Australian Government
Productivity Commission

PRODUCTIVITY COMMISSION

DRAFT REPORT INTO THE NATIONAL ACCESS REGIME

MS P. SCOTT, Presiding Commissioner
MS A. MACRAE, Commissioner

TRANSCRIPT OF PROCEEDINGS

AT PERTH ON TUESDAY, 16 JULY 2013, AT 7.57 AM

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MS SCOTT: Good morning. My name is Patricia Scott. I'm a member of the Productivity Commission and I'm the presiding commissioner for this inquiry, and I'm pleased to say that I'm joined by my fellow commissioner, Angela MacRae. The purpose of this round of hearings is to facilitate public scrutiny of the commission's work and to get comments and feedback on our draft report. Following this hearing in Perth, hearings will also be held in Sydney and Melbourne, and then we will be working towards completing the report to government in October, having considered all the evidence presented and the new submissions, as well as other informal discussions.

Our participants at this inquiry will automatically receive a copy of the final report once released by the government, which may be up to 25 parliamentary sitting days after the completion. We like to conduct all our hearings in a reasonably informal manner but I do remind participants that a full transcript is being taken. For this reason comments from the floor will not be accepted but at the end of the proceedings, if someone wanted to - they might indicate now if they would like to - I could provide a few minutes for you to make a comment. Is that likely that you would like to make a comment? No. Okay, that means I think we will be hearing from the people at the table and then we will be able to draw our proceedings to a close.

Participants are not required to take an oath but of course should be truthful in their remarks and they're welcome to comment on the issues raised in other submissions. The transcript will be made available to participants and will be available from the commission's web site following the hearings. It typically takes about two or three days to be available and of course all our submissions are available on the web site, provided they're not marked confidential.

To comply with the requirements of the Commonwealth occupational health and safety legislation, you are advised that in the unlikely event of an emergency requiring evacuation, you should exit from those doors there, turn left, walk down to where the stairs are alongside the lifts and then exit the building. The assembly point is on the opposite side of Hay Street.

Now I would like to welcome to our hearings Paul Scott, Richard Codling and Mark Neo appearing for Co-operative Bulk Handling. For the purposes of the transcript would you just identify yourself and your position with Bulk Handling and then would you like to make an opening statement? We've got a few questions and I'm pleased to say that Angela, of course, is familiar with some of your topics from earlier inquiries and so she will probably take the bulk of the lead today. So welcome and thank you for coming along.

MR CODLING (CBH): Our pleasure. Richard Codling, group general counsel for

CBH.

MR SCOTT (CBH): Paul Scott, government relations manager.

MR NEO (CBH): And Mark Neo, corporate lawyer.

MS SCOTT: Gentlemen, would you like to make some statements or remarks?

MR CODLING (CBH): Yes. I'll do it very briefly, if you don't mind, and then move on to perhaps just a bit of a discussion with both of you. CBH is obviously very interested in the National Access Regime as a major infrastructure owner in Western Australia and potentially throughout other locations in Australia. So for us at CBH it's vitally important that the National Access Regime works, and works appropriately for us.

One of the key criteria for CBH is a uniformity of regulation across all participants in the sectors in which it operates. In the case of access regulation, what we're vitally interested in is making sure that we are not burdened with a higher level of regulation than any other participant in the industry and that we effectively have the capacity to be on a level playing field in terms of costs. That would be the first point.

The second point that we would make is that under CBH's compulsory access undertakings it's incurred too many costs - you have noted that in your draft report - and ultimately these costs are borne by the growers in Western Australia. What that does is it essentially means that the margins of growers in Western Australia are reduced because we operate in an export situation where we only have a defined level of remuneration coming to our growers from overseas.

Every cost on the supply chain domestically is a reduction in the potential funds available to growers in Western Australia. In that sense CBH certainly agrees with your draft finding 6.1 that compliance costs are there; access does add to those and therefore care needs to be taken as to whether access regulation is mandated.

The second point that we would make is that there can be a tendency for access regulation to hinder commercial outcomes; not through any malicious means but simply through bureaucracy and consideration of long time limits and the potential for gaming, I guess, in regulatory outcomes that exists. There's also, we would say, in our market significant competition now between parties, between infrastructure owners and between grain marketers.

Accordingly, we agree with your draft finding 8.2 that essentially the need for access regulation in grain marketing and in the access regulation to port

infrastructure has, shall we say, lessened considerably such that there would no longer be a need for it to continue. CBH in particular would prefer that - there's a new port building at Bunbury being built by Bunge, a major multinational corporation, and there's the conversion of a woodchip terminal at Albany by Vicstock Global to export on behalf of the Beidahuang Group of China.

We say there's the potential for real and timely entry into the port terminal market, which would lessen the need for further access regulation. We also believe that draft finding 3.1 is a good example of where alternative infrastructure providers are giving services, there needs to be care that the access regulation imposes similar burdens on each party - just to make the first point that I mentioned a bit relevant to your report.

The next issue would just be in relation to the appeal against decisions associated with the National Access Regime. CBH would support there still being some form of merits based review of decisions. We just feel that it's important to have checks and balances in this regime and that the money invested by participants in infrastructure is significant when they're caught under the regime, and there needs to be a proper process in that regard. So we would agree with drafting recommendation 8.5 as well, and there needs to be a process for the NCC to recommend revocation of the certified access agreement where it can be demonstrated that the regime is not meeting principles set out in clause 6 of the Competition Principles Agreement.

