AUSTRALIAN COMPETITION TRIBUNAL

Application by Co-operative Bulk Handling Limited (No 3)

[2013] ACompT 3

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| Citation: | Application by Co-operative Bulk Handling Limited (No 3) [2013] ACompT 3 |
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| Parties: | **APPLICATION BY CO-OPERATIVE BULK HANDLING LIMITED FOR A REVIEW OF THE GIVING OF A NOTICE BY THE AUSTRALIAN COMPETITION AND CONSUMER COMMISSION UNDER SECTION 93(3) OF THE COMPETITION AND CONSUMER ACT 2010 TO REVOKE NOTIFICATION N93439** |
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| File number: |  |
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| Tribunal: | **MANSFIELD J (PRESIDENT)**  **GF LATTA (member)**  **R STEINWALL (MEMBER)** |
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| Date of decision: | 19 April 2013 |
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| Catchwords: | **NOTIFICATION** – notification of conduct by wheat growers co-operative of conduct which may infringe s 47 *Competition and Consumer Act 2010* (Cth) (previously *Trade Practices Act 1974* (Cth)) – Australian Competition and Consumer Commission (ACCC) after investigation gave notice under s 93 to revoke Notification – application under s 101A to review notice of ACCC  **REVOCATION OF NOTIFICATION** – Application to review Notice of ACCC revoking Notification of conduct which involved the provision of transport services to use of grain receival and storage services – whether Tribunal satisfied that notified conduct does not and would not be likely to have effect of substantially lessening competition in the grain transport market – whether Tribunal satisfied that notified conduct has resulted or would be likely to result in benefits to public that outweigh detriment to public constituted by any lessening of competition.  **EXCLUSIVE DEALING** – grain growers’ co-operative owned and operated all grain receival sites in Western Australia – co-operative also operated all grain export ports, subject to fixed access regime – co-operative required all grain received by it to be transported to ports by transport arranged by co-operative – most grain transported by rail – co-operative contracted with above rail service provider after competitive tender for provision to co-operative of above rail transport services – whether competition for grain transport market sufficient to indicate no substantial lessening of competition in grain transport market – evidence of potential competition in grain transport market – evidence of marketers about prospects of using alternative grain transport providers – evidence of why grain transport markets and grain sales markets operated interstate – consideration of whether tied provision of services or grain transport market to receival and handling of grain in grain storage market had effect of likely effect of substantially lessening competition in grain transport market  **PUBLIC BENEFIT** – grain growers’ co-operative owned and operated all grain receival sites in Western Australia – co-operative also operated all grain export ports, subject to fixed access regime – co-operative required all grain received by it to be transported to ports by transport arranged by co-operative – most grain transported by rail – co-operative contracted with above rail service provider after competitive tender for provision to co-operative of above rail transport services – identification of potential public benefits – consideration of public benefits of notified conduct – review of claimed public benefits – weighing against public detriment by lessening of competition |
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| Legislation: | *Competition and Consumer Act 2010* (Cth) ss 4G, 44ZZA, 102, 103, 46, 93, 101A, 47  *Co-operatives Act 2009* (WA)  *Bulk Handling Act 1976* (WA) ss 37, 42, 45, 11, 35A, 36, 38  *Bulk Handling Regulations 1967* (WA) reg 26  *Wheat Export Marketing Act 2008* (Cth) s 24  *Commerce Act 1986* (NZ) s 36 |
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| Cases cited: | *Re Queensland Co-operative Milling Association Ltd*  *Re Defiance Holdings Ltd* (1976) 25 FLR 169  *Re Tooth & Co Ltd and Tooheys Pty Ltd* (1979) 39 FLR 1  *Stirling Harbour Services Pty Ltd v Bunbury Port Authority* [2000] FCA 38  *Stirling Harbour Services Pty Ltd v Bunbury Port Authority* [2000] ATPR 41-783  *Dandy Power Equipment Pty Ltd v Mercury Marine Pty Ltd* (1982) 64 FLR 238  *Australian Competition and Consumer Commission v Metcash Trading Ltd* (2011) 198 FCR 297  *Telecom Corporation of New Zealand Ltd v Clear Communications Ltd* [1995] 1 NZLR 385  *Rural Press Ltd v Australian Competition and Consumer Commission* (2003) 216 CLR 53  *Outboard Marine Australia Pty Ltd v Hecor Investments (No 6) Pty Ltd* (1982) 66 FLR 120  *Application by Chime Communications Pty Ltd (No 2)* [2009] ACompT 2  *Re Telstra Corporation Ltd (No 3)* [2007] ACompT 3 |

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| Date of hearing: | 6-23 March 2012 and 7-8 May 2012 |
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| Place: |  |
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| Category: | Catchwords |
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| Number of paragraphs: | 365 |
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| Counsel for Co-operative Bulk Handling Limited: | P Brereton SC and JA Arnott |
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| Solicitor for Co-operative Bulk Handling Limited: | Corrs Chambers Westgarth |
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| Counsel for Australian Competition and Consumer Commission: | M Moshinsky SC, M Borsky and T Glover |
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| Solicitor for Australian Competition and Consumer Commission: | DLA Piper |

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| IN THE australian competition tribunal |  |
|  | ACT 8 of 2011 |

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| RE: | APPLICATION BY CO-OPERATIVE BULK HANDLING LIMITED FOR A REVIEW OF THE GIVING OF A NOTICE BY THE AUSTRALIAN COMPETITION AND CONSUMER COMMISSION UNDER SECTION 93(3) OF THE COMPETITION AND CONSUMER ACT 2010 TO REVOKE NOTIFICATION N 93439  Applicant |

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| tribunal: | MANSFIELD J (PRESIDENT)  GF LATTA (MEMBER)  R STEINWALL (MEMBER) |
| DATE OF ORDER: | 19 APRIL 2013 |
| WHERE MADE: | ADELAIDE (VIA VIDEO LINK TO PERTH AND MELBOURNE) |

THE TRIBUNAL DETERMINES THAT:

1. The Notice dated 29 June 2011 given by the Australian Competition and Consumer Commission to Co-operative Bulk Handling Limited pursuant to s 93(3) of the *Competition and Consumer Act 2010* (Cth) in respect of Notification N 93439 is affirmed.

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| IN THE australian competition tribunal |  |
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| re: | application by co-operative bulk handling limited for a review of the giving of a notice by the australian competition and consumer commission under section 93(3) of the competition and consumer act 2010 To revoke notification n 93439 |

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| : | MANSFIELD J (PRESIDENT)  GF LATTA (MEMBER)  R STEINWALL (MEMBER) |
| DATE: |  |
| PLACE: | ADELAIDE (VIA VIDEO LINK TO PERTH AND MELBOURNE |

**REASONS FOR DECISION**

# introduction

1. This matter concerns an application by Co-operative Bulk Handling Limited (CBH) under s 101A of the *Competition and Consumer Act 2010* (Cth) (CC Act).
2. The application is for a review of a decision of the Australian Competition and Consumer Commission (ACCC) to give notice pursuant to s 93(3) of the CC Act to revoke Notification N93439 (the Notification).
3. On 11 June 2008 CBH lodged the Notification with the ACCC pursuant to s 93(1) of the CC Act, giving CBH, in effect, statutory protection from legal action for engaging in the conduct specified in the Notification until the Notification was withdrawn or, relevantly, the ACCC gave notice to CBH under s 93(3) of the CC Act. The ACCC did not issue a notice under s 93(3) at the time of the lodgement of the Notification.
4. The Notification concerned conduct of a kind referred to in s 47(2) of the CC Act. In short, it involved offering to supply grain storage and handling facilities and services on the condition that growers or marketers of grain also acquire supply chain co-ordination services and transport services from CBH (the Notified Conduct).
5. In June 2010 the ACCC commenced a review of the Notification, apparently in response to complaints about the effect of the notified conduct. In December 2010, following its review, the ACCC released a draft decision proposing to revoke the Notification. On 29 June 2011 the ACCC gave its final notice to revoke the statutory protection afforded by the Notification (the ACCC Notice).
6. For the reasons set out below, the Tribunal has determined that it should affirm the ACCC Notice.
7. CBH, on 19 July 2011, filed an application in the Tribunal, pursuant to s 101A of the CC Act seeking a review of the ACCC Notice.

# Background

## CBH

1. CBH was established in 1933 as a co-operative of growers. In January 2011, the board of CBH resolved to modernise the CBH constitution and transition the organisation from the previous legislative regime to the new *Co-operatives Act 2009* (WA)(Co-operatives Act). On 4 May 2011, the members of CBH held an extraordinary general meeting and voted overwhelmingly in favour of modifying the constitution in order to register as a co-operative under the Co-operatives Act. Accordingly, as recently as May 2011, the growers comprising the CBH co-operative have voted in favour of it maintaining the co-operative corporate structure.
2. CBH currently has 4,697 members. In order to be eligible for active membership of CBH, a member must have delivered grain to the co-operative in either of the last two seasons, have an aggregate of all grain deliveries over the past three seasons of not less than 600 tonnes and an involvement in the actual production of the grain delivered and not merely the delivery of the grain. A person is not qualified to be admitted to membership of CBH unless there are reasonable grounds for believing the person will be an active member. Each of CBH’s members has one vote at meetings of the company.
3. CBH is governed by a board of directors that is primarily comprised of and elected by its members. The board of CBH is comprised of nine member directors and up to three independent directors, who are required to have special skills. No member of management is a director.
4. CBH has two main business activities. The first is the supply of grain at its receival sites and the delivery of the grain to ports or for domestic purposes, which is managed by the operations division of CBH. The second is grain trading and marketing, which is conducted by a subsidiary of CBH, CBH Grain. The CBH Grain business is subject to ring fencing arrangements that separate it from CBH’s operations division. The purpose and effect of the ring fencing is to ensure that information that CBH obtains through its operation of the grain supply chain is not used by CBH Grain to gain an advantage in grain trading and marketing over other grain marketers. The ring fencing arrangements were implemented as part of the Grain Express project (referred to below) and were included in CBH’s submission in support of the Notification in 2008. CBH’s ring fencing arrangements were audited in 2009 and 2010. Both audits confirmed the effectiveness of the ring fencing arrangements.
5. The ring fencing arrangements were put in place in order to satisfy the ACCC that the Notified Conduct would not substantially lessen competition in relation to grain trading and marketing. The main bulk handlers of grain in South Australia and New South Wales, Viterra Ltd (Viterra) and GrainCorp Operations Ltd (GrainCorp) respectively do not have in place ring fencing arrangements that separate their operations divisions from the grain trading and marketing divisions.
6. For the purposes of this review, CBH Grain is only of relevance as one of the grain marketers operating in Western Australia and elsewhere in Australia.
7. CBH’s purpose is to create and return value to its grower members. CBH measures how well it is returning value to growers through a performance indicator called “grower value return on capital”.
8. Over time, CBH says it has created value by building and investing in infrastructure and operating it so as to provide the growers with a supply chain. The efficiency of the system is very important to growers. For instance, there is a risk to growers during the harvest in that they need to harvest and get into storage as quickly as possible their crop so as to avoid any risk of weather damage.
9. As part of its grain storage and handling activities CBH owns and has operated approximately 193 “up-country” grain receival, storage and handling facilities throughout Western Australia. Not all receival points are opened in each grain season, and the evidence suggests that 17 of them are no longer in use. CBH also owns and operates the Metro Grain Centre (MGC), a large intermodal bulk handling and distribution centre near Perth that has rail access and provides bulk handling facilities and storage for grains. It also owns and operates all four grain export terminals in Western Australia (Grain Export Ports), located at Albany, Esperance, Kwinana and Geraldton.
10. In addition to its grain storage and handling activities, CBH undertakes research and development within the Australian grains industry directed to the development of new techniques, new infrastructure and improved grain quality.
11. Under the *Bulk Handling Act 1967* (WA) (BH Act) and the *Bulk Handling Regulations 1967* (WA) (BH Regs) CBH must receive all grain tendered to it that meets the requisite standards: BH Act s 42. CBH must deliver the grain to the receival point or port in Western Australia as required by the person who is entitled to the grain under a warrant issued pursuant to BH Act s 37(1). The holder of such a warrant must take delivery by 30 September of the year following the receival of the grain by CBH. If the warrant holder does not take delivery by that date CBH can sell the grain, deduct its costs from the proceeds and pay any net proceeds from the sale to the holder of the warrant: BH Act ss 45(1) and (2); BH Regs reg 26. All grain under its custody and control must be insured by CBH: BH Act s 11.
12. CBH does not operate at a profit. Rule 42(a) of the Rules of CBH prevents CBH from distributing any income or profit of CBH to its members. Similarly, no part of any income or property of CBH shall be, directly or indirectly, paid or transferred as a profit, by way of a dividend or bonus or otherwise, to any member of CBH: BH Act s 35A(a). Rule 42(b) of the Rules provides that all income and property of CBH shall be applied towards the objects of CBH as set out in rule 3.2 of its Rules and not otherwise. Similarly, all income and property of CBH shall be applied, subject to the BH Act, towards the objects of CBH as set out in clause 2 of its Memorandum of Association (now rule 3 of the Rules) and not otherwise: BH Act s 35A(b).
13. CBH submits that one of the mechanisms by which it returns value to its grower members is by having lower fees for both storage and handling and for port services. CBH submits that benchmarking demonstrates that the storage and handling and port charges levied by CBH are significantly less than its peers in other states and territories. A survey of growers carried out by CBH at the time of its review of its corporate structure in 2011 indicated that growers considered the most important way in which CBH should return value to it is by providing the best storage and handling services at the lowest cost.
14. As a non-distributing co-operative, the principal way in which CBH returns value to its grower members is through ensuring that the charges that the growers pay for the services provided by CBH are kept as low as possible while at the same time ensuring that sufficient revenue is obtained so as to maintain the sustainability of CBH’s business and allow it to invest in its system on an ongoing basis. CBH also seeks to ensure that the charges that it levies on marketers are kept as low as possible because these charges are ultimately passed on to the growers.
15. CBH submits that its status as a co-operative is relevant to the proceeding before the Tribunal because it explains an important distinction between the structure of the industry in Western Australia compared with other States. CBH contends that it is appropriately characterised as being the means by which the growers have organised themselves so as to undertake storage and handling activities at receival sites, bulk handling of grain to port and the operation of port terminal facilities to allow the export of that grain from Western Australia. According to CBH, its incentives are aligned with the interests of the growers. The ownership structure of CBH is likely to have some relevance to the assessments of both competition and public benefits. This is because the ownership structure will have important effects on the incentives and motives of CBH.
16. CBH submits that, because of its ownership base and co-operative structure, regardless of whether it could increase prices above a competitive level, it has no incentive to do so. CBH contends that any market power of CBH is constrained by the countervailing power of its customers, the growers, who have the capability, knowledge and incentive to nip in the bud any attempt at an exercise of market power by CBH.
17. In his second report, Dr Fisher sought to make criticism of the co-operative model operated by CBH, including that growers did not have access to analyst reports or management presentations, which he asserted they would if CBH was a publicly listed company. Dr Fisher asserted that the only information in the public domain about CBH’s operations was its annual reports. That assertion was incorrect. Dr Fisher accepted in cross-examination that growers would have access to information about the operation of CBH through regular growers’ meetings and that there would be a variety of informal and formal communications between growers and CBH. Dr Fisher was also taken to examples of individualised letters that CBH had sent to growers which identified the activities of CBH, how it had performed that year and the value in use that CBH had returned to growers in the form of savings and Quality Optimisation.
18. The ACCC submits that CBH’s structure as a not-for-profit co-operative does not ameliorate the competition and efficiency problems and associated public detriment arising from the Notified Conduct. Indeed, the ACCC submits that the co-operative structure might even exacerbate some of these problems.
19. The ACCC submits that CBH’s constitution is not a substitute for market pressures. In the absence of competition, the imperative for CBH to service its customers better and to lower costs is significantly weakened. Absent competition, a co-operative with substantial market power can make decisions different from those it would be forced to make if the market were competitive.
20. The ACCC further submits that co-operatives such as CBH may be subject to principal/agent issues. This occurs where there is an asymmetry of information between management and owners that allows management to pursue strategies and decisions that do not reflect the interests of the owners.
21. A related problem can be management pursuing “quiet life” goals, resulting in padded costs (x-inefficiency). Dr Philip Williams accepted that there can be productive efficiency problems with non-profit co-operatives, as management might pursue “quiet life” goals, resulting in x-inefficiency. He also acknowledged that one reason for this may be a lack of competitive pressure.
22. Growers are not a single, homogeneous group and some of them might wish to make alternative transport arrangements which better suit their individual interests. The evidence of Mr Bradley demonstrates that some growers would like to have the choice to arrange their own transport of grain from CBH’s up-country storages to port. Whilst CBH’s objectives might align with those of the “average grower”, they do not necessarily align with the objectives of particular growers or groups of growers.
23. The ACCC also submits that social policy or political considerations may enter into CBH’s pricing and other decisions, including the freight rates it sets. The ACCC contends that the co-operative structure together with the Notified Conduct give rise to the possibility of transfers or cross-subsidies with consequential allocative inefficiencies. The ACCC submits that in a competitive market CBH would risk losing as customers those growers who are net contributors to the transfer or cross-subsidy. Under the Notified Conduct, the CBH co-operative is insulated against this risk in relation to its grain transport service and able to prevent growers from switching to a rival offering a better service.
24. Additionally, the ACCC submits that CBH is immune from external market discipline on management since memberships are not tradeable. The threat of takeover and the discipline of market share trading to which for-profit businesses are subject is therefore lacking.

