Australian Grain Exporters Association

Submission to the ACCC Issues Paper in relation to CBH's proposed Port Terminal Services Access Undertaking

Introduction

The Australian Grain Exporters Association (AGEA) was formed in 1980 and is the representative body for exporters of Australian grain. AGEA represents its members to facilitate an efficient and effective export industry. Members are active in grain accumulation, storage, handling and processing, as well as risk management and hedging strategies involving commodity futures, foreign currency and counterparty risk. AGEA member companies also have substantial investments in non-grain sectors of the rural economy, such as meat processing and intensive livestock production, oilseed crushing, fertiliser distribution, cotton, ocean freight ownership and bulk and container shipping.

In responding to the ACCC public consultation on the proposed CBH port terminal services access undertaking, AGEA has firstly outlined some broad principles relating to port access that it believes should be applied to undertakings for all parties i.e. GrainCorp, Viterra and CBH. Following this, AGEA has addressed the issues raised in the ACCC issues paper.

This reflects AGEA's view that the focus must be on developing the principles that underpin the port terminal services and port loading protocols that will facilitate an efficient and competitive market. Individual members may have specific issues or issues of a commercial nature that they wish to raise directly with the ACCC.

The objective of port access arrangements is to promote an efficient supply chain. The undertakings should be a tool to ensure that there are no processes or practices in place that would hinder the achievement of this objective.

Access objectives

AGEA believes that it is important that the undertakings establish a set of minimum requirements that meet industry needs in relation to fair and reasonable access; provide mechanisms that achieve an equitable allocation of capacity and ensure that the services are provided on commercial terms.. Negotiation of issues beyond minimum requirements is the domain of commercial negotiations between the exporter and BHC.

AGEA is seeking a globally efficient supply chain in which exporters have certainty and the ability to execute sales; where relationships through the supply chain are commercially based; and 100% of port capacity is contestable.

Access principles

AGEA believes that there is a set of principles that should be reflected in the undertakings of all BHCs. These principles are aimed at improving the efficiency of the operation of Australia's export supply chain and levelling the playing field for export participants to ensure effective competition to the ultimate benefit of all supply chain participants. AGEA would like to see a consistent mechanism applied nationally.

These principles are:

1. Shipping slots should be transferrable

   Shipping slots should be transferable across:

   - Port;
   - Time/elevation period;
   - Grain; and
   - Owner (approved counter parties).

2. Shipping slots should be allocated via a process that is transparent; where price determines allocation and where the cost and cashflow impacts are equal for all participants; and BHCs should be accountable for performance

   - Transparent/visible

     AGEA has supported a 'first come first in' approach on the east coast, but the experience of the current season where demand exceeds supply has highlighted some limitations to this. AGEA recognises that the auction system may be a more effective tool for allocation in periods of high demand. AGEA was not opposed to the auction system proposed by CBH as a mechanism, but had concerns around a number of the business rules accompanying the auction.

   - Price is the only determinant when capacity is limited

     Where demand for capacity exceeds supply, price should be the only determinant of the quantity of capacity allocated to each applicant. Subjective allocation of programs and terms and conditions (T&C) should not be used to ration capacity. As such, if BHC offers (T&C) or a program, the same T&C/program should be available to all shippers with a service agreement (i.e. eligibility criteria for access should not be determined by BHCs).

   - Cost impact of not using capacity is incurred by all players

     The allocation process should provide exporters with certainty to acquire and execute slots without having to speculate. All parties should incur a 'real cost' for capacity booked and not utilised. Agreed slot fees for all participants across all BHC ports should be paid into a trust account. The fees resulting from non-performance by an exporter result in forfeiture to the incumbent BHC, while fees resulting from non-performance by a BHC result in forfeiture to fund. The fund would be redistributed to all parties who shipped grain in the designated period e.g. annually or less. The mechanisms are slightly different for the various BHCs, for example:

     - In the case of Viterra and Graincorp, this would be the downpayment (prepayment) of a part of the fobbing charge which is forfeited if capacity is not used; and
     - In the case of CBH's auction premium it is the prepayment of a premium to secure capacity at CBH auction, accompanied with the commitment to pay all/part of the fobbing charge(s) if the slot is not used (or lost capacity charge)

     The significant difference is that in CBH land the auction premium gets redistributed to those who ship, whereas the prepayment in case of Viterra and GraiCorp and the lost capacity charge in CBH gets paid to the BHC.

   - BHC is accountable for performance, particularly where a bundled service is offered

     Where the incumbent BHC offers a bundled service, the capacity of the bundled and third party components should be nominated. The bundled service capacity should be accompanied by commercially realistic load rates and the payment of demurrage/despatch at prevailing market shipping rates.