That might be a slight change to the thrust of the recommendation, in that we're saying if it's demonstrated not to be a meeting that it should be revoked, not merely where there's been a change in circumstances. We feel you've got to continue to examine these matters as they go along and as the markets develop and demonstrate how access is being either helped or hindered.

MS SCOTT: So just to clarify, Richard, that's an idea that there's almost a moving work program for the NCC to move through these areas and revoke things as circumstances change?

MR CODLING (CBH): Whether or not it's a moving program for the NCC to have the obligation to do it, or whether matters can be brought to the NCC's attention for them to consider, I think is a matter for discussion.

MS SCOTT: Okay.

MR CODLING (CBH): But we feel that it is relevant to continually look at these matters because investment in infrastructure is a dynamic market as well.

MS SCOTT: Thank you.

MR CODLING (CBH): A couple of last points: the Competition and Infrastructure Reform Agreement in 2006; lofty ideals and lofty aims. We feel it's perhaps been honoured a bit more in the breach than it has been in actual compliance to its terms. Regulation of ports through the mandatory undertakings is perhaps one example of that. No concrete evidence was provided of the need for regulation, so that would be quite a different take on that Competition and Infrastructure Reform Agreement.

MS SCOTT: Can you point to any discernible benefits either your firm, your sector or the Australian economy has gained from it?

MR CODLING (CBH): From the regulation?

MS SCOTT: Yes.

MR CODLING (CBH): No.

MS SCOTT: Okay.

MR CODLING (CBH): CBH is also of the view that there is merit in having a national and consistent approach to rail regulation. Although we nominally have it through the National Access Regime, the differences in the detail between the regimes is where the cost of compliance and the cost of performance lies. So from CBH's point of view, whilst not every aspect of regulation could be stipulated or needs to be stipulated, there is significant overlap across principles where consistency would be a lot more desirable from our point of view. Matters such as providing transparency on pricing and methodologies, publishing track performance standards and dispute resolution mechanisms are suggested areas.

Lastly, I guess, we strongly agree with draft finding 10.2, that it's important that appropriate access arrangements are in place before public monopolies engaged in infrastructure provision are privatised. CBH considers it would be worthwhile, following an NCC review of proposed access arrangements, that any NCC findings or recommendations are actually implemented prior to an access regime being confirmed and the relevant infrastructure then being privatised. What we say is that it's quite important, the set-up of the system, as opposed to merely getting it out there and then seeing how it works.

They're the broad comments we would like to make and, other than that, we would welcome any questions you have.

MS MACRAE: Can I just ask initially - if we take the matters in the order that you raised them. Thank you very much for your initial submission. It gave us quite some detail on your compliance costs for the mandatory undertaking that you have, and that's very useful to us. We are looking again at draft finding 6.1 and we appreciate your support for that. I just wanted to ask a couple of questions around that. One of the things that comes out in some of your later comments is that a lot of the protections that are provided, had you gone through the standard route of declaration and Part IIIA, were missing under the mandatory undertaking and that was a real problem.

So one of the things that we might consider is looking at how those sorts of protections might be brought back in, so one option might be to say should another mandatory undertaking - even though we're not very attracted to mandatory undertakings - be imposed in any sort of situation in future, one option would be to put those protections in as part of that mandatory undertaking.

Another alternative which the NCC has proposed in their submission to us is that it would have been better to have a deemed declaration rather than a mandatory undertaking. I wonder if you - well, one, if you see that there would be benefits in having those protections provided in some form, and whether you would see which of those sort of alternatives - you know, had you had an option, would you say that a deemed declaration may have made your process harder or easier than a mandatory undertaking?

MR CODLING (CBH): The deemed declaration, providing there's an opportunity I guess to then appeal it on a merits based review, might be a more preferable way to go. It still all depends, in our circumstance, on the consequences of not meeting what was called the access test. So in CBH's circumstances, if it didn't meet the access test it couldn't export wheat, which it was previously doing. So effectively we ran the risk of having a right taken away from us with very little warning, so for us it's about that process. I think it would be clearer if we had a deemed declaration and the process was until such point as whatever appeal rights are done then your access test wouldn't be failed. That would have been a much preferable situation.

MS MACRAE: Had you had a merits review opportunity available to you, do you think you would have used it?

MR CODLING (CBH): Yes, I do. Part of the reason we say that is because we were providing access to participants prior to the access undertakings. We had been providing access prior to the deregulation of wheat. We're a large-volume business and essentially we need to push as much tonnes as we can through the system. Because we were set up to export all of the production of WA, any reduction that we get is a substantial inefficiency for us, so it's in our interests to move it up. As we

have seen, entry is timely and possible in those markets. We feel it was just a rush to introduce access regulation.

MS MACRAE: Just in relation to your experience over time now, would you say that the requirements under the mandatory undertaking have become more or less burdensome over time?

MR CODLING (CBH): I question whether it's more burdensome or just more detailed.

MS MACRAE: Right.

MR CODLING (CBH): There is a bit of burden in the detail but they're much more specific and it's becoming probably more rigid. So each time something happens there's a change to deal with that particular task, but the industry is changing much more rapidly as we move along. In some ways the element that they're introducing changes for is over and done, and then we end up with a new situation.

MR SCOTT (CBH): We're falling further behind, aren't we?

MR CODLING (CBH): Yes. We feel that there's a lot more inertia in charge now. We're noticing that to get anything through is taking four to six months at a minimum. In our industry particularly we're driven by seasons.

MS MACRAE: Yes, that's right. If you miss the boat you miss it for another year.