## The Western Australian Grain Industry

1. Grain growers in Western Australia predominantly produce wheat. They also produce barley, coarse grains (sorghum, oats, maize and triticale), oilseeds (canola and soy) and pulses (lupins, field peas and chick peas).
2. In Western Australia, the majority of grain is produced in the south western grain belt, which runs in a broad band from north of Geraldton to east of Esperance. The Western Australian grain belt is roughly divided into four zones, each of which is served by a port. The Geraldton zone comprises the area surrounding the Geraldton port and includes the regional centres of Mingenew, Mullewa and Morowa. The Kwinana zone comprises the largest area of the Western Australian grain belt, stretching from Kwinana in the west to Southern Cross in the east, and from Narrogin in the south to Wubin in the north. The Albany zone covers the south-west corner of the Western Australian grain belt from Hyden and Newdegate in the north-east to Albany in the south and Bunbury in the west, and includes the regional centres of Katanning, Lake Grace and Albany.
3. As in the rest of Australia, growers in Western Australia are required to pay, directly or indirectly, for the supply chain costs of moving grain from the point of production to the point of export (or domestic sale).
4. The amount of grain received by CBH in Western Australia was, or was estimated to be, approximately 12.3 million tonnes in the 2008/09 harvest season, 11.1 million tonnes in the 2009/10 harvest season and 6.5 million tonnes in the 2010/11 harvest season. The largest grain harvest received by CBH in Western Australia was 14.7 million tonnes in the 2003/04 harvest season. The grain harvest in Western Australia usually accounts for between 33 and 40% of the total national grain harvest. Production is characterised by significant seasonal variability, which affects the amount produced and the percentage of total national production.
5. Around 90-95% of the grain harvested in Western Australia is exported. The remaining production is sold domestically. The amount of grain sold domestically remains relatively constant in absolute terms from season to season, at around 1 million tonnes. As such, the percentage of a particular harvest that is sold domestically varies, depending on the size of each harvest. Approximately 90% of grain harvested in Western Australia is exported through CBH’s grain export port terminals and five percent is exported in containers.
6. There is around 22 million tonnes of grain storage capacity in Western Australia. CBH’s total grain storage and handling capacity in Western Australia exceeds 20 million tonnes. Australian Bureau of Statistics data indicates that as at 30 June 2010 there is 2 million tonnes of on-farm grain storage capacity in Western Australia. A significant proportion of this on-farm storage capacity is required for on-farm use and is not used for the storing of grain for commercial sale.
7. The supply chain for grain in Western Australia broadly follows the following process. Growers produce grain and following harvest either store or accumulate it at their farms or arrange for the grain to be transported by road to a receival point. At present, all receival points are under the control of CBH. The grain is then unloaded at the receival point and sampled, analysed, weighed, graded and stored until it is to be transported. CBH operates a significant number of up-country receival sites for grain in Western Australia. It has over time developed those receival sites in response to the grain growers’ requirements, but it chooses to “open”, that is to receive grain, at such sites as it considers appropriate in each season depending upon the size of the harvest including localised demand. The grain is transported by rail or road from the receival points to the port in time for shipment, the container loading facility or the domestic market destination. Export grain is either stored in receival points or at the port until it is loaded onto a ship for export.
8. CBH also operates four port terminals for the export of grain in Western Australia at Geraldton, Kwinana, Albany and Esperance (the ports). As the grain is exported to a range of countries principally for Australia to the Northern Asian, South East Asian and Middle Eastern regions, it is exported in competition with other international exporting regions – in particular North America and Europe. The bulk grain trade is international. The buyers of grain in the international market are liquid and price is a function of the global supply and demand. Hence, Australian exporters of grain fall into the description of “price takers” rather than “price makers”. It follows that the supply chain costs from farm to export affect the price at which marketers will sell bulk grain for export, and that in turn affects the price that the marketers will pay to the growers.
9. CBH’s supply chain for bulk export grain is currently vertically integrated. It has three functional levels: bulk export grain receival, storage and handling, transportation of bulk export grain from a receival point to a CBH Grain Export Port terminal, and Grain Export Port terminal operations.
10. CBH presently organises its supply chain by dividing the Western Australian grain belt into four zones, each of which is served by a port terminal:
11. the Geraldton zone comprises the area surrounding the Geraldton port and includes the regional centres of Mingenew, Mullewa and Morawa;
12. the Kwinana zone comprises the largest area of the Western Australian grain belt, stretching from Kwinana in the west to Southern Cross in the east, and from Narrogin in the south to Wubin in the north;
13. the Albany zone covers the south-west corner of Western Australia from Hyden and Newdegate in the north-east, to Albany in the south and Bunbury in the west, and includes the regional centres of Katanning, Lake Grace and Albany; and
14. the Esperance zone comprises the south-east grain belt, the area north of Esperance and surrounding Salmon Gums.
15. As noted, CBH offers grain receival services for particular grains at particular receival sites. Not all receival sites will be set up to receive all grains or grades of grain each harvest season or at all times during a harvest season. Some receival sites do not operate at all in some years; this is dependent on the size of the harvest and its distribution throughout the grain belt. CBH plans and configures its receival sites ahead of the commencement of each harvest season using crop estimate information provided by growers, information obtained through consultation between grower-elected receival site representatives and growers locally and the information provided by marketers regarding their forward shipping plans. By way of example, it may be projected that a particular geographic area will predominately produce barley and canola at one stage of the harvest season and produce wheat at a later stage. The site or sites serving that geographic area may therefore be set up so as to initially receive barley and canola and then later in the harvest receive wheat, but not offer a receival service for lupins at any stage during the harvest, because of a lack of demand or storage space within the receival site. In such an instance, growers in the area who have produced lupins would be informed in advance of the harvest of the nearest receival site to them that is set up to receive lupins.
16. Grain is stored at CBH receival sites in bulk by reference to the type and grade of grain. All grain within a storage class is co-mingled and it is not possible to take out the precise parcel of grain which a particular grower has deposited. It is not practicable to store each load of grain delivered by a grower in a distinct, segregated parcel. This is because each of the storage facilities has a large capacity and is designed for the bulk handling of grain. For this reason, CBH stores grain in common “stacks” or “segregations”.
17. Any requirement for separation creates the inherent potential for lost capacity. This is due to the space required between parcels in horizontal or bulkhead storage, and the lost capacity of the remainder of the silo. This lost capacity in CBH’s storage facility is referred to as “*loss by division*”. It represents a substantial potential inefficiency (or potentially an inability to receive the grain harvested in the catchment area of the receival site) for CBH if its infrastructure is underutilised due to unnecessary division. If growers or marketers were able to require the movement of particular parcels of grain to occur in an ad hoc or uncoordinated fashion there would be increased incidences of wasted storage capacity.
18. Grain is segregated in the storage facilities according to grain type (such as wheat, barley, canola or lupins) and recognised grade standards (which are defined by the quality or attributes specifications within each grain, which, for example, for wheat are: Australian Hard, Australian Premium White and Australian Standard White. This means that when a grower delivers grain of a particular type and grade, it is stored in bulk with grain of the same type and grade. Accordingly, a truckload of grain, once delivered to storage at a CBH receival site, is comingled with other loads of similar grade grain already received into storage.
19. It is neither efficient, nor possible for the person entitled to any grain held by CBH to insist that CBH deliver the same grains to that person at the receival site or at port or at any other location as were delivered by the grower at the receival site. The BH Act provides for this in the following way. Section 36 provides that, on receipt of grain, CBH shall cause it to be weighed, its grade determined and a uniquely numbered weighbridge ticket issued for the grain. Section 37 provides that CBH shall issue a unique warrant in respect of grain received. s 38(2) provides that each warrant is a negotiable instrument transferable by endorsement. Section 44 provides that the holder of a warrant 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.
20. As can be seen, the role of CBH in the receival, transport and dispatch of grain in Western Australia is a very significant one. In the area of grain marketing, its role through CBH Grain is less significant.
21. Marketers of grain act as intermediaries between the growers of grain and the ultimate users. The main marketers in Western Australia are CBH Grain, Cargill Australia Ltd (Cargill) which in December 2010 acquired the Australian Wheat Board Ltd (AWB) grain trading business, Viterra, Glencore Grain Pty Ltd (Glencore), Alfred C Toepfer International (Australia) Pty Ltd and Emerald Group Australia Pty Ltd. They also include Louis Dreyfus Commodities Australia Pty Ltd (Louis Dreyfus) and Gavilon Grain Australia Pty Ltd.
22. Marketers generally fall into three categories:
23. grain processers, such as flour millers, who acquire for their own use and trade any surplus stocks or run a trading business as a related business, an example being Cargill;
24. originator traders who have interests in grain production or storage and handling in their countries of origin, examples of which are Viterra and CBH through CBH Grain; and
25. pure commodity traders, who have limited vertical integration and focus mainly on marketing and trading grain in international markets, an example being Glencore.
26. Growers in Western Australia sell their grain to marketers by way of the transfer of the warrant issued by CBH. That is, they do not sell their grain directly to marketers, but instead sell to marketers the right to receive from CBH grain of the type and grade specified in the warrant.

### The Grain Express system

1. The Grain Express supply chain operated by CBH was developed by CBH following the experience of the partial deregulation of grain marketing in the 2006-2007 and 2007-2008 seasons. It was developed, from the view of CBH, to meet the requirements of marketers who export grain, and domestic users of grain, and to service its member growers.
2. In Western Australia, prior to the introduction of the *Wheat Export Marketers Act 2008* (Cth) (Wheat Act), AWB, as the monopoly exporter of bulk wheat, contracted with transport service providers to transport grain from receival points to port. As noted, prior to the commencement of the Wheat Act, and in anticipation of the dismantling of the single desk, CBH devised an integrated and coordinated grain supply chain system which it called ‘Grain Express’ (Grain Express). CBH has operated Grain Express since 2008.
3. In describing the system, it is important to bear in mind that the Grain Express system is not itself the Notified Conduct. Grain Express is a bundled supply chain service provided by CBH, combining storage and handling services, transport services and port receival services. The Notified Conduct is the tie of the Grain Express system to the storage and handling services, so that growers using the storage and handling services must use the CBH supply chain coordination services and its transportation services.
4. Growers produce grain and during harvest either store it at their farms or (in most cases) arrange for their grain to be transported by road to one of the up-country receival sites. Grain is sampled and analysed for quality, weighed, graded, unloaded and then stored at the receival site until it is to be transported.
5. On receipt of the grain, the grower is issued with a weighbridge ticket recording the quantity, type and grade of grain that they have delivered. In addition, an electronic record is created in CBH’s stock management system, IBIS, which is available for access by growers within 15 minutes of the delivery (from most sites) through an internet-based front end system operated by CBH which is accessible to growers called LoadNet. LoadNet lists all of the deliveries that the grower has made, and each delivery’s quantity, type and grade. The system also records CBH’s estimated freight charges to those destinations (in the period October to February) and the finalised freight charges (which are posted in February when CBH calculates its freight charges based on the quantity of grain received and its distribution throughout the CBH receival network). The grower can then use the LoadNet system to nominate portions of their grain to particular marketers in response to particular product offers. LoadNet therefore provides a virtual marketplace for growers and marketers to interact. Provided delivery is made by December, growers have from the date of delivery until 30 September of the following year to make their marketing decisions and nominate their grain without incurring any additional charges. This permits the grower to delay any marketing decisions until after they have completed their harvest.
6. When a grower, using LoadNet, makes a nomination, the marketer becomes entitled to outturn grain but only at the nominated destination site. If a grower chooses to warehouse grain, he or she may, subject to meeting various charges and conditions, outturn grain from a receival point.
7. When Grain Express was introduced, growers and marketers using LoadNet were able to choose from amongst 15 destination sites, including CBH’s Grain Export Port terminals, to outturn grain from CBH’s custody. CBH uses the road or rail transport services it acquires to move grain in its custody between the receival point and the destination sites.
8. Once a grower has nominated a marketing option, CBH arranges transport to the nominated destination site and invoices the grower for its services to that point. A marketer who has received a nomination of grain under the LoadNet system acquires an entitlement to that grain at the destination site. The marketer then advises CBH that it intends to outturn an amount of grain onto a vessel. CBH checks that the marketer has entitlement to that quantity of grain in CBH’s system and CBH outturns the grain onto the vessel. CBH invoices the marketer for storage and handling services it provides in relation to the grain at the destination site.
9. If a grower does not nominate an acquirer and destination site but instead chooses to warehouse their grain at a receival point, the grower can either nominate an acquirer at a later date through the LoadNet system or, subject to CBH’s consent and the grower’s payment of the relevant fees, outturn the grain from CBH’s storage.
10. Not all grain is exported or sold domestically in the year following its harvest. Approximately two to three million tonnes of grain per annum are carried over from each season. This grain remains in CBH’s storage facilities and is one reason that the total storage capacity in WA exceeds the largest ever harvest.
11. CBH sets it fees in such a way as to ensure that the total revenue from all operations is sufficient to fund the operational expenses and capital expenditure of the business as a whole. The fees are not determined on an activity cost basis, but do, to a certain extent, reflect the costs of providing the service.
12. CBH considers both the demand profile as revealed through discussions with the marketers and the results of the auction of port slots, and the supply side, and in particular whether the supply of grain into particular receival sites is likely to exceed the capacity of that receival site and therefore require essential movements of grain in order to maintain capacity at the site. CBH then prepares a model of the logistics task for the harvest season and puts in place transport plans with its road and rail providers. The harvest occurs from late October or early November and is concluded by December or January each year. At the conclusion of the harvest, the number of staff present at each of CBH’s receival sites is reduced and many are no longer manned, as staff are no longer required to receive grain from growers. At this time, CBH aggregates the information regarding the quantities, types and grades of grain received at each of its receival sites and updates its logistics plans to begin moving that grain to its destination, which is predominately the port terminals serving each of the four zones of the grain belt.
13. Grain movements are planned to occur on a bulk basis, with the maximum amount of stock taken by rail or, where rail is not feasible or available, by road, at a given time so as to obtain economies of scale in the out-loading of grain. Grain is transported by rail or road from the receival sites to either the port terminal (for the approximately 90% that is exported in bulk) in time for shipment, the container loading facility (for the approximately 5% that is exported in containers) or the domestic market destination (for the approximately 5% sold domestically). Export grain is stored at the port terminal until it is loaded onto a vessel for export.
14. The Grain Express system functions in a very similar fashion for both export grain and grain that is to be sold domestically. The domestic sites are very similar to the export port terminals in the manner in which they form part of the Grain Express system.
15. There are exceptions to these processes. Some growers, particularly growers who grow grain in areas that are relatively close to the port terminals in Geraldton, Albany and Esperance, deliver their grain directly to the port terminals for storage by CBH at the port terminal in preparation for export. Approximately 23% of all grain is delivered directly to port or near port storage by growers.
16. As part of the arrangements to implement the Grain Express system, CBH created the Freight Pool. CBH uses the Freight Pool to achieve, and give transparency to, its aim to ensure that the amounts paid by growers for freight are approximately equivalent to the costs that CBH incurs in providing freight, and therefore to freight to growers on a not-for-profit basis. The Freight Pool achieves this by containing all of the transactions which represent the revenue and costs of providing grain freight. CBH sets freight rates with the intention that revenue and costs will be approximately equivalent. Any surplus remaining in the Freight Pool, in theory, is returned to growers at the end of the harvest as a rebate or kept in the Freight Pool to reduce freight costs in the next harvest. The retention of funds in the Freight Pool is further discussed later in these reasons. Separate accounts are produced for the Freight Pool and these accounts are then the subject of an audit by external independent auditors.
17. Concurrently with the transport planning process, CBH prepares a schedule of port capacity to be allocated at each of its port terminals. Since the port congestion experienced during the 2008/2009 harvest season, CBH uses capacity auctions to allocate available capacity at port (with one of the factors taken into consideration being the ability of the land-based supply chain to deliver grain to the port terminal). The slots obtained through the auction process can be and are traded in a secondary market.
18. The bulk export grain receival, storage and handling level has three components.
19. First, the receival of grain, delivered from farms, at receival points. CBH charges a $10.50 per tonne up-country “receival fee”. Once grain is delivered to a receival point or bulk grain storage facility located at a Grain Export Port terminal it enters CBH’s custody.
20. Secondly, storage of bulk export grain at a receival point or bulk grain storage facility located at a Grain Export Port terminal until such time as it is outloaded or outturned. While many of the bulk handlers elsewhere in Australia charge time-based storage fees, CBH does not. Evidence was given that the $10.50 receival fee, along with the export fee discussed below, are calculated so as to, jointly and on average, recover the time dependent costs of storage. It was indicated that it is likely that a proposal to introduce an explicit time based storage fee may go to the board of CBH in the near future.
21. Thirdly, outloading and outturning of bulk export grain from up-country receival points. The expression “outloading” refers to the process of removing grain from a receival point, for transport to another receival point or Grain Export terminal, where the grain does not leave CBH’s custody. CBH does not charge an additional fee for outloading of bulk export grain. The expression “outturning” is used to describe the process of removing bulk export grain from a receival point, for transport to a Grain Export Port terminal or another destination such as outturn site, where the grain leaves CBH’s custody. Outturned grain is loaded, using CBH’s handling equipment, onto non-CBH transport arranged by the acquirer of the outturn service, being the grower or marketer. CBH currently charges a fee of $8.50 per tonne for outturn by road and $11.55 for outturn by rail. This outturn of grain is referred to as “domestic outturn”.
22. The transportation of bulk export grain involves, for outloaded grain, transportation by or arranged by CBH, using either road or rail. For outturned grain, the transportation of bulk export grain involves transportation by a non-CBH transport provider using either road or rail. The charges for transportation services vary depending on the mode of transport and distance travelled.
23. Hence, as CBH said, there were complexities and perceived inefficiencies in the supply chain caused by the increased number of marketers from about 2008, including with some marketers acquiring smaller quantities of grain from a number of receival sites and then wishing them to be assembled at port for a larger export sale. The nature of those concerns, and their significance, is addressed later in these reasons for decision. It was to meet those concerns and to ensure its systems operated well in the interests of growers and marketers that CBH developed the Grain Express system.
24. The transport arrangements of CBH in the period leading up to the Wheat Act, and for a few seasons thereafter, are reflected in the Western Australian Export Grain Transportation and Handling Agreement (the ARG Agreement). Australian Railroad Group Pty Ltd (ARG) sold its above rail assets to Queensland Rail (now Queensland Rail National) (QR) in 2006 and in the same year it sold its below rail assets (through Westnet Rail Pty Ltd) to Babcock & Brown and then they were sold to Brookfield Infrastructure Partners LP in a subsidiary Brookfield Rail. QR continued to use the ARG name until July 2011. At all times while QR provided above rail transportation services to CBH, it did so under the ARG Agreement, as varied and extended from time to time, including for the Grain Express system.
25. In 2010, CBH conducted a tender process for the provision of bulk grain rail transport services. It was dissatisfied to some degree with the services and prices of QR.
26. The Request for Proposals was issued on 8 March 2010. It allowed for three packages: provision of grain rail services in the northern narrow gauge section servicing the Geraldton and Kwinana port terminals; provision of grain rail services in the standard gauge section servicing the Kwinana and Esperance port terminals; and provision of grain rail services for the southern narrow gauge section servicing the Kwinana and Albany port terminals and the Merredin transfer line. Various proposals were received and assessed.
27. As a result of this tender process, CBH entered into a 10 year contract, commencing on 1 May 2012, with Watco Companies Inc (Watco), a US based company, for the provision of “a comprehensive rail logistics planning service including train planning and scheduling, tracking, maintenance, inventory control and crew management”. Watco does not supply the rolling stock. The rolling stock is to be owned by CBH, and provided to Watco. A Rail Services Agreement was executed on 28 August 2011. CBH then proceeded to acquire the 22 locomotives and 570 wagons for use by Watco. Obviously that was at considerable capital cost.
28. CBH also acquires road transport services by means of a tender process. The tenders are organised based on the port zones. There are many prospective suppliers of road transport services to CBH. Often more than one provider is chosen in each zone.
29. CBH charges growers for the transportation of grain pursuant to a schedule of rates for freight from each receival site which is published each year.
30. Not all grain is delivered to CBH receival sites. A significant proportion of grain is delivered by growers to storage sites at or near one of CBH’s four ports. The quantity that is delivered to port, as this sort of delivery is commonly described, varies from season to season, but has averaged approximately 17% of the harvest over the past 10 years. The principal factor that determines the percentage delivered to port is the size of the harvest. According to Colin Tutt, the General Manager, Operations, for CBH, in a season in which the harvest is small, growers are under less pressure to harvest their grain swiftly and, thus, may be willing to truck the grain longer distances in order to avoid transport fees. In large harvests, however, growers often find themselves under great pressure to harvest their grain swiftly, for example to harvest the grain before adverse weather materialises. Thus, in seasons in which the harvest is large growers are more likely to deliver their grain to their nearest receival site so as to expedite the harvesting process.
31. In CBH’s Grain Export Port terminal operations, bulk export grain is transported to one of CBH’s four Grain Export Port terminals where it is loaded onto vessels for export by marketers who have acquired the entitlement to the grain. CBH charges an “export outturn” or port fee for loading the grain onto a vessel of $17.10 per tonne.
32. On 1 July 2008 the Wheat Act commenced operation. The Wheat Act led to significant changes in the way in which bulk wheat is exported from Australia. In particular, the Wheat Act resulted in the dismantling of the “single desk”, being the monopoly marketing of wheat by the AWB between 1939-1999 and later AWB’s subsidiary, AWB International, from 1999-2008. The single desk encompassed both domestic and export wheat sales but from 1999, only wheat export sales.
33. The Wheat Act requires bulk wheat exporters to be accredited by Wheat Exports Australia. There are currently approximately 26 accredited wheat exporters (marketers) in Australia, 13 of which operate in Western Australia. The exporting of non-bulk wheat (which is typically exported in containers) and other types of grains is not subject to regulation by the Wheat Act.
34. As both a marketer and the operator of the four Grain Export Port terminals, CBH is required by s 24 of the Wheat Act to satisfy the “access test”. A port terminal access undertaking (Access Undertaking) for wheat is in force in relation to CBH’s port terminals pursuant to s 44ZZA of the CC Act. The Access Undertaking was accepted by the Australian ACCC on 29 September 2009 and expired on 30 September 2011. CBH submitted a proposed access undertaking to the ACCC, intended to replace its current undertaking, on 31 March 2011. The proposed access undertaking is currently being assessed by the ACCC.