3. Measurable performance criteria

   Currently the incumbent BHC has the ability to set benchmarks in non transparent way and there is no risk/loss for non performance by the BHC.

   Key measurable performance indicators should be defined against which BHC performance can be measured and disputes initiated in the event of non performance.

   Measurable performance indicators for the port terminal businesses (separate from the integrated entity) would provide greater clarity in relation performance of the stem and encourage increased efficiency in the port business i.e. throughput of the port terminal.

   Total port terminal capacity should be set at the level which the port can achieve in an efficient operating condition. Seasonal capacity .i.e. the volume of supply chain capacity that the BHC is willing to provide in a bundled logistics service, should not be used to reduce the total volume of port capacity offered and artificially tighten the supply with the likely effect of increasing the auction premium paid in the first round of auctions.

Issues raised in the ACCC issues paper

Publish–negotiate–arbitrate model

AGEA believes that the 'publish and negotiate' approach has worked as an approach in relation to the port terminal services agreements. However, what is not clear is whether it has assisted access seekers as there is no counterfactual approach to measure outcomes against. There is a need for more measureable performance benchmarks against which BHCs can be held to account (currently it is difficult to initiate an arbitration under the undertakings as benchmarks are not clear and measurable).

Approach to pricing

The approach has largely been that CBH has published and then exporters have chosen whether to accept or not. Individual members are best placed to provide information in regard to negotiations and outcomes or may have issues that they wish to raise directly with the Commission based on their experience (AGEA is not a party to commercial negotiations).

Charges are transparent to the extent that CBH has published the charges, however, exporters have no guide as to whether or not they are reasonable in terms of the cost of providing the service i.e. there is no basis for assessing whether the charges appropriately represent the true cost of providing the service.

AGEA agrees that distribution of auction premiums to those that shipped is an appropriate mechanism for rebate.

Substance of the Standard Access Agreement

Standard terms have formed a starting point for exporters, with the ability to negotiate beyond this point. As indicated above, AGEA is focused on getting the policy settings and minimum requirements in place that will deliver an efficient export supply chain. Individual members can comment on the effectiveness of negotiations and satisfaction of outcomes obtained.

The Standard Access Agreement favours CBH has it does not include measurable elements by which exporters can measure performance, nor provide an accountability on the part of CBH (nor are there adequate liability provisions). Thus, for these reasons, the Standard Access Agreement is in the favour of CBH.

Definition of available capacity

There is a disconnect in relation to capacity under the CBH undertakings in that while CBH define capacity as one thing, this is not what is offered i.e. auction capacity is different to defined capacity. In effect, CBH defines capacity in the Port Terminal Rules as the tonnage capacity to put grain on a vessel in a period, however, the actual capacity offered is based on CBH's logistics capacity.

Thus, CBH should state the total port terminal capacity and this figure should not be subject to the crop size. CBH should also state the volume of bundled logistics service that they are willing to offer in each period, which may well vary with the crop size and the arrangements that CBH has to contract freight and other services. For the remainder, the exporter who commits to purchase fobbing capacity, regardless of whether or not an auction premium is paid, CBH receives compensation in the form of the lost capacity charges which are 100% of the cost they charge to deliver the service(i.e. CBH captures both the fixed and variable cost when capacity is forfeited).

After the initial auction, CBH can determine the availability of capacity from time to time, having regard to its arrangements with its own workforce and with the providers of rail and road transport.

CBH has total discretion as to what capacity it offers and their view of the size of grain export task and the logistical capacity related to that task as defined by CBH is what determines this. This then effectively sets the auction premium and this can artificially drive prices up. For example, if CBH estimate only small export task, but it is actually a big crop, then this can drive up prices.

Where full shipping capacity is not offered, then exporters can be deterred as it is CBH logistics that is determining the capacity not the total supply chain capability or the capacity of the terminals.

Port Terminal Rules – the auction system

AGEA believes that, in general, exporters found the auction system to work effectively in allocating capacity once some of the restrictive and anti-competitive business rules were changed. AGEA believes that the auction system, with appropriate business rules, can be an effective mechanism for allocating capacity and, in fact, the auction system may be the most effective mechanism where demand for capacity exceeds supply . As is suggested in the AGEA principles above, price should be the only determining factor in this circumstance.

AGEA understands that the spare capacity allocation system has been adequate – there is no need for an auction system (allocation by price) when there is surplus capacity.

