may have to acquire wheat, trade wheat or supply wheat, either in Australia or overseas; or
- (vii) any of the customers' future tenders, contracts, marketing proposals or trading positions.

CBH submits:

Put simply, a snapshot of information about the volume of grain to be exported on one or more vessels provides the Port Operator with absolutely no visibility of the exporter's wider trading operations. That position is determined by the owner's stocks, purchases and sales of wheat at a global level and over a period of time:

Trading Position = Contracted Purchases + Stock on hand – Contracted Sales

Port Operators are not aware of or privy to a wheat owner's sale and purchase contractual arrangements, the prices at which those sales take place, the wheat owner's trading position or any information in relation to competition for future sales'.³¹⁸

CBH considers that the ring fencing measures in its proposed Undertaking are 'substantially more detailed than those regarded as acceptable by the ACCC in its consideration of the Grain Express Notification'. CBH states that it has adopted 'a more detailed approach in recognition of the WEMA's focus on vertical integration issues'³¹⁹ and states that it 'accepts that appropriate measures are required to address both the perception and potential reality of discrimination'.³²⁰

CBH states that the audits provided for in its ring-fencing rules will identify breaches of the ring-fencing rules.³²¹ CBH submits that 'the ACCC will have the opportunity to consult with CBH as to the selection and appointment of the auditor. If the ACCC objects to CBH's nomination, CBH will choose an alternative auditor, provided that one is available'.³²²

On its proposed accounting separation regime, CBH states the following:

The costs for Grain Pool are managed and processed for accounting separately and Grain Pool is required to prepare a separate audited financial report in accordance with accounting standards and Corporations Act requirements.

In addition, there is a separation of individuals responsible for processing transactions on Grain Pool's behalf from other entities = such separation arrangements include a separate system for processing grower payments from Grain Pool

³¹⁸ Co-operative Bulk Handling Limited, *Submission to the ACCC*, 14 April 2009, para 4.9, p. 30.

³¹⁹ Co-operative Bulk Handling Limited, *Submission to the ACCC*, 14 April 2009, para 5.9, p. 38.

³²⁰ Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 75.

³²¹ Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 66.

³²² Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 88.

Grain Pool is also charged a shared services fee monthly for the costs of shared services provided to Grain Pool. This includes finance, HR, ICT, executive time, etc

The audit team from Ernst & Young for Grain Pool is also separate from the CBH audit team and that Ernst & Young audit team audits and verifies that all costs are correctly allocated to the right entity.

....

The Annual Report of Co-operative Bulk Handling Limited complies with Australian Accounting Standards which include Australian equivalents of International Financial Reporting Standards (AIFRS) and also complies with International Financial Reporting Standards (IFRS). Further, a breakdown of operating segments is provided by business unit., for which, CBH has adopted AASB 8 – Operating Segments as the means of reporting. To allow this report to be properly audited CBH records profit and loss on a divisional basis. In the case of Grain Pool, separate special purpose accounts are filed with the Australian Securities and Exchange Commission. An example of these segment accounts are shown below.³²³

CBH submits that

Any ring-fencing arrangement must distinguish between legitimate and prohibited information flows. To prohibit all information flows would be an unworkable outcome. The Undertaking takes an orthodox, measured approach to this issue. Clause 6(c)(ii) refers to information that is intended to be placed in the public domain. CBH will not provide any information to GPPL that is not available to all other exporters. The complaints handling procedure is not limited to CBH. The auditor will review all complaints under clause 13.³²⁴

11.3 Submissions received from interested parties

11.3.1 Australian Grain Exporters Association

In relation to CBH's ring fencing rules, AGEA submits that the clauses relating to separate business units and work areas 'does not of itself protect the flow of confidential information. CBH has not explained any process it intends to implement to create or ensure Chinese Walls exist'.³²⁵ On this issue, AGEA submits the following:

If the work areas are to be kept separate, no employees should be permitted access to the other businesses' work area. Qualifying the issue of access to permit such access for the alleged "purpose of arm's length dealings" allows the ring-fencing arrangement to breakdown.³²⁶

AGEA submits that CBH clause 6(a) of its ring fencing rules, which permits Support Services Staff to be involved in the Operations Business and the Trading Business provided such involvement is not simultaneous, 'is inadequate and it is not clear why it is limited to Support Services Staff'. AGEA submits that:

there must be a strict separation of all staff at all times. Further, no employee of the Trading Business or any employee of a previous Third Party Trader should be permitted to be employed

³²³ Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, pp. 85-86.

³²⁴ Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 66.

³²⁵ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 16.7, p. 35.

³²⁶ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 16.8, p. 35.

with the Operations Business for at least 12 months after they cease employment with the Trading Business or a previous Third Party Trader (and vice versa).³²⁷

On CBH clause 6(c)(ii), AGEA submits:

Clause 6(c)(ii) allows the Operations Business to pass on to "any person" information concerning grade, quality quantity, location or attributes of bulk wheat received by CBH, provided that the information is aggregated. That the information is aggregated does not render it useless and, in fact, providing that information may confer an unfair advantage to the particular exporter to the detriment of the applicant or user. This clause entitles CBH to provide GrainPool with valuable information that is not available to AWE. For example, GrainPool will know what grain is stored and where throughout the CBH grain system, which will assist GrainPool to plan its sales contracts, and vessel requirements. Understanding what portion / grades of crop is sold / warehoused gives GrainPool significant advantage in planning sales programs and potential when setting bids for acquisition.³²⁸

AGEA submits that CBH clause 8(d) is 'vague and uncertain' and states that it is unclear what is a 'need to know basis' in the context of allowing the disclosure of prohibited information.³²⁹

AGEA submits that the complaints handling procedure in CBH's ring fencing rules 'must provide for complaints to be made to an independent third party'. AGEA submits that 'CBH lacks the impartiality to conduct a proper and independent investigation into a complaint about its own potential breach of the ring fencing rules'.³³⁰

11.3.2 WA Department of Agriculture and Food (DAFWA)

DAFWA notes CBH's ring fencing provisions but states that it:

'is of the view that the best solution for this issue would be for CBH to 'spin off' its grain marketing operations (Grain Pool Pty Ltd) as a separate commercial entity and retain CBH purely as a grower owned and operated storage and handling entity. In the event that this occurs the need for a Port Services Access Undertaking would appear to be redundant'.³³¹

On this point, DAFWA adds that:

'[o]ften perception is as damaging as reality, hence DAFWA suggests the only way to overcome this issue is true separation of the two entities'.³³²

³²⁷ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 16.9, p. 36.

³²⁸ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 16.10, p. 36.

³²⁹ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 16.11, p. 36.

³³⁰ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 16.12, p. 36.

³³¹ Department of Agriculture and Food Western Australia, *Submission in relation to proposed CBH access undertaking*, 18 May 2009, para 6.1, p. 2.

³³² Department of Agriculture and Food Western Australia, *Submission in relation to proposed CBH access undertaking*, 18 May 2009, para 6.12, p. 3.

11.3.3 The Western Australian Farmers Federation (WA Farmers)

WA Farmers is of the view that CBH's ring fencing rules are adequate. WA Farmers submits:

Through regular interactions with CBH, WA Farmers is satisfied that CBH has amended and implemented its existing ring fencing arrangements from its Grain Express project as per CBH's Port Terminal Services Access Undertaking, Schedule 2 – Information and Operational Segregation Rules.

The new arrangements include provisions for the legally distinct entities to conduct trading activities, which has resulted in the physical segregation and accounting separation of these entities whereby information flow is restricted and compliance is ensured via external independent audits.³³³

11.3.4 Pastoralists and Graziers Association of WA (PGA)

In relation to CBH's ring-fencing rules, the PGA submits that it considers that the ring-fencing arrangements are inadequate.³³⁴

PGA submits:

The ACCC has proposed that ring fencing rules are critical to a fair and transparent access regime. The CBH Undertaking states that its ring fencing measures are substantially more detailed than those regarded as acceptable by the ACCC.

CBH has an obvious conflict of interest. It has enormous potential and real incentive to exercise their monopoly power in the bulk handling services market to inhibit competition by discriminating in favour of their Trading Division Grain Pool and restricting access to services.

The CBH Undertaking sets out details of CBH's organisational structure and undertakes to implement measures to ensure that CBH's trading arm is organisationally separate from its other business units. The CBH Undertaking provides for the separation of work areas, and separation of employees and for information technology access controls.

The PGA considers these arrangements to be inadequate. The ringed fencing provisions provide that CBH's Trading Business and Other Business Units must have separate work areas. The PGA understands that CBH's Trading Business and Other Business Units occupy different floors (one level apart) in the same building. The physical separation of work areas does not of itself protect the flow of confidential information. CBH has not explained any process it intends to implement to create or ensure Chinese Walls exist.

If the work areas are to be kept separate, no employees should be permitted access to the other businesses' work area. The proposed arrangements permit Support Services Staff to be involved in the Operations Business and the Trading Business, provided such involvement is not "simultaneous". This is inadequate and it is not clear why it is limited to Support Services Staff. There must be a strict separation of all staff at all times.

The proposed arrangements also allow the Operations Business to pass on to "any person" information concerning grade, quality quantity, location or attributes of bulk wheat received by CBH, provided that the information is aggregated. That the information is aggregated does not render it useless and, providing that information may confer an unfair advantage to the particular exporter to the detriment of the applicant or user. This may entitle CBH to provide GrainPool with valuable information that is not available to its competition. GrainPool may be permitted to know the quantities and types of grain is stored throughout the CBH system, which may assist

³³³ The Western Australian Farmers Federation (Inc), *Submission in relation to proposed CBH access undertaking*, 29 May 2009, p. 3.

³³⁴ Pastoralists and Graziers Association, *Submission in relation to proposed CBH access undertaking*, 29 May 2009, para 4.22-4.28, pp. 10-11.

GrainPool to plan its sales contracts, and vessel requirements, giving them a significant advantage over their competition.

Example: On 21 January 2009 growers in Western Australia received a letter from the Grain Pool advising them that the Grain Pool had entered into a “strategic partnership with leading WA plant breeder InterGrain to develop a market for premium noodle [wheat] varieties.”¹⁰

After the PGA had publicly questioned the validity of this arrangement, the PGA was contacted by the CBH General Manager Corporate Affairs and Grower Services to attend a meeting between Grain Pool and InterGrain to discuss this issue. Although the meeting was attended only by members of Grain Pool, it is concerning that management between the two entities interact and freely discuss information.

The complaints handling procedure in the proposed arrangements does not provide for complaints to be made to an independent third party. CBH may lack the impartiality to conduct a proper and independent investigation into a complaint about its own potential breach of the ring fencing rules.

11.4 ACCC’s views

Ring-fencing is one tool that can be used, in conjunction with robust non-discrimination and no hindering access clauses, fair and transparent port terminal protocols and an indicative access agreement to protect against anti-competitive discrimination.

The ACCC notes that CBH is already subject to ring-fencing arrangements arising from the ACCC’s decision not to revoke a ‘notification’ from CBH relating to a component of its Grain Express product in 2008. CBH’s ring-fencing rules in its proposed Undertaking differ in some respects from the ring-fencing arrangements which form part of CBH’s Grain Express exclusive dealing notification. For instance, the Grain Express ring-fencing policy provides for a more robust complaints handling/resolutions process than the process provided in its proposed Undertaking.

The ACCC is therefore of the view that the ring-fencing rules in CBH’s proposed Undertaking would not, in their current form, serve as an effective safeguard against anti-competitive discrimination in the provision of port terminal services.

However, were CBH’s proposed Undertaking amended to contain robust non-discrimination and no hindering access clauses, fair and transparent port terminal protocols and an indicative access agreement (as well as measures to deal with the potential for information about port terminal services to be used to the advantage of CBH’s wheat exporting arm – such as the publication measures described in the Other Issues chapter), then, in the circumstances, it would not be necessary for CBH to include ring-fencing measures in its undertaking at this particular point in time.

In forming this view, the ACCC has taken into account the transitional nature of the industry and the possibility that any ring-fencing measures that were implemented at this point in time could need to be revised in the near future in accordance with any regulatory changes (either to extend or reduce the regulation to which CBH is

subject).³³⁵ The ACCC considers that this would be an undesirable outcome in that it could impose unnecessary regulatory costs during a time of industry transition.

The ACCC has also taken into account the short duration of CBH's proposed Undertaking and will closely monitor the effectiveness of its undertaking in ensuring against anti-competitive discrimination during its operation.

The ACCC notes that, once the regulatory framework to which CBH is subject is more certain, any future undertaking submitted by CBH may need to include robust ring-fencing rules which cover CBH's port operations.

It is important to note that the ACCC's approach taken to ring-fencing in assessing this particular access undertaking is not indicative of the approach to ring-fencing that the ACCC would be likely to take in relation to other regulated industries. The approach taken on this occasion reflects the factors outlined above, and in particular, that the industry is still transitioning from having a single desk responsible for the export of wheat in mid 2008 to the current situation of having 23 wheat exporters accredited to export wheat from Australia; and that the arrangements can be revisited in two years.

Finally, it is also important the note that the ACCC's approach to CBH's ring-fencing measures in this draft decision has no bearing on the need for CBH to comply with the ring-fencing arrangements it agreed to adhere to in conjunction with the ACCC's decision not to revoke the 'notification' relating to a component of the Grain Express product.

CBH's agreement to comply with these ring-fencing measures formed an important part of the ACCC's decision not to revoke the notification. Accordingly, the ACCC does not accept CBH's position that ring-fencing measures provided to the ACCC in conjunction with the current access undertaking assessment can apply in substitution for those arrangements referred to in CBH's Grain Express notification to the ACCC.

³³⁵ For example, the ACCC notes the planned Productivity Commission review of the WEMA and statements by the Federal Government that it will monitor developments in the up-country stages of the grain supply chain

12 Capacity Management

Summary

It is not appropriate that CBH's proposed Undertaking does not include its policies and procedures for managing demand for the Port Terminal Services (including policies and procedures relating to the nomination and acceptance of ships to be loaded using the Port Terminal Service) (together, Port Terminal Rules, or PTRs), given that these documents set out the key processes by which CBH will allocate and manage port terminal capacity.

However, the ACCC considers it desirable that CBH has the flexibility to run its operations in an efficient manner. However, access seekers must have a sufficient degree of notice about amendments and it should be made clear that any variations will be subject to the non-discrimination clauses in the Undertaking. It is also desirable that the PTRs include a swift dispute resolution mechanism.

In the interests of retaining flexibility and efficiency, the ACCC would be prepared for the variation mechanism to be based on a robust industry consultation process rather than a formal ACCC consultation process. The ACCC will, however, closely monitor the success of this variation method and will take its findings into account in any future review of access undertakings.

To ensure that the PTRs that have been varied can be enforced, a provision should be included in the Undertaking that obliges CBH to comply with the PTRs (as varied from time to time). In addition, a provision should be included in the undertaking that states that any variations to the PTRs are subject to the non-discrimination provisions of the undertaking.

The ACCC notes that CBH has provided the ACCC with three draft versions of its PTRs. The ACCC seeks submissions on CBH's latest draft of its PTRs, provided to the ACCC on 31 July 2009 and annexed to the draft decision at Annexure B.

12.1 CBH's proposed Undertaking

12.1.1 Obligation to publish Port Terminal Rules

CBH's proposed Undertaking states that CBH will, 'from time to time publish on its website ... a statement setting out ... the policies and procedures for managing demand for the Port Terminal Service (including the ... policies and procedures relating to the nomination and acceptance of ships to be loaded using the Port Terminal Service)'. This statement is referred to as 'Port Terminal Rules' (PTRs).³³⁶

³³⁶ Co-operative Bulk Handling Limited, *Port Terminal Services Access Undertaking*, 14 April 2009, clauses 9.1(a) and 1.1.

Clause 9.1(b) provides that '[t]he current Port Terminal Rules are available on CBH's website at www.cbhoperations.com.au.'³³⁷

12.1.2 The Port Terminal Rules

Clause 6.1(a) obliges CBH to publish, by no later than 30 September of each year on its website, standard offer terms and conditions (Standard Terms).³³⁸ Clause 6.1(a)(ii) provides that the Standard Terms 'must include an obligation for the Port Operator to comply with the Port Terminal Rules when providing the Port Terminal Services'.³³⁹

Clause 9.1(a) provides that the PTRs 'must be consistent' with CBH's obligation to provide non discriminatory access under clause 6.4 (which is subject to the exceptions contained in clause 6.5) and the objectives of the proposed Undertaking set out in clause 2.³⁴⁰

12.1.2.1 Status of the PTRs

The ACCC notes that CBH has provided the ACCC with three draft versions of documents that set out elements of its policies and procedures for managing demand for the Port Terminal Service (including CBH's policies and procedures relating to the nomination and acceptance of ships to be loaded using the Port Terminal Service).

The first version is the draft 'Published Port Terminal Rules' that were included in CBH's supporting submission accompanying the proposed Undertaking of 14 April 2009. This version of the PTRs does not form part of the proposed Undertaking. The second version is the 'Proposed 2009/10 Shipping Capacity Access Allocations' submitted on 19 May 2009, which sets out a draft proposal for an auction process for capacity allocation. The third version is a refined draft of the 'Auction Process Outline' and 'Draft Auction Rules', which were submitted on 29 June 2009 as part of CBH's further submission to the ACCC.

In relation to these three elements of the PTRs, CBH has also noted that '[b]ecause the Auction Rules have not been finalised, CBH has not completed the amendments to the Port Rules that will be required to incorporate the new Capacity Allocation System into the Port Rules. Finalised Port Rules, incorporating the new Capacity Allocation System and Auction Rules will be completed as soon as possible.'³⁴¹

As neither the original draft version of the PTRs or any documents related to the capacity allocation system form part of the proposed Undertaking as submitted on 14 April 2009, they have not been assessed as part of this draft decision. The ACCC notes however that CBH provided a finalised version of the PTRs and related documents to the ACCC on 31 July 2009, annexed to the draft decision at Annexure B.

³³⁷ Co-operative Bulk Handling Limited, *Port Terminal Services Access Undertaking*, 14 April 2009, clause 9.1(b).

³³⁸ Co-operative Bulk Handling Limited, *Port Terminal Services Access Undertaking*, 14 April 2009, clause 6.1(a).

³³⁹ Co-operative Bulk Handling Limited, *Port Terminal Services Access Undertaking*, 14 April 2009, clause 6.1(a)(ii).

³⁴⁰ Co-operative Bulk Handling Limited, *Port Terminal Services Access Undertaking*, 14 April 2009, clause 9.1(a).

³⁴¹ Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 26.

12.1.3 Varying the Port Terminal Rules

In accordance with the Undertaking, CBH may vary the PTRs ‘provided that they are consistent’ with: (i) CBH’s obligation to provide non discriminatory access under clause 6.4 (which is subject to the exceptions contained in clause 6.5); and (ii) the objectives of the proposed Undertaking set out at clause 2.³⁴²

Any variation ‘under clause 9.1(c) must be published at least 30 days prior to the date on which it is to become effective’ in the ‘same locations as it publishes its Port Terminal Rules.’³⁴³

CBH must give the ACCC copies of the varied PTRs ‘promptly’ after they are published.³⁴⁴

12.1.4 Operational Decisions

In making decisions relating to the provision of access to the Port Terminal Services, the Undertaking provides that CBH is likely to make ‘Operational Decisions’.³⁴⁵

Operational Decisions are defined in the Undertaking as ‘decisions made in the course of providing the Port Terminal Services’.³⁴⁶

Clause 9.2(a) provides a list of the kinds of areas Operational Decisions will cover, such as: ‘scheduling, cargo accumulation decisions and ship loading’.³⁴⁷ This list is not exhaustive.

In arriving at an Operation Decision relating to the provision of access to the Port Terminal Services, the Undertaking requires CBH to:

- (i) ‘make decisions in a manner consistent with the objects of the Undertaking’ and to ‘make decisions that are commercially justifiable, taking into account the matters referred to in clause 9.2(c)’³⁴⁸; and
- (ii) ‘subject to clause 9.2(c), must not discriminate between Users ... in providing Port Terminal Services.’³⁴⁹

³⁴² Co-operative Bulk Handling Limited, *Port Terminal Services Access Undertaking*, 14 April 2009, clause 9.1(c).

³⁴³ Co-operative Bulk Handling Limited, *Port Terminal Services Access Undertaking*, 14 April 2009, clause 9.1(d).

³⁴⁴ Co-operative Bulk Handling Limited, *Port Terminal Services Access Undertaking*, 14 April 2009, clause 9.1(e).

³⁴⁵ Co-operative Bulk Handling Limited, *Port Terminal Services Access Undertaking*, 14 April 2009, clauses 9.2(a) and 1.1.

³⁴⁶ Co-operative Bulk Handling Limited, *Port Terminal Services Access Undertaking*, 14 April 2009, clause 9.2(a).

³⁴⁷ Co-operative Bulk Handling Limited, *Port Terminal Services Access Undertaking*, 14 April 2009, clause 9.2(a).

³⁴⁸ Co-operative Bulk Handling Limited, *Port Terminal Services Access Undertaking*, 14 April 2009, clause 9.2(b)(i).

³⁴⁹ Co-operative Bulk Handling Limited, *Port Terminal Services Access Undertaking*, 14 April 2009, clause 9.2(b)(ii).

The Undertaking provides that the obligations in 9.2(b) are subject to the ‘qualification’ in 9.2(c) that ‘many Operational Decisions made ... will necessarily involve conflicts of interest of users of the Port’ and may ‘necessarily confer a relative disadvantage on one user ... and an advantage on others.’³⁵⁰

Further, the Undertaking provides that the ‘fact that an individual Operational Decision confers a relative disadvantage on one user of the Port or an advantage on another does not, of itself, mean that the Port Operator has breached this Undertaking.’³⁵¹

Without limiting the qualifications in clause 9.2(c) (set out above) or the matters that CBH can have regard to in determining the price and non-price terms for the provision of access to Port Terminal Services for different ‘Applicants or Users’ (as set out in clause 6.5),³⁵² CBH may, in making Operational Decisions:

- (i) give priority to vessels based on the ‘lead time given between nomination and vessel ETA, the likely availability of sufficient Bulk Wheat at the Port prior to vessel ETA, the likely uncommitted storage capacity at the Port Terminal Facility and the uncommitted inloading capacity necessary to make a nominated vessel’s nominated cargo tonnage’³⁵³;
- (ii) take into account, in particular, the objectives of:³⁵⁴
 - a. ‘minimising demurrage at the Port over a given period’;
 - b. ‘maximising throughput ... at the Port over a given period’;
- (iii) ‘vary a cargo assembly plan or ‘queuing order for vessels’ as a result of’:³⁵⁵
 - a. ‘insufficient Bulk Wheat at the Port accumulated by the User necessary to make a User’s nominated vessel’s nominated cargo tonnage’;
 - b. ‘variations in vessel arrival times’;
 - c. ‘failure of vessels to pass surveys’;
 - d. ‘stability and ship worthiness inspections’;
 - e. ‘vessel congestion’;

³⁵⁰ Co-operative Bulk Handling Limited, *Port Terminal Services Access Undertaking*, 14 April 2009, clause 9.2(c).

³⁵¹ Co-operative Bulk Handling Limited, *Port Terminal Services Access Undertaking*, 14 April 2009, clause 9.2(c).

³⁵² Co-operative Bulk Handling Limited, *Port Terminal Services Access Undertaking*, 14 April 2009, clause 9.2(d).

³⁵³ Co-operative Bulk Handling Limited, *Port Terminal Services Access Undertaking*, 14 April 2009, clause 9.2(d)(i).

³⁵⁴ Co-operative Bulk Handling Limited, *Port Terminal Services Access Undertaking*, 14 April 2009, clause 9.2(d)(ii).

³⁵⁵ Co-operative Bulk Handling Limited, *Port Terminal Services Access Undertaking*, 14 April 2009, clause 9.2(d)(iii).

- f. 'variation in cargo requirements';
- g. 'lack of performance of freight providers';
- h. 'equipment failure';
- i. 'maintenance outages';
- j. 'weather preventing relevant activities at the Port Terminal Facilities';
- k. 'embargo, strike, lockout, or labour conditions impacting on the provision of the Port Terminal Services';
- l. 'any material breach by the user of the Port Terminal Facilities';
- m. 'the status of the accreditation of the user of the Port Terminal Services under the Access Agreement';
- n. 'contamination of accumulated cargoes or contamination of loads'; or
- o. 'a User not working a vessel or accumulating a cargo on a 24 hour / 7 day basis where another User is able to do'.

12.1.5 Other matters

The Standard Terms 'must include an obligation for the Port Operator to comply with the Port Terminal Rules when providing the Port Terminal Services'.³⁵⁶

CBH must not engage in conduct 'having a purpose of hindering access to the Port Terminal Services by any User in the exercise of a reasonable right of access'.³⁵⁷

12.2 CBH's supporting submission to the proposed Undertaking as submitted on 14 April 2009

This section summarises the arguments in CBH's supporting submission that expand on or otherwise explain the approach taken in relation to the Capacity management (Clause 9) component of the proposed Undertaking as submitted on 14 April 2009.

12.2.1 General comments on the proposed PTRs

12.2.1.1 CBH submits that the public interest and the interests of access seekers are served by access arrangements which ensure certainty, transparency and non-discrimination

CBH submits that the public interest and the interests of access seekers are served by CBH 'continuing to provide access to Port Terminal Services to accredited wheat

³⁵⁶ Co-operative Bulk Handling Limited, *Port Terminal Services Access Undertaking*, 14 April 2009, clause 6.1(a)(ii).

³⁵⁷ Co-operative Bulk Handling Limited, *Port Terminal Services Access Undertaking*, 14 April 2009, clause 9.3.

exporters ... under more fully documented arrangements which ensure certainty, transparency and non-discrimination'.³⁵⁸

CBH also submits that access seekers 'want certainty – certainty of terms ... certainty of non-discrimination and the certainty of disciplined processes for negotiation and dispute resolution. The Undertaking provides all these things.'³⁵⁹

12.2.1.2 CBH submits that the PTRs are not incorporated in the proposed Undertaking as CBH requires the flexibility to amend the PTRs to adapt to changing circumstances

CBH submits that the draft 'Port Terminal Rules are ... not incorporated in the Undertaking ... because they must retain the flexibility to change ... with operational requirements and other factors that may become evident as the full consequences of deregulation become apparent.'³⁶⁰

CBH submits that '[h]owever the Port Terminal Rules (and any amendments to them) are required to comply with the principles of non-discrimination and be implemented and interpreted in a non-discriminatory manner. The Standard Terms require CBH to comply with the Port terminal Rules.'³⁶¹

CBH also submits that the 'Port Terminal Rules, together with the non-price terms and conditions and Cargo Accumulation Guidelines, will govern the operational provision of the Port Terminal Services.'³⁶²

12.2.1.3 CBH submits that the transparency provided by publication of the PTRs and the shipping stem as required under the WEMA, when combined with the terms of the proposed Undertaking, 'substantially addresses' any concerns that CBH may discriminate in relation to its management of the PTRs or the shipping stem

CBH submits that 'there is generally excess capacity at each export grain terminal operated by CBH' with 'port allocations being given in accordance with published non-discriminatory protocols.'³⁶³

CBH submits that the proposed Undertaking relies on two key mechanisms for capacity management: the Port Terminal Rules and the shipping stem, both of which are in the public domain.³⁶⁴ When read in combination with the ring-fencing provisions, CBH submits that these commitments 'should substantially address any concerns about the way port terminal capacity ... is managed.'³⁶⁵

³⁵⁸ Co-operative Bulk Handling Limited, *Submission to the ACCC*, 14 April 2009, p. 5-6.

³⁵⁹ Co-operative Bulk Handling Limited, *Submission to the ACCC*, 14 April 2009, p. 41.

³⁶⁰ Co-operative Bulk Handling Limited, *Submission to the ACCC*, 14 April 2009, p. 4.

³⁶¹ Co-operative Bulk Handling Limited, *Submission to the ACCC*, 14 April 2009, p. 4.

³⁶² Co-operative Bulk Handling Limited, *Submission to the ACCC*, 14 April 2009, p. 4.

³⁶³ Co-operative Bulk Handling Limited, *Submission to the ACCC*, 14 April 2009, pp. 35-36.

