



Cooperative Bulk Handling Limited

Further submission to the ACCC in response to  
ACCC Issues Paper, ACCC Letter and Stakeholders'  
Submissions

# Port Terminal Services Undertaking

Dated 29 June 2009

# Port Terminal Services Undertaking

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# Submission to the ACCC

## Port Terminal Services Undertaking

### 1. Introduction and summary of submission

#### 1.1 Purpose of submission

This submission is made by CBH in relation to its Port Terminal Services Undertaking (**Undertaking**) submitted to the ACCC under section 44ZZA of the TPA 1974 (Cth) (**TPA**).

In particular, this further submission is made in response to the:

- (a) *ACCC's Issues Paper dated 29 April 2009 (**Issues Paper**);*
- (b) *ACCC's letter to CBH dated 2 June 2009, requesting further information to assist the ACCC in its assessment of the Undertaking (**ACCC Letter**); and*
- (c) *submissions by third party stakeholders in relation to the Undertaking (**Stakeholder Submissions**).*

#### 1.2 Structure of submission

This submission is divided into six parts:

- (a) ***Part 1** contains introductory information and a summary of this submission.*
- (b) ***Part 2** provides a detailed explanation of the co-ordinated wheat export supply chain logistic services offered by CBH under an exclusive dealing notification provided to the ACCC, known as "Grain Express". This part also outlines the differentiation of the service offering under Grain Express from the service offering under the Undertaking.*
- (c) ***Part 3** contains CBH's response to each issue identified by the ACCC in the issues Paper. Where the Stakeholder Submissions respond to the Issues identified in the Issues Paper, this part also responds to those Stakeholder Submissions.*
- (d) ***Part 4** contains CBH's response to each issue identified by the ACCC in the ACCC Letter. Where the Stakeholder Submissions respond to the Issues identified in the ACCC Letter, this part also responds to those Stakeholder Submissions.*
- (e) ***Part 5** contains CBH's response to the further key issues raised in the Stakeholder Submissions, to the extent that those issues have not been identified in the Issues Paper or the ACCC Letter.*
- (f) ***Part 6** provides information in relation to CBH's Capacity Allocation System, which will be incorporated into its Port Rules.*

### 1.3 Preliminary issue

Before addressing specific issues, CBH wishes to state its position in relation to the manner in which allegations have been made in Stakeholder Submissions. The AGEA Submission makes a number of allegations to the effect that CBH has engaged in unfair or unreasonable conduct, preferential self-dealing or discriminatory conduct in the conduct of its storage and handling business. The following allegations are made in the AGEA submission dated 29 May 2009 (**AGEA Submission**).

At paragraph 3.24:

*“BHCs have no incentive to manage the services efficiently. BHCs transfer the risk and cost on to AWEs by imposing unfair terms, charging prices that are unrelated to the cost of providing the service and by refusing access to services unless AWEs agree their terms and conditions. **Examples where this has occurred are set out directly below and in the Confidential Submissions...**”*

*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.**”*

At paragraph 4.9

*“Limiting the scope of the proposed access undertakings to wheat has the potential to enable BHCs to restrict AWEs’ access to port terminal services by exhausting the port terminal’s capacity in favour of other grains. Example: BHCs control the ability to accumulate stock at port. Historically, ABB has distorted accumulation of wheat in its port services, allowing it to reduce capacity at the port, by storing its own non-wheat commodities. **The Confidential Submissions provide further examples where BHCs have refused or delayed in granting access to port terminal services.**”*

At paragraph 4.12

*“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.*

*Example: In 2009, CBH indicated that it would align the Shipping Stem with its freight program, leaving customers and commercial considerations subject to logistics management. CBH said they aimed “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” (Dow Jones, 05/03/2009). **The Confidential Submissions refer to other examples where discrimination against AWEs in the management (or manipulation) of the Shipping Stem has occurred. The position will be worse if the proposed access undertakings are accepted.**”*

At paragraph 4.18

*“The proposed access undertakings must not allow BHCs to...(d) swap grain held at site and require AWEs to bear the consequences of this;(an example where this has occurred is referred to in one of AGEA's Confidential Submissions);”*

At paragraph 14.6

*“At present, there is no transparency in relation to the Shipping Stems. AGEA is aware of a number of examples where Shipping Stems were altered to accommodate certain vessels, **see the Confidential Submissions**. This brings into question the transparency of the Shipping Stem and the ability of the BHCs to manipulate the Shipping Stem to their commercial advantage, contrary to the objectives and obligations under the WEM Act and the proposed access undertakings.”*

At paragraph 16.1

*“The ring fencing rules are critical to a fair and transparent access regime. The rules in the drafts are inadequate. **Examples where the ring-fencing rules have broken down are set out in the Confidential Submissions.**”*

These allegations, if substantiated, have the potential to harm CBH's commercial reputation and, may raise concerns under Part IV of the TPA. We assume that, since some of these allegations are made against CBH, the information that forms the basis of those allegations would be within CBH's knowledge. For that reason, CBH is surprised that the allegations themselves are made in general form in the public version of the AGEA submission, while the detail of the allegations and any supporting evidence appears to have been the subject of a successful claim for confidentiality by AGEA. As a result, the information has not been made available to CBH or the public, though the prejudicial allegations themselves are publicly stated. For this reason, CBH's reputation has been publicly damaged but CBH has been denied an appropriate opportunity to respond. The allegations are made at such a level of generality that CBH is unable even to determine the relevant year in which the conduct is said to have occurred.

CBH accepts that corporations may wish to provide confidential material to the ACCC in opposition to certain aspects of the CBH access undertaking. In those circumstances, CBH would not expect to be provided with the confidential material. However, the approach taken to allegations of preferential self-dealing and discrimination in the AGEA submission should be treated differently from other information for which confidentiality is appropriately claimed and granted. In this case, AGEA is making specific allegations of inappropriate and potentially unlawful conduct against CBH. Those allegations have the potential to be highly prejudicial in circumstances where their probative value to the ACCC's decision making may be limited.

As the ACCC is aware, the following principles are fundamental to natural justice:

- (a) A person should be given adequate notice of matters relevant to an impending decision affecting their interests so that they have a reasonable opportunity to prepare their case; and
- (b) There may be a breach of natural justice where a decision maker bases a decision on evidence, findings or reasonings not

disclosed to the party adversely affected by them, thus necessarily depriving them of the opportunity to address the relevant matter.

In *Kioa v West*<sup>1</sup> the High Court held that a person should be provided with details of any credible, relevant and significant adverse information which the decision maker has, and which may affect the decision to be made, and be given an opportunity to respond.

Importantly, while the obligation to retain confidentiality might mean that copies of confidential documents or names of persons supplying information should not be disclosed, natural justice will generally require that the substance or essence of the information be provided<sup>2</sup>.

Unless CBH is provided with sufficient notice of the detail these allegations, and given an opportunity to respond, the allegations should be disregarded.

## 2 Grain Express and its interaction with the Undertaking

### 2.1 Overview

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 .

This section of the submission provides information in relation to:

- the WA export grain supply chain;

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<sup>1</sup> (1985) 159 CLR550

<sup>2</sup> *Ansett v Minister for Aviation* (1987) 72 ALR469

- the structure of CBH;
- the relevant provisions of the Bulk Handling Act, including why understanding the nature of grain entitlement is crucial to understanding Grain Express and assessing the Undertaking in an informed manner;
- the Grain Express service with a particular focus upon the efficiencies generated by treating grain in CBH's custody as forming part of a single system<sup>3</sup>;
- the differences between the Grain Express service and the Port Terminal Service provided under the Undertaking; and
- why Grain Express Customers will not and should not be required to acquire Port Terminal Services under the Undertaking.

## 2.2 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;
- **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

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<sup>3</sup> The information contained in this section is compiled from the documents submitted to the ACCC in June 2008

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.

### **2.3 CBH**

CBH owns storage and handling infrastructure serving the four port zones of the grain belt in Western Australia. This infrastructure includes:

- (1) sampling equipment, analysing technologies, fumigation and aeration infrastructure;
- (2) weighbridge, road or rail loading/unloading and storage facilities;
- (3) the MGC, a large intermodal terminal, storage facility and container packing facility; and
- (4) road or rail unloading facilities, storage facilities and ship loading facilities in Esperance, Albany, Kwinana and Geraldton.

CBH submits that its structure, which effectively aligns its interests with those of its Grower members is a relevant factor in assessing the effectiveness of the access provided by the Undertaking.

CBH has approximately 5,000 shareholders that are Growers of grain in the Western Australian grain belt. CBH has 12 directors. CBH's Articles of Association provide that CBH can have a maximum of 12 directors appointed as follows:

- 9 directors who are shareholders (or representatives of shareholders) (**Grower Directors**) (article 84); and
- 3 directors who are appointed by the Grower Directors (article 85).

Under article 5 of CBH's Articles of Association, each shareholder of CBH can only hold a maximum of 5 CBH shares.

Article 110 of CBH's Articles of Association prevents CBH from distributing any income or profit of CBH to its shareholders.

Article 111 of CBH's Articles of Association provides that "all income and property of the Company shall be applied towards the objects of the Company as set out in the Memorandum of Association and not otherwise".



Article 114 of CBH's Articles of Association provides that any surplus assets of CBH after the payment of its debts and liabilities and the costs of winding up are not to be distributed to shareholders.

CBH's objectives are contained in Article 2(a) – (ee) of its Memorandum. Its main objectives are contained in Articles 2(a), (b) and (f) which are:

- “(a) To establish maintain and conduct any schemes or systems for handling of wheat and/or other grain in bulk or otherwise.*
- (b) To receive handle transport grade classify and store wheat and/or other grain...*
- (f) To carry on either in conjunction with or separately from the business authorise to be carried on by the preceding paragraphs or any of them all or any businesses or business which in the opinion of the Directors may be conveniently carried on by the Company or promote assist be incidental or conducive to the attainment of its objects or any of them.”*

## **2.4 Bulk Handling Act**

In addition to its obligations under the Memorandum, the Articles of Association and the Cooperative Act, CBH has a number of obligations under the Bulk Handling Act and Bulk Handling Act Regulations. These obligations apply to both the Grain Express Service and the Port Terminal Service. They also apply to all grain, unlike WEMA requirements that apply only to export wheat. These obligations are summarised below:

- CBH is obliged to allow a person on the payment of charges to use any bulk handling facilities and equipment controlled by it in ports in Western Australia: section 19 Bulk Handling Act;
- 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 tending 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 section 37(1) of the Bulk Handling Act 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 section 37(1) of the Bulk Handling Act 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 place restrictions on the manner in which CBH can use its income or property. In this regard, these sections provide:

- “(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.*
- (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”.*

Important information exchanges occur at the production stage, which influence the rest of the grain Supply Chain.

Growers delivering to storage facilities are required by the Bulk Handling Regulations to provide crop estimate data before harvest. This information includes the Grower's hectares sown, estimated hectares for delivery for each type of grain and the preferred storage site to which delivery is to be made. Pursuant to section 11(3) of the Bulk Handling Regulations, CBH is not to receive grain from a person until the crop estimate data has been provided.

CBH uses this information to conduct pre-harvest planning for the movement of grain through its facilities, subject to the decision-making power of Exporters. As the description (below) of storage and handling services shows, CBH's management of capacity in its storage and handling system is crucial to supply chain management and the costs ultimately borne by Growers.

CBH receives grain from Growers at the country storage sites and at the Albany Port. It has a statutory obligation to do so, subject to quality requirements. Section 42 of the Bulk Handling Act provides:

- “(1) Subject to subsection (2), [CBH] shall receive all grain that is tendered to it in bulk.*
- (2) Notwithstanding the provisions of subsection (1), [CBH] –*

- (a) *shall not receive, as and when tendered, any grain that is unsound or that is inferior to the lowest grade then in force, but shall make arrangements to receive the grain at such time or place, or subject to such conditions, as it may require;*
- (b) *is not obliged to receive any grain except at a reasonably convenient time and place nominated by it.”*

## **2.5 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.

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

- a 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 receival 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.

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 stacks.

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 (ie: homogenous cargo) grain movements are substantial and valuable<sup>4</sup>.

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.

These efficiency issues were compounded when 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.

## **2.6 Grain Express**

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.

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<sup>4</sup> Report of Synergies Economic Consulting May 2008 paragraph 4.3.1

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 receipt, storage, handling, logistics and transport service;
- flexible and effective receipt 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 Receipt 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);
- 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 receipt, 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 a 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 a 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:

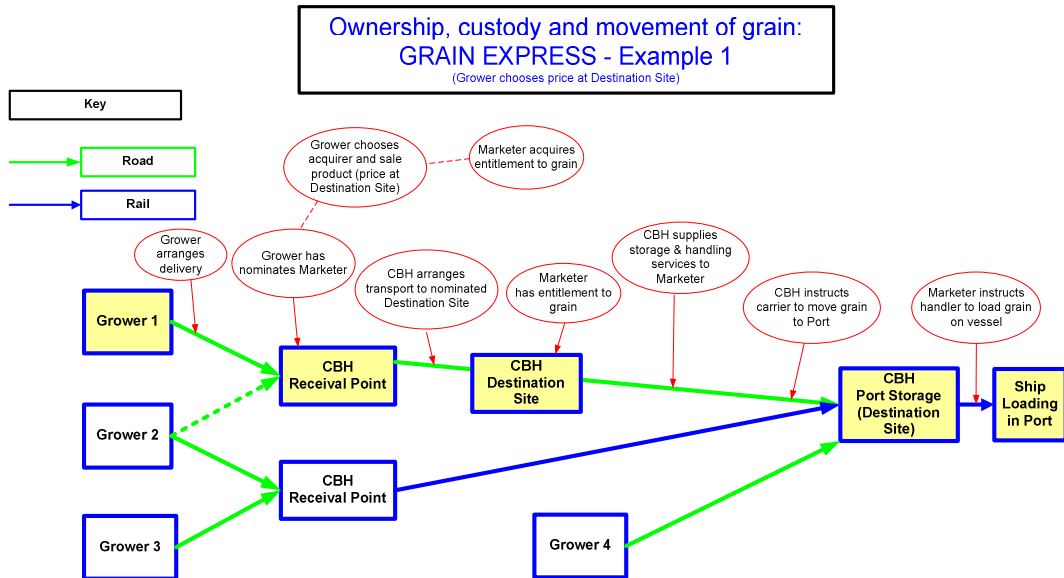
- has appointed a logistics quality manager, who is responsible for meeting quality specifications; and
- works with Exporters to develop quality management plans.

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.

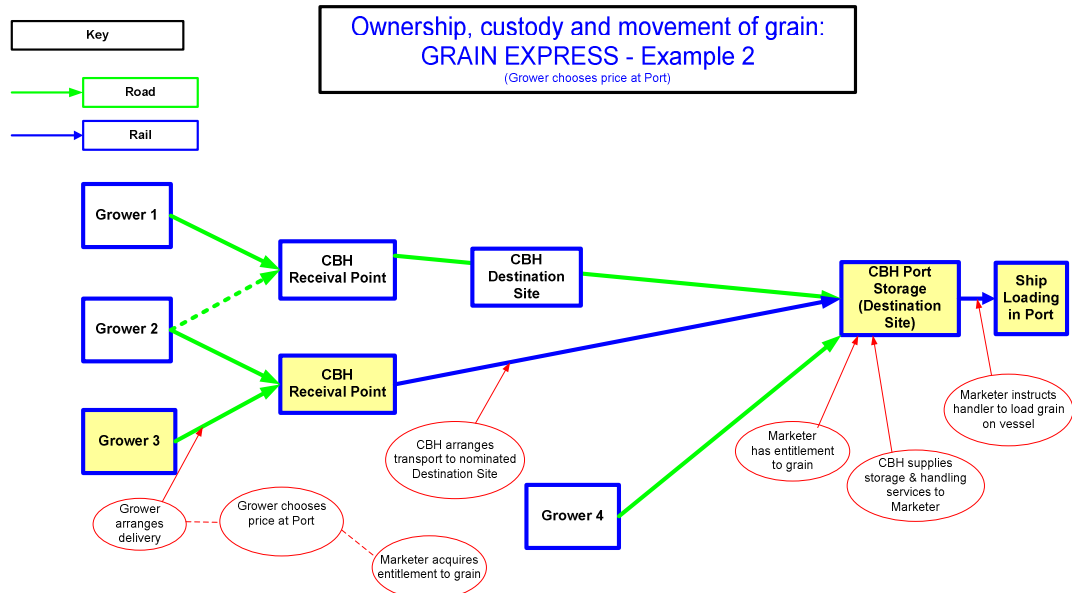
The following diagrams summarise the ownership, movement and custody of grain in Grain Express.

**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**



## 2.7 Comparison between Grain Express Service and the Port Terminal Service under the Undertaking

The main differences between the Grain Express Service and the Port Terminal Service are:

- Access seekers for the Port Terminal Service will acquire and arrange their own country storage and transport to port. This may increase the relative cost of transport but will also give Exporters direct control over grain movements;
- Under the Port Terminal Service, unless Exporters combine to share country storage and transport facilities and services, grain will not be commingled at any point in the supply chain. It is not as efficient in large scale supply chain operations to have numerous segregations. However, if Exporters wish to assert control over specific grain parcels and exploit niche quality markets to an extent that is less achievable through commingled segregations, they may choose to increase the number of segregations. Exporters may also opt to use on farm storage;
- Under the Port Terminal Service, at the point of delivery to CBH's Port Terminal Facility, CBH will have limited information about the origin, grade and weight of grain. CBH will therefore need to examine and weigh the grain in order to comply with the Bulk Handling Act and to ensure the integrity of its facilities against pest infestation and contamination;
- Once in CBH's Port Terminal storage, the grain received under the Port Terminal Service will be held in stacks that are exclusively owned by the Exporter. Grain Express grain forms part of an integrated supply chain in which CBH has coordinated to attain efficiencies. Commingling access seekers' grain with Grain Express grain would prevent CBH from treating the

Grain Express grain as part of an integrated system. It may also give rise to disputes over the equivalence of grain Outturned onto a vessel. Segregating non-Grain Express grain enables Exporters to exert complete control over grain movement from farm gate to ship loader including their own control over grain quality.

- Exporters using the Port Terminal Service under the Undertaking will be responsible for the logistics required for cargo accumulation. Each Exporter will have the potential to invest in detailed information about its own grain but will not have the ability to appreciate the impact of grain movements upon other members of the Supply Chain.

