

# GLENCORE GRAIN PTY LTD

ABN 29 106 378 885

Level 6, 437 St Kilda Rd Melbourne, Vic, 3004

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13 August 2009

Mr R Chadwick  
General Manager – Adjudication  
Australian Competition and Consumer Commission  
23 Marcus Clarke Street  
Canberra ACT 2601

richard.chadwick@accc.gov.au

Also for the attention of [sarah.sheppard@accc.gov.au](mailto:sarah.sheppard@accc.gov.au),  
[eugene.henry@accc.gov.au](mailto:eugene.henry@accc.gov.au),  
[david.hatfield@accc.gov.au](mailto:david.hatfield@accc.gov.au),  
[tony.hilton@accc.gov.au](mailto:tony.hilton@accc.gov.au).

Dear Mr Chadwick,

## **REQUEST TO REVOKE COOPERATIVE BULK HANDLING LTD'S NOTIFICATION OF GRAIN EXPRESS**

Glencore Grain Pty Ltd buys and sells grain in Australia. Its group company, Glencore Grain BV, buys and sells grain all over the world.

In Western Australia Cooperative Bulk Handling Ltd, which stores grain around the state and operates the four grain ports of the state, requires that CBH organise the transport of grain to port and that the grower pay for that transport.

Uniquely in Australia, and to my knowledge in the world, in Western Australia a marketer such as Glencore Grain is **not** allowed to organise the transport to port of grain that we buy.

CBH's requirements are terms of Grain Express, a kind of exclusive dealing which it has notified to the commission and which was accepted by the commission's decision of 8 September 2008.

However in January to March 2009 of this last grain season Glencore Grain's exports from the Western Australian ports were delayed by a total of over 123 laytime days by CBH's late delivery of grain to the ports. This resulted in demurrage charges to Glencore Grain of [REDACTED].

Also since February 2009 CBH has levied a novel surge charge which it has imposed by threatening further delays if the charge was not paid. The surge charge has totalled [REDACTED].

Surge charges are set to continue in amounts such as \$88,800 per vessel.

While other marketers suffered similar delays and charges, we do not believe that they were similarly imposed on CBH's marketing arms Grain Pool and Agra Corp.

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In particular the surge charge:

- is not transparent: you cannot look through the charge and find a service which it provides.
- is a levy.
- is a levy which falls on marketers but not growers, since the charge was imposed after marketers had agreed prices with growers.

The demurrage and surge charges effectively remove Glencore Grain's trading margin. Their effect is to deter us from operating in Western Australia. CBH's delays ruin the reputation of the state among overseas buyers. The practice of CBH exclusively organising transport to port excludes us and all marketers from that transport market.

Glencore Grain wishes to be in the position as it is everywhere else in Australia of deciding for itself how to transport grain to port. It is willing to use transport organised by CBH if the transport is timely, cost effective, does not favour CBH's marketing arms and if CBH assumes some of the supply chain risk. But Glencore Grain does not wish to be forced to use CBH's transport which is, as it was last season, slow, expensive, favoured CBH's marketing subsidiaries Grain Pool and Agra Corp and purported to place all risk on Glencore Grain.

Thus Glencore Grain requests:

## **A. Revocation by notice under s 93(3) Trade Practices Act 1974**

It is requested that as soon as possible the commission notify CBH under s 93(3) so that CBH's anomalous practice of requiring all transport to port to be acquired only from CBH is brought to an end. The grounds for a s 93(3) notice are that:

- Grain Express has had the effect of substantially lessening competition in the market for transport of grain to port (being a market in which CBH engages) - to the extent that CBH has become the sole supplier of such transport.
- transport to port controlled by a single entity, CBH, is slow and costly, and thus a detriment to the public comprised of marketers, shipping lines and overseas buyers as well as growers. It is exploitative of marketers who are forced to pay the surge charge.
- Grain Express has not resulted in a benefit to the public.

Alternatively if the Grain Express conduct is properly characterised as third line forcing, as it may be, the commission's notice should be under s 93(3A).

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## B. Other grounds for not sanctioning Grain Express

It is requested that the commission's decision of 8 September 2008 sanctioning Grain Express be reversed since CBH's Grain Express notification was not exclusive dealing of the kind in s 47(2) of the Trade Practices Act, as CBH claimed.

It is also submitted that the transportation requirement in Grain Express it is not permitted by the Western Australian Bulk Handling Act 1967 and the regulations thereunder. Thus the commission as a matter of good order ought not to sanction the transport requirement in Grain Express. The same result is achieved by the commission in discharge of its duty under s 118 of the Australian Constitution giving full faith and credit to the public Acts of a state, in this case the Western Australian Bulk Handling Act 1967 and the regulations thereunder.

The background and details of these requests follow.

## C. Key points

Some key points from the following details are as follows:

- In furtherance of Grain Express CBH *refused* Glencore Grain's offer of trucks to get delayed grain to port - para 2.2 following. This delay was exacerbated by CBH failing to use sufficient trains – para 3.1
- CBH's *surge charge is a gross and unfair impost*:
  - The surge charge was not foreshadowed in CBH's briefing on Grain Express – para 1.
  - The surge charge is not provided for in the Grain Services Agreement.
  - The surge charge was forced on Glencore Grain in the middle of CBH's transport and shipping delays in February 2009 and had to be accepted on a day's notice on penalty of further delays – para 2.3.
  - The reason the surge charge could be forced on us was that we were not allowed to use any other transport under Grain Express/the GSA – para 2.3.
  - The surge charge could not be passed on by marketers to their growers although the marketing arms of CBH, Grain Pool and Agra Corp could do this by means of pools.
  - The surge charge was an opaque levy unrelated to particular transport costs. It is not transparent.
  - The surge charge is at the sole discretion of CBH.

