

**WHEAT EXPORT MARKETING BILL 2008
(Exposure Draft)**

SUBMISSION TO:

Department of Agriculture, Fisheries and Forestry
Attention: Russell Phillips

FROM: CBH Group
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30 Delhi Street
WEST PERTH WA 6005

DATE: 28 March 2008

The following are submissions presented for consideration by Co-operative Bulk Handling Limited (CBH) and Grain Pool Pty Ltd (GPPL) (collectively the “CBH Group”) in response to the request for public comments on the Exposure Draft (5/3/2008) of the Wheat Export Marketing Bill 2008 (“the WEM Bill”).

1. CRITERIA FOR ACCREDITATION OF APPLICANTS

(a) Related Bodies Corporate

Section 11 of the WEM Bill sets out the criteria for eligibility for accreditation under the wheat export accreditation scheme. Section 11(1)(a) provides that a company is not eligible unless “the company is registered as a company under Part 2A.2 of the *Corporations Act 2001*”.

As CBH is a co-operative, deemed to be registered under the Companies (Co-operative) Act 1943, it would appear that it is not eligible for accreditation under the terms of the proposed WEM Bill. GPPL (which is a wholly owned subsidiary of CBH registered under the Corporations Act and which is the grain marketing arm of the CBH Group) would be eligible to seek accreditation.

In these circumstances, it is CBH's view that when assessing “*the financial resources available to the company*” under section 11(1)(c)(i) of the WEM Bill, the financial resources of the related bodies corporate of the applicant company should also be taken into consideration.

Submission

That section 11(1)(c)(i) be amended so that when determining whether a company is a fit and proper company for accreditation, regard is had to “the financial resources available to the company and its related bodies corporate within Australia”.

(b) Executive Officer

Executive Officer is defined as:

“... an individual, by whatever name called and whether or not a director of the company, who is concerned in, or takes part in, the management of the company”

It follows from this definition that a director of a company is only deemed to be an Executive Officer if he or she is involved in the management of the company.

Section 11(1)(c) makes numerous references to the suitability or otherwise of the Executive Officers of an applicant. In many instances a non executive director of an applicant company will not be involved in “the management of the company” but will nonetheless have a significant involvement in making key decisions and influencing the behaviour of the company.

The CBH Group's view is that the WEA should be satisfied with the suitability of all Directors of an applicant in addition to the “Executive Officers” of an applicant as currently defined.

Submission

That the definition of “*Executive Officer*” be amended to specifically include “non executive directors”, regardless of whether they are involved in the management of the company.

(c) Technical Market Support

GPPL considers that any accredited wheat exporter should be obliged to provide evidence of their ability to appropriately meet their customers’ needs in relation to technical / quality support of Australian wheat. The reputation of, and premium return on, bulk Australian wheat will only be maintained through the careful targeting of wheat varieties to customers’ needs.

Unless there is a commitment to understanding and properly promoting the quality properties of Australian wheat, it will not be capable of being differentiated on any ground other than price.

Submission

That section 11 of the WEM Bill be modified so that when determining whether an applicant is a fit and proper person to be accredited the WEA is to consider:

“the company’s record in supporting the management of quality and development of Australian wheat and other grains in order to enhance the quality and reputation of the Australian grain industry”.

2. PORT ACCESS

(a) Background/Comments

CBH owns and operates ports in Western Australia in the following locations:

- Esperance
- Geraldton
- Albany
- Kwinana

The bulk handling of grain by CBH in Western Australia is regulated by the Bulk Handling Act 1967 (**BHA**). Section 19 of the BHA provides as follows:

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

With respect to CBH’s obligations to receive all bulk grain, Section 42(1) of the BHA provides as follows:

“Subject to subsection (2), the Company shall receive all grain that is tendered to it in bulk.”

CBH complies with its obligations under the BHA and provides open and fair access to all of its customers at its ports and facilities.

