

2 September 2014

Ms Lyn Camilleri
Acting Deputy General Manager, Infrastructure & Transport – Access & Pricing
Infrastructure Regulation Division
Australian Competition & Consumer Commission

Via email – transport@acc.gov.au

Copy to:

Mr Michael Eady
Director, Infrastructure & Transport – Access & Pricing
Infrastructure Regulation Division
Australian Competition & Consumer Commission

Via email – Michael.Eady@acc.gov.au

Dear Ms Camilleri

We refer to the ACCC's consultation paper dated 26 August 2014 seeking comments on Co-Operative Bulk Handling Limited's (**CBH**) proposed changes to its long term capacity allocation process.

1. OVERVIEW

GrainCorp supports CBH's attempt to introduce long term access agreements (**LTAs**) at its ports. We recognise that, if introduced in a considered, transparent and equitable manner, LTAs could offer substantial benefits to the grain export industry, including through providing greater certainty for users in planning their long term export programs, allowing for improved management of vessel loading and improving investment signals.

However, GrainCorp has serious concerns both with the way CBH has conducted the allocation process to manage excess demand to date and with CBH's proposed changes to that process.

In relation to CBH's proposed changes, GrainCorp is concerned that they:

- are not sufficiently transparent, unlike GrainCorp's LTA process, which is more detailed, transparent and fair, particularly for handling over-subscription; and
- systematically favour the status quo, to the detriment of smaller or new exporters.

In GrainCorp's view the proposed changes do not adequately balance the interests of access seekers and the public interest against the legitimate business interests of CBH and do not achieve the objectives of Part IIIA of the *Competition & Consumer Act 2010*. For this reason the proposed changes should not be approved.

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There are also significant concerns with the way CBH has attempted to introduce these important aspects of the LTA allocation system:

- the proposal is inconsistent with the process originally advocated by CBH and which GrainCorp has sought to follow in good faith;
- the new proposal is intended to justify pre-existing decisions and to apply after the event;
- the proposal has been composed under significant time pressure and entirely “on the run”. Proper management of excess demand is a serious issue and one that was not adequately planned for or addressed by CBH. It is not sensible to lock in an ad hoc solution that has been arrived at without proper consideration and the application of balanced principles; and
- the attempt to recast the process in retrospect undermines the consultation process that has been undertaken between CBH and customers over many months to develop the LTA process.

GrainCorp’s concerns are highlighted by a lack of transparency and, in GrainCorp’s view, a demonstrably inequitable process on this occasion.

To remedy this situation GrainCorp believes CBH must accept that these unexpected events have disrupted its anticipated process this year and revert to the usual capacity auction, as it previously indicated it would.

GrainCorp supports CBH seeking to introduce LTAs for future years, using the knowledge obtained from this unsuccessful process and having regard to the considered views of the industry.

GrainCorp is confident that equitable and balanced criteria for managing this type of excess demand can be developed by CBH, given time to do so and without the burden and inflexibility of needing to justify pre-existing allocation decisions.

2. CONCERNS WITH THE ALLOCATION PROCESS RECENTLY UNDERTAKEN BY CBH

CBH’s recent capacity allocation process was badly flawed

As noted above, GrainCorp has serious concerns regarding the manner in which CBH has managed the allocation of long term capacity for the 2014-15 – 2016-17 shipping years to date.

CBH’s process has been inconsistent with its proposed Port Terminal Services Undertaking and 2014-2017 Port Terminal Rules. In this regard, we note CBH’s submission in support of its application for approval of its 2014 Undertaking dated 24 March 2014 (**Supporting Submission**) said the following:

If any given Quarter, or any month within a Quarter (relevant “window”), is oversubscribed, and following discussions between CBH and relevant participants, LTA participants do not wish to reduce or relocate their demand, then each oversubscribed window will revert to be auctioned.

GrainCorp (and presumably the entire industry other than CBH) has acted throughout the process in good faith in accordance with the proposal put forward by CBH. Because numerous shipping windows remained oversubscribed and there was a lack of industry consensus given the unsatisfactory process, GrainCorp reasonably expected each relevant oversubscribed shipping window would revert to be auctioned, in accordance with CBH’s Supporting Submission.

CBH has now allocated capacity in a different way and seeks to have its process supported in retrospect. This is a significantly flawed process and it is likely that GrainCorp and many

others in the industry would have acted and reacted differently under the new CBH proposal. Simply saying that GrainCorp can still accept the unsatisfactory allocation is not a proper solution, because the capacity of others has been unexpectedly locked in.

It has been apparent to GrainCorp that the CBH process and the new proposal has been composed under significant time pressure and has evolved "on the run". Proper management of this level of excess demand for LTAs in Western Australia is a serious issue and was addressed by CBH in its Supporting Submission.

The new proposal does not reflect a fair balance between the interests of CBH and of access seekers - it appears to be intended to justify pre-existing decisions.

The attempt to recast the process in retrospect is also inconsistent with the careful consultation process that has been undertaken between CBH and customers over many months to develop the LTA process.

Customer "acceptance" of this process is not a good measure of the appropriate outcome

CBH's submission suggests that its capacity allocation process has resulted in an equitable outcome, because "effectively 11 of 14 Customers accepted the CBH proposals."

In GrainCorp's view, this is not a fair representation, particularly in circumstances where customers have been offered capacity on a "take it or leave it" basis and may have been forced to accept an unsatisfactory proposal or risk missing out on capacity entirely.

