

13 October 2009

Dr Richard Chadwick
The General Manager
Adjudication Branch
Australian Competition and Consumer
Commission
PO Box 1199
DICKSON ACT 2602

Partner
Bill Keane (08) 9460 1600
Email: bill.keane@corrs.com.au

Dear Dr Chadwick

Grain Express exclusive dealing notification N93439

We refer to your letter of 17 September 2009 requesting further information on the exclusive dealing notification lodged by Co-operative Bulk Handling Limited (**CBH**) on 11 June 2008 (**Notification**), and which the ACCC decided not to revoke on 8 September 2009.

We attach:

- (a) a confidential version of CBH's responses to the questions in your letter, in which confidential information is identified and highlighted in pink; and
- (b) a public version of CBH's responses to the questions in your letter, from which the confidential information has been redacted.

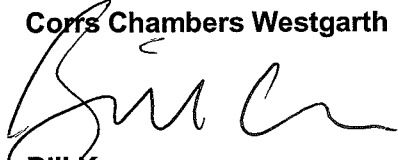
CBH requests that the ACCC allow the confidential information identified to be excluded from the public register, for the reasons specified in the **attached** schedule.

CBH notes that the submissions made to the ACCC by Glencore Grain Pty Ltd on 13 August 2009 and 11 September 2009 contain many assertions in relation to Grain Express and CBH which are unsupported by evidence. CBH has not commented on those assertions, and has confined its response to the issues raised in your letter. CBH will shortly provide a separate response to those matters.

If you have any questions or require any further information, please contact me on (08) 9460 1600.

Yours faithfully

Corrs Chambers Westgarth



Bill Keane
Partner

attachments

Schedule 1 – Information identified for exclusion from public register

Paragraph	Reason for exclusion from public register
3.5	The unauthorised disclosure of the information in this paragraph may affect the interests of third parties.
3.7 (including Schedule 1)	This is statistical information, which is confidential and market sensitive.
4.4 (including Schedule 4)	This is market sensitive information. The unauthorised disclosure of the information in this paragraph may affect the interests of third parties.
5.8	This is confidential and market sensitive information. The unauthorised disclosure of this information may affect the interests of third parties.
5.10	This is confidential market sensitive information.
5.11	This is confidential market sensitive information.
5.14 (including table)	This is statistical information, which is confidential and market sensitive. The unauthorised disclosure of the information in this paragraph may affect the interests of third parties.
5.21 (including Schedule 5)	This is confidential and market sensitive information. The unauthorised disclosure of this information may affect the interests of third parties.
6.2 (including Schedule 6)	This is confidential and market sensitive information. The unauthorised disclosure of this information may affect the interests of third parties.
6.3	This is confidential market sensitive information.
6.8 (including Schedule 5)	This is confidential and market sensitive information. The unauthorised disclosure of this information may affect the interests of third parties.
7.4(ii)	This is confidential market sensitive information.
8.3 (last sentence)	This is confidential and market sensitive information. The unauthorised disclosure of this information may affect the interests of third parties.
10.6	This is confidential market sensitive information. The unauthorised disclosure of this information may affect the interests of third parties.

**CBH response to ACCC request for further information
Grain Express Notification (N93439)**

1 Request 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.

- 1.1 The attached **Annexure A** is a stand-alone document which lists the storage and handling services CBH offers growers and marketers subject to conditions (i) and (ii) of the notification in Form G. This list has not changed since it was included in CBH’s supporting submission to the Notification.
- 1.2 The Notification Form G defines the notified conduct as follows:
- “In substance, CBH will offer to supply grain storage and **handling** services on condition that growers and marketers of grain acquire:*
- *grain supply coordination services from CBH, and*
 - *transport services from CBH whilst their grain remains in CBH’s custody.” [our emphasis]*
- 1.3 The form refers to CBH’s supporting submission for further detail.
- 1.4 The supporting submission to the Notification lists the services described as “handling services” twice. Once at paragraph 2.9 and again at 2.30. In both paragraphs, loading grain onto export vessels is expressly included.

2 Request 2

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.

Please confirm whether this is the case.

- 2.1 CBH confirms that it will offer export outloading services at the same price to exporters, regardless of whether they use Grain Express or access the port directly.

3 Request 3

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.

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.

- 3.1 CBH disagrees with Glencore's assertion in relation to this issue. CBH maintains that the five factors explained in its letter to the ACCC of 14 May 2009 were the major factors causing the congestion at ports.
- 3.2 Glencore has not provided any reasoning or evidence in support of its assertion that the factors CBH explained were not or should not have been significant factors causing congestion and subsequent delays. CBH's response to the ACCC's concerns about port congestion on 14 May 2009 provided significant detail on those issues, and has not been the subject of any relevant rebuttal. CBH summarises below its answers contained in its 14 May 2009

response together with some additional information where relevant to Glencore.

