



CBH Group

Public Submission on views sought by ACCC on CBH's proposed amendment regarding changes to long term capacity allocation process

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A. Introduction

CBH Group is grateful for the ACCC having reviewed the proposed clause that CBH Group believed was required in order to be able to allocate Long Term Agreements ("LTA") tonnage under the Proposed Undertaking. CBH Group believes that such a clause was:

- (a) The only practical means to be able to accommodate the tonnages in the presence of excess demand beyond CBH Group's terminal capacity for LTA tonnage;
- (b) Preferable to a pro-rata scale back that the ACCC had indicated may be preferable as such a process would lead to exaggerated nominations (indeed as was the exact position that Port Waratah Coal Terminal found itself in before it was able to put in place long term agreements) that are not true reflections of actual demand and do not provide proper investment signals;
- (c) The most equitable position for existing exporters who had supported the Western Australian grain industry and growers while balancing the interest of new entrants with no track record, while still giving them some LTA capacity to become new entrants as that was viewed in the best interest of Western Australian growers as a whole; and
- (d) Responsible as it allowed CBH as infrastructure operator to best manage the Western Australian grain export task for the benefit of Western Australian growers and Western Australia as a whole.

In the circumstances of the public submissions that the ACCC has provided to CBH, CBH notes that a fundamental point to make is that in the absence of the Proposed Clause, there will be no LTA arrangements in place in 2014/15 or for the foreseeable future. This will mean all tonnages will revert to the auction process, itself a process that has considerable questions as to its suitability from a regulatory perspective for an infrastructure owner.

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B. Questions for interested parties

1. Does the proposed clause provide sufficient certainty and transparency about the method by which CBH will allocate LTA capacity should it be oversubscribed?

1.1. General

CBH submits that the proposed amendment to the draft undertaking has no material effect on the current level of certainty and transparency that is currently offered under the process by which CBH will allocate Long Term Capacity in the event of oversubscription. It is also important to note that the proposed amendment does not alter CBH's commitment to provide 34% of all capacity for allocation through the auction process or remove or vary any other of its obligations to exporters or access seekers in the draft undertaking, over which the ACCC expressed no substantive concerns.

1.2. Transparency

CBH believes that clause 3.3(e)(iii) ("**Proposed Clause**") provides for an allocation mechanism for LTA capacity that enhances the level of certainty and transparency, and does not involve any element of hindering access to, or discriminating against exporters. Importantly, it better promotes the legitimate business interests of the infrastructure owner and facilitates proper commercial investment signals to build new capacity if required.

The approach embodied in the Proposed Clause, and the approach actually taken by CBH, provides an equitable mechanism. In the first instance the market has the opportunity to settle its requirements without intervention from CBH. It is only where the market is not able to determine an outcome that CBH wishes to intervene to preserve longer term investment signals. It was initially anticipated that the excess demand would not occur in such a broad proportion of shipping windows and that only a relatively few windows would be likely to be oversubscribed. However, to preserve the long term investment signals and provide some commercial certainty for its existing customers CBH created a Long Term Capacity proposal for each Customer. CBH took the Long Term Capacity requirements of all Customers into account having regard to factors that are likely to provide the most reliable basis for CBH to assess the commercial reasonableness of each respective Customer's proposals for Long Term Capacity in light of the level of current demand in the industry, having regard to the export and capacity profile of each Customer, which will include:

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- (a) the 3-year historical average of shipped exports and capacity utilisation of each respective Customer;
- (b) each respective Customer's shipped exports and capacity utilisation in the current year to date; and
- (c) the length of time that the Customer has been shipping from the Port Operator's port terminals.

CBH does not propose to adopt an arbitrary formulaic approach in relation to the significance placed on each of the three factors for the purposes of determining how long term capacity will be allocated to Customers. However, while CBH is willing to adopt a holistic approach to assessing each proposal by a Customer for Long Term Capacity on its merits having regard to all relevant factors, for the purposes of transparency and consistency.

