



Australian
Competition &
Consumer
Commission

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17 September 2009

Mr Bill Keane
Partner
Corrs Chambers Westgarth
Level 15
240 St Georges Terrace
Perth WA 6000

Via email: Bill.Keane@corrs.com.au

Dear Mr Keane

**Cooperative Bulk Handling Limited (CBH) exclusive dealing notification N93439
- request for further information**

I refer to CBH's recent correspondence and discussions with the Australian Competition and Consumer Commission's (ACCC) in respect of the above notification. The correspondence and discussions have primarily concerned two issues, the scope of the conduct covered by the notification and a submission received by the ACCC from Glencore Grain Pty Ltd (Glencore) about the notified arrangements.

Attached to this letter is a list of questions about these issues.

As previously discussed, the ACCC intends to place the public version of the submission provided by Glencore, including attachments, along with CBH's response, subject to any request for information included in CBH's response to be excluded from the public register, on its public register once CBH's response is received.

On 10 September 2009 Glencore provided an additional submission about the notification. Some of the questions the ACCC is seeking a response to relate to this submission and this submission is also attached. It is also intended that this submission be placed on the Public register.

I would appreciate your response to questions one and two in the attached document, regarding the scope of the notified conduct, by **23 September 2009** and your response to questions three to eleven, along with any other comments you may care to make about the Glencore submission, by **30 September 2009**.

If you wish to discuss any aspect of this matter, please contact: Gina D'Ettorre on (03) 9290 1483 (gina.dettorre@accc.gov.au) or Gavin Jones on (03) 9290 1475 (gavin.jones@accc.gov.au).

Yours sincerely

A handwritten signature in dark ink, appearing to be 'R Chadwick', with a long horizontal stroke extending to the right.

Dr Richard Chadwick
General Manager
Adjudication Branch

Questions for CBH re notification N93439 – 17 September 2009

Scope of the notified conduct

Recent correspondence and discussions, in particular, CBH's letter dated 24 August 2009 and the ACCC response of 27 August 2009, discussed the scope of the conduct the subject of the notification.

The conduct the subject of the notification is described on the notification Form G as follows:

CBH will offer to supply storage and handling services on the condition that Growers and 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).

The notification Form G further states that the conduct is described in detail in an attached submission. The submission itself details conduct in addition to that the subject of the exclusive dealing notification. Specifically, the submission details the operation of the entire Grain Express system.

However, with respect to the conduct the subject of the notification, as described on the notification Form G, the focus of the notified conduct and supporting submission is the bundling of grain transport services to one of 15 Destination Sites with CBH's storage and handling services provided through its storage and handling network.

Consistent with this, the ACCC's public assessment statement in relation to the notification focused on the potential efficiencies to be gained by CBH being able to coordinate movement of grain (via road and rail) in its system to Destination Sites.

Based on CBH's recent correspondence it appears that CBH has a different view about the scope of the notified conduct to that which was the focus of the ACCC's public assessment statement and which, in the ACCC's view, was also the focus of CBH's submission in support of the notification.

1. As a first step towards clarifying this issue please provide a complete list of all 'storage and handling services' CBH intended to offer to growers and marketers subject to conditions (i) and (ii) set out in the notification Form G. Please also provide a complete list of all 'supply chain coordination services' referred to in the notification Form G.

At this stage the ACCC is not seeking further details about how each of these services fit within the broader Grain Express arrangements, how the provision of each these services is structured or interrelated, or why they are structured in the way that they are.

Rather, the ACCC requests that CBH provide, as a stand alone document, a complete list of each service and a description of what the provision of each

service entails, in a form that can be referred to in any further public consultation that the ACCC decides to undertake about the notification.

In providing this list CBH should describe each relevant service at as disaggregated a level as possible.

CBH has recently announced to customers a restructuring of its charges in accordance with its Port Access Undertaking. In particular, CBH has announced that all exporters are now charged the same for port services, whether using Grain Express or direct port access.

Based on your discussion with Gavin Jones of this office on 10 September 2009 the ACCC understands that CBH is of the view that 'storage and handling services' as referred to in CBH's notification Form G, includes all port services.

It appears from CBH's latest announcement about its new pricing structure that CBH will not be offering any port services covered by CBH's export outloading fee subject to conditions (i) and (ii) set out in the notification Form G. That is, it appears that CBH now proposes to offer export outloading services, and offer these services at the same price, irrespective of whether the grower or marketer uses Grain Express or accesses the port directly.

2. Please confirm whether this is the case.

Concerns raised by Glencore Grain

Delays in delivery of grain to ports

Glencore submits that late delivery of grain to ports by CBH last season resulted in delays in loading vessels, and associated demurrage costs, that were well in excess of usual delays and, in Glencore's view, 'grossly excessive'.