³⁶⁴ Co-operative Bulk Handling Limited, *Submission to the ACCC*, 14 April 2009, p. 36.

³⁶⁵ Co-operative Bulk Handling Limited, *Submission to the ACCC*, 14 April 2009, p. 36.

CBH submits that as the proposed Undertaking ‘obliges CBH to publish these documents ... CBH is subject to oversight by both the WEA under the WEMA and the ACCC under the Undertaking’.³⁶⁶

CBH also submits that this publication requirement ‘provides transparency about the operation of the port and the port allocation and enables wheat exporters to ensure that ... [CBH] is complying with its obligations under the Port Terminal Rules and management of the shipping stem.’³⁶⁷

12.2.1.4 CBH submits that the approach to capacity management in the proposed Undertaking provides an appropriate balance between the need to ensure non-discrimination in relation to operational matters and the need for flexibility in relation to port rules

CBH submits that the ‘approach to capacity management and scheduling ... is designed to strike an appropriate balance between:’

- (i) ‘the need to ensure non-discrimination in relation to operational matters such as the ... the movement and loading of vessels in the shipping stem; and’
- (ii) ‘the need for the Port Operator to maintain ... 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.’³⁶⁸

CBH submits that this balance is provided by ‘the principles of non-discrimination ... in the Undertaking (see clauses 6.4, 9.2, 9.3 and 9.4);’ applying ‘at the day to day operational level of decision making in relation to capacity management and scheduling’. CBH submits that while the PTRs are not included in the Undertaking, ‘the Capacity Management aspects of the Undertaking, such as the port rules are explicitly subject to non-discrimination principles.’³⁶⁹

CBH submits that ‘number of inherent safeguards exist to ensure these obligations will be complied with. The Port Terminal Rules themselves are required to be published’ providing ‘access seekers and potential access seekers with the opportunity to object to any current provisions ... or to any changes to the Port Terminal Rules once made. Operational decisions are subject to a dispute resolution process under the Standard Terms.’³⁷⁰ In addition, CBH submits that ‘[i]ntense scrutiny is already applied to shipping stem decisions by an informed market and an effective regulator in the WEA.’³⁷¹

12.2.1.5 CBH submits that given the complex requirements involved in providing Port Terminal Services and the transitional state of the industry, it would not be

³⁶⁶ Co-operative Bulk Handling Limited, *Submission to the ACCC*, 14 April 2009, p. 36.

³⁶⁷ Co-operative Bulk Handling Limited, *Submission to the ACCC*, 14 April 2009, p. 15, 28 and 36.

³⁶⁸ Co-operative Bulk Handling Limited, *Submission to the ACCC*, 14 April 2009, p. 36.

³⁶⁹ Co-operative Bulk Handling Limited, *Submission to the ACCC*, 14 April 2009, pp. 36-37.

³⁷⁰ Co-operative Bulk Handling Limited, *Submission to the ACCC*, 14 April 2009, p. 37.

³⁷¹ Co-operative Bulk Handling Limited, *Submission to the ACCC*, 14 April 2009, p. 37.

appropriate to require the PTRs to be included in the proposed Undertaking such that the PTRs could only be amended for the duration of the Undertaking

CBH also submits that ‘it would be both unworkable and not appropriate to require the port rules to form part of the Undertaking itself’ as the ‘movement of millions of tonnes of export wheat through port facilities in the space of a few months creates ... inevitable scheduling conflicts and no facility could be constructed efficiently that would be free of such inherent conflicts.’³⁷²

CBH submits that an ‘inefficiency in one part of the supply chain may give rise to a cascading series of problems and requires changes in other parts of the logistics chain’ and as a result, the PTRs ‘that provide the framework for operational decision making must remain flexible enough so that changes may be efficiently implemented’.³⁷³

CBH submits that given the fact that the bulk wheat export industry is in transition, ‘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 Undertaking.’³⁷⁴

CBH submits that ‘[a]ccordingly, it is essential for the efficient operation of facilities the Port Operators have a mechanism to amend Port Terminal Rules where appropriate, and without having to provide a new or amended Undertaking.’³⁷⁵

CBH submits however that ‘it is appropriate for any changes to the Port Terminal Rules to be made in accordance with the non-discrimination principles embodied in the 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 Undertaking.’³⁷⁶

12.2.2 Operational Decisions

12.2.2.1 CBH submits that the proposed Undertaking provides a mechanism for ensuring operational decisions are made on objectively verifiable commercial factors

CBH submits that ‘[o]perationally, the Undertaking recognises that decisions must be taken that will necessarily advantage one user over another in the context of that decision alone. However the Undertaking provides a mechanism for preventing preferential self-dealing and ensuring decisions are made on objectively verifiable commercial factors’.³⁷⁷ Further, CBH submits that this ‘principle applies ... in the context of operational decision making in the performance of an access agreement (clause 9.2, 9.3 and 9.4).’³⁷⁸

³⁷² Co-operative Bulk Handling Limited, *Submission to the ACCC*, 14 April 2009, p. 37.

³⁷³ Co-operative Bulk Handling Limited, *Submission to the ACCC*, 14 April 2009, p. 37.

³⁷⁴ Co-operative Bulk Handling Limited, *Submission to the ACCC*, 14 April 2009, p. 38.

³⁷⁵ Co-operative Bulk Handling Limited, *Submission to the ACCC*, 14 April 2009, p. 38.

³⁷⁶ Co-operative Bulk Handling Limited, *Submission to the ACCC*, 14 April 2009, p. 38.

³⁷⁷ Co-operative Bulk Handling Limited, *Submission to the ACCC*, 14 April 2009, n 31, p. 35.

³⁷⁸ Co-operative Bulk Handling Limited, *Submission to the ACCC*, 14 April 2009, p. 35.

12.3 CBH's supplementary submission to the proposed Undertaking as submitted on 14 April 2009

This section summarises the arguments in CBH's supplementary submission, dated 29 June 2009, that expands on or otherwise explains the approach taken in relation to the Capacity management (Clause 9) component in the proposed Undertaking as submitted on 14 April 2009.

CBH's supplementary submission responds to matters raised in the ACCC's Issues Paper, Information Request and the public submissions received from interested parties.

12.3.1 Responses to general comments on CBH's proposed Undertaking

12.3.1.1 CBH submits that the proposed Undertaking does provide transparency in relation to CBH's management of shipping slots and accumulation at port

CBH submits that it is 'required to publish Shipping Stem information under the WEMA' and it 'is unclear how any additional transparency could reasonably be required.'³⁷⁹

CBH also submits that the proposed Undertaking 'incorporates detailed enforceable provisions concerning non-discrimination in decision making' and 'appropriate ring fencing measures and dispute resolution procedures', therefore 'it is difficult to see what further measures could be adopted to address these issues.'³⁸⁰

12.3.1.2 CBH submits that the alignment of its transport and shipping stem is aimed at increasing efficiency and reducing costs

CBH submits that it 'is unclear what legitimate concern arises from CBH's quoted intention "to regulate bookings in its Shipping Stem or schedule so that monthly shipping requirements meet the capacity of the state's up-country transport network to bring grain to port"'. CBH submits that this is 'a benign statement of CBH's intention to properly arrange its resources to meet the demand for services and in doing so increase efficiency and reduce cost.'³⁸¹

12.3.1.3 CBH submits that decisions in relation to 'surge' transport costs are made without reference to the identity of the customer

CBH submits that 'decisions in relation to surge transport are made entirely without reference to the identity of the customer' which are 'made at a managerial level within CBH that is indifferent to the identity of the customer. The sole consideration in making these decisions is the efficient deployment of CBH's supply chain infrastructure.'³⁸²

CBH also submits that 'under Grain Express that it is impossible to determine whose grain is moving at any one time and for that reason, impossible to selectively charge

³⁷⁹ Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 41.

³⁸⁰ Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 41.

³⁸¹ Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 41.

³⁸² Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 42.

grain owners. Under Grain Express grain is moved to port to meet cargo requirements regardless of the identity of the exporter.³⁸³

12.3.1.4 CBH submits that the proposed treatment of ‘risk’ in relation to grain from difference sources is standard commercial practice

CBH submits that its ‘proposed terms and conditions under the Undertaking do not differ in their treatment of risk from:

- (i) ‘CBH’s grain services agreement under Grain Express;’
- (ii) ‘CBH’s delivery and warehousing terms under which grain is received from Growers;’
- (iii) ‘The equivalent terms and conditions of other storage and handling operators in Australia and other countries.’³⁸⁴

CBH submits that if access seekers do ‘wish to require CBH to assume additional risk, that will have an obvious and proportional effect upon CBH’s charges.’³⁸⁵

12.3.2 Responses to comments on CBH’s PTRs

12.3.2.1 CBH submits that certain claims by interested parties do not provide any arguments, facts, examples or evidence in support and as a result, have been unable to make any detailed response to the statements

In relation to a number of claims by interested parties, CBH has submitted that ‘[i]n the absence of any supporting arguments, facts, examples or evidence, CBH is unable to make any detailed response to the statement.’³⁸⁶

12.3.2.2 CBH submits that the PTRs should not be included in the proposed Undertaking

CBH notes that its ‘submission at 5.7 (original submission) sets out the basis upon which it is submitted that the port protocols should not be included in the undertaking’.³⁸⁷

12.3.2.3 CBH submits that its revised PTRs will likely include an independent umpire to resolve operational disputes but that a 24 hour turnaround is unworkable

CBH submits that in ‘considering the revised port capacity allocation procedure, CBH will be proposing that an umpire should be appointed for the resolution of operational disputes and will include such provisions as consequential amendments to the port protocols in finalising its capacity allocation proposals.’³⁸⁸

³⁸³ Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 42.

³⁸⁴ Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 42.

³⁸⁵ Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 42.

³⁸⁶ Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, Schedule 1, pp. 61-62 & 64.

³⁸⁷ Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 60.

³⁸⁸ Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 59.

CBH also submits that it ‘does not consider that a 24 hour dispute resolution process would be workable’ as an ‘umpire would have difficulty becoming sufficiently informed in that time.’³⁸⁹

12.3.2.4 CBH submits that the current approach to the PTRs in the proposed Undertaking strikes an appropriate balance between the interests of access seekers and CBH’s legitimate business interests

CBH submits that under the PTRs, it must have ‘sufficient scope ... to ensure the respect of the legitimate interests of other Users of the port terminal facility and to ensure as far as possible that all Users or Applicants are not disadvantaged or prejudiced as a result of the failures of particular parties in particular circumstances’.³⁹⁰

CBH also submits that under the PTRs, CBH ‘is the entity responsible for managing access, and in the performance of that function ... must deal equitably with all Users and potential Users ... to ensure as far as possible that the requirements amongst all Users are managed in a way that does not give preference to nor disadvantage or prejudice any parties.’³⁹¹

CBH submits that ‘many factors arise in everyday operations that may not be completely foreseeable, and not within the control or scope of responsibility of CBH to manage, and therefore not adequately dealt with in a more prescriptive and rigid set of rules ... which is likely to [lead to] ... the removal of effective control by CBH and therefore a decrease in the efficiency of the Port Terminal Facilities.’³⁹²

CBH submits that examples of matters that it requires flexibility in relation to providing Port Terminal Services include ‘[v]essels failing to clear survey’, ‘[l]ack of entitlement for loading’, ‘[v]ariations in road and rail services’, ‘[w]eather disruptions to loading, berthing or departure’, ‘[q]uarantine related matters such as the presence of insects or rodents’, ‘[c]hanges to vessel ETA’, ‘[t]erminal blockage as a result of unexpected changes to vessels’ ability to load’, ‘[t]ides’, ‘[s]trikes and other industrial action’, ‘[m]echanical failures’.³⁹³

CBH submits that the PTRs ‘have been drafted in a way that provides the appropriate balance.’³⁹⁴

12.3.3 Capacity Allocation System

CBH has made submissions explaining the provisions of its proposed Capacity Allocation System.

As noted above, CBH submitted on 29 June 2009 that ‘[f]inalised Port Rules, incorporating the new Capacity Allocation System and Auction Rules will be completed as soon as possible.’³⁹⁵

³⁸⁹ Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, pp. 59-60.

³⁹⁰ Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 60.

³⁹¹ Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 60.

³⁹² Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 60.

³⁹³ Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, pp. 60-61.

³⁹⁴ Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 61. These points are reiterated on p. 64.

As these documents have neither been submitted as part of the proposed Undertaking nor have any amended versions been subject to adequate public consultation, the ACCC has considered that it would not be appropriate to comment on the terms of the PTRs or the draft capacity allocation system or draft auction rules as part of the draft decision.

However, in the interests of expediency, and as the ACCC has annexed the most recent version of the revised documents (at Annexure B) for comment during the consultation period on the draft decision, it has also set out a summary of CBH's arguments in relation to the proposed documents.

12.3.3.1 Outline of CBH's proposed Capacity Allocation System

The following outline of CBH's proposed Capacity Allocation System is extracted from pages 18 to 19 of CBH's further submission to the ACCC dated 29 June 2009:

During Harvest Period

- During harvest period (1 November to 15 January), expressions of interest (EOI) sought
 - Capacity is allocated by reference to an export window (each window is first / last half of each month)
- Demand for shipping capacity is tallied and if the total capacity requirements are less than available capacity, all requests for capacity are allocated
 - A secondary trade or swap of allocations between or amongst entitlement holders can occur (CBH is notified of any changes)
- If demand exceeds supply, EOIs are allocated in proportion to available capacity
- Any unallocated capacity is notified and made available on a first come, first served basis.

Annual Shipping period

- Primary auction held during August – September for majority of expected shipping capacity allocated by reference to export windows
 - Auction is live (on-line, web based) and open to view by all participants, including access to price and demand.
- Secondary auction is held for additional available capacity every month to two months prior to the start of the month of shipping
 - A secondary trade or swap of allocations between or amongst entitlement holders can occur (CBH is notified of any changes)
- Any unused capacity is notified and made available on a first come, first served basis

³⁹⁵ Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 26 & 89.

- The unused capacity is the capacity passed in at the primary auction and any new capacity acquired in the intervening period. A secondary trade or swap of allocations between or amongst entitlement holders can occur (CBH is notified of any changes).

All cases

- Shipper nominates in accordance with nomination rules
- Nomination includes requirement for pre-delivery samples, and cargo accumulation plan.
 - As CBH have custody of grain and control grain movements, no pre-delivery samples are required nor is an accumulation plan required to be negotiated (under Grain Express)
- Deliveries commence up to 21 days before arrival date of vessel
 - CBH under Grain Express can use accumulated grain at port or deliveries from up-country storage for accumulation of cargo
- Vessel nominated 21 days prior to loading
- Cargo accumulated at port
- When cargo accumulated, vessel may enter the berth queue – priority determined by the order of provision of vessel’s notice of readiness
- Ship berths and is loaded with cargo
- Loaded ship departs port

12.3.3.2 CBH’s explanation of the process by which shipping capacity will be allocated

CBH submits that its Capacity Allocation System (CAS) ‘will be incorporated by reference into the Port Rules.’³⁹⁶

CBH submits that the CAS ‘uses an auction mechanism for the period to achieve an efficient allocation of shipping capacity ... without securing windfall profits for CBH because any surplus ... is returned to Exporters in proportion to the volume of grain exported.’³⁹⁷

CBH submits that Shipping Capacity Allocation will operate over two periods throughout the year:

- (i) ‘The Harvest Shipping Period 1 Nov – 15 Jan where capacity will be allocated on the basis of expressions of interest’ where ‘capacity will be

³⁹⁶ Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 26.

³⁹⁷ Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 26.

allocated subsequent to Exporters providing CBH with expressions of interest for shipping capacity'.³⁹⁸

- (ii) 'The Annual Shipping Period 15 Jan - 31 Oct where capacity will be allocated on the basis of a price/volume based auction', namely 'an ascending "clock auction" mechanism' will apply. CBH also submits that '[t]he first phase allocation of Core Capacity for the Annual Shipping Period (15 Jan – 31 Oct) will be conducted in the period of August/September prior to Harvest. A subsequent rolling allocation of residual Core Capacity and any required Surge Capacity will be conducted two months prior to the relevant shipping period. All proceeds ... will be returned to all Exporters using CBH Port Terminals in full, less direct costs and on a pro rata basis, allocated using all tonnes shipped from 1 Nov – 31 Oct.'³⁹⁹

CBH submits that this 'allocation processes will allow Exporters to establish an operational commitment for the accumulation of their grain within agreed ship loading windows.'⁴⁰⁰

12.3.3.3 CBH submits that for the purposes of the Undertaking, the important issues in relation to the CAS are that it is non-discriminatory, its design doesn't allow CBH to generate a surplus from the auction and that the process achieves the intended efficiency outcomes

CBH submits that the 'key issues in relation to CBH's capacity allocation auction are:'

- (i) '[i]s the auction process non-discriminatory';
- (ii) '[i]s there an appropriate process to ensure that CBH does not generate a revenue surplus from the auction'; and
- (iii) '[d]oes the auction design conform to appropriate standards in order to ensure that it appropriately achieves the intended efficiency outcomes'.⁴⁰¹

1. *Non-discrimination*

CBH submits that its 'existing approach to capacity allocation requires CBH to make allocation decisions where available shipping capacity is over subscribed' which 'creates the potential for allegations of preferential self dealing if one of the applicants for capacity' is CBH's trading arm.⁴⁰²

CBH submits that an 'auction, designed and administered by an independent operator and conducted according to clear rules that apply equally to all market participants is an effective measure to assure the market that CBH will not have any opportunity or

³⁹⁸ Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 31.

³⁹⁹ Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 31.

⁴⁰⁰ Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 31.

⁴⁰¹ Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 32.

⁴⁰² Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 32.

ability to exercise discretion in relation to the allocation of capacity in oversubscribed periods.⁴⁰³

2. *No surplus retained by CBH*

CBH submits that the auction process contains a mechanism ‘to ensure that any premium paid ... for capacity in high demand periods is not retained by CBH but is instead returned to market participants.’⁴⁰⁴

CBH submits that ‘the most appropriate, equitable and efficiency enhancing approach is to calculate the aggregate surplus generated, deduct CBH’s costs of administering the auction and rebate the surplus to users of shipping capacity in proportion to the tonnage of grain those participants have exported through CBH’s port terminals.’

CBH submits that the CAS does this through ‘a rebate system for “Auction Proceeds”, which are defined as the per tonne bid values made by Exporters to win the allocation of slots of Shipping Capacity, less the direct cost of the auction including any set up costs’ where auction proceeds ‘will be rebated to Exporters on a per tonne basis, proportionally distributed over the entire shipping period’ and will be ‘paid to participating Exporters within 30 days of the completion of the export program for the season on 31 October.’⁴⁰⁵

CBH submits that this:

‘will have the effect of accentuating the relative difference in capacity cost between low demand and high demand periods, creating an incentive for Exporters to use available capacity in less demanded periods at a lower cost. In short, capacity during peak months will be allocated to those customers who value it most, without deriving a monopoly rent for CBH as the owner of the capacity constrained infrastructure.’⁴⁰⁶

3. *Auction efficiency*

CBH submits that ‘it has determined that the most efficient and non-discriminatory mechanism for allocating shipping capacity at its port terminals is an auction process.’⁴⁰⁷

In light of this, CBH sets out the following quotes from the Productivity Commission 2003 report ‘The Role of Auctions in Allocating Public Resources’:

“The main advantage of an auction is its tendency to attain allocated efficiency without requiring governments to have accurate prior knowledge of resource values or costs. This outcome is achievable by promoting competition among bidders; those who place a relatively high value on the good on sale will generally be willing to bid highest for it. Auctions can therefore assign resources to those able to make the best use of them. Compared with administrative methods of allocating public resources, auctions are more transparent and less dependent on official subjective judgment. Last but not

⁴⁰³ Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 32.

⁴⁰⁴ Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 32.

⁴⁰⁵ Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 32.

⁴⁰⁶ Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 33.

⁴⁰⁷ Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 33.

last, bidding competition can yield revenues or cost savings for governments.⁴⁰⁸

CBH also submit that the Productivity Commission also noted:

“Despite their potential merits, auctions can perform poorly if they are not carefully designed and conducted. Specific market conditions and design issues can distort auction outcomes and affect the revenue raising potential of an efficient allocation.”⁴⁰⁹

CBH submits that it is ‘in discussions with Tradeslot, a specialist auction design firm’ who ‘will be instructed to design and administer auction rules that promote efficiency and reduce the risk of gaming or distortion.’⁴¹⁰

12.3.3.4 CBH submits that requiring the inclusion of the Capacity Allocation System in the proposed Undertaking is unnecessary given they apply to all grains and the excessive regulatory effect such inclusion would have

CBH submits that the CAS, ‘like the Port Rules, applies to all grains and applies ... to Grain Express customers and access seekers under the Undertaking.’ CBH submits that this broader scope of application is ‘one of the reasons why it is not appropriate to include the Port Rules and the Capacity Allocation System in the Undertaking itself.’⁴¹¹ CBH also submit that including the PTRs and CAS ‘would effect regulatory outcomes in excess of the intended scope of the Undertaking under the WEMA’ where, ‘in any event’ the inclusion of ‘non-discrimination principles in operational decision-making effectively enables discriminatory conduct to be enforced as a breach of the Undertaking.’⁴¹²

In addition, CBH submits that the lack of response to its proposal from customers in November 2008 in relation to a proposal for an allocation system for priority shipping ‘highlights the difficulty that CBH would face in any potential alteration of the rules around accessing the Shipping Stem’⁴¹³

12.3.3.5 CBH submits that the proposed CAS will apply to all grains, as the shipping stem currently applies

CBH submits that the ‘proposed Capacity Allocation System will apply to all grain exports’ and the ‘shipping stem includes vessels for grain other than wheat.’

CBH also submit that there ‘are some non-grain vessels included within the shipping stem operating independently out of the ports (except for Kwinana) that CBH cannot prevent from berthing at those ports.’⁴¹⁴

⁴⁰⁸ Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 33.

⁴⁰⁹ Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 33.

⁴¹⁰ Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 33.

⁴¹¹ Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 26.

⁴¹² Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 26.

⁴¹³ Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 30.

⁴¹⁴ Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 76.

12.4 Submissions received from interested parties to the proposed Undertaking as submitted on 14 April 2009

This section summarises the arguments put forward in public submissions by interested parties in response to CBH's proposed Undertaking and supporting submission in relation to Capacity management (Clause 9) in the proposed Undertaking as submitted on 14 April 2009.

12.4.1 Australian Grain Exporters Association (AGEA)

12.4.1.1 AGEA's general comments on CBH's proposed Undertaking

AGEA submits that '[f]air and transparent access requires ... an ... undertaking which has clarity, certainty and transparency. The rules must be detailed and clear ... [and] be capable of objective application. Discretionary or subjective decisions must be kept to the absolute minimum. Decisions and the reasons for them must be disclosed in a timely way and open to effective and timely review.'⁴¹⁵

AGEA also submits that unless the proposed access undertakings provide transparency in relation to BHCs' decisions'⁴¹⁶, 'BHCs will be able to manipulate logistics, substitute vessels and/or vary the shipping stem to confer preferential treatment on themselves'⁴¹⁷.

12.4.1.2 AGEA's general comments on CBH's proposed PTRs

1. *Transparency and certainty required in the application of the PTRs and shipping stem*

AGEA submits that the proposed PTRs do not provide transparency 'in relation to the management and operation of BHCs' port terminals and shipping stem. The Port Protocols provide the BHCs with wide discretions and lack objective criteria for the allocation of shipping slots'.⁴¹⁸ AGEA further submit that the PTRs 'do not contain clearly defined rules which are capable of objective application.'⁴¹⁹

AGEA also submits that 'there is no transparency in relation to the shipping stems', bringing into question 'the ability of the BHCs to manipulate the shipping stem to their commercial advantage'.⁴²⁰

⁴¹⁵ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 2.6, p. 2.

⁴¹⁶ It should be noted that AGEA's submissions on the proposed Undertakings (including the proposed port protocols) are, unless otherwise specified, comments relating to the proposed Undertaking and proposed port protocols of all three bulk handling companies (ABB, GrainCorp and CBH).

⁴¹⁷ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 4.12, p. 10.

⁴¹⁸ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 14.1, p. 31.

⁴¹⁹ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, Schedule 1, para K2(iii), p. 48.

⁴²⁰ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 14.6, p. 32.

AGEA also submits that '[t]ransparency should ensure that port protocols are applied to BHCs ... and AWEs on a 'no less favourable' basis. This does not occur at present.'⁴²¹

In addition, AGEA submits that the access provider's need for flexibility and the access seeker's need for transparency and certainty can be balanced by 'clearly specifying the obligations of the BHCs.'⁴²²

2. *Conflict of interest means BHC will discriminate against other users*

AGEA submits that 'BHCs' conflict of interest make it inevitable that BHCs will give preferential treatment to their Trading Divisions and make operational decisions that allow them to maximise profits [for example, in the allocation of overtime and other expenses], to the detriment of other users of the port and competition in the bulk wheat export market.'⁴²³

To mitigate against these risks AGEA states that 'a clearly defined shipping protocol and transparency in relation to BHCs' decision-making is required.'⁴²⁴

3. *Certainty of reserved shipping slots and limited re-ordering of shipping slots*

AGEA submits that access seekers must have 'the certainty of knowing that if they book a spot for a vessel on a particular day, the service will be delivered or they will be adequately compensated.'⁴²⁵ 'At present ... BHCs have the discretion to change booking slots and do not incur any liability if they fail to deliver.'⁴²⁶

AGEA also submits that '[r]eordering of the load order of vessels in the shipping stem should only be allowed in certain ... circumstances and with full transparency in the decision-making process.' The reason proposed for this is that '[o]therwise, BHCs may assert that delays were encountered in getting stock to port or insufficient stock was accumulated, but AWEs would never know if that was the case.'⁴²⁷

4. *Entitlement should not be a basis on which an ability to export is determined*

AGEA submits that the 'ability to export stock should not be subject to BHC being satisfied that AWEs have stock available because':

- (i) 'BHCs control the ability of AWEs to get stock to port and accumulation.'

⁴²¹ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 14.7, p. 32.

⁴²² Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, Schedule 1, para K2(ii), p. 48.

⁴²³ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 14.2, p. 31.

⁴²⁴ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 14.2, p. 31.

⁴²⁵ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 14.3, p. 31.

⁴²⁶ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 14.3, p. 31.

⁴²⁷ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 14.5, p. 31.

- (ii) ‘BHCs can allow their stock to sit in port, taking up accumulation space ... [and] therefore have the ability to manipulate the logistics of getting stock to port to serve their own interests’; and
- (iii) ‘AWEs enter into forward sale contracts’ under which they have legal title to wheat ‘but this would not be apparent from BHCs’ system’.⁴²⁸

5. *The capacity allocation process should be completely transparent*

AGEA submits that there ‘must be complete transparency in relation to capacity allocation or an independent person should be appointed to make decisions about capacity allocation.’⁴²⁹

AGEA submit that capacity could be allocated by way of an auction process whereby:

‘AWEs can bid for capacity by port, for any month at ... the export out-loading charge ... The initial tender should take place as early as possible, with the full annual capacity put up for tender. In each tender, AWEs can bid for a maximum of 25% capacity in each pot. The tender should be operated by an independent third party ... Tenders for under-subscribed capacity could then be held at intervals to be determined. Where a tender is oversubscribed, the capacity should be issued on a pro-rated basis ...

Where storage capacity at port is limited ... capacity should be allocated on the basis that a port user has access to storage facilities for [an appropriate] ... period ... to allow the user to accumulate and ship their vessel.’⁴³⁰

6. *Dispute resolution process for operational matters*

AGEA submits that the PTRs must ‘contain a clear dispute resolution mechanism whereby disputes [in relation to the PTRs] may be referred to an independent umpire for a binding decision to be made within 24 hours’. The reason proposed for this is that ‘[i]f a dispute is not resolved within 24 hours, the opportunity to export stock may be lost because a slot may have been allocated to another party.’⁴³¹

7. *Varying the PTRs*

AGEA submits that the access provider’s right to unilaterally vary the PTRs ‘is inconsistent with the requirement of clarity and certainty’ and notes that BHCs ‘are only required to “consult” with AWEs before implementation of the varied terms and conditions.’⁴³²

⁴²⁸ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 14.4, p. 31.

⁴²⁹ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 14.6, p. 32

⁴³⁰ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 14.9-14.10, pp. 32-33.

⁴³¹ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 14.11, p. 33.