# issues

1. In determining an application under s 101A of the CC Act the Tribunal has all the powers of the ACCC: CC Act s 102(1). The Tribunal must either set aside the notice or make a determination affirming the ACCC Notice: CC Act s 102(4).
2. If the Tribunal is satisfied by CBH that the Notified Conduct does not and would not have the purpose, and does not and is not likely to have the effect, of substantially lessening competition (within the meaning of s 47(13) of the CC Act) or alternatively is satisfied that the Notified Conduct has resulted or is likely to result in a benefit to the public and that benefit outweighs or would outweigh the detriment to the public constituted by any lessening of competition that has resulted or is likely to result from the Notified Conduct, it must set aside the ACCC Notice: CC Act s 102(4)(a).
3. If the Tribunal is not satisfied of the matters set out in the preceding paragraph, it must make a determination affirming the notice: CC Act s 102(4)(b).
4. Section 47(13) relevantly provides:

(b) a reference to competition, in relation to conduct to which a provision of this section other than subsection (8) or (9) applies, shall be read as a reference to competition in any market in which:

(i) the corporation engaging in the conduct or any body corporate related to that corporation; or

(ii) any person whose business dealings are restricted, limited or otherwise circumscribed by the conduct or, if that person is a body corporate, any body corporate related to that body corporate;

supplies or acquires, or is likely to supply or acquire, goods or services or would but for the conduct, supply or acquire, or be likely to supply or acquire, goods or services.

1. As to the definition of competition for the purposes of the CC Act, regard should also be had to the decision of the Trade Practices Tribunal in *Re Queensland Co-operative Milling Association Ltd; Re Defiance Holdings Ltd* (1976) 25 FLR 169 at pages 187 to 188.
2. The ACCC does not contend that CBH had or has the purpose of substantially lessening competition. It is therefore necessary to focus only on:
3. whether CBH has satisfied the Tribunal that the Notified Conduct does not and would not be likely to have the effect of substantially lessening competition within the meaning of s 47; and
4. if it is not so satisfied, whether CBH has satisfied the Tribunal that the Notified Conduct has resulted in or would be likely to result in a benefit to the public that outweighs the detriment to the public constituted by any lessening of competition.

Those are the two relevant matters decided by the ACCC in the consideration required by s 93(3), and decided adversely to CBH so that the ACCC Notice was given.

1. They are the two relevant matters which the Tribunal is required by s 103(4) to address on this review.
2. In order to address those matters, it is first necessary to identify the markets of concern. This is reflected in the definition of competition found in s 47 of the CC Act.
3. A market should be defined to contain the maximum range of business activities and the widest geographic area within which, if given a sufficient economic incentive, buyers can switch to a substantial extent from one source of supply to another and sellers can switch to a substantial extent from one production plan to another: *Re Tooth & Co Ltd and Tooheys Pty Ltd* (1979) 39 FLR 1 at 38.
4. It was agreed between CBH and the ACCC that there were three markets that may be relevant for this matter. These may be described as:
5. a Western Australian market for the provision of grain receival, storage and handling services (Grain Storage Market);
6. a Western Australian market for the provision of grain transport services (Grain Transport Market); and
7. a Western Australian market for grain trading services (Grain Trading Market).
8. There may be some debate as to whether there is, relevantly, one market for grain transport in Western Australia or two, being the market for transport of grain by rail and the market for grain transport by road. Rail and road transport of grain are clearly substitutes and may also be complements. The proper determination of this application does not require the resolution of this matter.
9. Although there are three markets that may be affected by the Notified Conduct, it is agreed between CBH and the ACCC parties that only the Grain Transport Market is relevant to the question whether there has been or is likely to be a substantial lessening of competition as a result of the Notified Conduct.
10. In assessing whether the Notified Conduct has or is likely to result in a substantial lessening of competition the Tribunal must consider the state of competition in the market both with and without the Notified Conduct: *Stirling Harbour Services Pty Ltd v Bunbury Port Authority* [2000] FCA 38 at [113] (*Stirling Harbour*) affirmed on appeal: *Stirling Harbour Services Pty Ltd v Bunbury Port Authority* [2000] ATPR 41-783; *Dandy Power Equipment Pty Ltd v Mercury Marine Pty Ltd* (1982) 64 FLR 238 at 259. This method of evaluation has come to be referred to as the factual and counterfactual test: see, for example, *Australian Competition and Consumer Commission v Metcash Trading Ltd* (2011) 198 FCR 297 at 326 [148] (Yates J, Finn and Buchanan JJ agreeing).
11. The effect of the Notified Conduct is that, if a participant in the process of exporting bulk quantities of grain from Western Australia wishes to use CBH’s up-country receival and storage sites as well as one of the ports (currently the only ports in Western Australia from which bulk grain may be exported are operated by CBH) there is only one means of arranging transport from a receival site or sites to port. As far as a grower as user of the CBH receival sites and ports is concerned, CBH is a monopoly provider of grain transport services to the ports.
12. The Notified Conduct does not prevent anyone, be they a grower, a marketer or any other participant, from utilising transport other than that organised by CBH provided they do not use both CBH’s up-country receival sites and CBH’s ports. For example, as noted, growers may deliver their grain directly to port by way of transport organised themselves. As it stands about one fifth of the annual grain crop reaches port in this fashion. Similarly, there is no proscription on the development of independent up-country receival sites or ports. Thus, currently, that is in the world with the Notified Conduct, there exist opportunities for growers dissatisfied with the terms and conditions of CBH’s transport services to transport grain for export by delivering it by truck to one of the ports, so long as one of the receival sites of CBH is not utilised. In addition, although it has not yet occurred, another entity – be it a grower, a marketer or an independent company could establish an up-country receival site or sites, and arrange for such transport of grain from that site or those sites to port as that entity wishes to arrange.
13. A distinction was made, in particular by the expert economists, between competition *in* the market for transport services on the one hand, and competition *for* the market for transport services on the other. The method by which CBH allocates transport contracts was said, at least by CBH, to give rise to very substantial competition for the market. That is, the tender process engaged in by CBH by which it sought to encourage potential providers of transport services for the market to compete fiercely with each other, thus giving rise to competitive outcomes. These reasons will address that distinction below.
14. It is also important in assessing what public benefits arise from the Notified Conduct to distinguish between the Grain Express system itself and the Notified Conduct. It will not be an important factor to the determination of this matter if the Grain Express system has great public benefits and if those benefits would continue to be available despite the cessation of the Notified Conduct.

# specific ISSUES AND FINDINGS

1. Before turning to the primary issues of whether the Tribunal is satisfied Notified Conduct will not or will not be likely to cause a substantial lessening of competition and, if it has such an effect, whether the public benefits accruing from the Notified Conduct outweigh its anti-competitive detriments, it will be useful to address some specific issues. These issues will inform the likely effects of the Notified Conduct.

## The Eastern States

1. The Tribunal received a substantial amount of evidence about the grain industry in the Eastern States of Australia, being New South Wales, Queensland and Victoria.

### Characteristics of the grain industry in the Eastern States

1. The grain industry in the Eastern States comprises over 10,000 growers, producing an average of 15 to 17 million tonnes of grain per annum but ranging year to year from 8 to 24 million tonnes, comprising wheat, barley, canola and other oilseeds, pulses and sorghum.
2. Most of the grain produced in the Eastern States is consumed domestically, with any surplus grain being exported. The average volume of domestic consumption is 9 to 10 million tonnes.
3. Grain receival and storage services are provided by various parties. These include GrainCorp, Cargill, ABA, others such as Louis Dreyfus and Glencore, local grain merchants and on-farm storage facilities owned by growers themselves. GrainCorp estimates there is over 40 million tonnes of storage capacity in the Eastern States.
4. A number of transport service providers transport grain from up-country storage to port. Marketers are heavily involved in the planning of the process for transporting their grain from storage facility to the required destination.
5. There are a number of grain marketers and traders, including accredited wheat exporters and local grain merchants. Throughout the course of any year, the ownership of grain may change hands many times, including whilst it is in storage. For grain that is exported, marketers frequently trade grain in the over-the-counter “paper” market. Marketers also frequently engage in “stock swaps” in order to ensure that they have sufficient grain at specific sites.

### The market participants

1. GrainCorp is an ASX-listed agribusiness entity which has bulk export grain handling operations in the Eastern States. These bulk handling operations include up-country receival, storage and handling services provided to over 10,000 growers and over 100 traders from 280 up-country storage sites. GrainCorp also manages between three and four million tonnes of above rail capacity on a ‘take or pay’ basis and over one million tonnes of road transport every year. GrainCorp operates seven port elevators, which handle up to 80% of bulk grain exports from the Eastern States.
2. In addition to the 280 receival sites mentioned above, GrainCorp owns between 350 and 400 receival sites which it no longer operates, although around 20 or 30 of these sites can be opened if necessary. The number of receival sites which GrainCorp opens each year depends on the size of the harvest and varies from around 150 in a drought year to up to about 300 in a peak year.
3. Some of GrainCorp’s receival sites were established as early as 1918 and most of its older infrastructure was established in the 1960s. GrainCorp’s receival sites vary in terms of the capacity they hold from 4,000 tonnes to 120,000 tonnes, and some are in very remote locations. The decision whether to open a site each year is made in conjunction with the local growers. If there is unlikely to be sufficient volume of grain brought to the receival site to justify it opening, GrainCorp would not open the site and would direct growers to another site nearby.
4. As mentioned, GrainCorp has a large number of receival sites and has capacity which was anticipated to exceed the largest harvest. However in recent harvest seasons GrainCorp has needed to construct additional receival capacity to meet the demands of the seasons.
5. Grain received at a GrainCorp up-country storage facility is co-mingled on receipt, according to type of grain and grade. In 2011, GrainCorp had 200 different segregations according to grade. The Eastern States generally have tended to have far more grades of grain than in WA, because of the larger protein spread. GrainCorp operates a process called “dynamic binning” by which grain can be upgraded on receival and binned into a higher grade. This may be thought of as a less formalised version of CBH’s “Quality Optimisation” program.
6. GrainCorp up-country sites receive approximately 50-60% of grain harvested in the Eastern States. Approximately 30% of grain is stored on farm and 10-20% is stored in third party storages (including Cargill, Glencore, Louis Dreyfus and ABA).
7. GrainCorp’s grain storage and handling services, grain transport services and port terminal services are supplied to its customers on a standalone contracted basis. Unlike CBH, and Viterra through its Export Select service, GrainCorp does not offer a bundle of these services. In other words, it is the responsibility of the owner of the grain to arrange transport services from GrainCorp up-country sites to port or to a domestic customer.
8. Where GrainCorp is the supplier of transportation services, those services are contracted separately from the provision of GrainCorp’s receival, storage and handling services on the one hand, and port terminal services on the other.
9. The actual costs incurred by GrainCorp in receiving grain vary from site to site depending on the site’s characteristics, the volume of grain received at the site, the speed at which grain is delivered to a site and any disruptions caused by weather. The costs to GrainCorp of storing grain will also differ between receival sites depending on a number of factors, including quality arrangements in place at the site and the equipment that the site has installed. GrainCorp’s practice is to have the same prices apply across its receival site network, even though some sites and some storage elements within those sites may have different costs from other sites and storage elements.
10. Allan Johns, the Chief Development Officer of GrainCorp, gave evidence during cross-examination that GrainCorp does not seek to set its fees for receiving and storing grain to reflect the different costs incurred at different sites. The approach adopted by GrainCorp is to look at the total cost of operating its up-country receival network and then prepare a fee structure against that total cost. Many of the costs associated with the network are not possible to quantify in advance. GrainCorp’s experience is that the cost of running a silo, whether large or small, is fairly similar. It is a mistake, in GrainCorp’s experience, to assume that large sites are necessarily more efficient than smaller sites. In fact, GrainCorp’s experience is that some of its larger silos are actually more expensive to operate per tonne than some of its smaller storage facilities.
11. In order to set its receival fees, GrainCorp works out the average cost across the network. GrainCorp does this because it is GrainCorp’s choice which type of storage a grower’s grain is deposited in, not that of the grower, and setting differing fees for differing sites or types of storage would disadvantage some growers as a result of decisions made by GrainCorp.
12. The cost to GrainCorp of out-loading grain varies depending on a number of factors, including the number of tonnes that are out-loaded. GrainCorp seeks to manage this by imposing minimum tonnage restrictions on any out-loading. If a request is made to outturn less than 200 tonnes, GrainCorp would not permit the outturn from the site unless it could be coordinated or consolidated with a larger order. GrainCorp takes the same approach as CBH that if it is outturning grain from a particular site at a particular time then it will permit smaller quantities of outturned from that site on the same occasion.
13. The terms and conditions on which GrainCorp supplies storage and handling are set out in the Country Storage and Handling Agreement. Under clause 5.23 of that Agreement, the customer acknowledges that GrainCorp can swap a grade of grain with the same grade of grain between GrainCorp storages within a port zone for “Operational Reasons”. This term is defined to mean delays or grain unavailability due to weather problems, grain infestation or fumigation, grain quality problems, inaccessible grain, mechanical failure, rail availability or delays, last of grain storage being out-loaded and failure to accumulate cargo at a port terminal in a timely manner. Where GrainCorp undertakes a stock swap GrainCorp charges the customer the freight differential between the site at which the customer had the entitlement and the site at which GrainCorp outturns the grain. For export grain, that is, grain destined for one of the GrainCorp port terminals, GrainCorp charges the differential in the location differentials developed by Grain Trade Australia (GTA), the industry body for grain marketers, for the two port terminals. Accordingly, if grain is outturned by GrainCorp at port or at a site closer to port from the site at which the customer holds entitlement, GrainCorp charges the GTA location differential as a proxy for the freight costs of moving the grain between the receival site and the outturning site, even if the grain does not physically move.
14. In order to accommodate its fumigation schedule, GrainCorp must undertake a series of transfers of ownership between storage sites in order to ensure the grain can be outturned to customers. Despite these steps, on occasion situations arise where grain is under fumigation and grain of an equivalent quality, grade or quantity is not available and therefore there is a mismatch between the demand for grain and export bookings.
15. Cargill is an international provider of food, agricultural and risk management products and services. Cargill’s “GrainFlow” operations commenced in 1999 under the ownership of AWB. Cargill operates 18 grain storage facilities across the Eastern States as well as 4 grain storage facilities in SA. These facilities are known as “GrainFlow centres”. They were built by AWB over a period from 1999 to 2004. GrainFlow centres have a “consistent configuration”, with the exception of the Dimbulah GrainFlow centre, and use “[v]ery consistent technology”.
16. Cargill provides receival, warehousing, storage and handling, and outturn services to growers and “acquirers” of grain at its GrainFlow centres. Growers are able to “warehouse” their grain at a GrainFlow centre free of charge until after harvest, when storage charges begin. Similarly to the GrainCorp system, the fees charged by Cargill for outturning grain from a GrainFlow centre are the same regardless of whether transport is arranged by Cargill or separately arranged by the acquirer. Cargill enters into arrangements with rail and road transport service providers, primarily for the purpose of transporting grain it owns, but on-sells approximately 10% of its contracted rail capacity to third parties.
17. Under certain circumstances, the outturn fee charged by Cargill can substantially increase to reflect the inefficiency of a particular outturn. For wheat, the price charged by Cargill for outturning to rail or road is $4.20 per tonne for the 2011/2012 harvest season. In addition to this fee, Cargill imposes what it describes as outturn efficiency fees under certain circumstances. For example, if the outturn request is for less than 80 tonnes per day, an additional charge per tonne of $3.00 is levied and if the total order is less than 200 tonnes, an additional $3.00 per tonne is levied. These fees are cumulative so if the order is less than 80 tonnes then the total additional charges would be $6.00 per tonne. If an order was made to outturn less than 80 tonnes in a day on a weekend, the total outturn fee would be $12.20 per tonne. Cargill also has outturn efficiency fees with respect to late arrival or notification and a failure to outturn in accordance with an order. These additional charges are indicative of the additional significant costs imposed on a bulk handler for outturning grain in small quantities or outside of its regular operating parameters.
18. Cargill’s experience is that the cost of out-loading grain incurred by a bulk handler can vary depending on a large range of considerations including the amount outturned, whether the outturn occurs on a public holiday or a weekend and in relation to the amount outturned. Generally the smaller the amount is, the higher the cost on a per tonne basis. The nature and configuration of the receival site can also affect the cost.
19. CBH submitted that the systems in the Eastern States provide limited assistance to the Tribunal, because the marketplace on the East Coast is primarily domestic focussed, which creates different issues and solutions compared with an export-focussed supply chain. It said the system operated in South Australia is the closer comparator to Western Australia, particularly in the areas where the grain that is produced is predominantly exported. It also said that the status of CBH as a co-operative provides an important distinction between the structure of the grain industry in Western Australia from that in the Eastern States and in South Australia.
20. Those differences must be accepted. But it is, on the other hand, too simple a proposition to say that, because CBH as a co-operative represents the growers’ self-arrangement and therefore best reflects the growers’ interests, no regard should be had to practices elsewhere in Australia. Indeed, CBH did not put its position that strongly. It accepted that some regard could be had to the interstate practices. It may also be observed (as is discussed in more detail later in these reasons) that, while it is undoubtedly true that CBH does operate in a way which it regards as representing the best interests of the growers in Western Australia, the interests of all growers are not necessarily equally well served by the decisions of CBH on their collective behalf. There are growers with very different production levels, different geographical positions and growers who would have different transport options (but for the Notified Conduct); a substantial grower closer to a rail line might choose its economic interests to arrange its own rail or road transport even though that grower may wish to use a CBH receival facility. In addition, whilst its decisions through its board are no doubt made in good faith and on the best judgment of those involved, it is not routinely obvious – for example – that all growers would support the way the Freight Levy is applied, or more accurately any surplus after each season, or their capital as co-operative members being used and tied up in very significant expenditure on locomotives and rolling stock.
21. It should also be noted that there is evidence that the major exporters or marketers are investing (or considering investing) in their own supply chain capabilities in the Eastern States. That has led to competition between supply chains in the Eastern States. GrainCorp considers on farm storage to constitute part of its competition, as a grower has the choice of delivering to a GrainCorp receival site or storing the grain on farm. Whilst the differences pointed out by CBH are not insignificant, the Tribunal does not simply discount the evidence about the Eastern States. It has some relevance. Amongst other things, it demonstrates in the context of the Eastern States vigorous and open competition in the Grain Transport Market, as well as in the other markets referred to above. That aspect is further discussed below.
22. Glencore’s practices were explained by James Maw, Senior Trading Manager of Glencore. Mr Maw said that, in the site entitlement system that operates in the Eastern States, Glencore acquires each year grain from many growers which is stored in hundreds of different receival sites throughout the Eastern States. When Glencore wishes to export a cargo, its starting point is to book a shipping slot in one of the ports in the Eastern States. Glencore then seeks to work out how it can best get grain from a multitude of receival sites to the port terminal in time for shipping. Mr Maw accepted that it was more advantageous for Glencore to use a smaller number of sites but sometimes it had no option but to accumulate from a larger number of sites.
23. Mr Maw stated that Glencore does not always have a choice in the arranging of transport from up-country receival sites to port terminals because sometimes the bulk handler responsible for the receival site in which grain Glencore has acquired is stored would have already transported grain to port and Glencore will swap that grain and pay the freight costs to the bulk handler. These freight rates are typically based on the GTA location differentials.
24. In the Eastern States, Louis Dreyfus also acquires grain at a number of sites. However, the sites from which it acquires grain that it then transports to port for export are very limited. Louis Dreyfus aims to acquire grain for export from around two to three sites for transport by rail and up to four to six sites for transport by road. The grain that it acquires at other sites in the Eastern States are required to either supply the domestic market or for hedging purposes.
25. Louis Dreyfus publishes each day a list of the price that it pays for various grades and types of grain at the various ports in Australia. The amount that it will pay a grower is its list price less the published freight differential between the port terminal and the receival site at which the grower’s grain is stored. The freight location differentials are published by GTA. The location differentials are set by the Transport Storage and Handling Committee of GTA on a yearly basis. As GTA makes clear, the locations differentials are not freight rates and do not reflect the actual cost of providing freight between two locations. Nevertheless, these are the amounts which are deducted from the amounts paid by Louis Dreyfus to the growers from which it acquires grain. Providing marketers with control over transport may also allow them to apply a margin to the provision of that transport which is deducted from the amount paid by growers. Philip Coffin, the General Manager, Grains of Louis Dreyfus acknowledged that marketers do attempt to make a margin on the various storage and handling services that they provide to growers.

