

31 August 2009

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

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

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

Dear Sarah

CBH Access Undertaking: Further submission in relation to price and non-price terms

This submission addresses the ACCC's comments in Parts 8 and 9 of its draft decision (**Draft Decision**) regarding the publication of the price and non-price terms, dealt with in clause 6 of CBH's undertaking.

CBH intends to amend its undertaking to address the comments and recommendations in the above referred Parts of the Draft Decision, except in relation to the "holding over" arrangements (please see paragraph 3 below).

I refer to my letter to you dated 24 August 2009 regarding non-discrimination, which is also dealt with in clause 6 of CBH's undertaking. In the course of preparing the amendments in relation to the price and non-price terms, we also made some minor further amendments to the non-discrimination provisions, which are also addressed in this submission.

1 Proposed price and non-price terms clause

CBH proposes to replace section 6 of its undertaking with the new section 6 set out in **Annexure A** to this letter.

2 Reasons for amendments – price and non-price terms (excluding holding over)

2.1 CBH is proposing the amendments to section 6 in relation to price and non-price terms to address the concerns raised by the ACCC, and specifically to:

- (i) include the indicative terms of the Port Terminal Services Agreement in the undertaking in line with the ACCC's view in the Draft Decision;
- (ii) bring forward the timing for CBH's publication of the price and non-price terms for each season; and
- (iii) clarify and limit the grounds on which CBH may differentiate between different Applicants and Users.

2.2 Some of the amendments to section 6 were made as a result of CBH's proposed amendments to section 7 of its undertaking (relating to application and negotiation for access to the Port Terminal Services); in relation to those amendments, please refer to my letter to you dated 24 August 2009 about section 7.

2.3 Section 6 was also amended to move the provisions relating to amending the Port Terminal Rules to section 10 (Capacity Management); we will soon send you CBH's proposed amendments to section 10.

3 Reasons for amendments – price and non-price terms : holding over

3.1 The Draft Decision sets out the ACCC's view that a holding over arrangement is necessary to ensure that Applicants are not delayed in obtaining access because they are engaging in the negotiation process, including where the dispute resolution and arbitration processes are being followed.

3.2 CBH agrees with the ACCC's views that Applicants should not be delayed in obtaining access in the above circumstances. However, CBH has not included a holding over arrangement in clause 6 because it is of the view that the amended clause 4.3 (sent to you with my letter dated 25 August 2009) and amended clause 7.5(a) (sent to you with my letter dated 24 August 2009) provides Applicants with appropriate and sufficient protection.

3.3 For your ease of reference, clauses 4.3 and 7.5(a) are set out below:

"7.5(a) If the Applicant requires the Port Terminal Services to be provided under the terms offered in the Price and Non-Price Terms Documents, then:

- (i) at any time after submitting its Access Application the Applicant may give the Port Operator written notice of that fact; and
- (ii) within five Business Days of the Port Operator receiving a notice under **clause 7.5(a)(i)**, the Port Operator and the Applicant must execute an Access Agreement in the form of the Price and Non-Price Terms Documents."

"4.3 A User may seek a variation to the provisions of its existing Access Agreement relating to the supply of Port Terminal Services by following the process in **clause 7** for applying and negotiating for access to the Port Terminal Services."

3.4 Under clause 7.5(a), if an Applicant requires the "standard offering" Port Terminal Services on the published prices, then it can lodge an Access Application accompanied by a notice stating that the Applicant wants the standard offering, in which case within five Business Days CBH and the Applicant must execute an Access Agreement in the form of the Price and Non-Price Terms Documents.

3.5 If an Applicant requires non-standard Port Terminal Services, or prices other than those published by CBH, then:

- (i) the Applicant can follow the procedure set out in paragraph 0 above to obtain the "standard offering"; and

- (ii) simultaneously lodge an Access Application for the non-standard Port Terminal Services, or for prices other than those published by CBH. During the period when the Applicant and CBH are negotiating the non-standard Port Terminal Services, or prices other than those published by CBH, the Applicant will receive the "standard offering". The non-standard Access Agreement, once finalised and executed, would include a provision terminating the "standard offering" Access Agreement.
- 3.6 Finally, if an Applicant has either a "standard offering" Access Agreement or a "non-standard offering" Access Agreement, and wishes to amend the terms on which it receives the Port Terminal Services, clause 4.3 allows the Applicant to lodge a new Access Application and follow the process set out in section 7 for a replacement Access Agreement. During the period when the Applicant and CBH are negotiating the new Access Application, the existing Access Agreement will be in operation.
- 3.7 Accordingly, CBH is of the view that its amended undertaking already provides the protections recommended by the ACCC in relation to holding over, and that including a separate "holding over process" in the undertaking would cause confusion and create uncertainty.

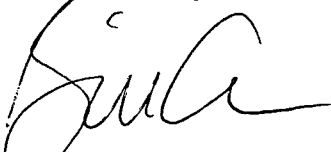
4 Reasons for minor further amendments – non-discrimination

CBH is proposing the minor further amendments to section 6.2 (non-discrimination) to:

- (i) confirm that its obligation to not discriminate requires it to not discriminate between **any** Applicants and Users (including its Trading Business), and not just between non-CBH Applicants and Users, on the one hand, and the Trading Business, on the other; and
- (ii) to clarify the grounds on which it may differentiate between Applicants and Users.

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

Yours sincerely



Bill Keane
Partner

Annexure A

6 Price and non-price terms

6.1 Obligation to publish price and non-price terms

- (a) Subject to **clause 6.1(b)**, by no later than 31 August of each year the Port Operator must publish on its website (and provide a copy to the ACCC):
 - (i) a single set of reference prices; and
 - (ii) the PTSA;which will apply to access to the Port Terminal Services for the Season commencing in that year (together the **Price and Non-Price Terms Documents**).
- (b) For the first year of term of this Undertaking, the Port Operator must publish the Price and Non-Price Terms on its website (and provide a copy to the ACCC) within three Business Days of the Commencement Date.
- (c) The Price and Non-Price Terms Documents must be consistent with **clause 6.1** and the objectives set out in **clause 2**.
- (d) **Schedule 2** contains an indicative PTSA for the first year of the term of this Undertaking.

6.2 Non-discriminatory access

- (a) Subject to **clause 6.2(b)**, in providing access to the Port Terminal Services, the Port Operator must not discriminate between different Applicants or Users (including its own Trading Business) including discrimination based on the location or identity of the storage custodian, handler or transporter of the Applicants' or Users' Bulk Wheat.
- (b) The Port Operator shall not be in breach of its obligation under **clause 6.2(a)** where, in providing access to the 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 an Applicant or User is higher than the cost of providing access to other Applicants or Users, including where the Applicant or User utilises capacity less efficiently than other Applicants or Users; or
 - (ii) it is necessary on the grounds of hygiene, grain quality, health and safety or Legislative Requirements.