## CBH Comparison table

	Activity	Grain Express (GE)	Port Terminal Service (PTS)	Notes
<b>1</b>	<b>Pre season</b>			
1.1	Pre-season shipping accumulation programme provided by Exporters	Y	Y	
1.2	Pre-season Quality management plan developed with Growers	Y	N	
1.3	Standard terms and prices for contract for services offered	Y	Y	
1.4	Season contract for services negotiated and concluded	Y	Y	
1.5	Actual and Reference prices for service published in advance of season	N	Y	
<b>2.</b>	<b>Grain Movement during season from field to receipt &amp; storage</b>			
2.1	Pre-delivery samples of grain taken by CBH	Y	Y	Pre-delivery sampling does not take place during harvest
2.2	Grain received direct at CBH up-country GE Receipt Points	Y	N	
2.3	Grain received direct at port terminal	Y	Y	

	Activity	Grain Express (GE)	Port Terminal Service (PTS)	Notes
	receival facilities			
2.5	Grain sampled and tested for type and infestation / contamination at point of receipt	Y	Y	PTS Exporter is provided with details of running grade during intake. This is consistent with the running grade sampling performed on outturn.
2.6	Grain quality tested, graded and segregated at point of receipt	Y	N	Grain is thoroughly tested at its point of initial receipt under GE. Exporters using PTS provide this for themselves
2.7	Road vehicle deliveries handling according to arrival into queue at Receipt Point gate	Y	Y	
2.8	Road vehicles are weighed (gross)	Y	Y	
2.9	Road vehicles are unloaded into grid	Y	Y	
2.10	Grain is elevated from grid and stored in commingled stacks of a single grain type and grade	Y	N	GE grain is not segregated by reference to the grain owner.
2.11	Grain is elevated from grid and stored in segregated stacks of a single grain type and grade	N	Y	PTS grain is segregated by reference to grain owner
2.12	Road vehicle is weighed (net) and weighbridge ticket issued	Y	Y	
2.13	Grain is warehoused and kept in phytosanitary fumigation control for a maximum period up to the end of the season (30 September)	Y	N	PTS grain delivered to Port is held only for the purposes of accumulation for cargo assembly and shipping
2.14	Grain (direct to port) is stored for the purpose of accumulation for shipping	Y	Y	GE grain can be direct delivered to port for the purposes of accumulation for shipping
<b>3</b>	<b>Shipping Capacity Allocation process</b>			

	Activity	Grain Express (GE)	Port Terminal Service (PTS)	Notes
3.1	Exporter executes agreement with CBH	Y	Y	Either Grain Express agreement or PTS access agreement
	<b>During Harvest period</b>			
3.2	During harvest period (1 November to 15 January), expressions of interest (EOI) sought	Y	Y	Capacity is allocated by reference to an export window (each window is first / last half of each month)
3.3	Demand for shipping capacity is tallied and if the total capacity requirements are less than available capacity, all requests for capacity are allocated	Y	Y	A secondary trade or swap of allocations between or amongst entitlement holders can occur (CBH is notified of any changes)
3.4	If demand exceeds supply, EOI's are allocated in proportion to available capacity	Y	Y	
3.5	Any unallocated capacity is notified and made available on a first come, first served basis	Y	Y	
	<b>Annual Shipping period</b>			
3.6	Primary auction held during August – September for majority of expected shipping capacity allocated by reference to export windows	Y	Y	Auction is live (on-line - web based) and open to view by all participants, including access to price and demand.
3.7	Secondary auction is held for additional available capacity every month to two months prior to the start of the month of shipping	Y	Y	A secondary trade or swap of allocations between or amongst entitlement holders can occur (CBH is notified of any changes)
3.8	Any unused capacity is notified and made available on a first come, first served basis	Y	Y	The unused capacity is the capacity passed in at the primary auction and any new capacity acquired in the intervening period. A

	Activity	Grain Express (GE)	Port Terminal Service (PTS)	Notes
				secondary trade or swap of allocations between or amongst entitlement holders can occur (CBH is notified of any changes)
	<b>All cases</b>			
3.9	Shipper nominates in accordance with nomination rules	Y	Y	
3.10	Nomination includes requirement for pre-delivery samples, and cargo accumulation plan.	N	Y	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
3.11	Deliveries commence up to 21 days before arrival date of vessel	N	Y	CBH under Grain Express can use accumulated grain at port or deliveries from up-country storage for accumulation of cargo
3.12	Vessel nominated 21 days prior to loading	Y	Y	
3.13	Cargo accumulated at port	Y	Y	
3.14	When cargo accumulated, vessel may enter the berth queue – priority determined by the order of provision of vessel’s notice of readiness	Y	Y	
3.15	Ship berths and is loaded with cargo	Y	Y	
3.16	Loaded ship departs port	Y	Y	
<b>4</b>	<b>Grain movement during season from storage to port</b>			
4.1	Road vehicles and rail wagons transport grain from storage to port	Y	N	Exporters provide this for themselves

	Activity	Grain Express (GE)	Port Terminal Service (PTS)	Notes
4.2	Grain sampled and tested for type and infestation / contamination at port receipt	Y	Y	GE grain tested for grade and type to prevent commingling errors
4.3	Grain quality tested and graded at port receipt	N	Y/N	For PTS, grain owner is solely responsible for grade and quality information. CBH provide running quality results of grain tests for PTS grain received. Different testing to that provided under GE.
4.4	Road vehicles weighed (gross)	Y/N	Y	Road vehicles delivering from CBH up-country sites are randomly weighed for compliance and security. Exporters using PTS may provide this for themselves.
4.5	Road vehicles unloaded into grid	Y	Y	
4.6	Road vehicles weighed (net)	Y/N	Y	Grower deliveries to Albany port are weighed on site.
4.7	Rail deliveries unloaded into grids	Y	Y	Currently, there is no non-GE rail delivery programme to the port terminals, but this option is not precluded for PTS
5	Port operations			
5.1	Grain is elevated from grid, batch weighed and sampled (for grade and pre-delivery sample confirmation) for storage for purposes of accumulation	Y/N	Y	Grain is not stored for any purpose other than accumulation at port facilities either under GE or PTS.  GE grain is not batch weighed or grade / pre-

	Activity	Grain Express (GE)	Port Terminal Service (PTS)	Notes
				delivery sampled as is remains in sole custody of CBH
5.2	Grain is passed to storage units in segregated stacks of a single grain type and grade for load accumulation	N	Y	
5.3	Grain is passed to storage units in commingled stacks of a specific grain type and grade for load accumulation	Y	N	
5.4	Grain is elevated and moved into final cargo shipping position	Y	Y	
5.5	Grain is batch weighed, graded and AQIS sampled on conveyor weighing belts and Outturned to ships hold	Y	Y	
5.6	Excess grain is returned to segregated storage	N	Y	
5.7	Grain in commingled storage is made available for accumulation of load of same type, grade and quality	Y	N	
5.8	Grain in segregated storage is Outturned to custody of owner	N	Y	<p>A charge is payable for storage and Outturn services for both GE and PTS.</p> <p>Commingled grain is merged or used in other loads of same requirements.</p> <p>Storage charges are levied on a time basis.</p> <p>Outturn (ie: removal from the site) fees are payable for both GE and PTS</p>

## 2.8 Why the Grain Express Customers will not be required to acquire Port terminal Services under the Undertaking

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.

It has been suggested to CBH that a preferable approach may be for CBH to require Grain Express customers to acquire that portion of the Grain Express service that is supplied using Port Terminal Facilities by means of the Undertaking.

Effectively, this position would establish the Undertaking as the exclusive means by which CBH may provide services using its port terminal facilities. It would also have direct impact on the provision of services in relation to other grains, which are not the subject of the WEMA.

For the reasons explained below, CBH considers that this 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 requests may be satisfied; and
- separate its port terminal operations from its country functions.

CBH is unsure of the legal basis of this position and is not aware of any similar stance having been adopted in any analogous case. CBH considers such a 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
  - the express objects of Part IIIA of the Trade Practices Act (Cth) (**TPA**).

In any event, CBH considers that the Standard Terms and Conditions for access seekers under the Undertaking differ from the terms and conditions of the Grain Express Service (CBH's Grain Services Agreement) only to the extent that the Grain Express



Service encompasses different services (including receipt, transport, logistics and other service components). We also note the CBH Capacity Allocation system will apply in the same way to all customers.

As is made clear in the preceding paragraphs of this submission, the main objective of CBH's Grain Express project was to enhance efficiency by enabling CBH to coordinate movements of grain within its system. An important element of that efficiency is derived from the treatment of grain as a "liquid" commodity in which customers do not own specific parcels of grain. Once grain is delivered into CBH's commingled system, customers' rights in relation to the grain are defined by the Bulk Handling Act (WA) and their Grain Services Agreement with CBH. Those rights are best described as an "entitlement" to have a certain quantity and grade of grain Outturned for that customer. In the case of export grain, the relevant Outturn is onto a vessel.

Grain held in CBH's port storage is delivered by Growers to receipt points in the CBH Network, held in co-mingled storage and is moved and Outturned as part of an integrated supply chain service. The use of the entire CBH system (including port storage) to deliver efficiency can be illustrated in practical terms. Under the Grain Express service, CBH is able to satisfy a customer's entitlement at a particular port by loading a defined quantity and grade of grain onto a vessel, even though the entitlement of that customer arises from acquisitions that it has made from grain delivered into CBH's system by a Grower in a country location and the grain delivered has not physically moved from its delivery point. In short, Grain Express enables CBH to treat grain in its system as if it formed part of a single stockpile.

Under the Undertaking, access seekers' grain is delivered by a single customer, to a single place for a single purpose. Access seekers' grain will not be co-mingled with grain of Grain Express customers and CBH will not be in a position to unilaterally decide to move that grain to satisfy the entitlement of a Grain Express customer. In short, the Port Terminal Service supplied under the Undertaking is substantially different from the Grain Express Service and must therefore be supplied on terms that differ from the Grain Express terms to the extent of those differences. Of course, as the ACCC will observe from a comparison of the relevant terms and conditions, the standard terms and conditions for the Undertaking are based on, and are substantially similar to the Grain Services Agreements offered under Grain Express. Differences between the terms are limited to differences between the services.

The flexibility of the Grain Express Service is an essential element contributing to the overall efficiency of the CBH supply chain. CBH considers that this is one of the core reasons why the CBH system is capable of handling the nation's largest grain export task and doing so for prices that are significantly lower than similar services at other ports, despite the additional challenges faced in Western Australia, including the sheer size of the WA wheat belt.

The efficiency of Grain Express was recognised by the ACCC in 2008, when the Chairman of the ACCC stated:

*"The ACCC believes there are likely to be significant efficiency benefits under Grain Express as a result of the central coordination of grain storage, handling and transportation in Western Australia"*

If CBH is required to have its Grain Express Customers acquire Port Terminal Services through the Undertaking, the effect of that requirement is to prohibit CBH from offering an integrated service. This exceeds the scope of regulation that was introduced by WEMA.

The access test in section 24 of the WEMA is concerned with a particular issue - the potential for owners of Port Terminal Facilities to restrict access to the services provided by means of those facilities either to the advantage of their own wheat exporting businesses. That is why the access test must only be satisfied by Port Terminal owners that wish to be accredited for wheat exporting.

The WEMA Explanatory Memorandum makes it clear that the focus of the access test is not the integration of country storage and port terminal services:

*“Some submissions expressed concern that bulk handling companies may restrict competition by refusing access to their up-country storage and handling facilities. To prevent this they argued that the access test proposed for port terminal services should be extended to cover up-country services as well.*

*Access undertakings are made under Part IIIA of the Trade Practices Act 1974. The regime set out in Part IIIA establishes legal rights for third parties to share the use of certain infrastructure services of national significance on reasonable terms and conditions. Part IIIA is confined to a narrow range of infrastructure with natural monopoly characteristics.*

*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. Nor do they meet the criteria outlined in the Competition Principles Agreement 1995 for the application of access regimes. Further, it would impose an excessive regulatory burden to apply access arrangements to up-country storage facilities.”*

While the Port Terminal Facilities, in conjunction with other facilities not referred to in the WEMA (including transport infrastructure and up-country storage and handling facilities) are used to provide the Grain Express Service, neither the WEMA nor the provisions of or principles embodied in Part IIIA of the TPA create any obligation for CBH to effectively unbundle the Grain Express service.

It is important to this issue that the relevant provisions of Part IIIA of the TPA are properly understood as providing for access to infrastructure **facilities** rather than access to **services** provided by means of those facilities.

As the reasoning in the High Court's decision in (*BHP v NCC*)<sup>5</sup> make clear, an infrastructure **facility** is capable of being used for more than a single **service**. In that case, the High Court held that Fortescue Metals Group (**FMG**) sought access, not to BHP's integrated ore blending, transport and stock management process (**Integrated BHP Process**) but to a service limited to the use of the rail infrastructure to run FMG's own trains. While the Integrated BHP Process was a production process, the service sought by FMG was not.

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<sup>5</sup> BHP Billiton Iron Ore Pty Ltd v NCC [2008] HCA 45

In this case, CBH's Grain Express Service (like BHP's integrated service) incorporates some use of facilities that are also used to supply the service to which regulated access is sought. CBH submits that requiring all uses of its Port Terminal Facilities to be governed by the access undertaking effectively equates facilities with services and is contrary to a plain reading of Part IIIA of the TPA.

The objects of Pt IIIA of the Act recited in s 44AA of the Act are to:

*(a) 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*

*(b) provide a framework and guiding principles to encourage a consistent approach to access regulation in each industry.*

The reasoning in the BHP case is applicable also in terms of the broader objects of the TPA. One reason why uses of production processes are excluded from declaration is that to do so is likely to seriously reduce efficiency. For the reasons submitted above, CBH submits that this would also be the result in this case if the ACCC were to regard a separation of the port elements of the integrated Grain Express Service as an essential precondition for the Undertaking to be accepted.

### 3 Issues identified in the ACCC's Issues Paper

In the Issues Paper, the ACCC has identified a number of Issues and invited comment.

In the attached table at **Schedule 1** each Issue raised in the Issues Paper is dealt with as follows:

- 1) CBH sets out its response to the Issue or any further information that it feels is appropriate to include;
- 2) CBH identifies and sets out any responses made in Stakeholder Submissions relating to the Issue; and
- 3) CBH sets out its response to the to Stakeholder Submissions on the Issue.

Where an issue does not call for CBH comment or CBH's comments are confined to its original submission, the issue is not addressed in Schedule 1.

In addition to the responses in Schedule 1, CBH wishes to state its position in relation to an approach taken to the making of allegations and the use of confidential information by AGEA in its submission.

### 4 Issues identified in the ACCC Letter

In the ACCC letter, the ACCC has identified a number of Issues and invited comment.

In the attached table at **Schedule 2**, CBH sets out its responses to each question.

## 5 Further issues from Stakeholder Submissions

In the attached table at **Schedule 3**, further Issues have been raised in the various Stakeholder Submissions and in each case CBH has identified the Issue and set its response.

## 6 CBH's Capacity Allocation System

### 6.1 Overview

This section of the submission provides information in support of CBH's Capacity Allocation System, which will be incorporated by reference into the Port Rules.

Because 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.

The Capacity Allocation System uses an auction mechanism for the period to achieve an efficient allocation of shipping capacity. Importantly, it does so without securing windfall profits for CBH because any surplus generated from the auction is returned to Exporters in proportion to the volume of grain exported.

The Capacity Allocation System, like the Port Rules applies to all grains and applies in an identical manner to Grain Express customers and access seekers under the Undertaking. 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<sup>6</sup>. CBH agrees that the principles of non-discrimination and ring-fencing arrangements that will apply to the Port Rules and the Capacity Allocation System should be included in the Undertaking. However, including Port Rules and the Capacity Allocation System would effect regulatory outcomes in excess of the intended scope of the Undertaking under WEMA. In any event CBH's inclusion of non-discrimination principles in operational decision-making effectively enables discriminatory conduct to be enforced as a breach of the Undertaking.

Before outlining the Capacity Allocation System, this section of the Submission explains the nature and source of difficulties CBH experienced in allocating capacity in March 2009<sup>7</sup>. These difficulties have informed CBH's response, which is embodied in the Capacity Allocation System.

### 6.2 Difficulties with Capacity Allocation in 2009

As the ACCC is aware, CBH experienced some difficulty in March 2009 managing surplus demand for shipping during that month. The major factors that combined to cause congestion in the WA export grain supply chain were:

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<sup>6</sup> Once the final details of the Capacity Allocation System are completed by CBH, some consequential amendments to the Port Rules will be required and will be submitted to the ACCC by CBH.

<sup>7</sup> This section is substantially reproduced from CBH's response dated 8 May 2009 to the ACCC's Grain Express project team

- a substantial increase in the number of exporters involved in the export of grain, due to the changes implemented by the WEMA;
- a large harvest in Western Australia and small harvest in Eastern Australia;
- a late harvest;
- miscellaneous factors including underperformance of rail infrastructure; and
- a flood of shipping nominations for the same shipment period.

CBH considers that the Grain Express project reduced the effect of these factors because Grain Express enabled the movement of grain from country storage to port to occur in a coordinated fashion. But for those changes, congestion may have been endemic throughout the supply chain.

In the first season of liberalisation of wheat exports from Australia a series of factors combined to cause an unprecedented demand for export shipping in a compressed period. Information on each of these factors is set out below.

### **6.3 Impact of regulatory change**

The removal of the exporting restrictions known as the “single desk” caused an immediate proliferation of bulk wheat Exporters in the 2008/2009 harvest. This increase in number of exporters increased the risk that demand for shipping capacity would concentrate in a compressed period. To use a simple analogy, the system was changed from a single person walking through a doorway twenty times to twenty people trying to walk through the same doorway at the same time.

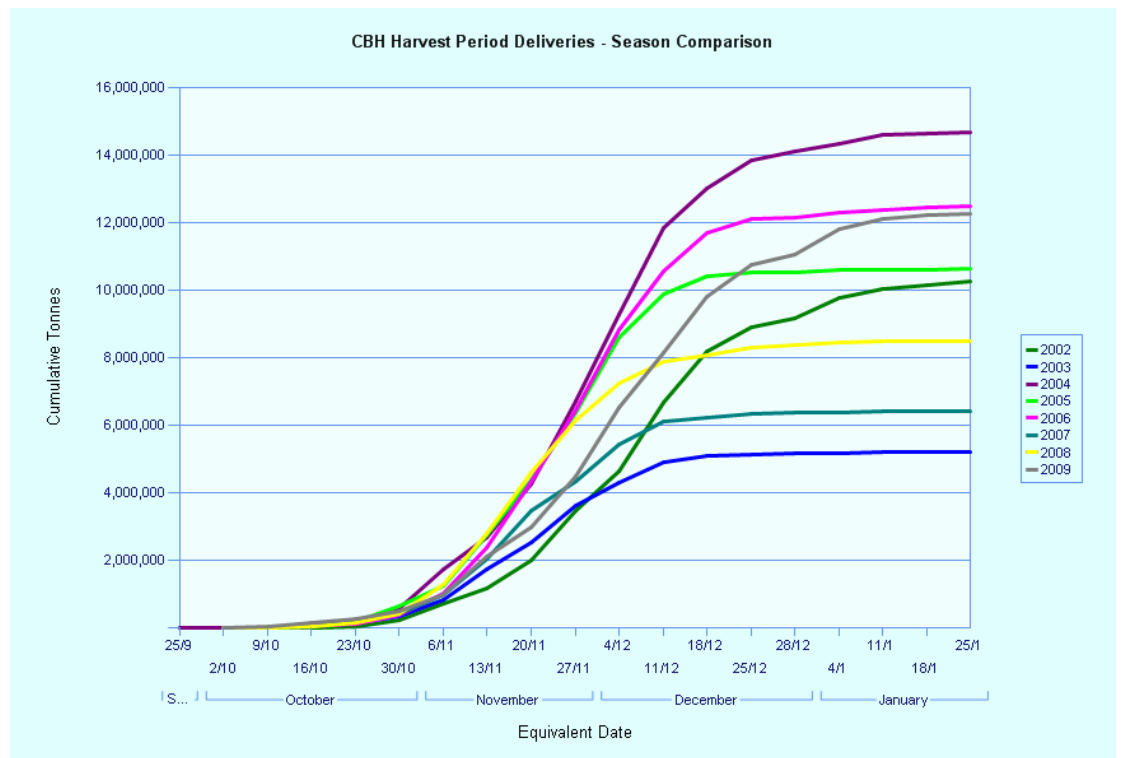
The increase in the number of Exporters meant that in 2008/2009 Growers had more choice than ever before with regard to the sale of their grain. Grain Express has an effect also, because it facilitated transactions between Growers and exporters by enabling more reliable and orderly decision and contracting.

Instead of nominating an Exporter at the time of delivery, under Grain Express, Growers had 21 days (without any charge) to nominate an Exporter. This meant that there was a delay between delivery of grain and the nomination of grain to exporters across the entire grain harvest rather than merely that portion of Growers who warehoused grain.

[CONFIDENTIAL - REDACTED]

*Size of harvest*

Figure 4 - Size and timing of harvest- shows the seasonal variation experienced in harvests in Western Australia over the last 8 years with a variance of nearly 10 million tonnes.



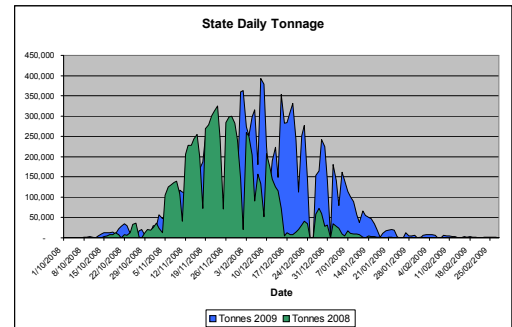
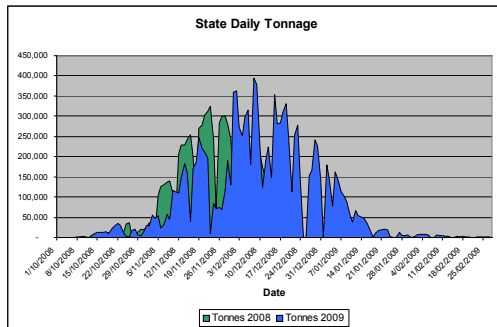


Figure 4 - Size and timing of harvest

Of itself a large harvest will not cause congestion problems such as those experienced in the 2008/2009 harvest. In the record harvest of 2003/2004 the CBH system experienced substantially less congestion than this year. However, a large harvest places inherent pressure on the supply chain and combined with the factors referred to below results in unusual congestion.

*Timing of harvest*

It can be seen in

Figure 4 - Size and timing of harvest that small harvests like 2007/2008 and 2002/2003 were finished by early December as opposed to the 2008/2009 harvest which went all the way through January. Likewise the pace of the 2008/2009 harvest can be seen to be slower than other large harvests like 2003/2004 and 2005/2006. The two diagrams below show the difference in receipts between 2007/2008 and 2008/2009 where significant tonnages were received later in harvest.