⁴³² Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, Schedule 1, para K2(vii), p. 48.

12.4.1.3 Specific comments on CBH's proposed PTRs and proposed capacity allocation system

1. *PTRs must contain certain provisions*

AGEA submits that the PTRs must provide:⁴³³

- (i) that if the access seekers 'pay the vessel nomination fee and are allocated an estimated load date, BHCs must provide the necessary services to allow ... load[ing of] the vessel (within a three day spread), failing which BHCs will be liable for any loss or damage' suffered;
- (ii) 'transparency as to how the BHCs accept vessel nominations and provide vessel slots';
- (iii) 'mutual rights to terminate on the grounds of force majeure';
- (iv) 'a dispute resolution mechanism whereby disputes may be referred to an independent 'umpire' for a binding and timely decision' within 24 hours.

2. *The clauses in the proposed PTRs are uncertain, lack transparency and provide opportunities for discrimination*

AGEA submits that:⁴³⁴

- (i) in relation to clause 4 of the proposed PTRs, 'a "Year" is defined as being 1 November to 31 October.' However, a year in the Port Terminal Services Agreement is 1 October to 30 September. Accordingly, the Forecast Submission Period is not properly defined' and in addition, 'there is no reason why CBH needs to know AWE's future requirements';
- (ii) in relation to clause 5.2, 'the booking process applies from 15 September until 14 October in each Year, or such other period as the BHCs may publish from time to time' which does not correspond with 'CBH's Port Terminal Services Agreements';
- (iii) in relation to clause 5.2(c) and 6.2(c), the references to "'the relevant Users' shipping history, "the efficient operation of the relevant Port Terminal facility'", "'the Port Operator's Bulk Wheat storage network'" and "'the efficient operation of the relevant Port Terminal Facility'" is uncertain' and shows 'the lack of transparency in the way CBH can exercise unfettered discretions to discriminate in favour of its own interest[s]';
- (iv) in relation to clause 5.2(d)(iii) and 5.2(e), 'in the event that the [access seeker] does not ship the wheat (i.e. use CBH's services), the [access seeker] is not entitled to a refund of the undisclosed fee ... [h]owever, CBH does not incur any liability if it fails to provide the service';

⁴³³ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 4.17(h), p. 14.

⁴³⁴ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, Schedule 4, pp. 55-56.

- (v) in relation to clause 6.2 [an expression of interest process by which Port Terminal Services are allocated], ‘CBH decides what EOIs to offer’ and ‘retains the discretion to accept all or part of the EOI’;
 - (vi) in relation to clauses 6.5 to 6.8, ‘there is no way for [access seekers] to know how CBH applies these rules because CBH refuses to provide AWEs with relevant data.’ AGEA also submits that ‘22 days is a long lead time pending confirmation of a exporter’s status in the nomination and accumulation process’; and
 - (vii) ‘it is not clear whether the “Timetable of Port Terminal Rules” would apply to CBH sites only, or to CBH and non-CBH sites.’
3. *Any certainty achieved by the PTRs are frustrated by the uncertainty in CBH’s export accumulation guidelines*

AGEA submits that ‘CBH’s export accumulation guidelines apply after a User’s Shipping Window is booked. Any clarity that might have been achieved by CBH’s Shipping Rules can be frustrated by CBH’s export accumulation guidelines.’⁴³⁵

AGEA submits that the follow examples from ‘the current port Export Accumulation Guidelines’ demonstrate this:⁴³⁶

- (i) ‘[v]essels arriving before their contracted lay-can window may be considered for early loading at **CBH discretion** for operational reasons such as port blockages and the continuation of port efficiencies’ [AGEA’s emphasis];
 - (ii) ‘[p]riority changes due to updated ETAs within this stage will be at the **sole discretion of CBH** based on how advanced accumulation arrangements have progressed for each nomination’ [AGEA’s emphasis];
 - (iii) ‘[p]riority for vessels that have progressed from the Assembly stage will be locked in, however CBH Operations **reserve the right at its sole discretion to make changes** for operational reasons such as port blockages and the continuation of port efficiencies. These changes will also take into account the impact on cargo accumulations for other vessels within this window’ [AGEA’s emphasis].
4. *The draft 2009/2010 Shipping Capacity Access Allocations policy auction proposals are labour intensive, time consuming and complicated with no limits on capacity for single parties*

AGEA submits that ‘the auction model contained in CBH’s proposed access allocations policy is ... labour intensive, time consuming and complicated. Furthermore, there is no proposed limit on capacity for any single party. The proposed

⁴³⁵ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, Schedule 4, p. 56

⁴³⁶ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, Schedule 4, p. 56.

auction model will not prevent related parties of CBH bidding up the auction and securing as many slots as required to the detriment of AWEs.⁴³⁷

5. *AGEA's proposed amendments to the draft 2009/2010 Shipping Capacity Access Allocations policy*

AGEA submits that in relation to CBH's proposed 2009/2010 Shipping Capacity Access Allocations policy, 'the policy is subject to change.'⁴³⁸

AGEA note however that CBH's draft allocation policy should be 'amended to contain or deal with the following provisions':⁴³⁹

- (i) 'there should be one system that applies for the entire season – the policy currently provides a different set of rules for, essentially, peak and non-peak periods';
- (ii) 'CBH must provide details of the port's operational capacity prior to the tender process. The capacity referred to in the proposed policy is conservative and needs to be reviewed. Capacity should be based on the port terminal operational capacity, i.e. daily intake, storage flexibility and outturn, and should not be linked to inward logistics';
- (iii) 'tenders for shipping slots should be held on a fortnightly basis';
- (iv) 'tenders should be managed by an independent third party';
- (v) '[access seekers] should be permitted to bid for Capacity by port, for any month at Par to the Export Outloading Charge for the relevant month';
- (vi) 'bids should be submitted in 10,000mt increments';
- (vii) 'alternative supply chains should be able to be nominated and treated by CBH equally in terms of pricing and access to port terminal services, i.e. Grain Express or direct port access model';
- (viii) 'where a tender is oversubscribed, the capacity should be issued on a pro-rata basis (Capacity / total tonnage bid * tonnage bid by individual shipper)';
- (ix) 'part certificates should be offered to the nearest 1,000 tonnes';
- (x) 'successful bids in each tender should be issued with Shipping Certificates in 10,000mt increments';

⁴³⁷ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 14.9, p. 32.

⁴³⁸ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, Schedule 4, p. 56.

⁴³⁹ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, Schedule 4, pp. 56-57.

- (xi) ‘Shipping Certificates should be able to be traded in a secondary market, independent of CBH’;
- (xii) ‘in the event that CBH fails to load a vessel within the dates specified on the Shipping Certificates, storage should not be levied against the shipper beyond the last day specified on the Shipping Certificates’;
- (xiii) ‘Shipping Certificates must be paid for within 3 days of allocation at 50% of the price’;
- (xiv) ‘any unpaid Shipping Certificates should be reoffered in the next fortnightly tender’;
- (xv) ‘in case of pro-rata allocation due to oversubscription excess deposit should be returned to the bidder 24 hrs after the tender’;
- (xvi) ‘only [access seekers] with a current CBH grain services agreement should be entitled to bid for certificates’;
- (xvii) ‘remaining 50% should be payable at presentation of Shipping Certificates’;
- (xviii) ‘Shipping Certificates should be presented to CBH latest 30 days prior to the first day of the shipment period specified on the Shipping Certificate’;
- (xix) ‘the holder of the Shipping Certificates should narrow the shipping period to a 10 day window within the shipping month no later than 30 days prior to the first day of the narrowed shipping window’;
- (xx) ‘[access seekers] should provide the name of performing vessel 7 days prior vessel ETA’;
- (xxi) ‘[access seekers] should have stock entitlement not less than 5 working days prior vessel’s ETA’;
- (xxii) ‘Shipping Certificates that are not presented should be forfeited without refund and capacity will be reallocated at the next fortnightly tender’; and
- (xxiii) ‘CBH and [access seekers] should be liable where the fail to meet benchmarks and other obligations’.

12.4.1.4 General comments on proposed clause 9.2 – ‘Operational Decisions’

1. *The arguments raised in relation to the PTRs are also relevant to the clauses on Operational Decisions*

AGEA submits that its arguments in relation to the PTRs (as set out above) are also relevant to the clauses in the proposed Undertaking dealing with ‘Operational Decisions’.⁴⁴⁰

⁴⁴⁰ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 15.1, p. 33.

2. *The criteria CBH can take into account when making Operational Decisions are largely subjective and create uncertainty*

AGEA submits that CBH's discretion in making Operational Decisions 'is too wide and subjective' and that access seekers 'need the certainty of knowing shipping slots will be available.'⁴⁴¹

AGEA propose that this could be achieved by having PTRs that 'clearly define the obligations to accept vessel nominations', whereby if the access seeker 'fails to get wheat to port by the load date' they 'forfeit the booking fee', which would protect CBH's interests.⁴⁴²

12.4.1.5 Specific comments on proposed clause 9.2 – 'Operational Decisions'

1. *CBH can determine priority of a particular vessel based on factors within its control*

AGEA note that clause 9.2(d)(i) 'entitles BHCs to make Operational Decisions to give priority to vessels based on the "lead time given between nomination and vessel ETA and likely availability of sufficient Bulk Wheat at the Port Terminal prior to vessel ETA"'.⁴⁴³

AGEA submits that CBH controls 'the movement and accumulation of wheat at port.'⁴⁴⁴

2. *The objectives CBH can take into account when making Operational Decisions are vague and provide opportunities for CBH to restrict access*

AGEA submits that clause 9.2(d)(ii) 'provides opportunities for BHCs to restrict access to port terminal services' and are uncertain'.⁴⁴⁵ In particular, AGEA submits that:⁴⁴⁶

- (i) under clause 9.2(d)(ii)(A), CBH would not normally be 'aware of the AWE's vessel demurrage rate' and regardless, an access seeker's 'ability to negotiate a low demurrage should not result in ... another vessel being given priority ... because it has a higher demurrage rate.'; and
- (ii) under clause 9.2(d)(ii)(B), as CBH 'controls the movement and accumulation of wheat at port, it is within its means to show that the throughput of bulk wheat is maximised by loading its vessels in priority' to other access seeker's vessels.

⁴⁴¹ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 15.2, p. 33.

⁴⁴² Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 15.2, p. 33.

⁴⁴³ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 15.4, p. 33.

⁴⁴⁴ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 15.4, p. 33.

⁴⁴⁵ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 15.5, p. 33.

⁴⁴⁶ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 15.5, p. 34.

3. *The factors on which CBH can vary a cargo assembly or queuing order are broad and some are within CBH's control*

AGEA submits that clause 9.2(d)(iii) provides CBH with 'very broad entitlements to vary a cargo assembly plan or queuing order of a vessel.'⁴⁴⁷ In particular, AGEA submits that:⁴⁴⁸

- (i) with regard to the criterion in clause 9.2(d)(iii)(A), CBH 'control[s] the movement and accumulation of wheat at port facility'; and
- (ii) with regard to the criterion in clause 9.2(d)(iii)(E), 'vessel congestion' is a ground that is not appropriate.

12.4.2 Western Australian Farmers Federation (WAFF)

12.4.2.1 WAFF submits that the requirement on CBH to publish the shipping stem would make transparent any anti-competitive conduct

WAFF submits that 'CBH is required to provide transparent records of both the shipping nomination and queuing processes as well as make the available shipping stem information to enable monitoring of compliance' and that '[o]ver time, this shipping stem information would make transparent any anti-competitive practices' which provides 'an opportunity to adopt existing remedies under Section 46 of the Trade Practices Act to prevent further breaches.'⁴⁴⁹

12.4.2.2 WAFF submits that the Export Accumulation Guidelines and Port Queuing Policy in combination with the Grain Services Agreement provides a logical and binding dispute resolution mechanism

WAFF submits that 'CBH has demonstrated that it has clear and equitable Export Accumulation Guidelines and a Port Queuing Policy that operate in conjunction with the customer's Grain Services Agreement that allows for disputes to be resolved in a logical and binding manner.'⁴⁵⁰

WAFF also submits that the '[p]ort management guidelines, including required notice periods for ordering the use of terminal infrastructure are available to all users of infrastructure services and these guidelines, in conjunction with CBH's terms, conditions and prices for access to the infrastructure services should allow prospective customers the confidence to market their grain in a fair and transparent system.'⁴⁵¹

⁴⁴⁷ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 15.6, p. 34.

⁴⁴⁸ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 15.5, p. 34.

⁴⁴⁹ The Western Australian Farmers Federation (Inc), *Submission in relation to proposed CBH access undertaking*, 29 May 2009, p. 2.

⁴⁵⁰ The Western Australian Farmers Federation (Inc), *Submission in relation to proposed CBH access undertaking*, 29 May 2009, p. 2.

⁴⁵¹ The Western Australian Farmers Federation (Inc), *Submission in relation to proposed CBH access undertaking*, 29 May 2009, p. 2.

12.4.3 Pastoralists & Graziers Association of WA (Inc.) (PGAWA)

12.4.3.1 PGAWA submits that allocation based on entitlement favours pooling operations

PGAWA submits that ‘CBH ... discriminate[s] in favour of their trading division Grain Pool ... by imposing unfair terms and conditions and restricting Australian wheat exporters’ access to port terminal services, through the allocation of shipping slots ... based on entitlements.’⁴⁵²

PGAWA also submits that ‘[a]s allocations are decided by CBH based on entitlement, pooling operations are favoured over non pooling entities due to volume. This may force growers into using pooling operations. The Undertaking will not prevent this behaviour continuing, to the detriment of efficiency and competition in the Australian wheat export market, reducing prices and limiting choice for Western Australian growers.’⁴⁵³

12.4.3.2 PGAWA submits that the proposed Undertaking does not provide transparency in relation to the management of shipping slots and accumulation at port

PGAWA submits that the ‘proposed Undertaking does not provide any transparency in relation to CBH’s management of shipping slots and accumulation at port. Unless the proposed access undertakings provide transparency in relation to CBH’s decisions, CBH may be able to manipulate logistics, substitute vessels and/or vary the shipping stem to confer preferential treatment on their trading division.’⁴⁵⁴

12.4.4 Grain Industry Association of Victoria (GIAV)

12.4.4.1 GIAV submits that the draft allocation policy for export capacity under the direct port access is on restrictive terms and at higher prices

GIAV submits that CBH’s ‘draft proposal ... for allocating export capacity in WA ... states that they will provide some form of direct port access, but they have made it clear that this will be on restrictive terms and at higher prices.’⁴⁵⁵

12.5 ACCC’s Assessment of Issues

12.5.1 Introduction

The ACCC has identified the following issues as arising for consideration in relation to the proposed Capacity management (Clause 9) component of the proposed Undertaking:

⁴⁵² Pastoralists and Graziers Association, *Submission in relation to proposed CBH access undertaking*, 29 May 2009, para 2.14, p. 3.

⁴⁵³ Pastoralists and Graziers Association, *Submission in relation to proposed CBH access undertaking*, 29 May 2009, para 2.14, pp. 3-4 and para 4.42(b), p. 14.

⁴⁵⁴ Pastoralists and Graziers Association, *Submission in relation to proposed CBH access undertaking*, 29 May 2009, para 4.33, p. 12.

⁴⁵⁵ Grain Industry Association of Victoria, *Submission in relation to proposed access undertakings*, 1 June 2009, p. 2.

- The nature of the inclusion of the PTRs (and other associated documents relating to CBH's capacity allocation system⁴⁵⁶) in the proposed Undertaking and Access Agreements;
- the need for the inclusion of the PTRs in the proposed Undertaking given the disclosure requirements under the WEMA;
- the process to be applied in varying the PTRs;
- interaction of the Operational Decisions clause with the PTRs; and
- whether the Operational Decisions clause provides an appropriate balance between providing access seekers with sufficient certainty and clarity as to their terms, effect and operation; and CBH with sufficient flexibility in their management of the Port Terminal Services.

The ACCC considers it important that the proposed Undertaking provides for sufficient certainty and clarity in its terms, effect and operation in order to enable the access provider and access seekers to be adequately aware of their respective rights and obligations, and thereby avoid unnecessary costs, monetary or otherwise, when utilising the processes set by the proposed Undertaking.

The ACCC considers that an undertaking that achieves these aims is in the public interest, would promote the interests of persons who might want access to the service, while also protecting the legitimate business interests of the provider, and would allow for an enforceable undertaking.

Inability to consult on the rationale for various provisions

As a preliminary point, the ACCC notes that CBH did not provide comments in support of a number of the clauses in the 'Capacity management' component of the proposed Undertaking in its initial submission, and it was only in response to a request for information from the ACCC and submissions from interested parties that CBH elaborated on why it considered its particular approach appropriate. CBH provided its public response to the ACCC's information request on 29 June 2009, and consequently CBH's further submissions have not been subject to public consultation.

The ACCC acknowledges that CBH's further submission in some instances provides further explanation, and therefore clarity, as to how many of the proposed clauses (and the proposed new capacity allocation system) are intended to operate. While this is beneficial, the ACCC considers it also highlights deficiencies in the drafting of many clauses as they currently appear in the proposed Undertaking. These are addressed in the following sections of this chapter.

⁴⁵⁶ Hereinafter a reference to the PTRs is to be taken as a reference to the PTRs and other associated documents relating to CBH's capacity allocation system.

12.5.2 Nature of the inclusion of the PTRs in the proposed Undertaking and Access Agreements

12.5.2.1 PTRs do not form part of the proposed Undertaking

CBH's draft 'Published Port Terminal Rules' were included in CBH's supporting submission accompanying the proposed Undertaking of 14 April 2009. However neither this version, nor any other version, of the Port Terminal Rules form part of the proposed Undertaking.

CBH also submitted a refined draft of their proposed 'Auction Process Outline' (the original version was received by the ACCC on 19 May 2009) and 'Draft Auction Rules' to the ACCC on 29 June 2009 as part of CBH's further submission to the ACCC that comprise the additional elements of CBH's proposed capacity allocation system.

Given that the various documents that set out the elements of CBH's policies and procedures for managing demand for the Port Terminal Service (including CBH's policies and procedures relating to the nomination and acceptance of ships to be loaded using the Port Terminal Service) set out the key processes by which CBH will allocate and manage port terminal capacity, it is the ACCC's view that the non-inclusion of these documents in the proposed Undertaking is not appropriate.

12.5.2.2 CBH's 'Standard Terms' must include an obligation for CBH to comply with the PTRs when providing the Port Terminal Services

Clause 6.1(a) of the proposed Undertaking obliges CBH to publish, by no later than 30 September of each year ... standard offer terms and conditions (Standard Terms).⁴⁵⁷ Clause 6.1(a)(ii) also provides that the Standard Terms [Standard Access Agreement] 'must include an obligation for the Port Operator to comply with the Port Terminal Rules when providing the Port Terminal Services'.⁴⁵⁸

As the ACCC understands this proposal, the PTRs would not form part of the contractual terms and conditions that CBH agrees to provide to access seekers for the term of the Standard Access Agreement, but rather that CBH is obliged to comply with the terms of the PTRs, whereby a breach of this obligation, would be a breach of the Standard Access Agreement. Under the proposed Undertaking however, CBH can also vary the PTRs subject to the terms in the Undertaking.

In the ACCC's view, the practical result of this provision does not provide for sufficient certainty and clarity in the terms, effect and operation of the proposed Undertaking because:

- (i) the wording of the obligation in clause 6.1(a)(ii) does not appear to require CBH to comply with the terms of the PTRs when providing Port Terminal Services in Access Agreements that are negotiated outside the framework in relation to the 'Standard Terms'; and

⁴⁵⁷ Co-operative Bulk Handling Limited, *Port Terminal Services Access Undertaking*, 14 April 2009, clause 6.1(a).

⁴⁵⁸ Co-operative Bulk Handling Limited, *Port Terminal Services Access Undertaking*, 14 April 2009, clause 6.1(a)(ii).

- (ii) the PTRs in combination with other associated documents relating to CBH's capacity allocation system, set out CBH's policies and procedures for managing demand for the Port Terminal Services. As set out above, the obligation in 6.1(a)(ii) should require CBH to comply with all other documents related to capacity allocation the managing of demand for Port Terminal Services.

In light of this, the ACCC's view is that the obligation in relation to CBH complying with the PTRs when providing Port Terminal Services in clause 6.1(a)(ii) is likely to not be appropriate in its current form.

The ACCC considers that, while it is appropriate that the PTRs be part of the Undertaking, the obligation on CBH in clause 6.1(a)(ii) should be expanded so that CBH must comply with the PTRs when providing the Port Terminal Services under all forms of Access Agreements, on the terms contained in the PTRs that are in existence at the date the access undertaking came into operation or, if relevant, as varied from time to time in accordance with the variation methodology in the Undertaking (discussed further below).

When combined with the recommendation in relation the variation methodology, it is the ACCC's preliminary view that this approach is more likely to be appropriate as it would maintain a flexible and pragmatic approach to variations of the PTRs – allowing CBH to respond to operational concerns – while providing access seekers with sufficient certainty and clarity in its terms, effect and operation of the proposed PTRs.

12.5.3 Transparency provisions in the proposed Undertaking and the WEMA

The ACCC has considered whether the provisions in the Undertaking and the transparency provisions in the WEMA and the proposed Undertaking are sufficient to adequately deal with concerns in relation to capacity management issues.

With regard to this consideration, the ACCC notes that the very premise behind the requirements under the WEMA for Bulk Handlers to provide an access undertaking to the ACCC is that these bulk handlers are vertically integrated and an access undertaking is required to provide a level of constraint against the potential for discrimination in the provision of port terminal services. Further, the transparency provided by publication of certain information in relation to the shipping stem and the publication of PTRs, does not in the ACCC's view by itself provide satisfactory protection against the ability for CBH to discriminate in favour of its own trading arm.

As a result, the ACCC considers that it is necessary to include the PTRs in the undertaking in order to provide for sufficient certainty and clarity in its terms, effect and operation in order to enable the access provider and access seekers to be adequately aware of their respective rights and obligations, and thereby avoid unnecessary costs, monetary or otherwise, when utilising the processes set by the proposed PTRs and other associated documents relating to CBH's capacity allocation system) and Undertaking.

12.5.4 Considerations that the ACCC may take into account in assessing any future PTRs

CBH has made a number of submissions explaining the provisions of its proposed capacity allocation system. In light of this, CBH submitted on 29 June 2009 that '[f]inalised Port Rules, incorporating the new Capacity Allocation System and Auction Rules will be completed as soon as possible' and handed to the ACCC.⁴⁵⁹

As set out above, in the ACCC's view, as these documents have neither been submitted as part of the proposed Undertaking nor have any amended versions been subject to adequate public consultation, the ACCC has considered that it would not be appropriate to specifically comment on the terms of the PTRs or the draft capacity allocation system or draft auction rules as part of this draft decision.

However, in the interests of expediency, and as the ACCC has annexed the most recent version of the revised documents (at Annexure B) for comment during the consultation period on the draft decision, the ACCC makes the following high level comments in relation to the future assessment of the substance of any submitted PTRs and other associated documents relating to CBH's capacity allocation system:

- (i) The ACCC will consider the appropriateness of the clauses in the PTRs and any other associated documents in light of the fact that these documents form part of the key processes by which CBH will allocate and manage its port terminal capacity. The ACCC considers it relevant that the proposed Undertaking provides for sufficient certainty and clarity in its terms, effect and operation in order to enable CBH and access seekers to be adequately aware of their respective rights and obligations and will consider these documents with these considerations at the forefront.
- (ii) However, the ACCC also recognises that the process of vessel nomination, acceptance and rejection and overall capacity management is an evolving process. This is (at least in part) due to the existence of a range of possible exogenous developments which can precipitate a change to any previously stated plan. As a result, the ACCC recognises that the maintenance of a flexible and pragmatic approach is required to maintain the overall efficiency of the system (and is proposed under the recommendation in relation to the variation mechanism for the undertaking below).

The ACCC notes that CBH's proposed capacity allocation methodology is based on an auction system. The ACCC has no in-principle objection to the use of a well designed auction process run by an independent third party under which capacity is allocated as, in very general terms, a well functioning price mechanism can ameliorate circumstances of 'excess demand'.

12.5.5 Varying the Port Terminal Rules and other associated documents relating to CBH's capacity allocation system

It is the ACCC's preliminary view that the process to be applied in the proposed Undertaking when seeking a variation of the PTRs provides too much discretion to

⁴⁵⁹ Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 26 and 89.

CBH and insufficient certainty for access seekers. Given the PTRs form part of key processes by which CBH will allocate and manage port terminal capacity, their variation should, by and large, only take place after consultation with the port users.

As discussed above, the ACCC has recommended that the PTRs and other associated documents relating to CBH's capacity allocation system should form part of the Undertaking.

Further, in order to vary the PTRs under the proposed Undertaking, the obligation on CBH in clause 6.1(a)(ii) should be expanded so that CBH must comply with the PTRs when providing the Port Terminal Services under all forms of Access Agreements, on the terms contained in the PTRs that are in existence at the date the access undertaking came into operation or, if relevant, as varied from time to time in accordance with the variation methodology in the Undertaking. In addition, a provision should be included in the undertaking that states that any variations to the PTRs must be made in accordance with, and are subject to the non-discrimination provisions in the undertaking.

The variation methodology for the PTRs in the Undertaking would require:

- (i) a consultation process (the proposed methodology set out at pages 77-78 of CBH's supplementary submission in relation to variations to the proposed Undertaking could be used as a base) where access seekers are given a sufficient degree of notice about amendments, with the PTRs as varied from time to time being required to be published on its website and provided to the ACCC within 5 days.
- (ii) in recognition of the fact that parties may not respond to CBH's communications regarding proposed changes, in certain specifically defined circumstances (i.e. force majeure situations) that are set out clearly in the Undertaking, the amendments may be implemented unilaterally.
- (iii) and a clause would be included in the Undertaking obligating CBH to comply with the PTRs (as amended from time to time).

The ACCC notes that this proposal leaves CBH with the flexibility to vary the PTRs and lies somewhere in the middle of the spectrum of possible PTR variation mechanisms that could be included in the Undertaking. On one end would be the mechanism to allowing CBH the flexibility to amend the PTRs at will, and at the other extreme, the mechanism of only allowing CBH would only be able to amendments to the PTRs in accordance with the formal variation mechanism in section 44ZZA(7) of the Act.

While the ACCC recognises that the recommended 'model' could lead to amendments being made to the PTRs (given that the ACCC will not review all proposed amendments to determine their appropriateness) it is the ACCC's preliminary view that this risk is mitigated by:

- the inclusion of a robust consultation mechanism;
- the inclusion of a provision allowing the ACCC to treat a breach of the amended PTRs as a breach of the Undertaking;

- the recommendation for a clearer non-discrimination provision and the inclusion of a provision that any variation to the PTRs must be made in accordance with and are subject to the non-discrimination provisions in the undertaking; and
- the fact that if this there are issues with this particular model is abused, the term of the Undertaking is relatively short and the variation mechanism would need to be strengthened in any future Undertaking.

It is the ACCC's preliminary view that this approach is more likely to be appropriate as it would maintain a flexible and pragmatic approach to variations of the PTRs – allowing CBH to respond to operational concerns without having to formally vary the Undertaking itself – while providing access seekers with sufficient certainty and clarity in its terms, effect and operation of the key processes by which CBH will allocate and manage port terminal capacity as provided by the PTRs.

To ensure that the ACCC can enforce PTRs that have been varied, a provision should be included in the undertaking that obliges CBH to comply with the PTRs (as varied from time to time).

12.5.6 Operational Decisions

12.5.6.1 Interaction of the Operational Decisions clause in 9.2 and the PTRs

Under the proposed Undertaking, 'Operational Decisions' constitute all decisions made in the course of providing the Port Terminal Services.

The ACCC notes that as a result of the definition of Operational Decisions, there is significant potential overlap with the provisions in the PTRs. From this point of view, the interaction between the PTRs and the Operational Decisions component of the proposed Undertaking is unclear. The ACCC's preliminary view is that it is more likely to be appropriate that the provisions under clause 9.2 are included in the PTRs. See the Non-Discrimination chapter for more detail on this issue.

