



**Australian
Competition &
Consumer
Commission**

Co-operative Bulk Handling Limited's proposed 2014-17 Port Terminal Services Access Undertaking

**Comments sought on proposed change to long
term capacity allocation process**

26 August 2014

1. Background

On 14 March 2014, CBH lodged a Proposed Undertaking for its port terminal services with the ACCC for assessment. The undertaking was intended to apply from 1 October 2014 to 30 September 2017.

Following an ACCC issues paper, and the receipt of submissions, the ACCC released a draft decision on 26 June 2014 to accept CBH's Proposed Undertaking, subject to certain drafting amendments, and invited submissions on its draft decision.

On 6 August 2014 CBH withdrew its Proposed Undertaking and submitted a Revised Undertaking which addressed the two drafting amendments discussed in the ACCC's draft decision, along with an amendment concerning the commencement date of the undertaking.

The ACCC is yet to make a final decision on this Revised Undertaking.

On 22 August 2014, CBH provided a submission to the ACCC proposing a further change to the Revised Undertaking, relating to the conclusion of the capacity allocation process for long term capacity. In that submission, CBH puts forward a possible additional clause for inclusion in its Revised Undertaking (although the additional clause is not formally in the Revised Undertaking at this time).

The ACCC seeks views on this recently proposed change put forward by CBH. Submissions should be provided to the ACCC by or before **5pm Tuesday 2 September 2014**

This document should be read in conjunction with:

- the ACCC's draft decision on CBH's proposed 2014-17 undertaking, published on 26 June 2014
- CBH's submission of 22 August 2014 in support of recent proposed changes to the undertaking
- other documents from the ACCC's assessment process.

These documents are available on the ACCC's website at:

<http://www.accc.gov.au/regulated-infrastructure/wheat-export/co-operative-bulk-handling-2014>

2. ACCC decision framework

The ACCC must have regard to the matters set out in subs. 44ZZA(3) of the CCA in deciding whether to accept an access undertaking. Essentially, the ACCC may accept the undertaking if it thinks it appropriate to do so having regard to various matters, including but not limited to:

- the objects of Part IIIA of the CCA (including promoting the economically efficient operation of, use of and investment in the infrastructure by which services are provided, thereby promoting effective competition in upstream and downstream markets)
- the legitimate business interests of the provider of the service
- the public interest, including the public interest in having competition in markets
- the interests of persons who might want access to the service.

The full list of matters is set out in Appendix A of the ACCC's draft decision.

3. Recent proposed changes

Following the ACCC's draft decision to accept the undertaking, CBH performed a long term allocation (LTA) capacity process, pending the ACCC's final decision, to obtain indications from customers on how they would apply for capacity under the proposed undertaking.

As set out in its 22 August submission, CBH received applications for LTA capacity significantly in excess of what was available. The original process contemplated by CBH involved a negotiation process whereby customers would reduce their bids voluntarily to reach a situation where the LTA process could close. However, the demand for LTA capacity was not reduced to an amount that was under the total amount offered.

In response, CBH has now proposed the inclusion of an additional clause relating to the LTA application process that would allow CBH to make proposals to customers that the customer must either accept or reject. This is a change from the process as originally contemplated. In its revised process, CBH will have regard to the historic exports of customers in making revisions to the LTA capacity that each customer obtains under the LTA process.

CBH's proposed clause requires acceptance by 75 per cent of LTA customers based on numbers and that it is not rejected by customers who have more than 25 per cent of exports in both the current year and over the previous three years.

The proposed subclause 3.3(e), as amended, provides that, in the case of oversubscription, CBH may revert to auction, negotiate with customers, accept the offers or follow a new process as specified in a proposed 3.3(e)(iii) which states:

- "(iii) provide all Customers with proposals that represent its best effort to balance out Long Term Capacity requirements of all Customers taking into account the historical exports of Customers, over a 3 year average as well in the current year to date and taking into account the length of time that the customer has been shipping from the Port Operator's port terminals. Any proposals must:*
- (A) obtain acceptance of at least 75% of Customers provided with a proposal by number; and*
 - (B) not be rejected by Customers who in aggregate represent more than 25% of exports in the both current year and over the 3 years prior to the current year."*

CBH's proposed subclause follows the approach that CBH has taken in its offers to applicants on 11 August as part of its allocation of capacity pending the ACCC's final approval of the undertaking. As set out in CBH's submission, the acceptance thresholds in the above clause were met in that process. Therefore, if the proposed clause is included in CBH's Revised Undertaking, CBH submits that it would allocate long-term capacity in the manner in which it has proposed to customers through the process recently undertaken. CBH has indicated in its submission that it would allow declining customers a further opportunity to reconsider CBH's offer.

