



Australian
Competition &
Consumer
Commission

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By email: bill.keane@corrs.com.au

Dear Mr Keane

Re: Cooperative Bulk Handling Ltd (CBH) Port Terminal Service Access Undertaking

I refer to the proposed access undertaking from Co-operative Bulk Handling Ltd (CBH) for its port terminal services at Kwinana, Geraldton, Esperance and Albany (the Undertaking) submitted to the ACCC on 14 April 2009 for consideration under Part IIIA of the *Trade Practices Act 1974* (the Act).

In order to facilitate the ACCC's assessment of the proposed Undertaking, the ACCC seeks the further information from CBH requested at **Attachment A**. Responses by CBH in relation to the questions at Attachment A are relevant to the ACCC's ability to assess whether to accept or reject the Undertaking having regard to the matters set out in section 44ZZA(3) of the Act.

There are two parts to the information request at Attachment A. The first part relates to various statements made by CBH in its supporting submission to the Undertaking relating to issues such as the competition provided by other grain terminals, the possibility of new port entry and the countervailing power of customers. The ACCC notes that a number of these assertions have not been backed up by detailed supporting submissions and would like to give CBH the opportunity to substantiate the claims. In addition, the ACCC considers that this information will assist the ACCC to form a view about whether it would be appropriate to accept the Undertaking, having regard to the matters set out in section 44ZZA(3), in particular, the objects of Part IIIA of the Act, the legitimate business interests of the provider, the public interest, including the public interest in having competition in markets and the interests of persons who might want access to the service.

The second part of the information request relates to the ACCC gaining an understanding of the rationale for, workability and appropriateness of specific clauses of the Undertaking. The ACCC requires this information in order to assess whether the Undertaking, as provided by CBH, will operate to provide access to the port terminal services in a manner considered by the ACCC to be appropriate pursuant to section 44ZZA(3).

The ACCC therefore seeks CBH's co-operation in responding to the questions at Attachment A in a timely fashion.

The ACCC understands that CBH intends to provide a submission to the ACCC responding to the ACCC's issues paper dated 29 April 2009 (Issues Paper) as well as to submissions provided by interested parties. The ACCC is amenable to CBH providing its response to the Issues Paper and to submissions by interested parties in conjunction with its response to this information request. It is recognised that CBH may have intended that some of the information requested in this information request would be provided in its response to the Issues Paper – and accordingly, the ACCC is open to an approach that minimises duplication.

CBH's response to this information request, as well any submissions it proposes to make in response to the Issues Paper and submissions from interested parties, are requested to be provided to the ACCC no later than close of business on **23 June 2009**.

Under section 44ZZBC of the Act, the ACCC must use its best endeavours to complete its assessment of the Undertaking within six months from the date it was submitted. However, as noted in my letter of 17 April 2009, this is likely to be dependent on CBH providing complete information in response to ACCC information requests. A prompt response to this request will assist the ACCC in its timely assessment of the Undertaking.

Please also note that the attached questions should not be interpreted as indicative of all the matters the ACCC may wish to have regard to in its assessment of the Undertaking, and the ACCC may make further information requests at a later stage.

Please contact me on (03) 9290 1804, or Sarah Sheppard on (03) 9290 1992, if you have any questions in relation to the above.

Yours sincerely



Anthony Wing
General Manager
Transport & General Prices Oversight

Attachment A

Part A – Matters raised in CBH’s supporting submission

‘Possibility of new entry’

1. Paragraph 4.6 of CBH’s supporting submission to its proposed undertaking, dated 14 April 2009 (**the CBH submission**), suggests that the ability of Port Operators to raise prices above efficient levels is constrained by the potential entry of new competing port facilities. In light of this comment, and in relation to a possible new bulk wheat grain export terminal, please elaborate on the following:
 - a. What capacity (intake, shipping bin and ship loading) would a new terminal need to be competitive?
 - b. What is the likely cost of construction?
 - c. What would be likely locations for a new terminal, and what would be required to obtain/utilise those locations?
 - d. What would be the minimum level of volume required for the terminal to operate successfully?
 - e. Would it be possible to obtain sufficient volumes for the terminal to operate successfully?
 - f. Who would be likely to pursue development of a new terminal?
 - g. What regulatory or other approvals (such as approval from the port authority) would it be necessary to obtain in order to commence construction?
 - h. Could an existing terminal be converted to export bulk wheat?
 - i. What would be the likely timeframe for constructing and commissioning a new port terminal?

‘Power of vertically integrated customers’

2. Paragraph 4.8 of the CBH submission suggests that many of the grain exporters seeking access to the port terminal services have a substantial degree of bargaining power and the ability to shift their supply sources to wheat produced in other countries. Please elaborate on the following:
 - a. If a bulk wheat exporter was dissatisfied with proposed access terms, what alternatives for equivalent services are currently available in Australia, and what would be the typical costs (monetary and otherwise) to the exporter in switching to such alternatives? Further, what would be the costs (monetary and otherwise) to CBH of losing the customer to such alternatives?
 - b. Please provide examples of the ways in which a bulk wheat exporter could use bargaining power in its negotiations with CBH in relation to the provision of port terminal services at a given terminal.
 - c. Currently, what options are available to a bulk wheat exporter in the event it believes that CBH had engaged in discriminatory conduct in relation to the provision of port terminal services? In particular, would the exporter have any recourse under contractual arrangements with CBH?

