



CBH Port Access

Submission in response to ACCC's Draft
Issues Paper in relation to CBH Access
Undertaking under Part IIIA of the Competition
and Consumer Act 2010

May 2014

1. Purpose of Submission

This Submission responds to the submissions made by interested parties in relation to the Issues Paper dated 4 April 2014 ("**Issues Paper**") released by the Australian Competition & Consumer Commission ("**ACCC**") in relation to CBH's proposed 2014-2017 Port Terminal Services Access Undertaking ("**Proposed Undertaking**").

CBH notes that all submissions lodged by interested parties were supportive of CBH's Proposed Undertaking. Therefore, CBH only wishes to address in this Submission areas that it believes are necessary having regard to those submissions and the ACCC Issues Paper, that may warrant further comments by CBH, before the ACCC issues a draft decision relating to the Proposed Undertaking.

2. Structure of Submission

CBH appreciates the work involved in the ACCC's assessment of its Proposed Undertaking as set out in the ACCC Issues Paper. CBH also appreciates the submissions made by Glencore Grain Pty Limited and Viterro Ltd dated 30 April 2014 ("**Glencore Submission**"), Cargill Australia Limited dated 30 April 2014 ("**Cargill Submission**"), Plum Grove Pty Ltd dated 30 April 2014 ("**Plum Grove Submission**") and GrainCorp Limited dated 29 April 2014 ("**GrainCorp Submission**"), all of which support CBH's Proposed Undertaking.

In order to assist the ACCC, this Submission will focus on any key issues that CBH believes arise from the ACCC's Issues Paper and will be informed by and add to the above submissions as considered appropriate.

CBH also notes that since the ACCC published its Issues Paper, various submissions have been lodged with the Agricultural Competitiveness Task Force. The Productivity Commission also lodged a submission on 17 April 2014 ("**Productivity Commission Submission**") that is particularly relevant.

CBH hopes that this Submission is constructive and helpful in the ACCC's deliberations.

3. Executive Summary

3.1 Submissions have been supportive of the Proposed Undertaking

As the submissions from parties responding to the ACCC's Issues Paper have noted, CBH's Proposed Undertaking is largely similar to CBH's 2011 Undertaking (that had been accepted by the ACCC previously), except for the inclusion of the Long Term Agreement ("**LTA**") arrangements.

Each of the submissions that have been lodged with the ACCC in response to the Issues Paper has been supportive of the Proposed Undertaking and the LTA arrangements, because they provide additional commercial certainty for exporters. As the Glencore Submission summarised (see page 1 of the Glencore Submission):

"LTAs offer significant benefits to both the infrastructure owner in assuring continued use of existing assets and the exporter customers in ensuring security of execution beyond the immediate demand period."

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In our view, LTAs will become increasingly important as genuine commercial negotiations represent the most efficient way for port terminal operators and exporters to strike an appropriate balance between the flexibility and certainty they each require."

It is quite clear from the Plum Grove Submission that the LTA arrangements are a positive advance. Plum Grove stated in the Plum Grove Submission:

"Plum Grove supports the changes proposed by CBH to its Port Terminal Service Access undertaking. Specifically we believe the introduction of proposed Long Term Agreements [LTAs] will provide greater certainty for CBH and exporters seeking stable, longer term access to port capacity..."

Given some of our shareholders are amongst the largest consumers of Australian grain we are a grain exporter with clear, consistent and significant demand throughout the year. One of our major challenges is ensuring we have secured suitable port capacity to satisfy the demand base for our shareholders. Under current arrangements in a number of cases port capacity access is the determinate of meeting demand availability and not the demand itself."

3.2 The Proposed Undertaking provides additional commercial certainty and therefore provides incentives for supply chain investment.

The interested party submissions have been strongly supportive of increased efficiency and certainty. Cargill Australia stated in the Cargill Submission that:

"Cargill Australia supports the Co-operative Bulk Handling Limited proposal 2014-17 Port Terminal Services Access Undertaking as we are of the firm view that this is a welcome step towards direct commercial negotiations between port owners and its customers as the proposed undertaking is a more efficient arrangement than the current auction system."

No submission has been negative in relation to the Proposed Undertaking and importantly it would appear to be acceptable to a broad range of customers and industry participants; Cargill stated:

"In addition, Cargill Australia is of the opinion that CBH's proposal to incorporate both LTA's for 'long term' capacity and an auction system to allocate 'near term' capacity (and any capacity not booked under LTAs or via the auction will be allocated on a first-come, first-served basis) will cater for all port customers, both large and small, to secure port access."