1.3. Customer and industry safeguards

The requirement for each proposal to obtain acceptance of at least 75% of Customers provided with a proposal, in addition to the requirement that a proposal cannot be accepted if rejected by Customers who in aggregate represent more than 25% of exports in both the current year and over the 3 years prior to the current year will act as significant safeguards, and will ensure that CBH cannot hinder access to, or discriminate against, any Customer. The introduction of this new clause effectively provides a way of ensuring that an allocation can be made which is acceptable to the vast majority of the industry in circumstances where industry cannot coordinate the level of demand.

1.4. Comparison to other LTA arrangements

CBH also submits that the Proposed Clause offers a greater degree of certainty and transparency to Customers than that provided by the provisions for the assessment of indicative long term nominations in Part B clause 3.6 of the GrainCorp undertaking ("**GrainCorp Provisions**"), which was accepted by the ACCC. The GrainCorp Provisions provide three ways for which GrainCorp may assess Long Term Indicative Nominations in the case of insufficient capacity, including:

- (a) consulting with the Customer, and allowing the Customer to resubmit its indicative Long Term Nomination with either reduced monthly tonnage or by moving its tonnage to another Port Terminal;

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- (b) accept the Indicative Long-Term Nomination following a variation in the Indicative Elevation Capacity (whereby no more than 60% of the Indicative Elevation Capacity and Nominated Elevation Capacity for each Port Terminal will be allocated to Customers under Long Term Nominated Elevation Capacity for each Port Terminal is allocated to Customers under Long Term Port Terminal Service Agreements); or
- (c) following consultation with the Customer, accept the Indicative Long Term Nomination following the pro rata reduction of each Customer's Indicative Long-Term Nomination on a Port Terminal by Port Terminal basis and on a non-discriminatory basis.

CBH notes that while the GrainCorp undertaking provides three available options to GrainCorp for assessing Long Term Indicative Nominations in the case of insufficient capacity, it does not provide any details of, or outline of relevant considerations or factors that will be taken into account for the purposes of accepting or varying a Customer's Long Term Nomination. CBH also notes that the approved GrainCorp undertaking did not include any significant safeguards (similar to those contained in the Proposed Clause) to ensure that an allocation can be made which is acceptable to the vast majority of the industry in circumstances where industry cannot coordinate the level of demand.

As such, CBH submits that the Proposed Clause offers a more certain and transparent regulatory framework than that contained in the approved GrainCorp undertaking and the previous version of CBH's draft undertaking, that will more effectively balance out Long Term Capacity requirements of all Customers and provide the significant benefits, including the enhanced efficiency of CBH's facilities, recognised by the ACCC in its draft decision here and earlier decision in relation to GrainCorp.

2. 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?

2.1. Introduction

As noted above, CBH submits that assessing proposed Long Term Capacity Proposals from Customers on the basis of the 3-year historical average of shipped exports and capacity utilisation of each respective Customer; each respective Customer's shipped exports and capacity utilisation in the current year to date; and the length of time that the Customer has

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been shipping from the Port Operator's port terminals is the most appropriate, reliable, transparent and equitable approach to allocating Long Term Capacity. While CBH acknowledges that Customers' capacity requirements can be affected by seasonal weather variations, CBH is of the view that using a Customer's historical export averages over a three year period in conjunction with that Customer's exports in the current year to date forms the most appropriate and non-speculative basis upon which to assess and allocate Long Term Capacity. Over the 3 year period there will be changes in the shipping profile and accordingly if the same capacity allocation system is utilised again there may well be a different outcome due to the change in 3 year shipping averages. Given the preservation of significant near term capacity and that no one Customer is likely to be getting the entirety of their shipping demand in Long Term Capacity (other than perhaps the new entrants), granting capacity in this fashion will not prevent new entrants from emerging.

2.2. Most equitable approach based on past data

CBH believes that taking these considerations into account when assessing and allocating Long Term Capacity is the most effective, equitable, and appropriate means of balancing the interests of different industry participants, as regard will be had to each respective Customer's current and historical shipping export capacity and capacity utilisation, which is likely to provide the most accurate basis upon which to assess the likely capacity requirements of each respective Customer for Long Term Agreements. The approach will also ensure the most efficient operation of CBH's facilities by providing CBH with greater certainty as to the amount of investment that will be required in its facilities in order to best meet industry demand in a commercially sustainable and viable way.