Effect of deregulation

- 3.3 The industry change from 2 main marketers to 23 marketers remains a significant factor in causing port congestion. A logistics provider dealing with one or two marketers has a less complex task than is now the case for a number of reasons¹. Firstly, a small number of marketers will, to an extent, self-regulate when it comes to adding additional vessels to the shipping stem during periods of congestion. During such periods, marketers in a concentrated market will know that adding more vessels will only add delays and costs to their own vessels already on the shipping stem. The incentives and behaviour of firms change in a less concentrated structure. If there are twenty three marketers, it is likely that a significant number of those would not have an existing vessel on the stem at the time of seeking to add another. This means that the cost of additional congestion is distributed to other users in greater proportion than is borne by the individual marketer. In short, reduced concentration in marketing, despite its competition/efficiency benefits, gives rise to free-rider issues in the logistics function.
- 3.4 The incentives are exacerbated by the provisions of marketers' contracts with buyers. Those contracts may place the marketer in breach if a nomination is refused, creating a further incentive to submit nominations even in congested periods, particularly when the price of vessel loading service is the same regardless of demand. .

3.5 [CONFIDENTIAL MARKET SENSITIVE INFORMATION REMOVED]

Harvest size and timing

- 3.6 The information Glencore cites in relation to harvest size is incorrect. The harvest for 2008/2009 was 12.3 million tonnes, not 8.9 million tonnes. Glencore asserts, without supporting evidence, that capacity should have been available by comparison with a year in which shipping was significantly flatter and lower throughout the year.

3.7 [CONFIDENTIAL MARKET SENSITIVE INFORMATION REMOVED]

- 3.8 The lateness of the 2008/2009 harvest affected the marketers' abilities to acquire title to grain, and thus their entitlement to load grain onto vessels. If harvest vessels are delayed and ship outside the harvest shipping period, this impacts on CBH's ability to load vessels in subsequent periods – which can result in port congestion. Glencore contributed to the congestion experienced, as a number of its harvest vessels were delayed by lack of entitlement into the February/March 2009 period.

Allocation of resources

- 3.9 Glencore suggests that CBH reduced the available transport resources to save itself money and that this contributed to the delays and Glencore's alleged losses.
- 3.10 In fact, CBH reduced the number of train sets to be acquired by one in September 2008, because CBH would have had to pay for that train set to be

¹ This is not to say that the previous statutory monopolies were a good thing. CBH simply notes that deregulation of marketing has complicated the storage, handling and transport tasks.

available in October, November and December of 2008 – without sufficient work to make it worthwhile. The train was available and was used in February and March, when it was most needed.

4 Request 4

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

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.

- 4.1 The attached **Schedule 2** shows the industry average for turnaround time in days. Turnaround time is the difference between a vessel's arrival date and completion date.
- 4.2 The attached **Schedule 3** shows the turnaround time for both Glencore and Grain Pool for January – February 2009.
- 4.3 Schedule 1 shows a spike in the industry average turnaround time in February 2009 of around 17 days. Schedule 2 shows that, in February 2009, both Glencore and Grain Pool experienced turnaround times higher than the industry average, of 20.33 days and 20.13 days respectively.
- 4.4 **[CONFIDENTIAL MARKET SENSITIVE INFORMATION REMOVED]**
- 4.5 It can be seen from the information provided that Grain Pool and AgraCorp incurred delays of the same magnitude as Glencore, notwithstanding that their respective circumstances were different. In general, Grain Pool did not suffer delays from lack of entitlement to grain to the same degree as Glencore, due to Grain Pool's larger stock holdings. Grain Pool also did not have the same proportion of vessels within the congested period as Glencore.
- 4.6 In relation to the delay loading the F&K at the port of Albany, upon which Glencore comments at paragraph 2.6 of its submission to the ACCC, CBH says as follows:
- (i) The F&K was a 'priority harvest ship' nominated by Glencore on 12 January 2009 with an ETA of 27 January 2009 (only 15 days notice, not the required 21 day and therefore a late vessel nomination fee should have applied);
 - (ii) Under the terms relating to priority harvest shipping in the Grain Services Agreement, Glencore was required to ship the grain for this vessel between 25 November 2008 and 10 January 2009;
 - (iii) Glencore paid a \$3.00 per tonne non-refundable deposit associated with booking capacity for shipment of 60,000 tonnes of feed barley and feed wheat out of Albany. Under the strict terms of that agreement Glencore should have forfeited that deposit;
 - (iv) However, given the out-of-the-ordinary harvest conditions, CBH indicated that it would accept nominations for this cargo without requiring a forfeiture of the deposit on 12 January 2009;

- (v) At the time of nomination Glencore did not have sufficient entitlement to load any of the vessels. So while the F&K was placed on the shipping stem, it was not placed into the accumulation queue. This was in accordance with the way that CBH treated all other vessels nominated at that time;
- (vi) When Glencore subsequently acquired sufficient entitlement to load the vessel, the F&K entered the shipping stem like all other vessels – but with the advantage that its nomination acceptance date was earlier than other vessels;
- (vii) Glencore now wishes to claim demurrage against a vessel that should have been nominated and arrived before 10 January 2009. Glencore's failure to nominate a vessel entitled CBH to retain the \$180,000 deposit paid by Glencore. As a result of CBH attempting to assist Glencore to ship its grain, Glencore wishes to claim additional costs from CBH whilst denying CBH the ability to recover costs forced onto it by Glencore.