MR CODLING (CBH): And the optimum time in terms of ensuring you can get it through and then make changes in preparation for the next season is actually during the harvest of the season that is raising the issues.

MS MACRAE: Yes.

MS SCOTT: Can I just ask a question there? Normally when regulators are exposed to a new situation there will of course be a learning curve. And then you think that as people climb the learning curve they might actually ask less questions or become more familiar or less anxious about things as they settle into their learning pattern. So what do you think explains why, in fact, you are finding more detail required? What does that reflect?

MR CODLING (CBH): I think partly it reflects the continuing development of the industry and we're seeing new developments.

MS SCOTT: Could you be a bit more specific about what the developments mean?

I mean we're all obviously seeing new developments.

MR CODLING (CBH): There's consolidation in participants. There's also changes in the systems as we go along. So what we're trying to do is respond to changes in the competitive environment because of new entrants and things like that, particularly in a system which has been settled for quite some time prior to deregulation.

MS SCOTT: Okay.

MR CODLING (CBH): We're also seeing quite significant change in the people in the regulators.

MS SCOTT: So the continuity of people.

MR CODLING (CBH): Continuity of people has definitely been one, and so we're finding that there's been, say, two or three sets of people in the last five years at the ACCC. It's not necessarily a criticism of the ACCC, it's just they have had changing people.

MS SCOTT: It adds to the cost.

MR CODLING (CBH): It's a cost, it does add to the cost, and the second would be that over time we have also seen a changing regulatory landscape, so we have had some interaction between Wheat Exports Australia and the ACCC, and there's been confusion over the boundaries of their remit.

MS SCOTT: Right.

MR CODLING (CBH): There has, to a degree, been overlap in that and people are unsure as to whether it's their regulatory issue.

MS SCOTT: So the consequence of that for your firm, Richard, is that you get more requests for information, more detail. In some ways you are victim of the demarcation issue.

MR CODLING (CBH): We were until Wheat Exports Australia was abolished.

MS SCOTT: Yes, of course.

MR CODLING (CBH): But now there's the issue, I guess, of just - because it's been made up on the run as it's gone, we have just seen that there's been uncertainty as to whether it's an ACCC role or not, and trying to get the system to work where

they have thrust us in, so there's no balance between the access undertaking requirement and just the idea of, "Well, I'll run my risk of declaration."

MS SCOTT: And does the ACCC ask you, in surveys or something, about - does it seek feedback from you about the regulatory burden they're imposing on you?

MR CODLING (CBH): No, no. Anything would be informal, ad hoc.

MS SCOTT: So it could be the case that the ACCC simply doesn't know the burden that they're putting on you.

MR CODLING (CBH): Absolutely.

MS SCOTT: Okay.

MS MACRAE: I think it was your second submission talked about instances where you and the customer agreed that you would like certain changes to be made but you couldn't get an acceptance through the ACCC and the undertaking didn't currently allow for a change that you would agree with your customer. So even though all parties agreed, you still couldn't make the change that it would appear everybody wanted.

MR CODLING (CBH): Yes.

MS MACRAE: How does that situation arise? Is it just a matter of timing or is it a misunderstanding?

MR CODLING (CBH): Predominantly there's a matter of timing and, as I said, the deadlines we end up with harvests. Last year was one of the critical examples where we wanted to tweak the auction system and had very broad consensus on how to do it, but that then required a change in the access agreement, the standard access agreement attached to our undertaking, and the ACCC wanted to run through their process for that. We just ran out of time to do that and hold the auctions in a reasonable time before harvest.

It takes a while to build consensus amongst industry, and then by the time you do that there's little time to run through the ACCC processes. If you flip it round the other way and start the ACCC process first, then you're putting the regulator before the customer. So we get caught in a bind as to which do we do first and how do we take them along, and unfortunately the ACCC process is quite regimented because they feel that they have to do so for public purposes and to ensure a transparency in their processes. It's simply regulatory inertia.

MS MACRAE: Aside from removing the requirement and the undertaking, there's no real solution to that, is there?

MR CODLING (CBH): No. But as you said, we would expect certain smaller matters to be capable of faster resolution than what they perhaps have been.

MS MACRAE: Do you feel that it gets down to too low a level of detail? Are there things that you think, "Look, what's the risk in this if we made this change and we hadn't been required to get approval beforehand?" Is there a level of flexibility that might be allowed for in the undertaking that's currently not there, do you think?

MR CODLING (CBH): There is some level of flexibility with the port terminal rules but once you delve into the actual undertaking, which our actual standard access agreement is part of, then there's no flexibility and I guess maybe it's a peculiar thing to what CBH and Viterra having auctions is, but the auction is mandated as part of the undertaking and therefore there is no scope to move unless the commission consents, even with the consent of all the customers, and there's a risk because if one customer coming along later doesn't like it, they can insist on the standard access terms.

Even though theoretically we would still be offering standard access terms to every party in a nondiscriminatory manner and not hindering, they could still insist on a different set of access terms, which in a common-user system is quite difficult. Certain things in a common-user system just absolutely have to match up amongst everyone.

MS SCOTT: This is a broad question so maybe you want to take it on notice and come back and make a comment at the end of your hearing, but you talked about change in your industry, and new entrants and so on. You don't have to go too far from a newspaper to know that a fair bit is happening.

MR CODLING (CBH): Yes.

MS SCOTT: Given that, do you think there is a danger that mandatory undertakings are seen as a means to assuage concerns, and seen as a low-cost way to assuage concerns to regulators, when in fact the industry is moving in a direction of increased competition and increased access opportunities? So could you comment on that, either now or later?