12.5.6.2 Whether the Operational Decisions clause provides an appropriate balance between providing access seekers with sufficient certainty and clarity as to their terms, effect and operation and CBH with sufficient flexibility in their management of the Port Terminal Services

Given the divergence of views as to the effect of the wording in the Operational Decisions clause in the proposed Undertaking (clause 9.2), the ACCC has considered the appropriateness of the wording of the clauses, noting that the ACCC considers it to be important that the proposed Undertaking provides for sufficient certainty and clarity in its terms, effect and operation in order to enable CBH and access seekers to be adequately aware of their respective rights and obligations.

However, the ACCC also recognises that the process of making Operational Decisions in the provision of Port Terminal Services – namely overall capacity management – is an evolving process. This is (at least in part) due to the existence of a range of possible exogenous developments which can precipitate a change to any previously stated plan. As a result, the ACCC recognises that the maintenance of a flexible and pragmatic approach is required to maintain the overall efficiency of the system.

The ACCC's following comments on the particular provisions of the Operational Decisions clause are made in recognition of both sets of challenges.

1. The ACCC's preliminary view is that clause 9.2(b)(i)(B) is not appropriate because the requirement to 'make decisions that are commercially justifiable taking into account the matters referred to in clause 9.2(c)' provides excessive flexibility to CBH and insufficient certainty for access seekers given that 9.2(c) provides that CBH will be able to make some decisions that 'when viewed in isolation ... necessarily confer a relative disadvantage on one user of the Port and an advantage on others'. A clause that expands on the criteria that are likely to be relevant and the process to be applied in determining whether a decision is 'commercially justifiable' would be more likely to be appropriate.
2. The ACCC's preliminary view is that clause 9.2(d)(i) as currently drafted is not appropriate because the criteria used and the process to be applied in CBH's assessment of the 'likely availability of sufficient Bulk Wheat', 'the likely uncommitted storage capacity at the Port Terminal Facility', and the 'uncommitted inloading capacity necessary to make a nominated vessel's nominated cargo tonnage' are unclear.
3. The ACCC's preliminary view is that clause 9.2(d)(ii)(A) and 9.2(d)(ii)(B) as currently drafted are not appropriate because the criteria that are within CBH's control or require subjective determinations by CBH when determining whether the objective of minimising demurrage or maximising throughput 'over a given period' is unclear and require further explanation. For example, CBH could determine that an objective when making an Operational Decision is to maximise throughput 'over a given period', with that given period to be 12 months. Clauses that remove the 'over a given period' qualifiers would be more likely to be appropriate.
4. The ACCC's preliminary view is that clause 9.2(d)(iii) as currently drafted is not appropriate because the criteria that are within CBH's control or require subjective determinations by CBH when varying a cargo assembly plan or queuing order for vessels are unclear and require further explanation (for example, 'vessel congestion', 'weather preventing relevant activities', 'lack of performance of freight providers').
5. The ACCC's preliminary view is that clause 9.3 as currently drafted is not appropriate. See the Non-Discrimination chapter for more detail.

13 Other issues

Summary

Publication of stocks of grain at port

It is not appropriate that CBH's proposed Undertaking does not include an obligation to publish stocks of grains at port.

Such an obligation would address concerns raised by interested parties that port operators have the potential to restrict access to port for bulk wheat services by exhausting the port terminal's capacity in favour of other grains.

For the avoidance of doubt, this obligation would not extend to publication of up-country information. This is because, as set out in the Scope chapter of this draft decision, it is the ACCC's view that CBH's approach of limiting its proposed Undertaking to port terminal services (and by extension, information about its port operations) is appropriate in the circumstances.

Publication of key port terminal information

As set out in the Ring-Fencing chapter, the ACCC considers that it is appropriate that arrangements be provided for in the proposed Undertaking to address the potential for CBH's marketing arm to misuse port terminal information to its advantage.

The ACCC considers that the appropriate approach to dealing with this issue would be for the proposed Undertaking to require publication of key port terminal information (such as vessel nominations) on the shipping stem a short time after its receipt by CBH. This would increase transparency of nominations that have been made and lessen the opportunity for CBH's marketing arm to misuse key port terminal information. It is important to note that any such discriminatory conduct would be prohibited by a robust non-discrimination clause, such as that recommended by the ACCC in the Non-Discrimination chapter.

Publication of key service standards

It is not appropriate that CBH's proposed Undertaking does not include an obligation to report on a number of key service standards.

Such reporting would provide a degree of transparency around the level of service being provided to wheat exporters and assist potential access seekers in assessing the appropriateness of the price offered for a service.

Part IIIA of the TPA does not prescribe what must be included in an access undertaking. Therefore, a potential access provider has a degree of discretion in how to structure its proposed Undertaking and what it includes in the undertaking. However, the ACCC notes that acceptance of an Undertaking by the ACCC precludes that service from being declared under Part IIIA (see section 44H(3)) of the TPA). In

these circumstances, it is appropriate that the range of terms and conditions of access be sufficient to give access seekers certainty regarding the service subject of the undertaking, and the terms and conditions upon which that service will be provided.

This chapter address the need for additional clauses to those proposed in CBH's proposed Undertaking.

13.1 Publication of information

13.1.1 CBH's proposed Undertaking

CBH's proposed Undertaking does not include an obligation to publish any information about stocks held in storage either in its ports or in its up-country storage and handling network.

13.2 CBH's supporting submissions

In response to submissions from interested parties in relation to the publication of information at port, CBH states:

As the ACCC is aware, CBH and other port terminal operators are required to publish Shipping Stem information under the WEMA. It is unclear how any additional transparency could reasonably be required.⁴⁶⁰

CBH also states that much of the information held at its ports can be obtained from government agencies or through the access available on CBH's web based information services such as those already offered to exporters.⁴⁶¹

In response to submissions calling for greater transparency on the information held in its system, CBH submits:

These complaints are both incorrect and not directly relevant to the Undertaking, because they address services that are performed using country storage facilities. If an Exporter accesses the Port Terminal Service under the Undertaking, it will not require CBH to provide the kind of detailed stock information across the entire CBH network. It will also have handled its own logistics and transport to port. If, like CBH, that process has involved information gathering up-country, then those Exporters will have already met its stock knowledge requirements. To the extent that information regarding stock held at port for the Port Terminal Service, CBH will provide this information to Exporters on a daily basis.

To the extent that CBH's information services under Grain Express are relevant, CBH currently provides the following information to marketers:

- Acquisitions (Grower loads)
- Acquisitions Name & Address of growers - matches each Acquisition transmission
- Movements (including freight) from site to site within the CBH system

⁴⁶⁰ Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 41.

⁴⁶¹ Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 54.

- Outturns (Domestic) for all non-shipping transactions for grain leaving the control of CBH
- Stock levels (operational) for all stocks held by CBH, at a site, grain, grade level
- Property Details (a full listing of all CBH client property details). This is a CBH-generated format and not considered a recognised standard but has been included in this document for completeness.

Riverina's complaint is essentially that it has difficulty accessing information and that CBH provides the information it requires too slowly. Exporters have access stock information in two ways. If an Exporter wants information about its stock holdings, it can access that information through Stocknet at any time. If it requires more specific information, such as on grower deliveries, it may use the client access tool, which uses software provided free of charge by CBH. Riverina and some other Exporters consider that the client access software is difficult for them to use and have asked CBH to send out information in report form. CBH has done so but the conversion of the data to report form means that the report is sent well after the information itself could have been accessed by an Exporter that was able to use the client access software. Many Exporters have been able to use the CBH client access software effectively. Riverina is one of a small minority of Exporters who have requested CBH to perform the task of extracting relevant data into a report format. In short, the information was always available but a small minority of Exporters have experienced some difficulty using it.⁴⁶²

13.3 Submissions from interested parties

13.3.1 Australian Grain Exporters Association

AGEA submits that the BHCs have the ability to discriminate against other traders through manipulating other grain stocks at port:

The proposed access undertakings do not provide transparency in relation to BHCs' management of shipping slots and accumulation at port. Unless the proposed access undertakings provide transparency in relation to BHCs' decisions, BHCs will be able to manipulate logistics, substitute vessels and/or vary the shipping stem to confer preferential treatment on themselves of their Trading Division.⁴⁶³

Further, AGEA submits:

BHCs can allow their stock to sit in port, taking up accumulation space from other AWEs. BHCs therefore have the ability to manipulate the logistics of getting stock to port to serve their own interests (or the interests of their Trading Division).⁴⁶⁴

AGEA also submits on the overall information available to CBH because of its vertically integrated nature:

⁴⁶² Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 91.

⁴⁶³ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 4.12, p. 10.

⁴⁶⁴ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 14.4, p. 31.

There is a critical imbalance between the information available to BHCs as port operators and the information available to AWEs. BHCs control inventory movements, quality profile, transportation and capacity at ports and have within their control information relating to logistics of stock into port. BHCs know who is transporting stock into port, what stock is coming into port, how much stock is in the port and when and how much stock is due to leave the port. BHCs could refuse to allow AWEs to accumulate stock on the basis that the port is full, but no-one would know if that is the case.

This imbalance in information is exacerbated in situations where, as is the case here, the BHCs provide upstream and downstream services. The result is that the BHCs possess a great deal of information about the trading activities of the AWEs (their competitors) and are consequently in a position to advantage the BHCs' related entities, or to disadvantage the AWEs. The undertakings do not ensure that AWEs obtain access to the same information that is available to BHCs.⁴⁶⁵

To overcome some of these issues, AGEA submits that the following information should be published by CBH on a timely basis:

- (a) port capacity;
- (b) stock on hand at port;
- (c) daily receivals by grade;
- (d) the accumulation programme at port;
- (e) stock movements;
- (f) allocation and changes to vessel loading slots;
- (g) weight, quality and AQIS compliance;
- (h) all other necessary information for AWEs to assess whether BHCs have met the performance criteria.⁴⁶⁶

AGEA also submits that CBH should provide daily updates on:

- (i) stock on hand at port;
- (ii) daily receivals by grade into port;
- (iii) the port's capacity;
- (iv) wheat accumulation;
- (v) unloading from upcountry transporters into port;
- (vi) stock movements.⁴⁶⁷

⁴⁶⁵ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 4.13-4.14, pp. 11-12.

⁴⁶⁶ Australian Grain Exporters Association, *Submission to Port Terminal Services Access Undertakings*, 29 May 2009, para 4.16, p. 12.

13.3.2 Western Australian Farmers Federation

The Western Australian Farmers Federation made the following comment in relation to the transparency of information:

In addition to shipping stem information, WAFarmers remains steadfast in its request to CBH that as much information as is commercially viable be made available to growers so that they can make informed decisions given that they are individual marketers.⁴⁶⁸

13.3.3 New South Wales Farmers Association

The NSW Farmers Association, who provided its submission in relation to CBH as well as GrainCorp, submits that there is a lack of transparency of information relating to the grain supply chain. It states:

It is widely known within the industry that Australian storage and handlers have information readily available to them relating to stocks on hand, which can be updated on a daily basis. In fact WEA may be within its rights to request this information, if it believes this is appropriate. Therefore if WEA were directed it might provide an additional and useful service to the wider industry in receiving and publishing the relevant information.⁴⁶⁹

13.3.4 Pastoralists and Graziers Association of WA

The PGA submits that there is an imbalance between the information held by CBH and grain marketers, stating:

There is a critical imbalance between the information available to CBH as port operator and the information available to assist growers in their negotiations with grain marketers. CBH controls inventory movements, quality profile, transportation and capacity at ports and have within their control information relating to logistics of stock into port, including all information relating to up country storage. CBH knows who is transporting stock into port, what stock is coming into port, how much stock is in the port and when and how much stock is due to leave the port throughout Western Australia.⁴⁷⁰

The PGA also submits that CBH should provide growers and exporters with timely information relating to:

- (a) port capacity;
- (b) stock on hand at port;
- (c) daily receipts by grade;
- (d) the accumulation programme at port;

⁴⁶⁷ Australian Grain Exporters Association, *Submission to Port Terminal Services Access Undertakings*, 29 May 2009, para 4.17(k), p. 14.

⁴⁶⁸ Western Australian Farmers Federation (Inc), *Submission in relation to proposed CBH access undertaking*, 29 May 2009, p. 2.

⁴⁶⁹ NSW Farmers Association, *Submission in relation to proposed access undertakings*, June 2009, p. 5.

⁴⁷⁰ Pastoralists and Graziers Association, *Submission in relation to proposed CBH access undertaking*, 29 May 2009, para 2.12, p. 3.

- (e) stock movements;
- (f) allocation and changes to vessel loading slots;
- (g) weight, quality and AQIS compliance;
- (h) all other necessary information for exporters and growers to assess whether CBH has met the performance criteria.⁴⁷¹

13.4 ACCC's views

The ACCC considers that it is not appropriate that CBH's proposed Undertaking does not include a requirement to publish information about stock held at port.

The ACCC notes the submission made by AGEA that, given the proposed Undertaking relates only to wheat, port operators have the potential to restrict access to port by exhausting the port terminal's capacity in favour of other grains.⁴⁷²

While the ACCC does not have evidence to suggest that such behaviour has occurred, the ACCC recognises that providing a greater level of transparency over stocks at port would assist to alleviate the potential for port operators to engage in this behaviour. Accordingly, the ACCC considers that it would be appropriate for CBH's proposed Undertaking to state that it will publish information relating to the stocks held at port on a regular basis.

However, the ACCC considers CBH's approach of not including an obligation to publish stocks held *up-country*, is appropriate in the circumstances.

The ACCC recognises that, as CBH has submitted, it is clear that the intention of the WEMA is that the proposed Undertakings should apply only to services offered at port.

In this regard, the ACCC notes that the Explanatory Memorandum to the WEMA responded to calls to extend the access test to cover up-country services, stating that:

Up-country facilities do not display natural monopoly characteristics as they have low barriers to entry and there are already a number of competitors in the industry who provide up-country storage services.⁴⁷³

The Explanatory Memorandum goes on to note that an extension of the access arrangements to up-country storage facilities would 'impose an excessive regulatory burden'.⁴⁷⁴ Further, the Second Reading Speech of the WEMA provides:

The Senate inquiry also identified concerns in relation to the potential for bulk-handling companies to restrict access to up-country storage facilities in a similar manner to concerns in relation to port facilities.

⁴⁷¹ Pastoralists and Graziers Association, *Submission in relation to proposed CBH access undertaking*, 29 May 2009, para 4.32, p. 12.

⁴⁷² Australian Grain Exporters Association, *Submission to Port Terminal Services Access Undertakings*, 29 May 2009, para 4.9, p. 10.

⁴⁷³ Explanatory Memorandum, *Wheat Export Marketing Bill 2008*, p. 13.

⁴⁷⁴ Explanatory Memorandum, *Wheat Export Marketing Bill 2008*, p. 14.

It is unclear from the evidence presented to the Senate inquiry whether the problem would necessarily arise, and if so, the extent of legislation that would be required to correct it.

If the highest level of regulation were to be imposed on the more than 500 up-country facilities, there is no doubt that this would create increased compliance costs which would almost certainly be directly passed back to growers.

The government will, therefore, continue to monitor the ability of exporters to access up-country storage facilities.

Let me say here, if any problems are identified then the government will take steps to remedy the situation including, if necessary, the development of a code of conduct.⁴⁷⁵

While the ACCC is cognisant of the submissions made calling for the publication of information in relation to stocks held in CBH's up-country storage and handling facilities, the ACCC notes that the ring-fencing rules CBH currently has in place prohibit the sharing of information between CBH and GrainPool.

Given this, the clear express intention of the WEMA, and having regard to the risk and undesirability of imposing regulation that is not appropriate at a time when the industry is newly liberalised and in transition, the ACCC considers that it is appropriate pursuant to section 44ZZA(3) of the TPA that CBH's proposed Undertaking does not include a requirement to publish stocks held in its up-country network.

13.5 Publication of key port terminal information

As set out in the Ring-Fencing chapter, the ACCC considers that it is appropriate that arrangements be provided for in the proposed Undertaking to address the potential for CBH's marketing arm to misuse port terminal information to its advantage.

The ACCC considers that the appropriate approach to dealing with this issue would be for the proposed Undertaking to require publication of key port terminal information (such as vessel nominations) on the shipping stem a short time after its receipt by CBH.

This would increase transparency of nominations that have been made and lessen the opportunity for CBH's marketing arm to misuse key port terminal information. It is important to note that any such discriminatory conduct would be prohibited by a robust non-discrimination clause, such as that recommended by the ACCC in the Non-Discrimination chapter.

⁴⁷⁵ House of Representatives, *Votes and Proceedings, Hansard*, Thursday 29 May 2009, pp. 76–77.

13.6 Port performance indicators

13.6.1 CBH's proposed Undertaking

CBH's proposed Undertaking does not place any obligation on it to maintain and publish performance indicators.

13.7 CBH's supporting submissions

In response to questions in the ACCC Issues Paper published 29 April 2009 and submissions from interested parties, CBH states:

CBH does not consider that performance indicators should be mandated through the Undertaking. To do so would import a level [of] operational and contractual supervision that exceeds what is required in other similar processes. No substantive case has been made in relation to the introduction of that degree of control of private services as part of a Government regulatory process.

It is also questionable whether the information gathered serves a useful purpose or adds to existing information relating to performance.

The terms and conditions offered under the Undertaking contain no less discipline on CBH's performance than CBH's Grain Services Agreement under Grain Express. The inclusion of the access test in the WEMA was not for the purpose of regulating the quality and detailed delivery of services by the owners of port terminal facilities. Rather, it was included to ensure that appropriate access to services was offered by vertically integrated port terminal operators. The inclusion of performance indicators would exceed the extend [sic] of regulation intended by the introduction of the WEMA.⁴⁷⁶

13.8 Submissions from interested parties

13.8.1 Australian Grain Exporters Association

AGEA calls for the following minimum performance criteria to be included in the standard terms:

- (f) the specification of minimum performance criteria which BHCs are required to meet including:
 - i) acceptance of vessel nominations regardless of stock entitlements within 24 hours;
 - ii) changes to vessel slots and cargo accumulation;
 - iii) unloading of trains/road transport within six hours;
 - iv) load rates and time to count as per Austwheat 2008 charterparty (as amended from time to time);
 - v) benchmark criteria for grading, fumigation, weighing, compliance with AQIS requirements, loading to receipt standards. The grain loaded to the ship should be of a

⁴⁷⁶ Co-operative Bulk Handling Limited, *Further submission to the ACCC*, 29 June 2009, p. 39.

standard not less than that delivered to the port terminal by or on behalf of the exporter. The terminal should provide running samples and/or analysis during loading so that any deviation from the required quality is known by the exporter prior to the completion of loading.

vi) settling despatch demurrage at the applicable vessel rate.⁴⁷⁷

13.9 ACCC's views

The ACCC considers that it is not appropriate that CBH's proposed Undertaking does not include a requirement report on a number of service performance levels.

Such reporting would provide a degree of transparency around the level of service being provided to wheat exporters and assist potential access seekers in assessing the appropriateness of the price offered for a service.

While not seeking to prescribe what service performance indicators should be included in an undertaking, the ACCC notes the following possible indicators:

- Ship rejections;
- Cargo assembly times;
- Transport queuing times;
- Port blockouts;
- Overtime charged;
- Demurrage.

The ACCC notes that, contrary to CBH's arguments, including obligations to report on service standards is a common obligation included access undertakings.⁴⁷⁸

⁴⁷⁷ Australian Grain Exporters Association, *Submission to Port Terminal Services Access Undertakings*, 29 May 2009, para 4.17(f), p. 13.

⁴⁷⁸ See, for example, the access undertaking submitted by the Australian Rail Track Corporation (ARTC), and accepted by the ACCC on 30 July 2008.

14 Draft Decision on CBH's access Undertaking

Summary

The ACCC's draft decision is that it should not accept the access Undertaking given to the ACCC by CBH on 14 April 2009.

14.1 Draft Decision on CBH's access Undertaking

In relation to the access Undertaking given to the ACCC by CBH on 14 April 2009, the ACCC's draft finding is that, having regard to the matters listed in s.44ZZA(3) of the TPA, it would not be appropriate to accept the Undertaking.

As a result, the ACCC's draft decision is that it should not accept the Undertaking in its current form.

The ACCC has provided its draft views throughout on provisions that would not be appropriate, and alternatives that might be more appropriate.

Annexure A: Proposed Indicative Access Agreement



CO-OPERATIVE BULK HANDLING LIMITED
(ABN 29 256 604 947)

**2009/10 Season
PORT TERMINAL SERVICES AGREEMENT**

FOR

Standard Port Terminal Services

PROVIDED TO

XXX
(ABN xxx)

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THIS AGREEMENT dated the

BETWEEN:

CO-OPERATIVE BULK HANDLING LIMITED
(ABN 29 256 604 947)
of Gayfer House, 30 Delhi Street, West Perth WA 6005
("**CBH**")

AND

XXX
(ABN xxx)
of 'insert address'
("**Customer**")

RECITALS

- A. CBH operates Port Terminal Facilities in Western Australia.
- B. CBH provides Port Terminal Services to Customers for the export of Bulk Grain under the terms of its Undertaking.
- C. The Customer purchases Grain and wishes to utilise the Services.
- D. CBH has agreed to provide the Customer with the Services pursuant to the terms and conditions of this Agreement.
- E. The Customer has agreed to the terms and conditions of this Agreement and will remunerate CBH in accordance with the terms of this Agreement.

THE PARTIES AGREE AS FOLLOWS:

1 COMMENCEMENT AND TERMINATION

1.1 Commencement

- (a) This Agreement will apply to all Services provided by CBH after 1 October 2009 ("**Commencement Date**") unless otherwise agreed in writing between CBH and the Customer.
- (b) The terms and conditions set out in this Agreement shall be deemed to be accepted by the Customer if the Customer utilises any of the Services contained in this Agreement notwithstanding the fact that the Customer has not executed this Agreement.
- (c) This Agreement supersedes any previous agreement between CBH and the Customer.

1.2 General Termination

This Agreement will terminate on 30 September 2010 ("**End Date**") and the Customer must ensure that prior arrangements are made to Outturn all Grain held by CBH prior to this date otherwise the Customer will be bound by the terms and conditions of any superseding standard Port Terminal Services Agreement.

1.3 Immediate Termination

CBH may terminate this Agreement by notice with immediate effect if the Customer commits a Material Breach of this Agreement.

If the Agreement is terminated with immediate effect in accordance with clause 1.3, CBH may require that all Grain must be Outturned as soon as possible, and the terms of this Agreement will continue to apply until all Grain has been Outturned.

1.4 Survival of Terms

Clauses 5.6, 9, 10, 13, 15, 18, 23 and 25 shall survive the termination of this Agreement.

2 DEFINITIONS

In this Agreement:

“**ACCC**” means the Australian Competition and Consumer Commission.

“**Accumulation Plan**” has the meaning set out in the Port Terminal Rules.

“**Additional Storage Charges**” has the meaning given in Schedule 1.

“**AGC**” means the Australian Grains Centre located at 700 Abernethy Road, Forrestfield WA 6058.

“**Agreement**” means this agreement and all schedules, annexures and attachments.

“**Annual Shipping Period**” has the meaning set out in the Port Terminal Rules.

“**AQIS**” means the Australian Quarantine Inspection Services.

“**Arrival**” has the meaning set out in the Port Terminal Rules. **Arrives** and **Arrived** have a corresponding meaning.

“**Auction**” means the sale by auction of Capacity during the Annual Shipping Period.

“**Auction Premium**” means any additional amount paid by the Customer for Capacity which is in excess of the Upfront Marketer’s Fee.

“**Auction Premium Rebate**” means the rebate calculated in accordance with Schedule 2.

“**Auction Rules**” means the auction rules in Schedule 1 of the Port Terminal Rules, as those rules may be amended from time to time. The current version of these rules can be found on CBH’s website, www.cbh.com.au.

“**Bulk Handling Act**” means the Bulk Handling Act 1967 (WA).

“**Bulk Handling Regulations**” means the Bulk Handling Act Regulations 1967 (WA).

“**Bulk Wheat**” has the meaning set out in the Undertaking.

“**Business Day**” means a day that is not a Saturday, Sunday or gazetted public holiday in Western Australia.

“**Capacity**” has the meaning set out in the Port Terminal Rules.

“**Capacity Transfer Fee**” has the meaning set out in Schedule 1.

“**Cargo Request Form**” means the form available from CBH on which all bulk export requests are to be made.

“**CDF**” means the Carter’s Delivery Form as that form stands from time to time.

“**Charter Party**” means the agreement between the owner of a vessel and the party hiring the vessel for use of the vessel in transporting a cargo.

“**Commencement Date**” has the meaning set out in clause 1.1.

“**Contaminant**” means a Level 1 Contaminant, a Level 2 Contaminant or a Level 3 Contaminant as the case requires.

“**Corynetoxins Contamination**” means contamination by low molecular weight chemicals that cause annual ryegrass toxicity.

“**Credit Application Form**” means the form available from CBH on which all customers’ credit application requests are to be made.

"Customer's Manager" means the Customer's representative who is responsible for the Customer's Grain as notified in writing to CBH.

"Demurrage" means the defined level of damages paid to a vessel owner for the delays in loading or discharging the vessel after the Laytime has expired. It is customarily expressed in US dollars per day or portion thereof.

"Dispatch" means the money payable by the vessel owner to the charterer if the vessel completes loading within the agreed Laytime. It is customarily expressed in US dollars per day or portion thereof.

"End Date" has the meaning given in clause 1.2.

"ETA" means the estimated time of arrival of the Nominated Vessel.

"Export Fee" has the meaning given in Schedule 1.

"Export Outturn Request" means an export outturn request in relation to Port Outturning Services.

"Fair Market Price" means the average value at the relevant time and place (of the requirement to determine the Fair Market Price) to be derived from the average of three independent broker valuations by broker appointed by the National Agricultural Commodities Marketing Association, with the valuations to take into account the Grade and variety and taking into account the cost of insurance, levies, taxes, charges, Freight and associated costs.

"Force Majeure" has the meaning given in clause 15.1.

"Forfeiture Approval Authority" means an authority issued by the Customer to CBH to forfeit Grain in excess of the Acceptable Vehicle Mass (as that term is defined in the HMMS).

"Fumigation Certificate" means a certificate declaring that a particular tonnage of Grain has been fumigated, and shall be in the form adopted and prescribed by CBH from time to time.

"Genetically Modified Organism" has the meaning given to that term in the *Gene Technology Act 2000 (Cth)*.

"Good Operating Practices" means the practices, methods and acts engaged in or by a party who, in the conduct of its undertaking, exercises that degree of diligence, prudence and foresight reasonably and ordinarily exercised by skilled and experienced Australian operators engaged in the same type of undertaking under the same or similar circumstances and conditions.

"Grade" means, in relation to Grain, the grade of the Grain actually delivered to the Port Terminal Facility .

"Grain" means all grains, pulses and oil seeds received into the Port Terminal Facility and held by CBH pursuant to this Agreement on behalf of the Customer and includes Bulk Wheat.

"Grain Entitlement" has the meaning set out in clause 6.4.

"Grain Receival Services" means the Grain receival services provided by CBH pursuant in clause 5.

"Grain Storage Services" means the storage services provided by CBH pursuant to clause 6.

"Gross Negligence" means, if a duty of care is owed, an act or omission done with reckless disregard, whether consciously or not, for the consequences of the act or omission.

"Freight" means the independent Customer freight charges for delivery of Grain to a Port Terminal Facility determined or payable by a Customer.

"GST" means any tax imposed by or through the GST Legislation on a supply (without regard to any input tax credit).

"GST Legislation" means *A New Tax System (Goods and Services Tax) Act 1999 (Cth)* and any related tax imposition act (whether imposing tax as a duty of customs excise or otherwise) and

includes any legislation which is enacted to validate recapture or recoup the tax imposed by any of such acts.

"Harvest Shipping Period" means the period from 1 November 2009 to 15 January 2010 as modified from the Port Operator from time to time prior to 31 August for the coming season.

"Heavy Metal Contamination" means any heavy metal that if it comes into contact with or is contained in Grain would present, in CBH's reasonable opinion, a health risk to the environment or humans, irrespective of whether that heavy metal is airborne, solid or contained in solution.

"HMMS" is CBH's Harvest Mass Management Scheme.

