



**SUBMISSION TO THE
AUSTRALIAN COMPETITION AND CONSUMER COMMISSION**

**DRAFT DECISION BY
AUSTRALIAN COMPETITION AND CONSUMER COMMISSION ON THE
PORT TERMINAL SERVICES ACCESS UNDERTAKING BY
CO-OPERATIVE BULK HANDLING LTD**

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SUBMISSION TO THE AUSTRALIAN COMPETITION AND CONSUMER COMMISSION BY
THE PASTORALISTS AND GRAZIERS ASSOCIATION OF WA (INC.)

INTRODUCTION

1. Background

- 1.1 The Pastoralists and Graziers Association of WA (Inc) (“**PGA**”) is a non-profit industry organisation established in 1907, which represents primary producers in both the pastoral and agricultural regions in Western Australia. The PGA represents around 1200 progressive Western Australian grain growers who believe in the benefits of competition and the reduction of government regulation within their industry. Our membership produces on average one third of the Western Australian grain harvest per annum.
- 1.2 On 6 August 2009, the Australian Competition and Consumer Commission (“**ACCC**”) released its draft decision (“**Draft Decision**”) not to accept the Port Terminal Services Undertaking (“**Undertaking**”) of Co-operative Bulk Handling Ltd (“**CBH**”).
- 1.3 The Draft Decision details the ACCC’s preliminary assessment of the proposed Undertaking lodged by CBH on 14 April 2009 for consideration under Division 6 of Part IIIA of the *Trade Practices Act 1974 (Cathy)* (“**TPA**”).
- 1.4 CBH submitted its proposed Undertaking to the ACCC pursuant to Part IIIA of the TPA for the purpose of satisfying the access test for the period on or after 1 October 2009 as set down under the *Wheat Export Marketing Act 2008 (Cth)* (“**WEMA**”) .
- 1.5 The access test is set out in section 24 of the WEM Act, and does not relate to any other part of the export grain supply chain other than ‘Port

Terminal Services'. The rationale for the access test in the WEMA is the concern that owners of port terminals who wish to market bulk wheat for export do not attempt to use their ownership of port terminals to derive an unfair advantage in their marketing operations.

- 1.6 Under the 'access test' providers of port terminal services must also comply with "continuous disclosure rules" set out in subsection 24(4) of the WEMA.
- 1.7 The proposed Undertaking relates to the provision of access to services for the export of bulk wheat at four grain terminals operated by CBH in Western Australia. The terminals are Albany; Esperance; Geraldton; and Kwinana.
- 1.8 The ACCC Draft Decision reached the view that it would not accept CBH's proposed Undertaking in its current form. The ACCC identified several key issues where the approach proposed by CBH was not considered appropriate in regard to section 44ZZA (3) of the TPA.
- 1.9 The PGA makes this submission on the Draft Decision by the ACCC on the access undertaking applications of CBH.
- 1.10 The structure of this submission largely follows the structure of the ACCC Draft Decision, and in particular focuses on the following areas outlined in the Draft Decision including:
 - a) Section 7 Scope
 - b) Section 8 Publish/negotiate/Arbitrate
 - c) Section 9 Indicative Access Agreement
 - d) Section 10 Non-discrimination
 - e) Section 11 Ring-Fencing
 - f) Section 12 Capacity Management
 - g) Section 13 Other Issues
- 1.11 The submission focuses on the following questions published by the ACCC under Section 2 Procedural Overview in the Draft Decision:

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

COMMENT ON SPECIFIC ISSUES

2. Scope (Section 7)

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

- 2.1 The PGA agrees with the ACCC's acceptance of CBH's submission that the proposed Undertaking applies only to wheat. Limiting the scope of the Undertaking to wheat reduces any potential risk of imposing regulation when the industry is newly liberalised and in transition.

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

- 2.2 The PGA does not agree with the ACCC acceptance of the CBH submission that it is appropriate that the proposed Undertaking applies only to services offered at port, and not up-country.
- 2.3 Port terminal services are but one part of the services necessary for access to bulk wheat export markets. The upcountry activities of port operators are closely related and cannot feasibly be separated from port terminal services. CBH is the monopoly provider of both port terminal

services and upstream services in Western Australia. The proposed Undertaking does not ensure that growers are not disadvantaged due to a lack of competition through the control of both services by CBH.