The issue of congestion problems and consequent delays in loading grain vessels at CBH's export terminals is discussed in the ACCC's letter of 23 April 2009 and the public version of CBH's response, received on 14 May 2009.

Glencore asserts, at page 22 of its submission, that CBH's response of 14 May 2009 does not adequately explain the factors causing these delays.

3. Please provide a response to Glencore's assertion that the five factors cited by CBH in its letter of 14 May 2009 as the major factors causing the congestion problem were not, or should not have been, significant factors causing congestion.

Glencore also argues that CBH's marketing arms, Grain Pool and Agra Corp, did not necessarily incur the same loading delays as Glencore.

4. Please provide details of loading delays incurred by Grain Pool and Agra Corp in the 2008/09 season, relative to those of other exporters/marketers, including reasons for any significant differences in the type and duration of delays experienced.

'Surge fees' paid by exporters

Glencore's submission provides details of CBH requiring users of export services to contribute to the costs incurred in increasing accumulation capacity. The proposal for users to contribute to these additional costs was advised to users by email on 17 February 2009 and users were asked to respond by 18 February 2009. In its email of 17 February 2009 CBH stated that if any exporter did not accept the proposal and additional costs CBH would need to review the stem and loading dates and re-offer to those marketers that were willing to participate.

- 5.(a) Please provide a response to the concerns raised by Glencore that these charges:
- were forced on marketers during shipping delays with marketers having no alternative but to accept the charges or risk further delays
 - allowed a single day for a response preventing serious consideration of alternatives, and
 - are not transparent and are at the sole discretion of CBH.
- 5.(b) Please explain how CBH calculated the surge charge in relation to the accelerated accumulation arrangements for the 2008/09 harvest? Please provide details of the amount raised by CBH via surge charges for the same period.

Glencore argues that as the surge fees were imposed after marketers had agreed prices with growers, marketers were unable to recover the cost of this surcharge whereas, if the surge fees were imposed on CBH's marketing arms, Grain Pool and Agra Corp, it could be included in pool costs and passed onto growers.

- 6.(a). Were Grain Pool and Agra Corp charged a surge fee similar to other marketers?
- 6.(b). Please also provide a response to Glencore's assertion that Grain Pool and Agra Corp were advantaged by the surge fee arrangements, either by their ability to pass the fee on, or because they were not charged a fee.
- 6.(c) CBH advised customers on 2 September 2009 that it expected to provide a rebate to exporters who paid the surge charge. Please provide details of the amount of the rebate and how it will be calculated for each port zone.

Ring fencing arrangements

Glencore argues that Grain Pool and Agra Corp have access to information about grain planned to be shipped from port which provides them with a competitive advantage over other marketers by allowing them to make more informed decisions about the quality and price of grain they offer.

Clause 4.6 of CBH's ring fencing policy and requirements permits CBH to disclose to any person information concerning the grade, quality, quantity, location or attributes of grain received by CBH, provided that the information is aggregated to such an extent that a recipient of that information would not be capable of identifying information specific to any particular third party.

7. Has CBH provided information of this type to Grain Pool and/or Agra Corp? Is this type of information provided to other exporters/markets either on request or otherwise? If this information is available to other exporters/marketers on request, how has CBH made parties aware that they are able to request this information?

Transport charges under Grain Express

8. Please provide a response to Glencore's assertion that transport prices charged by CBH were 38% higher last season than in the previous season, including providing reasons for any significant differences in transport costs between the 2008/09 season and previous years.

On 11 September 2009, Glencore provided a further submission to the ACCC about the notified conduct. A copy of this submission is attached.

In this submission Glencore argues that CBH does not publish details of transport costs in a timely manner, preventing transport costs being adequately taken into account when negotiating to 'sell ahead' and thereby reducing opportunities to sell ahead.

9. Please provide CBH's view on the concerns raised by Glencore

Compliance with the Bulk Handling Act 1976

10. Does CBH have a view on Glencore's assertion, at pages 24 to 27 of its submission, that the grain express arrangements do not comply with the *Bulk Handling Act 1967 (WA)*?

Freight Fund

At pages 14 and 15 of its submission Glencore raises concerns about CBH's freight fund. Glencore notes CBH's submission that the Freight Fund will be independently audited by an external auditor and an annual financial report (the Report) will be provided to the National Agricultural Commodities Marketing Association and the Pastoralists and Graziers Association.

- 11.(a) Please advise whether the Report has been completed and if so, whether a copy of the Report has been provided to the above parties. If the Report has not been provided to the above parties please advise when CBH anticipates doing so.
- 11.(b) If available, please provide the ACCC with a copy of the Report.