Agricultural consultants were also reportedly advising Growers to patiently exercise their choices when marketing their grain. These circumstances, when combined with a very late harvest due to prevailing wet weather conditions in Western Australia during November and December resulted in exporter ownership being delayed to a greater degree than in previous years. These delays inhibited shipping during harvest and concentrated demand.

The delay in the harvest had a significant multiplier effect. For example, fumigation activity was significantly delayed which meant that a large volume of grain was under gas and not available during January and February. The period of peak demand for the export service occurred in February 2009. [CONFIDENTIAL - REDACTED] Later than normal fumigation meant that access to grain was very problematic during this period.

*Other factors*

CBH was facing severe restrictions in the performance of rail based grain transport which had not been tested to the same degree in the previous two seasons. At this time CBH had restrictions preventing trains from running during daylight hours.

The plentiful availability of grain in Western Australia (compared to a drought affected Eastern Australia), plus a favourable freight differential of \$10 per tonne (over South Australia) meant that exporting from WA became very attractive.

In addition:

- there was a very significant drop in shipping rates and a corresponding increase in available shipping which would make shipping earlier more attractive; and
- in January 2009 grain prices were falling, which meant that traders wished to ship as soon as possible.

*The flood of nominations*

**[CONFIDENTIAL - REDACTED]**

Had CBH been more explicit about the shipping capacity (of which the main determinant is the ability of the transport infrastructure to get grain to port) during the period then it is possible the backlog would not have existed. However, even if the shipping capacity was known that fact in itself would not guarantee that a sudden flood of nominations would not have occurred in the same fashion as occurred in January and February 2009.

To prevent the backlog from occurring CBH would have had to take steps to strictly allocate this capacity as opposed to operating a first come first served process. However, the strict adherence to either rejecting nominations or allocating capacity would have resulted in some customers not being able to fulfil contracts already signed by them as they would not have acquired capacity and access to the shipping stem.

Unfortunately, there was no precedent for shipping demand and capacity allocation processes before the liberalisation of wheat exports from Australia and CBH had only its own shipping process precedent to follow. Prior to 1 July 2008 the process of capacity allocation was that the exporter would generally contact CBH prior to their sales and shipping nominations, to establish if the shipment could be executed from Western Australia. This process kept the shipping from WA within the capacity of CBH's transport corridor. This was the result of the two main Exporters clearly understanding the capacity of the transport corridor and the proportionate split of capacity between them given historical export tonnages of the different grain types.

CBH examined the possibility of introducing a capacity booking system prior to the 2008/09 season, but it ran out of time and resources due to:

- the work being performed for the introduction of Grain Express;
- the need to get a Grain Services Agreement drafted and out for the potential early start to harvest; and
- the requirement to have the Grain Services Agreement up on the CBH website by 1 October 2008 to comply with the WEMA requirement.



[CONFIDENTIAL - REDACTED]

In the events leading to February 2009, multiple Exporters of grain from Western Australia did not contact CBH prior to sales or shipping nominations to confirm if their proposed delivery timeframe was possible to execute. Whilst some exporters made early enquiries as to shipping capacity, these were not immediately translated into a firm nomination. This meant that capacity was already over sold by the time nominations were presented to CBH.

CBH had to stop receiving further nominations from 3 February 2009 as it was clear that to do so would continue to cost Exporters due to considerable delays and ongoing uncertainty over shipping.

[CONFIDENTIAL - REDACTED]

#### **6.4 Outline of the Capacity Allocation System**

The CBH Port Rules will now incorporate, by reference, CBH's Capacity Allocation System. The auction process outline is **attached** to this submission at **Annexure 1** and the draft Auction Rules are **attached** at Annexure 2. Shipping Capacity Allocation will operate over two periods throughout the year-

- The Harvest Shipping Period 1 Nov – 15 Jan where capacity will be allocated on the basis of expressions of interest.
- The Annual Shipping Period 15 Jan - 31 Oct where capacity will be allocated on the basis of a price/volume based auction.

The allocation processes will allow Exporters to establish an operational commitment for the accumulation of their grain within agreed ship loading windows.

As was the case in 2008/9, during the harvest period (1 Nov – 15 Jan), capacity will be allocated subsequent to Exporters providing CBH with expressions of interest for shipping capacity

For the Annual Shipping period (15 Jan – 31 Oct), the allocation of shipping Capacity will be conducted via an ascending "clock auction" mechanism. The 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 (auction premium) 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.

### **6.5 Issues relevant to the Undertaking**

For the purpose of the Undertaking, the key issues in relation to CBH's capacity allocation auction are:

- Is the auction process non-discriminatory (does it confer any advantage upon GPPL or CBH's grain express customers?)
- Is there an appropriate process to ensure that CBH does not generate a revenue surplus from the auction, and in doing so transfer value from Growers and Exporters to itself?
- Does the auction design conform to appropriate standards in order to ensure that it appropriately achieves the intended efficiency outcomes?

### **6.6 Non discrimination**

CBH's existing approach to capacity allocation requires CBH to make allocation decisions where available shipping capacity is over subscribed. This inherently creates the potential for allegations of preferential self dealing if one of the applicants for capacity is GPPL. CBH wishes to eliminate the risk and perception of such preferential self dealing.

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 ability to exercise discretion in relation to the allocation of capacity in oversubscribed periods.

### **6.7 No surplus retained by CBH**

CBH has designed its auction process with the express aim of including a mechanism to ensure that any premium paid by market participants for capacity in high demand periods is not retained by CBH but is instead returned to market participants. This raises the important question of how and on what basis to return any such surplus.

CBH considers 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.

To this end, the Capacity Allocation System adopts 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.

Auction proceeds will be rebated to Exporters on a per tonne basis, proportionally distributed over the entire shipping period. For example, if auction proceeds are \$10 M,

and the WA export program from 1 Nov – 31 October is 10 M tonnes, the rebate across all tonnes shipped in every month will be \$ 1 per MT. The rebate will be paid to participating Exporters within 30 days of the completion of the export program for the season on 31 October.

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.

### **6.8 Auction efficiency**

CBH has determined that the most efficient and non-discriminatory mechanism for allocating shipping capacity at its port terminals is an auction process. As the Productivity Commission stated in its 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 last, bidding competition can yield revenues or cost savings for governments.”*

However, as 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 effect the revenue raising potential of an efficient allocation.”*

CBH is in discussions with Tradeslot, a specialist auction design firm. Tradeslot will be instructed to design and administer auction rules that promote efficiency and reduce the risk of gaming or distortion.

## Glossary:

<b>ACCC</b> means Australian Competition and Consumer Commission.
<b>ARG</b> means Australian Railway Group.
<b>AWB</b> means Australian Wheat Board.
<b>Bulk Handling Act</b> means the <i>Bulk Handling Act 1967 (WA)</i> .
<b>Bulk Handling Regulation</b> means the <i>Bulk Handling Act Regulations 1967 (WA)</i> .
<b>Capacity Allocation System</b> means the system described in Section 6.
<b>CBH</b> means Cooperative Bulk Handling Ltd.
<b>Destination Sites</b> means large grain storage and loading facilities, where grain may be Outturned by the Grower or Exporter
<b>Exporter</b> means an exporter of bulk wheat accredited under the provision of the WEMA.
<b>GPPL</b> means Grain Pool Pty Ltd.
<b>Grain Express</b> means the bundled grain handling and logistics service provided by CBH.
<b>Grower</b> means a farm producer of wheat.
<b>LoadNet®</b> means CBH's web based supply chain information system.
<b>Outturning</b> means delivering custody of the grain from CBH to another party.
<b>Receival Points</b> means storage and handling facilities.
<b>Shipping Stem</b> means the schedule of ship movements in and out of a port.
<b>TPA</b> means <i>Trade Practice Act 1974 (Cth)</i> .
<b>Undertaking</b> means the undertaking required to be provided to the ACCC under the terms of the WEMA.
<b>WEMA</b> means <i>Wheat Export Marketing Act 2008 (Cth)</i> .

## Schedule 1 – CBH response to ACCC issues and stakeholder submissions

Issue		ACCC Issue
1		To what extent are bulk wheat Exporters able to switch between different ports at different locations around Australia, including between different States?
1.1	CBH position	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.
1.2	Stakeholder position	AGEA submits that:  <i>“AWEs [accredited wheat Exporters] have limited ability to physically move wheat between different ports at different locations around Australia, particularly between different States. Moving wheat between different ports, particularly between States, is cost prohibitive.”<sup>8</sup></i>
1.3	CBH response	<p>CBH agrees with the AGEA submission that <i>physical</i> grain movement costs may dissuade <i>physical</i> switching. To assess, as AGEA appears to have done, the capacity of an exporter to switch between ports once grain has been acquired is to mischaracterise how grain acquisition decisions and grain export decisions are made. Exporters take supply chain costs into account in making decisions about where to acquire grain and at what price. Therefore substitution occurs at the point of acquisition of grain not at the point of acquisition of storage and handling services. This is also why a Grower owned storage and handling operator is effectively constrained in relation to its storage and handling charges. If those charges are too high, the grain prices offered by CBH’s Grower members suffers a competitive disadvantages to grain offered for purchase in other states and other countries. Once grain has been acquired, it is rare for the exporter to make a choice of one port over another because that choice was made as part of the decision to acquire the grain.</p> <p>In addition factors such as quality and grain type availability at different geographical locations, and seasonal variations affecting volumes and quality will be considered as part of the decision making process.</p> <p>However, Exporters make wheat acquisition decisions that take port terminal and other storage and handling costs into account. Some</p>

<sup>8</sup> AGEA submission, 29 May 2009 at Sch 1 A2.

Issue		ACCC Issue
		<p>degree of competitive tension occurs between ports because exporters are attracted to wheat grown in an area served by cost effective supply chain infrastructure. Once a choice has been made to acquire grain from a particular place, the physical constraints of moving that grain will affect the viability of switching between ports.</p> <p>Unfortunately there is limited evidence available in relation to acquisition decisions by exporters in response to supply chain costs. In recent years the existence of the wheat export single desk and low yields on the eastern seaboard have reduced the likelihood of this type of decision making based upon supply chain costs.</p> <p>There is, apart from the consideration of the above factors, nothing that prevents an exporter from choosing to concentrate activity around port terminal facilities that provide the services required by the exporter</p>
<b>2</b>		<b>Are there any limitations that prevent bulk wheat Exporters from switching between ports (such as different grain types, infrastructure constraints, freight differentials?)</b>
2.1	CBH position	<p>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.</p> <p>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.</p>
2.2	Stakeholder position	<p>AGEA submits</p> <p><i>“Other factors which limit AWEs’ ability to physically move wheat between different ports include differences in grain quality and characteristics, BHCs’ quality specifications and BHC’s shipping nomination and port protocols/rules.”<sup>9</sup></i></p>
2.3	CBH response	<p>No evidence is provided in support of the submission that <i>“BHCs’ quality specifications and BHC’s shipping nomination and port protocols/rules”</i> are a limitation.</p>
<b>3</b>		<b>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?</b>
3.1	CBH position	<b>[CONFIDENTIAL - REDACTED]</b>

<sup>9</sup> AGEA submission, 29 May 2009 at Sch 1 A2.

Issue		ACCC Issue
		<p><b>[CONFIDENTIAL - REDACTED]</b></p> <p>CBH's submission in support of its Undertaking referred to press coverage points to the following preliminary steps toward new entry taking place: a group of Geraldton Growers is trialling a proposal to invest in Port Terminal Facilities; a group of Growers in the Albany zone is in talks with a third party supplier in relation to Port Terminal Services.</p> <p><b>[CONFIDENTIAL - REDACTED]</b></p> <p><b>Attached at Annexure 3</b> is a bundle of press articles from 23 April 2009 which refers to proposals to introduce competitive facilities in Albany and Esperance.</p> <p>Information about the scale of new entry is provided in answer to the ACCC's specific enquiry in Schedule 2 of this submission.</p>
3.2	Stakeholder position	<p>AGEA submits</p> <p><i>"The likelihood of a new entrant establishing a new port terminal to compete with port operators is negligible given the cost and current geographical spread of port terminals servicing the grain belt."<sup>10</sup></i></p>
3.3	CBH response	<p>The press articles referred to above is sufficient to show that the likelihood of new entry is not negligible. The submissions from the PGA<sup>11</sup> refer to reports of discussions relating to development of alternative Port Terminal Services and facilities.</p> <p><b>[CONFIDENTIAL - REDACTED]</b></p> <p>For example, the Western Australian government is considering the development of a new intermodal freight terminal in Kwinana<sup>12</sup> which will include an increased capacity for containerised export grain in addition to the existing intermodal terminal at Forrestfield.</p> <p><b>[CONFIDENTIAL - REDACTED]</b></p>

<sup>10</sup> AGEA submission, 29 May 2009 at Sch 1 A2.

<sup>11</sup> PGA submission, 29 May 2009, 7 at 4.7

<sup>12</sup> See DPI Website: <http://www.dpi.wa.gov.au/freight/19811.asp>

Issue		ACCC Issue
		[CONFIDENTIAL - REDACTED]
4		<b>What factors, if any, constrain Port Operators from discriminating in favour of their own wheat export marketing businesses? Consider the various arguments raised by Port Operators in their supporting submissions as to these constraints.</b>
4.1	CBH position	<p>CBH is constrained by factors, including:</p> <ul style="list-style-type: none"> <li>• its Grower-owned cooperative structure, which aligns its interests with Growers, who bear supply chain costs;</li> <li>• its existing ring fencing policy, which existed prior to the Undertaking being offered;</li> <li>• its contracts with export marketing customers, several of whom are multinationals, which are customers of CBH's marketing subsidiary GPPL. Therefore even if CBH did in fact discriminate in favour of GPPL (which it does not), it is unclear whether any such conduct would be beneficial to CBH, since these multinational customers having the clear ability to retaliate to the disadvantage of GPPL;</li> <li>• its need to maximise throughput and efficiency in its facilities; and</li> <li>• the potential application of section 46 of the TPA.</li> </ul> <p>However, the Undertaking is drafted as if CBH had an incentive and opportunity to discriminate. A key feature of the Undertaking is non-discrimination – this principle is mentioned throughout the entire submission and substantial measures are in place to ensure its observance.<sup>13</sup> These measures are regarded as effective, particularly as they are underpinned by the availability of the provisions of the <i>Trade Practices Act 1974</i> for enforcement for any aggrieved party which have existed for some time.</p>
4.2	Stakeholder position	<p>AGEA submits</p> <p><i>“Absent regulation, there are no factors which effectively constrain the BHCs from discriminating in favour of their own Trading Divisions”</i>.<sup>14</sup></p>
4.3	CBH Response	This is an obvious overstatement. It fails to distinguish between the Exporters or address the fact that CBH is a Grower owned

<sup>13</sup> CBH submission, 14 April 2009, at 1.6, 1.7, 3, 3.1, 4, 4.2, 4.3, 4.6, 4.8, 4.9, 5.4, 5.5, 5.7, 6.1, 6.2, 6.3, and 6.5.

<sup>14</sup> AGEA submission, 29 May 2009 at Sch 1 A2.



Issue	ACCC Issue	
		cooperative.
5		<b>Are provisions relating to capacity expansion and performance indicators (such as quality of service and timeliness) necessary or appropriate for inclusion in the Undertakings?</b>
5.1	CBH position	<p>CBH has not addressed capacity expansion in the Undertaking.<sup>15</sup> CBH adopted this approach because:</p> <ul style="list-style-type: none"> <li>• it regarded the definition of Port Terminal Facilities in WEMA to refer to current facilities;</li> <li>• it agreed with the view stated by Michael Gauci of the ACCC on 30 January 2009 in an email to CBH that the provisions of Part IIIA of the TPA that relate to access undertakings do not appear to empower the ACCC to require a service provider to extend a facility;</li> <li>• the Undertakings are for relatively short duration, so capacity expansion provisions may not serve a practical purpose, particularly given the seasonal volatility affecting their levels of use.</li> </ul> <p>CBH does not consider that performance indicators should be mandated through the Undertaking. To do so would import a level operational and contractual supervision that exceeds what is required in other similar processes. No substantiative case has been made in relation to the introduction of that degree of control of private services as part of a Government regulatory process.</p> <p>It is also questionable whether the information gathered serves a useful purpose or adds to existing information relating to performance.</p> <p>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 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 of regulation intended by the introduction of WEMA.</p>
5.2	Stakeholder position	<p>AGEA submits</p> <p><i>"To address these issues, among other things, the proposed access undertakings should include minimum terms and conditions in relation to the provision of access to port terminal services by BHCs and BHCs should be liable for losses (including demurrage) if they breach those terms and conditions."<sup>16</sup></i></p>
5.3	CBH response	<p>As far as CBH is aware, no port terminal operator offers terms under which it would be liable for consequential loss. CBH is liable for the full value of grain within its system (including its ports) in the event that grain is loss or destroyed, save for certain limited circumstances</p>

<sup>15</sup> CBH submission, 14 April 2009, 38 at 5.8.

<sup>16</sup> AGEA submission, 29 May 2009 at Sch 1 A2.

Issue		ACCC Issue
		<p>that risk is insurable. For CBH to be liable for demurrage would be incongruous because:</p> <ul style="list-style-type: none"> <li>• it is not eligible to be rewarded for dispatch; and</li> <li>• it is not in control of many of the decisions that might result in demurrage or despatch.</li> </ul> <p><b>[CONFIDENTIAL - REDACTED]</b></p>
<b>6</b>		<b>Are the terms defined with sufficient clarity and certainty?</b>
6.1	CBH position	CBH considers that terms are defined with sufficient clarity.
6.2	Stakeholder position	<p>AGEA submits that the scope of the undertakings should not be limited to services at the port<sup>17</sup> and also states:</p> <p><i>“The access undertakings do not provide clear definitions of ‘port terminal services’. Instead, they include very narrow and imprecise descriptions as to what “may” or may not, in their view, fall within the definition.</i></p> <p><i>At the same time, in their undertakings, the bulk handlers reserve the right to rely upon matters and services that are clearly outside of their definitions as a basis to exclude access to ‘port terminal services.’<sup>18</sup></i></p>
6.3	CBH response	Clause 5.1(b) of the Undertaking defines “Port Terminal Services” consistently with the WEMA. The Undertaking is not required to, and does not, relate to any part of the export grain supply chain other than Port Terminal Services. Parliament considered this issue and resolved not to include upcountry receival points in the WEMA. <sup>19</sup>
<b>7</b>		<b>Other stakeholder submissions on Interpretation issues</b>
7.1	Stakeholder position	<ul style="list-style-type: none"> <li>• 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.<sup>20</sup></li> <li>• Example: <b>In 2009, CBH indicated that it would align the Shipping Stem with its freight program, leaving customers and commercial considerations subject to logistics management.</b> CBH said they aimed “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</li> </ul>

<sup>17</sup> AGEA submission, 29 May 2009, 9.

<sup>18</sup> AGEA submission, 15 May 2009 at pg 2.

<sup>19</sup> CBH PTS Access Undertaking submission, 14 April 2009, at 1.4 and 5.3. Wheat Export Marketing Bill 2008 Explanatory Memorandum, 16.

<sup>20</sup> AGEA submission, 29 May 2009, 10 at [4.12].

Issue		ACCC Issue
		<p>port” (Dow Jones, 05/03/2009). <b>The Confidential Submissions refer to other examples where discrimination against AWEs in the management (or manipulation) of the Shipping Stem has occurred.</b> The position will be worse if the proposed access undertakings are accepted.<sup>21</sup></p> <ul style="list-style-type: none"> <li>• Example: <b>AWEs are constantly charged for “surge capacity” by CBH and overtime by GrainCorp.</b> This suggests BHCs transfer their stock during normal hours and AWEs’ stock is moved after hours. Overtime charges also provide the potential for BHCs to amend the shipping program for their own trading groups’ gain. This additional cost for so called “surge transportation” is levied against AWEs, yet no information is available about stock at port or stock movement to port. BHCs should provide AWEs with this information to allow AWEs to make decisions to minimise the cost impact on their own business and the business of their customers.<sup>22</sup></li> <li>• Example: <b>The BHCs’ current storage and handling agreements impose uncommercial monetary penalties and liability caps, effectively transferring the vast majority of risk to the users.</b> The ACCC needs to know whether such penalties and liability caps will be applied to the trading and marketing entities associated with bulk handlers in the same way as they are applied to unrelated wheat exporting customers. <b>It is not sufficient that AWEs merely have access to port terminal services and not be tied to using BHC upcountry services.</b> It is necessary that access to port terminal services is provided to AWEs on a ‘no less favourable’ basis to the access provided by BHCs’ Trading Divisions.<sup>23</sup></li> </ul>
7.2	CBH response	<ul style="list-style-type: none"> <li>• 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.</li> <li>• The Undertaking incorporates detailed any enforceable provisions concerning non-discrimination in decision making. The Undertaking also incorporates appropriate ring fencing measures and dispute resolution procedures. Short of prohibiting port terminal operators from participating in wheat marketing at all, it is difficult to see what further measures could be adopted to address these issues.</li> <li>• It is unclear what legitimate concern arises from CBH’s quoted intention to “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”. This appears to be 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.</li> <li>• As is stated at paragraph 1 of this submission, CBH does not consider that it is appropriate for industry participants to make allegations of discriminatory conduct against CBH in a public submission, while claiming confidentiality in relation to the evidence</li> </ul>

<sup>21</sup> AGEA submission, 29 May 2009, 11.