Proposed two-tiered capacity allocation system

AGEA does not believe a two tiered access is appropriate. A port terminal operator can offer more than one program with accompanying terms, but all programs and related standard terms and conditions should be available to all access seekers. CBH, or any BHC, should not set eligibility criteria that are subjective and they should not be the judge of which access seeker is successful or eligible for a specific program and set of terms. This is clearly putting CBH in the position of operating in a discriminatory manner.

There are a number of issues with the two-tiered arrangement proposed including:

- Potential for smaller players or those who were deemed not eligible for base load capacity to be put at a competitive disadvantage when attempting to access capacity via the auction. For example, if base load capacity eligible participants have 60% and they know it's going to be a large export task, then they can afford to bid up the auction premium for the remaining 40% knowing that they will be able to spread that auction premium over the total of their tonnes, whilst the non base load participant will need to pay the premium and allocate this to the tonnes purchased in the auction. If the premium is bid to 25% this equates to ≈$4.50/t (of the $17.10 FOB cost) and this is material to the other participants. The model has the potential to provide considerable leverage to the base load participants in peak periods.

- Access to base load participation i.e. how does a new or emerging exporter get access where CBH has sole discretion over who is eligible for base load capacity using the past three years as a significant criteria
- Lost capacity – where base load capacity is not used, this should be put back on the stem and allocated via a transparent process to non other shippers

AGEA recognises that some of the impacts above are mitigated by the restrictions on base load capacity such as non transferrable, need to use over 12 months, higher lost capacity charge, etc, however, this does not change the principle that the model is anti-competitive and will result in inefficiencies.

It is appropriate for eligible customers of 'base load capacity' not be permitted to transfer port terminal capacity. However, it is important that this is declared as lost capacity and made available to the market via the stem.

Secondary market for port terminal capacity

A number of AGEA members have used the secondary market for the trading of port terminal capacity in Western Australia and found it effective. Individual members can provide more detail.

AGEA believes that transferability of capacity is critical across port, time, grain and owner – refer to the access principles earlier in this submission.

In relation to the proposed two-tiered capacity allocation model, AGEA does not support this but in the event it was introduced, sees it as appropriate that the capacity is not transferrable or permitted in the secondary market, but it is critical that CBH places this capacity back on stem for allocation to the market.

Port Terminal Rules variation process

In general, AGEA understands that access seekers were not satisfied with the consultation process carried out by CBH prior to varying its port terminal protocols. While recognising that it is undoubtedly somewhat difficult for CBH to satisfy all accredited exporters, the consultation must be effective. In this respect, where CBH does not demonstrably endeavour in good faith to take into consideration the views of accredited exporters with whom it discusses the terms and conditions of service provision, it is very difficult to say that CBH has consulted effectively

Ring-fencing arrangements

AGEA continues to remain concerned about the ability of the BHCs to use information to the advantage of their trading arm. AGEA believes that ACCC should require BHCs to put in place mechanisms that avoid vertically integrated companies from advantaging their trading arms through access to information/services that are not available to other exporters i.e. anything that a BHC trading team sees/receives should be made available to the market. The information that AGEA believes should be available is listed below.

As noted above, the requirement for BHCs had to report on performance indicators for their storage and port businesses separately from the integrated entity has the potential to drive greater efficiencies i.e. the BHCs would be driven by maximising throughput.

Dispute resolution

As noted above, the dispute resolution provisions in the 2009 Undertaking have not been tested to AGEA's knowledge. While, in principle no issues are expected with the dispute resolution process, it is recognised that a limiting factor relating to disputes and arbitration is that the criteria relating to non compliance or a breach of the Undertakings are not easily measurable.

Term of the Proposed Undertaking and transition Arrangements

The three year term of the Proposed Undertaking is appropriate.

AGEA does not support the two-tiered capacity model and thus, views on whether the time relating to its introduction is adequate or not is not relevant.

Publication of key port information and performance Indicators

AGEA believes that all parties should have access to the same information. This includes:

- Receival/Storage
    - Up to date/regular (daily) receival data by site by commodity by grade by tonnes
    - Zone average quality data by port zone by commodity by grade by tonnes
    - Receival profile summary post harvest by commodity by grade by tonnes
    - Full warehouse stock (i.e. that stock which is in the BHC system under the grower warehouse option i.e. uncommitted grain) availability
    - Access to up to date fumigation details and plans to ensure compliance with PRF and MRL
- Ports
    - Daily reporting of stocks in port by commodity
    - Vessel quality information (e.g. access to sampling, laboratory testing, quality results) prior, during and on completion of loading of vessels