### Eastern States experience

1. The ACCC submitted that the experience in the Eastern States demonstrates that an unbundled service is able to be provided without significant disruption to the task of moving grain to port for export. For example, the ACCC submitted that GrainCorp manages the issue of outturning small volumes of grain by moving an order of less than 200 tonnes to another site which is already open for outturning other orders or consolidating that order with others from the same customer.
2. The grain industry in the Eastern States is, in the ACCC’s submission, also illustrative of the dynamic efficiency gains that may result from competition for grain transport services. By way of example the ACCC pointed out that Cargill has invested in “belt weighing” infrastructure at its GrainFlow facilities which, Mitchell Morison (the General Manager of Commercial and Risk Management of Cargill) considers, gives Cargill a “distinct advantage” over other bulk handlers.
3. As with the system operated by Viterra in South Australia, it is undoubtedly true that unbundled grain storage and handling and transport services can be supplied. CBH accepts that. That fact, however, does not provide a simple answer for the Tribunal. The structure and history of the grain industry on the Eastern States is substantially different from that in Western Australia, limiting the ease with which comparisons can be made. For example, the fact that there are multiple transport providers and operators of storage and handling facilities in the Eastern States does not necessarily imply that such a scenario would eventuate in Western Australia should the Notification be removed. It is difficult to assess with any confidence the accuracy of the ACCC’s claim that the Eastern States’ experiences with operating outturn to third party transport providers at multiple sites without causing significant disruption can be transported to Western Australia. This is particularly the case when the system that may be the subject of disruption is a bundled one such as the Grain Express system. It is important to take account of those differences in reaching decisions on the primary issues for the Tribunal.
4. As CBH submitted, the Eastern States system has not been established with a bundled and unbundled service running side-by-side. The substantial differences between the systems in place in the Eastern States and the likely systems that CBH would implement were the Notification removed make the experience of the Eastern States of limited significance to these proceedings.

### Comparison of fees

1. During the hearing the Tribunal heard some evidence comparing the storage and handling fees, and the freight fees, between States. CBH conducted a comparison of fees as a result of a “benchmarking exercise” conducted for the purpose of setting “grower value return on capital”. CBH benchmarked its storage and handling fees against bulk handlers in other States because it has no competitor in WA. In the case of both storage and handling fees and rail freight fees, CBH’s fees appear to be significantly below those of bulk handlers operating in other states (Viterra, GrainCorp and ABA).
2. The ACCC submitted that the comparison of fees by CBH is neither a like-for-like comparison, nor a measure of CBH’s relative performance or efficiency. In the ACCC’s submission, in order to undertake such a comparison it would be necessary to makevarious adjustments to the data to take account of differences in the costs of inputs between States and differing operating conditions, including geography, climate and homogeneity of grain. Accordingly, the ACCC submitted that the Tribunal does not have the requisite evidence before it to conduct a true like-for-like comparison of fees between States.
3. Given the substantial differences between the Eastern States and Western Australia mentioned above, the Tribunal accepts that it is not possible for it to come to a firm conclusion about the relative pricing or efficiencies of the two regions. Indeed, there is no evidence of any efficiency study in the Eastern States which would enable a meaningful comparison to be made, or at least one with sufficient certainty to act on it with confidence.

## South Australia

1. The Tribunal was also taken to a large body of evidence about the grain industry in South Australia. The experience in that State was used as a comparator to that in Western Australia, by the ACCC in particular.
2. Approximately 80-85% of the grain harvested in SA is exported, with some variation from year to year. Grain grown on the Eyre Peninsula and to the west of the Spencer Gulf is predominantly exported, making it the region most similar to Western Australia.
3. The principal bulk handler in South Australia is Viterra. Viterra is a global agribusiness with headquarters in Canada. It has operations in Australia, New Zealand, the United States and Canada and has trading offices in Japan, Singapore, China, Switzerland, Italy, Ukraine, Germany and India. Viterra commenced operations in Australia in October 2009, when it merged with ABB Grain Limited.
4. The Tribunal heard considerable evidence about Viterra’s operations in SA. Viterra operates 106 receival sites in South Australia. Its network is significantly larger than any other bulk handler in South Australia, with a total capacity of approximately 10 million tonnes. The other operators are Cargill (which operates four sites in South Australia), GrainCorp (which operates one site in South Australia), Free Eyre Limited (which operates one site), and various other entities which have their own storage facilities and on farm storage. There are four marketers who export grain from South Australia, including Viterra. All four use Viterra’s supply chain services to export grain from South Australia.
5. In South Australia, approximately half the grain moved from Viterra’s up-country sites to port is transported by rail and the other half is transported by road. There is only one rail operator in South Australia, namely Genesee & Wyoming Australia Pty Limited. There are multiple road freight service operators, both small and large, who service the grain industry. There are six port terminals in South Australia from which grain is exported, all of which are operated by Viterra.
6. Since 2008, that is the time of the introduction of Grain Express in Western Australia, on average approximately 20% of grain received by Viterra at its port terminals in SA is delivered directly by growers. This is a similar percentage to that delivered to the port or near port sites in Western Australia. About another 8% comes to port from third party storages.
7. Viterra has two services for bulk export grain. The first is known as “Export Select”. Under Export Select, growers and/or marketers acquire a bundled product from Viterra comprising storage and handling and transportation services and acquire an entitlement to grain of a particular type and grade at the port terminal. This service is a port-based notional entitlement system. The second is known as “Export Standard” and is a service by which customers can manage their own logistics to port, whilst still accumulating grain in Viterra’s up-country sites. This service is a site-based notional entitlement system and is similar to the systems in the Eastern States.
8. The expression “Export Standard” is also used where grain is transported from a third party receival site to port by a marketer. Viterra also offers a transportation service from third party storages to port, which is also classified as “Export Standard”.
9. Viterra does not offer the unbundled Export Standard service at all receival sites. This is recorded in the Viterra’s operational manual. The manual states that marketers are able to choose between the two products “except from an Export Select only site”. The restrictions that Viterra places on particular sites are set out in schedule D of the manual. The Export Select status of the site is shown in the fifth column (which contains a set of sub-columns for types of grain). Where a grain type is identified in this table, it means that grain in that grain type can only be outturned from the site using the Export Select product.
10. For example, the receival site at Werrimull, which was identified by Timothy Krause, General Manager Strategy and Compliance, Grain, of Viterra in cross-examination as an Export Select only site, has the notation *“All Wheat”*, which means that for all wheat grades deposited at the receival site, only the Export Select product can be used to transport that grain out of the site. However, the absence of other grain types from the schedule does not mean that Export Standard is available for these grains at the site. Mr Krause confirmed that the Werrimull receival site does not accept any grains other than wheat. Accordingly, the schedule is even more restrictive than it appears on its face, because the absence of a grain from an Export Select restriction does not imply its acceptance at the site.
11. On the second page of schedule D, the receival sites on the Eyre Peninsula are set out. All but five of the 35 receival sites opened on the Eyre Peninsula for the 2010-2012 harvest season by Viterra were restricted to Export Select for all wheat grades or had other restrictions on the availability of the Export Standard product. These sites were Cummins, Kimba, Lock, Thevenard and Tumby Bay. Thevenard is a port terminal, so it is unlikely there would be demand to outturn grain from this site to third party transport. Cummins and Tumby Bay both have significant minimum daily outturn rates which, for wheat stored in bunkers or sheds, means that a marketer would have to outturn a minimum of 2,000 tonnes per day from each site in order to be permitted to outturn from the sites.
12. Apart from those five receival sites, the evidence shows that for growers and marketers who deposited their grain into the restricted receival sites, only the Export Select product could be used to transport the grain from the receival site to the port terminal for export. That requirement is established through a contractual tie.
13. Viterra sites which are designated as “primary sites” for “Export Standard” permit unrestricted use of Export Standard. In the Eyre Peninsula (where wheat is primarily intended for export) there are five “primary sites”, mentioned above, at which Export Standard is permitted. Viterra seeks to encourage marketers to use its Export Select service by offering a rebate for users of that service.
14. CBH submits that the outright restriction placed on any product other than Export Select at a significant number of sites, combined with the operational restrictions regarding outturning at sites, such as the four day notice period for primary sites and varying minimum outturn restrictions for sites, means that the choice faced by marketers in South Australia is limited, or non-existent. The limited nature of the choice, in CBH’s submission, combined with the rebate offered by Viterra to marketers who use the Export Select system, means that the choice available to marketers is illusory.
15. Significantly, in CBH’s submission, Viterra considers that it needs to make Export Select compulsory at the designated sites in order to achieve the efficiency benefits of the system. Mr Krause agreed that making Export Select compulsory at the sites stated by Viterra allowed it to achieve many benefits, including reduced costs and better utilisation of transport capacity and infrastructure. The benefits that accrue to Viterra in making Export Select compulsory are substantially the same benefits that CBH propounds as justifying the Notified Conduct.
16. CBH maintains that it is incorrect to suggest that Viterra obtains efficiencies equivalent to the Grain Express system without having to impose a contractual condition tying transport to storage and handling. It is, in CBH’s submission, essential for the efficient operation of the Viterra system that the tie be in place. Without it, as Mr Krause said, the substantial benefits to Viterra of the Export Select system and the public benefits arising from the efficiencies so derived would not occur. As noted above, Viterra seeks to encourage marketers to use its Export Select service by offering a rebate for users of that service. However, it does not rely on pricing alone as, apart from its primary sites, Viterra also imposes a contractual condition which obliges the grower or marketer to use the Export Select package, including its transport system to port.
17. Where both Export Select and Export Standard are available, customers are able to choose Export Select, Export Standard or a combination of both services. Export Select and Export Standard have operated for the past three harvests (2008/09, 2009/10 and 2010/11).
18. A distinction between CBH and Viterra’s operations is that Viterra charges marketers for all of the storage and handling, transport and export fees and charges associated with grain export, whereas CBH charges growers the receival fee and for transport.
19. Viterra encourages its customers to use Export Select, by giving them a rebate on the total price charged. Customers receive the benefit of the rebate on a sliding scale, payable at a higher rate if grain is transferred into Export Select early in the season, and decreasing as the season progresses. The maximum rebate for the 2011/12 season is $2.20 per tonne, and the minimum rebate is $1.00 per tonne. Viterra charges an outturn fee which is the same whether the grain is outturned to Viterra-arranged transport or third party transportation.
20. Viterra has a “take or pay” arrangement with Genessee & Wyoming for rail services and engages road transport providers on short, medium and spot bases. Viterra does not provide unlimited transport capacity for Export Select. Rather, it offers an initial amount of capacity, and then may provide additional capacity which is called Additional Export Select. Marketers who may initially have chosen – or who are forced due to capacity issues to choose – Export Standard, may elect to switch from Export Standard to Additional Export Select.
21. During the last two harvests almost 100% of grain from Viterra’s up-country receival sites was delivered to port under Export Select (and not Export Standard). There was slightly more grain delivered under Export Standard the previous harvest.
22. In relation to the 2010/2011 harvest, which to then was the biggest ever in South Australia, Mr Krause was unable to say whether Export Select could be used to move all grain from Viterra’s up-country sites to port. He explained that the capacity being shipped through Viterra’s ports at a particular point in time may be higher than Viterra’s Export Select capacity. In such a circumstance, the shortfall could be made up by marketers “bringing their own transport logistics in” and shifting grain from Viterra’s up-country sites to the port. Mr Morison gave evidence that Cargill had occasion during May and June of the 2009/2010 season to move a train from Victoria to SA to fulfil transport requirements in SA. Mr Morison was not cross-examined on this event. James Maw, Senior Trading Manager of Glencore, also gave an example of an occasion when Glencore organised its own road transport in circumstances where Viterra was unable to organise transport. In response to a question from the Tribunal, Mr Krause stated that a company with a large transport fleet relocated to SA for the purposes of a “campaign”.
23. In cross-examination, Mr Maw stated that in the past couple of seasons Glencore has chosen Export Select because he was satisfied with the performance of Viterra as its transport provider.
24. The evidence of the marketers operating in South Australia, including CBH Grain, was that it was important to them to have the option to organise their own transport (from up-country receival site to port) if they wish to do so. For example, Mr Maw stated that Glencore “values the choice in South Australia as it provides a significant amount of flexibility and facilitates competition in transporting grain to port”.
25. Timothy Ross, Logistics Manager Eastern of CBH Grain, gave evidence that CBH Grain does not always use Export Select, as CBH Grain may wish to: “(i) increase capacity for a particular vessel; (ii) develop and maintain its own relationships with transport companies servicing Viterra’s ports (where freight savings can be achieved comparable to the Export Select rebate)...”.
26. The relevance of the South Australian situation, as the ACCC contended, is that it is evidence of the lack of difficulties that would be faced in operating unbundled and bundled systems together.
27. CBH took issue with this position and submitted that the Viterra system did not provide a useful reference or comparison. Its submission was put on the basis that, should the Notification be revoked, CBH believed (based on the wording of the ACCC Notice) that it would be required to offer the unbundled service at a large majority, if not all, of its receival sites.
28. The ACCC, through its counsel, said that that was not the ACCC position. Rather, it was said, were the Notification to be revoked, it would be open to CBH to operate a system that resembled the Viterra system. In response to a question from the Tribunal, CBH’s counsel agreed that the extent to which CBH needed to provide an unbundled service depended on its view of the requirements of the CC Act and CBH’s own risk assessment. The position taken by the ACCC is, of course, one which the Tribunal is entitled to proceed upon. Indeed, the Tribunal did not perceive that the ACCC position by the ACCC Notice would require CBH to provide the facility for every grower using a CBH receival site, wherever its location and whatever the tonnage of grain delivered, to support in an unlimited way and irrespective of efficiency of handling the grower’s selection of the means of transport of that particular grain and the destination of that particular grain.
29. If the ACCC’s position is accepted, the utility of the comparison is immediately apparent.
30. The situation in South Australia suggests that it is possible to establish a system in which bundled and unbundled services are provided side-by-side. It also supports CBH’s contention that there are substantial efficiency gains from operating a bundled service. So much is not contested by the ACCC. It may also be inferred from the fact that the unbundled service is not offered at a large number of sites that it is not efficient for it to be offered at every site.
31. It is the view of the Tribunal that the Viterra system may be used as a useful guide to identifying a likely world in Western Australia without the Notified Conduct. It tends to show that, if the Notified Conduct were to cease, it would not routinely follow that the Grain Express systems would no longer be able to operate or to operate efficiently and effectively in Western Australia. It does not, however, directly answer the question of whether there would be substantial public benefits or detriments resulting from the continuation of the Notified Conduct, so the balancing required by s 102(4) is still required.

## Quality Optimisation

1. Dr Richard Williams is a grain scientist. He has signed three statements in these proceedings. Dr Williams is the Customer Quality Manager in the Operations Division of CBH and is responsible for grain quality management for CBH. This role is twofold. First, Dr Williams assists CBH’s grower members to maximise the value of their grain by taking full advantage of the grades and quality of grain grown. Secondly, it is Dr William’s responsibility to ensure that CBH is able to deliver to marketers the quality of grain that has been purchased. Dr Williams has given detailed evidence on how the grade and quality of different grains is determined. Growers must make a complex set of decisions in planning each harvest so as ultimately to produce a crop which can be sold at the highest price.
2. Previously, if a grower delivered a particular load of grain which did not meet the minimum average standards on testing at the storage facility, then the grower would have to either accept a lower grading or attempt to physically blend the grain on farm with higher quality grain to lift the average quality of the load. Under the Grain Express system, CBH has established the Quality Optimisation program which allows growers to virtually blend the quality of each of their deliveries of grain so that the value of all of the grain delivered is maximised.
3. It is Dr Williams’ view that CBH would need to reconsider whether it could offer the Quality Optimisation program if the Notification is revoked. Ultimately, the decision on whether Quality Optimisation would be viable would be made having regard to the volume of grain that bypassed the CBH supply chain. CBH submitted that there would be a real risk to it in offering Quality Optimisation without the Notified Conduct, because the greater the volume of grain in the CBH system, the lower the risk that CBH will be unable to deliver grain of a particular quality to a marketer.
4. There would be two issues that CBH would need to consider if the Notified Conduct is not permitted.
5. First, and more generally, where small parcels of grain are removed from a stack it would not be clear what the actual quality of that grain is and what effect removing this grain would have on the quality profile of the remaining stack. Second, Quality Optimisation relies on CBH having huge quantities of each grade in its custody, so that the average quality across a port zone can be managed. The impact of a below grade delivery on the average quality of a stack is reduced where the size of the stack is increased.
6. CBH has had overwhelmingly positive feedback from growers on Quality Optimisation. CBH submitted that it is an example of CBH delivering real value to its grower members. CBH also submitted that it is an example of CBH showing competitive initiative, and is inconsistent with any suggestion that CBH management is “enjoying the good life”.
7. It is Dr Williams’ role to ensure that within each port zone, the grade and quality profile of grain held in CBH’s custody matches the entitlement that marketers have over grain in that port zone. This includes making sure that a marketer does not get a higher quality of grain than it has paid for, as this may mean there will be insufficient grain of the higher quality to fulfil the entitlement of another marketer.
8. CBH manages growers’ and marketers’ interests by planning storage to maximise the segregations available for different grades while also maximising the storage capacity. Quality management is considerably more complex in a site-based entitlement system as a bulk-handler cannot maintain as accurate a quality profile of grain in its custody. Under Grain Express, CBH has complete information about the grain in its custody and can treat all grain of a particular grade within a port zone as a single stack. CBH submitted that this enables it to offer an efficient and consistent quality management program.
9. CBH endeavours to deliver to marketers grain of the average quality specification for a particular grade for that port zone, rather than the minimum quality as is required under the BH Act. Accordingly, marketers only require information on the average quality in each port zone when planning the accumulation of a cargo, rather than complete information of grain quality at each receival site that it purchases grain. This makes the process of accumulation more efficient for marketers and bulk handlers.
10. The ACCC did not contest the value of the Quality Optimisation program. Rather, the ACCC submitted that that service does not depend upon the Notified Conduct being allowed to continue. It pointed out that CBH’s “future planning” evidence makes clear that CBH proposes to continue to offer Quality Optimisation at least to those growers who choose Grain Express.
11. The Tribunal does not consider that the Quality Optimisation program, and its obvious benefits to growers in Western Australia, are at risk by reason of the ACCC Notice putting an end to the Notified Conduct. In short, that is because the Tribunal does not consider that the Grain Express system will cease to be available to, and used by, growers if the Notified Conduct must stop. If there is no tie of all grain deposited at any CBH receival site to the Grain Express system, so the Grain Transport Market is contestable, the Tribunal considers that growers will continue to use extensively the Grain Express system in any event. The reason for that conclusion is discussed in more detail below. But it may be observed that CBH, understandably, put the submission that the ACCC Notice and so the end of the Notified Conduct would not, or would not be likely to, significantly lessen competition in the Grain Transport Market because the Grain Express system has such advantages to growers that they would continue to support it so strongly that – without the tie – the system would continue unabated. Without adopting that submission as correct, a matter discussed below, the Tribunal accepts that the Grain Express system is of such benefit to a sufficient number of growers – in both number and tonnage – to secure the ongoing efficiencies of the Grain Express system and the benefits – such as the Quality Optimisation program – which flow to growers as a result.