<sup>22</sup> AGEA submission, 29 May 2009, 11.

<sup>23</sup> AGEA submission, 29 May 2009, 11.

Issue	ACCC Issue
	<p>that is claimed to support the allegation. If the information in question concerns discriminatory conduct by CBH, it is unclear on what basis confidentiality may be legitimately claimed in relation to CBH. Further, as a matter of procedural fairness, CBH has limited ability to defend itself against such an allegation and for this reason, the ACCC should disregard these allegations, unless the maker of the allegation is prepared to give CBH appropriate notice of the details of the allegation. CBH may have in its possession information that conclusively refutes these allegations but it has no ability or opportunity to provide this information to the ACCC while the detail of the allegations remain confidential.</p> <ul style="list-style-type: none"> <li>• AGEA's inference that CBH has discriminated in favour of GPPL in relation to surge transport is without basis.</li> </ul> <p><b>[CONFIDENTIAL - REDACTED]</b></p> <ul style="list-style-type: none"> <li>• CBH considers that it is telling that such a serious allegation has been made against it based upon such a flimsy premise. Faced with a complete absence of information concerning CBH's surge transport decision making, the AGEA submission leaps immediately to an explanation that involves an allegation of inappropriate conduct by CBH.</li> <li>• Further, the AGEA's submission ignores the position 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 grain owners. Under Grain Express grain is moved to port to meet cargo requirements regardless of the identity of the exporter. Grain Express endeavours to find the optimum logistics solution to all shipping requirements across each season.</li> <li>• CBH's proposed terms and conditions under the Undertaking do not differ in their treatment of risk from: <ul style="list-style-type: none"> <li>• CBH's grain services agreement under Grain Express;</li> <li>• CBH's delivery and warehousing terms under which grain is received from Growers;</li> <li>• The equivalent terms and conditions of other storage and handling operators in Australia and other countries.<sup>24</sup></li> </ul> </li> <li>• If Exporters wish to require CBH to assume additional risk, that will have an obvious and proportional effect upon CBH's charges. If that is to be the case, those Exporters that own interests in port terminal infrastructure (including the owners of the Port of Melbourne facility) should be asked what level of risk they assume in providing similar services.</li> </ul>

Issue		ACCC Issue
7.3	Stakeholder position	<ul style="list-style-type: none"> <li>The undertakings must ensure equal access to information<sup>25</sup>.</li> <li>“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. <b>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.</b><sup>26</sup>”</li> </ul>
7.4	CBH response	<ul style="list-style-type: none"> <li>As this is a volume based business, it is in CBH’s interests to ensure that the port is used to its maximum throughput / utilisation capacity</li> <li>A high proportion of CBH’s costs in providing port terminal services is fixed and sunk. For that reason, CBH’s primary incentive is to maximise throughput. Underutilisation of a port terminal comes at a substantial opportunity cost. That cost exceeds any reasonable estimate of the short term advantage that might be gained from deterring third party access.</li> <li>CBH has existing ring fencing provisions in place to ensure that it does not improperly provide an informational advantage to GPPL. In addition, the information services available under Grain Express are equally available to all Grain Express customers and access seekers under the Undertaking. CBH notes that no constructive suggestion is made as to how information could better be made available.</li> </ul>
7.5	Stakeholder position	<ul style="list-style-type: none"> <li>AGEA disputes paragraph 4.9 of CBH’s Submission. Information about who is holding what grain in the BHCs’ system is not available through ABARE, however, this is valuable information to the BHCs’ Trading Divisions. If the information is publicly available and of no commercial value, as the BHCs suggest, they should have no difficulty in making all information available to the industry.<sup>27</sup></li> <li>Minimum terms and conditions are to be contained in the undertakings<sup>28</sup></li> </ul>
7.6	CBH response	<ul style="list-style-type: none"> <li>AGEA misquotes/mischaracterises paragraph 4.9 of CBH’s submission. That paragraph did not submit that information about who is holding what grain was available through ABARE. Instead, CBH submitted correctly that certain kinds of information was available in ABARE monthly reports. The PGA submission dated 29 May 2009 makes the same mistake at paragraph 4.31. The PGA submission compounds that error by suggesting that confidential information may be made available by CBH to GPPL. CBH denies that suggestion and notes that no evidence is provided in support of it.</li> <li>CBH did not submit that information about individual customers stock holdings was public and of no commercial value. To the</li> </ul>

<sup>25</sup> AGEA submission, 29 May 2009, 11.

<sup>26</sup> AGEA submission, 29 May 2009, 11 at [4.13].

<sup>27</sup> AGEA submission, 29 May 2009, 12 at [4.15].

<sup>28</sup> AGEA submission, 29 May 2009, 12.

Issue		ACCC Issue
		<p>contrary the information is highly confidential.</p> <ul style="list-style-type: none"> <li>If CBH provided information about who was holding what grain in CBH's system it would be in breach of its Grain Services Agreements with customers and its ring fencing arrangements under Grain Express because it would be disclosing confidential information. CBH customers have access to information about their own grain entitlements. However, it would not be appropriate to provide them with information about other customers grain entitlements. It is unclear whether the AGEA submission is suggesting to the contrary.</li> <li></li> </ul>
<b>8</b>		<b>Are the objectives of the Undertaking appropriate and sufficiently certain and unambiguous?</b>
8.1	Stakeholder position	<p>AGEA submits:</p> <p>The objectives of the undertakings are not appropriate or sufficiently certain and unambiguous.<sup>29</sup></p>
8.2	CBH response	<p>It is difficult to respond to a submission at this level of generality. The submission fails to state in what respect that objectives are inappropriate, uncertain or ambiguous. It is worth noting however, that the objectives are primarily derived from the TPA and WEMA.</p>
<b>9</b>		<b>Do the objectives accord with the terms of the Undertaking set out in subsequent clauses?</b>
9.1	Stakeholder position	<p>AGEA submits</p> <p>The objectives do not accord with the terms of the undertakings because, inter alia, the Undertakings do not provide an effective opportunity to negotiate access or an open, non-discriminatory process for obtaining access to port terminal services.<sup>30</sup></p>
9.2	CBH response	<p>CBH disagrees with this conclusion. It is difficult to respond to a submission at this level of generality.</p>
<b>10</b>		<b>Is the reference to giving consideration to the 'reasonably anticipated requirements' of Port Operators appropriate?</b>
10.1	Stakeholder position	<p>AGEA submits</p> <p>The reference to giving consideration to the 'reasonably anticipated requirements' of Port Operators is vague, lacks transparency and provides opportunity for BHCs to discriminate because the disparity between the information available to BHCs and that available to AWEs means that the 'reasonably anticipated requirements' of Port Operators cannot be objectively determined.<sup>31</sup></p>
10.2	CBH response	<p>CBH disagrees with this conclusion. It is difficult to respond to a submission at this level of generality.</p>

<sup>29</sup> AGEA submission, 29 May 2009, 38 at Sch 1 B2.

<sup>30</sup> AGEA submission, 29 May 2009, 38 at Sch 1 B2.

<sup>31</sup> AGEA submission, 29 May 2009, 38 at Sch 1 B2.

Issue		ACCC Issue
11		Is it appropriate that the terms of a schedule prevail over the General Terms of the Undertaking to the extent that there is any inconsistency between them?
11.1	CBH position	The Undertaking will cover multiple ports, the “General Terms” section of the Undertaking applies generally to all the ports, and the “Port Schedules” deal with port specific matters and have priority over the General Terms. <sup>32</sup> It is appropriate for terms and conditions that are adapted to particular facilities prevail over general terms in order to ensure that the terms governing the relationship between CBH and its customers are appropriate for the specific operational environment of each port terminal. Terms made necessarily require specific tailoring for a port and in those circumstances, prioritising those terms above general terms is more likely to be efficiency enhancing.
11.2	Stakeholder position	AGEA submits:  It is impossible to assess the appropriateness of the General Terms prevailing over the Port Schedules in the absence of the terms and conditions. <sup>33</sup>
11.3	CBH response	We assume that by the “terms and conditions” AGEA is referring to the standard terms and conditions that will be offered to access seekers. Indicative standard terms and conditions were attached to CBH’s submission in support of the undertaking. It is unclear why AGEA has not referred to this in response to this issue.
12		<b>Is the proposed term of the Undertaking appropriate?</b>
12.1	Stakeholder position	AGEA submits  The proposed two year term of ABB’s and GrainCorp’s undertaking (and the three year term of CBH’s undertaking) is unacceptable to AWEs and unlikely to promote efficient investment. <sup>34</sup>  The undertakings must operate for a minimum of five years and have a common expiry date. <sup>35</sup>
12.2	CBH response	CBH has no further submission to make in relation to the term of the Undertaking. CBH’s first submission stated its position in relation to this issues as follows:  <i>“CBH considers that the 3 year 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. The Undertaking should be for a sufficiently brief term to enable these developments to be taken</i>

<sup>32</sup> CBH PTS Access Undertaking submission, 14 April 2009, 31 at [5.1].

<sup>33</sup> AGEA submission, 29 May 2009, 39 at Sch 1 C2.

<sup>34</sup> AGEA submission, 29 May 2009, 18 at [7.1].

<sup>35</sup> AGEA submission, 29 May 2009 at Sch 1 D2.

<sup>36</sup> CBH PTS Access Undertaking submission, 14 April 2009, 31 at [5.2].

Issue		ACCC Issue
		<i>into account.</i> <sup>36</sup>
<b>13</b>		<b>Does having different expiry dates for the CBH Undertaking and the GrainCorp and ABB Undertakings raise any issues?</b>
	CBH position	CBH considers that it would be efficient and appropriate for each of the Undertakings to have the same expiry date.
<b>14</b>		<b>Please comment on the circumstances in which the Port Operators may seek the ACCC's approval to withdraw or vary the Undertaking. Are they appropriate, in light of the provisions in section 44ZZA(7) of the Act?</b>
14.1	Stakeholder position	AGEA submits  <i>"It is unnecessary for the undertakings to specify the circumstances in which Port Operators may seek the ACCC's approval to withdraw or vary the undertakings as this is covered by section 44ZZA(7) of the TPA".</i> <sup>37</sup>
14.2	CBH response	CBH agrees with this aspect of AGEA's submission. The purpose of including an express reference to seeking ACCC approval to withdraw or vary the Undertaking was not to extend or vary the rights of CBH even if that were possible. Rather, the purpose was to disclose that such an application might be made in appropriate circumstances. If this aspect of the undertaking were required to be removed, CBH would not object.
<b>15</b>		<b>Is it appropriate that the Undertaking applies only to new Access Agreements?</b>
15.1	CBH position	It is appropriate that the Undertaking applies only to new Access Agreements. To do otherwise would create substantial interference in existing contractual obligations.
15.2	Stakeholder position	AGEA submits  <i>"It is appropriate that the Undertaking applies only to new Access Agreements."</i> <sup>38</sup>
<b>16</b>		<b>Is the scope of the Undertaking appropriate? That is, does the Undertaking sufficiently provide for access to all appropriate port terminal-related services necessary to export wheat in bulk?</b>
16.1	CBH position	CBH submits that the scope of the Undertaking is appropriate and observes that port terminal services is defined for the undertaking consistent with the definition under the WEMA.
16.2	Stakeholder position	AGEA submits <ul style="list-style-type: none"> <li>The scope of the proposed access undertaking is unduly restrictive, is not in accordance with the WEM Act or the TPA and is not defined with sufficient certainty or clarity.<sup>39</sup></li> </ul>

<sup>37</sup> AGEA submission, 29 May 2009 at Sch 1 D2.

<sup>38</sup> AGEA submission, 29 May 2009 at Sch 1 D2.



Issue		ACCC Issue
		<ul style="list-style-type: none"> <li>CBH “improperly seek[s] to exclude various services or matters from the scope of the undertaking. CBH seeks to exclude “fumigation of grain as a preventative measure...” [CBH clause 5.4(b)(iii)].</li> </ul>
16.3	CBH response	<p>The “Undertaking only covers Port Terminal Services in relation to bulk wheat as required under the WEMA. It does not cover all services provided in the grain supply chain or to other grains because the WEMA mandates an access undertaking for Port Terminal Services only.”<sup>40</sup></p> <p>The CBH definition of port terminal facilities is explicitly defined in Schedules 3, 4, 5 and 6 to the Undertaking. Note that facilities are defined using aerial photographs. It is difficult to see what further definitional certainty could have been provided.</p> <p>In relation to fumigation services, CBH considers that it is not appropriate to require CBH to provide preventative fumigation through the Undertaking, because those services fall outside the definition of Port Terminals Services in WEMA. As part of the Port Terminal Service, CBH requires that a current fumigation certificate must be provided to CBH prior to grain being received at the port to manage the real risk of insect infestation in the port. As such, there is no need to duplicate fumigation unless there is a subsequently identified insect infestation threat. The Undertaking does provide for fumigation to be provided in response to a specific infestation threat. CBH considers that preventative fumigation is most appropriately carried out at the point grain is first delivered into storage and handling infrastructure. The storage facilities provided at port are specifically for the purpose of cargo accumulation. Correct application of phosphine takes approximately 28 days. It is not an efficient use of Port Terminal Facilities to tie up this constrained capacity whilst fumigation occurs. It is substantially more efficient for fumigation to be carried out on farm or in up country storage facilities. Both of those possibilities would be open to an access seeker.</p>
<b>17</b>		<b>Is the scope of the Undertaking and, in particular, the concept of port terminal services, defined with sufficient certainty and clarity?</b>
17.1	Stakeholder position	<p>AGEA submits</p> <p><i>“The definition of port terminal services should identify the geographic boundaries of the port terminal facilities and include all services provided within that geographic area.”<sup>41</sup></i></p>

<sup>39</sup> AGEA submission, 29 May 2009, 40 at Sch 1 E2.

<sup>40</sup> CBH PTS Access Undertaking submission, 14 April 2009, 31 at [5.1].

<sup>41</sup> AGEA submission, 29 May 2009, 40 at Sch 1 E2.

Issue		ACCC Issue
17.2	Stakeholder position	The Grain Industry Association of Victoria submits  <i>“that the scope of the proposed access undertakings should not be limited to services at the port terminal but should address rail and road access.”<sup>42</sup></i>
17.3	CBH response	In response to the AGEA submission, CBH notes that its Undertaking identifies the geographic boundary using aerial photographs. In response to GIAV, CBH states that its definition is consistent with the definition in WEMA and that its Port Terminal Service appropriately addresses the interface between the port terminal facilities and the available transport infrastructure.  The definition of the Port Terminal Service is in Clause 5.1(b) of the Undertaking which in turn refers to the Port Schedules. <sup>43</sup>
<b>18</b>		<b>How are issues of bundling of port terminal services with freight and up-country storage and handling relevant, if at all?</b>
18.1	Stakeholder position	AGEA submits  <i>“The scope of the undertaking should provide for access to all appropriate port terminal-related services necessary to export wheat in bulk, including bundling, road, rail and upcountry services.”<sup>44</sup></i>
18.2	CBH response	The Undertaking only covers Port Terminal Services in relation to bulk wheat as required under the WEMA. It does not cover all services provided in the grain supply chain or to other grains because the WEMA mandates an access undertaking for Port Terminal Services only. We refer to Part 2 of this Submission on relation to Grain Express.  The issue of bundling of services in the context of achieving an effective and efficient grain export market has been considered elsewhere recently.  For example, the National Transport Commission recently published a position paper <sup>45</sup> in respect of capacity constraints and supply chain performance.  In one of the consultants reports <sup>46</sup> used in the preparation of the position paper, the following points are made:  <i>The ACCC will have a role in the oversight of port access undertakings due from bulk handlers by October 2009 under Wheat Marketing regulations. ACCC will have the task of exposing such undertakings to public scrutiny and ruling on their effectiveness and equitability to the trade. Inevitable, the issue of port access will lead to scrutiny of the entire chain. BHCs now control in large part, the assets making up the bulk handling chains in each port zone, with some exceptions being where secondary BHCs operate smaller networks and competing transport options.</i>  <i>Regulators including ACCC, in determining the appropriate levels of access to these chains by different Exporters, should recognise some</i>

<sup>42</sup> Grain Industry Association of Victoria submission, 1 June 2009 at 1.

<sup>43</sup> CBH PTS Access Undertaking submission, 14 April 2009, 31 at 5.1 and 5.3.

<sup>44</sup> AGEA submission, 29 May 2009, 41 at Sch 1 E2.

<sup>45</sup> See NTC website: <http://www.ntc.gov.au/filemedia/Reports/SupplyChPilotsDraftPosMar09.pdf>

<sup>46</sup> See SD7D report p.28 - <http://www.ntc.gov.au/filemedia/Reports/SupplyChPilotsDraftPosMar09.pdf>

Issue		ACCC Issue
		<p><i>key characteristics of this sector:</i></p> <ul style="list-style-type: none"> <li><i>The natural port zone monopolies now emerging may be the most effective structures for efficient export chains, given the extreme uncertainties around annual production, quality etc and the losses incurred in country storage and transport during poor years.</i></li> <li><i>There will inevitably be a consolidation of export grain trading, as smaller bodies fall foul of market volatility. BHCs will inevitably be dominant traders within their natural monopoly zones.</i></li> </ul> <p><i>Traders will, however, be able to acquire grain from BHCs at port, and leverage their international marketing skills to provide competition in pure marketing of grain.</i></p> <p><i>There is no need for artificial protection of the traders ability to acquire grain at country sites, and thus attempt to acquire rail-based transport services in competition with the BHC. The ability to compete outside the BHC network however, is important. Traders should be free to acquire grain from farmers, and to use on-farm storage and road transport to compete with the BHCs' rail-based chains.</i></p> <p><i>For these competing chains to use BHC port terminals, there will need to be some careful monitoring of the differential pricing used by BHCs for the receipt of grain at port – by rail or road, from farm or site, and from the BHC site versus those of competing BHCs. The focus of competition will be between the BHC system (including integrated rail services) and the on-farm storage market (essentially using road transport).</i></p> <p>CBH notes that:</p> <ul style="list-style-type: none"> <li>Consistent with the objects of the WEMA, the focus of the regulatory framework established under WEMA is on the port access element of the supply chain</li> <li>In doing so, the WEMA has been drafted in recognition that there is competition in the upstream elements of the bulk wheat export supply chain, including as between integrated services such as Grain Express and other forms of storage / transport systems – these were matters that were explored at length by the Senate committee during the passage of the WEMA through the parliamentary process</li> <li>the essence of port access addressed by WEMA is the interface at the point of receipt of grain at the port terminals and the upstream supply chain elements (storage and transport) and the price and non-price terms of that access, not the whole of the supply chain</li> <li>where CBH is providing services over and above Port Terminal Services, as it does in Grain Express, it controls those elements of the supply chain, however, in the case of providing Port Terminal Services only, it does not control those other elements of the supply chain, the risk of and cost of doing so remains with the exporter</li> </ul>
<b>19</b>		<b>Are access seekers likely to use the services specified in the Undertaking?</b>
19.1	CBH position	It is difficult to predict the demand for the Port Terminal Service as the factors determining demand are outside CBH's control. The whole of supply chain service cost , network-wide efficiencies and convenience of Grain Express may prove more popular than the Port Terminal Service but there are situations where the Port Terminal Service may prove attractive to exporters. For example, niche quality attributes which may otherwise be lost through co-mingling may be able to be preserved using a segregated supply chain system and the Port

Issue		ACCC Issue
		Terminal Service. This may enable an Exporter to retain value from the inherent quality characteristics in grain acquired. [CONFIDENTIAL - REDACTED]
19.2	Stakeholder position	AGEA submits AWEs will have no option but to use BHCs' port terminal services if they wish to export wheat from BHCs' port terminals. <sup>47</sup>
19.3	CBH response	Exporters have the choice to use the Grain Express service on the terms offered by CBH or the Port Terminal Service as provided through the Undertaking when exporting wheat through CBH's ports. In addition, exporters commonly export wheat (non-bulk) through container facilities and are expected to continue to do so. Exporters also have the choice to construct their own terminals, negotiate with other bulk product loading ports that could be used for grain or potentially, use another port service provider should new entrants establish operations at other ports, for example those reported to be under consideration at Geraldton and Albany <sup>48</sup> .
<b>20</b>		<b>To what extent does the publication requirement provide sufficient certainty and transparency for access seekers?</b>
20.1	Stakeholder position	AGEA submits The publication requirement does not provide certainty and transparency unless publication occurs well in advance of the proposed commencement date. <sup>49</sup>
20.2	CBH response	CBH agrees that publication should occur earlier and proposes that the date be moved to 31 August 2009. The annual publication of pricing for standard Port Terminal Services provides transparency in the provision of Port Terminal Services which facilitates ex post monitoring to ensure CBH does not engage in discriminatory pricing and promotes efficient negotiation and timely agreement on the terms of access to the port terminal by competitors operating in the market for services provided by CBH. <sup>50</sup>
<b>21</b>		<b>Are the proposed timeframes for publishing Reference Prices and Standard Terms appropriate, having regard to periods of contract negotiation, the commencement date of Access Agreements and balancing the interests of the Port Operator and the</b>

<sup>47</sup> AGEA submission, 29 May 2009, 41 at Sch 1 E2.