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- Thus Glencore Grain incurred surge charges totalling [REDACTED]
  - Imposing the surge charge on the marketer makes misleading the CBH claim to your commission that it is the grower who meets the cost of transport to port.
  - Imposing the surge charge makes misleading the practice of sale by growers to marketers "free in store" meaning that the purchase of grain covers the cost of its transport to port.
- 
- CBH's *delays*, totalling over 123 laytime days or over 20 days per vessel, were on any view grossly excessive. The usual laytime per vessel is one to two days and a laytime of four to five days has hitherto been regarded as extreme.
  - There is *no effective ring fencing* between CBH grain handling operations and its marketing arm, as shown by:
    - CBH's surge charge to pay for getting grain to port faster, imposed after we had agreed prices with growers, falling on Glencore Grain, whereas CBH's marketing arm which operated on a pool could pass it on to growers – para 7.
    - At receival sites CBH favouring its own carriers over those of competitors
    - The advance information about grain planted and to be sold required by CBH from growers and marketers being very useful to CBH's marketing arms. There is a fair risk that this could become known to the marketing arms – para 7.
  - *Land transport charges* under Grain Express:
    - For the last season were *38% higher* than the previous season para 3.2.
    - For the coming season will include a surge charge or levy as high as \$88,800.00 per vessel – para 2.4.
    - In the case of a 1000 t delivery to the Metropolitan Grain Centre CBH charges a \$6000 levy in addition to the carrier's actual charges - 3.4.
    - Further these charges may not even be for transport as they go into an opaque unstructured Freight Fund controlled it seems by CBH and rail and road carriers and from which the rail network may be repaired – para 4 - and CBH is not obliged to spend the charges on transport – para 2.8.

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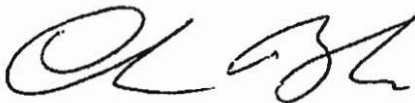
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- CBH's claims about Grain Express have been *misleading*:
  - Grain Express was described as an "industry initiative" and as "coordination". In fact it was CBH's initiative and its purpose, which has been achieved, is to give CBH a monopoly in transport to port – para 5.2.
  - It was misleading to say that marketers need equitable access to transport to be guaranteed by CBH. There are plenty of trucks and trains and marketers don't need a guarantee from CBH – para 8.1.
  - Accusing marketers of gaming was wholly unfounded and improper – para 8.2
  - Synergies Economic Consulting report is replete with unsubstantiated or misleading claims – para 8.3
- CBH has admitted that Grain Express was not up to scratch – to the tune of [REDACTED] additional cost to CBH – para 9. Clearly it is wrong to impose such a loss-causing system on the public.
- *Grain Express is technically or legally flawed*:
  - It is not exclusive dealing within s 47(2) of the Trade Practices Act as claimed – para 10.1
  - It does not comply with the Western Australian Bulk Handling Act 1967 and regulations thereunder – an Act that specifically governs the matters of grain handling in question-10.2.1 and .2
  - Your commission should not in the interests of good order and to comply with s 118 of the Australian Constitution sanction a system that does not comply with the directly relevant State Act – 10.2.3.

I look forward to your advice on this request. Please contact me if you wish to discuss any aspect.

Yours faithfully



Chris Brooks

Managing Director

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## **REQUEST BY GLENCORE GRAIN PTY LTD THAT THE AUSTRALIAN COMPETITION AND CONSUMER COMMISSION**

### **REVOKE**

#### **COOPERATIVE BULK HANDLING LTD'S NOTIFICATION OF GRAIN EXPRESS**

##### **1. BACKGROUND**

This request amplifies our objections to CBH organising transport for our grain outlined at our meeting with yourself, Ms Sarah Shepherd and other officers at the commission's Melbourne office on 29 June 2009, and earlier in my email to Ms Shepherd of 25 June.

CBH's transport requirement and its requirement that grain growers or marketers acquire "supply chain coordination services from CBH", being conditions of its offering to supply storage and handling services, comprise what it calls Grain Express.

Last year CBH asked us to endorse Grain Express. On the basis of our five years experience in exporting grain from Western Australia we endorsed Grain Express (see **attachment 1**) because it promised central coordination of grain freight in place of the previous less efficient vessel by vessel coordination and in the forthcoming (and now achieved) deregulated export market the supply chain from up country receival site to port might have proved unmanageable.

However our endorsement was conditional on (1) CBH Operations being completely separated from CBH's marketing arms Grain Pool Pty Ltd and Agra Corp Pty Ltd and (2) CBH sharing 50/50 with us in any payable receivable demurrage and despatch as per charter party rate. The first condition was based on our experience that CBH favoured its subsidiaries and the former monolith AWB over other marketers like our company. The second condition was based on the need to hold CBH accountable if it wanted to be the exclusive transport organiser. If CBH-organised transport failed we could not afford to be stuck. Furthermore in the previously regulated export market, CBH had only one significant customer, the earlier discredited AWB. AWB used to coordinate and plan delivery to port and CBH used to organise trains and trucks. AWB and CBH being monopolists and AWB being able to bury costs in pools, there was little previous discipline on CBH or AWB to organise transport to port efficiently and at least cost.

Thus our conditions of support for Grain Express were justified. In the event the conditions were not met and Grain Express does not have our support.

CBH said in briefing us that a key feature of Grain Express was that the grower would pay for transport to port. The marketer was not to be charged for transport. CBH did not foreshadow any surge charge of the kind that in fact it has imposed this season.

However we wish to be quite clear that we support centrally organised transport to port. We would expect that a central organiser could organise transport to port for less cost and in better time and without congestion at port or on the railways than if the transport to port was organised by individual marketers. That CBH has failed in these regards underscores the case that Grain Express be terminated.

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The failure is illustrated in six of Glencore Grain's shipments, details of which follow in the next section. The failure is also one which CBH admits (details para 9).

## **2. IMMEDIATE LOSSES CAUSED BY GRAIN EXPRESS**

### **2.1. Outline of losses to Glencore Grain**

The immediate losses to Glencore Grain are demurrage charges incurred because CBH delayed delivery of grain to port, and surge charges which CBH imposed on Glencore Grain to overcome delays.

### **2.2. Delivery to port arrangements**

The term or condition of Grain Express that to the extent that grain remains in CBH's custody customers may only acquire transport services from CBH was given effect in CBH's standard 2008/09 Grain Services Agreement (GSA). Glencore Grain is a party to the GSA. The GSA covers a number of services by CBH including CBH's grain handling services for the grower and CBH's port outturning for marketers, that is, the bulk loading of grain at port into a ship. The latter service is provided under sec 10 of the GSA. A form of the GSA accompanied CBH's submission with its notification to your commission.

