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18 May 2011

By email and post: transport@accc.gov.au
Mr Anthony Wing
General Manager, Transport and General
Prices Oversight
Australian Competition & Consumer
Commission
GPO Box 520
MELBOURNE VIC 3001

Contact
Matthew Knox (08) 9460 1602
Email: matthew.knox@corrs.com.au

Dear Mr Wing

CBH Access Undertaking for Port Terminal Services

Please find **attached** a submission from Cooperative Bulk Handling Limited on the Australian Competition & Consumer Commission's Issues Paper for Cooperative Bulk Handling Limited's proposed Port Terminal Services Access Undertaking dated 21 April 2011.

If the Commission requires any further information, or has any questions in relation to the information provided in the enclosed submission, please contact me.

Yours faithfully
Corrs Chambers Westgarth

A handwritten signature in black ink, appearing to read 'M. Knox', followed by a long horizontal line.

Matthew Knox
Partner

attachments

copy: Mr Richard Codling, Group General Counsel, Co-operative Bulk Handling Limited,
Gayfer House , 30 Delhi Street , WEST PERTH WA 6005, by email:
Richard.Codling@cbh.com.au

18 May 2011

Australian Competition & Consumer Commission

CBH Access Undertaking for Port Terminal Services



Cooperative Bulk Handling Limited

Public Submission to the Australian Competition &
Consumer Commission

Port Terminal Services Undertaking

Dated: 18 May 2011

Supplemental submission to the Australian Competition & Consumer Commission

This is a further submission in support of the undertaking lodged by Cooperative Bulk Handling Limited (**CBH**) with the ACCC on 31 March 2011 (**Undertaking**). This submission addresses a number of issues raised by the ACCC in its issues paper dated 21 April 2011. Where CBH has not responded to the ACCC's issues paper CBH considers that the issue has been covered in CBH's submission in support of the draft undertaking dated 31 March 2011 (**supporting submission**), CBH's response to the ACCC's request for information dated 13 May 2011 or CBH will respond once the ACCC has received a submission on the issue. This submission should be read in conjunction with the supporting submission and CBH's response to the ACCC's request for information dated 13 May 2011.

1 Publish – negotiate – arbitrate model

1.1 General approach and approach to pricing

Operation of the existing undertaking

A number of the "issues for comment" refer to the existing undertaking and, in particular, the operation of that undertaking. As set out in the supporting submission:

- users were able to obtain access to CBH's Port Terminal Services on acceptable terms for the 2009/2010 and 2010/2011 seasons without formal disputes or substantial complaints of breaches of the Undertaking or the Port Terminal Rules; and
- CBH Port Terminal Operations have worked efficiently in the 2009/2010 and 2010/2011 seasons and there has been no recurrence of the congestion issues that arose in 2009.

The general structure of the Undertaking is not altered from the structure under the existing undertaking (other than the capacity model which is addressed in the supporting submission and below). Under the provisions of the existing undertaking:

- access seekers have not been denied access to services provided by the use of CBH's Port Terminal Facilities (and there has been no evidence to suggest otherwise);
- there were no formal disputes or substantial complaints of breaches of the existing undertaking. Rather, access seekers have expressed some minor complaints in relation to operational performance but there have been no pricing disputes and relatively few negotiations;
- CBH has not discriminated in favour of its related marketing entity, CBH Grain (and there has been no evidence to suggest otherwise); and
- the combined effect of factors including published reference prices for all Port Terminal Operators, the requirement to publish the shipping stem, and CBH's

non-profit cooperative structure ensures that CBH has neither the incentive nor the opportunity to derive monopoly rents or to preferentially self-deal.

These reasons justify continuing a similar approach to the Undertaking.

2 Capacity Allocation

2.1 Definition of Capacity

Clause 1.1 of the Port Terminal Rules defines "annual capacity" as:

the tonnage of grain capable of being exported through the Port Operator's grain terminals during a year from November to October, as determined by the Port Operator, taking into account the efficient deployment of resources (including fixed assets and labour) over the year.

CBH defines capacity by reference to the supply chain as CBH's port operations do not exist in a vacuum. That is, the wheat must actually be transported to the port before it is loaded for export. It is unrealistic and misleading to offer to the market capacity that CBH knows cannot be used because the supply chain will be unable to transport it to the port (whether through Grain Express or otherwise). CBH determines capacity by estimating what any supply chain can bring to the port (including, but not limited to, CBH's supply chain) and makes that capacity available. As set out in the table at paragraph 5.5 of CBH's supporting submission, to date this method has not resulted in a shortage of available capacity.

3 Port Terminal Rules

3.1 Port Terminal Rules variation

Objection Notice

CBH modelled the objection notice clause on the clause required by the ACCC in GrainCorp's proposed 2011 undertaking. CBH understands the desire of the ACCC to have a voice in this process and notes that the Port Terminal Rules are a highly specialised document. If there is a dispute between CBH and the ACCC as to the appropriateness or effect of an amendment to the Port Terminal Rules the decision by an arbitrator, who has specialist knowledge of the operation of a port, is an appropriate way to resolve the dispute.

4 Ring fencing arrangements

CBH has already provided a detailed submission on ring fencing as part of its supporting submission (section 7) and CBH's response to the ACCC's request for information dated 13 May 2011 (questions 18 and 19). In those submissions, CBH set out the reasons why ring fencing was not appropriate for the Undertaking.

The issues paper and the "Issue for Comment" box did not reference all of the issues set out in the supporting submission or reference the ACCC's draft decision regarding GrainCorp's proposed 2011 undertaking. It concentrated on CBH's existing ring fencing arrangements under the Grain Express Notification.

In doing so, it merged two distinct issues, namely whether the existing ring fencing which CBH assumed as part of the Grain Express notification should continue and whether it is necessary and desirable to require CBH to ring fence its port operations from its up-country

operations. CBH has provided detailed reasons why this is not appropriate both in its supporting submission and in question 19 of its response to the ACCC's request for information dated 13 May 2011.

As set out above in Section 7 of its supporting submission and CBH's response to the ACCC's request for information dated 13 May 2011 the existing framework is working and is appropriate and there is no justification for including ring fencing arrangements in the Undertaking.

5 Dispute resolution

CBH has excepted a number of matters from the definition of "dispute" in the Undertaking for efficiency and to avoid any potential for gaming the provisions of the Undertaking. The specific reasons for each exception are as follows.

- (a) *Disputes in relation to an executed Access Agreement.* This is to prevent a party from re-opening negotiations which have already been agreed between the parties. Further, disputes in relation to the operation of the executed access agreement will be dealt with under the provisions of the agreement itself and not the Undertaking.
- (b) *The terms of the initial Standard Port Terminal Terms or the Standard Port Terminal Terms applying at the time of the Access Application.* This is to prevent an access seeker from circumventing the process in the Undertaking for non standard access agreements. If an access seeker does not wish to contract on the standard terms and conditions then the Undertaking sets out the process for negotiating such an agreement.
- (c) *A decision by the Port Operator to vary the prices at which Port Terminal Services are provided to reflect changes to the Perth (All Groups) Consumer Price Index.* This is a standard escalation of prices in accordance with an objective criteria. As such, it should not be the subject of a dispute resolution process. If CBH increases costs above the CPI rate then the option remains for a user to dispute the increase. This also provides an incentive for CBH not to increase costs above the CPI rate which is of benefit to users.