<sup>48</sup> CBH PTS Access Undertaking submission, 14 April 2009, at 4.4 and 4.6

<sup>49</sup> AGEA submission, 29 May 2009, 42 at Sch 1 F2.

<sup>50</sup> CBH PTS Access Undertaking submission, 14 April 2009, at 5.4.

Issue		ACCC Issue
		<b>access seeker?</b>
21.1	CBH position	Annual publication of pricing for standard Port Terminal Services is appropriate. <sup>51</sup> However, CBH recognises that publication should occur earlier and proposes that the date be moved to 31 August. Arbitration decisions should also be back datable under this Undertaking.
21.2	Stakeholder position	<p>AGEA also submits that:</p> <ul style="list-style-type: none"> <li>• CBH's draft terms and conditions are deficient as they are not binding, do not address the matters referred to in paragraph 4.16 above and do not ensure that there is fair and transparent access to port terminal services.<sup>52</sup></li> <li>• <b>Price and non-price terms must be published in advance of the commencement of the undertakings.</b> Users need to know the terms and conditions on which the services will be provided to assess the reliability of the service, plan, budget and generally compete in the market. ...<sup>53</sup></li> <li>• <b>BHCs should not be able to vary price and non-price terms except in clearly defined circumstances</b> (such as a material adverse change) and provided both parties agree to the proposed changes, and then the implementation of the amended terms should only take effect after 6 months' notice, to give AWEs time to adjust.<sup>54</sup></li> </ul>
21.3	CBH response	This matter is addressed in detail in Schedule 2.
<b>22</b>		<b>Is a maximum 12 month access agreement appropriate for access seekers, having regard to commercial considerations and the length of the term of the access Undertaking? Should the access agreement term be longer or shorter?</b>
22.1	Stakeholder position	<p>AGEA submits</p> <p>12 months' duration for the access agreements is appropriate.</p> <p>BHCs should not be permitted to vary standard prices or terms during that 12 month period except in the event of a material adverse change and then, only if both parties agree to the variation and the BHCs have given AWEs at least 6 months' notice of the proposed change, to give AWEs time to adjust.<sup>55</sup></p>
22.2	CBH position	CBH considers that 12 months is appropriate.
<b>23</b>		<b>Is it appropriate for the parties to be able to include terms applying to access to services other than Port Terminal Services in an</b>

<sup>51</sup> CBH PTS Access Undertaking submission, 14 April 2009, at 5.4.

<sup>52</sup> AGEA submission, 29 May 2009, 23 at [9.1].

<sup>53</sup> AGEA submission, 29 May 2009, 24 at [9.6].

<sup>54</sup> AGEA submission, 29 May 2009, 24 at [9.8].

<sup>55</sup> AGEA submission, 29 May 2009, 42 at Sch 1 F2.

Issue		ACCC Issue
		<b>Access Agreement governed by the access Undertaking (i.e., to bundle other services together with Port Terminal Services)?</b>
23.1	Stakeholder position	AGEA submits  BHCs should not be permitted to vary the undertakings except with the consent of the ACCC. Further, such variation should not be permitted except after consultation with relevant stakeholders and at least 6 months' notice to AWEs. <sup>56</sup>
23.2	CBH position	No, if parties wish to agree services outside the scope of the Undertaking, it is not appropriate for the undertaking to apply. The Undertaking, like WEMA, is designed for specific services.
<b>24</b>		<b>To what extent is it possible to clearly separate the upstream activities of Port Operators (i.e., freight and up-country storage and handling) from the Port Terminal Services?</b>
24.1	Stakeholder position	AGEA submits  The access agreements should also apply to all services provided by a port operator as it is not feasible to separate such closely-related services from port terminal services which are all provided by the same entity. <sup>57</sup>
24.2	CBH position	The Port Terminal Service offered under the Undertaking has been specifically designed to be operated separately from upstream activities. This is also separate from the alternative but wider bundled service offered under Grain Express. Please see Paragraph 2 above.
<b>25</b>		<b>In relation to CBH's Undertaking, is it appropriate that the standard terms include the 'port protocols'?</b>
25.1	Stakeholder position	AGEA submits  Port protocols should be part of the undertakings. <sup>58</sup>
25.2	CBH response	Please see Schedule 2.
<b>26</b>		<b>Is it appropriate for the Undertaking to include, on an indicative basis, the standard terms that will be published once the Undertaking comes into effect?</b>
	CBH position	CBH is in the process of completing its Standard Terms for the provision of the Port Terminal Services. The current draft Standard Terms are attached to CBH's first Submission but do not form part of the Undertaking itself. This is necessary in order to preserve flexibility. The industry generally works on an annual contracting basis and incorporating the terms and conditions would remove the flexibility to deal with developments and emerging market efficiency incentives (such as capacity booking mechanisms) without obtaining consent to

<sup>56</sup> AGEA submission, 29 May 2009, 42 at Sch 1 F2.

<sup>57</sup> AGEA submission, 29 May 2009, 42 at Sch 1 F2.

<sup>58</sup> AGEA submission, 29 May 2009, 42 at Sch 1 F2.

Issue		ACCC Issue
		variation. This is not practical. It would also create regulatory difficulty if any breach of contract were enforceable as a breach of the Undertaking. CBH assumes that the ACCC does not wish to be burdened with contract disputes that raise no apparent competition concerns. <sup>59</sup>
<b>27</b>		<b>Are the clauses related to non-discriminatory access appropriate? Are the clauses sufficient to effectively prevent discrimination in relation to the provision of Port Terminal Services? Are the clauses relating to non-discriminatory access sufficiently clear and certain?</b>
27.1	Stakeholder position	AGEA submits  The clauses relating to non-discriminatory access are neither appropriate nor sufficient to effectively prevent discrimination in relation to the provision of port terminal services. <sup>60</sup>
27.2	CBH response	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. <sup>61</sup> The AGEA submission fails to state reasons or evidence for its view.
<b>28</b>		<b>Are the obligations relating to publication of Reference Prices and Standard Terms consistent with the non-discriminatory access provisions and the objectives of the Undertaking?</b>
28.1	Stakeholder position	AGEA submits  The obligations relating to publication of Reference Prices and Standard Terms are not consistent with the non-discriminatory access provisions and objectives of the Undertakings because BHCs may provide as little as one day before or up to 15 business days after the undertakings take effect to publish its terms and conditions. <sup>62</sup>
28.2	CBH response	CBH agrees to revise the latest date for publication to 31 August to deal with this point. CBH intends to have the relevant materials published prior to that date.
<b>29</b>		<b>Are the various factors that a Port Operator may take into account in deciding to offer different terms to different Applicants/Users appropriate? Are these factors sufficiently certain and clear? Is the list of factors that the Port Operator may consider when offering access to different Applicants/Users consistent with the obligation not to discriminate?</b>
29.1	Stakeholder	AGEA submits

<sup>59</sup> CBH PTS Access Undertaking submission, 14 April 2009, at 5.4.

<sup>60</sup> AGEA submission, 29 May 2009 at Sch 1 G2.

<sup>61</sup> CBH PTS Access Undertaking submission, 14 April 2009, at 1.6 and 5.5.

<sup>62</sup> AGEA submission, 29 May 2009 at Sch 1 G2.

Issue		ACCC Issue
	position	Port Operators must be required to offer access to port terminal services to all accredited wheat Exporters. <sup>63</sup>
29.2	CBH response	The Undertaking 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. <sup>64</sup> AGEA provides no reasoning for its view on this issue.
<b>30</b>		<b>Is it appropriate that the regime does not include a period or consultation with relevant stakeholders prior to variation?</b>
	CBH position	CBH is prepared to provide for a 30 day period of consultation.
<b>31</b>		<b>Is the obligation on the Port Operator to provide information sufficient to enable meaningful and effective access negotiations? What type of information should be provided by the Port Operator in these circumstances?</b>
31.1	Stakeholder position	AGEA submits  The undertakings should clearly stipulate the categories of information the BHCs must provide if requested (i.e. information relating to cost, the services to be provided, availability and so on). The requirement that the information be “reasonably required” is subjective. <sup>65</sup>
31.2	CBH response	The publication of the Shipping Stem on CBH’s website as required under the WEMA effectively provides a level of transparency in relation to shipping at its port terminals.” “In addition to the Shipping Stem, much of the information on grain held by CBH 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.” <sup>66</sup>
<b>32</b>		<b>Is it appropriate that the Applicant must agree to pay the ‘reasonable costs’ incurred by the Port Operator in obtaining information that is not ordinarily and freely available to the Port Operator?</b>
32.1	Stakeholder position	AGEA submits  In order to assess whether it is appropriate that the applicant pay the ‘reasonable costs’ incurred by the Port Operator in obtaining information, clarification is required as to what is meant by ‘information that is not ordinarily and freely available.’  In order to negotiate access, the undertakings should require BHCs to disclose the costs of providing the services to be covered by the undertakings. <sup>67</sup>

<sup>63</sup> AGEA submission, 29 May 2009 at Sch 1 G2.

<sup>64</sup> CBH PTS Access Undertaking submission, 14 April 2009, at 5.6.

<sup>65</sup> AGEA submission, 29 May 2009, 44 at Sch 1 H2.

<sup>66</sup> CBH PTS Access Undertaking submission, 14 April 2009, at 4.9.

<sup>67</sup> AGEA submission, 29 May 2009, 44 at Sch 1 H2.



Issue		ACCC Issue
32.2	CBH response	CBH is prepared to state an estimate of these costs.
<b>33</b>		<b>Is it appropriate that the Undertaking proposes a number of grounds on which the Port Operator may cease negotiations with the Applicant? Are the specified grounds sufficiently certain and clear? Are time periods for the Port Operator to provide reasons for its decision to refuse to negotiate appropriate?</b>
33.1	Stakeholder position	<p>AGEA submits</p> <p>It is not appropriate that the undertakings propose a number of grounds on which the Port Operator may cease negotiations with the Applicant. The dispute resolution process is lengthy and the right to cease negotiations could lead to BWEs incurring substantial losses for non-compliance with sales contracts. BHCs should be required to negotiate on reasonable terms with any person that is an accredited AWE. If negotiations stall, BHCs' interests are adequately protected by a right to refer a dispute to arbitration.<sup>68</sup></p>
33.2	CBH response	The criteria stated are clear and reasonable. AGEA fails to state why CBH should not be able to cease negotiations in the stated grounds.
<b>34</b>		<b>Is the definition of Prudential Requirements in Undertaking appropriate?</b>
34.1	Stakeholder position	<p>AGEA submits</p> <p>The definition of Prudential Requirements in the undertakings is neither appropriate nor necessary. Once an AWE obtains accreditation under the WEM Act, it should not be necessary for BHCs to enquire into the AWE's financial standing.<sup>69</sup></p>
34.2	CBH response	<p>CBH is entitled to ensure that it makes its own enquiries as part of its commercial assessment, particularly solvency risk, of parties with whom it conducts business to ensure that they 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. The WEA accreditation process does not necessarily provide any information to CBH that CBH can rely on. It may be that while accurate and complete at the time provided to the WEA, the information is out of date at the time that CBH may enter into its commercial arrangements with those entities.</p> <p>Further, 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. The management of CBH would be remiss in their duties if they failed to consider the financial solvency of its major customers.</p>
<b>35</b>		<b>Is the clause relating to the avenue of appeal directly to the arbitrator appropriate?</b>
35.1	Stakeholder	AGEA submits

<sup>68</sup> AGEA submission, 29 May 2009, 44 at Sch 1 H2.

<sup>69</sup> AGEA submission, 29 May 2009, 45 at Sch 1 H2.

Issue		ACCC Issue
	position	The proposed access undertakings must contain a right to refer disputes to arbitration, according to the dispute resolution procedure ... <sup>70</sup>
35.2	CBH response	At clause 8 of the Undertaking there is an express right to refer disputes to arbitration.
<b>36</b>		<b>Is the provision for an Applicant to seek pre-submission meetings and discussions appropriate?</b>
36.1	Stakeholder position	AGEA submits Pre-submission meetings and discussions are unnecessary as they make the negotiation process slow and unwieldy. <sup>71</sup>
36.2	CBH response	Pre-submission meetings are suggested as a means of assisting to expedite the timescales.
<b>37</b>		<b>Are the timeframes for acknowledgment appropriate?</b>
37.1	Stakeholder position	AGEA submits The timeframe for acknowledgements is inappropriate and slows down the negotiation process. <sup>72</sup>
37.2	CBH response	CBH has included these provisions to facilitate early identification and clarification of any issues that need to be dealt with as a priority. The timeframes strike a balance between the need for CBH and applicant to engage in good faith negotiations taking account of the need for all parties to consult with advisers and stakeholders (eg shareholders, owners, customers, etc), the need for timely processing and the resolution of any conflict or disputes that may arise as part of the process;
<b>38</b>		<b>Is the information required to be provided in an Access Application appropriate? Is more or less information required?</b>
	Stakeholder position	AGEA submits The information required to be provided in an Access Application is appropriate. <sup>73</sup>
<b>39</b>		<b>Does the negotiation process achieve an appropriate balance between the interests of the Port Operator and access seekers?</b>
	CBH response	"CBH is obliged to negotiate with access seekers in good faith in accordance with a detailed negotiation process, to ensure that such negotiations are progressed according to benchmark timeframes." <sup>74</sup>

<sup>70</sup> AGEA submission, 29 May 2009, 45 at Sch 1 H2.

<sup>71</sup> AGEA submission, 29 May 2009, 45 at Sch 1 H2.

<sup>72</sup> AGEA submission, 29 May 2009, 45 at Sch 1 H2.

<sup>73</sup> AGEA submission, 29 May 2009, 45 at Sch 1 H2.

<sup>74</sup> CBH PTS Access Undertaking submission, 14 April 2009, at 5.6.

Issue		ACCC Issue
40		Are the timeframes for the negotiation process appropriate and sufficiently clear, certain and cost effective?
41		Are the circumstances in which the Port Operator has discretion to cease negotiations appropriate?
42		Are liability terms and limits able to be negotiated effectively under the proposed arrangements? Is it appropriate for the Undertaking to acknowledge such arrangements?
42.1	Stakeholder position	<p>AGEA submits</p> <p>Liability terms and limits must reflect commercial reality and contain realistic limits on liability. Given the volume of stock BHCs handle, BHCs should not be able to exclude or limit liability. Requiring BHCs to be responsible for loss or damage caused would improve efficiency.<sup>75</sup></p> <p>The BHCs are monopoly providers of bulk handling services, including port terminal services, which are essential services for AWEs. <b>AWEs do not have a realistic alternative supplier of port terminal services. In reality, customers have little, if any, bargaining power.</b> The imbalance in market power has resulted in BHCs refusing to negotiate, imposing unfair terms and prices and discriminating against AWEs who did not accept BHCs' standard terms and conditions.<sup>76</sup></p> <p>This obvious imbalance in bargaining power is exacerbated by the current form of the undertaking which does not provide a genuine framework for negotiations because:</p> <p><b><i>BHCs are not required to negotiate in good faith and reach agreement on the terms of access;</i></b></p> <p><b><i>the practical effect of offering terms and conditions at the eleventh hour is that AWEs know that if they do not execute the agreements, they will be denied access to bulk handling services;</i></b></p> <p><b><i>the application process and timeframe for conducting negotiations is slow and unwieldy;</i></b></p> <p><b><i>the dispute resolution mechanism does not provide for the speedy resolution of disputes (see paragraph 13 below);</i></b></p> <p><b><i>BHCs are allowed to “reserve the right to negotiate”, “refuse to negotiate” and to “cease” negotiations. Contrary to the WEM Act, BHCs have the opportunity to restrict access to port terminal services by reserving to themselves the right to refuse to negotiate with an applicant who is or has in the previous two years been in “Material Default” of any agreement with BHCs (see ...CBH clause 7.4(b)(iv)(B)).</i></b><sup>77</sup></p>
42.2	CBH response	This is dealt with in Schedule 2

<sup>75</sup> AGEA submission, 29 May 2009, 45 at Sch 1 I2.

<sup>76</sup> AGEA submission, 29 May 2009, 27 at [11.1].

<sup>77</sup> AGEA submission, 29 May 2009, 27 at [11.2].

Issue		ACCC Issue
<b>43</b>		<b>Is it appropriate for the Port Operator to offer the standard terms to the Applicant subject to the Applicant meeting the specified requirements?</b>
43.1	Stakeholder position	AGEA submits Port Operators must be required to offer the standard terms to any applicant which is an accredited wheat exporter. <sup>78</sup>
43.2	CBH response	CBH agrees to provide the port terminal services on the standard terms to any accredited wheat exporter that meets the Prudential Requirements and otherwise complies with the Applicant's obligations under the Undertaking.
<b>44</b>		<b>Is there sufficient certainty and clarity regarding what particular types of terms and conditions an Access Agreement must cover?</b>
<b>45</b>		<b>Is it appropriate for the Access Agreement to include or refer to the 'Port Protocols/Rules'?</b>
46.2	Stakeholder position	AGEA submits The port protocols/rules must be set out in the undertakings. <sup>79</sup> AGEA accepts that offering standard terms to applicants for access is appropriate. However, reference prices and standard terms must be published by at least 1 September (the wheat season commences on 1 October of each year). Further, there must be a proper framework which allows good faith negotiations on terms of access. <sup>80</sup>
46.3	CBH response	CBH agrees that the time for publication of the Reference Prices and Standard Terms should be extended to 31 August.
<b>47</b>		<b>Do the Undertakings provide sufficient certainty as to when a binding agreement is in place?</b>
<b>48</b>		<b>Is the ACCC role in the arbitration process appropriate? Are the matters listed for consideration by the arbitrator appropriate? Are the restrictions on determinations appropriate (for example, the restriction relating to section 44W of the Act)?</b>
48.1	Stakeholder position	AGEA submits The dispute resolution process should provide that either party may give notice to the ACCC that a dispute exists under the undertaking and may refer the dispute to arbitration, which is to be conducted by the ACCC. <sup>81</sup> BHCs must take reasonable steps to mitigate loss, including continuing to provide port terminal services during, and pending the

<sup>78</sup> AGEA submission, 29 May 2009, 45 at Sch 1 I2.

<sup>79</sup> AGEA submission, 29 May 2009, 45 at Sch 1 I2.

<sup>80</sup> AGEA submission, 29 May 2009, 29 at [12.1].

<sup>81</sup> AGEA submission, 29 May 2009, 46 at Sch 1 J2.

Issue		ACCC Issue
		<p>determination of, any dispute.<sup>82</sup></p> <p>The restriction relating to determinations and section 44W of the TPA is appropriate.<sup>83</sup></p> <p>Disputes relating to substitution of vessels in Shipping Stems or which affect the timing of a vessel's loading must be resolved within 24 hours through a clear dispute resolution mechanism such as referral to an independent umpire for a binding decision within 24 hours.<sup>84</sup></p>
48.2	CBH response	This is dealt with in Schedule 2.
<b>49</b>		<b>Do the confidentiality provisions contained within the Dispute Resolution clause sufficiently provide for the protection of commercially sensitive information?</b>
49.1	Stakeholder position	<p>AGEA submits</p> <p>The confidentiality provisions relating to dispute resolution do not sufficiently protect commercially sensitive information. There should be an obligation upon the parties and the arbitrator that that the entire arbitration process is confidential, unless and only to the extent that both parties agree in writing otherwise.<sup>85</sup></p> <p>AGEA also submits that:</p> <p>There are certain disputes such as substitution of vessels in Shipping Stems or any dispute affecting the timing of a vessel's loading that require a resolution within 24 hours . . . . For these types of disputes, there must be a clear dispute resolution mechanism whereby disputes may be referred to an independent umpire for a binding decision within 24 hours.<sup>86</sup></p>
49.2	CBH response	<p>In respect of confidentiality, the detailed provisions set out in clauses 7 and 8 of the Undertaking provide for protection of confidentiality of information and in respect of the arbitration proceedings and do not require an amendment in the form suggested in the AGEA response for any further protection.</p> <p>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.</p> <p>CBH does not consider that a 24 hour dispute resolution process would be workable. An umpire would have difficulty becoming</p>

<sup>82</sup> AGEA submission, 29 May 2009, 46 at Sch 1 J2.