"Indirect or Consequential Loss" means indirect, consequential or remote loss or any loss in the nature of compensation for loss of production, loss of profit, loss of opportunity, loss of markets, loss of use of money, goods or other property or loss of goodwill or business reputation including any losses that the Customer may suffer in the event that the ability to resell the Grain is adversely affected.

"Laycan" means the earliest date on which Laytime can commence and the latest date, after which the charterer can opt to cancel the Charter Party.

"Laytime" means the amount of time that a charterer has to load a vessel before the vessel is deemed to be on Demurrage.

"Level 1 Contaminant" means a contaminant identified as Level 1 in the CBH contaminant list published by CBH for the current Season as amended from time to time, being contaminants that in CBH's opinion cannot be removed and constitute a significant food safety or quality risk.

"Level 2 Contaminant" means a contaminant identified as Level 2 in the CBH contaminant list published by CBH for the current Season as amended from time to time, being contaminants that in CBH's opinion pose a food safety or processing hazard and can have a significant impact on the integrity of the supply chain.

"Level 3 Contaminant" means a contaminant identified as Level 3 in the CBH contaminant list published by CBH for the current Season as amended from time to time, being contaminants that in CBH's opinion present a food safety or processing risk and can be managed on-farm.

"LoadNet® for Marketers™" means CBH's grain management interface for Acquirers which is available to registered users (including the Customer) at www.cbh.com.au

"Loss or Damage" means all losses, costs or damages (including legal costs on a solicitor client basis) arising in connection with any personal injury, death, damage to property or economic loss.

"Lost Capacity" has the meaning given in the Port Terminal Rules.

"Material Breach" means a breach which:

- (a) in the reasonable opinion of CBH, is not capable of being remedied; or
- (b) the Customer has failed to remedy after being given at least 14 days written notice by CBH to do so if the Customer:
 - (i) does not pay its debts as and when they fall due;
 - (ii) commits an act of bankruptcy;
 - (iii) enters into a composition or arrangement with its creditors or calls a meeting of creditors with the view to entering into a composition or arrangement;
 - (iv) has execution levied against it by creditors, debenture holders or trustees under a floating charge;
 - (v) takes or has taken or instituted against it any actions or proceedings, whether voluntary or compulsory, which have the object of or which may result in the winding up or bankruptcy of the Customer (except, in the case of a corporation, for the purposes of a solvent reconstruction);

- (vi) has a winding up order made against it or (except for the purposes of a solvent reconstruction) passes a resolution for winding up;
- (vii) is a party to the appointment of or has an administrator, official manager, receiver, receiver/manager, provisional liquidator or liquidator appointed to the whole or part of its property or undertaking; or
- (viii) repudiates this Agreement.

"Microbial Contamination" means contamination by pathogenic (disease-causing) micro-organisms including *E. coli*, *Cryptosporidium*, *Giardia*, and *Salmonella*.

"NCV" means no commercial value.

"Natural Toxicant Contamination" means contamination by toxins that are produced by, or naturally occur in, plants or micro-organisms (including, without limitation, mycotoxins produced by fungi, and poisonous low molecular weight substances of plant and bacterial origin).

"Nominated Tonnage" means the tonnage of Grain to be shipped in a particular Nominated Vessel and notified to CBH in accordance with this agreement and the Port Terminal Rules.

"Nominated Vessel" means a vessel nominated by the Customer and notified to CBH in accordance with the terms of this agreement and the Port Terminal Rules.

"Notice of Readiness" means a valid notice of readiness served by the owner of the Nominated Vessel pursuant to the Vessel Charter party stating, amongst other things, that the Nominated Vessel is ready to load in all respects (including physically and legally).

"Outturn" means to cause Grain to physically leave CBH's custody at a Port Terminal Facility and is deemed to occur when the Grain exits the delivery spout into a Grain shipping vessel at which point physical possession of the Grain passes from CBH to the Customer or a third party authorised by the Customer

"Outturn Request" means a request by the Customer to Outturn Grain on relevant Outturn Request Form or online via LoadNet® for Marketers™.

"Outturn Request Form" means the form available from CBH on which all Outturn requests are to be made.

"Pesticide Residue Contamination" means contamination by any substance in Grain resulting from the use of a pesticide. The concept of pesticide residue includes any derivatives of a pesticide, such as conversion products, metabolites, reaction products, and impurities considered to be of potential toxicological significance.

"Port Outturning Services" means the services provided by CBH pursuant to clause 7.

"Port Schedules" has the meaning given to that term in the Undertaking.

"Port Terminal Facility" has the meaning given to that term in the Undertaking.

"Port Terminal Rules" means the port terminal rules published from time to time by CBH.

"Port Terminal Service" has the meaning given to that term in the Undertaking.

"Pre-Delivery Sample Analysis Form" means the form available from CBH from time to time.

"Receival Standards" means the quality specifications declared in writing by the Customer at or before the time of delivery of each load of Grain delivered to the Port Terminal Facility.

"Related Bodies Corporate" has the meaning given to that term in the *Corporations Act 2001 (Cth)*.

"Relevant Surveys" means all relevant surveys required to be conducted on the Nominated Vessel before it can be loaded with the Grain, including, but not limited to a structural survey of the Nominated Vessel and surveys conducted by AQIS.

“Ring Fencing Rules” means the ring fencing rules in schedule 2 of the Undertaking.

“Season” means the period between 1 October of one year and the next 30 September.

“Services” means all of the services provided by CBH to the Customer pursuant to this Agreement.

“Shrinkage” means the allowance for loss in weight of Grain that occurs during the storage and handling and transport process.

“Stack” means the segregated load of Grain delivered to the Port Terminal Facility for export accumulation and loading to a ship.

“Stack Segregation” means the CBH system of Grain storage whereby Grain is stored at the Port Terminal Facility in a distinct storage arrangement for the purpose of export accumulation.

“Storage” means the silo, bin, Stack or other storage area at a Port Terminal Facility in which Grain is accumulated for loading to an export Grain shipping vessel.

“Taxable Supply” has the meaning given in the GST Legislation.

“Tax Invoice” has the meaning given in the GST Legislation.

“Term” means the term of this agreement which commences on the Commencement Date and ends on the End Date, unless terminated earlier in accordance with its terms.

“TPA” means the *Trade Practices Act 1974 (Cth)*.

“Undertaking” means the undertaking provided by CBH to the ACCC under the provisions of the WEMA and Part IIIA of the TPA dated [date] and available on the ACCC website [attach reference].

“Upfront Marketer's Fee” has the meaning given in Schedule 1.

“Varietal Purity” refers to the consistency in the genetic make-up of seed Grains, and is determined by measuring the percentage of seed in the sample of the declared variety.

“Vessel Nomination” has the meaning given in the Port Terminal Rules.

“WEMA” means the *Wheat Export Marketing Act 2008 (Cth)*.

“Wilful Misconduct” means an intentional and conscious disregard of any material provision of this Agreement, but does not include any error of judgment or mistake made by the person alleged to be culpable or by any director, employee, agent or contractor of that person in the exercise, in good faith, of any function, power, authority or discretion conferred on that person under this Agreement or under any law.

3 INTERPRETATION

In this Agreement:

3.1 Interpretation

- (a) headings, sub-headings, captions and service descriptions do not affect the construction or interpretation of this Agreement;
- (b) a word in the singular includes the plural of that word and vice versa;
- (c) a word of any gender includes the corresponding words of each other gender and a reference to one sex includes a reference to all sexes;
- (d) “including” means “including, but not limited to”;
- (e) where any word or phrase is given a defined meaning in this Agreement, any part of speech or other grammatical form of that word or phrase has a corresponding meaning;
- (f) a reference in this Agreement to a thing (including an amount) is a reference to the whole and each part of it (but nothing in this clause 3.1(f) implies that performance of part of an

obligation is the performance of the whole) and a reference to a group of persons is a reference to all of them collectively, to any 2 or more of them collectively and to each of them individually;

3.2 Documents and Parts of Documents

- (a) a reference to any Law, document, instrument or agreement, including this Agreement, includes a reference to that Law, document, instrument or agreement as amended, novated, supplemented, varied or replaced from time to time; and
- (b) a reference to a clause or annexure or attachment is (unless the context requires otherwise) a reference to a clause or annexure or attachment to this Agreement;

3.3 Persons and Corporations

- (a) a reference to a person includes a body politic, corporation, partnership, limited partnership, association or joint venture (whether incorporated or not) whatsoever and wheresoever formed and howsoever described and also a government, governmental or semi-governmental agency or local authority;
- (b) a reference to a person includes that person's successors and permitted assigns and, in the case of a natural person, that person's legal personal representatives;

3.4 Time, Money and Measurement

- (a) a reference to an amount of money is a reference to the amount in the lawful currency of Australia;
- (b) a reference to time is a reference to the local time in Perth, Western Australia (unless otherwise stated);
- (c) where any matter or thing is required to be attended to or done on a day which is not a Business Day, it will be attended to or done on the first day thereafter which is a Business Day; and
- (d) measurements of physical quantities are in Australian legal units of measurement within the meaning of the *National Measurement Act 1960* (Cth).

3.5 Discretions and Approvals

- (a) Whenever the Customer is required to form an opinion, give approval, exercise a discretion or perform any act under this Agreement, it must be done reasonably in the circumstances, and based on reasonable grounds, and not capriciously, or arbitrarily refused or unduly delayed.
- (b) In making any decision pursuant to this Agreement CBH shall have regard to the efficient running of the CBH Port Terminal Facility and balancing of the interests of all Customers of the Port Terminal Facility.
- (c) CBH's refusal to accept a request for Service will not be a breach of the Agreement for making a decision which in its reasonable opinion is in the best interests of the overall performance of the Port Terminal Facility and the Bulk Grain export market as a whole.

4 PORT TERMINAL RULES

CBH and the Customer:

- (a) Agree to comply with the Port Terminal Rules as published and as amended from time to time in accordance with the provisions of the Port Terminal Rules; and
- (b) Acknowledge that in case of any inconsistency between the terms of this Agreement and the Port Terminal Rules, the Port Terminal Rules shall apply.

5 GRAIN RECEIVAL SERVICES

Service Description: This service provides Grain receipt, storage assessment, weight measurement and Grain handling at the point of receipt into a Port Terminal Facility.

5.1 Service Availability

- (a) Grain Receipt Services are provided by CBH under this Agreement for the purpose of export accumulation only and will not be available more than 21 days before the ETA.
- (b) CBH agrees to make Grain Receipt Services available at the Port Terminal Facilities in accordance with the terms and conditions of this Agreement and the Port Terminal Rules.
- (c) Prior to requesting Grain Receipt Services, the Customer must acquire Capacity.
- (d) If the Customer requires Grain Receipt Services, the Customer must submit a Cargo Request Form to CBH no later than 30 days prior to the Nominated Vessel's ETA.
- (e) At least 22 days prior to the Nominated Vessel's ETA, the Customer must submit a valid Vessel Nomination (in accordance with the Port Terminal Rules).

5.2 Before Delivery

- (a) CBH requires a representative sample of the Grain intended for delivery to minimise the risk of insect and chemical residue contaminated Grain being received into the Port Terminal Facility.
- (b) The Customer must complete a Pre-Delivery Sample Analysis Form paying particular attention to completing the section marked '*Treatment*'.
- (c) The Customer must provide a one kilogram representative sample from each Storage that the Customer intends to collect Grain to be delivered to the Port Terminal Facility. If the Grain is from more than one storage type, the Storage identification must be clearly marked on each sample.
- (d) The Pre-Delivery Sample Analysis Form with the sample/s for chemical analysis must be couriered direct to: "Australian Grains Centre (AGC), 700 Abernethy Road, Forrestfield WA 6058"
- (e) CBH will provide the Customer with the sample results within 2 Business Days of the sample being received.
- (f) Each acceptable sample analysis will permit the Customer to deliver the Grain to the Port Terminal Facility for up to 28 days from the date when the results are reported to the Customer. If the Customer wishes to deliver Grain to the Port Terminal Facility after that 28 day period has expired, then the Customer must provide additional representative samples for testing (in accordance with the procedure set out in clauses 5.2(b) to 5.2(d)) from each remaining Storage from which Grain is to be collected for delivery to the Port Terminal Facility.
- (g) If the sample contains any manageable Contaminants, the Grain must be treated before a new sample is presented for testing.

5.3 During Delivery

- (a) Upon arrival of each truck load containing the Customer's Grain, CBH staff will assess the VRL of the truck delivering loads to the Port Terminal Facility. Each truck is to have a valid permit to meet the presented combination and the gross weight tendered. Unloading of non-compliant vehicles will be refused and those vehicles will be required to leave the Port Terminal Facility.
- (b) The grade, variety and other characteristics of the Grain delivered are to be declared in writing by the Customer by no later than the time of delivery and CBH takes no responsibility for the accuracy, completeness or veracity of the information relating to the Grain declared by the Customer. If the load is found to be contaminated or showing signs of insect infestation or activity for any reason the load will be rejected.

- (c) If a load is found to be contaminated the Customer will not be permitted to deliver to CBH Port Terminal Facilities until the Customer has provided CBH with evidence in the form of independent expert verification that there is no further risk of contamination. If the Contaminant is manageable and capable of being removed by treatment prior to delivery then the Customer must produce a new sample for testing prior to delivery.
- (d) All Grain delivered into the CBH Port Terminal Facility will be received into a segregated stack.
- (e) CBH shall segregate grain into Stack Segregations notified by the Customer, subject to clause 5.3 (f).
- (f) CBH shall not be required to:
 - (i) provide multiple Stack Segregations of less than 5000 tonnes per Stack Segregation;
 - (ii) test grain for grade prior to delivery;
 - (iii) warrant or promise that grain in any Stack Segregation meets any grade specification;
 - (iv) provide multiple Stack Segregations by grade if, at the relevant time, there is insufficient storage capacity in the relevant Port Terminal Facilities to provide multiple Stack Segregations without:
 - (A) substantially reducing the efficient use of the Port Terminal Facility; or
 - (B) adversely affecting the existing cargo accumulation or loading plans for other users of the Port Terminal Facility.

5.4 Receival Procedures

Where CBH receives a load of Grain (whether delivered by the Customer), CBH will at the time CBH receives the Grain:

- (a) record the running Grade of the Grain delivered to the Port Terminal Facility declared by the Customer;
- (b) determine the Storage into which the Grain will be placed;
- (c) weigh the Grain delivered;
- (d) store the Grain in accordance with the Grain Storage Services and any specific additional storage and handling requirements as agreed to in writing between the Customer and CBH;
- (e) furnish to the Customer a weighbridge ticket or a statement that specifies Grain type, running Grade, weight and any other relevant details or specifications; and
- (f) the person tendering a load of Grain to CBH at the Port Terminal Facility shall deliver to CBH a written statement declaring:
 - (i) the date of delivery;
 - (ii) the place of delivery;
 - (iii) the approximate quantity tendered; and
 - (iv) the type and variety of Grain.

5.5 Warranties

The Customer represents and warrants that:

- (i) it owns any Grain tendered for delivery by or on behalf of it;
- (ii) the full particulars of the variety of the Grain disclosed on any form are true and correct;
- (iii) it has not manipulated or loaded any delivery in any way to prevent the making of an accurate assessment by CBH of the quality of the Grain using CBH's standard sampling procedures;

- (iv) Grain being tendered for delivery will not:
 - (A) include any Contaminant ; or
 - (B) be in breach of the Bulk Handling Act or the Bulk Handling Regulations;
- (v) all of the Grain was grown between the May and September immediately prior to the current Season;
- (vi) all of the Grain in a delivery has been or is only contained in equipment, bags, farm implements, farm storages and bulk Grain motor bodies that have:
 - (A) not contained any Grain product prior to the containing Grain of this current Season and are free from insects and vermin; or
 - (B) previously contained a Grain product, but have been freed of all such Grain product and is free from insects and vermin;
- (vii) any vehicle that has previously transported non-Grain or contaminated Grain products:
 - (A) is clean, dry and free of any remaining materials and odours from previous loads;
 - (B) has been washed under high pressure prior to delivering any Grain; and
 - (C) has the details of previous loads disclosed on the relevant form;
- (viii) if any of the Grain has been treated with substances for the control of insects, details of the substances and the application of those substances has been provided in writing to CBH on the relevant form and the use of any other chemical in the process of planting, growing and storage of Grain has been in accordance with the levels prescribed in any relevant legislation and also in accordance with the usage instructions;
- (ix) none of the Grain in a delivery is a Genetically Modified Organism (unless declared in writing to, and approved in writing by, CBH before the delivery enters the Port Terminal Facility); and
- (x) any information it provides to CBH is true and correct and not misleading or deceptive or likely to mislead or deceive.

5.6 HMMS

Subclauses 5.6(a) to 5.6(d) inclusive apply in relation to any deliveries by the Customer or its agent to the Port Terminal Facility during the Harvest Shipping Period.

- (a) The HMMS is incorporated as part of the terms of this Agreement in respect of any non Grower receivals that may occur.
- (b) If as part of CBH's HMMS the Customer gives CBH a Forfeiture Approval Authority to forfeit Grain in excess of the Acceptable Vehicle Mass (as that term is defined in the HMMS), CBH is entitled to deduct, in accordance with the HMMS and the Forfeiture Approval Authority, the relevant tonnage from the delivered Grain when calculating the Customer's Grain Entitlement in accordance with clause 6.4. Title to any Grain deducted under this clause vests in CBH and CBH may donate the Grain or the proceeds from its sale to a charity or local government at CBH's discretion.
- (c) A Forfeiture Approval Authority:
 - (i) is valid and binding on the Customer until CBH acknowledges receipt of an instruction to vary it; and
 - (ii) may be varied on an individual delivery basis by signing a contrary instruction on the CDF.
- (d) Notwithstanding anything in the HMMS, the Customer agrees:
 - (i) that it is solely responsible for ensuring that it or its carrier/agent comply with all relevant mass limits prescribed by legislation or regulation for the vehicle used;
 - (ii) it will take all necessary steps (including unloading of any mass in excess of those prescribed limits) to ensure compliance; and
 - (iii) to indemnify and keep CBH indemnified against all expenses, Loss or Damage

incurred by CBH and all actions, claims and demands which may be made against CBH, that arise in relation to the Customer's non-compliance with any maximum mass limits prescribed by legislation or regulation for the vehicles used by it or its carrier/agent to deliver Grain to a CBH Port Terminal Facility.

6 GRAIN STORAGE SERVICES

Service Description: This service involves storage of Grain at Port Terminal Facilities.

6.1 Service Availability

- (a) Grain Storage Services are provided by CBH under this Agreement for the purpose of export accumulation only.
- (b) The Grain Storage Services are provided at a Port Terminal Facility if the relevant Storage is available.

6.2 No Common Stack Storage

All Grain will be stored by CBH in Stack Segregations in which the Customer's Grain will be separated from Grain owned by other Customers.

6.3 Outturn Specifications

Subject to clauses 6.6 and 6.7, the loads of Grain delivered to CBH and stored in a Stack Segregation will be Outturned by CBH upon request from the Customer, subject to the terms of this Agreement.

6.4 Grain Entitlement

- (a) CBH will maintain a register of the Customer's entitlement to Grain stored at Port Terminal Facilities (the "**Grain Entitlement**"). A certificate by an officer of CBH as to the Grain Entitlement shall be prima facie evidence of the loads of Grain that have been delivered to CBH and which the Customer is entitled to have Outturned from the CBH Port Terminal Facility, subject always to the terms and conditions of this Agreement.
- (b) Upon request and subject always to clause 6.4(d), CBH will provide the Customer with information regarding the Grain held at the Port Terminal Facility and delivered to the Port Terminal Facility by the Customer.
- (c) The Grain Entitlement of the Customer is calculated at any particular point in time by aggregating the weight of the loads of Grain received by CBH at the Port Terminal Facility on behalf of the Customer or transferred to the Customer:
 - (i) less the relevant Shrinkage factor specified in clause 6.6,
 - (ii) less the relevant Grain Dust Deduction in clause 6.7 where the Grain is Outturned via the Port Terminal Facility into the Nominated Vessel;
 - (iii) less the weight of any Grain that is damaged or destroyed as a result of a riot, industrial dispute, civil commotion, war, act of God or any unforeseen cause not attributable to the negligence of CBH;
 - (iv) less the weight of any NCV Grain or damaged Grain in respect of which an insurance claim has been made and paid to the Customer in accordance with clauses 13.1 and 14.1;
 - (v) less the weight of any Outturned Grain.
- (d) CBH does not warrant the correctness or completeness of data that has been supplied by the Customer provided in relation to loads of Grain.

6.5 Grain Fumigation

- (a) CBH will not fumigate Grain delivered to the Port Terminal Facility unless insect activity is detected by either or both CBH and AQIS.

- (b) Fumigation services will be carried out by CBH on all Grain where required in its Port Terminal Facility to protect the Grain. The application of fumigation services will limit availability of the Grain in accordance with standard CBH Grain protection practices. CBH will consult with the Customer as to the type of fumigant to be used. The Customer must nominate a representative who is available on a 24/7 basis to confirm available fumigation options. If CBH using reasonable endeavours is unable to obtain confirmation from the representative, CBH will determine the type of fumigant to be used. The Customer will be responsible for all fumigation costs incurred pursuant to this clause 6.5(b).
- (c) Where the Grain delivered by a Customer to a Port Terminal Facility has been fumigated prior to delivery, the Customer shall provide a Fumigation Certificate detailing any Grain treatment information following a written request from CBH.
- (d) Where Grain has been fumigated at the Port Terminal Facility by CBH:
- (i) CBH shall have no liability for any delays in loading the Customer's Vessel as a result of the unavailability of the Grain under fumigation;
 - (ii) CBH shall provide a Fumigation Certificate detailing any Grain treatment information following a written request from the Customer.

6.6 Shrinkage

Notwithstanding any other clause in this Agreement, CBH will apply a Shrinkage factor to all Grain delivered by the Customer to the Port Terminal Facility to determine the quantity of Grain that CBH is obliged to Outturn on behalf of the Customer.

The Shrinkage factors for Grain by type are listed below:

CBH Shrinkage rates					
Wheat	0.50%	Barley	0.50%	Oats	1.00%
Triticale	0.50%	Canola	0.50%	Lupins	0.50%
Albus	0.50%	Millet	0.50%	Lentils	0.75%
Field Peas	0.75%	Chick Peas	0.75%	Faba Beans	0.75%

6.7 Grain Dust

Dust, chaff or fines removed at any stage of the handling process into a CBH dust extraction system is considered be NCV dust and CBH is entitled to dispose of NCV dust as it sees fit. CBH will apply a Grain Dust Deduction as set out below from a Customer's Grain Entitlement when the relevant Grain type is Outturned from a Port Terminal Facility into a vessel.

CBH Dust Deduction					
Wheat	0.25%	Barley	0.25%	Oats	0.00%
Triticale	0.25%	Canola	0.25%	Lupins	0.25%
Albus	0.25%	Millet	0.25%	Lentils	0.25%
Field Peas	0.25%	Chick Peas	0.25%	Faba Beans	0.25%

6.8 Additional Grain Storage Charges

CBH will invoice the Customer for Additional Storage Charges at the rate specified in Schedule 1 if:

- (a) there is any residual Grain Entitlement following the loading of the Customer's vessel; or

- (b) Three days have passed since the ETA in the original Vessel Nomination and the Customer's vessel has not commenced loading as a result of:
 - (i) delays in the date and time of Arrival of the Customer's Vessel or delays in the passing of any Relevant Surveys;
 - (ii) the Customer failing to meet the Accumulation Plan agreed with CBH; or
 - (iii) quality issues with the Customer's Grain Entitlement.

6.9 Title to surplus Grain

Title in any Grain remaining in the CBH system which is surplus to the Customer's Grain Entitlement shall transfer to CBH and CBH shall be entitled to sell or dispose of any surplus Grain as it sees fit and retain any proceeds.

7 PORT OUTTURNING SERVICES

Service Description: This service provides bulk Outturning of Grain at a Port Terminal Facility into a ship's hold.

7.1 Service Availability

- (a) Port Outturning Services are provided by CBH under this Agreement for the purpose of export accumulation only.
- (b) Port Outturning Services are offered at all Port Terminal Facilities in accordance with the terms and conditions contained in this Agreement.
- (c) Port Outturning Service charges do not include any rail or road transportation costs in moving Grain to the relevant Port Terminal Facility.

7.2 Outturn Requests

The Customer must request any Port Outturning Services required either online through LoadNet® for Marketers™, or on an Outturn Request Form.

7.3 Export Outturn Request Form

On receipt of an Export Outturn Request, CBH will determine its ability to meet the request and advise the Customer if CBH has:

- (a) accepted the Outturn Request; or
- (b) rejected the Outturn Request.

7.4 Operational Decision Making

In making any decision to accept or reject the Outturn Request, CBH shall make its determination in accordance with the terms of the Undertaking and in particular having regard to the following:

- (a) that in making decisions relating to the provision of access to the Port Terminal Services, CBH must balance conflicts of interests of Customers of the Port Terminal Facilities;
- (b) the application by CBH of objective commercial criteria and practices and policies to promote fair, reasonable and non-discriminatory Operational Decision making;
- (c) giving priority to vessels based on the lead time given between nomination and vessel ETA, and the likely availability of sufficient Grain Entitlement at the Port prior to vessel ETA, the likely uncommitted storage capacity at the Port Terminal Facility and the uncommitted inloading capacity necessary to make a Nominated Vessel's Nominated Tonnage;
- (d) taking into account in particular, the objectives of:
 - (i) minimising Demurrage at the Port over a given period; and
 - (ii) maximising throughput of Grain at the Port over a given period; and

- (e) vary a cargo assembly plan or queuing order for vessels as a result of:
- (i) insufficient Grain Entitlement at the Port accumulated by the Customer necessary to make a Customer's Nominated Vessel's Nominated Tonnage;
 - (ii) variations in vessel arrival times;
 - (iii) failure of vessels to pass surveys;
 - (iv) stability and ship worthiness inspections;
 - (v) vessel congestion;
 - (vi) variation in cargo requirements;
 - (vii) lack of performance of freight providers;
 - (viii) equipment failure;
 - (ix) maintenance outages;
 - (x) contamination of accumulated cargoes or contamination of loads; or
 - (xi) a Material Breach;
 - (xii) a Customer not working a vessel or accumulating a cargo on a 24 hour/7 day basis where another Customer is able to do so.
 - (xiii) the Grain is unavailable as a result of fumigation activities pursuant to clause 6.5;
 - (xiv) the Export Outturn Request contains inadequate or inaccurate information; or
 - (xv) an event of Force Majeure prevents the scheduling of Port Outturning Services.

7.5 Acceptance of Outturn Request

Upon acceptance of an Outturn Request, CBH shall Outturn the Grain in accordance with the Cargo Outturn Request Form and all other provisions of this Agreement.

7.6 Outturn Standard

CBH is obliged to Outturn the Grain delivered to the Port Terminal Facility by the Customer and held in Storage.

7.7 Weigh

CBH shall weigh all Grain Outturned using its certified batch weighers. In the absence of manifest error or fraud the CBH weight measurement will be final.

7.8 AQIS Sampling

Grain will be made available for inspection by AQIS inspectors at the Customer's cost prior to Outturning the Grain onto the Nominated Vessel.

7.9 Auction Premium Rebate

Within 30 days of the end of the Term, CBH will pay the Auction Premium Rebate (if any) to the Customer.

7.10 Right to Invoice Prior to Outturning

If Grain is scheduled to be Outturned into a ship's hold from a Port Terminal Facility, CBH reserves the right to invoice the Customer and receive payment for the Port Outturning Service charges prior to the Grain being Outturned onto a ship. Where there are variations in respect of the amount of Grain actually Outturned and the costs incurred in Outturning, CBH and the Customer agree that:

- (a) within 30 days of the Grain being Outturned onto a ship, CBH will refund any amounts paid by the Customer under this clause in respect of Outturning charges invoiced by CBH relating to Grain that was not Outturned onto a ship; and
- (b) CBH is entitled to invoice the Customer for any additional Grain Outturned plus costs incurred by CBH as a direct result of the actions of the Customer or the Customer's agent.

7.11 Grain Export Licence

The Customer warrants that the appropriate Grain export licence or accreditation (if applicable) continues to be held prior to requesting Port Outturning Services and that the request is within the terms of the licence. CBH reserves the right to request details of the Grain export licence or accreditation, at any time, and the Customer agrees to provide a copy of the licence to CBH within twenty-four (24) hours of any such request.