MR CODLING (CBH): No, I can comment on that. It's no different to the position I guess we have held for the last five years. Quite simply, we felt that access regulation should not be mandated in our industry and that entry could be done in a timely and real fashion, and that's been borne out and what we're seeing throughout

the industry globally is a competition between supply chains as opposed to more of a competition within a supply chain market. I guess the age-old idea of having a market which everyone participates in and can form any number of linkages is partly being displaced in the form of direct supply chains, and you're seeing it probably in more than just agriculture. Then it's a competition between those supply chains to see who can deliver the best product to an end-user customer.

In essence I would say yes, they probably are an easy way for people to assuage concerns about access but it's more the looking at the actual need for access than the process where the issue is, I think. If they fully examined the need for access then they would have seen that there was no need and that commercial outcomes would drive the provision of access because the threat is the loss of volume.

MS MACRAE: Can I just ask - and I haven't been as up to date with things and as close to things as you are. Just in relation to where you're heading now, the idea is that there will now be a mandatory code, if I've got it right, from 1 October.

MR SCOTT (CBH): Where are we headed now?

MS MACRAE: And where is that up to and how much difference do you think there will be between what you're required to do under the mandatory undertaking and what you will be potentially required to do under the code, and whether in fact there's going to be much difference between those things?

MS SCOTT: Paul, you might just identify yourself for the transcript too, please.

MR SCOTT (CBH): Paul Scott, government relations manager. Perhaps I'll lead off a little bit. The mandatory code process, or the code process, as you would be aware, has been in play I think now for 18 months.

MR CODLING (CBH): Yes.

MR SCOTT (CBH): We all started off with good intentions of developing a voluntary code and now we're likely to end up with a mandatory code, but the process has stalled somewhat at present with I think the election getting closer and time lines sort of going back a few months, that we were likely to see things play out before the election with everything being finalised but - - -

MS SCOTT: Sorry, could I just check on where is the slowness coming - is that slowness on - - -

MR SCOTT (CBH): I think it's a combination of factors and the department would

need to provide clarity on that, but the message we're getting is that it's obviously, firstly, in the drafting arrangements. It's also in the consultation between the various regulators or funders within government, so whether that be DAFF or Treasury or the ACCC. Then we haven't even got to the final part of sending the draft document back through industry consultation. There's been very heavy consultation, as I indicated, across 18 months but we haven't actually seen the final document and the legislation, how the schedule will work and what will actually be included.

The industry agreed what would be included but what the final document includes is at this stage unknown. Whether that occurs prior to the election at this point we don't know. We're hopeful that it will get distributed before the election but nobody knows when the election will be, so it's a bit up and down. Now, that does put pressure on us in the sense that this process could - we're not sure of an election outcome. I mean we don't really know what an incoming government's view will be. We would presume that the current government, although it has a new minister, would have a consistent approach but we haven't had a chance to speak there yet either.

It is worrying. It's troubling in the sense of the uncertainty that we have, because we will probably have to start the process of another access undertaking and there will be some costs involved in that.

MS SCOTT: Yes, okay. Paul, I appreciate the fluidity of this, but what about in your own WA setting? If there's lack of clarity at the moment from a number of bodies in relation to Canberra, what about the WA government? Is the position of the WA government clear on this issue?

MR SCOTT (CBH): That's a good point. I'm not aware that they have a public view on access. I think it's fair to say that they certainly have a view that supports competition in the grain market and at ports. I wouldn't like to speculate any more than that.

MS SCOTT: That's okay.

MS MACRAE: There hasn't been a view from the WA government side about the appropriateness of the mandatory undertakings or any of those things? They haven't sort of entered that policy?

MS SCOTT: Just given the significance of this sector.

MR SCOTT (CBH): To be frank, there was certainly support from the previous agriculture minister. We haven't gone near the new minister in relation to this matter but the previous ag minister and the premier certainly supported further deregulation

of the wheat marketing arrangements. So where there was a desire to sort of influence an outcome amongst federal WA politicians, the WA state government was of the view that further deregulation should occur.

MS MACRAE: Just in relation to what's likely to be the mandatory code - and I know it's still under construction but do you think as part of that there will be any kind of review or will there be a mechanism that at some point someone might be able to say - well, is there any kind of trigger to say there's an out for this at any stage or is it just going to be assumed, do you think, and there will just be an ongoing - - -

MR CODLING (CBH): It's certainly proposed that there would be a review after a number of years.

MS MACRAE: Would it be looking at the state of competition in the sector?

MR CODLING (CBH): That was the intent of the parties. I guess the intent of the parties in both the voluntary and mandatory code was to examine the costs of ongoing compliance versus the benefits provided by it. The principles agreed by industry had a review two or three years down the track to see whether it was actually producing any recognised benefits and, if not, then it could be, I guess, "sunsetted".

MS MACRAE: Right.

MR CODLING (CBH): Because it is a code, that's probably an easier process than under this legislation.

MS MACRAE: Yes.

MR CODLING (CBH): That was the view of industry anyway.

MS SCOTT: Could I get you to summarise, maybe just in three dots, what in an ideal world will happen now in relation to the mandatory undertaking arrangements. What would be the best thing, for your firm, to happen?

MR CODLING (CBH): The best thing at the moment would be the withdrawal of mandatory undertakings. The second-best thing would be perhaps the imposition of a mandatory code which had uniform application to all wheat export terminals but had a slightly more flexible approach than the undertakings. If they followed the principles agreed by industry that would be the outcome - a lighter touch again, sort of a step down.