<sup>83</sup> AGEA submission, 29 May 2009, 46 at Sch 1 J2.

<sup>84</sup> AGEA submission, 29 May 2009, 46 at Sch 1 J2.

<sup>85</sup> AGEA submission, 29 May 2009, 47 at Sch 1 J2.

<sup>86</sup> AGEA submission, 29 May 2009, 30 at [13.3].

Issue		ACCC Issue
		sufficiently informed in that time.
<b>50</b>		<b>Is it appropriate for the provisions in the 'Port Protocols' themselves to be included in the Undertaking?</b>
50.1	Stakeholder position	AGEA submits The port protocols/rules must be part of the undertakings. <sup>87</sup>
50.2	CBH response	CBH's submission at 5.7 sets out the basis upon which it is submitted that the port protocols should not be included in the Undertaking. <sup>88</sup>
<b>51</b>		<b>To what extent does a balance need to be struck between the need for Port Operators to retain flexibility over their operations and the need for transparency and certainty around the Port Protocols?</b>
51.1	Stakeholder position	AGEA submits The balance between the need for BHCs to retain flexibility and the need for transparency and certainty can be achieved by clearly specifying the obligations of the BHCs. <sup>89</sup>
51.2	CBH response	<p>CBH as the operator of the port terminal services in complying with its obligations under the 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;</p> <p>CBH must have sufficient scope in the port terminal rules 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;</p> <p>Under the port terminal rules, CBH is the entity responsible for managing access, and in the performance of that function CBH must deal equitably with all Users and potential Users of the facilities 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. In addition, a great 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, the end result of which is likely to be the removal of effective control by CBH and therefore a decrease in the efficiency of the Port Terminal Facilities.</p> <p>Examples of matters which occur which require the Port Terminal Operator to have a degree of flexibility include:</p> <ul style="list-style-type: none"> <li>• Vessels failing to clear survey</li> </ul>

<sup>87</sup> AGEA submission, 29 May 2009, 48 at Sch 1 K2.

<sup>88</sup> CBH PTS Access Undertaking submission, 14 April 2009, at [5.7].

<sup>89</sup> AGEA submission, 29 May 2009, 48 at Sch 1 K2.

Issue		ACCC Issue
		<ul style="list-style-type: none"> <li>• Lack of entitlement for loading;</li> <li>• Variations in road and rail services;</li> <li>• Weather disruptions to loading, berthing or departure;</li> <li>• Quarantine related matters such as the presence of insects or rodents;</li> <li>• Changes to vessel ETA</li> <li>• Terminal blockage as a result of unexpected changes to vessels' ability to load;</li> <li>• Tides;</li> <li>• Strikes and other industrial action;</li> <li>• Mechanical failures.</li> </ul> <p>CBH submits that the Port Terminal rules have been drafted in a way that provides the appropriate balance.</p> <p>By way of example, , CBH has had a vessel present for loading, but fail survey, then removed for cleaning, re-present and fail a second time. CBH was able to respond by suggesting that the vessel depart for another port in order to clean the vessel and then responded to cargo changes to allow that third party exporter to minimise demurrage costs. Without the ability to respond flexibly, CBH would have been forced into a situation of restricted operational ability at the port terminal, resulting from the cargo being accumulated at port some 4 weeks longer than expected.</p>
<b>52</b>		<b>Are the provisions in the Port Protocols sufficient to provide transparency and certainty for access seekers? If not, what other information should be included and why?</b>
52.1	Stakeholder position	<p>AGEA submits</p> <p>The proposed port protocols/rules do not provide transparency and certainty for access seekers. The protocols/rules do not contain clearly defined rules which are capable of objective application.<sup>90</sup></p>
52.2	CBH response	In the absence of any supporting arguments, facts, examples or evidence, CBH is unable to make any detailed response to the statement.

<sup>90</sup> AGEA submission, 29 May 2009, 48 at Sch 1 K2.

Issue		ACCC Issue
53		Are the Port Protocols sufficiently detailed? Do they address all necessary issues? What further issues should be included, if any?
54		Are the dispute resolution provisions in the Port Protocols appropriate? Are they sufficient to provide certainty and transparency to access seekers?
55		Is the process for the ordering and queuing of ships, and the decision criteria determining the order and speed within which ships will be loaded, appropriate and sufficiently certain and transparent?
56		Is there an appropriate degree of clarity and transparency in relation to the link between ship nomination, estimated time of arrival, and the timing and quantum of cargo accumulation into the port?
56.1	Stakeholder position	<p>AGEA submits</p> <p>There is no clarity or transparency in relation to the link between ship nomination, estimated time of arrival, and the timing and quantum of cargo accumulation into the port.<sup>91</sup></p> <p>Further, the criteria the Port Operator can take into account when making operational decisions is largely discretionary and therefore are not clear or certain.<sup>92</sup></p>
56.2	CBH response	In the absence of any supporting arguments, facts, examples or evidence, CBH is unable to make any detailed response to the statement.
57		Is the availability and allocation of Port Operator overtime (and other related out of the ordinary course resources and costs) appropriate and sufficiently transparent and reasonable?
57.1	Stakeholder position	<p>AGEA submits</p> <p>Allocation of Port Operator overtime (and other related out of the ordinary course resources and costs) is not appropriate, transparent or reasonable.<sup>93</sup></p>
57.2	CBH response	In the absence of any supporting arguments, facts, examples or evidence, CBH is unable to make any detailed response to the statement.
58		Is the process for varying the Port Protocols appropriate and sufficiently detailed?
58.1	Stakeholder	AGEA submits

<sup>91</sup> AGEA submission, 29 May 2009, 48 at Sch 1 K2.

<sup>92</sup> AGEA submission, 29 May 2009, 48 at Sch 1 K2.

<sup>93</sup> AGEA submission, 29 May 2009, 48 at Sch 1 K2.



Issue		ACCC Issue
	position	BHCs' right to unilaterally vary the Port Terminal Rules, is inconsistent with the requirement of clarity and certainty. BHCs are only required to "consult" with AWEs before implementation of the varied terms and conditions. <sup>94</sup>
58.2	CBH response	CBH's submission includes a detailed discussion of key features of the Undertaking, including publication of port terminal rules. <sup>95</sup>  CBH has responded separately to specific issues relating to consultation raised by the ACCC which are set out in Section 4 of this document below
<b>59</b>		<b>Are the criteria the Port Operator can take into account when making operational decisions appropriate? Are they sufficiently clear and certain?</b>
60.1	Stakeholder position	<p>AGEA submits:</p> <p><b>Port Protocols/Rules</b></p> <ul style="list-style-type: none"> <li>CBH's proposed 2009/2010 Shipping Capacity Access Allocations policy contains two auction methodologies for the allocation of shipping capacity. AGEA's position regarding the auction model contained in CBH's proposed access allocations policy is that it is labour intensive, time consuming and complicated. Furthermore, there is no proposed limit on capacity for any single party. The proposed 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. AGEA's further comments on CBH's proposed 2009/2010 Shipping Capacity Access Allocations policy is set out in Schedule 4.<sup>96</sup></li> </ul> <p><b>Operational decisions</b></p> <ul style="list-style-type: none"> <li><b>The BHCs' discretion to make Operational Decisions is too wide and subjective.</b> 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.<sup>97</sup></li> <li>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". <b>BHCs control the movement and accumulation of wheat at port.</b><sup>98</sup></li> <li>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 <b>AWE's ability to negotiate a low demurrage should not result in that AWE being penalised by having</b></li> </ul>

<sup>94</sup> AGEA submission, 29 May 2009, 48 at Sch 1 K2.

<sup>95</sup> CBH PTS Access Undertaking submission, 14 April 2009, at [1.6(f)].

<sup>96</sup> AGEA submission, 29 May 2009, 32 at [14.9].

<sup>97</sup> AGEA submission, 29 May 2009, 33 at [15.2].

<sup>98</sup> AGEA submission, 29 May 2009, 33 at [15.4].

Issue		ACCC Issue
		<p>another vessel being given priority at berthing, because it has a higher demurrage rate.<sup>99</sup></p> <ul style="list-style-type: none"> <li>In relation to...CBH clause 9.2(d)(ii)(B), as BHCs control the movement and accumulation of wheat at port, <b>it is within its means to show that the throughput of bulk wheat is maximised by loading its vessels in priority to other AWEs.</b><sup>100</sup></li> <li>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)). <b>BHCs should not be entitled to vary a cargo assembly plan or queuing order as a result of vessel congestion ...</b>(CBH clause 9.2(d)(iii)(A)).<sup>101</sup></li> </ul>
59.2	CBH response	<p>CBH is developing its capacity allocation procedures which it proposes to manage by way of an auction based system and expressions of interest, the details of which are summarised in Section 6 and <b>attached</b> to this Submission at <b>Annexures 1 and 2</b></p> <p>CBH provides services to and is required to coordinate access among a number of access seekers or potential access seekers.</p> <p>CBH seeks to 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.</p> <p>CBH must have sufficient scope in the application of the port terminal rules to take into account the failure by an Applicant to comply with its obligations under the rules including compliance with the processes specified in the rules, to safeguard the legitimate interests of other Users of the port terminal facility and to ensure as far as possible that other Users or Applicants are not disadvantaged or prejudiced as a result of the failures of an Applicant in particular circumstances.</p> <p>Under the port terminal rules, CBH is the entity responsible for managing access, and in the performance of that function CBH must deal equitably with all Users and potential Users of the facilities to ensure as far as possible that the acts and omissions of Applicants engaging in the process do not disadvantage or prejudice "innocent" parties.</p> <p>The factors that will inform CBH's consideration that Users are not following the processes include:</p> <ul style="list-style-type: none"> <li>(a) The timeliness of compliance with the procedural steps outlined in the process;</li> <li>(b) The User's compliance with its other obligations set out in the rules;</li> <li>(c) The reasonably anticipated consequences of the failure by a User to comply with the procedural requirements and other obligations under the Rules in so far as those consequences may adversely effect other Users or potential Users;</li> </ul> <p>The implication that in spite of having in place objective controls in the form of the port rules that comply with the Undertaking, CBH would</p>

<sup>99</sup> AGEA submission, 29 May 2009, 34 at [15.5(a)].

<sup>100</sup> AGEA submission, 29 May 2009, 34 at [15.5(b)].

<sup>101</sup> AGEA submission, 29 May 2009, 34 at [15.6].

Issue		ACCC Issue
		<p>wilfully and deliberately breach those rules is rejected as mere speculation.</p> <p>It is noted that nowhere in the submissions is any allegation, much less any evidence, provided of any actual or suspected breaches or practices as are suggested here. CBH has been subjected to an audit of its shipping policies and procedures by the WEA for the 2008-09 season. That report did not find any discrimination by CBH amongst users nor any discrimination in favour of Grain Pool.</p> <p>In the absence of any supporting arguments, facts or evidence, CBH is unable to make any further detailed responses to the responses made on this Issue.</p>
<b>60</b>		<b>To what extent is accounting separation necessary or unnecessary in order for the ring fencing regimes to be effective?</b>
60.1	Stakeholder position	<p>AGEA submits</p> <p>There must be transparency and accounting separation to ascertain whether BHCs' Trading Divisions are required to make the very substantial payments which AWEs are required to make for port terminal services, or whether there are merely book entries between the trading and operating divisions.<sup>102</sup></p>
60.2	CBH response	<p>CBH's submission states that the ring fencing measures contain measures including accounting separation for trading entities.<sup>103</sup></p> <p>Compliance with the conditions of the Grain Express notification has been independently audited for 2008/09 and reported as compliant</p>
<b>61</b>		<b>Is the scope of Restricted, Prohibited and Permitted information flows appropriate and adequate?</b>
61.1	Stakeholder position	<p>AGEA submits</p> <p>The Restricted, Prohibited and Permitted information flows are neither appropriate nor adequate.<sup>104</sup></p>
61.2	CBH response	<p>In the absence of any supporting arguments, facts, examples or evidence, CBH is unable to make any detailed response to the statement.</p>
<b>62</b>		<b>Are the compliance and training obligations applying to Port Operator employees handling Restricted and Prohibited information appropriate?</b>
62.1	Stakeholder position	<p>AGEA submits</p> <p>There is no provision for employees to be adequately sanctioned for breaches that they might commit.<sup>105</sup></p>
62.2	CBH response	<p>CBH's submission states that the ring fencing measures contain measures including staff training.<sup>106</sup> Sanctions are provided for at clause</p>

<sup>102</sup> AGEA submission, 29 May 2009, 49 at Sch 1 L2.

<sup>103</sup> CBH PTS Access Undertaking submission, 14 April 2009, at [5.9.]

<sup>104</sup> AGEA submission, 29 May 2009, 49 at Sch 1 L2.

<sup>105</sup> AGEA submission, 29 May 2009, 49 at Sch 1 L2.

Issue		ACCC Issue
		11.1 of the Undertaking.
<b>63</b>		<b>Beyond employee training, should there be other processes through which compliance with the ring fencing rules can be achieved? If yes, what should they be?</b>
	CBH position	We refer to clause 11.1 of the ring-fencing rules in Schedule 2 to the Undertaking.
<b>64</b>		<b>Are there any other obligations that should be included in the ring fencing regime? If yes, please specify.</b>
64.1	Stakeholder position	<p>AGEA submits</p> <p>The flow of information between the BHCs and their Trading Divisions must be prohibited. This includes but is not limited to information that could be transmitted by emails, meetings, reports, board meetings/papers, committee meetings, papers, staff movements, IT systems, databases, consultants and secondees.<sup>107</sup></p> <p>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. <b>This clause entitles CBH to provide GrainPool with valuable information that is not available to AWE.</b> 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.<sup>108</sup></p> <p>The complaints handling procedure in clause 12 must provide for complaints to be made to an independent third party. CBH lacks the impartiality to conduct a proper and independent investigation into a complaint about its own potential breach of the ring fencing rules.<sup>109</sup></p>
64.2	CBH response	<p>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 8(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.</p> <p>The complaints handling procedure is not limited to CBH. The auditor will review all complaints under clause 13.</p>

<sup>106</sup> CBH PTS Access Undertaking submission, 14 April 2009, at 5.9.

<sup>107</sup> AGEA submission, 29 May 2009, 49 at Sch 1 L2.

<sup>108</sup> AGEA submission, 29 May 2009, 36 at [16.10]

<sup>109</sup> AGEA submission, 29 May 2009, 36 at [16.12]

## Schedule 2 – CBH response to ACCC request for further information

Issue 1	Paragraph 4.6 of CBH’s supporting submission to its proposed undertaking, dated 14 April 2009 (the CBH submission), suggests that the ability of Port Operators to raise prices above efficient levels is constrained by the potential entry of new competing port facilities. In light of this comment, and in relation to a possible new bulk wheat grain export terminal, please elaborate on the following:
1(a)	What capacity (intake, shipping bin and ship loading) would a new terminal need to be competitive?
CBH response	<p>This question examines an issue that 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 no realistic constraint from the threat of new entry. The Undertaking adopts a published price and non-price terms and a negotiate/arbitrate model, which is what would be applied if the relevant services were declared. To deal with vertical integration issues, CBH has non-discrimination principles and ring fencing arrangements.</p> <p><b>1 [CONFIDENTIAL REDACTED]</b></p> <p>The trials performed by Grower groups in Geraldton suggest that data is available on a small scale entry but CBH does not have access to it for obvious reasons.</p> <p><b>[CONFIDENTIAL - REDACTED]</b></p> <p>Any port terminal facility operator would need to conduct an analysis as part of its business case to ensure that its costs of acquiring or hiring equipment and personnel together with its operational overheads in supplying the service are recovered together with a sufficient rate of return.</p> <p>Central to such a business model is the calculation of the minimum volumes of grain to be handled to provide the income /cash flow necessary to sustain such a business model.</p>

		<p>[CONFIDENTIAL - REDACTED]</p> <p>After taking into account the costs associated with the above requirements, the operator of a new competing port facility would need to calculate its rate of return in arriving at a price per tonne that would appeal to users of the service.</p>
<b>1(b)</b>		<b>What is the likely cost of construction?</b>
	CBH response	<p>[CONFIDENTIAL - REDACTED]</p>

<b>1(c)</b>		<b>What would be likely locations for a new terminal, and what would be required to obtain/utilise those locations?</b>
	CBH response	<p>In determining likely locations for a new terminal, consideration must be given to a range of factors including:</p> <ul style="list-style-type: none"> <li>• the off site transport infrastructure such as existing road and rail links, shipping lanes and utility services such as electricity, water, sewerage, drainage and telecoms);</li> <li>• proximity to the location of grain producers (in particular, producers of wheat for export in bulk);</li> <li>• physical “harbour” characteristics such as tidal patterns and prevailing shipping conditions;</li> <li>• physical characteristics and layout of the coastline;</li> <li>• assessment of the number and class of vessels using the port facility including a consideration of the need for access channel deepening, sizing and constructing breakwaters and berths or offshore loading facilities such as loading dolphins;</li> <li>• availability of site personnel and operational staff.</li> </ul> <p><b>[CONFIDENTIAL - REDACTED]</b></p>
<b>1(d)</b>		<b>What would be the minimum level of volume required for the terminal to operate successfully?</b>
	CBH response	<p>Please see response to 1(a) above.</p> <p>The exercise described in the response to issue 1(a) above would be required to determine the volumes required for the success of the business model proposed by the operator of competing port facilities. However, once that exercise had been performed the necessary volume to cover costs could be determined.</p> <p>In broad terms, the closer the volume that is able to be handled at any facility is to its peak capacity, the more efficient it is to provide the service, due to the increased income and the largely fixed and sunk costs of providing and operating the facilities.</p> <p>A niche operation focussed on providing an extremely limited service for a single segregation at low volumes (especially where quality was not as important) could be viable on relatively small volumes due to minimal operating costs and capital expenditure.</p>
<b>1(e)</b>		<b>Would it be possible to obtain sufficient volumes for the terminal to operate successfully?</b>
	CBH response	<p>CBH is not able to predict the future success or failure of a hypothetical competitor. Please see response to issues 1(a) and 1(d) above.</p> <p>As explained above [1(a)], the available volumes of grain during any harvest season are finite.</p> <p>Any port terminal service operators need to secure sufficient volumes of grain in order to cover their costs of investment in and operation of the</p>

		<p>infrastructure and facilities.</p> <p>Provided that the operator of a port facility is able to develop a sustainable business model and to secure volumes of grain to sustain that business model, there is no reason why a new market entrant could not obtain sufficient volumes of grain to operate alternative port facilities successfully. Ultimately price and a suitably scaled service offering are the key factors that will need to be addressed by any new entrant.</p>
<b>1(f)</b>		<b>Who would be likely to pursue development of a new terminal?</b>
	CBH response	<p>As explained above, any volumes of grain can be secured by the operator of competing port facility will affect the incumbent operator by removing that volume from the incumbent.</p> <p>As explained in the response to issue 1(a) above, it is possible for a bare minimum small scale operator, such as a grower group, to successfully develop a competing port terminal service subject their development of an appropriate business model and sustainable business case.</p> <p>At the other end of the spectrum, a number of exporters and Exporters who operate in the global grain market are substantial organisations in their own right or are part of corporate groups that have access to debt and equity markets to secure funds for investment and therefore the potential to invest in the development of new port terminal facilities.</p> <p>Again, using the recent Oakajee port and rail project as an example, it is possible to develop port terminal infrastructure where an appropriate business model and sustainable business case exists.</p>
<b>1(g)</b>		<b>What regulatory or other approvals (such as approval from the port authority) would it be necessary to obtain in order to commence construction?</b>
	CBH response	<p>Please see the response to 1(c) above.</p> <p>Taking the three examples of the temporary facilities, bare minimum port terminal service and the large scale stand alone/co-located port terminal facility in turn:</p> <ul style="list-style-type: none"> <li>• in all cases, regulatory approval (including providing an undertaking required under the provisions of WEMA to the ACCC) to operate the facilities is required; <ul style="list-style-type: none"> <li>• necessary accreditation for AQIS and customs compliance;</li> <li>• health and safety and phytosanitary certification;</li> <li>• operational environmental approvals catering for dust</li> <li>• transport and operation licensing requirements (including noise, hours of operations, etc);</li> </ul> </li> </ul>