The key provisions of sec 10 of the GSA may be summarised as follows:

- o Under cl 10.1(b) "Port Outturning Services" did not include rail or road transport costs from a Destination Site (one of some 10 sites where CBH accumulate grain from receival sites). This is consistent with the grower meeting these costs.
- o The marketer would request a particular loading slot at a port by means of an Outturn Request Form to CBH – cl 10.2.
- o Under cl 10.3 on receipt of that form CBH was either to accept or reject the request in the form. Para (b) of the clause allows rejection on any of eight reasons including insufficient grain entitlement, the grain being unavailable because of fumigation, force majeure preventing the scheduling of vessels and "the requested date, time or timeframe is not acceptable as a result of transport capacity issues or other operational concerns". Thus if CBH at the time of receiving a request expected delay in transporting grain to port to meet a request it was required to take this into account and could reject a request for that reason. Given the permissible reasons for rejection, if a request was accepted the marketer could expect that those reasons were not of concern to the marketer's application. The acceptance of a request for a loading would indicate that there were no transport capacity issues or other operational concerns for the loading.

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- o Cl 10.4 provides: "Upon acceptance of an Outturn Request, CBH shall Outturn the Grain in accordance with the Cargo Outturn Request Form and all other provisions of this Agreement." This is a clear indication that a loading slot that has been accepted is to be adhered to by CBH. Equally it is to be adhered to by Glencore Grain as the customer because cl 10.9 says that the customer is to meet repositioning costs of CBH if grain is not shipped in accordance with the outturn request form.
- o Cl 10.16 provides for the parties to share demurrage costs and "dispatch" (bonuses for early loading) and para (a) of the clause states "CBH is willing to participate in Demurrage/Dispatch arrangements by mutual agreement". This allows both parties to limit their exposure to demurrage costs.

Sec 15(1)(a) of the GSA provides for the customer, which includes the grower, to pay transport charges (see also para 5.1).

Thus since transport to port is met by the grower there is no reason for a marketer to be charged for transport. If CBH found it had not charged enough for transport it should have worn the loss or charged the grower more. Instead CBH created the novel surge charge.

## 2.3. Surge Charges

On 17 February 2009 CBH announced (see attachment 2) that an additional transport charge, called a surge charge, was payable in order to avoid ships being placed further down the queue. CBH's email request was sent to Glencore Grain at the end of the working day. It advised of "accelerated accumulation" "to deal with the congested shipping line up for February/March/April". All exporters were asked to contribute to the cost of the acceleration and to agree to do so by the end of the next day, failing which it was said "If any exporter does not accept the proposal and additional costs, CBH will need to review the stem and loading dates and re-offer to those marketers that are willing participants". In other words without paying for the acceleration, an exporter risked being placed further back in the queue for export. There are three things to note about the surge charge request:

- (i) the marketer was penalised by further delay if the marketer did not agree. The request put the marketer under duress.
- (ii) the request was not made under or referenced to Grain Express or to the GSA. However under cl 15.1(a) of the GSA Glencore Grain had to accept CBH's transport to port. I.e. the CBH monopoly of transport to port denied Glencore any alternative to paying the surge charge.
- (iii) allowing a mere day for a reply prevented serious consideration of alternatives.

In these circumstances Glencore Grain was forced to agree to the surge charge. It agreed under protest.



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The reason why CBH could impose surge charges on marketers was that under Grain Express marketers were not allowed to use any other transport to port bar CBH's.

The surge charge being an afterthought of CBH arising after Glencore Grain had agreed prices with its growers, the charge could not be passed on to the growers. On the other hand for CBH's grain trading business, which is predominantly by pool, the surge charge could generally be added to the costs in pools (which at that time would not have been distributed). Thus CBH in imposing the surge charge harmed its grain trading competitors but not CBH's own grain trading businesses.

The surge costs would have been mitigated for the present shipments if CBH had accepted Glencore Grain's offer of transport.

## 2.4. CBH's further development of surge charges

For the purpose of obtaining loading dates in the month of June 2009, CBH has required that Glencore Grain sign "CBH Capacity Shipping Standard Terms and Conditions". These terms require payment of a "Surge Fee" defined as "Surge Tonnage by the Surge Tonnage Rate". The Surge Tonnage appears to be a percentage of the maximum tonnage per vessel covered by the agreement. By reference to Schedule 1 to the agreement the following is an example of the Surge Fee for a 50,000 tonnes vessel at Esperance, i.e.

37.19% of 10,000 tonnes x 5 (maximum tonnage for this vessel) x \$4.78 per tonne        =  
\$88,800.00

The Surge Fee is additional to the Base Fee under the agreement which in fact is the loading charge under the other agreement covering port services, namely the GSA. There is no other definition of the Surge Fee. We are not told whether the Surge Fee is for transport or for any other purpose.

Thus CBH is now imposing on us as part of Grain Express a mere levy, a totally untransparent charge, which is as high as \$88,800.00 per vessel.

## 2.5. Absence of statutory authority for surge charge

The Bulk Handling Act 1967, which is further considered in sec 10.2 below, expressly regulates the bulk handling operations of CBH.

The Act contains no provisions allowing the surge charge to be imposed. Part V of the Act contains a limited power for CBH to charge for a special purpose subject to approval of shareholders in meetings and subject to the Governor in Council fixing the charge.

The regulation of special charges under the Act highlights their exceptional or special character and that special charges may not merely be fixed by agreement or agreement under duress with CBH.

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## 2.6. Delay leading to demurrage charge

In the January to March 2009 period Glencore Grain incurred delays in the loading of six ships, the MVs Young Spring, Patriot, Captain Diamantis, F&K, CS Green and Lupinus. The delay in loading the MV F&K is illustrative.