One of the criteria for eligibility for accreditation, pursuant to Section 11(1)(e) of the WEM Bill is that *“if the company, or a related body corporate, is the provider of a port terminal service – WEA is satisfied that the company or the related body corporate, as the case may be, passes the access test in relation to that service”*.

As CBH is a related body corporate of GPPL, it must therefore pass the “access test” (which is further described in Section 20). Under the access test, an access undertaking must be in place under Division 6 of Part IIIA of the Trade Practices Act 1974 after 1 October 2009.

As CBH is already required to (and does) provide open access to its port facilities and equipment under the BHA, it is submitted that the access test under section 20 of the WEM Bill is unnecessary to ensure access is provided by CBH to its port facilities to accredited wheat exporters.

CBH provides access to all licensed grain exporters in a fair and equitable manner and in accordance with its Grain Services Agreement, Port Queue Policy and Export Accumulation Guidelines. These documents provide the framework for the equitable allocation of CBH’s resources to satisfy the competing interests of grain exporters.

(b) Increased Regulatory Burden

As well as being unnecessary, the requirement for a formal access undertaking to be entered into under Part IIIA of the Trade Practices Act will result in a greatly increased regulatory burden for CBH (and other Bulk Handling Companies (BHC’s)).

CBH understands that other access undertakings under Part IIIA of the Trade Practices Act in different industries have involved heavy price regulation. A similar approach in this instance is likely to hinder the development of competition in the provision of bulk export facilities and will result in a reduced desire to invest in current facilities by BHC’s.

The Council of Australian Government’s 2006 Competition and Infrastructure Reform Agreement (CIRA) states in clause 4.1.a that

“ports should only be subject to economic regulation where a clear need for it exists...” (underlining added).

Given that CBH is already required to (and does) provide open access to its port facilities, CBH requests that the Department and Government reconsider whether there is sufficient value to be obtained from imposing additional regulatory burdens on BHC’s.

The Essential Services Commission of Victoria (ESC) did not think so when it last reviewed the regulation of export grain terminals¹. Rather, the ESC determined that it would monitor whether the three terminals provided access on ‘fair and reasonable’ terms and obtained a simple undertaking from Graincorp Operations Limited not to unfairly discriminate between grain marketers as to the terms and conditions upon which access is provided.

¹ Essential Services Commission (ESC), 2006, Grain Handling Regime Review – Final Report, Melbourne p 50

CBH would have no objection to providing an undertaking along the lines of that given by Graincorp Operations Limited to the ESC or along the lines of that given by ABB to the ACCC at the time of its merger with Ausbulk. However, CBH considers that a formal access undertaking under Part IIIA of the Trade Practices Act, including the likelihood of price regulation, would involve a significant additional regulatory burden for no additional benefit.

The CBH Board currently sets fees and charges for the use of CBH's port facilities in accordance with the BHA, and these charges are amongst the lowest in Australia. CBH considers that any regulation of port fees and charges would result in an increase in those charges and would not be in the best interests of the grains industry.

Past history shows that it is not necessary to regulate pricing of access to CBH infrastructure as access has always been given and CBH has not endeavoured to utilise market power to extract monopoly rents.

CBH does not consider that any case has been made that BHC's in general, and CBH in particular, will deny an accredited wheat exporter access to the CBH system nor seek to utilise any regional market power to unfairly gain an advantage in the wheat export market.

Before introducing "heavy handed" price regulation, this issue should be monitored over the next 18 to 24 months. In the unlikely event that CBH or other BHC's do abuse their market position and power there are existing remedies available under the Trade Practices Act and heavier regulatory price control could then be introduced during the 2010 review of the WEM Bill.

CBH is aware that the AWB is suggesting that even greater regulation or an extension of the "access test" is required eg to require that port operators comply with a national standardised pricing regime or to capture the up-country facilities of the port operators. This is ironic given that AWB was not heavily regulated in the performance of its own monopoly functions and yet is pushing for heavy regulatory burdens to be imposed on BHC's now that it faces competition for the first time in wheat exporting.