5 Request 5 – Surge fees paid by exporters

'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.**

- 5.1 Surge charges were a response to the congestion in the 2009 season. In essence, CBH determined that the resources it had in place would be insufficient to deal with the unprecedented congestion experienced as a result of the factors referred to above. This was a problem that would affect all users of the CBH system, so CBH needed to find a way to urgently acquire and deploy additional resources and to distribute that cost equitably among users.
- 5.2 For this reason, CBH considers that surge charges were, of necessity, an industry approach. CBH and the industry had very little time in which to

formulate and resolve these issues. If only some marketers accepted surge charges but the shipping stem remained the same, then those marketers which elected not to pay surge charges would essentially have 'free ridden' on those marketers who chose to pay the surge costs. In CBH's view, that would not have been an equitable situation. Had there not been a unanimous decision by marketers to accept the surge charges, then CBH would either have had to withdraw the entire plan to accelerate the flow of grain to port, or alter the stem to reflect the varying changes in flow of grain to port.

- 5.3 Whilst CBH requested a rapid response from marketers in relation to the surge charges, it was done so in the context of continuing discussions with marketers about the developing congestion problems. This included communications from CBH to marketers on:
- (i) 20 January 2009;
 - (ii) 30 January 2009;
 - (iii) 4 February 2009;
 - (iv) 6 February 2009;
 - (v) 10 February 2009 (teleconference); and
 - (vi) 17 February 2009.
- 5.4 CBH could have waited longer and provided marketers with an increased period to consider and respond, but this would have increased the delay and the costs to marketers.
- 5.5 Glencore effectively states that CBH had no statutory or contractual entitlement to charge surge fees. This is incorrect. Regulation 19 of the Bulk Handling Act Regulations 1967 (WA) (**Bulk Handling Regulations**) allows CBH to recover charges from users of its storage system for the transportation of grain.
- 5.6 Clause 15 of the 2008/2009 GSA provides CBH with the contractual right to charge for transport services that are requested by a customer. Surge transport was arranged as a result of the demands of Exporters exceeding the available grower funded resources.

Calculation of surge charge

- 5.7 The surge charge was introduced to accelerate deliveries of grain to port. The movement of grain to port involves the application of transport resources. Those transport resources have a finite capacity to move grain to port and the surge charge funded the acquisition of additional resources to move all grain to port. The charges were applied in a non-discriminatory fashion and were borne by all exporters shipping grain.
- 5.8 **[CONFIDENTIAL MARKET SENSITIVE INFORMATION REMOVED]**
- 5.9 When demand dropped below the rate that grower freight could service, surge charges were not imposed at all. This occurred in September and October 2009 at all ports.
- 5.10 **[CONFIDENTIAL MARKET SENSITIVE INFORMATION REMOVED]**
- 5.11 **[CONFIDENTIAL MARKET SENSITIVE INFORMATION REMOVED]**
- 5.12 The surge charge was published on the Internet and advised to each exporter. CBH informed exporters that the surge charge was for the acquisition of transport resources, and surge charge funds received have been applied in

that regard. CBH disagrees that the surge charge is a levy, because marketers had the option to avoid or remove altogether the surge charge by decreasing their required demand in subsequent shipping periods.

- 5.13 CBH cannot control when marketers agree prices with growers. Nor can it control what charges Glencore in particular chooses to cater for in its contracts nor when Glencore chooses to acquire grain.

5.14 [CONFIDENTIAL MARKET SENSITIVE INFORMATION REMOVED]

- 5.15 CBH considers that it was able to minimise the costs of surge transport through innovative planning and utilisation of transport resources. Accordingly, CBH will rebate approximately 40% of the surge charges collected from marketers. The rebate will be determined by port zone and returned to marketers in relation to each tonne of grain shipped in the zone for which the surge charge was imposed.

- 5.16 Surge costs paid by marketers could not be used to benefit those customers who did not pay them. Accordingly, all customers were advised that unless they agreed to pay the appropriate surge charge, CBH would have to reassess the effective queue. This is because certain customers would accumulate faster through the application of surge charges, and would therefore be ready to load earlier than those customers who remained with the grower funded freight resources only.

- 5.17 Glencore appears to have interpreted CBH's communication regarding the surge charge to mean that marketers would be penalised by additional delay if they did not agree to pay the surge charge. CBH did not propose additional delay as a penalty, but noted that a marketer's relative delay would be greater if the marketer did not accelerate freight (by accepting the surge charge). All customers agreed to accelerate the accumulation of cargos for their shipments by accepting the surge charge.