## Fumigation and contamination

### Fumigation

1. In Western Australia, once grain is received into the CBH network during the harvest period, it is generally immediately fumigated unless it is going to be transported directly to port and exported, or outturned to a domestic client. Grain which is transported to port during harvest and shipped immediately is generally not fumigated, given the high confidence levels of low or nil insect populations. Grain that is not sent to port for immediate shipment is strictly fumigated in accordance with CBH-documented protocols.
2. CBH claims that, although it generally fumigates once every 90 days, it is an advantage of the Grain Express system that there is no need to set a rigid fumigation schedule to accommodate the supply directions from marketers. CBH submitted that the fumigation schedule is designed in conjunction with CBH logistics staff to facilitate the proposed shipping schedules without affecting logistic efficiency or quality.
3. CBH claims that the Notified Conduct gives it full awareness of the volume of grain that needs to be moved, and when it needs to be moved by, thus allowing it to plan an optimal fumigation schedule. Further, CBH submits that the removal of the Notified Conduct would result in the requirement for increased testing, more fumigations, less access to grain, increased insect resistance to phosphine and potentially a less safe working environment for its staff.
4. CBH’s contention was that the Grain Express system, in which CBH has complete control over the transport function, is better able to manage and reduce the risk of contamination and insect infestation of grain held within CBH’s systems.
5. As was made clear from the evidence of David Feinberg, now the Managing Director of Australasian Lupin Processing Pty Ltd (a joint venture of CBH and George Western Foods), it would not be safe or sensible to interrupt a fumigation process while underway. It follows that, if CBH were to offer an unbundled service, it would be perfectly appropriate and sensible for it to provide that the site entitlement could not be called upon in circumstances where the grain was under fumigation. This is what the draft business rules provide. These rules reflect processes already adopted in the Eastern States and South Australia.
6. The issue of phosphine resistance arises only where fumigation is not carried out properly. That may occur if the area is not properly sealed, the fumigation period is too short or the strength of the dose is inadequate. None of these matters are affected by offering an unbundled alternative, on the assumption that grain is not available during the period of fumigation. It follows that, so long as suitable procedures are put in place to prevent grain outturn during fumigation, there is no logical connection between offering an unbundled alternative and the risk of increased phosphine resistance.
7. CBH also says that increasing the frequency of opening of storages increases the risk of insect infestations. The risk was explained by Mr Feinberg as being that, while a storage is open, there is a risk of an insect flying in. However the risk is only present while the storage area is open. This will be the period of time when it is necessary to take out grain. In circumstances where storage areas are often open for days at a time for an outturning ‘campaign’ even in the world with the Notified Conduct, the opening of a storage area for a short period of time presents a negligible increase in the risk. The situation is no different to that in Eastern Australian and South Australia where the issue is managed adequately.

### Contamination

1. Another point raised by Mr Feinberg was the risk of contamination where a transport vehicle has chemical residue from a previous load. CBH already has in place a procedure to require a transport provider to disclose the three previous loads. CBH also inspects trucks before they are loaded.
2. There is no dispute that, if CBH is permitted in the counterfactual to prevent any rail or road operator that does not comply with its code of practice from transporting grain from its receival sites to port, then the risk of contamination significantly diminishes. CBH submitted, however, that it would not be entirely eliminated. That is because, if any transport occurs outside of the Grain Express system in the event the Notification is revoked, it is likely that this will be because the grower or marketer wishing to transport the grain has been able to obtain, on the spot market, a better rate for transport than that offered by CBH throughout the harvest season. CBH submitted that this rate, being lower than that offered by CBH, is likely to be from an operator who normally uses their transport fleet for another purpose, but is willing to assign it to the grain transport task for a period. That operator may not be as familiar with CBH’s requirements as an operator that transports grain on an ongoing basis, even if the operator states to CBH that it will comply with the code. As the operator will only be transporting grain for a limited period, its incentive to invest in systems and processes to ensure compliance with the strict requirements of CBH’s codes of practice is less than for an operator who is an ongoing supplier to CBH.
3. There is no reason why these procedures could not equally apply to a transport provider arranged by a marketer. Also, the Codes of Practice for Rail could apply for third party transport. Marketers could be held responsible for the conduct of the transport providers they arrange. Marketers certainly have an incentive to ensure grain they export is free from insects and chemical residue. It is noteworthy that CBH already allows road transport providers to sub-contract and CBH also uses spot transport on occasion. It is difficult to see why the risk is any greater where the marketer arranges the transport provider. Mr Johns, Mr Morison and Mr Krause gave evidence that the procedures designed to ensure grain quality is maintained in GrainCorp’s, Cargill’s and Viterra’s supply chains are the same irrespective of whether their own transport or third party transport is used.
4. For these reasons, the issues of fumigation, quality and contamination are capable of being managed in WA, just as they are in the Eastern States and South Australia.

## Despatch and demurrage

1. In their evidence, the Marketers have referred to instances where they have incurred demurrage on ships and assert that this demurrage could have been reduced or avoided had they arranged their own transport from receival sites to port. CBH submitted that this assertion should be rejected, principally on the basis that the CBH system is an overall net despatch system because of the strong coordination and control that the Notified Conduct permits over the supply chain.
2. CBH has discussed despatch and demurrage agreements with major customers but to date has not concluded any agreements. CBH expressly contemplated, in its standard terms and conditions with marketers, the entry into despatch and demurrage agreements by mutual agreement at the time CBH receives a vessel nomination from a marketer wishing to export.
3. CBH submitted that, from a time prior to the introduction of the Grain Express system, CBH, led by Mr Collins and his team, actively sought to settle the terms of a form of a demurrage and despatch sharing agreement with the various marketers in the industry. CBH submitted that it was seeking to propose agreements to marketers that fairly apportioned demurrage and despatch between CBH on the one hand and each of the marketers on the other.
4. On 18 November 2009, Mr Collins provided a discussion draft of the proposed CBH despatch and demurrage sharing agreement for the 2009/2010 harvest season. Mr Collins stated that CBH was intending to trial an agreement of this type from 15 January 2010 with selected customers and requested any comments from them within 14 days. The agreement provided that CBH would pay to the marketer any demurrage accrued in each month and the marketer would pay to CBH any despatch accrued in the month, with payments to occur 10 business days following the end of the month. The agreement had as schedule 1 a method of calculating the acceptable lay time. The determination of lay time was dealt with by clause 4.2.
5. Mr Collins was involved in further discussions with Mr Maw regarding the terms of an agreement with Glencore. By March 2010, CBH had reached what was or was very close to a final draft of an agreement with Glencore. On 5 March 2010, Mr Collins provided Mr Maw with the final draft of the proposed agreement. CBH was prepared to enter into an agreement in the form provided to Glencore on that day. The reason why the agreement was not made was that Glencore decided not to proceed. It did not accept the terms proposed by CBH.
6. CBH was also willing to backdate the operation of the agreement to 10 February 2010 so that it would apply to a Glencore vessel (MV Priscilla Venture) that had been delayed in February 2010. In a separate email, Mr Collins confirmed to Mr Maw that, following a discussion between them in relation to the MV Priscilla Venture, CBH was prepared to backdate the operation of the proposed agreement to include all Glencore vessels loaded after 10 February 2010, which would mean that the agreement would cover the MV Priscilla Venture. Mr Collins stated that he wished to recognise the CBH related issues that Glencore had experienced with that vessel and effectively to start the proposed agreement with Glencore in credit in favour of Glencore. Mr Maw accepted that this was a case of CBH presenting to Glencore a demurrage and despatch agreement that it was prepared to enter into and give it a retrospective operation, but that Glencore had declined to enter into the agreement. Mr Maw, in answer to a question from the Tribunal, confirmed that to the extent earlier drafts of the agreement had had any issues with respect to the lay time calculation in clause 4.2, that issue had been addressed in the version presented to him on 5 March 2010.
7. On 7 March 2010, Timothy Collins, then the Executive Manager Logistics for CBH gave an update to Mr Allyn Wasley, CBH’s general manager, strategy and business development, with respect to the negotiation of despatch and demurrage agreements with marketers. Mr Collins informed Mr Wasley that CBH Grain had no interest in an agreement as proposed because CBH Grain recognised that there would be very little in it for its business, and it would be a “solid earner”for CBH Operations. Mr Collins stated that Cargill had declined to enter into an agreement for the same reasons as CBH Grain. At the time he was negotiating these agreements, Mr Collins had a very strong view that any despatch/demurrage agreement would very much favour CBH Operations because of the operation of CBH’s ports. It is noted that Mr Collins in October 2010 left CBH, and is now the General Manager Business Development of QR National Freight, a division of QR.
8. Mr Collins’ views about the lack of incentive for the marketers to enter into demurrage and despatch agreements by reason of the performance of CBH’s ports are consistent with the evidence given by Jodie Ransom, Supply Chain Manager for CBH. In her second statement, Ms Ransom described that in the last three harvest seasons for CBH Grain, CBH had operated net despatch ports. It is likely on the evidence that a demurrage and despatch sharing agreement would have resulted in payments by marketers to CBH.
9. It was put to Mr Maw that the reason that Glencore did not sign up to a demurrage and despatch agreement with CBH was because it was more likely to result in Glencore paying money to CBH, rather than the other way around. Mr Maw would not accept this proposition. However, Mr Maw accepted that, with the exception of the 2008/2009 harvest season, the ports have been net despatch ports for Glencore. There was also some suggestion that the agreements submitted by CBH were not true demurrage and dispatch agreements as understood in the industry.
10. CBH submitted that it is clear that it offers as a matter of course to enter into despatch and demurrage sharing arrangements with marketers, including Glencore and Cargill and that these offers have been rebuffed. As such, CBH contended, there is no basis for the ACCC to make out in this proceeding that the incurring of demurrage is a reason why the Notification should be revoked. CBH maintained that it had done everything it could to enter into agreements on commercial terms to share the risk of port delay but that the marketers have declined to do so, the only rational explanation being because there would be no benefit in it for them.
11. In the end, the ACCC submitted that the reasons for the failure of CBH and the marketers to reach agreement as to a suitable despatch and demurrage agreement are not of any real significance to the resolution of this matter. The Tribunal accepts that submission. It is clear that the issues about despatch and demurrage reflect a contentious view on the part of CBH about the appropriate terms for such an agreement. That is a commercial matter. The Tribunal has no view about that. However it is not satisfied that, for the purposes of measuring public benefits against the detriment of the Notified Conduct on competition in the Grain Transport Market, the preparedness of CBH to enter into despatch and demurrage agreements with marketers on the terms CBH proposed represents a public benefit of any significance.

## Domestic outturn

1. The contractual structure and operation of the Grain Express system is to provide for the nomination by growers of their grain to marketers at the destination sites. Marketers can use the services supplied by CBH to outturn that grain for export at the ports or into containers at the MGC, or they can use the domestic outturn service to obtain grain at the nominated domestic sites. The Grower Agreement contemplates, by clause 6.1, that CBH may permit growers to outturn grain at sites other than destination sites, but provides that the decision whether to permit this remains in the discretion of CBH. CBH will usually permit outturn at a non-destination site if it is already outturning grain from the site for its broader operations.
2. Within the CBH system there are 10 sites designated as domestic outturn sites. In practice, CBH allows domestic outturn from any site unless it is inconvenient for it to do so. As a result, domestic outturn took place at 48 sites during the 2009/2010 season.
3. In each of the harvest seasons under the Grain Express system, the Albany port terminal, the Esperance port terminal, the Geraldton port terminal and the MGC have been domestic sites. The Kwinana port terminal has not been so classified. It is expressly excluded by clause 11.1(a) of the Grain Services Agreement. In addition to these sites, Carnamah, Mingenew, Avon, Calingiri, Brookton, Narrakine, Merredin, Wagin, Borden, Lake Grace and Cranbrook were also domestic sites in at least one of the harvest seasons between 2008/2009 and 2011/2012.
4. The percentage of domestic outturns that occur at non-domestic sites is small, and constitutes around 8% of total domestic outturns in a normal harvest year. This quantity of grain represents less than 0.7% of the average amount of grain CBH receives in a harvest season.
5. Domestic outturns are typically low volume movements and, with the exception of outturn to a conveyor belt facility at the MGC, are by road. A typical outturn into road transport would be around 50 tonnes.
6. The procedures relating to domestic outturn include a minimum notice period for outturn requests, booking slots for outturn once a request has been confirmed, weighing procedures, procedures for dealing with grain unavailability due to infestation, fumigation or operational activities and domestic transport arrangements. CBH charges a Domestic Outturn Fee for this service.
7. The ACCC submitted that the volume of domestic outturn is already uncertain from year to year because it can vary by over 200,000 tonnes from one year to another and that this does not present a problem for CBH.
8. There was a time when CBH did not charge for domestic outturns, but as the requirements for the domestic market changed and CBH became responsible for meeting the quality specifications on outturn, extra processes for domestic outturns were introduced. As the domestic market grew and the number of outturn requests increased, CBH decided it needed to recover costs such as mobilisation costs, domestic co-ordination staff costs and domestic infrastructure costs. Quantifying the true cost of domestic outturns was difficult.
9. The fee charged in the 2010-2011 harvest season for domestic outturn is $8.90 per tonne for outturn to road and $11.55 for outturn to rail.
10. CBH submitted that the management and coordination of domestic outturns is difficult, labour intensive and operationally costly. CBH tried to accommodate, coordinate and align export accumulations with domestic outturns so that efficiencies of bulk outturns could be enjoyed. However, with site-based ownership of grain and differing grain class and grade requirements for different markets, these efficiencies were not enjoyed very often and the parallel export and domestic systems often caused congestion at receival sites.
11. The Grain Express system for domestic operators involves the relatively regular but small outturn of precise quality parcels from a limited number of CBH receival sites, being the designated domestic sites, for trucking to domestic end users or packing facilities.
12. The ACCC submitted that many of the alleged difficulties with offering an unbundled service would be equally apposite to domestic outturn, but do not in fact present a problem in that context. The ACCC submitted that the volume of domestic outturn is already uncertain from year to year, varying by over 200,000 tonnes from one year to another, and this does not present a problem for CBH’s operations. Further, the ACCC relied on the fact that outturn of grain to third party transport already occurs, without presenting significant problems.
13. Not all grain that is used by domestic operators in Western Australia is received by CBH at any point. In operating a supply chain for the domestic supply of grain, CBH faces competition from on–farm storage, end user storage and independent storage. During harvest, growers can deliver straight from paddock to domestic end user storage and bypass CBH storage and transport entirely. Growers can also store grain on farm and deliver direct to end user storage post harvest, thus by-passing CBH storage and transport.
14. This, too, is a matter which in the view of the Tribunal is ultimately of little moment to its decision. Domestic outturns from CBH receival sites or designated sites now take place in the circumstances and on the terms described. There is a great deal of practical sense in the existing arrangements. There is no persuasive evidence to lead to the view that, absent the Notified Conduct, the practice of CBH in relation to domestic outturns will need to alter in any material way. No doubt, CBH will continue to be mindful of its responsibilities to its grower members, including those who select their grain to be delivered to the domestic market. That is what it has done in the past. The Tribunal is not persuaded that the ACCC Notice, and so the freeing up of the Grain Transport Market, will lead to any detriment to the public compared to the present arrangements of CBH. The relatively small level of domestic outturns in Western Australia is not likely to alter in any dramatic way, and the way CBH accommodates it at present should not be affected. To take the positive position, the public benefit (if such it be) of the way CBH addresses domestic outturns at present will not be affected by CBH no longer being able to engage in the Notified Conduct.

## Fees and charges

1. CBH’s primary consideration in setting the level of particular fees is whether the aggregate revenue from all fees will meet all costs. CBH has not conducted the exercise of quantifying the cost of each and every input required to provide the services covered by the Receival Fee, the export fees or the domestic Outturn Fee. Consequently, there is very little relationship between underlying costs and each of these fees.
2. CBH submitted that it is able to maintain low prices for supply-chain services such as storage and freight by not including a profit component, and by maintaining operational efficiency through Grain Express. In some years there was a significant surplus in the Freight Pool. That resulted from CBH overestimating the amounts to be charged to growers for providing service of the transport of grain. Where the surplus was not then returned to growers, it has the appearance of a profit on that aspect of the activities of CBH, even though CBH insulated the surplus from its general operations and applied it towards freight costs in the following year. It is not an immediately obvious proposition, in that light, to conclude that the fees and charges of CBH for providing transport services in the year of the surplus necessarily reflect operational efficiency. Nor is it immediately obvious that, by carrying the surplus into the following year, CBH necessarily provides transport services with operational efficiency.
3. Mr Maw of Glencore and Mr Coffin of Louis Dreyfus confirmed that CBH’s bulk handling prices are the lowest of the three major bulk handlers in Australia. Mr Maw also confirmed that CBH had a good reputation, both from an overseas perspective and from within its own grower members, with respect to its service provision.

### Receival fee

1. The basic Receival Fee is $10.50 per tonne for wheat at a tier 1 site and is payable by the grower. There is no storage fee up to 30 September of the year in which the grain was deposited. This means the grower can defer making a decision to sell the grain to a marketer until 30 September without incurring any additional storage fees, a process known as warehousing. CBH strives to keep the Receival Fee as low as possible as a way of ‘returning value’ to growers. The Receival Fee includes a component for storage and handling.

### Domestic outturn fee

1. The domestic outturn fee is charged for outturning grain to non-CBH arranged transport. The fee is not payable when CBH transports grain on behalf of a grower or marketer. The current domestic outturn fee for domestic outturn to rail is $11.55 per tonne and for domestic outturn to road is $8.90 per tonne.
2. The domestic outturn fee for domestic outturn to road was $3.20 for the 2008/09 harvest but was subsequently increased to $8.50 and then $8.95. The internal thinking behind the change was explained in evidence by Andrew Menschelyi, Road and Rail Contract Manager of CBH, and Mr Tutt. In summary, time-based storage fees were abolished and an average storage component of approximately $6.95 was to be added to the domestic outturn fee of $3.20. This took the fee to $10.15, but it was then decided to scale this back to $8.50 as $10.15 was considered too high.

### Export fees

1. Marketers pay export fees comprising an “Up-Front Marketer Fee” and an “Export Fee”. For the 2011/12 harvest, the total of those two fees is $17.95. For the preceding year, the total was $17.10. Mr Mencshelyi and Mr Tutt both said that a comparable average storage component was included in the export fee at the same time as it was in the domestic outturn fee.

### Storage and handling fees

1. At present, there is no specific storage and handling charge for the period up to 30 September. It is included in the fees referred to above. Mr Tutt said that there is “every chance” that a recommendation will go to the April 2012 Board meeting of CBH for the re-introduction of time-based storage fees. He also said that in that event “you will see our shipping fee will drop back to $12 a tonne, and outturn domestic will drop back to $3.50.”

### Freight fees

1. Under Grain Express, the freight fees are payable by the grower. Different freight fees apply for each receival site. The Tribunal heard evidence that, in 2009, ARG moved from network-based pricing to site-based pricing. In summary, the change was to price on the basis of the distance travelled by rail rather than the distance “as the crow flies” or the distance by road. The change was a cause of great concern within CBH. This is because some grain which is transported by rail has to move away from the port, initially, to intersect with the feeder line which will ultimately transport the grain to the port. In such circumstances, grain has to travel further when it is transported by rail rather than by road.
2. [REDACTED] CBH considered it to be too disruptive to pass on these changes in full, and adopted a “compromise” position of partly passing on these changes, with a view to “transitioning” to cost-reflective freight prices. [REDACTED]
3. The Western Australian Government has provided a subsidy, known as “Transitional Assistance Package” or “TAP” funding, to CBH to subsidise the cost of rail transport on certain lines. The express premise of the funding is that transport by rail is more costly than by road in some cases. The funding is to “subsidise the additional cost of conveying grain received from grain suppliers on the designated rail lines, compared to the cost of conveying grain by road.”