It would be unfortunate if the opening up of competition in bulk wheat exports is used to reduce competition and flexibility in grain storage and handling.

(c) Timing of Access Test

In the event that the access test under section 20 of the WEM Bill were to remain, CBH has a number of concerns over the potential impact of the timing of the access test. It is unclear under section 11 of the WEM Bill whether the related body corporate of the applicant for accreditation needs to satisfy the access test at the time of the application for accreditation or merely by the dates mentioned in the WEM Bill.

If the current access undertaking procedure is to be retained, the CBH Group considers that any accreditation given to GPPL following a 1 July 2008 application should only expire following the disposal of wheat acquired by GPPL up to 1 October 2009 in the event that CBH subsequently does not meet the access test outlined in section 20(2) of the WEM Bill.

If this is not the case there is a risk that the “access test” could be failed post 1 October 2009 by CBH, which would result in the immediate mandatory cancellation of GPPL’s accreditation pursuant to section 17 of the WEM Bill. To avoid this risk GPPL (and other BHC associated marketers) may have to limit their acquisition of wheat to avoid a situation arising where wheat acquired pre 1 October 2009 (whilst accredited) could not be exported after 1 October 2009.

Submission

That the WEM Bill be amended to provide that BHC’s must not unfairly or unreasonably deny access to, or discriminate between, accredited wheat exporters who seek access to port facilities following the introduction of the WEM. This can either be drafted directly into the legislation or, alternatively, CBH would be happy to provide such an undertaking to the ACCC (or a similar body) in similar form to that provided by ABB to the ACCC in relation to the Ausbulk merger or by Graincorp to the ESC. This requirement can be introduced almost immediately and will then be effective from that point forward. An undertaking of this type can also provide for a binding dispute resolution process.

3. INFORMATION GATHERING AND AUDITING POWERS

(a) Information Gathering

Under section 26 of the WEM Bill the WEA has the power to request a report. It is unclear from this section where the costs of preparing the report should lie.

Submission

That the WEM Bill is modified so that the reasonable costs of preparing the report shall be paid by the WEA.

(b) External Audit

Under section 27 of the WEM Bill the WEA has the power to appoint an external auditor. Unless the WEA is concerned over the impartiality of the external auditor (which we note would be a major concern to ASIC and the auditor itself) the existing external auditor of the accredited wheat exporter should be used. This will minimise costs and disruption as a result of any external audit. It is also unclear from this section where the costs of preparing the report should lie.

Submission

That the WEM Bill is modified so that:

- the accredited wheat exporter’s external auditor (if there is one) be used in preference to any other external auditor unless the WEA has reasonable doubts over the impartiality of the existing auditor; and
- the reasonable costs of preparing the report shall be paid by the WEA.

4. CONFIDENTIAL INFORMATION

Background

Section 13 of the WEM Bill provides that an accredited wheat exporter must give WEA a written report each year setting out:

- “(c) the quantity of wheat exported by the accredited wheat exporter during that year, broken down by grade and country of destination; and*
- (d) the terms and conditions on which the accredited wheat exporter, or a related body corporate, acquired wheat from growers during that year for export by the accredited wheat exporter.”*

This type of information would be highly sensitive market information which could have a detrimental commercial impact on a wheat exporter if disclosed to its competitors and on Australian grower interests if disclosed to a competing origin.

Section 70 of the WEM Bill sets out what information is “protected confidential information”.

Section 70(a)(iv) provides that the following is protected confidential information:

“the information is contained in a report given to WEA under the wheat export accreditation scheme, and the person who gave the report claims the information is commercial-in-confidence information”.

The CBH Group’s view is that any report provided pursuant to Section 13 of the WEM Bill should automatically be deemed to be “protected confidential information” under section 70.

Submission

That the WEM Bill be amended to provide that reports submitted by a wheat exporter pursuant to Section 13 be deemed to be *protected confidential information*, without the requirement to claim that the “information is commercial-in-confidence information”.