'Port terminals are throughput businesses'

3. Paragraph 4.5 of the CBH submission states that because 'the majority of costs associated with CBH's port terminals are fixed and sunk there is a strong economic incentive for CBH to facilitate increased throughput at its ports.' Please elaborate on the following:
 - a. What significance, if any, does the vertical integration of CBH as a provider of port terminal services and as a bulk wheat exporter (via Grain Pool) have for the incentives of CBH in relation to the port terminal services it provides to itself and other users of those services? Would CBH's incentives change if it was not vertically integrated with a bulk wheat exporter?

Other

4. What factors influence the ability of bulk wheat exporters to switch between terminals (either located in different port zones or owned by different bulk handlers) for the export of bulk wheat? In your answer please have regard to transport costs, infrastructure constraints, the availability of transport providers, terminal capacity and terminal availability.
5. Since the removal of the 'single desk' for bulk wheat exports, what are the market shares of each accredited exporter of bulk wheat exported from each of CBH's port terminals (by tonne and percentage)?
6. What were the total upfront capital costs incurred for each of CBH's grain terminals? (for terminals that were purchased rather than built, please provide the purchase price for that terminal).
7. For each of CBH's grain terminals, what were the annual total operating costs for the grain terminal for financial years 2005/06, 2006/07 and 2007/08?

Part B – Matters related to the operation of the proposed undertaking

The clause references in the following questions are to clauses in CBH's proposed undertaking. Words capitalised as proper nouns (e.g., Trading Division, Access Agreement) are as defined in the proposed undertaking, unless otherwise stated.

8. How, if at all, will the proposed undertaking impact on the export of grains other than bulk wheat at CBH's terminals? How will areas of potential overlap between wheat and non-wheat areas be dealt with (for example, will the shipping stem include vessels for wheat and other grains)?
9. To the extent that CBH proposes to offer bundled services (i.e. port terminal services plus up-country services), does CBH envisage that the proposed undertaking (both in general, and specifically in relation to the negotiate/arbitrate process) will apply to those bundled offers?

10. To the extent that there are any differences between the port terminal services offered under the proposed undertaking, and the port terminal services that are offered under any bundled offer, please set out these differences.
11. Please outline the basis on which CBH will provide access to port terminal services to its Trading Business. That is, will it be at ‘arms length’? If so, how will this be effected? Will it be on the same terms of access as offered to other bulk wheat exporters?
12. Clause 4.5(b) contains an obligation to ‘consult’ with various parties prior to seeking the ACCC's consent to vary the proposed undertaking. What, specifically, does the obligation to ‘consult’ on a proposed variation include?
13. In relation to the timeframes specified in clauses 6, 7 and 8 of the proposed undertaking, please provide an explanation as to why those timeframes are appropriate.

Non-discrimination

14. Clause 6.4 proposes a mechanism by which CBH may provide access to Applicants or Users, including its own Trading Business, on differentiated terms, provided such terms are consistent with the objectives of the proposed undertaking, taking into account the 21 matters set out in clause 6.5, and offered on an arms length commercial basis.
 - a. If in a given circumstance CBH considered that one of the matters listed in clause 6.5 provided ‘commercial justification’ for providing access on differentiated terms, what information or evidence would CBH rely upon to demonstrate that such ‘commercial justification’ existed and different terms were appropriate?
 - b. How would CBH communicate the reason/s for such terms to the Applicant/User?
 - c. What measures will CBH implement to ensure that differentiated terms are offered on an arms length commercial basis to its own Trading Business?

Publication of and variation to Reference Prices and Standard Terms

15. In clause 6.2(b), what does CBH envisage as ‘appropriate “holding over” provisions’?
16. Under what circumstances would CBH envisage varying Standard Terms or Reference Prices pursuant to clause 6.6? Does CBH propose any limitations or restrictions on its ability to make such variations? How many times in a particular year would CBH be likely to vary Standard Terms or Reference Prices?
17. What is the role of bulk wheat exporters in the variation process set out in clause 6.6, if any? (Such as consultation prior to publication of new prices, or renegotiation of existing prices?)

18. In relation to the requirement to publish a variation at least 30 days prior to its effective date in clause 6.6(b), please elaborate on why there is no similar requirement in relation to the annual publication of Standard Terms and Reference Prices?