		<ul style="list-style-type: none"> <li>in the case of temporary or small scale port terminal service operations, the operator would need to enter into arrangements with the site owner (usually the port authority) and negotiate the terms of any licence or lease for the occupation of the land together with ancillary arrangements such as transport access (including either or both of road or rail access);</li> <li>in the case of large scale port terminal facilities (either on a stand alone or co-located basis): <ul style="list-style-type: none"> <li>approvals associated with the acquisition and development of land including planning and development consent, environmental approvals;</li> <li>works permits for the development of land based transport and access infrastructure and marine works (including channel deepening, harbour construction, etc)</li> <li>for large scale stand alone or co-located new build facilities, it may necessary for the owner/operator to negotiate an agreement with the Western Australian Government for the development of those facilities – recent examples include the development by Fortescue Metals Group Limited of their Herb Elliot Port Facilities at Port Hedland and by Oakajee Port and Rail Pty Limited (a joint venture between Murchison Metals Limited, Mitsubishi Development Pty Limited and Crosslands Resources Limited).</li> </ul> </li> </ul>
<b>1(h)</b>		<b>Could an existing terminal be converted to export bulk wheat?</b>
	CBH response	<p>Subject to a consideration of the matters raised above, it is possible to convert existing port terminal facilities (ie: port terminal facilities that are not currently designed or used for the export of wheat in bulk) for the export of bulk wheat.</p> <p>Subject to obtaining the necessary approvals and negotiating appropriate on site arrangements and off site access and support arrangements, it is possible to establish a port terminal facility for the export of bulk wheat on an appropriate scale ranging from the bare minimum described in 1(a) above through to the larger scale operation by the use of fixed or temporary facilities at a port site.</p> <p>The principal considerations are to ensure that the flow paths for the grain are secure and that phytosanitary and export standards can be maintained in accordance with regulatory and legal requirements;</p>
<b>1(i)</b>		<b>What would be the likely timeframe for constructing and commissioning a new port terminal?</b>
	CBH response	<p>Taking the two examples of the bare minimum port terminal service and the large scale stand alone / co located port terminal facilities in turn:</p> <p>For the bare minimum port terminal service operations, the time to procure the necessary equipment and arrange for its installation should be achievable in a short period (between three to six months) however, further time will be required for negotiation of onsite and offsite arrangements relating to the provision of the services (ie licence to occupy/lease and incoming transport arrangements) together with the process of obtaining the</p>

		<p>necessary regulatory approvals (eg AQIS and customs compliance arrangements) and finally, the time required to provide an undertaking to the ACCC under the provisions of the WEMA.</p> <p>CBH would estimate that the minimum time for establishing a bare minimum port terminal service would be approximately 12 months.</p> <p>In the case of larger scale port terminal services facilities (leaving aside the time taken to acquire land and to procure the materials and equipment required for the infrastructure) the time required to construct and commission a port terminal on the scale of Kwinana would be approximately two to three years</p>
<b>Issue 2</b>		<b>Paragraph 4.8 of the CBH submissions suggests that many of the grain Exporters seeking access to the port terminal services have a substantial degree of bargaining power and the ability to shift their supply sources to wheat produced in other countries. Please elaborate on the following:</b>
<b>2(a)</b>		<b>If a bulk wheat exporter was dissatisfied with proposed access terms, what alternatives for equivalent services are currently available in Australia, and what would be the typical costs (monetary and otherwise) to the exporter in switching to such alternatives? Further, what would be the costs (monetary and otherwise) to CBH of losing the customer to such alternatives?</b>
	CBH response	<p>Please see CBH's response in section 3 above. As that section states, competitive tension is primarily expressed in the acquisition decisions of Exporters rather than once grain is acquired.</p> <p>As explained, bulk wheat Exporters have a limited degree of flexibility in Australia in choosing the source of grain to supply to the market.</p> <p>Larger grain Exporters operate at a global level and have developed sophisticated marketing and customer services systems and practices including, for example, commodity and foreign exchange hedging, chartering, forward selling, pooling, contracting, multi-origination of grain and value adding.</p> <p>Depending on the nature and requirements of the market in which the exporter operates, and the needs of individual customers, there is considerable choice at a global market level for bulk wheat.</p> <p>The association with and operations within the global wheat export market by Exporters mean that they are better positioned to match the demands of their customers with the various supply and price options that exist in the global market compared to Exporters who operate in a regional market or on a smaller scale.</p> <p>For example, it is possible for Australia's competitors in the global market such as established producers in Canada, the United States and Europe together with new and developing producers such as the Ukraine and South America to produce volumes of wheat for use in the global market and for the movement of grain in the global market to be managed in a way that serves the interests of producers and customers.</p> <p>Finally, because of CBH's cooperative structure, any outcome that reduces returns to Growers by making WA wheat less competitive in the global market, will result in an immediate response from CBH's members, who are Growers.</p> <p>The costs to CBH of losing a customer to an alternative market arise as a consequence of choices that grain producers make based on market</p>

		<p>indicators.</p> <p>The choices to be made include decisions as to whether or not to produce wheat for export in bulk or to produce for the domestic market or to produce different grain or put their productive land to alternative uses such as pasture or grazing.</p> <p><b>[CONFIDENTIAL - REDACTED]</b></p>
<b>2(b)</b>		<b>Please provide examples of the ways in which a bulk wheat exporter could use bargaining power in its negotiations with CBH in relation to the provision of port terminal services at a given terminal.</b>
	CBH response	<p>The main sources of bargaining power for an exporter are:</p> <ul style="list-style-type: none"> <li>• the ability to acquire equivalent grain elsewhere in a competitive global market;</li> <li>• the ability to inform Growers of that choice;</li> <li>• the ability to insist on access under the Bulk Handling Act 1967 (WA);</li> <li>• the ability to make complaints to the Western Australian Minister for Agriculture and the WEA; and</li> <li>• the ability to sponsor the new entry of competitive facilities.</li> </ul> <p>Examples of the existing potential for new entrants are contained in <b>Annexure 3</b>, which is a bundle of press articles describing potential challenges to CBH's port terminals. As is demonstrated here, there are numerous ways in which competition with CBH has been proposed.</p> <p>As this competitive threat is contained at each end of the price spectrum, no single response strategy by CBH can neutralise this threat and CBH remains constrained by the potential for loss of volume on a price for service basis.</p>
<b>2(c)</b>		<b>Currently, what options are available to a bulk wheat exporter in the event it believes that CBH had engaged in discriminatory conduct in relation to the provision of port terminal services? In particular, would the exporter have any recourse under contractual arrangements with CBH?</b>
	CBH response	<p>Currently, a bulk wheat exporter may:</p> <ul style="list-style-type: none"> <li>• invoke the complaint and dispute resolution mechanism in the CBH ring fencing policy. To date no complaints have been made to CBH ;</li> <li>• allege a breach of contract;</li> <li>• complain to the WEA;</li> </ul>

		<ul style="list-style-type: none"> <li>complain to the Western Australian Minister for Agriculture in relation to a breach of the Bulk Handling Act 1967 (WA);</li> <li>allege a contravention of the TPA.</li> </ul> <p>CBH has not received any complaints through the dispute resolution mechanism outlined in CBH's ring fencing policy introduced as a result of the Grain Express Notification. CBH is not aware of any allegation of such conduct that has been supported with credible evidence. Under the Undertaking, access seekers may allege a breach of the operational decision making provisions.</p>
<b>Issue 3</b>		<b>Paragraph 4.5 of the CBH submission states that because 'the majority of costs associated with CBH's port terminals are fixed and sunk there is a strong economic incentive for CBH to facilitate increased throughput at its ports.' Please elaborate on the following:</b>
		<b>What significance, if any, does the vertical integration of CBH as a provider of port terminal services and as a bulk wheat exporter (via Grain Pool) have for the incentives of CBH in relation to the port terminal services it provides to itself and other users of those services? Would CBH's incentives change if it was not vertically integrated with a bulk wheat exporter?</b>
	CBH response	<p>CBH considers that vertical integration may create incentives to discriminate. However, in this case, a number of factors affect the incentives:</p> <ul style="list-style-type: none"> <li>CBH is non-profit making (ie: any operating surplus is invested in services and infrastructure rather than paid to shareholders) and its members (Growers) ultimately pay the cost of supply chain services;</li> <li>Discrimination drives up those costs by reducing efficiency;</li> <li>CBH and GPPL are adequately ring-fenced as a result of Grain Express.</li> </ul> <p>CBH accepts that appropriate measures are required to address both the perception and potential reality of discrimination. That is why those measures are in place. It is not clear what further measures could reasonably be required, short of divestiture, which is unreasonable and was not required by WEMA.</p> <p>CBH is owned by Growers and as the majority of the services provided by CBH are used by those same Growers or by third parties whose use of those facilities provide services directly to those Growers (ie as in the case of Exporters), any cost and expenditure incurred by CBH and any income or profit made by CBH is ultimately paid for and recouped by the Growers that own CBH and use the services, directly or indirectly, provided by CBH.</p> <p>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.</p>

<b>Issue 4</b>	<b>What factors influence the ability of bulk wheat Exporters to switch between terminals (either located in different port zones or owned by different bulk handlers) for the export of bulk wheat? In your answer please have regard to transport costs, infrastructure constraints, the availability of transport providers, terminal capacity and terminal availability.</b>
CBH response	We refer to our answer to this question in Schedule 1.
<b>Issue 5</b>	<b>Since the removal of the ‘single desk’ for bulk wheat exports, what are the market shares of each accredited exporter of bulk wheat exported from each of CBH’s port terminals (by tonne and percentage)?</b>
CBH response	<b>[CONFIDENTIAL - REDACTED]</b>
<b>Issue 6</b>	<b>What were the total upfront capital costs incurred for each of CBH’s grain terminals? (for terminals that were purchased rather than built, please provide the purchase price for that terminal).</b>
CBH response	<b>[CONFIDENTIAL - REDACTED]</b>
<b>Issue 7</b>	<b>For each of CBH’s grain terminals, what were the annual total operating costs for the grain terminal for financial years 2005/06, 2006/07 and 2007/08?</b>
CBH response	<b>[CONFIDENTIAL - REDACTED]</b>
<b>Issue 8</b>	<p><b>The clause references in the following questions are to clauses in CBH’s proposed undertaking. Words capitalised as proper nouns (e.g., Trading Division, Access Agreement) are as defined in the proposed undertaking, unless otherwise stated.</b></p> <p><b>How, if at all, will the proposed undertaking impact on the export of grains other than bulk wheat at CBH’s terminals? How will areas of potential overlap between wheat and non-wheat areas be dealt with (for example, will the shipping stem include vessels for wheat and other grains)?</b></p>
CBH response	The proposed undertaking is not expected to directly impact 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.
<b>Issue 9</b>		<b>To the extent that CBH proposes to offer bundled services (i.e. port terminal services plus up-country services), does CBH envisage that the proposed undertaking (both in general, and specifically in relation to the negotiate/arbitrate process) will apply to those bundled offers?</b>
	CBH response	No. Please see section 2 of this submission that addresses Grain Express.  As the provisions of the WEMA and the undertaking required under the provisions of the WEMA apply only to access to port terminal services used for the export of bulk wheat, the proposed undertaking does not apply to any other services provided by CBH upstream or downstream of the port terminal services that it provides.
<b>Issue 10</b>		<b>To the extent that there are any differences between the port terminal services offered under the proposed undertaking, and the port terminal services that are offered under any bundled offer, please set out these differences.</b>
	CBH response	Please see section 2 of this submission which deals with Grain Express, in which the differences are explained.
<b>Issue 11</b>		<b>Please outline the basis on which CBH will provide access to port terminal services to its Trading Business. That is, will it be at ‘arms length’? If so, how will this be effected? Will it be on the same terms of access as offered to other bulk wheat Exporters?</b>
	CBH response	Dealings with GPPL will be on arms length and non-discriminatory terms under the Grain Express ring fencing arrangements.
<b>Issue 12</b>		<b>Clause 4.5(b) contains an obligation to ‘consult’ with various parties prior to seeking the ACCC’s consent to vary the proposed undertaking. What, specifically, does the obligation to ‘consult’ on a proposed variation include?</b>
	CBH response	The obligation to consult with Users and Applicants regarding any proposed variation to the undertaking will include the following: <ol style="list-style-type: none"> <li>1 Preparing a consultation document setting out the details of any proposed variation;</li> <li>2 Publishing the consultation document and providing copies of the consultation document directly to all Users and Applicants;</li> <li>3 Arranging for and requesting written responses and face to face consultations with Users and Applicants or interested third parties;</li> <li>4 Publishing a summary of any responses received and confirming, varying or withdrawing the proposed variation;</li> <li>5 In case of any amendment to the proposed variation, CBH will seek further written responses and invite face to face consultation before</li> </ol>

		<p>confirming the proposed variation or withdrawing the proposed variation;</p> <p>6 If CBH intends to proceed with a variation on an amended variation, it shall submit that variation for approval to the ACCC.</p>
<b>Issue 13</b>		<b>In relation to the timeframes specified in clauses 6, 7 and 8 of the proposed undertaking, please provide an explanation as to why those timeframes are appropriate.</b>
	CBH response	<p>In respect of clause 6 of the proposed undertaking, CBH has taken into account the responses from stakeholders as part of the undertaking consultation process and shall be proposing a revised publication deadline for price and non price terms of 31 August of each year (see clause 6.1). CBH will finalise the price and non-price terms prior to that deadline. In doing so, CBH points out that there is a significant amount of effort required to integrate the proposed methods of access and to revise and incorporate a revised capacity allocation system into the port terminal operations against the background of the finalisation of this Undertaking.</p> <p>In respect of the balance of clauses 6, 7 and 8, the timeframes suggested are considered by CBH to be appropriate for the following reasons:</p> <ol style="list-style-type: none"> <li>1 They strike a balance between the need for CBH and applicant to engage in good faith negotiations taking account of the need for all parties to consult with advisers and stakeholders (eg shareholders, owners, customers, etc), the need for timely processing and the resolution of any conflict or disputes that may arise as part of the process;</li> <li>2 It is important to remember that whilst an Applicant has to negotiate with CBH as a single Port Terminal Service provider in Western Australia, CBH may have to negotiate with up to 23 or more access seekers. Such an obligation could prove to be very onerous for CBH and is likely to require substantial resources for a large amount of activity within a compressed period of time. Further, managing 23 different negotiations alive and in compliance with the requirements and timeframes specified in the Undertaking will require the deployment of considerable additional resources and further expense for CBH.</li> <li>3 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 undertaking and the Dalrymple Bay Coal Terminal access undertaking; and</li> <li>4 In the case of the undertakings referred to above, similar infrastructure and service access and logistic coordination issues were addressed and the undertakings considered appropriate by the ACCC.</li> </ol>
<b>Issue 14</b>		<b>Clause 6.4 proposes a mechanism by which CBH may provide access to Applicants or Users, including its own Trading Business, on differentiated terms, provided such terms are consistent with the objectives of the proposed undertaking, taking into account the 21 matters set out in clause 6.5, and offered on an arms length commercial basis.</b>
<b>14(a)</b>		<b>If in a given circumstance CBH considered that one of the matters listed in clause 6.5 provided ‘commercial justification’ for providing access on differentiated terms, what information or evidence would CBH rely upon to demonstrate that such ‘commercial justification’ existed and different terms were appropriate?</b>

	CBH response	<p>Clause 6.1 of the proposed undertaking specifies that CBH must not provide access to applicants or users on terms and conditions which are different from Reference Prices or Standard Terms (or the price and non price terms offered to another Applicant or User) <b>unless</b> those different terms are consistent with the Objectives of the undertaking set out in clause 2; <b>and</b> are commercially justifiable taking into account the matters set out in clause 6.5; <b>and</b> are on an arms length commercial basis.</p> <p>In summary, CBH proposes that any decision will be based on a consideration of <b>all</b> of the matters listed in clause 6.5 <b>and</b> only where such a decision is consistent with the Objectives of the Undertaking set out in clause 2.</p> <p>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.</p> <p>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.</p>
<b>14(b)</b>		<b>How would CBH communicate the reasons for such terms to the Applicant/User?</b>
	CBH response	<p>CBH will communicate the reason for offering differentiated price and non price terms by outlining the process of assessment of the requirements specified in clause 6.4 and 6.5 that it has conducted, including an analysis of the information and evidence relied upon, any weighting allocated amongst the matters considered and written reasons for reaching its conclusion.</p>
<b>14(c)</b>		<b>What measures will CBH implement to ensure that differentiated terms are offered on an arms length commercial basis to its own Trading Business?</b>
	CBH response	<p>If GPPL seeks access under the Undertaking CBH is obliged to comply with clause 6.4 and 6.5. GPPL will be treated in exactly the same manner as any other applicant. Measures that CBH proposes to implement to ensure that differentiated terms are offered on an arms length commercial basis to its own trading business GPPL are as follows:</p> <ol style="list-style-type: none"> <li>1 The processes described in the preceding responses shall be applied to all Applicants and Users including Grain Pool Pty Ltd;</li> <li>2 The process of determining whether different terms and conditions can be offered to any user or applicant (including CBH's own trading business, GPPL will be conducted entirely by and confined to personnel within the CBH Grain Operations division (ie the provider of the port terminal services) in full compliance with CBH's ring fencing and business segregation rules and policies;</li> <li>3 Collation of records of requests for or determinations of non standard price and non price terms will be maintained and copies retained in accordance with CBH's legal obligations and document retention practices.</li> </ol>
<b>Issue 15</b>		<b>In clause 6.2(b), what does CBH envisage as 'appropriate "holding over" provisions'?</b>



	CBH response	<p>In clause 6.2(b), CBH envisages that appropriate holding over provisions would be:</p> <ul style="list-style-type: none"> <li>to 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 due and owing and for CBH to continue to perform the agreement would lead to further bad debt risk for CBH); but</li> <li>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.</li> </ul>
<b>Issue 16</b>		<b>Under what circumstances would CBH envisage varying Standard Terms or Reference Prices pursuant to clause 6.6? Does CBH propose any limitations or restrictions on its ability to make such variations? How many times in a particular year would CBH be likely to vary Standard Terms or Reference Prices?</b>
	CBH response	<p>CBH envisage varying standard terms of reference prices pursuant to clause 6.6 in very limited circumstances. It does not expect that it would do so more than once in any year, if at all.</p> <p>Such circumstances may include:</p> <ul style="list-style-type: none"> <li>The imposition of any direct costs associated with changes in legislation (eg taxation, levies or any new or amended form and levels of taxation or levy); or</li> <li>Unforeseeable changes in circumstances directly affecting the provision of the port terminal services;</li> <li>CBH has not varied its standard terms or prices during the course of the operational period of those terms or prices in the past.</li> <li>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 force of the WEMA undertaking.</li> </ul> <p>CBH does not propose any additional limitations or restrictions on the making of such variations but points out that any variations proposed must be published in advance and provided to an affected party, the ACCC and stakeholders with the opportunity to comment, endorse or dispute the proposed variation before it comes into force.</p>
<b>Issue 17</b>		<b>What is the role of bulk wheat Exporters in the variation process set out in clause 6.6, if any? (Such as consultation prior to publication of new prices, or renegotiation of existing prices?)</b>
	CBH response	<p>The role of bulk wheat Exporters in the variation process set out in clause 6.6 is from their position as Users or potential Applicants for access to port terminal services.</p> <p>Because the likelihood of variations under clause 6.6 being made is low, and because the purpose of the clause is to respond expeditiously to</p>