- 5.18 Time is unfortunately critical in these matters. Customers wished to obtain certainty as to when their vessels would be loaded, and CBH wished to ensure that there was a certain timeline for all currently accepted vessels, so that bookings could be re-opened for port terminal capacity in the remainder of the year.

- 5.19 CBH developed the surge charge as a means to service the shipping demands of all marketers. Glencore's suggestion that the surge charge was introduced because Glencore had fixed prices and Grain Pool did not is incorrect.

- 5.20 The surge fee is transparent as it relates to increasing transport capacity to port. The unused surge charge will be rebated to marketers, including the interest accrued on the funds whilst they were held by CBH. This rebate is forecast to return to Glencore some \$272,000 of the \$472,000 received. The use of the surge fee to cover additional transport resources will be audited.

5.21 [CONFIDENTIAL MARKET SENSITIVE INFORMATION REMOVED]

- 5.22 It would be impossible to provide a rate per tonne per km that was to be borne by marketers for surge freight, as cargos are assembled from different sites. Under Grain Express, the Grower Freight effectively and equitably apportions the costs of delivery from different sites to Port to growers (which they can control) and the use of grain for cargos is under the control and coordination of CBH.

- 5.23 The cost of accelerating the transport resource is therefore borne by marketers rateably in proportion to the acceleration needed in each half month in each port zone. This is the most equitable way of allocating the additional costs of increasing freight capacity amongst those who actually control whether demand for transport resources exceeds the supply of transport resources purchased by growers.
- 5.24 As can be seen with CBH's proposal to rebate excess surges charges received in a port zone as a result of efficiency gains, alternative operational methods and decreasing demand, the surge charge is directly linked to the cost of transport. Glencore's assertion that the surge charges have no relation to the cost of increasing the amount of grain moved to port is incorrect. With the disclosure of the rebate and revealing the actual surge costs incurred (bearing in mind this will be audited), the cost of moving additional grain is more transparent than ever.
- 5.25 Glencore states that "*Grain Express is used to overcharge for transport*" and suggests that CBH wishes to create a monopoly for transport services. It is not clear why CBH would seek to do this. CBH is a co-operative that derives no profit from transport services. Glencore's suggestion makes sense only if it could be shown that the Freight Fund was being used to derive profit for CBH. No evidence is provided in support of such a suggestion.

6 Request 6 – Surge fees

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.**

6(a)

- 6.1 Grain Pool was charged a surge fee the same as other marketers. AgraCorp did not ship any grain and therefore did not incur a surge fee. Grain Pool ultimately paid more surge fees than any other marketer, due to the volume of grain it exported.

6.2 [CONFIDENTIAL MARKET SENSITIVE INFORMATION REMOVED]

6.3 [CONFIDENTIAL MARKET SENSITIVE INFORMATION REMOVED]

6(b)

- 6.4 Given that Grain Pool was charged surge fees in the same manner as any other marketer, Glencore's assertion of discrimination is incorrect. The difference in the aggregate effect of the charges is not based on the identity of

the marketer. Rather it depended upon the means of contracting chosen by each marketer. In 2008, Glencore acquired grain on terms that may have made it unable to pass the charges on to growers. Had it acquired on different terms (as was open to it), the results would have been different. There is nothing to stop it from doing so for the coming harvest. As was the case last year, CBH will have no say in these terms.

- 6.5 When making the decision to use the surge resources and to allocate a portion of the costs to marketers, CBH did not consider the method by which marketers acquire grain, as it is not relevant to CBH's operations. Surge charges were passed to marketers on the basis of grain shipped, and not acquisition method. Accordingly, Grain Pool paid more surge fees than any other marketer.
- 6.6 The decision whether to pass on a surge fee to growers through lower pool returns is a decision for each marketer (including Grain Pool), and not CBH. Whilst it is agreed that a pool operator could pass the surge fee on via pooling agreements the pool operator bears the risk that pool returns would be lower – thus leading to lower deliveries to pools and lower profits in subsequent years. Growers will of course take this into account when deciding between marketers in subsequent years. Therefore, it is not accurate to suggest that surge fees were an advantage for marketers that operated pools.

6(c)

- 6.7 The surge rebate is determined on a zone by zone basis. It is calculated based on the difference between the total surge payment from all customers and the total freight expenses incurred to accelerate the grain accumulation for the February to August period. The rebate for each customer in each zone is based on the contribution made by the customer towards the overall surge payment for the zone. For example:
- The total surge payments collected for Geraldton were \$2 million;
 - The estimated surge surplus for Geraldton Zone is \$400,000;
 - Exporter XYZ made a surge payment of \$125,000 for Geraldton Zone, giving it a contribution of 6.25%;
 - The estimated final surge rebate for exporter XYZ is 6.25% of \$400,000 = \$25,000;
 - The first rebate payment is \$25,000 x 75% = \$18,750.

