

24 August 2009

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

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Dear Sarah

## **CBH Access Undertaking - Application of undertaking to Grain Express service**

We refer to:

- ACCC's statement in Chapter 7 of its draft decision (**Draft Decision**) in relation to the CBH Port Terminal Services Undertaking (**Undertaking**) that:  
*"It is not appropriate that CBH's proposed undertaking only applies to port terminal services when they are not bundled with other CBH services".*
- Commissioner Dimasi's statement in our meeting on 18 August 2009 to the effect that, in the Commission's view, the undertaking should be applied to any service in relation to wheat that is provided by means of the Port Terminal Services as defined in the *Wheat Export Marketing Act 2008 (WEMA)*; and
- the statements of ACCC staff in our meeting on 18 August 2009 to the effect that the ACCC expected that acquirers of the port terminal service should be able to co-mingle their grain with the grain of Grain Express customers.

This letter contains CBH's submissions in response to these matters and annexes the economic analysis of Synergies Economic Consulting.

### **1 The Draft Decision seeks to regulate facilities, not services**

- 1.1 Section 44ZZA of the Trade Practices Act 1974 (Cth)(**TPA**) provides for access undertakings in relation to services. The definition of "service" in section 44B of the TPA contains a clear distinction between services and facilities. That distinction was explicitly recognised in *Rail Access Corp v NSW Minerals Council*

*Ltd*<sup>1</sup> and was also central to the High Court's decision last year in *BHP Billiton v NCC*<sup>2</sup>.

- 1.2 The Draft Decision seeks to require CBH to make the Undertaking's negotiation and arbitration processes available for the port terminal service component of any agreement that is offered to customers where any of the services supplied under the agreement uses port terminal facilities in relation to bulk wheat. CBH submits that this, in effect, is regulation of the port terminal facility, not the port terminal service.
- 2 **Multiple services may be supplied by the same facilities but bundled services using additional (unregulated) infrastructure may be excluded from an undertaking**
  - 2.1 As is clear from the decision in *BHP Billiton v NCC*, a single facility may be used to provide several services. BHPBIO's rail lines, together with other facilities, were used to supply BHPBIO an integrated transportation, blending and stockpiling service. Fortescue Metals Group (FMG) did not seek access to that service. Instead it sought access to run its rolling stock on BHPBIO's rail lines.
  - 2.2 As a thought experiment, the ACCC could ask itself whether, if BHPBIO had offered an undertaking for the above-rail service sought by FMG, and also offered a bundled haulage service, would the ACCC have refused BHPBIO's undertaking because it did not apply to the integrated haulage service?
  - 2.3 CBH's approach to the Undertaking was to offer a stand-alone port terminal service, giving customers a choice between the CBH integrated service and making their own arrangements to port. That is the appropriate solution if it is accepted that port terminal facilities (and not up-country storage facilities) meet the criteria for economic regulation in Part IIIA of the TPA. The Grain Express service is an alternative, voluntary service that uses additional, duplicable facilities to provide a complete country to vessel solution.
- 3 **Regulating part of the bundle reduces efficiency**
  - 3.1 Importantly, under Grain Express, grain in storage at port terminals is part of the integrated supply chain that enables CBH to satisfy outturn requests by customers without moving grain in an ad-hoc manner. This core efficiency of Grain Express would be substantially eroded if CBH's port storage was unbundled from the up-country supply facilities.
  - 3.2 CBH understands the ACCC's view that enabling Grain Express customers to use the negotiation and arbitration process under the Undertaking would not unbundle the Grain Express service. That view does not align with the way Grain Express services are actually performed. It appears that the ACCC has assumed that Grain Express stops at the port terminal. This is not the case. In fact, grain in

<sup>1</sup> (1998) 87 FCR 517

<sup>2</sup> BHP Billiton Iron Ore Pty Ltd NCC [2008] HCA 45

storage at port is available for immediate out-turning for a customer that may have just acquired an entitlement at an up-country storage site in that port zone. CBH may load equivalent grain to satisfy that customer's requirements. This enables CBH to flexibly out-turn customers' entitlements, while simultaneously moving grain in a coordinated fashion (often in efficient unit trains).

- 3.3 However, if a customer must have the ability to arbitrate the port terminal service component of the bundled service, CBH will need to create a distinct port terminal component of the bundled service to be arbitrated. In the case of a service that involves grain in any part of the system (both up-country and port terminal facilities) being treated as part of a single system, the only way to achieve a clear port terminal component is to effectively unbundle the service.