In many respects the positive reaction to the Proposed Undertaking by industry participants is to be expected as CBH took on board previous suggestions (including from the ACCC) and constructively worked with customers to achieve an acceptable form of LTA.

CBH believes that the LTA arrangements will provide commercial certainty for all market participants. The increased certainty of access to Port Terminals will also drive investment along the export supply chain as occurred in relation to the coal chain in the Hunter Valley as part of the Port Waratah authorisation by the ACCC in 2009. Glencore stated in the Glencore Submission that:

"The Company supports LTAs as a desirable outcome which would encourage investment along the supply chain."

Such a statement from a large international company such as Glencore is instructive of likely developments in the export supply chain in Western Australia.

3.3 Industry Maturity and Regulatory Timing

A consistent theme from the submissions is that the industry has matured and would like to move to direct commercial negotiations. In these circumstances, particularly for the larger customers, the LTA arrangements provide commercial certainty and an appropriate balance between certainty and efficiency through flexibility. In these circumstances, CBH would like the opportunity to move forward with these arrangements well before major harvest periods to assist in the efficient planning of grain exports from Western Australia.

CBH has noted the ACCC's timetable is for a draft decision in June 2014 and a final decision in August 2014. Given the industry acceptance and belief in moving forward with the Proposed Undertaking, to provide commercial certainty to parties and facilitate investment in the supply chain, CBH would be appreciative if an accelerated timetable were possible, particularly given the limited differences to the previous Undertaking.

CBH would like to move forward and provide the industry with the certainty provided by the LTAs and now awaits the ACCC's regulatory decision. As Plum Grove stated:

"We believe that there will be strong interest and take up by industry in the LTAs as proposed by CBH..."

Plum Grove is of the view that although there remains significant uncertainty over the proposed Code of Access, the industry has reached a certain level of commercial maturity that should incentivise port providers and exporters to regulate long term commercial access agreements that deliver on key competitive and efficiency objectives"

4. ACCC Issues Paper on terms of Proposed Undertaking

4.1 Term, carried over arrangements in Proposed Undertaking and Proposed Code

No parties have put forward any negative submissions in relation to the term or carried over arrangements in the Proposed Undertaking from the previous Undertaking. To the contrary, the submissions have welcomed the increased commercial certainty that is provided.

CBH also notes that the ACCC allowed GrainCorp's similar provisions in its recent draft decision dated 10 April 2014 on the proposed variation to GrainCorp's Undertaking. The terms in CBH's Proposed Undertaking were based on those provisions in GrainCorp's Undertaking.

CBH believes that the ACCC in the draft decision on GrainCorp's variation to its Undertaking has also taken a sensible approach to the uncertainty created in the industry by the uncertain timing of the proposed Code. Accordingly, CBH believes it is sensible for the ACCC to consider the Proposed Undertaking given the considerable uncertainty about whether a Code will be brought in, what the Code will contain and what the timing may be in the future for the implementation of any Code.

4.2 LTA Arrangements

Term

In response to the Glencore Submission, while CBH would wish to have longer terms in the LTA arrangements, CBH took on board the ACCC's previous comments and limited the term to three years. If the ACCC was accepting of longer term 5 year arrangements, CBH would consider longer arrangements.

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Capacity allocation and qualifying tonnage

Each of the submissions has been supportive of the amount of capacity proposed to be available under the LTA arrangements and the reasonableness of the 66/34% split as well as the 600,000 qualifying tonnage in Western Australia. These matters were intended to provide certainty, but also a degree of flexibility for CBH as well as customers and it is pleasing they have been accepted by a broad range of customers such as Glencore, GrainCorp, Cargill and Plum Grove.

The only party to provide any substantive response to these issues raised by the ACCC was the Glencore Submission which stated that:

- *"We believe that the three year timeframe is acceptable (although our preference is for a longer timeframe). We also consider that the 34% of capacity reserved for 'near term' acquisition is more than adequate.*
- *The company considers that the minimum 600,000 tonnes per annum LTA commitment is appropriate, given the shipping profile (ie. panamax vessels) out of Western Australia."*

Plum Grove in the Plum Grove Submission stated that:

"We share the view that a move toward a combination of port allocation via LTA's and 'near term' auction capacity should provide CBH and exporters with greater certainty over port utilisation and access and result in reduced port premiums. The proposed split of allocation of capacity via LTA's and auction is appropriate in the first instance and the minimum of 600,000mt of capacity is an acceptable level of commitment."

Discretion provided to CBH to manage the export task

In the ACCC's Issues Paper, the ACCC raised for consideration questions on the restrictions CBH has included in the LTA arrangements in terms of limits on LTA capacity allocations and as to the discretion given to CBH to manage volumes and the export schedule. CBH included those restrictions to address concerns by customers as to overall fairness of the LTA arrangements and to seek improvements to the auction process and overall efficiency. CBH is pleased with feedback from industry participants in the various submissions which while accepting those propositions also expressly acknowledged that the Port Terminal Operator should be provided with discretion to appropriately manage the export supply task.

