

24 August 2009

Sydney
Melbourne
Brisbane
Perth

By email: Sarah.Sheppard@accg.gov.au;

Ms Sarah Sheppard
Australian Competition & Consumer
Commission
Level 35
360 Elizabeth Street
MELBOURNE VIC 3000

Contact
Simon Byrne (08) 9460 1688

Partner
Bill Keane (08) 9460 1600
Email: bill.keane@corrs.com.au

Dear Sarah

CBH Access Undertaking: Further submission in relation to non-discrimination

This submission addresses the ACCC's comments in Part 10 of its draft decision (**Draft Decision**) regarding non-discrimination.

CBH intends to amend its undertaking in response to the comments and recommendations in Part 10 of the Draft Decision. Specifically, CBH intends to amend the undertaking as follows:

- CBH will include in its proposed undertaking the minimum standard terms and conditions upon which it undertakes to offer access to its port terminal services;
- CBH will annex indicative standard terms and conditions to the Undertaking;
- CBH agrees to the inclusion of a simpler non-discrimination clause, the proposed form of which is set out below.

1 Proposed non-discrimination clause

1.1 CBH proposes to include the following clause in its amended undertaking:

“Non-discriminatory access

- (a) *Subject to clause 6.6(b), in providing access to Port Terminal Services, the Port Operator must not discriminate between different Applicants or Users (including its own Trading Division) in favour of its own Trading Division including, but not limited to, discrimination based on the location or identity of the storage custodian, handler or transporter of Applicants' or Users' Bulk Wheat..*
- (b) *The Port Operator shall not be in breach of its obligation under clause 6.6(a) where in providing access to Port Terminal Services, the Port Operator differentiates between different*

Applicants or Users (including its own Trading Division) on the basis that:

- (i) the cost of providing access to other Applicants or Users is higher, including where the Applicant or other User utilises capacity less efficiently than other Applicants or other Users;*
- (ii) it is necessary on the grounds of hygiene, grain quality, health and safety and Legislative Requirements."*

2 Reasons for amendment

- 2.1 The above clause has been amended from the ACCC's proposed wording by the insertion of the expression "*including where the applicant or other user utilises capacity less efficiently than other applicants or other users*".
- 2.2 The purpose of this amendment is to clarify that the efficiency with which all users utilise terminal capacity will be a relevant factor for the differential pricing of services under the undertaking. In the absence of this clarification it is possible that the provision could be interpreted narrowly so that the only differences that could be taken into account were the cash costs involved in servicing different users.
- 2.3 The ACCC may hold the view that the additional wording is unnecessary, because an arbitrator would be unlikely to adopt the narrow interpretation suggested above. However, CBH submits that an important function of the undertaking is to inform the parties as to their rights and obligations so that disputes either do not arise or may be settled by agreement. Making it clear that inefficient use of capacity is a proper basis for differences in terms and conditions of access may reduce the likelihood of disputes. Because this wording is included as a sub-set of costs, it should not be capable of:
 - (i) reducing the clarity of the provision; or
 - (ii) expanding the basis upon which CBH may offer different terms.
- 2.4 Finally, in response to a question asked at the meeting on 18 August 2009, we are instructed to confirm that CBH does not consider that this clause would entitle it to discriminate on the basis that providing a service to one user would result foregone grain marketing profits. These foregone profits are not a cost basis for discrimination.

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Australian Competition & Consumer Commission

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CORRS
CHAMBERS
WESTGARTH
lawyers

We would be grateful if you would advise whether this proposed draft form of non-discrimination clause would be acceptable to the ACCC.

Yours sincerely



Bill Keane
Partner