- In accordance with sec 10 of the GSA on 12 January 2009 Glencore Grain requested CBH for barley to be loaded at the port of Albany between 23 and 31 January 2009, a request agreed to that day by CBH. The timing of this notice was also governed by "CBH Priority Harvest Shipping Terms and Conditions". We believe that these terms and conditions do not override the above provisions of cl 10.
- 10 days later on 22 January CBH purported to withdraw its acceptance. However by then Glencore Grain's ship the MV "F&K" was on its way and it duly arrived within time, at Albany, on 27 January 2009 and was then ready to load.
- In fact CBH was not ready to load the F&K until 24 February by which time other shipments of Glencore Grain were also delayed by CBH. To minimise the delays Glencore Grain agreed with CBH to swap the 24 February loading slot from the F&K to another delayed ship the MV "Lupinus"
- On 6 March 2009 the F&K finally commenced loading barley at Albany and it sailed on 8 March, late just under five and a half weeks, which equated to 36.538194 laytime days used.
- The demurrage for the five plus weeks delay or 36.538194 laytime days was [REDACTED]. The only reason for the delay was CBH's delay in transporting barley to the port.
- The surge charge imposed by CBH on the F&K was [REDACTED]

Glencore Grain's shipments on the other vessels mentioned above were generally similarly delayed by CBH's transport of grain to these vessels.

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## 2.7. Total surge and demurrage charges

The total surge charges and demurrage charges on Glencore Grain are summarised below

MV	Laytime days used	Demurrage USD	Surge payment AUD
Young Spring	25.24306		
Patriot	40		
Capt Diamantis	20		
F&K	36.538194		
CS Green	13.56875		
Lupinus	24.506944		
Banzai			
Super Adventure			
Unused slot at Esperance			
Unused slot at Esperance			
Capt Diamantis (2)			
Slot bought from GPWA			
Capt Diamantis (2)			
Bal after C Diam (2)			
Swap to CBH			
Totals	123.318754		

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The total delay in loading ships was 123.318754 laytime days. This is an average of 20.5531 laytime days per ship which on any view is grossly excessive. The usual laytime per vessel is one to two days and a laytime of four to five days has hitherto been regarded as extreme.

The total demurrage cost, and the total surge costs known at 17 April 2009 which with interest and recovery charges came to [REDACTED] were the subject of a letter of demand to CBH dated 17 April 2009 which was rejected by CBH a month later. The fact of the delays, that demurrage was incurred on those delays and that surge charges were payable is understood not to be disputed by CBH.

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## 2.8. Grain Express helped CBH to impose these losses

The above delays could have been reduced by alternative or additional transport. In the latter part of January 2009 I had phone discussions on the problem of delays in transport to port with Dr A Crane, then incoming Chief Executive Officer, Mr T Collins, Executive Manager, Logistics Strategy, and Ms J McMiles, Manager Customer Accounts, all of CBH and offered for Glencore Grain to itself truck the grain to port for the F&K and the other ships, and thus to reduce the delay in their loading. These offers were rejected by CBH.

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Had they been accepted it is noted that we still would have been required to pay transport costs to CBH, under cl 15.1(a) of the GSA.

Curiously CBH's marketing arm did not necessarily suffer the same loading delays as us. For example the MV "Bulk Monaco" for the CBH subsidiary Grain Pool, arrived on the stem on 20 January 2009 – that is its name appeared on the list of vessels allocated loading slots at port (which CBH published on its website) on 20 January, which in the ordinary course of events meant that it was nominated and accepted on that date. The ship began loading that day, without any delay. A system of loading that allows the related party (Grain Pool) to load without any delay one day but seven days later requires the competitor (Glencore Grain) to wait five and a half weeks to load is suspect and ought not to be sanctioned.

## **2.9. The delays and losses affect the grain trading public, not just Glencore Grain**

Total laytime delays of over 123 days in loading just six vessels plus the surge costs are all detriments to the public who incur these costs, that is our company, our customers, and the growers from whom we buy.

Glencore Grain does not experience loading delays of five weeks for grain ships or average delays of 20 days per vessel in other parts of the world or in the eastern states.

## **3 TRANSPORT**

### **3.1 Under Grain Express CBH did not use all available transport**

[REDACTED] of Glencore Grain and I have been advised by [REDACTED] of Australian Railroad Group that during January and February 2009 when CBH delayed transport of grain to the ports, ARG had train sets available for hauling grain to port. CBH had reduced the number of train sets it used by one in September 2008 to save money and did not resume using this set until the crisis in loading ships in February. Thus one reason for the delays in getting grain to port was CBH's failure to organise sufficient trains.

### **3.2 Charges under Grain Express are 38% higher than previously**

CBH's charges for transport are on average 38% higher under Grain Express than previously. Attachment 3 shows transport rates from some 24 receival sites to their zone port or port terminal and also average transport prices per tonne from 2004 to 2008-2009. For the last harvest, 2008-2009, the average rose by \$7.63 to \$23.45, an increase of 38.78% on the previous year.

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This is despite the fact that for the last harvest factors such as the much larger volume of grain (8,915,000 tonnes compared to the previous year's harvest of 5,820,000 tonnes<sup>1</sup>) and a drop in fuel prices of about 50% should have kept prices steady.

### 3.3 Road transport of grain at present often cheaper than CBH rate

Our research shows that generally road haulage is cheaper than the rate CBH nominate for a given haulage task. In attachment 4 we show road haulage rates from different inland grain storage sites within a zone to the port for the zone. In only one case, Lake Grace to Albany is the CBH rate substantially cheaper than road.

CBH's chief executive officer Dr A Crane said on 24 June 2009 (see attachment 5) in relation to CBH's transport of grain to port during the last harvest that:

- CBH planned to use more road transport
- CBH is prepared to "divert investment into improving the rail track if it sees similar support from the rail lines"
- "the problem is the pipeline between" the upcountry receival sites and the ports. (The "pipeline" was Dr Crane's description of his company's organisation of transport to port.)

The combination of (i) CBH acknowledging that more road transport will be used, (ii) CBH's transport being dearer than what a marketer can contract direct with a carrier and (iii) road transport requiring less central organisation than rail transport, undermines the case for Grain Express.