More accurately, it appears 3 of 14 customers rejected CBH's proposals and an additional 4 indicated some level of concern. This means that at least 7 of 14 customers (or 7 of 13 customers excluding CBH's trading arm) were concerned with the process or its outcome. Stated another way, 54% of customers had serious concerns.

GrainCorp believes it will be relatively easy in future years for CBH to obtain 75% customer "acceptance" by similarly offering long term capacity on a "take it or leave it" basis. Many customers will have little option but to accept.

3. CONCERNS WITH CBH'S NEW PROPOSED ALLOCATION PROCESS

CBH will have a significant level of discretion in allocating capacity with few parameters as to how this discretion should be exercised

As noted in the ACCC's issues paper, 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.

By way of example, GrainCorp is concerned that in the recent process conducted by CBH (now retrospectively supported by the new proposal), CBH appears in part to have been guessing at what is likely to be acceptable to each customer. In this regard, we note CBH's submission dated 22 August said the following:

"CBH then examined the applicant's demand, revised demand, three year shipping history and current YTD shipping to attempt to determine what CBH reasonably considered would be the minimum level each customer would likely accept in order to try and accommodate everyone."

GrainCorp regards this as further evidence of an inappropriately ad hoc process that has allowed irrelevant and possibly inappropriate considerations to guide significant outcomes for the industry.

Lack of transparency

As the ACCC correctly noted in its draft decision dated 26 June 2014 proposing to accept CBH's 2014 Undertaking, CBH is required to comply with its general obligations in the 2014 Undertaking, including the obligation not to discriminate in favour of its own trading arm and the obligation not to hinder access to its port terminal services during the course of negotiating long term capacity allocations with customers.

However, granting CBH sole and unilateral discretion to determine who obtains the available capacity with no visibility as to the process would be inconsistent with the clear process that was required of GrainCorp when it introduced LTAs. It also brings significant risk that CBH will strategically exclude or include certain competitors. It would not be simple for the ACCC to second-guess CBH allocations or enforce general undertaking obligations. GrainCorp is particularly concerned in this regard about the lack of transparency in the allocation process.

For example:

- GrainCorp has been given no satisfactory explanation of why the majority of its request for long term capacity was not accommodated;
- the industry is presently unaware of the extent to which CBH's own trading division had its capacity requirements met during this process.

Indeed, until CBH provided its submission to the ACCC on 22 August, CBH had provided very little information on the method by which they had already made the capacity allocations. There has also been no substantive negotiation with GrainCorp since the initial CBH allocations of 11 August 2014. Not knowing the outcome of the process for which CBH seeks ratification leaves GrainCorp (and other customers) unable to identify and address any prejudice that may flow from the outcomes in this response.

Potential for discrimination against smaller or new exporters

GrainCorp is also concerned that the proposed changes do not provide adequate protection for smaller exporters, new entrants or those who wish to grow their business.

CBH's proposal appears to place a high priority on the length of time that a customer has been shipping from CBH's ports and historical volumes. While this may be a relevant consideration, CBH's proposed new sub-clause 3.3(e)(iii) contains no safeguards to protect the interests of new or growing customers seeking access to CBH's services.

There is a cost risk associated with auction capacity

CBH suggests that customers that do not obtain long term capacity allocations are protected by residual access to the remaining 34% of total capacity to be accessed through the auction system.

However, customers who do not have access to LTA capacity are likely to be at a material cost risk disadvantage. As the ACCC is aware, auction premiums apply with respect to capacity acquired at auction and the current level of over-subscription could drive auction premiums higher.

The fact that customers value access to LTA capacity is evidenced by the level of industry demand.

4. OPTIONS FOR A WAY FORWARD

GrainCorp recognises that managing oversubscribed LTA capacity is complex and a perfect solution may not exist.

However, we would welcome further detailed consideration of the following possibilities:

- 1) **Implementing a model based on a pro-rata allocation process.** While there are issues associated with pro-rata allocations (including the possibility of over-nomination in peak shipping periods), it would help to reduce the perception / reality of CBH having unilateral discretion to determine who obtains the available capacity. We expect that a workable solution in this regard may give CBH some level of discretion, for example, to avoid allocations resulting in unshippable parcels.
- 2) **Improved transparency over the allocation process.** Better transparency should reduce the perception / reality that CBH can favour its own operations, discriminate against certain competitors, or simply apply arbitrary or irrelevant considerations. Of course, greater transparency would also need to be balanced against commercial and competitive sensitivities.

That aside, GrainCorp considers that fairer and better criteria must be implemented to manage what has proven to be a substantive commercial issue.

GrainCorp is concerned that such criteria cannot be properly developed in a matter of days. They certainly cannot be applied in retrospect. Rather, this should be done with sufficient opportunity for comment, analysis and review by all interested parties.

Given the significance of this issue and the importance of getting it right, GrainCorp considers that the best way forward is to maintain the status quo for another year. CBH's application to vary the capacity allocation process could readily be made via a new process over the next 12 months. In the meantime, the alternative of reverting to the auction process in accordance with the current proposed Port Terminal Rules and the prior consultation conducted by CBH if the parties cannot agree is not only available, it is preferable and consistent with the objectives of the regulation.

5. CONCLUSION

GrainCorp has genuine concerns with variations to CBH's proposed Port Terminal Services Undertaking. We would like to meet and discuss the concerns outlined in this letter in further detail at your earliest convenience.

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Yours sincerely,



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