6.8 [CONFIDENTIAL MARKET SENSITIVE INFORMATION REMOVED]

7 Request 7 – Ring fencing arrangement

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.

Has CBH provided information of this type to Grain Pool and/or Agra Corp? Is this type of information provided to other exporters/marketers 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?

- 7.1 Glencore has provided no evidence in support of its allegation of a breach of ring-fencing. As the ACCC is aware, CBH was audited for ring-fencing compliance in 2008. No complaints or compliance failures were reported.
- 7.2 CBH has not provided any information to Grain Pool of a general or aggregated nature that it has not also made available to others in the market. In short, CBH has provided information to the marketers about harvest receivals and overall harvest quality. Glencore itself has requested this information and been provided with it. CBH has made the market aware that additional information services may be requested under the terms of the Grain Services Agreement.
- 7.3 Information about grain to be shipped from CBH's port terminals is available on CBH's website in accordance with the shipping stem, and the continuous disclosure rules required under the *Wheat Export Marketing Act 2008* (Cth).
- 7.4 CBH disagrees with Glencore's assertion that there is no effective ring fencing between CBH and Grain Pool. In response to the three matters Glencore raises on page 4 of its letter to the ACCC (dated 13 August 2009), CBH says as follows:
- (i) Grain Pool acquires grain on both a pool and a cash basis. In relation to pools, the surge charge may be passed on or retained by Grain Pool at its election. However, if the surge charge is passed through, the reduction in pool return will reduce demand for the pool in the future. CBH notes that Glencore is entitled to run pools if it wishes. The example provided by Glencore does not prove that the ring fencing between CBH and Grain Pool is ineffective;
 - (ii) **[CONFIDENTIAL MARKET SENSITIVE INFORMATION REMOVED]**
 - (iii) It is unclear how CBH can be said to have favoured its own carriers over those of competitors, because under Grain Express, all transporters moving grain between CBH sites were engaged by CBH.
 - (iv) CBH does not provide information acquired from Growers on crop estimates to Grain Pool. The risk of that information being obtained by Grain Pool is mitigated by reasonable ring fencing procedures that have been implemented by CBH in accordance with the Grain Express Notification². These procedures have been, and will continue to be, reviewed by an independent auditor in accordance with the Notification.

² See Annexure 2 to CBH Notification N93439, available at <http://www.accc.gov.au/content/trimFile.phtml?trimFileName=D08+57537.pdf&trimFileTitle=D08+57537.pdf&trimFileFromVersionId=872835>

8 Request 8

Transport charges under Grain Express

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.

- 8.1 CBH disagrees with Glencore's assertion that transport prices under Grain Express were 38% higher than the previous season. That assertion is based on incomplete information and simplistic assumptions. CBH will report on the transport costs for the 2008/9 season when it produces the freight pool Financial Report.
- 8.2 CBH accepts that overall transport costs increased in 2008/2009. However, this was not caused by CBH or the introduction of Grain Express. It was mainly due to increases in charges from ARG and the application of surge resources to meet additional shipping requirements of marketers.
- 8.3 ARG rail pricing to the grain industry increased approximately 38% over 2 years since being out of long-term contract, and increased approximately 10% for 2008/09. Fuel prices increased to record levels in 2008, and when freight rates were set, Terminal Gate Pricing was approximately \$1.48 per litre. It has since reduced by approximately 25%, to \$1.12 per litre. Freight rates for 2009/10 will be reduced as a result. Continued uncertainty about the long-term future of the Rail Network in Western Australia has prevented the negotiation of a long-term agreement. However, with the Western Australia Transport Minister's Strategic Grain Network Committee, there should be some certainty in coming months. **[CONFIDENTIAL MARKET SENSITIVE INFORMATION REMOVED]**
- 8.4 Had Grain Express not been introduced, CBH is confident that transport costs would have been much higher, particularly if each marketer had, as Glencore suggests, acquired its own transport. It is unclear whether Glencore contends that individual marketers would have secured cheaper, more efficient rail and road services than CBH was able to acquire on a non-profit basis.
- 8.5 Land transport charges cannot be calculated by adding freight rates and surge rates together, as not all tonnes moved incurred surge charges. In addition, as advised at paragraph 5.15, CBH is preparing to rebate marketers the excess surge charge funds received.
- 8.6 As surge charges for the current season have not yet been finally calculated, CBH does not believe Glencore's stated charge of \$88,000 is accurate, but is unable to provide the final figure at this time.
- 8.7 CBH notes that fuel costs were initially higher this season, although they dropped towards the end of the year. Fuel hedging had been performed to endeavour to ensure that the grower freight costs did not rise above the estimate.

9 Request 9

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.