### 3.4 Grain Express is used to overcharge for transport

One example of transport under Grain Express is the case of [REDACTED] wheat grower, who sought to transport 1000t of wheat to the Metropolitan Grain Centre, Perth, from [REDACTED] over [REDACTED] kilometres to the [REDACTED]. CBH quoted \$31.80 a tonne whereas [REDACTED] would have charged \$25.60 a tonne. CBH informed [REDACTED] that if he chose to do this, then they would charge another receival fee at the Metropolitan Grain Centre, which would have comprised \$10.50 a tonne and \$1.15 sampling fee, a total of \$11.65. A fee for the grain's receival and sampling by CBH at [REDACTED] had already been paid. To avoid the \$11.65 impost [REDACTED] agreed to CBH transporting the grain, for which CBH contracted [REDACTED] Transport. In the result [REDACTED] paid \$6 a tonne or \$6000 more than if he had contracted with [REDACTED] directly. The \$6000 required by CBH was a levy or a tax.

<sup>1</sup> ABARE Crop Report no 150, June 2009, p 15.

<sup>2</sup> A less detailed version of this incident of overcharging is given in para 4.18 of the PGA submission on the ACCC on the port terminal services access undertaking of CBH.

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The truck used by [REDACTED] was the same as the truck it would have used if [REDACTED] had contracted directly with [REDACTED].

### 3.5 Effect of grid capacity on transport

Each port has a grid at which incoming grain is weighed and discharged and fed to grain elevators or other storage.

An effect of Grain Express is to control the road and rail movement to each port to meet the capacity of the grid at the port. Otherwise trucks and trains can queue for long times to reach the grid.

If the grid capacity is limited then at peak times, such as the period to March, output or loading capacity of the ports will be limited.

If however there are multiple transporters of grain to a port there will be demand for larger or additional grids at the port. It is not expensive, and time can be found, to increase grid capacity and it can be financed from the additional deliveries and deliverers to the port. Multiple transporters in turn give the grower greater choice as to how his or her grain gets to port.

Incidentally the issues surrounding grid capacity, which are plainly critical in the grain supply chain, are nowhere addressed in CBH's submission to the commission on Grain Express.

In the circumstances an effect of Grain Express is to preserve limited grid capacity and prevent increased grid capacity. This in turn limits the transport choices of growers and in times of peak exports limits the output capacity of ports. This is clearly a public detriment.

## 4 FINANCIAL ASPECTS – THE “INDEPENDENT FREIGHT FUND”

CBH says at para 3.37 of its submission to the commission that it will establish an “independent Freight Fund, in the main rail and road export agreements” which CBH will manage and administer and which will be externally audited. An annual financial report will be given to NACMA and PGA. It is assumed that freight charges or at least their surplus will be fed into this fund. “It is intended that deductions to freight rates will be made from any previous years' surpluses” (para 3.38 of the submission).

This is a very unusual fund. It is obviously to be controlled by CBH and the road and rail carriers with which it contracts yet it is called an “independent” fund. The fund is not said to have trustees or rules. No budget has been published. Normally when you pay for transport you simply pay the transport provider – you don't set up a joint fund with the provider.

The contributors to the fund like Glencore Grain and other marketers do not have any control over the fund.

NACMA and PGA are cited as recipients of the annual reports of the fund. It is understood that neither body has been approached by CBH for this role nor have they received any annual report yet.

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If freight charges are designed to produce a surplus for lean years there should have been a surplus from last season's large harvest. Yet Glencore Grain and other marketers had to pay the extra "surge" freight charges for the last harvest.

CBH said it was unlikely with a multiplicity of marketers that the "fixed cost component of the freight task could be insured" (para 6.19(ii) of the CBH submission). But what is this fixed cost component? There are no details at all. Nor is it obvious that there was some ongoing fee payable by CBH for rail transport since the previous rail "industry contract" was expected to expire in October 2008 (para 2.66 of the CBH submission).

Another promise by CBH, at para 3.42 of its submission was that it would be in a position to

*provide Marketers and transporters with accurate and disaggregated information regarding the freight costs involved in moving grain.*

Contrast this with surge costs which are expressed as a percentage increase in accumulations in a port for which the cost varies between \$4.78 and \$6.24 per tonne. The rates have no relation to distance or to the actual cost of overcoming a blockage or delay in land transport. In fact no disaggregated information about transport costs has been given by CBH at all.

Glencore Grain cannot have any confidence in an unstructured, opaque fund of this kind to which it is forced to make payments. It is wrong in principle for the commission to sanction a system which forces such payments.

## 5 LESSENING/ELIMINATING COMPETITION

### 5.1 Elimination of competition under the Grain Services Agreement

The principal term of Grain Express is CBH making it a condition of, among other things, loading at port that the grain be transported to the port by CBH. This is spelt out in cl 15(1)(a) of the Grain Services Agreement which provides:

*It is a condition of CBH offering the Services under this Agreement that CBH transports the Grain between the Receiving Site and the Destination Site Nominated by the Grower or between Destination Sites if the Customer wishes to alter Destination Sites. CBH will be entitled to charge the Customer for the Freight whether or not the Grain has actually moved between Destination Sites.*

The direct effect of that condition is that CBH has a monopoly of the transport to port and competition in that transport market is denied.

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## 5.2 Monopoly Masked As Coordination

The key feature of Grain Express is its eliminating competition to CBH in transporting grain to port.

CBH has explained Grain Express in a publication on its website entitled "Frequently Asked Questions". In answer to Frequently Asked Question 1 Grain Express is described as "an industry initiative under which transport, storage and handling services will be packaged and managed by CBH Grain Operations". In CBH's submission to your commission in support of the notification of Grain Express, Grain Express is described as a "new coordinated logistics model" (para 1.7), or a "bundled receipt, storage, handling, logistics and transport service" (para 3.2(iii)), in which "CBH will become the head contractor for transport services" (para 3.35) and "CBH will occupy the Supply Chain coordination role for all grain held in its custody" (para 6.31).

In fact there has been no coming together of members of the grain industry investing CBH with the role of coordination. There has been no "Industry initiative". Glencore Grain's support was on the basis of two conditions which CBH has not met (see sec 2, p 2).

The direct effect of CBH making it a condition of, among other things, loading at port that the grain be transported to the port by CBH is that CBH has a monopoly of that transport. Nowhere in the Frequently Asked Questions or in the CBH submission to your commission is the creation of the monopoly mentioned.