Then the third point, the third level I guess, would just be certainty at the

moment. We don't know whether we should be starting a voluntary undertaking renewal process which really strictly, given the time frame, should kick off in September, or whether we should be waiting around for a code. There's a vast potential that if we do start the voluntary undertaking and they then agree a mandatory code, we have wasted further money. For us, regulatory certainty would then be the next best after those first two points.

MS MACRAE: But at the moment, as far as you're aware, the start date for the new mandatory code would be - is it October 2014?

MR CODLING (CBH): 1 October 2014.

MS MACRAE: That does seem pretty close when you know how long all these things take.

MR CODLING (CBH): And if the code isn't approved it will also be the start date for a new access undertaking for CBH with the old access test in place, which would mean that any wheat cargo that's exported would be forfeited.

MS SCOTT: Is it realistic to imagine that the code could be sorted out in the time frame you're talking about, notwithstanding the 18 months of work you have already put into it, given - I'm putting aside the political process and elections and new ministers. I'm going to put that to one side, Paul, but you have also got these potential new entrants into the sector, or is that irrelevant to your code? I mean, you keep stressing the need for evenness, Richard. How long will it realistically take if we've got quite a bit of movement in potential ownership structures in some parts of your sector?

MR CODLING (CBH): Realistically it is possible.

MS SCOTT: Okay.

MR CODLING (CBH): As I said, the principles were agreed by industry. They were agreed for a voluntary code and then they were agreed for a mandatory code, so it's - we're caught at a drafting stage of that, how to put quite comprehensive principles into words. The new entrance people like Bunge, people like NAT and other smaller ones who aren't subject to undertakings at the moment were part of that process. They were invited into that process, so we would say that it is quite possible.

The ACCC obviously then moves into an enforcement approach as opposed to the undertaking approach and on that they can use the same people who have experience in the industry. So it is possible to do and it's certainly possible to

transition within the time frame but we need regulatory certainty sooner rather than later for that.

MS MACRAE: Sorry, just so I do understand, with the mandatory code then what would the sanction be? You just mentioned about losing your power to export, which is the current sanction. Would that remain?

MR CODLING (CBH): That's the failing the access test, so under the mandatory code you would then just simply be in a position that you would be breaching your code, which contains all the remedies of the Competition Act. They're quite significant remedies.

MS MACRAE: The existing requirement in relation to your export capacity would no longer apply?

MR CODLING (CBH): That would fall away because the Wheat Export Marketing Act would finish.

MS MACRAE: So that would be a pretty big step forward then for you.

MR CODLING (CBH): That would be a big step forward. We would be regulated on our performance in relation to our port terminal infrastructure and not penalised in our wheat marketing division.

MS MACRAE: Okay, that's one thing that hadn't jelled properly in my mind, so that's a positive.

MS SCOTT: Can I seek some clarification, Richard? I think you have previously indicated to us that you've got a different view of the circumstances surrounding the 2009 access undertaking process from the ACCC.

MR CODLING (CBH): Yes.

MS SCOTT: I'm not an expert in this area. Could you be a bit more explicit about the divergence of views that you have on that, and maybe draw out quite sharply - if there are sharp distinctions - your views and those of the ACCC so we've got a better measure of the divergence, because there will be an opportunity of course for us to, if we wish to, avail ourselves of putting an expression to the ACCC.

MR CODLING (CBH): It's hard to run through the divergence without running through everything from day dot. We started in November 2008 for a September 2009 undertaking - end of September 2009. We did certain work with them, which then changed when they asked us if we could adopt a consistent approach with all of

industry. Perhaps it is merely in the drafting of the submission, the implication that we didn't have standard access terms contained in our undertaking and things like that. Our view was that that was not correct, that we did have standard access terms that were proposed for whoever chose to take access under the undertaking.

We had proposed an undertaking which was there as a fallback if you didn't negotiate terms with us, so more in the standard sense of the voluntary undertaking. We agreed that we would give access to anyone under these principles if they asked but people were free to come to us to negotiate and, if they negotiated, that was the deal.

MS SCOTT: So it was almost a debate about the word "standard"?

MR CODLING (CBH): Yes.

MS SCOTT: All right.

MS MACRAE: I don't want to put words in your mouth, and you may or may not agree with me on this point, but I think your view would have been that even in the absence of this undertaking you felt that there was enough pressure on you to give competitive outcomes in the absence of regulation, whereas I think the ACCC view would have been that, "With the undertaking we've now required them to give terms and conditions that wouldn't have been supplied under any other conditions, and that as a result of that we've improved the performance of the market," and I think you would have said the contrary, that the market would have been just fine without the requirements for those things.

MR CODLING (CBH): Correct.

MS MACRAE: I think that's just a different view about where you - - -

MR CODLING (CBH): The need for regulation.

MS MACRAE: So the starting point was different at the very beginning.

MR CODLING (CBH): Absolutely, Angela. I think that the ACCC adopted the process - we have no counterfactual in this sense. We don't know what would have happened in the absence and we say pretty much no different to what did happen. We signed everyone up on pretty much standard terms which weren't radically different from where they were before the undertakings came in and we continue to provide standard terms to everyone.

MS SCOTT: Gentlemen, I wouldn't mind now turning to the issue of access to the

southern WA rail network, if that's all right. In your submission you state that parts of the grain rail network are receiving little or no investment, such that they have been put out of service and mothballed. We have heard some contrary views in informal consultations that this is something that could be subject to negotiations, or in fact some money has been made available and so on. So could I just get you to clarify the situation as you see it now. Is this a problem to do really with commercial lease negotiations or is it a funding issue from the WA government? For a person who is not familiar with the topic, could you maybe for five minutes take us through it and tell us what the situation as you see it is.