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

- 9.1 CBH publishes information about transport costs as soon as they are available. Given that transport costs cannot be fixed by CBH without knowledge of the harvest size, cost of fuel and freight rates to be charged, it is impossible for CBH to post an accurate freight rate in advance of this information. CBH released the estimated freight rates for the 2009/2010 season on 13 October 2009 (see the attached **Schedule 7**, which is a copy of CBH's freight estimate media release).
- 9.2 Marketers have never before had freight rates available in May for the upcoming harvest and full year thereafter. The risks and uncertainties for the grower and marketer are certainly not eliminated if they were not operating under Grain Express. In this instance, the grower would face a risk that the marketer had overestimated its freight portion of the contract. The marketer would still be subject to the risk that it had underestimated its freight costs.
- 9.3 On the east coast, marketers and growers sign forward contracts on the basis of location differentials which may change from year to year and which may or may not represent the actual cost of freight. Accordingly, each party still retains some risk in relation to freight costs. It is merely the uncertainty as to how the freight costs will be fixed that is removed.
- 9.4 Transport contracts generally begin on 1 November. Annual adjustments and/or new contracted rates are often unknown until that time. Some freight rates have fixed and variable components (including rail). Therefore, to calculate a freight rate, tonnages are required to know how much fixed cost to recover. Estimates of harvest deliveries are unclear until mid-October. Estimates remain until harvest has finished, and the following information is available:
- (i) the amount of grain delivered;
 - (ii) where it has been delivered to;
 - (iii) where it is to be transported to (based on sales);
 - (iv) who will be transporting it; and
 - (v) when it will be transported.
- In 2008/2009 a freight rate was set for 12 months, which carried a high risk of freight cost variation. In 2009/2010, rates will be estimated until harvest is complete, and then with greater certainty; will be charged to growers.
- 9.5 Historically, rail freight rate adjustment mechanisms were aligned with long-term agreements, and so were more predictable. As CBH and ARG have been unable to reach agreement for the long-term, so for the third consecutive year, a 1 year agreement will be in place with a different charging and adjustment method.

10 Request 10

Compliance with the Bulk Handling Act 1976

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)*?

- 10.1 Glencore makes two arguments in support of its claims that the Grain Express arrangements do not comply with the *Bulk Handling Act 1967 (WA)* (**Bulk Handling Act**) and the Bulk Handling Regulations:
- (i) that CBH's limitation of the number of Destination Sites is inconsistent with regulation 20 of the Bulk Handling Regulations³;
 - (ii) that Grain Express is somehow inconsistent with the rights of persons to use port infrastructure under Section 10 of the Bulk Handling Act⁴.

Destination Sites

- 10.2 It is correct that for the upcoming harvest, CBH has reduced the number of Destination Sites to the four ports and MGC for export grain. CBH's decision was a response to a lack of demand. Less than 1% of nominations were to Destination Sites other than MGC or ports. Maintaining unneeded services and operational capability at Destination Sites made no practical or commercial sense.
- 10.3 However, CBH agrees that regulation 20 of the Bulk Handling Regulations requires CBH to deliver grain at any receival site prior to 1 March if requested to do so. CBH will comply with this obligation and Grain Express is not inconsistent with it. Obviously, moving grain from the point at which an exporter has entitlement to another point in the supply chain incurs transport and handling costs. These will be charged for in accordance with the applicable contract. CBH has the statutory right to do so under regulations 19(1)(a) and (b) of the Bulk Handling Regulations.

Use of ports

- 10.4 The Glencore submission asserts that CBH makes the delivery of grain to port conditional on CBH arranging transport. This allegation makes no sense. If grain is delivered to port by a person other than CBH, there is no need for transport to be provided by CBH. Transport has already been provided. In any event, CBH has never, and would never, refuse to provide port outloading services to a marketer because grain was delivered to port directly rather than through CBH's integrated supply chain.
- 10.5 Prior to the acceptance of CBH's Access Undertaking for Port Terminal Services, CBH envisioned the following means by which grain would be exported:
- (i) Grain Express - a grower could deliver to a CBH Receival Site, nominate the exporter to whom it had sold the grain and if that exporter had acquired CBH's Grain Express Service, the grain would

³ See heading 10.1.1 of the Glencore Submission dated 13 August 2009

⁴ See heading 10.1.2 of the Glencore Submission dated 13 August 2009.

be transported to port using CBH's transport solution and loaded onto a vessel by CBH at the nominated CBH port; and

- (ii) Independent supply chain and CBH port – a grower could sell its grain to a marketer at the farm, the exporter would then arrange for transport to port and CBH would provide port outloading services⁵.

10.6 [CONFIDENTIAL MARKET SENSITIVE INFORMATION REMOVED]

- 10.7 The availability of the independent supply chain option is made even clearer now that CBH's Access Undertaking for Port Terminal Services has been accepted.
- 10.8 Glencore referred to a condition in CBH's standard Grain Services Agreement to support its argument about port access. This assumes that the quoted clause of the Grain Services Agreement represents the entirety of CBH's willingness to provide services. CBH is quite prepared to provide access to its ports on a stand-alone basis if asked to do so. Glencore never requested such a service.