Glencore Grain has no issue with CBH offering coordination to avoid ad hoc or uncoordinated, and thus costly either to CBH or to marketers, movement of grain from country sites. But CBH overstates the problem when it says "any ability of Marketers to require the movement of particular parcels of grain to occur in an ad-hoc or uncoordinated fashion increases the incidence of capacity waste, particularly in country sites." (CBH submission, para 2.49, emphasis added). Marketers don't act perversely. That coordination is desirable is not the justification for CBH's monopoly.

It was misleading of CBH to have masked its creation of a monopoly of transport to port for itself as mere coordination.

## 5.3 Elimination of competition masked

In explaining the effect of Grain Express on competition, para 8.11 of the CBH submission says:

*As an entry-deference strategy, the proposed conduct would have no real effect in Western Australia. The Grain Express conduct does not prevent new entrants from building competitive storage or port loading facilities. Nor does the Grain Express conduct prevent Marketers from outturning their grain from CBH's custody at a nominated point, and making their own transport and port loading arrangements. In this sense, Grain Express does not foreclose entry.*

There are four grain ports in Western Australia, all operated by CBH. In relation to delays in loading at the ports, Dr Crane, said on 24 June 2009 in his press statement (attachment 5):



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*The problem is not the capacity of the up-country receival sites. We have capacity that far exceeds the largest crop ever produced, and we have capacity at the ports to outload the crop several times in a year but the problem is the pipeline between the two.(emphasis added)*

If as Dr Crane says the grain ports and up country receival sites are far more than adequate there will be no reason for anyone to invest in further ports and receival sites. If investment in further ports and receival sites is not likely it is misleading of CBH to raise the prospect of such investment as a measure of the competition that Grain Express excludes.

The claim that Grain Express does not prevent outturning at a nominated point and transporting from that point to a port has to be considered against (1) CBH's duty to outturn to port (i.e. not up country) if so requested by the person entitled to the grain in the period up to 1 March, under regulation 20(1) of the Bulk Handling Regulations 1967; and (2) CBH's policy of 25 June 2009 (attachment 6) that growers may now only nominate as destination sites for their grain the four ports and CBH's Metropolitan Grain Centre (MGC). The four ports and the MGC are the only places at which customers will "receive their grain entitlements".

The statutory duty and the new CBH policy give the export marketer only one place to physically get its grain, namely the port. This rules out of consideration alternative delivery points for the grain which are said not to be affected by Grain Express and are open to new entrants. It was misleading of CBH to raise this possibility of an alternative form of delivery to port when there is not one.

The actual competitive transport to port that Grain Express excludes may be seen particularly at the ports of Geraldton and Esperance. At Esperance all deliveries this last season were by road and at Geraldton 67.8% were by road (para 3.1 of CBH's "Please Explain" statement of 14 May 2009 to the ACCC). Forty percent of the Geraldton deliveries would have been deliveries direct by the growers and at Geraldton 20% of the above figure, i.e. some 13.56%, would have been by growers (CBH submission para 2.96 (iii) and (iv)).

If CBH agrees to growers delivering direct to port then it should be able to agree to marketers delivering direct to port. The need to coordinate transport, so that where possible it goes by rail, does not exist or has been abandoned at Esperance and is slight at Geraldton. Thus this rail justification for Grain Express does not exist for Esperance and is slight for Geraldton. Yet at both ports Grain Express excludes Glencore Grain and other marketers delivering their grain.

## **5.4 The Grain Express Conduct Characterised As Third Line Forcing**

It is submitted that it may be inferred from CBH's conduct of:

- itself not operating transport from up country receival points to port or performing any transport function for which it charged;
- contracting with Australian Railroad Group and road carriers to provide such transport;
- billing either growers or marketers for such transport so that it was not out of pocket for the transport;

that the condition imposed by CBH in supplying port loading or outturning services to marketers is that the marketers acquire transport to port indirectly from ARG or the road carriers. Such a condition attached to port loading or outturning is exclusive dealing of the kind described in s 47(6), i.e. CBH

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*(a) supplies, or offers to supply, goods or services;*

*...*

*on the condition that the person to whom the corporation supplies ...will acquire goods or services of a particular kind or description directly or indirectly from another person not being a body corporate related to the corporation.*

Accordingly the notification to revoke sanctioning of the conduct should be given under s 90(3A). The reasons for giving such a notification have been given in sec 6 below.

## **5.5 Detriment To The Public Constituted By Lessening Of Competition Resulting From Grain Express**

Included in this detriment is:

- the demurrage and surge charge and related costs of [REDACTED] and the delays totalling [ ] hours in loading vessels.
- similar demurrage and surge charge costs and delays for other marketers.

## **6 NO PUBLIC BENEFIT HAS RESULTED**

Grain Express has not resulted in any benefit to the public. In its Please Explain memorandum to the commission of 14 May 2009, CBH says that less grain would have gone to port without Grain Express. It gives no with- and without-comparison to substantiate this claim. The claim however is implausible since even without Grain Express there would be some central coordination of transport in the self interest of all concerned and in CBH's administration of requests for loading slots at ports. Furthermore in the case of Esperance and Geraldton there is no or little rail delivery but considerable grower delivery.

One "significant success" claimed by CBH for Grain Express is the "clearance of sites by campaign movement" and "surge grain to port" (para 4.1 of the Please Explain memorandum). This fails to mention CBH's extraction of surge charges from marketers supposedly to get grain to port more quickly. Surge charges were and are a levy or tax completely outside Grain Express.

The benefit of timely transport of grain to port has not been achieved. Instead marketers have incurred delays in transport to port – 123 laytime days, costing [REDACTED] in the case of Glencore Grain (para 2.7).

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The benefit of efficient use of trains was not achieved: train sets were idle during the period of the delays (para 3.1). Such a benefit is unlikely with CBH itself moving away from trains (para 3.3) and with the parlous state of the grain rail network.