Negotiating for access

19. Clause 6.1 proposes that CBH must publish Reference Prices and Standard Terms by no later than 30 September of each year. Please elaborate on whether publication by this date allows sufficient time for an exporter to have an Access Agreement in place for the harvest season in a particular year.
20. What ability will bulk wheat exporters have to negotiate terms prior to the publication of Reference Prices and Standard Terms, given that CBH is required to publish by *no later than 30 September* in each year?
21. Under what terms and conditions will CBH provide access to its port terminal services to wheat exporters prior to execution of an Access Agreement (such as where parties are involved in a Dispute)?
22. In relation to clause 7.4(a)(ii)(B), what factors will CBH take into account in deciding if a request is ‘unduly onerous’ or ‘disproportionate’?
23. In relation to clause 7.4(b)(i), why is it necessary for CBH to have discretion not to negotiate with the Applicant if CBH considers that the Applicant has not followed the process in the proposed undertaking? What factors will inform CBH’s consideration that an Applicant has not followed the process?
24. In relation to clause 7.5 & Schedule 1 (on the proposed form requirements for an access application):
- a. What is meant by ‘Applicant’s Application Type’ and ‘Business Category’?
 - b. Why is it necessary for the Applicant to have a website in order to seek access? If the Applicant does not have a website, will CBH refuse access?
25. In relation to clause 7.6(b)(iv), what factors would CBH take into account in deciding if the negotiations were not progressing in good faith towards the development of an Access Agreement within a reasonable time period?
26. What is meant by ‘amended Standard Terms’ in clause 7.7(b)(ii)? How does this clause interact with the ability of the CBH to offer different terms under clause 6.4? (That is, what, if any, is the difference between an ‘amended Standard Term’ and a ‘different term’?)
27. If the Negotiation Period ceases, will the Applicant be entitled to make another application for access? How would any further application be dealt with?

Disputes

28. With regard to the definition of 'Dispute' in clause 1.1, what does CBH mean by a 'bona fide dispute'? Please provide examples of disputes that CBH considers would be bona fide, and examples of disputes CBH considers would not be bona fide.
29. Clause 8.1(b) proposes that any disputes in relation to an Access Agreement once executed will be dealt with in accordance with the provisions of that Access Agreement. Does this include disputes regarding claims of discriminatory conduct? What dispute resolution mechanism will be provided under the Access Agreement?
30. In relation to clause 8.1(c), why should the report to the ACCC only deal with material disputes? What does CBH mean by a 'material' dispute? What does CBH consider to be a non-material dispute? Are material disputes different to bona fide disputes? If so, how?
31. In relation to clause 8.3(c), has CBH confirmed with the Institute of Arbitrators and Mediators of Australia (IAMA) that its involvement as a mediator, as contemplated by the proposed undertaking, is workable? Please provide copies of any correspondence between CBH and the IAMA to this effect.

Arbitration

32. Who does CBH envisage as likely candidates for Arbitrator, especially considering the matters set out in clauses 8.6 – 8.9?
33. In relation to clause 8.4(b), how soon after referral to arbitration must CBH notify the ACCC of the details of the dispute?
34. What does CBH estimate as the likely duration and cost of an arbitration process?
35. In relation to clause 8.9(b), who determines whether an Applicant does not comply with a determination or direction of the Arbitrator? What is the basis for reaching a conclusion that non-compliance has occurred?

Ring fencing

36. Will the auditor's report, referred to in clause 13 of Schedule 2 to the proposed undertaking, be required to identify potential breaches (if any) of the Ring Fencing Rules set out in Schedule 2?
37. Under the accounting separation provisions in clause 7 of Schedule 2, what cost allocation methodology does CBH propose to use in allocating the costs to different business areas?

38. Clause 13(b) of Schedule 2 of the proposed undertaking states that the ACCC will be notified of an independent auditor selected by CBH. Will the ACCC have any input into the appointment of the independent auditor?

Service standards

39. Does CBH currently report (internally or externally) on any key performance indicators/service standards in relation to its port terminal operations? If so, please list and explain the measures.

Capacity management/Port protocols

40. Clause 2(e)(i)(D) of the proposed undertaking refers to reaching an appropriate balance between the interests of various parties, including the legitimate business interests of CBH in meeting its own or its Trading Business' 'reasonably anticipated requirements' for Port Terminal Services.
- a. Does this objective mean that CBH intends to reserve and set aside its own or its Trading Business' 'reasonably anticipated requirements' and then provide access to third parties for the remaining capacity? If setting aside capacity for itself or its Trading Business, what criteria will CBH use to assess 'reasonably anticipated requirements'?
 - b. If CBH does intend to set aside capacity for itself or its Trading Business, how does this interact with the relevant ring-fencing obligations?
 - c. How does CBH otherwise propose to balance the port capacity requirements of itself or its own Trading Business with third party bulk wheat exporters?
41. Clause 6.2 of the Draft Port Terminal Rules (included as Attachment 1 to the CBH submission) proposes a mechanism by which CBH assesses expressions of interest received and allocates 'Capacity' for shipping for a relevant period. Have these rules been replaced with new rules? If so, please provide a copy of the latest port terminal rules and explain how the capacity of a given port is determined. Once all of the capacity has been allocated, are there any mechanisms by which additional capacity can be allocated? Is there a difference in the cost for users between the original capacity and any additional capacity? If there is a difference, what is the basis for the difference?