		<p>exceptional circumstances, publication of the proposed variation is suggested as the most effective mean of proceeding in such circumstances.</p> <p>CBH is mindful of the objectives of the undertaking contained in clause 2 and in particular will take other appropriate alternative means of dealing with the circumstances as they arise in relation to any proposed variation.</p> <p>The engagement of the variation provision in clause 6.6 is expected to be by exception and as a matter of last resort.</p>
<b>Issue 18</b>		<b>In relation to the requirement to publish a variation at least 30 days prior to its effective date in clause 6.6(b), please elaborate on why there is no similar requirement in relation to the annual publication of Standard Terms and Reference Prices?</b>
	CBH response	CBH recognises that there is an inconsistency in the publication requirement under clause 6.6(b) and clause 6.1(a). As noted in the response to issue 13 above, CBH proposes that it publish its Standard Terms and Reference Prices on or before 31 August of each year.
<b>Issue 19</b>		<b>Clause 6.1 proposes that CBH must publish Reference Prices and Standard Terms by no later than 30 September of each year. Please elaborate on whether publication by this date allows sufficient time for an exporter to have an Access Agreement in place for the harvest season in a particular year.</b>
	CBH response	Please see the response to issue 18 above.
<b>Issue 20</b>		<b>What ability will bulk wheat Exporters have to negotiate terms prior to the publication of Reference Prices and Standard Terms, given that CBH is required to publish by no later than 30 September in each year?</b>
	CBH response	Please see the response to issue 18 above.
<b>Issue 21</b>		<b>Under what terms and conditions will CBH provide access to its port terminal services to wheat Exporters prior to execution of an Access Agreement (such as where parties are involved in a Dispute)?</b>
	CBH response	CBH proposes that the terms and conditions upon which access will be provided to its port terminal services to wheat Exporters prior to the execution of an access agreement, such as where parties are involved in a dispute, shall be the Standard Terms and Reference Prices current at the time that the Applicant proposes to access the services. 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.
<b>Issue 22</b>		<b>In relation to clause 7.4(a)(ii)(B), what factors will CBH take into account in deciding if a request is ‘unduly onerous’ or ‘disproportionate’?</b>
	CBH response	<p>The factors that CBH will take into account in determining if a request is “unduly onerous” or “disproportionate” are:</p> <p>(a) in both cases, CBH will 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</p>

		(b) in considering whether a request is unduly onerous or the expense is disproportionate to the benefit, CBH will 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.
<b>Issue 23</b>		<b>In relation to clause 7.4(b)(i), why is it necessary for CBH to have discretion not to negotiate with the Applicant if CBH considers that the Applicant has not followed the process in the proposed undertaking? What factors will inform CBH’s consideration that an Applicant has not followed the process?</b>
	CBH response	<p>It is necessary for CBH to have the discretion not to negotiate with an Applicant if CBH considers the Applicant has not followed the processes prescribed in the proposed Undertaking including the Applicants obligations under the Undertaking for the following reasons:</p> <ul style="list-style-type: none"> <li>(a) CBH provides services to and is required to coordinate access among a number of access seekers or potential access seekers;</li> <li>(b) CBH as the operator of the port terminal services in complying with its obligations under the 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;</li> <li>(c) CBH must have discretion to take into account the failure by an Applicant to comply with its obligations including compliance with the processes specified in the Undertaking to safeguard the legitimate interests of other Users of the port terminal facility and to ensure as far as possible that other Users or Applicants are not disadvantaged or prejudiced as a result of the failures of an Applicant in particular circumstances;</li> <li>(d) Under the Undertaking, CBH is the entity responsible for brokering and resolving applications for access, and in the performance of that function CBH must deal equitably with all applicants and potential applicants to ensure as far as possible that the acts and omissions of Applicants engaging in the process do not disadvantage or prejudice “innocent” Applicants or potential Applicants.</li> </ul> <p>The factors that will inform CBH’s consideration that Applicants are not following the processes include:</p> <ul style="list-style-type: none"> <li>(e) The timeliness of compliance with the procedural steps outlined in the process;</li> <li>(f) The Applicant’s compliance with its other obligations set out in the Undertaking;</li> <li>(g) The reasonably anticipated consequences of the failure by an Applicant to comply with the procedural requirements and other obligations under the Undertaking in so far as those consequences may adversely effect other Applicants or potential Applicants;</li> <li>(h) The diversion of CBH’s resources away from other Applicants to deal with the failure of individual Applicants to follow the procedural requirements and comply with their obligations under the Undertaking.</li> </ul>
<b>Issue 24</b>		<b>In relation to clause 7.5 &amp; Schedule I (on the proposed form requirements for an access application):</b>
<b>24(a)</b>		<b>What is meant by ‘Applicant’s Application Type’ and ‘Business Category?’</b>

	CBH response	<p>"Customer Type" is a reference to whether they are accredited, conditionally or unconditionally, by the WEA under WEMA.</p> <p>"Business Category" is a reference to the nature of the Applicant as an exporter, trader, buyer, agent or otherwise describes their status.</p>
<b>24(b)</b>		<b>Why is it necessary for the Applicant to have a website in order to seek access? If the Applicant does not have a website, will CBH refuse access?</b>
	CBH response	<p>If an Applicant does not have a website, CBH will not refuse access. This particular requirement was intended as a means of CBH collecting information on an Applicant that is easily accessible and publicly available. However along with some other issues, the absence of a website may indicate that an Applicant is not a bona fide applicant in situations where the Applicant, has no website, operates using a post office box, is not a corporation registered or officially recognised in Australia..</p> <p>While any applicant who has access to the CBH website can obtain information that is available to users of that website, there are information exchange services between Applicants and Users and CBH that can only be accessed or operated where the Applicant has access to the internet.</p>
<b>Issue 25</b>		<b>In relation to clause 7.6(b)(iv), what factors would CBH take into account in deciding if the negotiations were not progressing in good faith towards the development of an Access Agreement within a reasonable time period?</b>
	CBH response	<p>The factors that CBH will take into account in deciding if negotiations are not progressing in good faith towards the development of an Access Agreement within a reasonable time period are:</p> <ul style="list-style-type: none"> <li>(c) The timeliness of compliance with the procedural steps outlined in the process; and</li> <li>(d) The Applicant's compliance with its other obligations set out in the Undertaking.</li> </ul>
<b>Issue 26</b>		<b>What is meant by 'amended Standard Terms' in clause 7.7(b)(ii)? How does this clause interact with the ability of the CBH to offer different terms under clause 6.4? (That is, what, if any, is the difference between an 'amended Standard Term' and a 'different term'?)</b>
	CBH response	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.
<b>Issue 27</b>		<b>If the Negotiation Period ceases, will the Applicant be entitled to make another application for access? How would any further application be dealt with?</b>
	CBH response	Yes. All applications would be dealt with on the same basis but subject to Applicants making further applications and negotiating those applications in good faith.
<b>Issue 28</b>		<b>With regard to the definition of 'Dispute' in clause 1.1, what does CBH mean by a 'bona fide dispute'? Please provide examples of</b>

		<b>disputes that CBH considers would be bona fide, and examples of disputes CBH considers would not be bona fide.</b>
	CBH response	A bona fide dispute is a requirement that a dispute has been brought in good faith and without fraud. The intent of adding the requirement for a bona fide dispute is to distinguish disputes that are vexatious, frivolous, an abuse of process or have been made in bad faith, from genuine and substantial evidence based disputes.
<b>Issue 29</b>		<b>Clause 8.1(b) proposes that any disputes in relation to an Access Agreement once executed will be dealt with in accordance with the provisions of that Access Agreement. Does this include disputes regarding claims of discriminatory conduct? What dispute resolution mechanism will be provided under the Access Agreement?</b>
	CBH response	An allegation of discrimination has the potential to be a breach of the Undertaking itself, specifically clause 9.2, which prohibits discrimination in operational decision-making. Clause 8.1(b) requires amendment to clarify the inconsistency.
<b>Issue 30</b>		<b>In relation to clause 8.1(c), why should the report to the ACCC only deal with material disputes? What does CBH mean by a ‘material’ dispute? What does CBH consider to be a non-material dispute? Are material disputes different to bona fide disputes? If so, how?</b>
	CBH response	<p>Clause 8.1(c) proposes that material disputes only are reported to the ACCC on the basis that only disputes which relate to the compliance with and performance of the obligations of the parties under the terms of the Access Undertaking are relevant for the ACCC to consider in its role under the provisions of the WEMA.</p> <p>CBH also considers that any disputes arising in respect of Access Agreements and port terminal rules to be material matters to be reported to the ACCC.</p> <p>CBH considers that disputes which relate to insubstantial matters such as payment of invoices, debt collection, matters that are resolved amicably and quickly with the agreement of the parties and the like are not material disputes that require to be reported.</p> <p>CBH does not consider that it is required to report disputes that are not considered bona fide. Of course, that does not prevent the other party to the dispute from doing so.</p>
<b>Issue 31</b>		<b>In relation to clause 8.3(c), has CBH 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? Please provide copies of any correspondence between CBH and the IAMA to this effect.</b>
	CBH response	CBH through its professional advisers has confirmed with the Institute of Arbitrators and Mediators of Australia ( <b>IAMA</b> ) that its involvement as a mediator as contemplated by the proposed undertaking is workable.
<b>Issue 32</b>		<b>Who does CBH envisage as likely candidates for Arbitrator, especially considering the matters set out in clauses 8.6 — 8.9?</b>
	CBH	CBH has considered the dispute resolution practitioner membership of the IAMA and the qualifications of likely candidates for arbitrators in the circumstances envisaged under the provisions of the Access Undertaking in particular taking into account the matters set out in clauses 8.6 to 8.9

	response	and considers that the IAMA has the capability and available, suitably qualified persons to act as an arbitrator as required under the terms of the Undertaking.
<b>Issue 33</b>		<b>In relation to clause 8.4(b), how soon after referral to arbitration must CBH notify the ACCC of the details of the dispute?</b>
	CBH response	In relation to clause 8.4(b), CBH will notify the ACCC within 5 Business Days of the details of the dispute being referred to arbitration .
<b>Issue 34</b>		<b>What does CBH estimate as the likely duration and cost of an arbitration process?</b>
	CBH response	The duration and cost will depend on the complexity of the issues raised in the dispute and the approach taken by the parties. CBH estimates that an arbitration should be completed in 1 to 2 months. If a dispute were unable to be resolved prior to the required date for services to commence, CBH would be 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.
<b>Issue 35</b>		<b>In relation to clause 8.9(b), who determines whether an Applicant does not comply with a determination or direction of the Arbitrator? What is the basis for reaching a conclusion that non-compliance has occurred?</b>
	CBH response	In relation to clause 8.9(b) the determination of whether an Applicant has complied with the determination or direction of an arbitrator may itself be referred to the arbitrator and if necessary, to a Court.  Whether a person has complied is a question of fact. The basis for reaching a conclusion as to whether non compliance has occurred will be determined by evidence of the Applicant's compliance with the specific terms if any determination or direction of an arbitrator provided either by the Applicant or CBH and referred to the arbitrator or a Court for determination.
<b>Issue 36</b>		<b>Will the auditor's report, referred to in clause 13 of Schedule 2 to the proposed undertaking, be required to identify potential breaches (if any) of the Ring Fencing Rules set out in Schedule 2?</b>
	CBH response	Yes. CBH considers that in the course of an auditor's review of compliance by a port operator's compliance with the Ring Fencing Rules, the process of that review would identify potential breaches of those Ring Fencing Rules.
<b>Issue 37</b>		<b>Under the accounting separation provisions in clause 7 of Schedule 2, what cost allocation methodology does CBH propose to use in allocating the costs to different business areas?</b>
	CBH response	(i) 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.  (ii) 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

		<p>(iii) Grain Pool are 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</p> <p>(iv) The audit team from Ernst &amp; Young for Grain Pool is also separate from the CBH audit team and that Ernst &amp; Young audit team audits and verifies that all costs are correctly allocated to the right entity.</p> <p>The Annual Report of Co-operative Bulk Handling Limited complies with Australian Accounting Standards which include Australian equivalents of International Financial Reporting Standards (AIRS) 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.</p> <p>In addition, CBH has been required by the Australian Taxation Office to ensure that costs are not improperly attributed to Grain Pool in order to reduce the amount of tax that is required to be paid by Grain Pool. In this regard it should be noted that any incentive to favour Grain Pool with lower charges is counterbalanced by the additional tax that would be required to be paid by Grain Pool.</p>
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# Notes to the Financial Statements

For the year ended 31 October 2008

## Note 29. Business Unit Results

	STORAGE AND HAN- DLING	GRAIN TRADING AND MARKET- ING	FLOUR MILLING (Note 27 (b))	ENGI- NEERING AND OTHER SERVICES	OTHER INVEST- MENTS (Note 27 (a)) (i)	HOLDING COSTS	ELIMINA- TIONS	TOTAL
	\$'000	\$'000	\$'000	\$'000	\$'000	\$'000	\$'000	\$'000
<b>Year ended 31 October 2008</b>								
<b>Business Unit Revenue</b>								
Sales to External Customers	199,736	895,861	936,861	6,696	3	618	(936,861)	1,102,914
Sales to other Business Units	62,026	5,196	-	81,673	-	-	(148,895)	-
<b>Total Business Unit Revenue</b>	<b>261,762</b>	<b>901,057</b>	<b>936,861</b>	<b>88,369</b>	<b>3</b>	<b>618</b>	<b>(1,085,756)</b>	<b>1,012,914</b>
<b>Total Business Unit Results</b>								
Profit/(loss) before tax	2,061	50,038	20,948	6,983	1,348	(650)	(6,301)	74,427
Minority interest share	-	-	(1,661)	-	-	-	-	(1,661)
Operating profit/(loss) before tax	2,061	50,038	19,287	6,983	1,348	(650)	(6,301)	72,766
<b>CBH Share (%)</b>	<b>100%</b>	<b>100%</b>	<b>50%</b>	<b>100%</b>	<b>50%-100%</b>	<b>100%</b>		
<b>CBH Share Business Unit Result</b>								
Income tax expense	-	(15,022)	(3,102)	(2,095)	(1,352)	-	-	(21,571)
Net profit/(loss) after tax	2,061	35,016	6,542	4,888	(679)	(650)	(6,301)	40,877
<b>Adjusted for:</b>								
Impairment of assets	(7,238)	-	-	-	(10,378)	-	7,238	(10,378)
Unrealised intercompany profits	-	-	(152)	-	-	-	-	(152)
Notional depreciation resulting from fair valuing EPPFM fixed assets	-	-	-	-	-	(1,885)	-	(1,885)
Dividend Distribution	-	-	-	-	-	-	-	-
Holding Costs	-	-	-	-	-	(1,929)	-	(1,929)
Unrealised foreign exchange on translation	15,222	-	-	-	-	1,811	(3,423)	13,610
<b>CBH Share after adjustments</b>	<b>10,045</b>	<b>35,016</b>	<b>6,390</b>	<b>4,888</b>	<b>(11,057)</b>	<b>(2,653)</b>	<b>(2,486)</b>	<b>40,143</b>

(i) Includes CBH investment in subsidiary Westgrains Insurance Pty Ltd.



<b>Issue 38</b>		<b>Clause 13(b) of Schedule 2 of the proposed undertaking states that the ACCC will be notified of an independent auditor selected by CBH. Will the ACCC have any input into the appointment of the independent auditor?</b>
	CBH response	CBH propose that as the independent auditor is selected and appointed by CBH, upon notification of that appointment to the ACCC, the ACCC would 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
<b>Issue 39</b>		<b>Does CBH currently report (internally or externally) on any key performance indicators/service standards in relation to its port terminal operations? If so, please list and explain the measures.</b>
	CBH response	CBH does not report on key performance indicators and service standards in relation to its port terminal operations. However, CBH transparently makes available to the market information setting out the amount of time between the steps of a vessel being nominated, arriving, commencing to load and departing. This information is contained on the shipping stem.
<b>Issue 40</b>		<b>Clause 2(e)(i)(D) of the proposed undertaking refers to reaching an appropriate balance between the interests of various parties, including the legitimate business interests of CBH in meeting its own or its Trading Business' 'reasonably anticipated requirements' for Port Terminal Services.</b>
<b>40(a)</b>		<b>Does this objective mean that CBH intends to reserve and set aside its own or its Trading Business' 'reasonably anticipated requirements' and then provide access to third parties for the remaining capacity? If setting aside capacity for itself or its Trading Business, what criteria will CBI-I use to assess 'reasonably anticipated requirements'?</b>
	CBH response	<p>CBH does not intend to nor will it reserve and set aside its own or its Trading Business' "reasonably anticipated requirements" and provide access to third parties for the remaining capacity.</p> <p>As explained in earlier responses above, CBH will deal with all applicants for access including its Trading Business, GPPL on the same terms and in the same manner.</p> <p>CBH refers to the proposed capacity allocation process described in section 5 above outlining the means by which capacity will be allocated.</p>
<b>40(b)</b>		<b>If CBH does intend to set aside capacity for itself or its Trading Business, how does this interact with the relevant ring-fencing obligations?</b>
	CBH response	See response to Issue 40(a) above.
<b>40(c)</b>		<b>How does CBH otherwise propose to balance the port capacity requirements of itself or its own Trading Business with third party bulk wheat Exporters?</b>
	CBH response	See response to Issue 40(a) above.

<b>Issue 41</b>	<b>Clause 6.2 of the Draft Port Terminal Rules (included as Attachment 1 to the CBH submission) proposes a mechanism by which CBH assesses expressions of interest received and allocates 'Capacity' for shipping for a relevant period. Have these rules been replaced with new rules? If so, please provide a copy of the latest port terminal rules and explain how the capacity of a given port is determined. Once all of the capacity has been allocated, are there any mechanisms by which additional capacity can be allocated? Is there a difference in the cost for users between the original capacity and any additional capacity? If there is a difference, what is the basis for the difference?</b>
CBH response	<p>At the time of submitting the draft undertaking to the ACCC on 14 April 2009, CBH were proposing the development of a capacity allocation process through an expressions of interest process.</p> <p>Subsequent to the date of submission of the proposal, CBH has completed consultations with stakeholders in respect of alternative means of capacity allocation and has developed an auction based capacity allocation system the details of which are explained more fully in section 6 above.</p>



## Schedule 3 – CBH response to additional issues raised in stakeholder submissions

Issue 1		Physical access to Ports
1.1	Stakeholder position	SGS Australia Pty Ltd and Intertek, in their submissions dated 26 May 2009 <sup>110</sup> and 29 May 2009 <sup>111</sup> respectively, raised the issue of physical access to port facilities by superintendence and inspection companies.
1.2	CBH response	The purpose of access undertakings provided under WEMA is to allow accredited wheat Exporters access to port terminal services to export wheat in bulk. The access undertakings are not concerned with providing physical access to the port terminal to non-wheat exporting third parties. It is therefore not appropriate for CBH to respond to this issue in this submission.
Issue 2		Transparency of stock information
2.1	Stakeholder position	In its submission dated 29 May 2009, Riverina submits that an obligation be included in the access undertaking that CBH provide traders with timely access to stock information in a useable format. <sup>112</sup> AGEA submits, in its submission of 15 May 2009, that bulk handlers should provide wheat Exporters with more visibility about stock accumulation and movement. <sup>113</sup>

<sup>110</sup> SGS Australia Pty Ltd submission, 26 May 2009.

<sup>111</sup> Intertek submission, 29 May 2009.

<sup>112</sup> Riverina submission, 29 May 2009, 10-11.

<sup>113</sup> AGEA submission, 15 May 2009 at pg 4.

2.2	CBH response	<p>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.</p> <p>To the extent that CBH's information services under Grain Express are relevant, CBH currently provides the following information to marketers:</p> <ul style="list-style-type: none"> <li>• Acquisitions (Grower loads)</li> <li>• Acquisitions Name &amp; Address of growers - matches each Acquisition transmission</li> <li>• Movements (including freight) from site to site within the CBH system</li> <li>• Outturns (Domestic) for all non-shipping transactions for grain leaving the control of CBH</li> <li>• Stock levels (operational) for all stocks held by CBH, at a site, grain, grade level</li> <li>• 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.</li> </ul> <p>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.</p>
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Issue 3		Coordinated / National approach
3.1	Stakeholder position	The Department of Agriculture and Food (WA) submits that the undertakings should adopt a national approach to their period of application, the Shipping Stem information and other market related information to be made available by bulk handlers <sup>114</sup> .
3.2	CBH response	CBH agrees this may be desirable but is not essential.

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<sup>114</sup> DAFWA submission, 27 May 2009.

<b>Issue 4</b>		<b>Market competition and incentives to discriminate by bulk handlers</b>
4.1	Stakeholder position	CBH's monopoly position is exacerbated by Grain Express which allows CBH to supply grain storage and handling services on condition that Growers and exporters of grain acquire grain supply coordination services from CBH and transport services from CBH whilst their grain remains in CBH's custody. <sup>115</sup>
4.2	CBH response	We refer to Part 2 of this submission.

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<sup>115</sup> AGEA submission, 29 May 2009, 3 at [3.5].

# Annexure 1: Auction Process Outline

# Annexure 2: Draft Auction Rules



# Annexure 3: Bundle of Press Articles

# Annexure 4:

[CONFIDENTIAL - REDACTED]

# Annexure 5:

[CONFIDENTIAL - REDACTED]

# Annexure 6:

[CONFIDENTIAL - REDACTED]

# Annexure 7:

[CONFIDENTIAL - REDACTED]