The benefit of lower transport costs to port have not been achieved. Instead costs have increased on our calculation over the previous year by 38% (para 3.2).. The surge charge is set to continue at amounts such as \$88,800.00 per vessel (para 3.7). A grower, [REDACTED], was required by CBH to pay an extra \$6000 for transport of a mere 1000t of wheat, even though the transport he had organised and which CBH used was by exactly the same carrier using exactly the same truck (para 3.4).

The benefit of transparency in transport costs is not achieved when the surge costs are levied as a fee per tonne, when there is an unexplained gap between what CBH charges and the lesser amount CBH's contractor charges (as in the experience of [REDACTED], para 4.5, or as is apparent in the comparison of road and CBH rates in attachment 4).

The surge costs of \$[REDACTED] imposed on Glencore Grain could not have been imposed if CBH had allowed Glencore Grain to use its own transport to overcome delays in CBH-organised transport. Instead CBH adhered to the condition of Grain Express that all transport to port be acquired from CBH. The above surge costs, which are a substantial detriment to Glencore Grain, following directly from the lessening of competition in the market for transport, a market reduced to one supplier, CBH.

## 7 BREACH OF RING FENCING

The surge charge fell on Glencore Grain and could not be passed on to its growers (with whom the selling price had already been fixed) but if the charge was imposed on CBH's subsidiaries it could be included in pool costs and thus passed on to growers (para 3.2).

The case of the Bulk Monaco raises suspicions that when Glencore Grain suffered delays in CBH-organised transport to port, CBH's subsidiary Grain Pool did not suffer such delays. (para 2.2)]

CBH needlessly delayed on one occasion the unloading of Glencore Grain's wheat at a country site, a practice which cost the carrier another load that day; and a practice which it does not impose on its trading subsidiaries (para 3.6).

The impracticality of expecting effective ring fencing between CBH's transport coordination role and its marketing arm can be seen in the all encompassing market information it requires for the transport role, namely:

*the best possible information from:*

*(i) Growers, regarding their expected crops – encompassing grain types, varieties and projected yields of each grain in an upcoming harvest;*

*(ii) transporters, regarding their available trucks, trains and rolling stock and accurate scheduling on the availability of this transport capacity; and*

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*(iii) Marketers, regarding their projected current, short range and long range marketing forecasts, coupled with their specific shipping plans and individual vessel nominations.(para 2.44 CBH submission)*

It is a fair risk, probably inevitable, that some information of this kind will pass to the marketing arm and thus be able to be used against Glencore Grain and other marketers. Cl 4.6(11) of the CBH Ring Fencing Arrangements and Policy also allow CBH to pass to Grain Pool and Agra Corp information about grain received by CBH. Thus information about grain planned for shipment from a port, even if it does not identify the marketer, given to Grain Pool or Agra Corp can trigger them to offer grain of a higher quality or better price to undercut the marketer.

The present situation is as unreassuring as if Qantas controlled Virgin Blue's landing and takeoff slots.

## **8 MISLEADING STATEMENTS CONCERNING THE NEED FOR GRAIN EXPRESS**

Misleading or unsubstantiated statements by CBH about the need for Grain Express in our view undermine the case for Grain Express. These are three serious examples of such statements.

### **8.1 CBH needs to guarantee equitable access to transport.**

In CBH's "Frequently Asked Questions" the answer to question 2 "Why is Grain Express being introduced?" includes the following:

*In large harvest years CBH Grain Operations needs to guarantee equitable access for all marketers to the available transport resources*

However there is in fact no shortage of trucks and trains to carry grain to port. In the last harvest ARG has advised us that they had a whole train unused. Glencore Grain had access to trucks to take grain to port in February and later (but CBH would not allow us to use them). Marketers or growers are not denied access to trucks and railways, but CBH denies access to the routes, from up country to port, where they are needed.

Glencore Grain welcomes CBH or another body organising truck and rail transport to port to bring down its cost and to ensure that it is timely. But it is misleading to say that marketers need equitable access to transport to be guaranteed by CBH. They already have the access and they don't need a guarantee from CBH.

### **8.2 Marketers are accused of gaming**

CBH says at para 8.20 of its submission:

*CBH submits that, in such a post-Single Desk environment, it is essential that grain movements are controlled by a single entity, and that Marketers are not in a position to engage in strategic conduct in grain movements to the detriment of their competitors.*

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CBH have not given any evidence of "strategic conduct" by a marketer. I have been in the grain marketing industry for decades and I do not believe thwarting other marketers' transport arrangements is something that a particular marketer would engage in.

All over the world Glencore Grain BV and its competitors arrange transport to port. Glencore's transport to port has never been thwarted or interfered with by a competitor – with the exception of the delays CBH caused to our transport this last season.

CBH has raised an entirely unfounded fear and in so doing creates a misleading impression of the need for Grain Express.

## **8.3 Unsubstantiated and other claims by Synergies Economic Consulting**

It is significant that the economists who reported on the "Benefits of Grain Express" did so without any gathering or reporting of data. Instead their report, which is attached to the CBH submission in support of the notification to the commission is variously: pap ("logistics chains are dynamic ..." (para 2.3.1), "competitive dynamic between grain marketers to strategically interact ..." (para 2.3.2), "lines of accountability" (para 2.3.5)); euphemistic ("narrow-gauge ... is inherently more vulnerable to modal shift" (para 2.3.4)); groundless discrediting (pre Grain Express "arrangements confer upon marketers a significant degree of leverage in the ralling task enabling the manipulation of rail movements to support individual marketer imperatives at the cost of the supply chain as a whole." (p 3), "gaming incentives ... antagonistic to supply chain efficiency" (para 2.3.4)); unsubstantiated (that the receivals from growers will be speeded up under Grain Express (4.1.1)); and contradicted by CBH (claims as to "enhanced rail efficiency" (para 4.3.1) are contradicted by the CBH chief executive saying that CBH planned to use more road transport (see attachment 5)).

One particular claim (at para 5.2.2) is that Grain Express is likely to promote rail competition between rail providers. This is contrary to all experience since privatization more than 10 years ago, which is that on the narrow gauge railways of Western Australia and South Australia there never has been any competition between train operators. In Victoria and New South Wales the incumbent Pacific National withdrew from operating grain trains and in New South Wales so unattractive was the prospect of rail haulage of grain that the state government gave the local grain handler, GrainCorp, free locomotives and rolling stock (see attachment 7)!