Importantly Glencore stated as follows in relation to the allocation and discretion in CBH's Proposed Undertaking and LTAs:

"The Company believes that the industry is mature enough to deal with a pro-rata system of allocation and we therefore consider that the CBH proposal on this issue is acceptable in the context of the overall proposal..."

Due to the demand profile for shipping slots at different times of the year, we believe that the port operator should have a level of discretion as to the mode and method of allocating of shipping slots..."

Overall the structure of the LTAs is acceptable to us as an exporter. We recognise that individual port terminal operations have a legitimate interest in ensuring that LTAs serve their specific business and operational requirements. It is very important that this is given appropriate weight in assessing the proposed new access undertaking."

CBH believes that many parties, including elements of government, underestimate the complex nature of the export supply task for agricultural commodities. Glencore as an international company has clearly noted this consideration in its submission.

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ACCC Issues Paper

CBH has not dealt with the other matters raised in the ACCC Issues Paper on the LTA arrangements as no submissions have raised substantive concerns.

5. Provisions for future exclusion of particular CBH ports from regulation and CBH's proposed Port Terminal Services Agreement

The ACCC Issues Paper noted that CBH included in clause 4.3 of the Proposed Undertaking a mechanism to remove Ports from the coverage of the Proposed Undertaking by an addendum to the Proposed Undertaking. The clause retains the requirement to obtain the ACCC's consent to remove such Ports in circumstances where there is competitive constraint. The process is no different to that which GrainCorp is undertaking with the ACCC in relation to the Port of Newcastle.

The ACCC raised a question in its Issues Paper whether an amendment to the Proposed Undertaking by way of an addendum rather than changes to the overall Undertaking was acceptable. CBH has drafted the Proposed Undertaking in this manner simply to try and avoid having a six months process to review revisions across provisions in the entire Undertaking rather than containing the changes to a specific set of pages. This was anticipated to be simpler than having a situation where the ACCC issues a long Issues Paper dealing with each set of changes across the whole document.

CBH continues to have significant concerns with the cost of the access test process that is involved in the Wheat Export Marketing Act 2008 (Cth) ("**WEMA**"), particularly given that it is clear from the industry submissions that it has reached a level of maturity where this level of regulation and scrutiny may no longer be needed. CBH notes the comments of the Productivity Commission at page 17 of its Submission to the Agricultural Competitiveness Taskforce as to the millions of dollars of compliance costs involved in the access test. CBH believes that this cost is continuing and requests that the ACCC consider the Federal Government's review of regulatory costs and the burden associated with regulatory red tape as well as the Productivity Commission's Proposed Audits of Regulators imposition of regulatory costs in administering regulation. CBH trusts that the ACCC may be sympathetic to what is intended in clause 4.3 to be a practical and constructive means to reduce regulatory costs for industry and also for a public tax payer funded entity such as the ACCC.

As to the substantive need for the clause, some of the major grain export terminal operators are seeing significant new investment in competing terminals which are imposing competitive constraints. Therefore, there needs to be scope for removing port terminals from regulation where there are competitive constraints. As the Productivity Commission noted at page 17 of its submission to the Agricultural Competitiveness Taskforce:

"Two multinational companies have made significant investments at Western Australian ports. Bunge has developed loading and storage facilities at Bunbury and Heilingjiang Feng Agricultural has invested in loading and storage facilities at Albany after taking a long term lease over a disused wood pellet export facility".

Having regard to the Productivity Commission's recent comments on the access test in relation to grain export terminals in its Report on Part IIIA¹, there are concerns as to how the access test

¹ <http://www.pc.gov.au/projects/inquiry/access-regime/report>

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required by the WEMA sits with Australia's competition policies. In these circumstances, CBH believes that the ACCC's approach to removing access regulation where there are new competing export terminals (as is indicated by the ACCC's Draft Decision in relation to GrainCorp's Variation of its Undertaking), is, as the Productivity Commission has stated at page 18 of the Productivity Commission Submission, "an appropriate future direction for regulation of grain port terminals".

CBH is sympathetic to Glencore's comments in the Glencore Submission as to the consistency of regulation of port terminals on a national basis as disparity in regulation creates distortion and inefficiency. However, that does not obviate the need to address factual issues on a case by case basis in the meantime while such regulation remains in place.

As to CBH's proposed amendments to the Port Terminal Services Agreement, no negative comments were received.