#### **4 Regulating part of a bundle doesn't work anyway**

- 4.1 The problem with applying a negotiate/arbitrate process to part of a single contract is that the access provider can easily use the "unregulated" terms and conditions to offset the effect of regulation in the balance of the agreement.
- 4.2 For example, if CBH wished to offset the potential effect of an adverse arbitration decision on port terminal charges, it could simply adjust its pricing for other parts of the bundle, rendering the arbitration meaningless.
- 4.3 A further difficulty with the partial regulation of a bundle is that many non-price terms apply to both regulated and non-regulated services. It is therefore difficult to arbitrate a multi-purpose clause for the purpose of the regulated service only.

#### **5 The Draft Decision inaccurately characterises the Grain Express notification**

- 5.1 The Draft Decision states at page 88:

*"It is important to note that CBH's Grain Express notification only relates to the bundling of up-country storage & handling services with transportation to port, while the grain remains in its system. It does not cover the bundling of CBH's port services with its up-country storage, handling and transportation services."*

- 5.2 This is incorrect. The description of the notified conduct, both on the Form G and in the supporting submission, is clear. The notified conduct is described as follows on the form G:

*"In substance, CBH will offer to supply storage and handling services on the condition that Growers or Marketers acquire:*

- (i) supply chain coordination services from CBH; and*
- (ii) to the extent that grain remains in CBH's custody, that they acquire transport services from CBH (through its nominated carrier)."*

- 5.3 As the ACCC is aware, CBH supplies storage & handling services at all four of its port terminals. It does so on the condition that is the subject of the notification.

The supporting submission to the Grain Express notification describes these services (and the notified conduct) in detail so there can be no confusion. The ACCC's characterisation of the notified conduct inserts the words "up-country" before "storage & handling" in the Draft Decision, but no such qualification or restriction appears in CBH's Form G, supporting submission or in the ACCC's press release or decision on the Grain Express notification.

**6 CBH should not be required to offer a service of co-mingling access seekers' grain with Grain Express Grain**

- 6.1 ACCC staff explained in the 18 August 2009 meeting that the ACCC expects that acquirers of port terminal services through the Undertaking should acquire the same service as the port terminal component of the Grain Express service. ACCC staff confirmed that, in practical terms, access seekers should be able to co-mingle their grain with the grain of Grain Express customers.
- 6.2 CBH submits that it should not be obliged to co-mingle the grain of acquirers of port terminal services through the Undertaking with the grain of Grain Express customers. It also submits that providing a co-mingled service to Grain Express customers (which uses both up-country and port services to create a single integrated system) does not discriminate against access seekers, whose grain would not be co-mingled with Grain Express grain.
- 6.3 Grain Express customers have agreed to have their grain co-mingled with other Grain Express customers' grain in order to achieve the efficiency benefits from a single grain system. They have not agreed that customers whose grain does not form part of that complete system can be co-mingled with their grain.
- 6.4 CBH's preferred approach does not prevent access seekers from agreeing with other access seekers to co-mingle grain in CBH's port terminal storage. If two or more access seekers agree to do so, CBH can give effect to that arrangement when it provides port terminal services.
- 6.5 Adopting the ACCC's preferred approach is likely to substantially reduce the efficiency of the Grain Express service and create opportunities for free-riding. We **attach** a note prepared by Synergies Economic Consulting on this issue.

**7 Analogies to ABB and Graincorp are not apposite**

- 7.1 It appears that both ABB and Graincorp intend to co-mingle the grain of access seekers with the grain held at port that has come from within their storage networks. This is neither surprising nor is it a basis to argue that CBH should be required to do the same.
- 7.2 Neither ABB nor Graincorp offer an integrated up-country, transport and port terminal service bundle such as Grain Express. Conditions in NSW and Victoria differ substantially from those in Western Australia. The Western Australian harvest is much bigger and a much higher proportion of the harvest is exported. Pest infestation conditions and the use of fumigants also differ.

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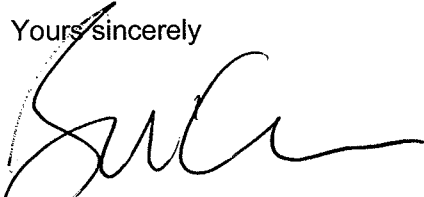
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- 7.3 Finally, we refer to the quality issues that are the subject of the attached note by Synergies. The fact that other operators have been prepared to co-mingle the grain of access seekers with existing stock of other users at port does not mean that it would be pro-competitive to do so.

Yours sincerely



**Bill Keane**  
Partner

**attachments**