## The Freight Pool

1. CBH operates a Freight Pool through which it accounts for the expenses and income referable to the transportation of bulk export grain from receival sites to port. The primary purpose of the Freight Pool is to ensure that the amounts paid by growers for freight are approximately equivalent to the costs of providing freight and that CBH does not derive a profit or financial benefit from the supply of freight services. CBH’s stated goal is to provide freight to growers on a not for profit basis. CBH submits that the Freight Pool achieves this by containing all of the transactions which represent the revenue and costs of providing grain freight. Any surplus remaining in the Freight Pool is returned to growers at the end of the harvest as a rebate or kept in the Freight Pool to reduce freight costs in the next harvest. Separate accounts are produced for the Freight Pool and these accounts are then the subject of an audit by external independent auditors.
2. While CBH’s objective is to manage the Freight Pool in such a way that the total costs are approximately equal to total income, it has in fact derived substantial surpluses in each year of the operation of the Freight Pool. The surpluses were $8.168 million in 2008/2009, $2.383 million in 2009/2010 and $15.954 million in 2010/2011.
3. Whether CBH remits the surplus, in whole or in part, is entirely within its discretion. The surplus for the 2009/10 year was “rolled forward” in anticipation of a smaller harvest the following year. This process, whilst arguably it may be for the benefit of growers, necessarily results in growers having significant funds held by CBH. Whilst the Notified Conduct is permitted, all growers who deposit grain at CBH receival sites must submit to that process. It is a matter of simple arithmetic that (say) a grower who deposited 100,000 tonnes of grain in the 2010/2011 season would have a significant amount of funds held back by CBH in the Freight Pool. The retained surplus would then be used to contribute to the transport costs incurred by CBH in the following season. The evidence shows that, whilst CBH publishes its freight rates to growers, they are not able to see the underlying costs incurred by CBH, including for particular routes. Neither a grower nor a marketer knows the underlying costs of the transport services for the path of particular grain, against which (but for the Notified Conduct) the grower or marketer might choose an alternative transport service. As noted above, whilst no doubt CBH endeavours to be efficient, the Notified Conduct removes it from the pressure to be economically efficient to which the opportunity for growers and marketers to switch transport providers might expose it. The way the Freight Pool operates to transfer transport costs from one year to the next is one possible example of the lack of such pressure.
4. At the commencement of the harvest season, CBH sets indicative freight prices from each of the receival sites to the available destination sites, being the port terminal in the particular zone in which they operate or the MGC near Perth. CBH estimates the transport that will be required based on the projection made by CBH of quantity and types of grain that will be harvested and the predicted distribution of the grain through CBH’s network of receival sites. CBH uses this information and the costs of that transport from CBH’s transport contracts to calculate the freight rates. By the end of the harvest period in December or January, CBH has accurate data regarding the harvest as it has been completed and as the majority of the grain from the harvest has been delivered to the receival sites. With more accurate data, CBH re-assesses its rates through its transport model and publishes final rates for the season based on the actual tonnes of grain received.
5. The actual costs that CBH pays for transporting grain depends on the actual movements that occur throughout the season, in response to demand for grain at the ports.

## Transfers and Cross-subsidies

1. The ACCC submitted that a number of routes are charged out at a price below CBH’s variable cost of operating them. Also, even where the rate is above CBH’s variable cost, it is clear that the contribution to CBH’s overall fixed costs of running the transportation system is not the same for each route. In other words, different routes make different proportionate contributions to the fixed costs of the transportation network. The term used by Dr Smith to describe the differing contribution to fixed and common costs was ‘transfer’. The way in which CBH sets the freight rates is entirely within its discretion. Despite the acknowledged ‘transitioning’ to full site-based pricing, CBH has no firm date as to when this process will be complete.
2. The ACCC submitted that the discretion with which CBH is able to determine freight rates is significant to the Tribunal’s consideration of the Notified Conduct. CBH in its discretion sets freight rates for routes which do not directly, or consistently, reflect the underlying cost, including the fixed cost component, of providing transportation for the route. In this context, the ACCC submitted, the Notified Conduct has two effects. First, a customer is prevented from taking up a better offer from a rival supplier of transport services. Secondly, CBH is insulated from the pressure to respond to its customers switching, or potentially switching, to a rival supplier by lowering its prices or improving its service. Thus the Notified Conduct, coupled with the CBH’s pricing practice of “transfers”, according to the ACCC, produces inefficiency.
3. The ACCC submitted that the points in the preceding paragraph are relevant to the question of whether CBH’s operations are “efficient” as assumed in some of the expert evidence and to the likelihood that growers and/or marketers may be interested in arranging their own transportation from receival site to port.
4. It is not the function of the Tribunal to comment upon the pricing and administrative structures and decisions of CBH, save to the extent that they are said to be relevant to the two primary decisions the Tribunal must make.
5. In relation to the question whether the Notified Conduct does not and would not have the effect or likely effect of substantially lessening competition in the Grain Transport Market, the Tribunal notes that the Notified Conduct enables CBH to set its pricing and administrative structures free of any element of competition in the Grain Transport Market, although (as CBH said) its process leading to its arrangement with Watco demonstrates the competition for the market itself.
6. It is sufficient at present for the Tribunal to indicate that the Tribunal is not satisfied that the exposure of the Grain Transport Market to competition would materially and detrimentally affect CBH’s ability to provide the services it offers to growers and marketers in an efficient way. Again, that is explained in more detail later in these reasons. But it is worth repeating that the Tribunal does not consider that, if CBH is no longer able to engage in the Notified Conduct, it will not maintain and be able to maintain the Grain Express system with the benefits it attributes to it.

## Rail tender

1. CBH submitted that the Notified Conduct is likely to increase competition in the Grain Transport Market because the volume of grain transport services acquired in that market by CBH by reason of the Notified Conduct provides certainty for the suppliers it acquires services from and this permits, facilitates and encourages new entry by suppliers of grain transport services. This is particularly the case with respect to rail, but applies also to road.
2. The evidence is that rail is more efficient than road for moving tonnes to port, because of the significantly larger volumes that can be moved in a single train movement (4000 tonnes) compared to a single truck (40 tonnes) and the associated savings in outloading.
3. In 2008, ARG was the incumbent rail operator. ARG provided grain rail services to CBH under the Western Australian Export Grain Transportation and Handling Agreement, which was entered into in 1999 in preparation for the privatisation of the Western Australian Government’s rail assets. The original term was until 31 October 2005 but it was subsequently extended four times and its terms varied.
4. CBH determined to conduct a tender process for its future rail needs. CBH submitted that without this tender process, there would be no competition to ARG. In the CBH submission, that would have impacted negatively on growers, marketers and the grain industry as a whole.
5. CBH submitted that in order to create competition it needed to attract new entrants. The Notified Conduct, CBH contended, significantly increased its prospects of securing competition in tendering to provide rail transport services. Without some certainty over the task, new entry would be unattractive because it comes at significant cost.
6. CBH commenced a project in 2009 to competitively tender its future acquisition of grain rail services. On 8 March 2010 CBH issued a request for proposals for the provision of grain rail services. The request was divided into three service packages. First, the provision of rail services in the northern narrow gauge section servicing the Geraldton and Kwinana port terminals. Secondly, the provision of rail services in the standard gauge section servicing the Kwinana and Esperance port terminals. Thirdly, the provision of rail services in the southern narrow gauge section servicing the Albany and Kwinana port terminals and the Merredin transfer line.
7. At that stage it was proposed that the transport provider would provide the locomotives and wagons, as has been the case under the current contract with ARG but, CBH submitted, it was open to considering any proposals concerning delivery of rolling stock including the transport provider supplying its own rolling stock or CBH supplying its own rolling stock and leasing it to the transport provider. All respondents to the tender other than ARG put forward their proposals on the basis that CBH would acquire the locomotives and wagons.
8. Mr Collins was involved in preparing an updated and amended response to the tender for CBH’s rail services following his employment by ARG in October 2010. In its tender response, ARG was seeking to put forward its best possible terms and conditions in order to seek to win the tender.
9. CBH chose Watco as the preferred tenderer after developing a financial model to assess the proposals and calculating the net present value of each proposal. Watco is a US based railway operator. It is a new entrant into Australia as a supplier of grain rail services in Western Australia.
10. At the time at which CBH accepted the Watco tender and decided to purchase the rolling stock, it was well aware of the ACCC’s proposal to revoke the Notification.
11. The analysis carried out by CBH of the proposals indicated that an outcome where CBH acquired new rolling stock and contracted Watco to operate the rolling stock for it was the optimal outcome. KPMG reviewed and agreed with CBH’s model and valuation methodology.
12. CBH signed a term sheet with Watco on 6 December 2010 and executed a rail services agreement on 7 October 2011 (the Watco Agreement). The Watco Agreement provides for Watco to provide grain rail services for 10 years from 1 May 2012.
13. Under the Watco Agreement, CBH will acquire the locomotives and wagons referred to earlier in these reasons. CBH maintains that it is in the best interests of growers for CBH to own the rolling stock because it will ultimately bring about lower freight rates for growers as well as numerous other “side benefits”. CBH expects the reduction in freight costs to be immediate, even with the capital costs of the rolling stock investment.
14. CBH submitted that the growers have purchasing power through CBH. The Notification reduced the counterparty risk of a new entrant committing to new entry through a contract with CBH because it needed to be confident that CBH is committed to volume, rather than having CBH have to convince growers to use its transport services. While this issue could be addressed through an increased fixed cost component, CBH submitted that this is not in the interests of growers, as it increases the cost of freight in years when the harvest is below average.
15. Mr McKechnie, the Chief Commercial Officer of Watco, led Watco’s successful tender for CBH’s rail transport task. He gave evidence concerning Watco’s position in relation to the Notified Conduct. His evidence was that Watco would not have tendered but for the Notification. This is because without the Notified Conduct, there would be no certainty as to the volume of the rail haulage task and Watco would be faced with a risk that it would not be able to recover its sunk costs. The Tribunal considers that Mr McKechnie overstated the position.
16. Mr McKechnie gave evidence during cross-examination that he was aware that the ACCC was reviewing the Notification when he entered a Heads of Agreement with CBH on behalf of Watco. Watco contracted after the ACCC Notice. CBH was aware of the possibility of the revocation of the ACCC Notice from June 2010, and received the draft decision of the ACCC on 6 December 2010. Clearly it conveyed that possibility to Watco. The ACCC Notice was given on 29 June 2011, and the Rail Services Agreement between Watco and CBH was signed on 7 October 2011. The Watco Agreement contains provision to address the risk that the Notification would be revoked [REDACTED]. If Mr McKechnie’s evidence (before cross-examination) were correct, Watco would not have entered into the agreement. CBH accepted that, but submitted that the critical issue is that Watco’s entry was encouraged by the certainty provided by the Notified Conduct. CBH submitted that that certainty is what facilitated the tender and allowed CBH to anticipate savings on freight expected to be between nine and 12%. It will also maintain, CBH submitted, subject to a final decision by the government, the operation of the Tier 3 lines, which would reduce the number of trucks on country roads. On the other hand, Watco considered that investing in the rolling stock would be too great a risk for a new entrant in the market. CBH contended that it can be understood that Watco is unlikely to have tendered without the option that CBH purchase the rolling stock.
17. The Watco Agreement is likely to effectively double the tonnes-to-port capacity while reducing the freight rate. CBH has carried out preliminary analysis of the savings, as compared to the previous arrangements with ARG (or QR), that it expects to arise from its arrangements with Watco. This analysis compares the various components of CBH’s rail costs. It assumes that the below rail costs (that is, access charges to Brookfield) and the cost of the road-to-rail transport costs are the same in both scenarios. The analysis is based on the average harvest. On CBH’s current estimates, its rail costs will fall by a significant amount compared to the arrangement with ARG/QR, and its overall savings will be very substantial. If all savings are realised, then the estimated savings from moving from ARG/QR to Watco would be a significant percentage.
18. Ten year rail contracts for the provision of rail services are common throughout the industry and ARG has signed a number of ten year contracts for the provision of rail services.
19. Watco aims to increase the percentage of the rail task from 50% to 70% as a guarantee of volume in poor harvests. This will require investment in improved service delivery from Watco, as compared to the incumbent rail provider ARG and will subsequently create competitive tension between the rail and road providers.
20. Watco intends to use its operations servicing the CBH grain task as a “springboard” into other Australian markets, especially in the mining sector. This was to be achieved by building a brand name and reputation in Australia, and be funded by the revenue generated under the CBH contract. If the Notification is revoked, Mr McKechnie says Watco’s ability to compete in other Australian markets will be hampered, or even eliminated.
21. In cross-examination Dr Philip Williams (whose evidence is referred to in more detail below) accepted that a significant part of his ultimate conclusions is based on his characterisation of CBH as a “purchaser and arranger” rather than a supplier of transport services. The ACCC submitted that CBH’s role extends far beyond this. In particular, the ACCC relied on the fact that CBH does not just pass on the cost of transport to its growers but that it has the discretion to set the freight rates and to retain any surplus in its freight pool rather than returning it to growers. Further, the ACCC submitted that, given that CBH has now purchased the rolling stock, its role clearly goes beyond merely purchasing and arranging the provision of transport by others, it will be a *direct* provider of transport services in its own right.
22. As the Tribunal has indicated, it does not accept that Watco would not have entered into the Watco Agreement but for the Notified Conduct. It clearly entered that Agreement, knowing that the ability of CBH to provide Watco with the contracted volumes inherent in as part of the tie was under review. The Watco Agreement expressly addresses the prospect of a notice such as the ACCC Notice. In addition, Watco’s capacity to transport grain received by CBH was somewhat limited, as noted earlier in these reasons.
23. CBH did not separately contend that the Tribunal should find that Watco may itself have provided the rolling stock, but for that risk, and Mr McKechnie did not give evidence to that effect.
24. Accordingly, the Tribunal is not satisfied that, but for the ability of CBH to engage in the Notified Conduct, it would not have been able to enter into an arrangement with Watco or another entity in much the same terms as the Watco Agreement. Watco anticipates that it will transport a significant percentage of the grain received by CBH at its receival centres, [REDACTED]. As the Tribunal has found, the Grain Express system is likely to continue to be offered by CBH and adopted by the majority of growers and marketers. It is likely to continue to operate in relation to the bulk of the grain received by CBH at its receival sites.
25. The Tribunal will address other submissions in relation to this aspect of the evidence later in these reasons.

