

24 August 2009

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Dear Sarah

## **CBH Access Undertaking: Further submission in relation to application and negotiation process**

This submission addresses the ACCC's comments in Parts 8.4.5 to 8.4.7, and 8.4.10 of its draft decision (**Draft Decision**) regarding application and negotiation for access to the Port Terminal Services.

CBH intends to amend its undertaking to address the comments and recommendations in the above referred Parts of the Draft Decision.

### **1 Proposed application and negotiation clause**

- 1.1 CBH proposes to replace section 7 of its undertaking with the new clause 7 set out in **Annexure A** to this letter.
- 1.2 CBH proposes to make the following related amendments to its undertaking:
- (i) Replace the defined term "Access Application" with the following definition:  
**"Access Application is defined in clause 7.3(a)."**
  - (ii) Replace the defined term "Confidential Information" with the following definition:  
**"Confidential Information means information of the Port Operator or an Applicant or a User (or any of their nominated representatives) in relation to the business of any of those persons that:**
    - (a) *is by its nature confidential;*
    - (b) *is specified to be confidential by the person who supplied it; or*
    - (c) *is known, or ought to be known, by a person using or supplying it to be confidential or commercially valuable;***but excludes information that:**

- (d) *is comprised solely of the name, address and contact details of a person; or*
  - (e) *was in the public domain at the time when it was supplied; or*
  - (f) *subsequently becomes available other than through a breach of confidence or breach of this Undertaking; or*
  - (g) *was in lawful possession of the recipient of the information prior to being provided by the other party; or*
  - (h) *must be disclosed under the Continuous Disclosure Rules under the WEMA; or*
  - (i) *ceases to be confidential in nature by any other lawful means.”*
- (iii) Replace the defined term “Prudential Requirements” with the following definition:
- “Eligibility Requirements means the requirements specified in clause 7.4.”**
- (iv) Replace item 4 of schedule 1 with:
- “4 Eligibility requirements**
  - 4.1 *Evidence of Solvency*
  - 4.2 *Evidence of no Material Default”*

## **2 Reasons for amendments**

- 2.1 CBH is proposing the above amendments to address the concerns raised by the ACCC, and specifically to:
- (i) add certainty regarding the timing of CBH’s acknowledgement of an Access Application, requests for further information or clarification regarding the Access Application, and the commencement of the Negotiation Period;
  - (ii) clarify the circumstances (including timing) which will entitle CBH to refuse or cease to negotiate or enter into an Access Agreement with the Applicant;
  - (iii) remove “pre-conditions” for the referral of negotiation disputes to the arbitrator; and
  - (iv) remove ambiguity and reiteration, and limiting CBH’s discretion in relation to the negotiation process generally.

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CORRS  
CHAMBERS  
WESTGARTH  
lawyers

We would be grateful if you would advise whether this proposed draft form of application and negotiation clause would be acceptable to the ACCC.

Yours sincerely



**Bill Keane**  
Partner