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

- 2.4 The PGA agrees with the ACCC's non-acceptance of CBH's submission that the proposed Undertaking applies only to those customers who wish to acquire port terminal services on a stand alone basis, and that it would not apply to those customers who acquire port terminal services as part of a bundled service.
- 2.5 CBH offers a consolidated or bundled wheat export supply chain logistics service under an exclusive dealing notification provided to the ACCC, known as Grain Express. Under Grain Express CBH supplies grain and handling services, grain supply co-ordination services, and grain transport services to growers while the grain remains in CBH's custody. When the grain is marketed the storage and handling fees are charged to the marketer.
- 2.6 The CBH Grain Express notification only relates to the bundling of up-country storage and handling services with transportation to port, while the grain remains in the system. It does not cover the bundling of CBH's port services with its upcountry storage, handling and transportation services.
- 2.7 CBH controls 197 receival sites through out the Western Australian grain belt. Typically, wheat is unloaded at receival sites, sampled, analysed, weighed, graded and sorted. Wheat may also be warehoused for varying periods of time at a site by growers before being sold (where title is transferred to another person). If grain requires fumigation, this is carried out prior to being loaded for transport from a receival site.
- 2.8 Wheat is transported from upcountry receival and storage sites to port by rail or road. Under Grain Express, CBH arranges transport to port, using rail and road service operators which are determined by CBH.

2.9 Access to port terminal services is essential to export bulk wheat from Australia. In Western Australia all grain for export is allocated to Grain Express, so Western Australian growers have no option but to utilise Grain Express in marketing their wheat.

2.10 The absence of alternative upcountry receival sites and port terminal facilities in Western Australia means that it is unlikely that growers who wish to acquire port terminal services on a stand alone basis would be able to do so, as currently these services can only be accessed as part of a bundled service.

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

2.11 The PGA agrees with the ACCC's non-acceptance of CBH's submission that "fumigation of grain as a preventative measure" ought to be expressly excluded from the scope of its proposed Undertaking.

2.12 Port terminal services are but one part of the services necessary for access to bulk wheat export markets. Other necessary services include:

- receival from growers by rail or truck;
- grading;
- fumigation;
- sampling;
- storage;
- segregation and/or blending;
- weighing services;
- rail and road transport services which transport the wheat from storage to the port terminal facility;
- shipping belts and ship loaders

2.13 In Western Australia fumigation is carried out at facilities which are upcountry from the port terminal facilities for a minimum period of 28 days. The upcountry activities of CBH are closely related with the port activities, and cannot feasibly be separated under the Grain Express system.

The drafting of the scope of the proposed Undertaking is not appropriate because it lacks clarity.

2.14 The PGA agrees with the ACCC' that the drafting of the scope of CBH's proposed Undertaking lacks clarity and therefore is not appropriate pursuant to section 44ZZA (3) of the TPA, and section 5 of the WEMA.

2.15 The PGA agrees with the ACCC's recommendations that:

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

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

2.16 The PGA agrees with the ACCC that the Undertaking is to provide access to port terminal services to accredited wheat exporters only, not employees of superintendence companies.

3. PUBLISH/NEGOTIATE/ARBITRATE (SECTION 8)

Appropriateness of publish-negotiate-arbitrate approach

3.1 The PGA agrees with the ACCC that the proposed publish-negotiate-arbitrate component of the proposed Undertaking is vague and ambiguous; does not appropriately address the interests of access seekers; and that as a result is unlikely to ensure fair and transparent access to port terminal services.

3.2 The PGA agrees with each of the ACCC's recommendations on page 129 of the Draft Decision.

4. INDICATIVE ACCESS AGREEMENT (SECTION 9)

Inclusion of an Access Agreement

4.1 The PGA agrees with the ACCC that by CBH not including an Indicative Access Agreement in the proposed Undertaking, it may result in a lack of certainty and clarity for potential access seekers, and is not appropriate under section 44Zza(3) of the TPA.

4.2 The PGA believes that CBH's proposed Undertaking does not contain minimum terms and conditions in relation to the provision of access to all port terminal services, both upstream and downstream. In particular, the terms and conditions should include:

- (a) the prices for the services;
- (b) a clearly specified list of all services received for that price, including upstream and downstream;
- (c) clearly specified circumstances in which higher charges (e.g., overtime) may apply, and CBH providing documentary proof that overtime charges were incurred and why they were necessary;
- (d) limited opportunity to vary price and non-price terms, Pricing should be based on the cost of CBH in providing the service, plus a reasonable commercial margin
- (e) an effective right for growers to recover their loss and damage against CBH if CBH breaches the terms and conditions of the port terminal services;

4.3 Indicative Access Agreements are required in order to permit growers and exporters to effectively negotiate with CBH, thus ensuring that terms and conditions are entered into by all parties.

Variation of an Indicative Access Agreement

4.4 The PGA agrees with the ACCC that the CBH approach to variation of

the “Standard Terms” is not appropriate, as the ability for CBH to unilaterally change the Indicative Access Agreement may result in a lack of certainty and clarity for potential access seekers.