7.12 Misrepresentation

- (a) The Customer warrants that the Grain and its Grade will not be misrepresented to third parties or incorrectly recorded on commercial or shipping documents.
- (b) The Customer indemnifies CBH against all Loss or Damage incurred in any dispute over Grain quality arising from such misrepresentation or incorrect recording of the Grade on commercial or shipping documents.

7.13 Cleanliness

- (a) The Customer is responsible for ensuring that all vessels arrive at a Port Terminal Facility in a clean, empty and well maintained state free from any Contaminants or residue.
- (b) CBH is not obliged to inspect any vessel for cleanliness but if it does inspect then CBH, acting reasonably at all times, is entitled to reject the vessel as unfit for the transportation of Grain and to refuse to load the vessel.
- (c) CBH is not liable for any Loss or Damage caused as a result of a rejection of the vessel.
- (d) The Customer agrees to pay CBH for any costs incurred by CBH as a result of the rejection of a vessel by CBH or AQIS.
- (e) Vessels are not permitted to be cleaned at any Port Terminal Facility without CBH's consent. If CBH consents to cleaning of the vessel, and if a vessel fails inspection, CBH can instruct a vessel to be removed from the berth if it is preventing another vessel from loading at the same berth.

7.14 Stevedoring

If the Customer requests, CBH is willing to arrange stevedoring services for the Customer's vessels when they are loaded at Port Terminal Facilities. Upon request CBH will provide the Customer with the necessary terms and conditions (including charges) for CBH's provision of stevedoring services.

7.15 Demurrage and Dispatch

The parties may enter into Demurrage and Dispatch arrangements by mutual agreement at the time CBH is notified of the Vessel Nomination in accordance with the Port Terminal Rules, subject to the Customer complying with the Port Terminal Rules.

7.16 Non-Shipment of Grain

If Grain is not shipped from a Port Terminal Facility as detailed in a Vessel Nomination other than as a result of circumstances directly within the control of CBH, then:

- (a) CBH will consult with the Customer about the re-positioning within, or removal from the Port Terminal Facility of the Grain;
- (b) After 14 days have passed since the ETA contained in the Vessel Nomination, CBH may remove or reposition Grain at its discretion and the Customer shall pay all reasonable costs incurred by CBH.

8 ADDITIONAL INFORMATION AND SERVICES

Service Description: CBH may also provide additional information or services over and above the standard information and services that CBH has agreed to provide under this Agreement.

8.1 Information and Service Requests

- (a) CBH will provide the Customer with an estimate of its costs and any additional terms and conditions required in order to provide additional information or services. Costs may either be a lump sum or in accordance with normal hourly rates.
- (b) The Customer agrees to pay CBH's costs in providing any additional information or services requested by the Customer.
- (c) The decision of CBH whether to provide any additional information or services requested by the Customer will be at CBH's absolute discretion unless it is required to provide such additional information by any law.

9 PAYMENT

9.1 Fees and Charges

- (a) In consideration for any Services provided by CBH to the Customer under this Agreement, the Customer agrees to pay CBH for all Services rendered in accordance with the charges set out in Schedule 1.
- (b) In particular, and without limiting the charges that may be levied under this Agreement the Customer agrees to pay:
 - (i) The Upfront Marketer Fee set out in Schedule 1 within 5 Business Days of the date of the CBH invoice for each tonne of Capacity that the Customer acquires in the:
 - (A) Harvest Shipping Period; and
 - (B) Annual Shipping Period;
 - (ii) the relevant Auction Premium within 5 Business Days of the date of the CBH invoice for each tonne of Capacity acquired at an Auction;
 - (iii) the Export Fee in accordance with the provisions of clauses 7.10, 9.3 and 9.6 for:
 - (A) each tonne loaded onto a Nominated Vessel; or
 - (B) each tonne of Lost Capacity;
 - (iv) the Additional Storage Charges in accordance with the provisions of clause 6.8 for each tonne of Capacity to which the Additional Storage Charges relate; and
 - (v) the Capacity Transfer Fee in relation to each 1000 tonnes of Capacity transferred in accordance with the Port Terminal Rules.
- (c) The Customer acknowledges that:
 - (i) the fees set out in Schedule 1 represent the cost to CBH of providing the service to which the fees relate;
 - (ii) the charges set out in Schedule 1 are a realistic assessment of the loss and damage that CBH will suffer as a result of a failure by the Customer to comply with their obligations under the Agreement and the Port Terminal Rules; and
 - (iii) CBH is entitled to retain the fees paid or to levy the charges payable as compensation by way of liquidated damages as a result of a failure by the Customer to comply with their obligations under the Agreement and the Port Terminal Rules.

9.2 Application for credit terms

- (a) If the Customer does not have an existing credit arrangement with CBH the Customer must provide CBH with a completed Credit Application Form at the same time as it executes this Agreement.
- (b) The Customer agrees that any credit provided by CBH is for business or investment purposes only and not for personal, domestic or household purposes.

9.3 Credit terms

- (a) If CBH agrees to provide credit terms to the Customer, then CBH reserves the right, in its absolute discretion, to:
 - (i) place or vary a limit on the amount allowed to be outstanding by the Customer at any time;
 - (ii) vary the credit terms by providing not less than 60 days' written notice of the new or varied credit terms;
 - (iii) refuse to extend further credit terms to the Customer; or
 - (iv) withdraw the Customer's credit terms.
- (b) It is the Customer's responsibility to request a credit limit increase if it is going to exceed the approved credit limit. Any refusal, withdrawal or exceeding of credit terms will result in the Services being provided on a prepaid basis.
- (c) If CBH has agreed to provide credit terms prior to the Commencement Date and has not withdrawn them prior to this Agreement then those credit terms will be deemed to continue on the terms and conditions set out in this clause 9.

9.4 Credit information

The Customer authorises CBH to provide information contained in the Credit Application Form and acquired as a result of the Customer's performance of this Agreement to any bank, credit reporting agency, debt collection agency, trade reference and any other person, business or company.

9.5 Invoicing

- (a) CBH will invoice the Customer for all charges payable in providing Services under this Agreement.
- (b) CBH will endeavour to issue invoices pertaining to bulk vessel shipments within 14 days of the vessel departure.
- (c) If GST is payable by CBH in respect of any Taxable Supply to the Customer under this Agreement, the Customer must pay any such GST (in addition to any other amounts payable under this Agreement).
- (d) CBH will provide the Customer with a tax invoice that complies with the GST Legislation.
- (e) All charges in this Agreement are expressed exclusive of GST.

9.6 Payment terms

- (a) If credit terms are made available by CBH at its discretion, then the Customer must pay the amount set out in any invoice provided by CBH within 14 days of the date of the invoice.
- (b) If:
 - (i) credit terms are not made available to the Customer;
 - (ii) the Customer fails to make payment of an invoice in accordance with clause 9.6(a); or
 - (iii) CBH withdraws the provision of the credit terms to the Customer,
 then all existing invoices shall become immediately due and payable and the Customer must tender to CBH the charges for any Service prior to the performance of that Service.
- (c) CBH may, in its absolute discretion, suspend the provision of the Services (including credit) if the Customer fails to pay an invoice in accordance with clauses 7.10 and 9. The suspension of the Services is not a breach by CBH of its obligations under this Agreement and CBH may continue to suspend the Services until such time as the invoice has been paid.

9.7 Certificates

A certificate signed by an authorised representative of CBH stating the amount owing to CBH by the Customer on any account whatsoever and all interest in respect thereof shall be a prima facie

evidence of the amount owed to CBH by the Customer at the date of the certificate and shall be deemed correct unless the Customer proves otherwise.

9.8 Interest on late payments

- (a) The Customer must pay interest on all amounts owing to CBH on any invoice that remains outstanding upon expiration of the due date expressed in the invoice at a rate 5% above the 90 day Bank bill rate offered by the Commonwealth Bank of Australia as at 31st October each year or as otherwise amended and notified to the Customer if there is a significant rise in this rate.
- (b) Interest will be calculated daily from the due date expressed in the invoice, until all amounts owing on the invoice, including interest, have been paid.
- (c) Payments by the Customer marked specifically for a particular invoice will be applied by CBH firstly in reduction of the interest outstanding and accruing on the invoice and then on any amount outstanding on the invoice.

9.9 Cost recoverable

Any Loss or Damage incurred by CBH in recovering any outstanding monies shall be paid in full by the Customer prior to CBH resuming the provision of the Services.

9.10 Notice

CBH shall provide the Customer with at least sixty (60) days' written notice of any changes to the charges specified in Schedule 1.

9.11 Set off

- (a) Any amounts owing by CBH or any of its Related Bodies Corporate to the Customer whether under this Agreement or otherwise, may, at the election of CBH, be set off (without prior notice) against any amounts owing by the Customer to CBH or any of its Related Bodies Corporate, whether under this Agreement or otherwise.
- (b) CBH holds the benefit of this clause and may exercise the rights under this clause on its own behalf and for and on behalf of each of its Related Bodies Corporate but nothing in this clause obliges such Related Bodies Corporate to perform any of the obligations of CBH under this Agreement.
- (c) CBH will give notice to the Customer of any set off performed under this clause.
- (d) The Customer is not entitled to set off amounts owing to CBH or any of its Related Bodies Corporate.

9.12 Security

The Customer shall provide such security to CBH as CBH reasonably requires (including the execution of personal guarantees by the Customer's signatories to this Agreement, directors, shareholders or beneficiaries of the Customer).

10 LIEN AND RIGHT TO WITHHOLD GRAIN

10.1 Statutory Lien

CBH has, in priority to all other claims, liens or security, a lien over any Grain received by it, in respect of any fees and charges payable to CBH in respect of that Grain.

10.2 Right to withhold Grain

Notwithstanding any other term of this Agreement, CBH may, at its sole discretion, refuse to Outturn the Customer's Grain if the Customer has not paid any amounts owing to CBH pursuant to clause 9.6.

11 DUE CARE AND DILIGENCE

- (a) CBH will comply with Good Operating Practices in the carrying out of its obligations under this Agreement.
- (b) The Customer will comply with Good Operating Practices in the carrying out of its obligations under this Agreement.

12 APPOINTMENT OF AN AGENT

12.1 Notice and Obligations

The Customer may appoint an agent to undertake the day to day co-ordination of its operational Service requirements. The Customer must notify CBH immediately in writing upon the appointment of any such agent. Any such appointment will not in any way relieve the Customer of its obligations under this Agreement and accordingly any instruction from the appointed agent is, and will be deemed to be, an instruction of the Customer.

12.2 Liability for Agent's Actions

The Customer agrees to accept full responsibility and to indemnify CBH for all actions, decisions and costs incurred or authorised by any agent appointed pursuant to clause 12.1 above when performing Services on behalf of the Customer under this Agreement.

13 CBH LIABILITY

13.1 Liability for Shortfall at a Port Terminal Facility

- (a) Subject always to clauses 6.5(d), 13.1(b) and 13.8, CBH will be responsible and liable for any shortfall at a Port Terminal Facility if it cannot Outturn the Customer's Grain Entitlement from the Port Terminal Facility to which the Customer's Grain Entitlement relates.
- (b) CBH's liability for a shortfall in Grain Entitlement pursuant to clause 13.1(a) will only extend (in the case of a shortfall in quantity), at the election of CBH, to either the:
 - (i) provision of sufficient grain of a similar type, variety and Grade from any Port Terminal Facility to ensure the Customer's Grain Entitlement is not diminished; or
 - (ii) provision of financial compensation for the value of the Grain shortfall to be determined at the Fair Market Price for such Grain.

For the avoidance of doubt, there is no shortfall in the Customer's Grain Entitlement if CBH is able to Outturn the Grain Entitlement following any fumigation.

13.2 Damage for Gross Negligence or Wilful Misconduct

Other than as set out in clause 13.7 and subject to clauses 13.3, 13.4 and 13.8, CBH will only be liable for loss and/or damage, which is caused by the Gross Negligence or Wilful Misconduct of CBH, its officers, employees or contractors.

13.3 Liability Cap

Other than as set out in clauses 13.1 and 13.7, CBH's maximum liability to the Customer howsoever arising shall be limited to \$100,000 for any single event and limited to a maximum in aggregate of \$250,000 for the term of this agreement, however caused including Loss or Damage resulting from:

- (a) the negligence of CBH, its servants or agents; or
- (b) the breach of this Agreement by CBH, its servants or agents.

13.4 Limitation of Grain Loss and Damage

Except as provided for in clauses 13.1, 13.2 and 13.7, CBH will not be liable or responsible for any Loss or Damage (including Indirect or Consequential Loss) to the Grain resulting from:

- (a) any variation in the quality of the Grain resulting from:
 - (i) the natural deterioration of Grain over time;
 - (ii) the loss of germinative capacity of Grain; or
 - (iii) the effects of the normal handling process on the Grain held at, or transported within Port Terminal Facility.

13.5 Limitation of Loss or Damage for delay

In the event of:

- (a) delays incurred in CBH Outturning the Grain;
- (b) delays due to the actions of third parties which are beyond the reasonable control of CBH;
- (c) delays in respect of the provision of information by CBH to the Customer pursuant to clause 6.4(b);
- (d) delays resulting from insect infestation of the Grain,

and such delay causes any shortfall in Grain Entitlement, then CBH's liability will only extend to the remedies provided in clause 13.1(b). CBH will not be liable for any other Loss or Damage caused by such delay.

13.6 Contribution to loss

Where any express or implied term of this Agreement places on any Party (in this clause 13.6 "**Party A**") any duty of care the breach of which would, if the duty of care were imposed by the general law rather than by such express or implied term, constitute an actionable tort against any other Party (in this clause "**Party B**"):

- (a) Party B has an obligation not to commit any negligent act or omission which contributes to any Loss or Damage it suffers or may suffer as a result by any breach by Party A of such express or implied terms; and
- (b) the liability of Party A for any such breach is limited to the direct and proximate Loss or Damage of Party B arising out of such breach, less the proportion of such Loss or Damage attributable to any breach by Party B of its obligations under clause 13.6(a).

The obligations imposed on a Party in this clause 13.6 in relation to any breach by Party A of the kind the subject to this clause are additional to, and not in derogation of, any obligation of Party B to mitigate its Loss or Damage in relation to such breach.

13.7 Conditional exclusion of Statutory Liability

This Agreement excludes to the maximum extent permitted by law any warranty or condition implied by common law, practice or statute. However in the case of those warranties under statute which may not be excluded, including the *Trade Practices Act 1974 (Cth)*, CBH's liability for breach of such conditions or warranties shall, to the maximum extent permitted by law, be limited, in the sole discretion of CBH, to the lesser of:

- (a) in the case of Services:
 - (i) the re-supply of the relevant Service; or
 - (ii) the payment of the cost of re-supply of the relevant Service; and
- (b) in the case of goods (including Grain provided under clause 13.1):
 - (i) the replacement of the goods or the supply of equivalent goods;
 - (ii) the repair of the goods;
 - (iii) the payment of the cost of replacing the goods or of acquiring replacement goods; or
 - (iv) the payment of the cost of having the goods repaired.

For the purposes of this clause 13.7, "relevant Service" shall mean the Service in relation to the

quantity of affected Grain only and does not mean the aggregate value of the relevant Service provided to the Customer.

13.8 No Indirect or Consequential Loss

Notwithstanding anything else in this Agreement, CBH will not be liable to the Customer for any Indirect or Consequential Loss arising out of or in relation to the provision of Services by CBH pursuant to this Agreement.

13.9 Indemnity and Release

The Customer hereby releases and indemnifies CBH in respect of all actions, claims and demands which may be instituted by the Customer against CBH in respect of the matters dealt with under clauses 13.4 and 13.8.

13.10 Exclusion of warranties

CBH does not represent, warrant or guarantee that any Grain received, acquired or Outturned for the Customer:

- (a) conforms to any specification as to Varietal Purity;
- (b) is free from the presence, at any level or concentration, of Pesticide Residue Contamination, Corynetoxins Contamination, Microbial Contamination, Heavy Metal Contamination or Natural Toxicant Contamination; or
- (c) is free from the presence, at any level or concentration, of Genetically Modified Organisms.

13.11 Exclusion Clauses

Notwithstanding anything expressed in or implied by this Agreement, to the extent permitted by law CBH will not be liable to the Customer for any and all Loss or Damage caused by the negligence, breach of contract, breach of statutory duty or any other legal or equitable obligation of CBH, or otherwise howsoever arising in connection with this Agreement from:

- (a) any variance in any specification as to Varietal Purity from the actual Varietal Purity of Grain received or Outturned for the Customer;
- (b) the presence, in any Grain received or Outturned for the Customer, at any level or concentration, of any Pesticide Residue Contamination, Corynetoxins Contamination, Microbial Contamination, Heavy Metal Contamination or Natural Toxicant Contamination; or
- (c) the presence, in any Grain received or Outturned for the Customer, at any level or concentration of any Genetically Modified Organisms.

13.12 Indemnity

Notwithstanding anything expressed in or implied by this Agreement, to the extent permitted by law the Customer shall indemnify, keep indemnified and hold harmless CBH from any and all Loss or Damage suffered by or claimed from CBH, whether caused by the negligence, breach of contract, breach of statutory duty or any other legal or equitable obligation of CBH, or otherwise howsoever arising in connection with this Agreement from:

- (a) any variance in any specification as to Varietal Purity from the actual Varietal Purity of Grain received or Outturned for the Customer;
- (b) the presence, in any Grain received or Outturned for the Customer, at any level or concentration, of any Pesticide Residue Contamination, Corynetoxins Contamination, Microbial Contamination, Heavy Metal Contamination or Natural Toxicant Contamination; or
- (c) the presence, in any Grain received or Outturned for the Customer, at any level or concentration of any Genetically Modified Organisms.

14 INSURANCE AND RISK

14.1 Insurance

- (a) CBH will, to the extent that it is reasonably practicable, take out and keep in force an insurance policy in respect to the risk of loss or damage to the Grain whilst:
 - (i) it is held in the Port Terminal Facilities; and
 - (ii) during transit organised by CBH within the Port Terminal Facility.
- (b) CBH will advise the Customer if it cannot gain insurance coverage as detail above.

14.2 Transfer of risk

- (a) Subject to clause 13, the risk of loss or damage to Grain is transferred to the Customer at the point in time when the Grain exits the Outturning spout of a Port Terminal Facility into a form of a Grain transportation vessel.

15 FORCE MAJEURE EVENT

15.1 Definition

An event of "**Force Majeure**" is any event or circumstance not within the reasonable control of the party affected by it (the "**Affected Party**"), including:

- (a) acts of God, including storms or cyclones, action of the elements, epidemics, landslides, earthquakes, floods, fire, road or rail closures due to washouts or impassability and natural disaster;
- (b) strikes, stoppages, restraints of labour, or other industrial disturbances;
- (c) acts of the public enemy, including wars which are declared or undeclared, blockades and insurrections;
- (d) riots, malicious damage, sabotage and civil disturbance;
- (e) accident (including accidental emissions of pollutants or hazardous substances), fire, explosion, radioactive contamination and toxic or dangerous chemical contamination;
- (f) the adverse application of any Australian laws or enforcement actions of any Commonwealth or State court or governmental agency not resulting from any wrongful act or omission of the Affected Party;
- (g) the refusal of or delay in obtaining any necessary consents from any government agency, provided that the Affected Party has acted in a timely manner in endeavouring to secure them;
- (h) the failure of, or the breakdown of or accident to, plant or machinery of any kind other than breakdowns or damage caused by the Gross Negligence of CBH;
- (i) the breach by any third party supplier of its obligations to supply goods or services to the Affected Party, provided that the Affected Party has acted in a timely manner in endeavouring to secure such supply, and provided that the Affected Party itself is not in breach of any relevant obligation; and
- (j) any production shutdown or interruption which is validly required or directed by the Commonwealth or State government or any governmental agency which is not due to the act or default of the Affected Party,

and which the Affected Party is not reasonably able to prevent or overcome, or the effects of which the Affected Party is not reasonably able to predict and take measures to avoid, by the exercise of reasonable technical and commercial diligence and prudence.

15.2 Exemption from Force Majeure

The lack of funds or inability to use any funds will not constitute Force Majeure.

15.3 Relief from performance and liability

Subject to clause 15.6, an Affected Party will be excused from performance of and will not be liable to the other party for any failure in carrying out any of its obligations under this Agreement if and only to the extent and for the time that it is prevented in whole or in part from doing so by Force Majeure.

15.4 Actions during Force Majeure Events

An Affected Party claiming the benefit or protection of Force Majeure will:

- (a) promptly give written notice to the other party of the occurrence and circumstances in respect of which the claim of Force Majeure arises;
- (b) take all reasonable steps to ameliorate and remedy the consequences of that occurrence without delay;
- (c) maintain regular communication with the other party to describe what is being done to remedy the Force Majeure; and
- (d) resume performance in full of its obligations under this Agreement as soon as reasonably practicable,

but the settlement of strikes, lockouts, or other industrial disputes or disturbances which constitute Force Majeure will be entirely within the discretion of the Affected Party and the Affected Party may refrain from settling the strike, lockout or dispute or may settle it at such time and on such terms as it considers to be in its best interests.

15.5 Termination

If the Affected Party is relieved from performance and liability in accordance with clause 15.3 due to Force Majeure for a period exceeding 60 days, either party may terminate this Agreement with immediate effect by written notice to the other party.

15.6 Payments by the Customer

Despite any other provision of this Agreement, the occurrence of Force Majeure affecting the Customer will not relieve the Customer of the obligation to pay any amounts owing under this Agreement in relation to Services performed by CBH prior to notice being given in accordance with clause 15.4(a), including but not limited to the payment of the charges set out in Schedule 1 as modified from time to time by CBH.

16 TITLE TO GRAIN

- (a) Subject to the terms of this Agreement, CBH is a bailee for reward of any Grain received from, on behalf of, or for the account of, the Customer, that is within CBH's power, possession, custody or control.
- (b) Subject to clause 10, the proprietary interest in Grain is vested in the person who, for the time being, is entitled to obtain it from the stocks held by CBH or under CBH's control.

17 PORT TERMINAL FACILITY ACCESS

17.1 Access Procedure

In order to protect the safety of the Customer's employees, agents or contractors and that of CBH's employees, agents, contractors and invitees:

- (a) if the Customer wishes to visit a Port Terminal Facility, then the Customer must give a minimum of 2 Business Days notice to the CBH Customer Account Manager stating the date the Customer wishes to attend, the identity of the Customer's representative and the purpose of the visit;
- (b) CBH may, in its absolute discretion, refuse or reject any visitation request or propose alternative times and/or places for the visit; and

- (c) subject to clause 17.2, the Customer shall not attend at any CBH Port Terminal Facility without receiving the prior consent of the Customer Account Manager for each visit and shall not enter or stay on the Port Terminal Facility without appropriate CBH supervision.

17.2 Public Reception

If a CBH Port Terminal Facility has a public reception, then clause 17.1(c) is modified to the extent necessary to allow the Customer to proceed directly following the commonly accepted route to the public reception but does not allow the Customer to proceed to any other part of the Port Terminal Facility without appropriate supervision.

17.3 Port Terminal Facility Safety

Whilst on a Port Terminal Facility, the Customer agrees to:

- (a) follow all reasonably necessary directions of CBH personnel, including departure from the Port Terminal Facility;
- (b) not create any hazard, or cause any contamination, on the Port Terminal Facility; and
- (c) procure that its employees, agents or contractors comply with this clause 17.3.

18 CONFIDENTIALITY

18.1 General obligation

Subject to clauses 18.2 and 18.3, this Agreement and all information exchanged between the parties under this Agreement or during the negotiations preceding the signing of this Agreement is confidential to the party which provided it and may not be disclosed to any person except:

- (a) by a party to the legal and other professional advisers, auditors and other consultants ("**Consultants**") and employees of:
 - (i) that party; or
 - (ii) that party's Related Bodies Corporate;
- (b) to another party with the consent of the party which first supplied the information;
- (c) if the information is at the time lawfully in the possession of the proposed recipient of the information through sources other than a party;
- (d) to the extent required by any law or by the lawful requirement of any governmental agency having jurisdiction over the party or its Related Bodies Corporate;
- (e) to the extent required by a lawful requirement of any stock exchange having jurisdiction over a party or its Related Bodies Corporate;
- (f) if necessary or commercially desirable to be disclosed in any prospectus or information memorandum to investors or proposed or prospective investors:
 - (i) for an issue or disposal of any shares in a party or its Related Bodies Corporate;
 - (ii) for an issue of debt instruments of a party or a party's Related Body Corporate; or
 - (iii) for the purposes of a party obtaining a listing on Australian Stock Exchange Limited of any shares;
- (g) if the information is at the time generally and publicly available other than as a result of breach of confidence by the party wishing to disclose the information or those to whom it proposes to disclose it;
- (h) if necessary or commercially desirable to be disclosed to an existing, or bona fide proposed or bona fide prospective:
 - (i) financier;
 - (ii) financier of a party or of any of its Related Bodies Corporate; or

- (iii) rating agency in respect of a party or of any of its Related Bodies Corporate;
- (i) if necessary or commercially desirable to be disclosed to any bona fide proposed or prospective:
 - (i) transferee of an interest in any Grain; or
 - (ii) financier of such transferee providing or proposing or considering whether to provide relevant financial accommodation; or
- (j) if necessary or commercially desirable to be disclosed to consultants or employees of any of the persons referred to in clause 18.1(h) or 18.1(i).

18.2 Conditions

- (a) In the case of a disclosure under clause 18.1(a) or 18.1(b) and, where appropriate, under clause 18.1(d), 18.1(e) or 18.1(f), the party wishing to make the disclosure must inform the proposed recipient of the confidentiality of the information and the party must take customary precautions to ensure that the proposed recipient keeps the information confidential.
- (b) In the case of a disclosure under clause 18.1(h), 18.1(i) or 18.1(j) (in the case of consultants only), the party wishing to make the disclosure must not make any disclosure unless:
 - (i) in the case of a disclosure under clause 18.1(h) or 18.1(i), the proposed recipient has first entered into and delivered to the parties a confidentiality undertaking in a form acceptable to all parties; and
 - (ii) in the case of a disclosure under clause 18.1(j), the principal or employer of the proposed recipient has first entered into and delivered to the parties a confidentiality undertaking in a form acceptable to all parties which shall incorporate a warranty by the principal or employer of the proposed recipient that the proposed recipient is under an obligation of confidentiality to the principal or employer and that the principal or employer will enforce that obligation to the fullest extent that the law allows upon being called upon to do so by any of the parties.

18.3 Notice to other Parties

Each party must:

- (a) promptly inform all other parties of any request received by that party from any person described in clause 18.1(d) to disclose information under clause 18.1(d);
- (b) inform all other parties as soon as reasonably practicable after information is disclosed by the party under clause 18.1(d); and
- (c) not disclose any information under clause 18.1(e) unless all other parties have been informed of the proposed disclosure.

18.4 Indemnities

Subject to clause 13, each party indemnifies each other party against any costs, losses or damages suffered by that other party arising out of or in connection with any disclosure by the first-mentioned party of information in contravention of this clause 18.

18.5 Binding nature of confidentiality obligations

The obligations of confidentiality imposed by this clause 18 survive the termination of this Agreement and any person who ceases to be a party continues to be bound by those obligations.

19 DISPUTE RESOLUTION

19.1 Disputes

- (a) Save for any dispute arising:

- (i) under the Auction Rules which shall be dealt with in accordance with the provisions of the Auction Rules; and
- (ii) under the Ring Fencing Rules which shall be dealt with in accordance with the provisions of the Ring Fencing Rules,

all disputes arising out of or in connection with this Agreement or the Port Terminal Rules shall be dealt with in accordance with the provisions of this clause 19.