MR CODLING (CBH): I think the best person to do this would be Mark as he has to deal with it day to day.

MR SCOTT (CBH): Okay, Mark. Come on down.

MR NEO (CBH): Mark Neo, corporate lawyer, CBH. Where to start? The West Australian Auditor-General released a report in January of this year reviewing the state government's lease of the rail assets to WestNet, now Brookfield. There were some interesting findings in that report, where the lease arrangement was amended over time whereby the asset holder was able to put certain lines into care and maintenance and not release those lines back to the government or for possible tender to other participants to operate. The auditor-general found that in the interests of competition that didn't make sense. In terms of funding for the grain network, there has been a lot of state government funding and I think there was a strategic grain network review in 2009.

MR SCOTT (CBH): And federal funding, predominantly federal funding that went into the grain networks, with some assistance from the state government, I think.

MR NEO (CBH): Yes.

MR SCOTT (CBH): Around about $200 million-odd went into the grain network in what we call tier 1 and tier 2 lines. I think that was a bit over $200 million or thereabouts and about 135 of that was federal funding.

MS MACRAE: But your concern, if I remember it correctly, in your submission was about these tier 3 lines.

MR SCOTT (CBH): In part, yes. In part.

MR NEO (CBH): Yes.

MS SCOTT: So does the tier 1 and tier 2 funding, Paul and Mark, now address

your concerns? Does that allay your concerns?

MR SCOTT (CBH): I suppose the key thing with the grain rail network is to understand that it's different from the rest of the rail freight network in Western Australia in the sense that grain rail network is - or certainly in parts of it it's very historic. It has low load levels across it. It's a very extensive network. It has had little maintenance in recent years, certainly since privatisation of the rail occurred, and the tier 1 and 2 part of the network is the part that receives greater loadings and was generally in a superior condition than the tier 3 sections of the network. The money that it has had applied to it has sort of reinstated it back to a workable level.

MS SCOTT: Has there been some improvement, Paul?

MR SCOTT (CBH): Absolutely, absolutely.

MS SCOTT: I just need to clarify this. Is this a problem to do with the original privatisation and lease arrangements, one; is it a problem to do with the WA access regime that applies to the southern wheat lines, two; or is this to do with really the viability of possibly these tier 3 lines which I think you're hinting are low volume and so on? It could be a combination of all three but even then I will probably get you to put your money on what the principal problem is. Mark, I'm looking at you, or I could look at Paul. What would you like to suggest?

MR NEO (CBH): I think it's (d), all the above, unfortunately.

MS SCOTT: Oh dear. Can I suggest that you might think about where the weighting of that issue is. In some ways this has emerged as a sideline topic through our general discussion. I just want to get a sense of where it fits in with the scheme of things.

MR NEO (CBH): I think I can address each point. The lease arrangements; there is no transparency in the lease. It's something we had to use Google to find and actually, if you read the auditor-general's report, it's not a public document; it's confidential. We can't actually determine what the performance standards of the track are. It's all contained in that lease which hasn't been tabled in parliament.

MS SCOTT: So this is not necessarily an ideal privatisation arrangement?

MR NEO (CBH): That's one issue.

MS SCOTT: Right.

MR NEO (CBH): We're the only user of the grain network but we don't know the

performance standards of the grain network, which seems a bit odd.

MR SCOTT (CBH): Or the maintenance standards.

MR NEO (CBH): Or the maintenance standards, or what investment proposals are put forward on all sorts of things. We're a user, we've got assets to use on those lines, we have loading facilities on those lines, but we're not a party to any of the arrangements regarding that.

MS SCOTT: This could be lessons learnt from privatisations. Is that a reasonable summary?

MR SCOTT (CBH): Yes.

MR CODLING (CBH): Definitely. Just, if I may, for us as a large infrastructure user, not having these signals being clear makes it quite difficult as to where we direct investment. We could direct investment to a site and then have the rail line to that site closed, which would then necessitate - either it's a waste of stranded investment or we then have to convert it to a road transport, which is less efficient than rail. For us, it makes it difficult to interpret the signals on the network and where we should be directing investment and consequently where grain could flow.

MR SCOTT (CBH): Just to add to that, I did say that the grain network is an historic piece of infrastructure.

MS SCOTT: Yes.

MR SCOTT (CBH): Our receivals sites in many instances are built to the rail, and so exactly what Richard is saying - you know, delivery mechanism for out-loading is to rail. If that changes it necessitates significant change in our receivals site handling.

MS MACRAE: Did the auditor-general's report recommend that that lease be made public? Did it go that far?

MR CODLING (CBH): Yes.

MS SCOTT: And has the WA government responded to this auditor-general's report to date?

MR SCOTT (CBH): Only in part.

MS SCOTT: I'm sorry, the date of that report, just so we can look it up?

MR NEO (CBH): I think it was January this year.

MS SCOTT: Okay, we can follow through on that. That's interesting. I think I interrupted, Mark, your analysis of "(d) all of the above".

MR NEO (CBH): Yes, okay. The use of the network - our product is seasonal. A lot of these grain networks go to areas where they may not actually produce any grain from one season to the next. A lot of these tracks and assets may only get used 20 times a year, 10 times a year, or none at all, depending on the season. These assets have been there for a hundred years and are still viable. We have a view that with minimal maintenance spent on these assets, they can be used for the next hundred years. They have been used for a hundred years; why can't they be used for another hundred?