- 4.5 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. Growers and exporters need to be able to make long term decisions and require certainty in their contracts in order to do so.

5. NON-DISCRIMINATION (SECTION 10)

Appropriate to include a non-discrimination clause in the proposed Undertaking

- 5.1 The PGA agrees with the ACCC that it is appropriate that CBH’s proposed Undertaking include robust non-discriminatory and no hindering access clauses obligating it to not discriminate against access seekers in favour of its affiliated trading business.
- 5.2 The PGA agrees with the ACCC that it would be appropriate for CBH’s proposed Undertaking to provide for an annual audit procedure of compliance with the non-discrimination clause.
- 5.3 The PGA acknowledges that the ACCC has not, in its assessment of CBH’s proposed Undertaking formed any views on the claims by interested parties of current or past discriminatory behaviour by CBH in favour of its trading arm, and notes that these matters are being assessed by the ACCC’s Enforcement and Compliance Division.

6. RING-FENCING (SECTION 11)

- 6.1 The PGA agrees with the ACCC that the ring-fencing rules in CBH’s proposed Undertaking do not, in their current form serve as an effective safeguard against anti-competitive discrimination in the provision of port terminal services.

6.2 The PGA agrees with the ACCC's non-acceptance of CBH's position that ring-fencing measures provided to the ACCC in conjunction with the current access undertaking assessment can apply in substitution for those arrangements referred to in CBH's Grain Express notification.

7. CAPACITY MANAGEMENT (Section 12)

7.1 The PGA agrees with the ACCC that it is not appropriate that CBH's proposed Undertaking does not include policies and procedures for managing demand for the Port Terminal Services, including shipping slot allocation and accumulation.

7.2 CBH may be able to manipulate logistics, substitute vessels and/or vary the shipping stem to confer preferential treatment on their trading division, unless the proposed Undertaking provides a level of transparency.

8. OTHER ISSUES (SECTION 13)

Publication of stocks at grain at port

8.1 The PGA agrees with the ACCC that it is not appropriate that the CBH's proposed Undertaking does not include an obligation to publish stocks of grain at port.

8.2 The PGA holds that the current ring-fencing arrangement may not be adequate enough to protect this information from being made available to CBH's trading division.

8.3 The PGA does not agree with the ACCC that it is appropriate that the CBH's proposed Undertaking does not include an obligation to publish stocks of grain at up-country networks.

8.4 CBH is the monopoly provider of both port terminal services and upstream services in Western Australia. CBH controls 197 receival sites; and the export supply chain through Grain Express. Growers sell their wheat to a wide range of grain traders or marketers at any point along the

export supply chain, and wheat may be traded several times while it remains in the CBH system before being sold to the end user.

- 8.5 Growers require aggregate information of upcountry stack levels to ensure that they have a fair and competitive position in the market place.

Publication of key port terminal information

- 8.6 The PGA agrees with the ACCC that it is appropriate that arrangements be provided in the CBH proposed Undertaking to address the potential for CBH's marketing arm to misuse port terminal information to its advantage.
- 8.7 The PGA agrees with the ACCC's recommendation that the proposed Undertaking require the publication of key port terminal information, such as vessel nominations on the shipping stem, thus increasing the transparency within the system.

Publication of key service standards

- 8.8 The PGA agrees with the ACCC that it is not appropriate that CBH's proposed Undertaking does not include a requirement to report on a number of service performance levels.
- 8.9 The PGA agrees with the ACCC's recommendations of possible indicators including:
- ship rejections;
 - cargo assembly times;
 - transport queuing times;
 - port block outs;
 - over time charged;
 - demurrage;

CONCLUSION

9. Draft Decision on CBH's Access Undertaking (Section 14)

- 9.1 The PGA agrees with the ACCC that in relation to the access Undertaking provided by CBH on 14 April 2009, and in particular to the

matters listed in s.44ZZA(3) of the TPA, that it is not appropriate for the ACCC to accept the Undertaking.

- 9.2 The PGA does consider that the proposed Undertaking would be acceptable if the recommendations proposed by the ACCC in the Draft Decision were adopted.
- 9.3 The PGA does not consider that CBH's proposed standard terms and conditions of access to port terminal services (Annexure A to the Draft Decision) form an appropriate Indicative Access Agreement, as it lacks certainty and clarity for potential access seekers, and is not appropriate under section 44Zza(3) of the TPA.
- 9.4 The PGA does not consider that CBH's revised Port Terminal Rules (Annexure B to the Draft Decision) would be appropriate if attached to a revised undertaking submitted by CBH, as it does not include policies and procedures for managing demand for the Port Terminal Services, including shipping slot allocation and accumulation.

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The Pastoralists and Graziers Association of WA (Inc)
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