- (b) A dispute shall be referred to the Customer's Manager and the CBH Operations Manager - Logistics for resolution. The CBH Operations Manager - Logistics and the Customer's Manager shall meet or confer at least once within 24 hours of the notification of the dispute to discuss the dispute and attempt to resolve the dispute.
- (c) Where the dispute relates to invoiced Services, the Customer is to inform the CBH Operations Manager - Logistics immediately, and before the due date of that invoice.
- (d) Any dispute relating to a breach of the terms and conditions of this Access Agreement shall not, of itself, amount to a dispute relating to a breach of the Undertaking or the rules forming part of the Undertaking,

19.2 Escalation of Dispute – Executive Panel

If no resolution of the dispute can be reached in accordance with clause 19.1, within seven (7) days of the dispute being notified to the other party, each party shall refer the dispute to the General Manager - Operations of CBH and the CEO of the Customer (or such person designated by the Customer as having authority equivalent to that of a CEO) (the "**Executive Panel**"). The Executive Panel:

- (a) will meet at least once at a time mutually convenient no later than 2 Business Days after the dispute has been referred to it; and
- (b) may decide on the methods and procedure by which it will resolve the dispute, which may include the obtaining of expert advice.

19.3 Payment of invoices pending resolution of a dispute

Notwithstanding anything in this Agreement, the Customer is not entitled to withhold payment of the undisputed amount of any invoice. If the Customer cannot provide a reasonable estimate of the disputed amount the Customer will not be entitled to withhold any payment.

19.4 Arbitration

(a) Referral to arbitration

- (i) If the Dispute is not resolved within ten Business Days after being referred to the Executive Panel under clause 19.2, either of the parties may give notice to the other party to refer the Dispute to Arbitration in Western Australia by a single arbitrator appointed by agreement of the parties or if they fail to agree within ten Business Days, an arbitrator appointed by the President of the Western Australian Chapter of the Institute of Arbitrators and Mediators of Australia (**IAMA**) acting on the request of either party.
- (ii) CBH must notify the ACCC of the details of any Dispute which has been referred to arbitration. CBH must provide the arbitrator's final determination to the ACCC.
- (iii) If the Customer serves notice under clause 19.4(a)(i), that notice will also include an agreement by that Customer to:
 - A) pay any amounts determined in accordance with clause 19.4 (f); and
 - B) indemnify the arbitrator from any claims made against the arbitrator arising in connection with the performance by the arbitrator of its duties under this clause 19, such indemnity excluding circumstances where the conduct of the arbitrator constitutes wilful negligence, or is dishonest or unlawful conduct.
- (iv) CBH must pay any amounts determined in accordance with clause 19.4 (f) and will indemnify the arbitrator from any claims made against the arbitrator arising in connection

with the performance by the arbitrator of its duties under this clause 19, such indemnity excluding circumstances where the conduct of the arbitrator constitutes wilful negligence, or is dishonest or unlawful conduct.

- (v) The arbitrator will not proceed with the arbitration unless and until the Customer has agreed to pay the arbitrator's costs as determined under clause 19.4(f).

(b) Arbitration procedure

- (i) Unless CBH and the Customer agree otherwise, the arbitration must be conducted in private.
- (ii) A party may appoint a person, including a legally qualified person, to represent it or assist it in the arbitration.
- (iii) The arbitrator will when conducting the arbitration:
 - A) observe the rules of natural justice but is not required to observe the rules of evidence;
 - B) proceed as quickly as is possible and consistent with a fair and proper assessment of the matter;
 - C) while having the right to decide on the form of presentations, encourage a written presentation by each party with exchange and with rebuttal opportunities and questioning by the arbitrator;
 - D) call on any party the arbitrator believes necessary to give evidence;
 - E) decide how to receive evidence and consider the need to keep evidence confidential and the need to protect the confidentiality of the arbitration process;
 - F) present its determination in a draft form to the parties and hear argument from the parties before making a final determination; and
 - G) hand down a final determination in writing which includes all its reasons for making the determination and findings on material questions of law and fact, including references to evidence on which the findings of fact were based.
- (iv) The arbitrator may at any time terminate arbitration (without making an award) if it thinks that:
 - A) the notification of the Dispute is vexatious;
 - B) the subject matter of the Dispute is trivial, misconceived or lacking in substance; or
 - C) the party who notified the Dispute has not engaged in negotiations in good faith.

(c) Matters which arbitrator must take into account

In deciding a Dispute the arbitrator will take into account the principles, methodologies and provisions set out in the Undertaking, in particular clauses 6.4 and 6.5;

(d) Confidentiality

- (i) The arbitrator must take all reasonable steps to protect the confidentiality of information that a party has identified is confidential or commercially sensitive.
- (ii) The arbitrator may require the parties to comply with rules and orders aimed at protecting the confidentiality of information provided by the parties, including:
 - A) requiring each party to give confidentiality undertakings to the other party and their external advisers; and
 - B) limiting access to confidential information to specified individuals subject to confidentiality undertakings provided by those individuals.
- (iii) The arbitrator may make confidential and non-confidential versions of its determination and limit access to the confidential versions to specific individuals.

- (iv) For the purpose of clarity, the entire dispute resolution process outlined in this clause 19 remains subject to clause 18.
- (e) Effect of arbitrator's determination
 - (i) The determination of the arbitrator will be final and binding subject to any rights of review by a court of law.
 - (ii) Except where the determination or direction is subject to a review by a court of law, if a Customer does not comply with a determination or direction of the arbitrator, then CBH will no longer be obliged to provide services under this Agreement for that Customer.
 - (iii) Except where the determination or direction is subject to a review by a court of law, CBH will comply with the lawful directions or determinations of the arbitrator.
- (f) Arbitrator's costs

The arbitrator's costs and the costs of the parties to the arbitration will be borne by the parties in such proportions as the arbitrator determines. Each party may make submissions to the arbitrator on the issue of costs at any time prior to that determination.

20 ENTIRE AGREEMENT

- (a) This Agreement constitutes the entire Agreement between the parties. Each party warrants and covenants to the other that there are no written or oral statements, representations, undertakings, covenants or agreements between the parties, express or implied, except as provided for in this Agreement.
- (b) This Agreement may only be amended or varied by Agreement in writing signed by both parties expressly amending this Agreement and unless the context otherwise requires, a reference to this Agreement shall include a reference to this Agreement as amended or varied from time to time.
- (c) Notwithstanding that CBH from time to time produces operational guidelines to assist customers, nothing in those guidelines shall be deemed to impliedly or expressly amend anything in this Agreement and if there is any inconsistency between any guidelines and a term of this Agreement, the terms of this Agreement shall prevail.

21 NOTICES

21.1 Types of Notices

Except as provided in clause 21.2, all notices of any kind and all statements, forecasts, advices, policy statements, procedures manuals, guidelines and the like, and all invoices given or made under this Agreement (each a "**Communication**") shall be:

- (a) in writing in the English language;
- (b) marked for the attention of the appropriate person; and
- (c) delivered by hand to the address of the addressee, or sent by ordinary letter post (airmail if posted to or from a place outside Australia) or hand delivery by a reputable courier service to the address of the addressee, or sent by facsimile to the facsimile number of the addressee.

21.2 Operational and Urgent Notices

Where this Agreement expressly so provides, and in those cases or categories of cases where the parties agree in writing, notices of a day to day operational nature or notices given in an operational emergency may be given orally and confirmed in writing. The parties shall also agree upon protocols, contact points and contact telephone numbers for dealing with matters which require urgent action in the administration of this Agreement, and shall ensure that lists of up-to-date contact points

and telephone numbers are exchanged as and when required to ensure the currency of those lists.

21.3 Notice Takes Effect

Subject to clause 21.4, a Communication takes effect from the later of:

- (a) the time it is actually received; and
- (b) any later time specified in the Communication.

21.4 Deemed Receipt

For the purposes of this Agreement:

- (a) a Communication delivered by hand to the address of a party shall be deemed to be received if it is handed (with or without acknowledgment of delivery) to any person at that address who, in the reasonable judgment of the person making the delivery (upon making appropriate enquiries), appears to be and represents himself as a manager or officer of the party to whom the Communication is addressed;
- (b) a Communication which is posted is deemed to be received by the party to whom the Communication is addressed on the second Business Day after the day of posting;
- (c) a Communication sent by facsimile transmission which is transmitted:
 - (i) prior to 4 p.m. on a Business Day shall be deemed to have been received by the party to whom it is addressed on that Business Day; and
 - (ii) after 4 p.m. on a Business Day shall be deemed to have been received by the party to whom it is addressed on the first Business Day following the date of transmission; and
 - (iii) the production of the transmission report or a printout of a transmission log generated by the sender's facsimile machine (or other facsimile transmission device) showing successful uninterrupted facsimile transmission of all pages of the relevant Communication to the facsimile number of the party to whom it is addressed and proof of confirmation by physical delivery or mailing as provided above shall constitute evidence of receipt of that facsimile transmission; and
- (d) a Communication given orally under clause 21.2 shall be deemed to have been received when first given orally.

21.5 Change of Address

A party may at any time, by notice given to the other parties to this Agreement, designate a different person, street address, postal address, electronic mail address or facsimile number for the purpose of Communications pursuant to this clause 21.

21.6 Electronic Mail

- (a) The parties agree, that in the absence of evidence to the contrary, an electronic mail message sent by a party to the electronic mail addresses notified by the parties shall be deemed to be received on the day after the day that the electronic mail message is recorded as having been sent by the sender's computer server.
- (b) Messages relating to the following subjects will not be valid if sent by electronic mail:
 - (i) termination of this Agreement;
 - (ii) disputes;
 - (iii) change of address, phone number, fax number or electronic mail address.

22 ASSIGNMENT

22.1 General Prohibition

Neither party may assign, transfer or otherwise dispose of all or any part of its rights or obligations

under this Agreement without the prior written consent of the other party.

22.2 Deed of Covenant

The assignee must enter into a deed of covenant with the party whose consent is sought, acknowledging that party's rights under this Agreement and undertaking by way of novation to observe and perform all the assignor's obligations under this Agreement. Such deed of covenant shall be prepared by the party whose consent is sought in such reasonable form as that party requires, but at the expense of the assignor. The deed shall be stamped by and at the expense of the assignor.

23 **WAIVER**

- (a) No right under this Agreement shall be deemed to be waived except by notice in writing signed by each party.
- (b) No default or delay on the part of any party exercising any of its rights or obligations under this Agreement shall operate as a waiver of any such right or obligation under this Agreement.

24 **NO PARTNERSHIP**

- (a) Nothing contained in this Agreement will be deemed or construed by the Customer or CBH or by any third party as creating the relationship of partnership, principal and agent, or joint venture.
- (b) No relationship between the Customer and CBH other than that of bailor and bailee upon the conditions and provisions in this Agreement will be created by the payment of any money under this Agreement, any other conditions or provision in this Agreement or any act of the Customer or CBH.

25 **GOVERNING LAW AND JURISDICTION**

25.1 Governing Law

This Agreement shall be governed by and construed in accordance with the laws of the State of Western Australia.

25.2 Jurisdiction

Each Party irrevocably submits to and accepts generally and unconditionally the non-exclusive jurisdiction of the courts and appellate courts of Western Australia.

26 **ATTORNEYS**

Each individual signing this Agreement on behalf of a party warrants that the individual has been duly authorised to execute this Agreement and to bind that party on whose behalf the individual is signing.

27 **SUB-CONTRACTING**

CBH may in its sole and absolute discretion:

- (a) sub-contract the whole or any part of the Services; or
 - (b) otherwise engage any person to undertake any part of the Services on CBH's behalf,
- without notice to the Customer.

28 **SEVERANCE**

If any term or other part of this Agreement is or becomes for any reason invalid or unenforceable at law, the remainder of this Agreement shall continue to be valid and enforceable and such term or other part of this Agreement shall be severed or modified without affecting the remainder of this Agreement.

Signed for and on behalf of **Co-operative Bulk Handling Limited** (ABN 29 256 604 947) in the presence of:

Signature of Witness

Name of Witness in full

Signed for and on behalf of **xxx** (ABN xxx in the presence of:

Signature of Witness

Name of Witness in full

Signature

Name

Position

Signature of authorised representative

Name

Position

SCHEDULE 1

Payment

All charges payable pursuant to this Agreement are to be paid in accordance with clause 9 of the Agreement. As set out in clause 10, CBH has the discretion not to Outturn Grain until all outstanding fees and charges have been paid.

[NOTE: the format and contents of this Schedule are indicative only and subject to finalisation]

Attached: [Port Terminal Services Agreement Charges for 2009/10 Grain]

1.1 Fees

Fee Description	Fee value	Unit rate of fee
Export Fee	\$ [x] per tonne	Per tonne of Capacity acquired
Upfront Marketer Fee	[\$x] per tonne	Per tonne of Capacity acquired
Capacity Transfer Fee	[\$x] per tonne	Per tonne of Capacity acquired

1.2 Charges

Charge Description	Charge value	Unit rate of charge
Additional Storage Charges	\$ [x] per tonne	Per tonne of Grain stored per day or part day

SCHEDULE 2

Auction Premium Rebate

The Auction Premium Rebate shall be calculated based on the following formula:.

$$APR = \left(\frac{TAPR - TAC}{TTSAC} \right) \times TTSC$$

Where:

APR is amount of the Auction Premium Rebate paid to the Customer

TAPR is the total Auction Premiums received by CBH during the Term

TAC is the Total Auction Costs

TTSAC is the total tonnes of Grain shipped from all four Port Terminals by all CBH customers during the Term

TTSC is the total tonnes of Grain shipped by CBH on behalf of the Customer during the Term

Annexure B: Proposed Port Terminal Rules



Port Terminal Rules

1 Interpretation

1.1 Definitions

In these Port Terminal Rules unless the context otherwise requires:

Access Agreement means either a Grain Services Agreement, a Port Terminal Services Agreement or a Negotiated Agreement relating to the provision of Port Terminal Services by the Port Operator (as the case requires).

Accumulation Plan means a cargo accumulation plan agreed in accordance with **rule 8.1(b)**.

Advised Harvest Capacity is defined in **rule 5.1(b)**

Annual Shipping Period means the period 16 January to the next 31 October as modified from the Port Operator from time to time prior to 31 August for the coming Season.

Assembly Window is defined in **rule 14(a)**.

Arrived means the time at which a vessel arrives at the waiting area designated from time to time by the relevant port authority for the Port Terminal Facility (whether or not it sets anchor), is ready to proceed to berthing and has presented a Notice of Readiness. **Arrives** and **Arrival** have a corresponding meaning.

Auction has the meaning given in the Access Agreement.

Auction Premium has the meaning given in the Access Agreement.

Auction Rules means the rules of that name published by the Port Operator from time to time attached as Schedule 1 to the Port Terminal Rules .

Bulk Wheat means wheat for export from Australia other than wheat that is exported in a bag or container that is capable of holding not more than 50 tonnes of wheat.

Capacity means the capacity, measured in tonnes, to put grain on board a vessel at a Port Terminal Facility during a Shipping Window.

Cargo Request Form has the meaning given in an Access Agreement.

Customer means a GSA Customer, a PTSA Customer and a Negotiated Agreement Customer of the Port Terminal Operator (as the case requires).

Direct to Port Delivery Declaration Form means the form substantially in the form attached at Schedule 2.

ETA means the estimated time of Arrival.

ETC means estimated time of commencement of loading.

First Phase Auction has the meaning set out in the Auction Rules.

Forecast Submission Period means [1 September] to [10 September] within each Year.

Grace Period means a period of 14 days that commences on the day following the last day of the Shipping Window.

Grade has the meaning given to it in an Access Agreement.

Grain means all grains, pulses and oil seeds received into the Port Terminal Facility and held by CBH pursuant to an Access Agreement on behalf of the Customer and includes Bulk Wheat.

Grain Entitlement has the meaning given to it in an Access Agreement.

Grain Services Agreement (GSA) means an agreement of that name entered into by a GSA Customer and the Port Operator.

GSA Capacity means Capacity acquired or sought to be acquired by a GSA Customer under a GSA.

GSA Customer means a customer of the Port Operator who is party to a GSA who uses the Port Operator's upcountry facilities, transport and logistics services and Port Terminal Facilities.

Harvest Capacity means Capacity during the Harvest Shipping Period.

Harvest Period EOI is defined in rule 5.1(c)(i).

Harvest Shipping Period means 1 November to 15 January as modified from the Port Operator from time to time prior to 31 August for the coming Season.

Lost Capacity has the meaning given to it in rule 7.

Negotiated Agreement means an agreement entered into by a Customer and the Port Operator that is not a GSA or a PTSA and relates to the provision of Port Terminal Services by the Port Operator.

Negotiated Agreement Capacity means Capacity acquired or sought to be acquired by a Negotiated Agreement Customer under a Negotiated Agreement.

Negotiated Agreement Customer means a Customer of the Port Operator who is party to a Negotiated Agreement, other than a GSA Customer or a PTSA Customer. **Nominated Vessel** has the meaning given in an Access Agreement.

Notice of Readiness or **NOR** has the meaning given in an Access Agreement.

Outload means to remove Grain from a Port Facility to another location by means other than Outturning to a vessel

Port Terminal Service Charges means the charges payable by a PTSA Customer or a Negotiated Agreement Customer for Port Terminal Services provided by the Port Operator under an Access Agreement.

Port Terminal Services Agreement (PTSA) means an agreement of that name entered into between a PTSA Customer and the Port Operator for the use of the Port Terminal Facilities.

Product means all Grain or other commodities or materials handled by the Port Operator through the Port Terminal Facilities.

PTSA Capacity means Capacity acquired or sought to be acquired by a PTSA Customer under a PTSA.

PTSA Customer means a Customer of the Port Operator who is a party to a PTSA and includes a person receiving services under a PTSA in respect of Grain other than Bulk Wheat.

Relevant Surveys has the meaning given in an Access Agreement.

Season has the meaning given in an Access Agreement.

Second Phase Auction has the meaning set out in the Auction Rules.

Secondary Market has the meaning set out in the Auction Rules.

Shipping Capacity Register means the register maintained and held by the Port Operator in order to record allocations of and entitlement to Capacity.

Shipping Stem Policy means the policy prescribed in **rule 11**.

Shipping Window means a half month period of between 14 and 16 days within which a Customer may nominate a vessel to arrive at a Port Terminal Facility for loading of a cargo.

Spare Capacity has the meaning given in **rules 5.1(f)** or **6.1(f)** in relation to the Harvest Shipping Period or the Annual Shipping Period respectively (as the case requires).

Spare Capacity Booking Form means the form of that name published by the Port Operator from time to time.

TBA means to be advised.

Transfer of Shipping Capacity Form means the form of that name published by the Port Operator from time to time.

Undertaking means the Undertaking offered by CBH in favour of the Australian Consumer and Competition Commission in accordance with the provisions of the *Wheat Export Marketing Act 2008 (Cth)*.

Vessel Nomination means a nomination of a vessel to ship the Nominated Tonnage on a Nominated Vessel within a Shipping Window held by the Customer under the Access Agreement.

Website means the website operated by the Port Operator from time to time and at the commencement of these rules means www.cbh.com.au.

Year means 1 November to 31 October.

1.2 Interpretation

- (a) Other defined terms have the meanings given to them in the Undertaking, unless the context otherwise requires.
- (b) Reference to a **rule** is a reference to a rule contained within these Port Terminal Rules.

2 Objects

2.1 Primary Objects

The primary objects of these Rules are to:

- (a) ensure that all Customers are provided with access to Port Terminal Facilities in a fair, equitable and transparent manner;
- (b) ensure that the manner and timing for booking Shipping Windows for all Customers are non-discriminatory;
- (c) achieve and maintain the optimum operational efficiency of the Product supply chain and the Port Terminal Facilities, by maximising the throughput of Products and minimising demurrage at the Port Terminal Facilities over a given period;
- (d) to provide a basis for decisions relating to the prioritisation of one vessel over another vessel; and

- (e) ensure compliance by Customers and the Port Operator with their respective obligations under the provisions of the Port Terminal Rules.

2.2 Efficiency of Operation

- (a) The key components of a successful Grain export accumulation program are ample notice of nominations, accurate scheduling and working together with Customers, transport service providers and shipping related third parties.
- (b) The Port Operator is committed to providing fair access to Port Terminal Facilities for all Customers. Considerable Grain export accumulation challenges arise daily due to the liquid nature of Grain, the potential presence of insects and the complexity of balancing the service demands of and amongst multiple Customers. The more notice that individual Customers can provide, the higher the probability of prompt loading of their vessels upon Arrival.
- (a) As Customers acquire capacity within a Shipping Window there is a potential for multiple Customers to seek to book a vessel to be loaded on the same day. These Port Terminal Rules endeavour to provide transparency over the order in which vessels will be loaded.

2.3 Variation

- (a) The Port Terminal Rules may be varied by the Port Operator provided that The Port Operator must:
 - (i) consult with all Customers, Applicants and Users to deal with technical and operational matters that arise under or in connection with these Port Terminal Rules;
 - (ii) comply with the consultation process set out in **rule 2.3 (d)**;
 - (iii) undertake consultation with all Customers in good faith;
 - (iv) use its reasonable endeavours to accommodate any reasonable requests that may be made by a Customer during the consultation process in respect of the proposed variation; and
 - (v) ensure that the Port Terminal Rules remain consistent with the terms of the Undertaking.
- (b) Subject to **rule 2.3(a)**, the Customer acknowledges and agrees that the Port Terminal Rules may include provisions that are necessary for, or reasonably required by, the Port Operator to comply with:
 - (i) the requirements of the Undertaking;
 - (ii) changed or unforeseen technical or operational circumstances; and
 - (iii) obligations arising under contractual or other operational arrangements with third parties on which the provision of the Port Terminal Services are dependent.
- (c) Any variation to the Port Terminal Rules:
 - (i) must be consistent with the requirements of the Undertaking and in particular, clauses 2 and 6.4 of the Undertaking;
 - (ii) forms part of the Port Terminal Rules and is binding on the Port Operator and Customers; and
 - (iii) may be further varied from time to time, subject to clauses 2.3(a) and 2.3(b).
- (d) Where the Port Operator proposes to make a variation under clause 2.3, the Port shall:

- (i) Publish the details of the proposed variation;
 - (ii) Provide copies of the proposed variation to all Customers, Applicants and Users;
 - (iii) Arrange for and request written responses and consultation meetings;
 - (iv) Publish copies of responses received; and
 - (v) In case of amendment to the proposed variation, the Port Operator shall seek further written responses and consultation meetings before confirming or withdrawing the proposed variation.
- (e) No variation shall take effect:
- (i) unless a period of no less than 30 days has elapsed from the date of publication of the proposed variation under clause 2.3(d)(i);
 - (ii) during the period from 1 November to the following 15 January in each Year.
- (f) All acts done in accordance with the superseded Port Terminal Rules will be treated as validly done in accordance with the current Port Terminal Rules.
- (g) Vessels nominated under superseded Port Terminal Rules will continue to be governed in accordance with the superseded Port Terminal Rules unless the Customer and the Port Operator agree otherwise.
- (h) Vessels nominated after the Port Terminal Rules have been varied in accordance with **rule 2.3** will be required to be nominated under the Port Terminal Rules as varied.

3 Customer's General Obligations

- (a) The Port Operator must discharge its obligations to Customers exporting under these Port Terminal Rules in accordance with the terms of its Access Agreements, and subject, in the case of Bulk Wheat Exports under the Port Terminal Services Agreement to the Port Operator's obligations under the Undertaking.
- (b) Upon request, all Customers must provide the Port Operator with relevant, complete and accurate information in a timely manner.

4 Services Forecast

In each Year, within the Forecast Submission Period each Customer must submit to the Port Operator a forecast of the Customer's exporting requirement for the current Year, including the following details:

- (a) anticipated gross tonnage of Bulk Wheat;
- (b) anticipated gross tonnage of other grains;
- (c) anticipated tonnage to be shipped by Customers under each GSA, PTSA and Negotiated Agreement; and
- (d) anticipated shipping programme.

All information provided by the Port Operator and the Customer under these rules will be treated in accordance with the confidentiality provisions of the relevant Access Agreement.

5 Harvest Shipping Period Port Terminal Services

5.1 Acquiring Harvest Capacity

- (a) A Customer may apply under this **rule 5.1** for Harvest Capacity.
- (b) A Customer must declare at the time of making any application in respect of each tonne of Harvest Capacity or Spare Capacity whether the Capacity it is applying for is:
 - (i) GSA Capacity;
 - (ii) PTSA Capacity; or
 - (iii) Negotiated Agreement Capacity; andonce made, the declaration shall be irrevocable.
- (c) From 15 September until 30 September in each Year:
 - (i) Customers should provide the Port Operator with their expressions of interest containing all specified information to request to export Grain cargoes during the Harvest Shipping Period from a nominated Port Terminal Facility (**Harvest Period EOI**); and
 - (ii) the Port Operator will allocate Harvest Capacity (**Advised Harvest Capacity**) to Customers during the Harvest Shipping Period thereby allowing them to secure access to Port Terminal Facilities for Grain export accumulation and export capacity in advance of obtaining Grain Entitlement.
- (d) Where Customers provide Harvest Period EOIs that exceed the Advised Harvest Capacity, the Port Operator will allocate the Harvest Capacity in a manner that is consistent with **clause 6.4** of the Undertaking and the objectives set out in **clause 2** of the Undertaking, which for the purposes of the 2009/10 Season will be to proportionally reduce the relevant Harvest Period EOIs until they meet the Advised Harvest Capacity. If the demand for Harvest Capacity in the 2009/10 Season significantly exceeds the Advised Harvest Capacity in a majority of Shipping Windows then the Port Operator may extend the Auctions to cover the Harvest Shipping Period.
- (e) The Port Operator may accept all or part of a Harvest Period EOI before 1 October in each Year, or such later date as the Port Operator may determine.
- (f) Where, in any Shipping Window during the Harvest Period the Harvest Period EOIs awarded do not exceed the Advised Harvest Capacity (in this **rule 5.1(f) Spare Capacity**), Customers may submit a Spare Capacity Booking Form to the Port Operator. Subject to the Spare Capacity Booking Form being correctly completed and the Harvest Capacity requested being less than or equal to the Spare Capacity, the Port Operator shall accept the Spare Capacity Booking Form and allocate Harvest Capacity to the Customer.
- (g) Where the Port Operator allocates Harvest Capacity to a Customer (either in accordance to a Harvest Period EOI or a Spare Capacity Booking Form):
 - (i) the Port Operator shall give notice of that acceptance to the Customer;
 - (ii) the Customer must pay the Port Operator in accordance with the Access Agreement in respect of which the Customer will receive the Capacity; and
 - (iii) subject to **rule 5.1(h)**, the Port Operator must provide Port Terminal Services in accordance with the relevant Access Agreement at the relevant Port Terminal Facility.
- (h) The Port Operator's obligation under **rule 5.1(g)(iii)** is subject to:

- (i) the Customer obtaining or delivering the relevant Grain Entitlement;
- (ii) the Customer complying with the notice requirements under **rule 7**; and
- (iii) the Arrival of the Customer's Nominated Vessel, within the Shipping Window for the relevant Port Terminal Facility and that vessel passing the Relevant Surveys.

5.2 Trading Harvest Capacity

- (a) Where a Customer does not expect to accumulate sufficient Grain Entitlement for any booked Port Terminal Services under their Access Agreement then

not less than seven days prior to the start of the Shipping Window for the Customer's vessel nominated under **rule 7.1** and with the consent of the Port Operator (which must not be unreasonably withheld or delayed), the Customer may transfer its Harvest Capacity entitlement to another Customer provided that:

 - (i) where a Customer has secured Harvest Capacity the following transfers or trades of Harvest Capacity only are permitted:
 - (A) GSA Capacity for the Harvest Shipping Period may only be traded with or transferred to another Customer that has a current GSA in place with the Port Operator;
 - (B) PTSA Capacity for the Harvest Shipping Period may only be traded with or transferred to another Customer that has a current PTSA in place with the Port Operator ;
 - (C) Negotiated Agreement Capacity for the Harvest Shipping Period may only be traded with or transferred to another Customer that has a current Negotiated Agreement in place with the Port Operator; and
 - (ii) in the case of a PTSA Customer: the PTSA Customer has:
 - (1) agreed to sell to the transferee the grain that the PTSA Customer has accumulated at the Port Terminal Facility; or
 - (2) PTSA Customer has made arrangements to Outload any Grain accumulated at the Port Terminal Facility, and pay the relevant charge under their Access Agreement, and there is sufficient time for the transferee to accumulate sufficient Grain in the assembly window (as may be modified with the consent of the Port Operator, such consent not to be unreasonably withheld
 - (A) in the case of a Negotiated Agreement Customer, the Negotiated Agreement Customer has:
 - (1) agreed to sell to the transferee the grain that the Negotiated Agreement Customer has accumulated at the Port Terminal Facility; or
 - (2) Negotiated Agreement Customer has made arrangements to Outload any Grain accumulated at the Port Terminal Facility, and pay the relevant charge under their Access Agreement, and there is sufficient time for the transferee to accumulate sufficient Grain in the assembly window (as may be modified with the consent of the Port Operator, such consent not to be unreasonably withheld)
- (b) For the avoidance of doubt, any purported trade or transfer by a Customer of Harvest Capacity that does not comply with **rule 5.2(a)** shall be of no effect.