11 Request 11

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.

- 11.1 As part of its Grain Express submission, CBH proposed to provide a report on the operation of the Freight Fund following the conclusion of the first season and every subsequent season's operation. The Freight Fund has not yet completed its first season of operation, which is due to finalise on 31 October 2009. The Freight Pool effectively operates on a 13 month season with the final month being used to position grain using funds received from growers.
- 11.2 CBH is currently preparing to produce the report, reconcile the costs incurred and request the auditing of the accounts relating to the acquisition of freight, and the expenditure of funds obtained growers for freight. This is due to take place at the same time that CBH performs its annual accounting process.
- 11.3 It would be impossible to furnish a financial report into the Freight Fund prior to the completion of the first season of operation. CBH will provide the ACCC with a copy of the Report as soon as it is available.

⁵ This could be achieved by growers using on-farm storage and delivering to port on behalf of the exporter.

Annexure A

Storage and handling services

- 1 Paragraph 2.9 on page 14 of CBH's submission in support of the notification¹ explains the grain receival storage and handling services that CBH provides as follows:
- (i) receival services include:
 - (A) planning harvest receivals, including segregation and service availability based on Grower information and retained knowledge;
 - (B) sampling / testing grain proffered for delivery;
 - (C) unloading grain from Grower-arranged road transport;
 - (D) weighing grain received;
 - (E) testing grain quality and attributes; and
 - (F) collecting and providing information concerning the source, weight, quality, attributes, treatment and type/grade of grain;
 - (ii) storage services include:
 - (A) determining segregation availability;
 - (B) fumigating grain and general grain husbandry;
 - (C) tarping grain stacks (as required);
 - (D) maintaining and updating ownership records; and
 - (E) providing information to Marketers and financiers about grain receivals;
 - (iii) handling services include:
 - (A) loading stored grain onto road or rail transport arranged by Marketers and/or CBH;
 - (B) unloading grain at next CBH destination (if any);
 - (C) blending grain parcels to provide required grain quality;
 - (D) loading grain into containers or bags;
 - (E) loading grain onto export vessels; and
 - (F) acting as shipping agent of various exporters.