# Substantial lessening of competition

1. It is now appropriate to address the two primary issues which the Tribunal is required to address.
2. The first is whether the Tribunal is satisfied that the Notified Conduct does not and would not have the effect or likely effect of substantially lessening competition in the Grain Transport Market, within the meaning of s 47 of the CC Act. As indicated at the commencement of these reasons for decision, the Tribunal is not satisfied of that.
3. CBH claimed that the Notified Conduct would not have, or would not be likely to have, the effect of substantially lessening competition in the Grain Transport Market. CBH’s primary contention in support of this submission was that, even if the Notified Conduct was no longer engaged in, there would remain almost no demand for the untied service.
4. CBH also contended that the competitive tender process for road and rail transport contract that takes place for the Grain Express system provides substantial and sufficient competition for, and in, the Grain Transport Market.
5. The evidence does not support CBH’s contention that there will be negligible demand for an untied service in the Grain Transport Market in the proximate future without the Notified Conduct.
6. To support that contention, CBH sought to establish the cost to growers or marketers of it providing rail transport services untied to its grain receival services. Its evidence suggested it will either use a bottom-up cost model or a pricing model based on the efficient component pricing rule (ECPR) to set prices. CBH submitted that, in using either approach, it would be acting reasonably and appropriately to set prices for the use of the site entitlement system and the export outturning services so as to recover its opportunity costs in supplying the unbundled service.
7. CBH relied on the evidence of Dr Philip Williams, an expert economist, to suggest that the ECPR is most likely to be used. According to Dr Williams, under the ECPR the access price for a component of a supply chain is set equal to the retail price for the final service minus the avoided costs of those components of the supply chain that the access provider does not supply.
8. CBH submitted that the application of ECPR as a pricing methodology in this case would be entirely appropriate. CBH devised the Grain Express system as its sole supply chain system and, with the support of the marketers, lodged the Notification with the ACCC. In order to supply the transport services necessary for the operation of the Grain Express system, CBH has entered into a number of contracts, in particular with Watco, which have a fixed cost component and it has purchased capital, in particular the rolling stock. CBH submitted that the costs of these factors cannot be completely avoided if it does not supply the transportation component for a particular bundle of grain that is outturned from its sites. CBH contended that its freight prices are set so as to recover the costs of providing the freight services. If the grain tonnage CBH arranges transport for and the revenue it receives for such transport decreases, then it has to spread its fixed costs across a smaller number of tonnes. Passing these costs on to users of the Grain Express system, which is the most efficient supply chain, penalises users of the system and is not in CBH’s interests because it makes the Grain Express system less attractive and potentially commences a “vicious circle”which could lead to the abandonment of the Grain Express system. Accordingly, CBH contended, it is appropriate for CBH to pass on in the prices for the unbundled service the full opportunity cost of providing the service. This includes the contribution that each tonne of grain outturned with the unbundled service would have contributed to the fixed and capital costs of CBH’s Freight Pool.
9. CBH maintained that this would cause the prices for storing grain in the site entitlement system and accessing the export outturning service to be substantially greater than the prices that will be charged for the Grain Express system, and (consistently with what occurs in the grain supply chain in South Australia) all or almost all grain will remain in the Grain Express system.
10. CBH submitted that, in the future without the Notified Conduct, growers and marketers would prefer not to hold grain in the site entitlement system. If the unbundled service is offered in such a way as not to disrupt the Grain Express system, there would be uncertainty as to the timing of access to unbundled grain at receival sites and the timing of access to the port terminals. Accordingly, in CBH’s submission, there will not be any real or meaningful demand for the site entitlement system, or for transport services from CBH’s receival sites to CBH’s port terminals or other locations other than the demand for such services through the Grain Express system.
11. There was a considerable amount of evidence about whether there was likely to be any, and the likely extent of any, take up of the unbundled service.
12. The ACCC contended that the evidence is that there is a relatively high willingness on the part of marketers to pay for alternative transport services, particularly when there are congestion problems in the Grain Express transport stem or if CBH does not price its transport services competitively. Mr Collins stated that QR had received “an overwhelming response from the market that they want to see QR continue to provide rail services”. CBH has acknowledged that some marketers would like the opportunity to arrange their own transport in some circumstances.
13. The ACCC submitted that the evidence also demonstrates that grain transport service providers would find it commercially feasible or economic to supply a grain transport service in competition with CBH. QR is in a position to provide rail transport services provided minimum tonnage levels can be met. There are a significant number of road transport providers that already supply transport services to growers to move grain from farm to CBH receival sites. The ACCC submitted that in the likely future without the Notified Conduct, these service providers would have the option to expand or otherwise organise themselves to supply a similar or slightly differentiated service to grain growers and marketers in competition with CBH for the transport of grain from receival sites to the ports.
14. The ACCC submitted that the prospect of such competition is real, as evidenced by the Heads of Agreement entered into between [REDACTED] and a subsidiary of QR. In the ACCC’s contention, the execution of this Heads of Agreement suggests that, among the marketers, at least [REDACTED] consider that there is a real chance that it will be economic to acquire an alternative transport service to transport grain from receival sites to port. Among the potential alternate transport service providers, at least QR expects it will be economic to supply a grain transport service in competition with the CBH/Watco transport service.
15. The ACCC submitted that Mr Collins’ evidence on the Heads of Agreement, suggests a real willingness and interest on the part of QR to supply and on the part of [REDACTED] to acquire such services. If this comes to fruition, the volume could be up to [REDACTED] tonnes of grain per annum.
16. The internal working assumption of CBH is that, in the “likely” scenario following revocation, some tonnage would shift to the unbundled service. There was a “pessimistic” scenario estimate with a greater tonnage shifting to the unbundled service. Ms Ransom said that, based on her discussions with QR about its intended rail transport service, the volume of tonnage which shifted from the Grain Express system could be higher than assumed in the ‘future planning’ documents. Similarly, Mr Tutt agreed that greater tonnages than those assumed in the ‘future planning’ documents could shift to the unbundled service.
17. The ACCC contended that it cannot be assumed and left untested by the market that CBH is in all cases efficient in arranging transport services and that there is no possibility that any grower or marketer could ever obtain a better price, better level of service or better outcome from a rival transport service provider.
18. For these reasons, the ACCC submitted that the Tribunal should conclude that there is a real chance there would be significant take up of the unbundled service and that it is not necessary for the Tribunal to form a view as to the precise volume of the likely take up.
19. CBH submitted that it is clear from the wording of the ACCC Notice that the ACCC was not countenancing the ability of CBH to maintain any elements of the Notified Conduct. In particular, CBH submitted, the ACCC was not countenancing the ability of CBH to deny growers and marketers the ability to outturn grain from some of its receival sites. This reasoning assumes that as soon as CBH prevents outturn from any of its receival sites, it engages in the Notified Conduct, albeit to a more limited extent. Accordingly, CBH submitted, its project team who had been responsible for the contingency project cannot be criticised for seeking to develop a pricing structure for an unbundled service, with business rules and pricing underlying it. That submission may have been prompted because, in the course of the hearing, CBH led some evidence that it would consider a pricing structure for an unbundled service offered at each of its receival sites and calculated applying ECPR and there was some discussion as to the appropriateness of doing so. For reasons which appear below, it is not necessarily the case that if the ACCC Notice is affirmed, CBH will be obliged to offer an unbundled service at each of its receival sites or that ECPR should routinely be used by it to determine outturn fees for an unbundled service as some of its larger receival or storage sites.
20. The Tribunal’s view is that CBH, even if it is no longer entitled to maintain the Notified Conduct, will maintain the Grain Express system. It is apparent to the Tribunal, as indeed is natural, that growers are anxious to achieve the best net price for their grain, however it is handled. That is self-evident. It is the rationale for the existence of a co-operative such as CBH. It is equally apparent that there are economics of scale in the sort of transport arrangements offered by CBH through the Grain Express system. In addition, it must be observed, there are a significant number of growers who choose to deliver their grain directly to port, presently mainly using road transport, and who therefore bypass the CBH receival sites. No doubt many of them are closer to a port terminal than others. But the fact that they choose that alternative indicates that there is a demand among growers for alternative grain handling and transport arrangements. The evidence is clear, too, that among marketers in Western Australia – who have been exposed to the systems in operation in the Eastern States and in South Australia – there is some appetite for securing grain for export delivered to the port terminal other than through Grain Express.
21. CBH, for its part, has an obligation to its grower members as it has described. If it has grower members who choose either through a marketer or directly for their grain to be transported other than through Grain Express, the Tribunal does not assume that CBH would select a pricing model or fee structure which would be uncommercial. It does not anticipate that CBH would, in such circumstances, adopt a pricing model or fee structure which would in effect be prohibitive. There is no proper reason why it would do so. In South Australia, Viterra has not done so. As CBH pointed out, it has not done so despite its commercial imperatives, compared to the co-operative imperatives which drive CBH.
22. The Tribunal, whilst accepting that to some degree the CBH project team looked at as dramatic a price consequence as ECPR might justify, accepts that the CBH project team would apply proper commercial judgments to its pricing model and fee structures for grain which is to be transported other than through the Grain Express system. Those judgments are likely to mean that outturns for separate transportation of grain to port will be at limited sites (as is already the case for domestic outturns) and at commercial realistic prices.
23. It is appropriate at this point to observe that in general terms the Tribunal has accepted that each of the witnesses who gave evidence was a truthful witness endeavouring to be accurate. It has no reason to doubt the honesty of any of the witnesses. Almost inevitably, there were some differences of emphasis between some witnesses and in a few cases some matters were deposed to which reflected the particular perspective or were based on a particular understanding of that witness, and which upon the whole of the evidence was not fully accepted by the Tribunal. Perhaps the most obvious example is the evidence of Mr McKechnie on one aspect which is discussed in a little detail above. In the present immediate context, those observations indicate why the evidence of certain CBH witnesses about how CBH might impose a pricing model and a fee structure for outturned grain transported other than in the Grain Express system has not been fully accepted by the Tribunal.
24. CBH maintained that the existence of CBH as a growers’ co-operative and bulk acquirer of transport services on behalf of growers would tend to decrease the price that growers would otherwise pay for the acquisition of transport services. Accordingly, CBH submitted, the Grain Express system is likely to remain the predominant, if not sole, means that growers select for their grain to be moved to the ports, even if the Notification were removed.
25. CBH, nevertheless, accepted that the preferences of the marketers are not irrelevant to the consideration of the extent of demand for transport services outside of the Grain Express system. In that regard, CBH submitted that the evidence of the marketers as to their future intentions supports the proposition that there will not be any significant or substantial acquisition of grain transport services outside of the Grain Express system. Mr Coffin stated that, if the Notification is revoked, Louis Dreyfus would continue to acquire the majority of its grain from growers who use the Grain Express system even though it would have other alternatives, much as it continues to use Viterra’s Export Select product. Mr Maw stated that, if the Notification is revoked, Glencore is likely to continue to use CBH’s transport services in most cases. Mr Morison stated that, if the Notification is revoked, Cargill was likely to continue to use the Grain Express system and CBH’s transport in most cases.
26. CBH acknowledged that there was some evidence to the contrary, but submitted it does not show that there would be a significant take up of the unbundled service. CBH submitted that the only evidence that suggested anything to the contrary is the evidence of Mr Collins who gave evidence that ARG had entered into a heads of agreement in December 2011 to explore the option of supplying rail haulage services using [REDACTED] standard gauge and [REDACTED] narrow gauge trains to [REDACTED]. However, the heads of agreement contemplated a feasibility study to be completed in January 2012, which has not occurred, nor has any price modelling. For this agreement to be feasible, it would require [REDACTED] tonnes to be carried outside of the Grain Express system. CBH maintained that demand in this magnitude will not arise.
27. Mr Collins’ evidence was that the initial pricing model and feasibility analysis contemplated by the Heads of Agreement with [REDACTED] had not been progressed because of the proceedings before the Tribunal and the uncertainty as to the terms and conditions on which CBH would provide an unbundled service if the Notification is revoked. Mr Collins’ evidence was that it was clear that any one single marketer would have difficulty in accumulating sufficient volumes at individual sites to allow a single train to operate all year long. However, he said that [REDACTED] would jointly acquire sufficient grain to operate the [REDACTED] narrow gauge trains and [REDACTED] standard gauge train contemplated by the Heads of Agreement.
28. CBH submitted that the uncontradicted evidence of the [REDACTED] witnesses called by the ACCC, [REDACTED], was that they would continue to use the Grain Express system on most occasions. Neither [REDACTED], who signed the Heads of Agreement on behalf of [REDACTED], gave any evidence about the Heads of Agreement. Neither gave evidence that it was likely to lead to either marketer entering into a binding “take or pay” agreement with ARG. Significantly, in CBH’s contention, neither [REDACTED] retracted the evidence from their affidavits to the effect that they anticipated that [REDACTED] respectively will continue to use Grain Express “in most cases”. CBH submitted that neither [REDACTED] could enter into an agreement with ARG on a take or pay basis as contemplated by ARG and continue to use Grain Express in most cases.
29. While CBH is unaware of the Heads of Agreement, [REDACTED] have informed CBH that they have been approached by ARG. Both [REDACTED] have informed CBH that they are only contemplating any agreement with ARG if the rail services acquired could be incorporated into and managed by CBH as part of the Grain Express system. No evidence was led from [REDACTED] to the effect that the statements made to CBH were not a correct expression of their intentions.
30. CBH submitted that there is no satisfactory evidentiary basis to support any contention that if the Notification is revoked, ARG will emerge as a rail operator competing with the Watco rail services. CBH maintained that the evidence supports the proposition that ARG will not continue to operate in the Western Australian grain industry. On the other hand, if the Heads of Agreement were to lead to an agreement between ARG, [REDACTED] of the kind contemplated, with the result that [REDACTED] tonnes per annum would be taken out of Grain Express, that would threaten the very existence of Grain Express.
31. While the marketers stated that they would continue to explore the option of acquiring transport outside of the Grain Express system if the Notification is revoked, CBH submits that it does not follow that there will be any demand for such services that leads to acquisitions of transport services outside of the system.
32. Naturally, the Tribunal has considered those detailed submissions. It accepts that the Grain Express system is one by which CBH is endeavouring to provide the best and most efficient transport of grain from up-country receival sites to ports for export, or to a limited degree for domestic purposes. As has occurred in South Australia, it accepts that it is probable that most marketers and most growers for a majority of the grain they wish to export would continue to use the Grain Export system even if the ACCC Notice is not withdrawn.
33. However, that is not a direct response to the first of the primary questions the Tribunal must address. The fact is that, for any grower using a receival site of CBH, the Notified Conduct means that they cannot engage other operators that may be able to provide competitive services in the Grain Transport Market. A grower either deposits grain with CBH at a receival site and uses the Grain Export system, or does not deposit grain at a receival site and either stores grain on the grower’s property and/or transports it or arranges with a marketer to transport it by road to a port.
34. Moreover, the Tribunal is satisfied on the evidence that, in a world without the Notified Conduct, there is a significant prospect of the take-up of alternative rail or road transport services in the Grain Transport Market in Western Australia. Not all growers share the same interests; their production economics, their crop sizes, their location and their grain management opportunities will differ. As the Tribunal has noted, that is demonstrated by the significant portion of the grain crop which, at present, is delivered direct to ports. It is also demonstrated by the extent to which marketers have taken up opportunities in Western Australia since 2008. The marketers who gave evidence all indicated a desire to explore alternative transport opportunities in the Grain Transport Market, notwithstanding that in many if not most instances they will use the Grain Express system. The Tribunal has already concluded that the Grain Express system is likely to continue, including its tied transport arrangements, even without the Notified Conduct – that is, even without the element of compulsion which the Notified Conduct presently permits to be imposed.
35. The Tribunal is also satisfied that there is a real capacity for a marketer or marketers to arrange for alternative rail transport for taking grain to ports. The evidence of Mr Collins was clear, and in the view of the Tribunal acceptable. He said that [REDACTED] transport services. The cross-examination did not cause the Tribunal to conclude that such an alternative service was not economically feasible from the point of view of QR, or would be so expensive as not to be taken up by a marketer or marketers (or, indeed, a grower or growers). Indeed, from the point of view of a marketer or a large grower, there may well be not insignificant savings in transport costs by taking up an alternative rail delivery option. That is almost self-evident, provided the outturn costs of CBH are realistic, because its system incorporates to some degree the sharing of common costs and is based upon its decisions about the most efficient means overall of getting receival grain to ports. It is an element of those decisions that it should on behalf of growers incur the significant capital cost of requiring the rolling stock and locomotives referred to above and enter into the arrangement with Watco. One illustration of the way in which a particular grower’s interests may not accord with the overall growers’ interests is in the retention policy for the Freight Pool. Clearly, if a grower were to be leaving the grain growing industry at the end of a season, it could not serve that grower’s interests to have his or her share of the unexpended or surplus portion of the Freight Pool withheld for the next season. As noted above, in some seasons the retained sum is substantial. Other growers may prefer to have their share of those funds available because they have other priorities. That is not to suggest that the administration of the Freight Pool by CBH is not conscientious and transparent. It is to point out that, in some respects, the overall grower good as assessed by CBH will not necessarily correspond with the particular interests of particular growers.
36. The issue of pricing was a feature of the CBH contention that there would be no take-up of alternative transport services, even if the Notified Conduct could not be engaged in. There was some evidence, referred to in a little detail above, about it choosing to use ECPR as its pricing choice for outturns of received grain to a transport provider other than Watco (or a CBH-arranged provider) under the Grain Express system.
37. Dr Philip Williams gave evidence that he considered that the most likely approach that CBH would take to pricing would be to apply the ECPR. There was some evidence from CBH officers that it would consider doing that. Under ECPR, the access price for a component of a supply chain is set equal to the final retail price, in this case for the bundled service, minus the net avoided costs of those components of the supply chain that the access provider no longer supplies. In short, under ECPR, CBH would build in all its costs of providing the Grain Express system including its investment in the locomotives and rolling stock to be provided to Watco as they are not awarded costs of the supply chain and add its costs of providing the grain to the alternative transport provider.
38. The ECPR approach to pricing a component was approved by the Privy Council in an appeal from the New Zealand Court of Appeal in *Telecom Corporation of New Zealand Ltd v Clear Communications Ltd* [1995] 1 NZLR 385. The case had been commenced by Clear Communications Ltd, which wanted to provide local telephone services to businesses in the central business districts of Auckland, Wellington and Christchurch. Clear proposed to build its own exchanges and roll out its own local loop between those exchanges and its customers. However, as the Privy Council observed, it is a fundamental requirement of anyone offering telecommunications services in New Zealand that its customers should be connected to all other telephone users in New Zealand. Clear commenced negotiations with Telecom Corporation of New Zealand Ltd (Telecom), which had been recently privatised and which owned the ubiquitous local loop Public Service Telecommunications Network (*PSTN*), comprising exchanges and copper cabling throughout New Zealand. Clear sought to agree terms for access to the PSTN. Terms could not be agreed. Clear commenced proceedings.
39. Clear brought its case alleging that Telecom, in refusing to agree terms, had misused its market power in contravention of s 36 of the *Commerce Act 1986* (NZ), which is the New Zealand equivalent of s 46 of the CC Act. In New Zealand at the time, and in contrast to the position in the US, Australia and the United Kingdom, there was no statutory right for competitors to be connected to the PSTN, no guidance had been given as to the terms of interconnection, and there was no independent body established to resolve disputes. In New Zealand, the legislative decision had been to leave these matters to market forces. Accordingly, this was not a regulated access case and was not equivalent to the cases the Tribunal is familiar with arising under Part XIC of the CC Act.
40. The Privy Council said that the relevant inquiry in order to ascertain whether Telecom was taking advantage of its dominant position in the market was to determine whether the price demanded by Telecom was higher than would have been demanded by a firm not in a dominant position, which is being asked to supply a component of a service to a competitor. The inquiry focused only on the conduct of the supplier in question, not at the price at which the would-be competitor could obtain the service from other suppliers. So Telecom could charge its opportunity cost as that is what it would charge in a fully competitive market.
41. Perhaps that decision was relied upon by CBH for the submission recorded at [273] above.
42. Dr Williams’ opinion was that the majority of the economic efficiencies generated by the Grain Express system are likely to be generated in the counterfactual. The basis of Dr Williams’ opinion was that there would be no significant difference in the quantity of grain carried within the Grain Express system in either the factual or the counterfactual because the contractual restriction of the Notified Conduct would be replaced with a pricing incentive.
43. In effect, he said that by reason of the conduct which has to date been able to be engaged in by reason of the Notified Conduct, CBH may now cost the supply of outturning grain to an alternative transport supplier at a price which in practice would mean that the Grain Express system would be the only service which could rationally be chosen by a grower or marketer. That is not an immediately attractive proposition. Indeed, as the Tribunal noted above, CBH acts in the interests of its grower members and the selection of a pricing option which led to the non-Grain Express option being prohibitively priced would not seem consistent with its stated interest. In any case pricing is only one of many factors that influence choices of growers and marketers. The Tribunal accepts the evidence that marketers will be influenced by the nature and extent of the product offerings available in the market and how they best fit within the mix of a marketers’ overall portfolio and commercial needs.
44. If CBH did not or was not able to implement ECPR pricing, the differences between the factual and the counterfactual may be greater than Dr Williams thought would occur. That is, there would be greater attraction to the option of separate transport arrangements. Dr Williams is not an expert in the grain logistics supply chain and, appropriately, confined himself to economic efficiencies. Dr Williams recognised that there could be other public benefits of the Notified Conduct. That reflects the Tribunal’s observation to the same effect in the preceding paragraph. He also recognised the significant difficulty in implementing a pricing system based on ECPR. The ACCC submitted that there is cause to doubt the appropriateness in principle of applying ECPR to price any unbundled service offering by CBH. Dr Williams himself said that he was not sure that ECPR would be the ideal pricing approach from CBH’s perspective and he disavowed any proposition that he knew whether CBH might be likely to adopt it. Dr Williams observed that ECPR has a restricted application, typically in the context of regulated monopolies. He agreed that “the use of the ECPR will also protect the incumbent and preserve its market power against the competitive erosion of prices and margins that even less efficient rivals could bring”.
45. The evidence from Dr Smith was consistent with this. She said that the use of ECPR in the present context would be quite unusual. According to Dr Smith, ECPR is normally only used for access pricing in natural monopoly situations; and, as no natural monopoly components are relevant in the present case, it would not be appropriate to use ECPR to justify requiring users of the unbundled service to make contributions to CBH’s freight pool and rail capital costs. Further, as Dr Smith notes, ECPR has been widely criticised. In large part this is because it essentially locks in any profits that are based on the incumbent’s market power. Both parties acknowledged that there were no natural monopoly elements in the Grain Express system.
46. ECPR is by no means an accepted or settled approach to pricing in the context of this matter. It is not within the Tribunal’s ambit in this matter to determine whether it would form the basis of an acceptable pricing regime should the ACCC Notice be set aside. The Tribunal presumes, and the parties conceded as much, that whatever pricing regime were chosen, CBH would need to be satisfied that it complies with the CC Act.
47. The Tribunal is not satisfied that CBH could properly adopt ECPR in the counterfactual, and more directly it is not satisfied that CBH could properly, or would, adopt a pricing structure for grain outturned to an alternative transport provider that would be so expensive as to effectively force all grain received by it into the Grain Express system. To the extent that CBH through its evidence suggested that that is what it would do, the Tribunal does not accept that evidence. More properly understood, those witnesses who addressed this topic were discussing a theoretical possibility. ECPR is not a pricing option which has been shown to have been adopted except in the case of regulated monopolies, and even in such cases, it is not uniformly approved.
48. As mentioned above, the provision of rail services for the Grain Express system was put out to tender. A similar process takes place for road transport, although there is a separate arrangement for each of the four zones.
49. CBH submitted that the competitive tender processes constituted competition for the relevant market and that in such circumstances competition in the market was not necessary for the market’s outcomes to be competitive.
50. While, under certain circumstances not far removed from the present, competition for the market can lead to competitive prices, such competition does not allow product differentiation within the market competed for. The tender process may ensure that the services the subject of the tender are workably competitive, but there is no scope for alternative services. This is particularly an issue when the tender is put out by a “representative” body like CBH. As the Tribunal has said, while the terms and conditions of the tender may be suitable to many, or even most, of CBH’s members, there may well exist a substantial number who would prefer to acquire transport services on a different basis. There is no evidence acceptable to the Tribunal which shows that, by reason of the competitive tender for the supply of transport services under the Grain Express system, there is no substantial lessening of competition in the Grain Transport Market in Western Australia. There may be markets where the tenders called for the supply of a service within that market are sufficient, such as where the market can accommodate only one supplier of the service. That is not the case here. [REDACTED].
51. Once the tender has been accepted there is no opportunity for a potential new supplier to offer a differentiated transport service, nor for the successful tenderer to offer a service outside the terms of the tender. It is the view of the Tribunal that, at least in respect of enabling a potential alternative transport provider to offer to transport grain received by CBH to ports, the tenders invited by CBH to supply such transport within the Grain Express system does not resolve the first primary question in favour of CBH.
52. There is substantial merit in CBH’s submission that competition for the market is sufficient to deliver a competitive price for the transport services provided by the successful tenderer. This is not, however, sufficient to establish that the tie does not have the effect of substantially lessening competition.
53. Even if it were accepted that the tender process did deliver a competitive price from the successful tenderer, the tie precludes the entry of alternative service providers. This, in turn, precludes users of transport services from having a choice as to the provider of the transport services they require. The tender process does not permit of individual users determining which provider of transport services is best suited to their needs.
54. The effect of the Notified Conduct on competition can be thought of as follows. Without it users would have a range of actual and potential providers of transport services, including CBH through the Grain Express system. With the Notified Conduct, this range has been condensed to one.
55. The Tribunal is not satisfied that in the Grain Transport Market the Notified Conduct does not and would not have the effect or likely effect of substantially lessening competition.
56. This is not a case where the potential providers of alternative services are purely hypothetical or where the potential for demand for alternative services is unlikely to materialise. There is substantial evidence to support the contention that a not insubstantial quantity of grain would be transported by non CBH-arranged transport should the tie be removed. In light of this evidence it cannot be said that the level of competition, both actual and potential and both on price and on differentiation, would not be materially different without the Notified Conduct.
57. As has been mentioned, the evidence clearly shows that marketers do desire the option of using non CBH-arranged transport. CBH itself accepts that there will be some use of third party transport if the tie is removed. While it is possible that CBH-arranged transport will be so much more efficient than any alternative that all users will remain with Grain Express, the evidence indicates that, perhaps despite the efficiency of Grain Express, some users will seriously investigate and will use alternatives. This process will provide some incentives to CBH to ensure that its fees and charges remain low and to maximise the efficiency and quality of its transport services.
58. The Tribunal is therefore not satisfied that the Notified Conduct does not and would not have or be likely to have the effect of substantially lessening competition in the Grain Transport Market.
59. As has been noted many times, the word substantial is susceptible of many meanings. Relevantly, it should be understood in the sense of being meaningful or relevant to the competitive process: *Rural Press v Australian Competition and Consumer Commission* (2003) 216 CLR 53 at [41] per Gummow, Heydon and Hayne JJ; *Stirling Harbour* at [114] per French J. The prevention or hindrance of competition constitutes lessening of competition for the purposes of the CC Act: CC Act: s 4G.
60. Dr Williams and Dr Smith in their evidence both explained entry barriers in economics. In the world with the Notified Conduct the Tribunal considers that there is a substantial barrier to entry into the Grain Transport Market. This barrier is constituted by the requirement that a potential new entrant to the Grain Transport Market must arrange for the construction of independent up-country sites (or take direct from grain farms) as well as providing a transport service in the face of the considerable volumes already committed to Watco as a result of the contractual tie. The effect of this barrier, on the evidence before the Tribunal, is that CBH is the sole provider of transport services to growers and marketers, whether as a supplier in its own right or as an intermediary, once a grower has deposited grain in the CBH receival site. Further, through its tender arrangements, CBH has ensured that there is only one provider of rail transport services and a very small number of providers of road transport in each zone. In the world without the Notified Conduct the contractual tie would be removed and with it a component of the barrier to entry. The evidence suggests there would be at least the potential of new entrants into the Grain Transport Market through one or more modes of transport. The differences in these characteristics suggest that the Notified Conduct has, or is likely to have, the effect of substantially lessening competition: see *Re Queensland Co-operative Milling Association Ltd* (1976) 25 FLR 169 at 189. It is clear that conduct that greatly decreases the capacity of other providers of transport services to enter the market has a substantial effect on competition, as does conduct that limits the potential range of services: *Outboard Marine Australia Pty Ltd v Hecar Investments (No 6) Pty Ltd* (1982) 66 FLR 120 at 132.
61. In *Application by Chime Communications Pty Ltd (No 2)* [2009] ACompT 2 (*Chime*) at [48], the Tribunal (Finkelstein J, Mr R Davey and Professor D Round) set out, in a different context, relevant criteria for competition. These criteria were structural, conduct-based and performance-based. These criteria direct the assessor’s attention to the number of sellers in the market, the extent of inhibitions on entry to or expansion within the market, the prevalence of exclusionary tactics or collusion in the market and the efficiency of the firms and prices in the market. In the present matter, as has already been mentioned, the world with the Notified Conduct is likely to have significantly higher barriers to entry in the Grain Transport Market. The evidence before the Tribunal does not permit an assessment of the competitiveness of the prices and practices of CBH. While some comparison was made to operations interstate, there was not sufficient evidence of CBH’s costs to determine conclusively whether the fees and charges it levies were reflective of its costs, nor whether its costs were commensurate with those to be expected in a competitive market.
62. In attempting to reconcile differing views amongst economists as to the proper definition of barriers to entry, the Tribunal concluded that barriers to entry are both determined by market characteristics, like economies of scale, and the result of the incumbent’s behaviour: *Chime* at [53]. The Notified Conduct constitutes a strategic barrier to entry.
63. This analysis is not to be confused with the desire to ensure the greatest number of competitors. It is aimed at determining whether the Notified Conduct prevents the entry of efficient suppliers of services in the Grain Transport Market: see *Re Telstra Corporation Ltd (No 3)* [2007] ACompT 3 at [99].
64. It is therefore necessary to address the second of the two primary issues identified by the Tribunal.