4. Effect of the proposed change

The change that CBH has proposed in this process will mean that, in the case of oversubscription for LTA capacity, applying exporters will have less control over the LTA capacity allocation process and the amounts of capacity that they receive. Instead, CBH will have a greater level of control over final LTA capacity allocations, although acceptance thresholds would need to be met.

CBH's proposal to have regard to historic and current year shipping in making its allocations will mean that CBH will have a significant level of discretion in adjusting exporters' allocations should it follow the new process. Given the reference to historical exports, the process is likely to favour those exporters who have been recent significant exporters out of CBH's ports in the current year or the previous three years.

However, as CBH notes in its submission of 22 August, at least 34 per cent of available capacity will be reserved for the auction capacity allocation process, which will be open to all exporters to participate in.

5. Views sought

The ACCC is seeking views from interested parties on CBH's proposed approach, should CBH withdraw its Revised Undertaking from ACCC consideration and submit a new form of undertaking that includes the proposed clause. Interested parties should keep the ACCC's decision framework in mind in providing responses to the ACCC.

The ACCC has provided the following questions on issues it is interested in but would welcome other comments as well.

Questions for interested parties

- Does the proposed clause provide sufficient certainty and transparency about the method by which CBH will allocate LTA capacity should it be oversubscribed?
- Is the proposed allocation method (i.e. having regard to historical exports of customers) appropriate, and does it appropriately balance the interests of different industry participants and the efficient operation of the facility?
- Will smaller or new exporters have sufficient opportunity to obtain capacity through the auction mechanism, if CBH submits an undertaking that includes the proposed clause?
- Do the proposed acceptance thresholds provide sufficient protection from potential issues of discrimination or hindering?
- Is the proposed drafting of the clause sufficiently clear?

6. Submission process

Contact details and timing of submissions

The ACCC seeks views from interested parties on the issues raised above.

Submissions should be addressed to:

Ms Lyn Camilleri
Acting Deputy General Manager
Infrastructure & Transport – Access & Pricing
Infrastructure Regulation Division
Email: transport@acc.gov.au

The ACCC prefers that submissions be sent via email in Microsoft Word format (although other text readable document formats will be accepted).

Submissions should be provided to the ACCC by or before **5pm Tuesday 2 September 2014**, in order to allow the ACCC sufficient time to consider submissions prior to making a decision. It is in interested parties' interest to make submissions within this timeframe to ensure their views are properly considered.

In deciding on a targeted one week consultation process, the ACCC notes that CBH has submitted that there is limited time left until the WA harvest and that accordingly there is a need to allocate capacity quickly. The ACCC also notes that parties are aware of this issue from the process followed by CBH. Several industry participants have contacted the ACCC to discuss the issue in recent times.

Confidentiality of information provided to the ACCC

The ACCC strongly encourages public submissions. Unless a submission, or part of a submission, is marked confidential, it will be published on the ACCC's website and may be made available to any person or organisation upon request.

Sections of submissions that are claimed to be confidential should be clearly identified. The ACCC will consider each claim of confidentiality on a case by case basis. If the ACCC refuses a request for confidentiality, the submitting party will be given the opportunity to withdraw the submission in its entirety or in part. The ACCC will then assess the undertaking without that information.

For further information about the collection, use and disclosure of information provided to the ACCC, please refer to the ACCC publication *Australian Competition and Consumer Commission / Australian Energy Regulator Information Policy – the collection, use and disclosure of information*, available on the ACCC website.¹

If you have any queries about any matters raised in this document, please contact:

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¹ Available at www.acc.gov.au.