But the asset owner has a different view and the government seems to agree with that view in saying that it's not economical for them to maintain these or run these assets, "So let's just park them, lock them up and not release them to anyone else to use," which seems odd.

MS SCOTT: But given your commercial imperative, couldn't you enter into negotiations with a view where you'd say, "Well, it might not be in your interest but it's in our interest and we'd like to see the" - and then some money changes hands from you to them and then - solution.

MR SCOTT (CBH): Certainly money does change hands presently. We pay a very significant fee to access the network. We're at a delicate stage at present because we're in discussions with Brookfield, so I'll choose my words reasonably carefully. Our worry is some of the network has had some investment which has been long overdue. Our concern is both an immediate and a future concern, and that is where does the next amount of funding come from to maintain and upgrade the network, notwithstanding that we pay a very significant fee to access the network now.

We would argue that what we pay in access fees should provide quite reasonable funding streams to maintain the network and provide a margin but, without having the benefit of understanding what the performance and maintenance standards are, it's a bit difficult to ensure or determine whether you are getting what you're paying for.

MS SCOTT: Would it actually be better that you, as the main user of the network, also owned and managed the network?

MR SCOTT (CBH): Certainly in relation to the tier 3 section of the network there was an intention previously that the tier 3 would close, and that was due to take effect in October last year but the infrastructure leaseholder, Brookfield, determined to keep it open for another 12 months while we continued discussions with them in relation to access across the tier 3 and in fact the entire grain network. Now, those discussions are ongoing.

MS MACRAE: Does the discussion just relate to levels of access fees or does it include even the possibility that you might take over some of those lines?

MR SCOTT (CBH): The discussions are very broad and certainly we would have a view that, given the right set of circumstances, our board would consider operating sections of the rail; as I said, given the right set of circumstances. At this point nothing has been agreed with Brookfield in relation to that. In fact it would be fair to say that we have been rebuffed in relation to being able to consider taking the tier 3.

MR NEO (CBH): I think the normal situation would be if the asset holder didn't want to use the assets and said they were uneconomic, they would return them back to the government. The government would either run them again or put it out to tender. That's not the case here.

MS SCOTT: Okay.

MR NEO (CBH): If we want to run parts of the network we have to agree with Brookfield, and your comments about whether we have considered that - yes, we have. I think it's been public knowledge that we have made approaches but, from Brookfield's perspective, why would they go ahead and give those assets to us if they are uneconomic, if they could just park them instead?

MS SCOTT: Okay, I've got three last questions.

MS MACRAE: Yes, you go ahead.

MS SCOTT: In our report we drew attention to bulk commodity exports and used the Pilbara example to advance an economic argument that where prices are not going to change as a result of the entry or exit of one firm, then there may be no merit in going through the whole hullabaloo of the access process, because at the end of the day people are price takers. The chance of one firm's entry or exit affecting the long-term price-taker price is very small. That was our argument we advanced in the draft report. We were using the example of iron ore.

Could you talk about whether you see any points of comparison with your sector. Are you price takers? Would it be the case that all this intense work that

goes into access actually makes absolutely no difference to the market price and the level of competition in the sector?

MR CODLING (CBH): I think there's probably a reasonably strong parallel with the grain industry. The price received in Western Australia is definitely a function of the global market and there is very little ability for the WA market to overly influence the global market prices. As we said, with the development of increasing competition between chains, access is measured on whether they believe that they can profitably enter and service a customer better than they can get the access from us. If there was an ability for us to take a greater share of the global revenue, then they would enter. As you see, even without that capacity they're deciding that they wish to enter for control purposes.

MS SCOTT: Now my two last questions. Richard, you showed no particular enthusiasm for the 2006 agreement, the competition reform agreement, and yet you seem to be enthusiastic about the idea that there could be a national rail access regime, so I just want to contrast these two things. Lofty statements, long processes, fine words on paper, hard to see necessarily, from your perspective, tangible results. We've been a little loath to suggest embarking on a national rail access regime because, to be frank, we have heard so many different sets of circumstances but, you're right, if you had a principles based approach you could start with principles. But then somebody might just use the word "lofty" on me.

I just want to see if I can quiz you a little in a sense of getting you to contrast between your assessment that a CIRA had produced really nothing and my concern that because of the unique set of circumstances, arriving at a National Access Regime that's going to cover all the very different circumstances around Australia could mean that you're left with high-level principles that don't take you much further.

MR CODLING (CBH): Yes.

MS SCOTT: Can you just tell me why I'm wrong?

MR CODLING (CBH): I don't think it's an easy thing to tell you why you're wrong in that sense. I don't think CIRA has failed. It's just that in our regard CIRA was not honoured, certainly in relation to port terminals.

MS SCOTT: Good point.

MR CODLING (CBH): So I'm sort of confining my points of view to the key fact that we saw that one of the key principles, that regulation of ports should be avoided unless there is a clearly-defined need, was certainly not honoured at all in throwing

us into the whole National Access Regime. Everything after that point comes as a result of the National Access Regime, so certainly I think it's taking it a little bit too far to say that CIRA doesn't get there.

In relation to your comments about the costs and benefits of regulation, again, whilst we see a greater benefit in the regulation being consistent in operating in multiple states across Australia - and certainly in rail because rail is where we see this supply chain developing for export grain in other states, so we need to be able to use rail in the other states. So we see great benefits there. It of course has to be looked at objectively, and the cost. We're not in a position to accurately assess the cost on everyone else, so whilst we're supportive of it and believe that it's the right way to go, we're also supportive of a fair examination of it.