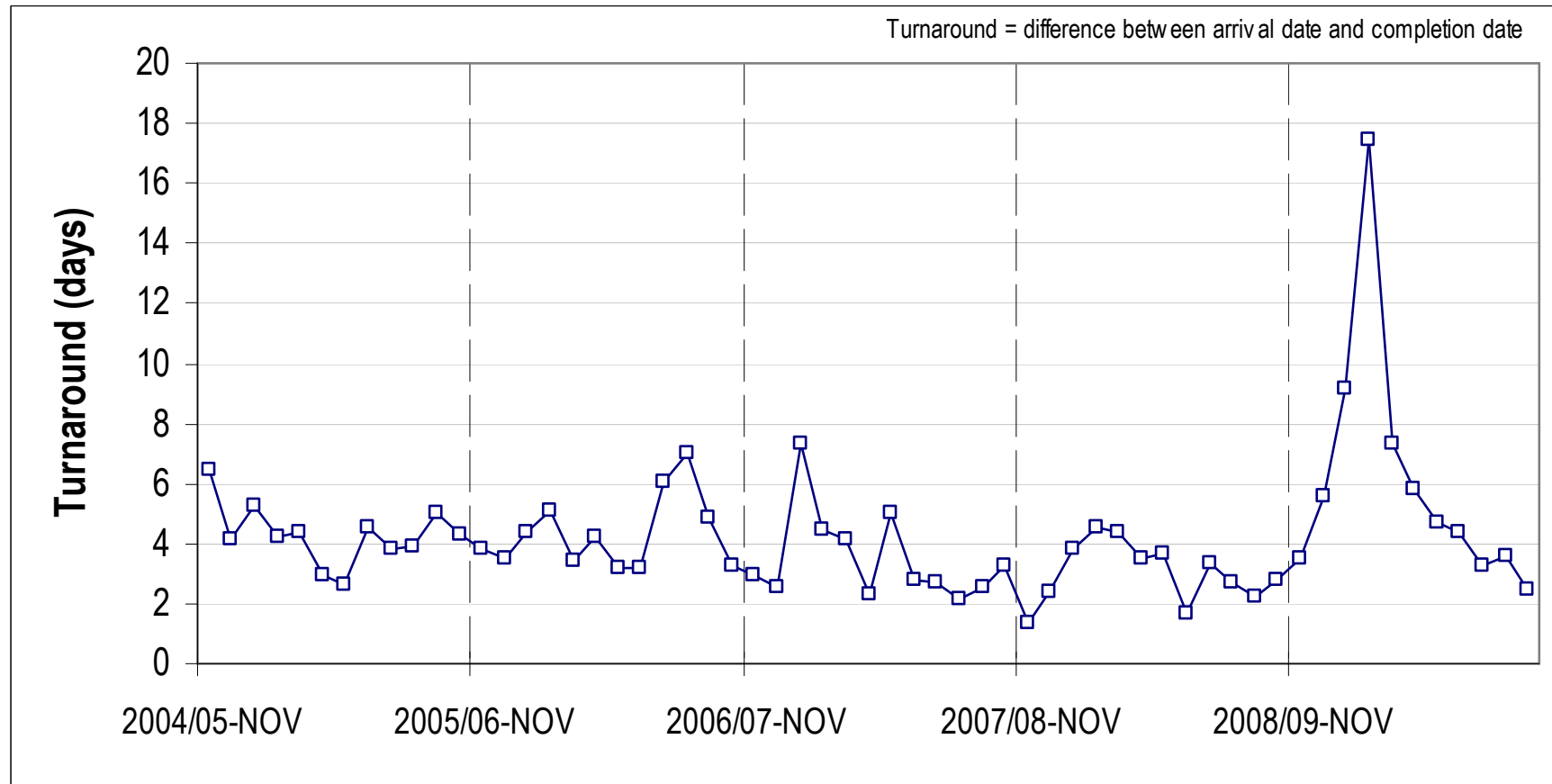
Supply chain coordination services

- 2 The supply chain coordination services referred to in Form G include the coordination of grain movement, transport, storage and handling between country sites and port.

¹ CBH Submission in support of Notification of Exclusive Dealing, available at <http://www.accc.gov.au/content/trimFile.phtml?trimFileName=D08+57523.pdf&trimFileTitle=D08+57523.pdf&trimFileFromVersionId=872835> as at 24 September 2009.

Schedule 2

Industry Average for turnaround time



Schedule 3

Glencore & GrainPool turnaround – January to February 2009

Shipper	Period	Arrive Month	Data	Total
GLENGRN	2. Jan-Feb	Jan	Average of Turnaround	13.50
			Sum of Number of ships	4.00
			Sum of Actual Quantity	56,505.83
		Feb	Average of Turnaround	20.33
			Sum of Number of ships	3.00
			Sum of Actual Quantity	113,433.03
	2. Jan-Feb Average of Turnaround			16.43
	2. Jan-Feb Sum of Number of ships			7.00
	2. Jan-Feb Sum of Actual Quantity			169,938.86
	GLENGRN Average of Turnaround			16.43
GLENGRN Sum of Number of ships			7.00	
GLENGRN Sum of Actual Quantity			169,938.86	
GPPL	2. Jan-Feb	Jan	Average of Turnaround	8.23
			Sum of Number of ships	26.00
			Sum of Actual Quantity	788,272.63
		Feb	Average of Turnaround	20.13
			Sum of Number of ships	15.00
			Sum of Actual Quantity	518,523.21
	2. Jan-Feb Average of Turnaround			12.59
	2. Jan-Feb Sum of Number of ships			41.00
	2. Jan-Feb Sum of Actual Quantity			1,306,795.84
	GPPL Average of Turnaround			12.59
GPPL Sum of Number of ships			41.00	
GPPL Sum of Actual Quantity			1,306,795.84	

Schedule 7

CBH Group Media Release:

- **The CBH Group releases freight estimates for 2009-10 (13 October 2009)**

>>>> MEDIA RELEASE MEDIA RELEASE MEDIA RELEASE

MEDIA RELEASE

The CBH Group releases freight estimates for 2009-10

The CBH Group has released the estimated freight rates for the 2009-10 season. The rates are available on LoadNet® and on the CBH Group website.

Colin Tutt, CBH Group General Manager Operations said this season's freight rates are around five per cent lower than last season when compared across the State.

"This is predominantly due to fuel costs being lower, making road transport more cost effective than rail in some areas of the network," he said.

"This season, we assessed each site individually and determined the least cost pathway to port from each site. This is why some areas will shift away from rail and use road transport when moving grain to port this season.

"There are a small number of sites where freight has increased slightly, however, for the vast majority of sites the rates estimated for this year are either at or below where they were last harvest.

Mr Tutt said it was important for growers to be aware these figures are only an estimate at this stage.

"The CBH Group will monitor and assess freight rates where necessary throughout the 2009-10 season," he said.

"In February 2010, as harvest draws to a close and we have a better understanding of the freight task required, the CBH Group will reassess the estimated freight rates.

"We will release an updated estimate for freight rates in February and, based on these estimates, growers will receive their initial freight invoice at this time. This invoice will cover freight charges on grain nominated before the date of invoice. "

Mr Tutt said freight rates will then be finalised in July, 2010. If the final rates are higher than the February estimate, growers will receive an invoice for the difference. If the final rate is lower, then the additional funds will be returned to growers.

Dated:
Media Contact:

Tuesday, 13 October, 2009
Amber Anderson
Media Advisor, CBH Group
Ph: (08) 9237 9820 Mob: 0404 544 184

#827918