3. 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?

3.1. Introduction

The position in relation to available capacity through the auction mechanism remains unchanged as a result of the Proposed Clause. Clause 3.1(b) of the Port Terminal Rules still imposes the following conditions on the Port Operator, which as a result must ensure that:

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- (a) *not less than thirty four percent (34%) of its declared Total Capacity in any Year is to be offered by way of the Auctions; or*
- (b) *not less than thirty four percent (34%) of the Capacity in each Shipping Window published under clause 2.3 at each Port Terminal is to be offered by way of the Auctions.*

CBH acknowledges that under the approved GrainCorp undertaking there is a slightly higher threshold requirement that no more than 60% of the Indicative Elevation Capacity and Nominated Elevation Capacity for each Port Terminal is permitted to be allocated under Long Term Port Terminal Service Agreements. However, CBH submits that the difference between a maximum percentage of 60% (under GrainCorp's undertaking) and 66% of capacity permitted to be allocated to Long Term Agreements (under CBH's draft undertaking for which very few concerns were raised by the ACCC or industry) is immaterial. This would appear to be the case particularly when having regard to the shipping profile and nature of comments from the limited number of Customers who were unhappy with the amount of capacity allocated, the profile and/or the process for the allocation of Long Term Capacity under the draft undertaking.

3.2. New entrants facilitated as a fact under the new LTA proposal

CBH also notes that the process under the draft undertaking has resulted in capacity being allocated to new entrants who have not previously shipped in order to foster and develop competition, and that this will be unlikely to change as a result of the proposed amendment to include the Proposed Clause in the draft undertaking. Long Term Capacity was allocated to new entrants to ensure that they received the opportunity to export at least 2 vessels in each of the next 3 years and to facilitate and increase competition for the export of grain.

3.3. Proper investment signals being bolstered to build new capacity

Although initially some smaller new entrants were not able to have their full demand met, the entry into the long term agreements has resulted in new capacity being invested in and delivered, which will enable their capacity demands to be met sufficiently over time. New entrants will continue to have the opportunity to acquire capacity in the near term and following a demonstration of long term commitment may be able to acquire Long Term Capacity at the conclusion of the current 3 year Long Term Agreements.

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On the basis of the above, CBH submits that the Proposed Clause will have limited if any affect on the opportunity of smaller or new exporters to obtain the capacity through the auction mechanism, as the Proposed Clause does not alter CBH's commitment to provide 34% of all capacity for allocation through the auctions. Indeed, to the contrary, the ability to have the LTA arrangements in place.

4. Do the proposed acceptance thresholds provide sufficient protection from potential issues of discrimination or hindering?

As noted above, the Proposed Clause includes a number of significant safeguards for exporters in relation to the process under which Long Term Capacity will be allocated. The requirement for each proposal to obtain acceptance of at least 75% of Customers (though CBH notes that this could be smaller without the risk of dramatic inequity) provided with a proposal by number, in addition to the requirement that a proposal cannot be accepted if rejected by Customers who in aggregate represent more than 25% of exports in both the current year and over the 3 years prior to the current year will act as significant safeguards, and will ensure that CBH cannot hinder access to, or discriminate against, any Customer.

CBH submits that the introduction of the Proposed Clause effectively provides a way of ensuring that an allocation can be made which is acceptable to the vast majority of the industry in circumstances where industry cannot coordinate the level of demand. Without this clause there are incentives for single customers or competitors to hold CBH and industry hostage with the aim of bettering their individual outcome.

5. Conclusion

In light of the ACCC's initial feedback that it has not reached a view but is minded to not accept the proposed clause to allow the use of LTA arrangements, and would therefore prefer capacity to be auctioned, CBH Group reluctantly advises that it has no ability to take forward the LTA arrangements and will revert to all capacity being auctioned.