- (c) The transferee of the Harvest Capacity entitlement must comply with this **rule 5**, and in particular the transferring Customer's Vessel Nomination if one has been provided prior to the transfer under **rules 7.1** or **7.2**; and
- (d) All transfers must be:
 - (i) proposed using the Transfer of Shipping Capacity Form,
 - (ii) accurately filled out and complete in all material regards; and
 - (iii) signed by the transferor and transferee,prior to submission to the Port Operator.
- (e) Subject to the transferor and transferee complying with their obligations under **rule 5.2(a)** to **(d)** and the Port Operator's approval, the Port Operator shall sign a copy of the Transfer of Shipping Capacity Form and provide a copy to the transferor and transferee and amend the Shipping Capacity Register to record the details of the transfer.
- (f) The Customer transferring Harvest Capacity must pay the Port Operator a fee of a \$50 for each 1000 tonnes of Harvest Capacity transferred for the Port Operator's administrative costs associated with the transfer.
- (g) For the avoidance of doubt, no transfer shall be effective until approved by the Port Operator under **rule 5.2(e)**.

6 Annual Shipping Period Port Terminal Services

6.1 Acquiring Capacity in Annual Shipping Period

- (a) In addition to applying for Capacity during the Harvest Period, a Customer may apply under this **rule 6.1** for Capacity during the Annual Shipping Period.
- (b) Shipping during the Annual Shipping Period (that is, for a period other than the Harvest Shipping Period) is allocated using a market based Auction process. All Customers may participate in the Auction process in order to acquire Capacity. Grain Entitlement is not required to acquire Capacity.
- (c) Auctions shall be held in stages to assist in the efficient planning and allocation of Capacity for the shipment year. The First Phase Auction will be held in September in order to allocate the majority of Capacity over the Annual Shipping Period. The Port Operator will publish the dates each Auction is scheduled to be held and a schedule of the Capacity on offer at each Auction not less than seven days prior to the date of commencement of the Auction.
- (d) Each Auction will be held in accordance with the Auction Rules under which each prospective Customer will have the opportunity to acquire Shipping Windows for a defined tonnage at each Port Terminal Facility regardless of whether the Customer is a GSA Customer, a PTSA Customer or a Negotiated Agreement Customer.
- (e) Any Capacity that is passed in at the First Phase Auction will be re-auctioned in the Second Phase Auctions together with any remaining Capacity. The Second Phase Auctions will be held on a monthly basis in accordance with the Auction timeline published by the Port Operator from time to time and offer Capacity for shipment for the Shipping Window that commences two months from the date of each Second Phase Auction.
- (f) A Customer must declare in respect of each tonne of Capacity acquired by Auction whether the Capacity it is applying for is GSA Capacity, PTSA Capacity, or Negotiated

Agreement Capacity and once made, the declaration shall be irrevocable. The Customer must make this declaration:

- (i) in the case of a First Phase Auction prior to 1 November; and
 - (ii) in the case of a Second Phase Auction within 7 days of the end of the Second Phase Auction in which the Capacity was acquired.
- (g) Where:
- (i) A period of not less than 7 days has passed after the end of the last Second Phase Auction prior to the commencement of the Shipping Window; and
 - (ii) the Capacity awarded at Auction does not exceed the advised Capacity for that Shipping Window during the Annual Shipping Period (in this **rule 6.1(f)** “**Spare Capacity**”)

Customers may submit a Spare Capacity Booking Form to the Port Operator at any time up to 22 days before the first day of the relevant Shipping Window. A Customer must declare at the time of making any application for Spare Capacity during the Annual Shipping Period whether the Capacity it is applying for is GSA Capacity, PTSA Capacity or Negotiated Agreement Capacity and once made, the declaration shall be irrevocable.

- (i) Subject to the Spare Capacity Booking Form being correctly completed and the Capacity requested being less than or equal to the Spare Capacity the Port Operator shall accept the Spare Capacity Booking Form and allocate Capacity to the Customer.
- (h) When a Customer is successful in securing Capacity in a Shipping Window at an Auction held under the Auction Rules
the Port Operator shall confirm the Capacity secured by the Customer at that Auction;
 - (i) the Customer must pay the Port Operator in accordance with the Access Agreement in respect of which the Customer will receive Capacity; and
 - (ii) subject to **rule 6.1(i)**, the Port Operator shall provide Port Terminal Services in accordance with the relevant Access Agreement at the relevant Port Terminal Facility.
- (i) The Port Operator’s obligation under **rule 6.1(h)(ii)** is subject to:
 - (i) the Customer obtaining or delivering the relevant Grain Entitlement;
 - (ii) the Customer complying with the notice requirements under **rule 7**; and
 - (iii) the Arrival of the Customer’s Nominated Vessel, within the Shipping Window for the relevant Port Terminal Facility and that vessel passing the Relevant Surveys.
- (j) Upon the later of the allocation of Spare Capacity following acceptance of the Spare Capacity Booking Form or the allocation of a Shipping Window, Customers will be required to nominate vessels into those Shipping Windows in accordance with these Port Terminal Rules.

6.2 Trading Annual Shipping Period Capacity

- (a) Customers may transfer Annual Shipping Period Capacity that they have acquired from the Port Operator (whether in the Auctions, by a Spare Capacity Booking Form or purchased from another Customer in the Secondary Market) provided that:
 - (i) Harvest Capacity secured under a GSA may only be traded with or transferred to another Customer that has a current GSA in place with the Port Operator;
 - (ii) Harvest Capacity secured under a PTSA may only be traded with or transferred to another Customer that has a current PTSA in place with the Port Operator and

- (iii) Harvest Capacity secured under a Negotiated Agreement may only be traded with or transferred to another Customer that has a current Negotiated Agreement in place with the Port Operator.
- (b) For the avoidance of doubt, any purported trade or transfer by a Customer of Harvest Capacity that does not comply with **rule 6.2(a)** shall be of no effect.
- (c) All transfers must be:
 - (i) proposed using the Transfer of Shipping Capacity Form,
 - (ii) accurately filled out and complete in all material regards; and
 - (iii) signed by the transferor and transferee,
 prior to submission to the Port Operator.
- (d) All transfers of Annual Shipping Period Capacity must be completed no later than 30 days prior to the first day of the Shipping Window.
- (e) Subject to the transferor complying with their obligations under **rule 6.2(a) to (c)**, and the Port Operator's approval, the Port Operator shall sign a copy of the Transfer of Shipping Capacity Form and provide a copy to the transferor and transferee and amend the Shipping Capacity Register to record the details of the transfer.
- (f) The Customer transferring Capacity must pay the Port Operator a fee of a \$50 for each 1000 tonnes of Capacity transferred for the Port Operator's administrative costs associated with the transfer.
- (g) For the avoidance of doubt, no transfer shall be effective until approved by the Port Operator under **rule 6.2(e)**.

7 Nominating Vessels for Shipping Windows during the Harvest Period

7.1 PTSA and Negotiated Agreement Customers

- (a) Vessel Nominations must be made no later than 22 days prior to the Nominated Vessel's ETA which must be no later than the last day of the Grace Period and in accordance with the rules outlined in **rule 8.1**.
- (b) No later than 48 hours prior to the ETA the Grain cargo must be fully accumulated in order for it to be loaded.
- (c) During Harvest, Customers will experience greater delays in deliveries at the Port Terminal Facilities of Albany, Esperance and Geraldton, as vehicles will queue along with Grower deliveries. PTSA and Negotiated Agreement Customers should note that this will place additional time constraints on the cargo accumulation process.
- (d) The Port Operator may waive compliance with **rules 8.1(c)** and **8.1(g)** during the Harvest Period provided that the PTSA or Negotiated Agreement Customer makes a declaration contained in the Direct to Port Delivery Declaration Form in respect of each load of Grain delivered to the Port Terminal Facility.

7.2 GSA Customers

- (a) Vessel Nominations must be made no later than 22 days prior to the Nominated Vessel's ETA which must be no later than the last day of the Grace Period and in accordance with the rules outlined in **rule 8.1**.

- (b) No later than 48 hours prior to the ETA, a GSA Customer must have Grain Entitlement equivalent or greater than the Nominated Tonnage for each Grade to be loaded onto the Nominated Vessel.

8 Nominating Vessels for Shipping Windows in the Annual Shipping Period

8.1 Direct to Port Process

(a) Shipping Notification

Following receipt of a notice from the PTSA Customer or Negotiated Access Customer of an intended shipment (a **Cargo Request Form**) within a Shipping Window allocated in accordance with **rule 6.1**, the Port Operator must:

- (i) agree an Accumulation Plan with the PTSA Customer or Negotiated Access Customer; and
- (ii) allocate the PTSA Customer or Negotiated Access Customer a shipping date in accordance with the Shipping Stem Policy.

A Cargo Request Form in relation to a Shipping Window must be given no later than 30 days prior to the ETA of the vessel actually nominated to be loaded in the Vessel Nomination.

The PTSA Customer or Negotiated Access Customer must submit with the Cargo Request Form:

- (iii) a pre-delivery sample of grain from each source of grain; and
- (iv) a Declaration that the pre-delivery sample is a representative sample of the grain to be delivered and is not misleading as well as to treatment of the Grain.

(b) Accumulation Plan

- (i) The PTSA Customer or Negotiated Access Customer and the Port Operator must agree an Accumulation Plan detailing:
 - (A) whether deliveries of Grain to a Port Terminal Facility for export are to be made by road or rail, subject to the capabilities of the Port Terminal Facility to receive such deliveries;
 - (B) the agreed timetable for deliveries to the Port Terminal Facility; fitting in with pre-planned deliveries;
 - (C) where deliveries are made by road, all loads must comply with the requirements of the Heavy Vehicle Mass Management Scheme.
- (ii) For the avoidance of doubt, the Port Operator is not required to allow a PTSA Customer or Negotiated Access Customer access to rail access train paths utilised by the Port Operator.

(c) Pre-delivery testing

The PTSA Customer or Negotiated Access Customer must coordinate the collection and delivery to the Port Operator of pre-delivery samples and the Port Operator must coordinate the testing of pre-delivery samples from the PTSA Customer or Negotiated Access Customer, prior to the delivery of Grain to the Port Terminal Facilities, so as to:

- (i) confirm the grain type and other characteristics of the Grain to be delivered;
- (ii) check for the presence of chemicals and other contaminants; and

- (iii) check for the presence of insect activity and live insects,

to minimise the risk of cross contamination whilst the Grain is held by the Port Operator at the Port Terminal Facilities.

(d) Sampling

- (i) The Port Operator will sample Grain delivered at the Port Terminal Facility, using Port Operator Sampling Facilities operated by personnel of the Port Operator who will:
 - (A) visually inspect the Grain for obvious signs of contaminants as it exits the vehicles; and
 - (B) sample the Grain unloaded into the grid as it is elevated on the way to storage,

and in all cases, the Port Operator will provide the PTSA Customer or Negotiated Access Customer with a record of the results of the sampling.

- (ii) The purpose of the sampling of loads of Grain is to:
 - (A) confirm the grain type and other characteristics of the Grain being delivered;
 - (B) check for the visible evidence of chemicals and other contaminants; and
 - (C) check for the visible evidence of insect activity and live insects,to minimise the risk of cross contamination whilst the Grain is held by the Port Operator at the Port Terminal Facilities.

(e) Unloading

Subject to **rule 14**:

- (i) the Port Operator will provide access to the Port Terminal Facilities to road vehicles and rail vehicles (where such facilities exist at the Port Terminal Facilities) for the purpose of PTSA Customers or Negotiated Access Customers unloading deliveries of Grain from the vehicles, for Grain export accumulation;
- (ii) access to the Port Terminal Facilities for unloading Grain will be provided by way of:
 - (A) road or rail vehicle access (where such facilities exist at the Port Terminal Facilities) including access to roadways, rail track, passing loops and sidings located within the Port Terminal Facilities; and
 - (B) unloading through a grid capable of accepting deliveries by road or rail (where such facilities exist at the Port Terminal Facilities); and
- (iii) where vehicles containing the PTSA Customer's or Negotiated Access Customer's Grain arrive at the Port Terminal Facilities as scheduled (or within a reasonable time before or after the scheduled time, so that it can be unloaded to comply with the scheduled time) the Port Operator must use all reasonable endeavours to ensure that the vehicles are unloaded at a rate (commensurate with the type, condition and volumes of the Grain) that enables the PTSA Customer's or Negotiated Access Customer's Nominated Vessel to be loaded at its ETA, but not greater than the maximum receival rating of the relevant grid.

(f) Weighing

All Grain delivered to the Port Terminal Facilities for unloading must be weighed using the Port Operator's weighing facilities operated by personnel of the Port Operator who must:

- (i) record the gross and tare weights of the road vehicles containing the loads of Grain; or
- (ii) at the Port Operator's discretion where the Port Terminal Facilities have such facilities, batch weigh the Grain unloaded from rail vehicles into the grid,

and in all cases, the Port Operator must provide the PTSA Customer or Negotiated Access Customer with a weighbridge ticket or other statement certifying the weight and quantity of Grain delivered, and confirming the name of the person in whose name the Grain is delivered based on the information contained in the PTSA Customer's or Negotiated Access Customer's Direct to Port Declaration Form provided to the Port Operator at or prior to the delivery of each load of Grain at the Port Terminal Facility.

(g) Fumigation

The PTSA Customer or Negotiated Access Customer must provide the Port Terminal Operator with a Fumigation Certificate detailing:

- (i) all chemicals applied to the Grain prior to delivery at the Port Terminal Facility, in relation to:
- (ii) all Grain delivered after 1 February in a Season; and
- (iii) all Grain that is not of the current Season.

(h) Storage of Grain

- (i) All storage and handling of Grain delivered by a PTSA Customer or Negotiated Access Customer at the Port Terminal Facilities must be segregated from all other grain stored or handled at the Port Terminal Facilities.
- (ii) All delivery and unloading points, including any discharge grids, storage locations, and the movement of Grain following discharge will be nominated and determined by the Port Operator in its sole discretion, acting in accordance with the Port Terminal Rules.
- (iii) Any excess Grain following loading of PTSA Customer's or Negotiated Access Customer's Nominated Vessel must be segregated from all other Grain stored or handled at the Port Terminal Facilities.

8.2 GSA Customers

- (a) GSA Customers must provide a Vessel Nomination to the Port Operator no later than 22 days prior to the last day of the Grace Period.
- (b) The ETA of the Nominated Vessel must be no later than the last day of the Grace Period.
- (c) All Vessel Nominations will be input into the Port Operator's shipping interface contained on LoadNet® for Marketers™ system.
- (d) At the time the Vessel Nomination is provided to the Port Operator, the GSA Customer must have full Grain Entitlement for the cargo outlined in the Vessel Nomination.

9 Vessel Nominations

9.1 Details

- (a) When making a Vessel Nomination, Customers must provide the following vessel nomination and handling instruction details to the Port Operator by entry into the Port Operator's shipping interface in LoadNet® for Marketers™:

- (i) maximum nominated tonnage (including Master's discretion);
 - (ii) destination details;
 - (iii) product description (commodity type and other characteristics);
 - (iv) ETA;
 - (v) discharge port;
 - (vi) shipping agency;
 - (vii) vessel part loading;
 - (viii) de-ballasting requirements;
 - (ix) ship loading sequence plan;
 - (x) vessel details (including beam, Arrival and departure drafts, dry-weight, vessel type/class, hold and hatch details, net and gross capacities);
 - (xi) cargo details (including batch reference, load tolerance range, total load tonnage);
 - (xii) stevedore details;
 - (xiii) vessel name; and
 - (xiv) Capacity Contract Reference number.
- (b) All Vessel Nominations must:
- (i) provide a vessel ETA that is within the relevant Grace Period for the Capacity the Customer is attempting to utilise; and
 - (ii) provide Laycans less or equal to 14 days, have ownership of cargo and provide port, grades, quality and tonnage details.
- (c) The Port Operator recognises it may not be possible to provide a named vessel with over 22 days lead time so a TBA nomination will be acceptable as long as the above criteria have been met and a vessel name is provided by no later than 15 days before the ETA.

9.2 Amendment of Vessel Nominations

- (a) The Port Operator may permit the amendment of a Vessel Nomination for operational reasons where, in its reasonable opinion, accepting the amendment:
- (i) would not constitute a departure from the principles outlined in clauses 6.4, 6.5 and 9.2 of the Undertaking entered into by the Port Operator;
 - (ii) is to assist achievement of:
 - (A) minimising demurrage at the Port over a given period; or
 - (B) maximising throughput at the Port over a given period;
 - (iii) does not materially alter the outcome or adversely affect Customers participating in the Harvest Period EOI or Annual Shipping Period Auctions;
 - (iv) would not result in other Customers incurring materially greater demurrage than would be the case if the amendment had not been accepted.

9.3 Additional Charges

Additional charges may be payable to the Port Operator to cover the Port Operator's costs incurred where a Customer requests amendments to the Vessel Nomination.

10 Lost Capacity

10.1 Harvest Shipping Period

- (a) Where, following acceptance by the Port Operator of a Vessel Nomination in respect of Harvest Capacity:
- (i) a Customer's vessel Arrives outside of the Shipping Window but within the Grace Period; or
 - (ii) the Customer acquires or accumulates Grain Entitlement sufficient to load the vessel within the Grace Period and the Customer's Vessel has Arrived,
- the Port Operator will use its reasonable endeavours to load the vessel.
- (b) Where following acceptance by the Port Operator of a Vessel Nomination in respect of Harvest Capacity:
- (i) a Customer's vessel has not Arrived within the Grace Period; or
 - (ii) the Customer does not have full Grain Entitlement within 48 hours of the ETA of the Nominated Vessel,
- the Harvest Capacity shall be treated as Lost Capacity and the Customer shall pay the fees specified as payable for Lost Capacity in the Access Agreement.
- (c) Where:
- (i) the Customer does not submit and have accepted by the Port Operator a Vessel Nomination for Harvest Capacity more than 22 days before the last day of the Grace Period; or
 - (ii) the Customer does not ship all acquired Harvest Capacity within the Harvest Shipping Period, then:
- the Customer will be regarded as not to have shipped the Grain in the relevant Shipping Window, the Harvest Capacity shall be treated as Lost Capacity and the Customer shall pay the fees specified as payable for Lost Capacity in the Access Agreement.

10.2 Annual Shipping Period

- (a) Where, following acceptance by the Port Operator of a Vessel Nomination in respect of Annual Shipping Period Capacity:
- (i) a Customer's vessel Arrives outside of the Shipping Window but within the Grace Period; or
 - (ii) the PTSA Customer or Negotiated Agreement Customer acquires or accumulates Grain Entitlement sufficient to load the vessel within the Grace Period and the Customer's Vessel has Arrived,
- the Port Operator will use its reasonable endeavours to load the vessel.
- (b) Where:
- (i) the Customer does not submit and have accepted by the Port Operator a Vessel Nomination more than 22 days before the last day of the Grace Period; or
 - (ii) the Customer's Nominated Vessel does not Arrive within the Grace Period; or
 - (iii) in the case of a GSA Customer, the GSA Customer does not obtain the full Grain Entitlement for the cargo at the time of Vessel Nomination; or
 - (iv) in the case of a PTSA Customer or Negotiated Agreement Customer, the PTSA Customer or Negotiated Agreement Customer (as the case may be) does not

obtain the full Grain Entitlement for the cargo at the time of Arrival of the Nominated Vessel,

the Customer will be regarded as not to have shipped the Grain in the relevant Shipping Window in accordance with **rule** and the Grain Capacity shall be treated as Lost Capacity and the Customer shall pay the fees specified as payable for Lost Capacity in the Access Agreement.

11 Shipping Stem Policy

11.1 Prioritising Loading of Vessels

The Shipping Stem is ordered by the Estimated Time of Commencement of Loading (**ETC**). In allocating or adjusting an ETC to a Customer the Port Operator shall have regard to (in order of decreasing importance):

- (a) the ETA of a vessel if the ETA is within the Shipping Window for which Capacity is being utilised and the Vessel actually Arrived within its Shipping Window;
- (b) the Nomination Date of the Vessel Nomination;
- (c) the Nomination Time of the Vessel Nomination;
- (d) changes in the ETA of a vessel (including those that would take it outside of the Shipping Window for which Capacity is being utilised);
- (e) changes in the expected Accumulation Plan of a vessel for a GSA Customer or departures from an agreed Accumulation Plan for PTSA Customers or Negotiated Agreement Customers; and
- (f) loading a vessel whose cargo remains at Port but which failed to Arrive prior to the last day of the Shipping Window.

11.2 Adjustments to the Stem

The Port Operator may adjust the Shipping Stem to cater for extraordinary or unusual circumstances including, but not limited to:

- (a) Customer's requests to defer Vessels;
- (b) Customer's requests to bring Vessels forward;
- (c) accepting a Vessel Nomination with less than the required notice having been provided by the Customer,

where the Port Operator is reasonably of the opinion that to do so will not cause any material detriment to the Port Operator or other Customers and is in accordance with the principles outlined in clauses 6.4, 6.5 and 9.2 of the Undertaking provided by the Port Operator.

Adjustments to the Shipping Stem will be at the sole discretion of the Port Operator acting in accordance with the Port Terminal Rules.

11.3 Discretion to Accept Vessel Nominations

Notwithstanding that the Port Operator may in its reasonable discretion accept a Vessel Nomination that does not comply fully with the requirements of **rule 9.1**:

- (a) for the purposes of assessing the priority for **rule 11.11** the Port Operator reserves the right to adjust the ETA by taking the Customer to have provided 22 days notice from the date the Vessel Nomination was accepted under this **rule 11.3**; and
- (b) a Vessel Nomination accepted under this **rule 11.3** shall in all cases have a lower priority than a Vessel Nomination that does comply fully with the requirements of **rule**

9.1 unless the loading of the Vessel Nomination accepted under this **rule 11.3** is necessary to ensure the continued operation of the Port Terminal

11.4 Other Information

The Shipping Stem shall provide information about the total Capacity in relation to a Shipping Window and the amount of Capacity currently allocated.

12 Storage Priority Policy

The Port Operator shall allocate the use of storage Capacity in a Port Terminal in order to meet the order of vessels contained in the Shipping Stem from time to time having regard to the Objects contained in **rule 2.1** of the Port Terminal Rules.

13 Port Queue Policy

13.1 Allocating Priority

- (a) The port queue is the berthing priority for each vessel that has Arrived at a Port Terminal Facility and is waiting to be loaded.
- (b) Berth priority for vessels is determined by:
 - (i) cargo accumulation status; and
 - (ii) the time of Arrival of a vessel and its relationship to the Shipping Window of the Vessel Nomination;
- (c) The Port Operator will not call a vessel in to berth until the full cargo is ready for loading at the Port Terminal Facility and the Customer has full Grain Entitlement for the cargo unless it is necessary in the reasonable opinion of the Port Operator for the efficient operation of the Port Terminal Facility.

13.2 Non compliant vessels

- (a) Customers' vessels must pass all Relevant Surveys within **[24 hours]** of berthing.
- (b) The Port Operator may require Customers to move their vessel from the berth if it fails survey in accordance with **rule 13.2(a)** and the non-compliant vessel is holding up the berth from another vessel.
- (c) where a vessel fails any Relevant Surveys it retains its original priority once it has passed the Relevant Surveys .

13.3 Two porting

The Port Operator recognises vessels which have received part grain cargo from a previous call (two port) at another Western Australian port. If this is applicable, then the actual Arrival date at the first port of call is used to establish its priority in the port berthing queue.

14 Delivery Queue Policy

- (a) Each PTSA Customer and Negotiated Agreement Customer will be allocated an assembly window once they have a confirmed Vessel Nomination and ETA, during which time the PTSA Customer or Negotiated Agreement Customer will be permitted to deliver loads of Grain to the Port Terminal Facility for the purposes of Export Accumulation (**Assembly Window**).

- (b) The Port Operator allocates Assembly Windows in order to meet the facilitated order of vessels contained in the Shipping Stem from time to time having regard to the Objects contained in **rule 2.1** of the Port Terminal Rules.
- (c) Assembly Windows will be allocated at Kwinana all Year round and at Geraldton, Albany and Esperance outside of the Harvest Period. During the Harvest Period at Geraldton, Albany and Esperance, PTSA Customer's and Negotiated Agreement Customer's Grain delivery vehicles will be required to queue for services along with other vehicles seeking access.
- (d) PTSA Customers and Negotiated Agreement Customer's may not access a delivery queue at a Port Terminal Facility until it has been provided with an Assembly Window by the Port Operator.
- (e) Provided that a PTSA Customer or Negotiated Agreement Customer arrives at the relevant Port Terminal Facility within their Assembly Window, the PTSA Customer's or Negotiated Agreement Customer's priority in the delivery queue will be determined by the time that they arrived.
- (f) The Port Operator may require Customers to move a vehicle of theirs from a delivery queue if the vehicle breaks down or is rejected in accordance with the terms and conditions of the Access Agreement or these Port Terminal Rules and the non-compliant vehicle is holding up the delivery queue for other vehicles.

15 Dispute Resolution

15.1 Contractual

- (a) Any dispute over the application of these rules or the exercise of discretion by the Port Operator, except in relation to the Auction Rules, will be dealt with in accordance with the provisions of the relevant Access Agreement.
- (b) Any dispute over the application of the Auction Rules shall be dealt with in accordance with the terms of the Auction Rules.

Schedule 1

Timetable for booking a PTSA Customer Vessel

[insert a PTSA Customer process map]

Schedule 2

Direct to Port Delivery Declaration Form

The PTSA Customer warrants and represents that:

- (a) grain being tendered at the Port will not:
 - (i) include any Contaminant
 - (ii) be in breach of the Bulk Handling Act 1967 (WA) or Bulk Handling Act Regulations 1967 (WA);
- (b) it owns any grain tendered for delivery by it or on its behalf;
- (c) all of the grain in a Delivery has been or is only contained in equipment, bags, farm implements, farm storages and bulk grain motor bodies that have:
 - (i) not contained any grain product prior to containing grain of this current season and are free from insects and vermin; or
 - (ii) previously contained a grain product, but have been freed of all such grain product and is free from insects and vermin;
- (d) any vehicle that has previously transported non-grain or contaminated grain products:
 - (i) is clean, dry and free of remaining materials and odours from previous loads;
 - (ii) has been washed under high pressure prior to delivering any grain; and
 - (iii) has the details of previous loads disclosed on the relevant form;
- (e) if any of the grain has been treated with substances for the control of insects, details of the substances and application of those substances has been provided in writing to CBH and the use of any other chemical in the process of planting, growing and storage of the grain has been in accordance with the levels prescribed in any relevant legislation and also in accordance with the usage instructions;
- (f) none of the grain in a delivery is a Genetically Modified Organism (unless declared in writing to, and approved in writing by, CBH before the Delivery enters the Port Terminal Facility);
- (g) any information provided to CBH in a delivery form is true and correct and not misleading or deceptive or likely to mislead or deceive; and
- (h) in the case of grain delivered during the Harvest Period and without a pre-delivery sample being tendered by the PTSA Customer, all of the grain in a delivery was grown between the May and September immediately prior to the Current Season.

Schedule 3

Direct to Port Sample Declaration form

The PTSA Customer warrants and represents that:

- (a) grain being provided as a pre-delivery sample is a true and correct representative sample that has not been manipulated or created in order to produce an misleading or deceptive assessment of the quality of the grain to be delivered to the Port Operator;
and
- (b) the grain is representative of all storages from which grain to be delivered to the Port Terminal Facility will be drawn.

Schedule 4

Auction Timeline