MS SCOTT: Okay.

MR CODLING (CBH): Checks and balances, like we spoke about before. We're not proposing a special deal for us in that sense.

MS SCOTT: You're not anticipating encountering any particular problems in terms of access to rail in other states? You just mentioned it on the way through there.

MR CODLING (CBH): Anticipating, encountering? At this stage, no, it's merely that the differences between states of course raise your regulatory prices.

MS MACRAE: I was just interested, and I was going to take up the point on CIRA as well, that even though - at the beginning I think Patricia had asked you did you see any benefits in the CIRA and I think you said a fairly definitive "No", but on the other hand actually I think, Mark, from reading your submissions I would say that you actually saw some real benefits in having CIRA if it had been honoured.

MR NEO (CBH): Honoured, yes.

MS MACRAE: Because for you there was value in having something that said that there should be this requirement to test that you needed regulation before you put it in place. It's just that you feel in your case that wasn't done.

MR CODLING (CBH): Absolutely.

MS MACRAE: Similarly, the CIRA does ask for some consistency, and I think it's the consistency issue that you're looking at with your preference for a national rail regime, but maybe you don't need to go quite that far, if I'm reading into it, but one of the alternatives - again, if I can take your submission - would be that if you were given an opportunity to say, "Well, look, this rail regime's been certified" - but the

NCC made the case that there wasn't enough consistency and it shouldn't have been certified.

Again I think you could say under the CIRA the NCC made the right decision there in what's going on here - one of our findings that you talked about. My reading of it, I think, is that what you're suggesting is not necessarily going further than what we had suggested, although it might be. So I'm just taking up the draft recommendation 8.5, the last part of that. We say that we should enable infrastructure service providers - you guys or, blah blah blah, the people - to apply to the NCC to make a recommendation to the Commonwealth minister for the revocation of certification. I would just be interested in whether or not, if that was to come to pass, you feel that that's something you might try and initiate in relation to that rail regime.

MR CODLING (CBH): I think that bullet point is definitely what we would like to say, that fourth bullet point. The question we had really was around whether the one immediately before it altered the interpretation of that to limit the ability of the minister to revoke certification if there's only been a substantial modification or the principles - - -

MS MACRAE: Okay, yes. Good, we will have a look at that then.

MR CODLING (CBH): That was where we felt that might limit, so an entity might well be able to recommend but the minister wouldn't then revoke.

MS MACRAE: Right, okay.

MR CODLING (CBH): That was sort of how we wanted to understand the interplay between those two.

MS MACRAE: That's helpful because we will look at the wording there.

MS SCOTT: So you're concerned there's potential inconsistency in the direction of those two dots?

MR CODLING (CBH): Yes.

MS SCOTT: Okay, well, that's a good one for us to concentrate on.

MS MACRAE: But on the broader question, do you think it is something that you might consider if there was an opportunity?

MR CODLING (CBH): You have to consider the things that are available to you

and the benefits that may come from them versus, I guess, the difficulty and costs you would incur in trying to push down that route. For the moment we would, as we have described, prefer to see a greater deal of transparency around aspects of the rail access regime so that we can gain, at the very least, a better understanding of where to direct our investment.

MS MACRAE: Okay, I don't think I have any more questions.

MS SCOTT: Richard, any final comments? Effectively the message to us is this is lead in your saddlebags, complex processes with potentially moving dates, no discernible benefits as you can see them, and privatisation deals that may have looked good at the time but end up imposing costs in a sector where new entrants and fluidity in the market probably means that you're very attuned to any potential unnecessary cost structures.

MR CODLING (CBH): Yes, I think that's a very good summary of our concerns. I think that, again, there can be differences between assets that may be declared as to their ability to be replicated, and I think the lower the ability to be replicated, it becomes more vitally important that they're looked at in a privatisation sense versus, say, the sale of something. Say somebody left WA, maybe an insurer which - there's plenty of market forces out there which could replicate what they're offering versus pipeline corridors which are incredibly difficult to replicate. So just perhaps a differing test when you look at the need for privatisation. That would be a lesson learnt, that the harder it is to replicate then the greater deal of attention that needs to be paid.

MS MACRAE: Can I just ask one quick final question? It's just a matter of detail and you might not know, but just in relation to these two new entrants in WA in Albany and Bunbury, what sort of proportion of the market might they take?

MR CODLING (CBH): Very good question. We're seeing the potential for, let's say, 1.3 million tonnes of exports out of Bunbury and Albany. Average year would be about nine.

MR SCOTT (CBH): 10 to 15 perhaps at best.

MS MACRAE: Okay.

MR SCOTT (CBH): 10 to 15 per cent.

MR CODLING (CBH): Maybe up to 18 per cent.

MS MACRAE: All right, thank you. That's interesting.

MS SCOTT: We're finished. You don't feel any urgent need to make a final remark?

MR CODLING (CBH): No, no. I would like to thank you for giving us the opportunity.

MR SCOTT (CBH): Thank you.

MR NEO (CBH): Thank you.

MS SCOTT: Thank you for coming along today. We very much appreciate it.

MS MACRAE: Yes, thank you.

MS SCOTT: And for your engagement with this exercise. So it's my pleasure now to draw this hearing to a close

AT 9.02 AM THE INQUIRY WAS ADJOURNED UNTIL
THURSDAY, 25 JULY 2013