

31 August 2009

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

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Dear Sarah

## **CBH Access Undertaking: Further submission in relation to Clause 10 of the CBH Undertaking (Capacity Management)**

This submission addresses the ACCC's comments in Part 12 of its draft decision (**Draft Decision**) and specifically, the comments of the ACCC in relation to:

- the nature of the inclusion of the Port Terminal Rules in the proposed Undertaking;
- the process to be applied in varying the Port Terminal Rules.

The balance of the issues raised by the ACCC in part 12 of its Draft Decision have been taken into account in amending the Port Terminal Rules themselves, a draft of which will be provided as soon as possible, with a supporting submission.

### **1 Proposed amendments**

CBH proposes to amend Clause 10 of its Undertaking as set out in Annexure A to this letter.

### **2 Reasons for amendments**

2.1 CBH is proposing to amend this part of its Undertaking to address the concerns raised by the ACCC, and to specifically to:

- provide for the Port Terminal Rules to form part of the Undertaking (as a schedule);
- require the Port Operator to comply with the Port Terminal Rules;
- require the Port Operator to publish the Port Terminal Rules;
- incorporate the Auction Rules into the Port Terminal Rules;
- enable the Port Operator to require its customers to agree to comply with the Port Terminal Rules as a condition of acquiring Port Terminal Services;

- (vi) to provide robust and certain procedures for variation of the Port Terminal Rules; and
  - (vii) remove the inconsistency caused by the inclusion of "Operational Decision-making" provisions in this clause.
- 2.2 The proposed new clause of the Undertaking contains clear obligations to publish and comply with the Port Terminal Rules. Please note that the new broader definition of "Access Agreement" captures all agreements for containing provisions for the supply of Port Terminal Services.
- 2.3 Other important features of the proposed amendments include:
  - (i) A variation process to deal with exceptional circumstances (Clause 10.3), which is defined as follows:

*"Exceptional Circumstances" means circumstances in which urgent variation to the Port Terminal Rules are necessary to prevent or reduce systemic or technical deficiencies or errors in the process or rules for the conduct of Capacity auctions, including any changes required to address or eliminate unforeseen gaming opportunities";*

This process contains appropriate provision for publication of the proposed variation, notification to Users and the ACCC and publication of any non-confidential responses.

CBH submits that an abridged process of this kind is necessary to address the kind of changes that may be required if, for example, an undetected flaw were to be discovered in the Auction Rules that enabled Users to unfairly manipulate the process to the detriment of other Users.
  - (ii) A variation process to deal with all other variations of the Port Terminal Rules (Clause 10.2). That process includes a more detailed consultation process, as suggested in the Draft Decision. The process includes, with clear times for performance of obligations, provisions requiring:
    - (A) publication of a sufficiently detailed variation notice;
    - (B) the provision of copies of the variation notice to all users and the ACCC;
    - (C) publication of non-confidential responses; and
    - (D) the conduct of meetings on request by any user or the ACCC.
- 2.4 Finally, the transitional measures in Clause 10.5 are necessary to provide certainty in cases where:
  - (i) the validity of actions taken prior to the effective date of a variation might otherwise be called into question;

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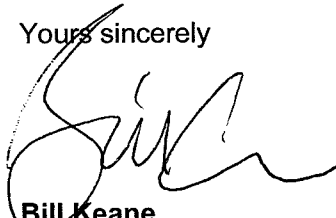
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- (ii) the requirement that vessel nominations are governed by the Port Terminal Rules that existed at the time of nomination. This is necessary to ensure that when Users make nomination decisions, they have the requisite degree of certainty about which rules will apply to that particular nomination.

2.5 We note the various additional comments made by the ACCC in relation to the number of documents concerning capacity allocation and the need to ensure that all of the relevant rules, policies and procedures are appropriately handled under the Undertaking. CBH is in the final stages of consolidating a single set of Port Terminal Rules that will comprehensively govern CBH's capacity allocation requirement. These rules will be provided as soon as possible.

Yours sincerely



**Bill Keane**  
Partner

# Annexure A

**“Exceptional Circumstances”** means circumstances in which urgent variation/s to the Port Terminal Rules are necessary to prevent or reduce systemic or technical deficiencies or errors in the process or rules for the conduct of Capacity auctions, including any changes required to address or eliminate unforeseen gaming opportunities.

**“Port Terminal Rules”** means the rules, policies and procedures in Schedule 2 to this Undertaking (or as varied under clause 10.2 of this Undertaking) and includes the Auction Rules (annexure 1 to the Port Terminal Rules).

## 10 Capacity management

### 10.1 Compliance with Port Terminal Rules

- (a) The Port Operator must comply with the Port Terminal Rules when providing or accessing the Port Terminal Services under an Access Agreement.
- (b) The Port Operator may require that Customers agree to comply with the Port Terminal Rules as a condition of acquiring Port Terminal Services.
- (c) The Port Operator must publish the Port Terminal Rules on its website.

### 10.2 Variation of Port Terminal Rules

- (a) The Port Terminal Rules may be varied by the Port Operator provided that:
  - (i) the variation is consistent with the Undertaking and in particular:
    - (A) the Non-discrimination provision in Clause 6.4; and
    - (B) the No Hindering Access provision in Clause 10.6;
  - (ii) the Port Operator has followed the process in Clause 10.3 or 10.4 in relation to the variation.

### 10.3 Variation following notice and consultation

- (a) In order to vary the Port Terminal Rules for any reason other than the Exceptional Circumstances referred to in Clause 10.4, the Port Operator must:
  - (i) publish a notice (**Variation Notice**) on the Port Operator’s website containing or annexing the following:
    - (A) a copy of the relevant part of the Port Terminal Rules with the proposed variation shown in mark-up;
    - (B) the Port Operator’s reasons for the variation;
    - (C) a request that interested parties provide written responses in relation to the proposed changes;

- (ii) send copies of the Variation Notice to all Users and the ACCC within one Business Day of publication of the Variation Notice;
- (iii) publish copies of all non-confidential responses received on the Port Operator's website within one Business Day of receipt of each response; and
- (iv) if it proposes to amend the Variation Notice, re-commence the variation process in this clause.

#### **10.5 Transitional measures**

- (a) All activities performed in accordance with the Port Terminal Rules prior to the Effective Date of any variation shall remain valid notwithstanding any subsequent variation of the Port Terminal Rules.
- (b) The nomination of vessels in accordance with the Port Terminal Rules shall be governed in accordance with the Port Terminal Rules published at the time of nomination notwithstanding any subsequent variation of the Port Terminal Rules unless the User and the Port Operator agree otherwise.
- (c) Vessels nominated after the Effective Date of any variation of the Port Terminal Rules will be required to be nominated under the Port Terminal Rules as varied.