# Public benefits

1. CBH submitted that the Notified Conduct has resulted or would be likely to result in benefits to the public which outweigh the detriment to the public by the lessening of competition. CBH claimed that there were a number of public benefits arising from the tie, although there was a degree of overlap between these. To an extent the Tribunal has addressed some of the claimed benefits and made findings about them. It is not necessary to repeat those discussions.
2. The claimed benefits have been assessed by the Tribunal. Their significance to the assessment of the ACCC Notice may be divided into several categories.
3. First, a number of the claimed benefits would, in the view of the Tribunal, persist in the world without the Notified Conduct. As such, these benefits are not ones that the Tribunal has placed much weight on in relation to weighing the public benefits and the detriments to competition of the Notified Conduct. The Tribunal’s view may be expressed in alternative ways. One way is to say that this group of claimed benefits are benefits of the Grain Express system, and not of the Notified Conduct. As the Grain Express system will continue to be operated by CBH, and is not itself a benefit of the Notified Conduct, there is no real weighting to be put in the scales as public benefits which might be lost if the Notified Conduct must cease. The alternative is to assume that this group of benefits is attributable to the Notified Conduct through the Grain Express system, but to conclude that because the Grain Express system will continue with the same benefits when the Notified Conduct ceases, the same benefits must be put on both sides of the scales and will cancel each other out.
4. The primary reason for the Tribunal considering that these benefits will persist is that the Grain Express system generally will continue independent of the tie. For the reasons already given, a very significant proportion of the grain deposited at an up-country receival site of CBH will be nominated to the Grain Express system, and growers will still have the opportunity to participate in its asserted benefits even in the world without the Notified Conduct. The Tribunal is not satisfied that a consequence of the ACCC Notice will be that the Grain Express system will be at risk, or will be reduced in the tonnage of grain it is asked to accept, to such an extent that it will no longer be economic to operate it or that the levels of benefit to growers (and to an extent marketers) will be materially diminished. That accords with the internal assessments of CBH and it reflects the practice in South Australia, where there is no complete tie of deposited grain to Viterra’s Export Select system although it does operate broadly except in selected receival sites. The Tribunal has addressed that comparison and other comparisons to the extent they are useful, earlier in these reasons.
5. The benefits that fall into this category include:
6. the absence of any need to negotiate with growers or marketers who own entitlements to grain at certain sites before moving that grain to port;
7. that grain can be moved from a receival site without waiting for a grower to nominate their grain to a marketer;
8. that CBH can ensure its transport facilities are used at maximum capacity;
9. that CBH can plan grain movements on a bulk basis, without reference to the nominal owners, with the maximum amount taken by rail or, where rail is not feasible, road so as to obtain economies of scale;
10. efficiency in operation of delivery of grain to ports and storage at ports;
11. the maintenance of grain quality;
12. the ability of growers to deliver grain when it is convenient to them and delay nomination of a marketer;
13. the management of grain grades in an optimal way;
14. the facilitation of the Quality Optimisation program;
15. the facilitation of crop insurance and fuel hedging.
16. There are a number of increased costs that CBH would face if forced to offer an untied system alongside the Grain Express system. Most of these costs, however, can be recovered by CBH through the imposition of outturn and other fees. If the untied system is still demanded by users despite the presence of such fees, this would be strongly indicative of the efficiency to those users of the untied service. If there is little demand, then the costs to CBH will be minimal. The costs that fall into this category are:
17. increased equipment requirements;
18. increased measuring and sampling requirements;
19. any costs associated with no longer being able to empty an entire storage site at once;
20. any costs associated with the increased operational requirements arising from having more than one rail transport provider, if untied grain is transported by rail;
21. decrements to the storage efficiency, where these are quantifiable.
22. The ACCC submitted and the Tribunal accepts that several of the claimed benefits can be retained in the world without the Notified Conduct through the implementation of sensible business rules. These claimed benefits are:
23. the ability to set fumigation schedules at efficient times and not have them interrupted;
24. the absence of a need to have parallel systems in place for the Grain Express system and the untied system to prevent congestion, to avoid missed outturn times and to ensure coordination of rail transport;
25. the increased efficiency of grain receival; and
26. increased storage efficiency.
27. Several of the claimed benefits, in the Tribunal’s view, are not supported. The Tribunal does not accept that the removal of the tie will result in:
28. increased uncertainty for CBH; or
29. diminished use of rail, where such use would have been efficient.
30. As noted, the Tribunal does not accept that it is likely that sufficient quantities of grain will be transported in the untied system so as to render the Grain Express system unviable, unless the Grain Express system is not efficient or is seen by growers and marketers as not efficient. If that were the case, it cannot be a public benefit to compel use of an inefficient system. It should be observed, however, that the Tribunal did not conclude that the Grain Express system was inefficient.
31. It is possible that the tie assists CBH to benefit from economies of scale in the Grain Transport Market. However, both CBH and the ACCC agreed that neither rail nor road transport markets separately are natural monopolies, implying that the returns to scale peak at a volume of grain transport below the entire harvest. Further, given that the likely world without the Notified Conduct will still see a large majority of grain transported through the Grain Express system, any decrement to the economies of scale achieved is likely to be minimal.
32. The principal benefit of the Notified Conduct appears to be the avoidance of creating designing and implementing a system and procedures to enable untied grain to be outturned and returned to the ports. The benefit of the tied system arises if the quantity of grain transported in the untied system is insufficient to recover the costs of the establishment of the parallel system. CBH has estimated that the cost of establishing an untied system would be approximately [REDACTED], some of which has already been incurred.
33. CBH submitted that the tie was necessary to create competition for the provision of rail transport services. In particular, it was submitted, the tie was necessary to entice Watco, the successful tenderer, to enter the market. This submission was supported by the evidence of Mr McKechnie of Watco. The benefit of the tie to the tendering process was said to be that it increased the certainty with which the required transport volumes could be predicted, as well as the volumes themselves. It is possible that the tie may have induced greater participation in the tender process than would otherwise have been the case. However, no evidence was proffered to support the proposition that a lower price would have resulted if the Notified Conduct was not permitted. The Tribunal has commented on this aspect in greater detail earlier in these reasons. The potential benefit of increased competition for the market should be taken into account in the weighing process, but it does not weigh heavily for the reasons given. It should be noted, too, that this benefit pertains particularly to rail transport, due to the relatively high fixed costs of entry.
34. There is a real possibility of increased disputes between CBH and transport users, for example about how to deal with congestion or missed outturn slots. The avoidance of disputation is clearly a public benefit. While such a benefit is almost impossible to quantify, it should nevertheless be, and is, taken into account.
35. The Tribunal must also assess the extent of any public detriment resulting from the lessening in competition.
36. The primary detriment is that the tie restricts growers and marketers seeking out alternative transport arrangements for the transportation of bulk export grain from receival sites to port. The evidence is that there is strong interest among some marketers to explore alternative transport options which better suit their needs. The evidence also shows that there is a willingness on the part of some transport providers to offer such transportation. In these circumstances, the foreclosure of such mutually beneficial trade is allocatively and dynamically inefficient.
37. The ACCC contended that the Notified Conduct made it possible for CBH to cross-subsidise the freight rates.
38. The setting of freight rates by CBH is a complex process. Ultimately CBH estimates its total anticipated freight costs for a particular season, and determines freight rates to enable it to recover those costs from growers. CBH sets freight rates for different rail routes, having regard to the anticipated grain tonnage on those routes, but they do not reflect directly the transport costs incurred from individual receival sites. The Western Australian Government also has provided some funding under the “Transitional Assistance Package” (TAP) to subsidise the cost of freight on certain designated rail lines, apparently to ensure their continued use.
39. The evidence does not enable the Tribunal to conclude that the process of determining freight rates from different receival areas to port involves cross-subsidies, in the economic sense (as explained by the expert economist witnesses) where the price of the service is less than its marginal cost of production. It was not in dispute that, to some degree, CBH engaged in “transfers” between different freight routes. That is, different freight routes contribute a different proportion of the joint and common costs of offering the transport services. That is a not uncommon course to adopt. Obviously there are matters of degree.
40. With one reservation, the “averaging” undertaken by CBH on the evidence is not regarded by the Tribunal as indicative of inefficiency in the Grain Transport Market. However, on the other hand, the evidence tended to suggest that the “averaging” may have enabled some of the more remote or smaller receival sites to continue to be operated so that, whether it occurs by cross-subsidy or transfer or by the benefit of the TAP funding, there may well be efficiencies available in the Grain Transport Market which the present costing system of CBH does not expose. Subject to the one exception concerning the surplus in the Freight Pool, the Tribunal makes no finding about whether the freight rates fixed by CBH demonstrate that the Notified Conduct in that limited respect has led to conduct which is shown to be inefficient, or on the other hand has resulted in a public benefit which should be put into the scales when addressing the second of the two primary questions it must consider. There is however a significant and obvious possibility that the setting of freight rates by CBH works to the economic disadvantage of certain growers, perhaps the larger growers near to receival sites readily accessible by rail to ports, and a corresponding advantage to certain growers in other areas. The evidence does not enable that observation to be taken further. The one exception concerns the Freight Pool surplus, and the way that is dealt with by CBH. That has been the subject of separate consideration in these reasons for decision.
41. Consequently, the Tribunal does not accept the ACCC submission when cross-subsidies are defined in the economic sense. On the evidence, the Tribunal is not persuaded that there are any detrimental transfers between freight routes. It may be that, as the ACCC submitted, if the tie is removed CBH, in the face of competition will “unwind” any transfers, but it does not necessarily follow that the continuation of these transfers constitutes a net public detriment.
42. The ACCC also submitted that the Notified Conduct resulted, or would result, in public detriments beyond the grain transport market. In particular, the ACCC submitted the following further public detriments should be taken into account.
43. In the grain storage and handling market, there was evidence that a number of CBH’s storage facilities may not be economically viable on an individual basis, but that CBH continues to operate them. To the extent that the prices of transport under the Notified Conduct are not cost reflective, that is that some growers using transport services are the beneficiaries of transfers, the growers will be receiving the “wrong” signals about where to deliver their grain and could be encouraged inefficiently to deliver to receival sites that are more costly to operate. Similarly, growers facing the wrong signals about where most efficiently to deliver their grain may be encouraged to grow more grain near sites that are otherwise more costly to operate.
44. A rebalancing of rail freight rates in the world without the Notified Conduct could deliver a productive efficiency benefit by reducing or eliminating the use of sections of the below rail network that are not viable absent the Notified Conduct and “subsidies”.
45. The Notified Conduct prevents marketers from taking advantage of transport arrangements that might better suit their needs (both in price and non-price terms). The removal of the tie would enable them to try to find a better deal, and this may well result in marketers making better offers to growers in the Grain Trading Market.
46. Having addressed the claimed public benefits that are likely to result from the Notified Conduct, as well as the anti-competitive detriment also likely to result, the Tribunal must determine whether those benefits outweigh the detriments.
47. This task is particularly difficult where, as here, at least some of the benefits and detriments are not susceptible of reduction to quantitative values.
48. There are three public benefits that the Tribunal accepts are likely to result from the Notified Conduct. First, the avoidance of the need to establish alternative systems, rules and protocols in circumstances where the costs of doing so may be unrecoverable. This was estimated by CBH to cost approximately [REDACTED], some of which had already been incurred. Secondly, the avoidance of an increase in disputes between users of the transport systems and CBH. No precise value was attributed to this public benefit. Thirdly, the increase in competition for the rail transport market. Again, no precise value was put on this benefit.
49. The Tribunal is of the view that the third of the public benefits, the increase in competition for the rail transport market, will be substantially matched by the increase in competition in the market that would be possible in the world without the Notified Conduct. The Tribunal is not satisfied that the benefit to be gained by increased competition for the market is greater than the benefits of a similar nature gained from increased competition in the market.
50. While it may be desirable to avoid the cost of establishing the untied system, the fixed costs of this are small when compared to the turnover of CBH’s transport operations. Assuming the [REDACTED] estimate is accurate, it would equate to approximately [REDACTED] per tonne harvested in Western Australia, assuming the entirety of the cost were recovered in one, average, year and was evenly distributed across all grain. In assessing the importance of this benefit, it is to be borne in mind that these costs can be charged to users of the untied system. Such users can be expected to bear such costs if the volumes transported in the untied system are sufficiently large. Accordingly, the Tribunal does not view this benefit as substantial.
51. It is clear enough that time lost in dealing with disputes between users and CBH is a public detriment, the avoidance of which is desirable. The tie may well assist in this. Assuming CBH adopts sensible rules and protocols and does not behave unreasonably, there is no reason for the Tribunal to find that the size of the losses associated with increased disputation will be anything other than relatively minimal.
52. The potential for efficiency gains to be driven by increased competition in the grain transport markets are substantial. Whether such competition comes from small road transport providers transporting grain on an ad-hoc basis or marketers transporting their entire entitlements independently, there is considerable scope for mutually beneficial trade outside the tied system. It is important to note that such benefits may not necessarily be in the form of lower prices, though this may often be the case, but rather may derive from the ability for users to customise the transport system to their needs. While the Tribunal is not in a position to assess, quantitatively, the scope of these benefits it is satisfied that they are substantial.
53. The potential gains from innovation that may occur as the result of having more than one dominant participant in the grain transport market will also be foreclosed in the world with the Notified Conduct. This foreclosure constitutes a substantial detriment.
54. In the world without the Notified Conduct it is more likely that freight rates will be close to cost-reflective. Thus, in the world without the Notified Conduct, it is more likely that growers will be able to observe prices that reflect the true costs of delivering grain to specific receival sites and of growing grain in specific areas. In this way it sends the correct market signals on which investment decisions may be made. The clouding of this information is more possible in the world with the Notified Conduct and has the potential to substantially alter growing and delivery patterns in a detrimental way.
55. Overall, CBH has not satisfied the Tribunal that, in all the circumstances, the public benefits that are or would be likely to accrue from the Notified Conduct outweigh the anti-competitive detriment.
56. The Tribunal has reached its conclusion without considering the impact of the Notified Conduct, if it is allowed to continue, upon the Grain Trading Market. In the view of the Tribunal, that effect should also weigh in the scales as a public detriment. The Notified Conduct prevents marketers of grain from exploring, and taking advantage of, transport arrangements outside those offered through the Grain Express system. They cannot go to the participants or potential participants in the Grain Transport Market and seek competitive prices or other more suitable terms for transporting grain. Consequently, their capacity to compete in the Grain Trading Market is impaired and including by their potential capacity to make better offers to growers whether as to price or non-price terms.

# conclusions

1. The Tribunal is not satisfied of either of the two primary issues referred to so as to set aside the ACCC Notice. Accordingly, CBH’s application must be dismissed and the ACCC’s Notice should be affirmed.

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| I certify that the preceding three hundred and sixty-five (365) numbered paragraphs are a true copy of the Reasons for Decision herein of the Honourable Justice Mansfield (President), Mr GF Latta and Mr R Steinwall (Members). |

Associate:

Dated: 19 April 2013