The claimed precedents for centralisation of supply chain management, the Goonyella - Dalrymple Bay system and the Hunter Valley Coal Chain Logistics Team, are both distinguishable in that they were not imposed by one party in the logistics chain (as is Grain Express) but by agreement and in the case of Goonyella the central coordination was accompanied by QR purchasing additional trains and changing its business practices (such physical changes are conspicuously absent from Grain Express).

## **9 CBH'S ADMISSIONS OF FAILURE**

CBH has variously made the following admissions about the failings or defects of Grain Express:

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- On 5 March 2009 in Farm Weekly News, on the internet: "In a remarkable admission to last week's Pastoralists and Graziers Association (PGA) convention, Mr Mencshelyi admitted the new logistics system implemented last year was not up to scratch". "What didn't work well unfortunately with Grain Express was that the system that we employed with the first deregulated harvest, we got wrong." Mr I Menschelyi was then the chief executive of CBH.
- On 24 June 2009 in a report by Reuters about CBH and its new chief executive (see attachment 5) "CBH blamed the problems on the poor state of the Western Australian rail network which limited its ability to move grain to port to fill waiting ships."
- In CBH's Mr C Tutt's letter to Glencore Grain's Managing Director of 13 May 2009 rejecting payment to Glencore of the demurrage and surge charges Glencore incurred because of the shipping delays: "Chris, I fully appreciate Glencore's concerns about the recent events, but I ask that you acknowledge that CBH incurred significant costs in this period. These costs should remain with each party ..." The significant costs were stated in the letter to be over [REDACTED]

In summary CBH admits that Grain Express was not up to scratch, was struggling, relied on a poor railway and even caused significant loss for CBH.

CBH further explains the shipping delays in para 1.1 of its Please Explain memorandum of 14 May 2009, which was in answer to a letter from the commission to CBH's lawyers of 29 April 2009 seeking information on the contribution of Grain Express to the "congestion problems" and the delays in loading vessels. CBH gave five factors causing "congestion in the WA export supply chain".

Four of the factors seem implausible or not significant: (i) the increase in the number of marketers was imminent and many marketers had already operated in the state; (ii) yes the harvest was large but half a million tonnes less than two years before<sup>3</sup> - so the capacity should have been there; (iv) the lateness of the harvest extended the overall period of deliveries but it did not cause bunching and thus congestion; and (iv) the flood of nominations for loading vessels in late January 2009 of itself did not cause congestion - a nomination should only lead to acceptance by CBH after matters such as congestion have been taken into account.

The remaining, fifth, factor given was "miscellaneous factors including underperformance of rail infrastructure" which jars with CBH on 24 June solely blaming the poor state of the railways for the shipping delays.

In our view other claims in the memorandum do not appear convincing. Fumigation activity should not be blamed for delays (para 1.12) as they are a matter to consider in whether to accept a nomination. To blame restrictions on daylight running of trains (para 1.13) is odd if the track is run down and if the restriction is self imposed (as we understood it was).

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<sup>3</sup> 2008-2009 was 8,915,000 tonnes according to ABARE Crop Report no 150, June 2009, whereas the 2006-2007 harvest was 9,436,000 tonnes.

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The fourth factor above, a flood of nominations, requires further comment. In para 1.24 of its Please Explain memorandum CBH says:

*CBH recognised that to insist on its contractual right to reject nominations, whilst preventing there being a backlog of ships on the stem could still result in damage to Australia's reputation as a grain exporter due to the large number of contractual defaults that would occur as opposed to the incurring of delay costs.*

First, this is an admission that CBH accepted nominations or requests for loading slots in full knowledge that transport of grain to fill the slots would be delayed. Secondly it shows CBH imposing delay costs on marketers. Thirdly it shows CBH second guessing how marketers should run their business. Time and resources do not permit us to establish whether CBH took the same approach to its marketing arms.

In summary putting aside CBH's implausible excuses of 14 May 2009, CBH admits that Grain Express was not up to scratch, was struggling, relied on a poor railway and even caused significant loss for CBH. Thus as a kind of exclusive dealing, Grain Express has to be characterised, for the purpose of s 90(3), as not likely to result in a benefit to the public.

## 10 OTHER GROUNDS FOR NOT SANCTIONING GRAIN EXPRESS

### 10.1 Grain Express Is Not Exclusive Dealing Within S47(2) Of The Trade Practices Act

CBH's Notification of Exclusive Dealing to the commission of 11 June 2008 described the Grain Express conduct as follows:

*In substance, CBH will offer to supply storage and handling services on the condition that Growers or 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 CBH submission supporting the notification says, without more, at paragraph 1.2 that this is conduct within s 47(2) of the Trade Practices Act. The commission accepted this characterisation, at paragraph 4.2 of its decision of 8 September 2008, also without giving reasons.

The condition described is set out in cl 15.1(a) of the Grain Services Agreement, which provides:

*It is a condition of CBH offering the Services under this Agreement that CBH transports the Grain between the Receiving Site and the Destination Site Nominated by the Grower or between Destination Sites if the Customer wishes to alter Destination Sites. CBH will be entitled to charge the Customer for the Freight whether or not the Grain has actually moved*

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*between Destination Sites.*

(The Services mentioned in this clause include Outturning or loading of grain at a port)

S 47(2) relevantly provides:

*A corporation engages in the practice of exclusive dealing if the corporation:*

(a) *supplies, or offers to supply, goods or services;*

*...*

*on the condition that the person to whom the corporation supplies, or offers or proposes to supply, the goods or services ...:*

(d) *will not, or will not except to a limited extent, acquire goods or services, or goods or services of a particular kind or description, directly or indirectly from a competitor of the corporation or from a competitor of a body corporate related to the corporation;*

The condition mentioned in this provision may be established by reference to conduct and circumstances, under s 47(13). However the CBH submission did not refer to conduct or circumstances to do this.

One is left to interpret the natural meaning of the words in the condition described in CBH's notification or the condition as it is in cl 15(i)(a) of the Grain Services Agreement. In either case the words on their face do not require the customer of CBH not to acquire "Supply Chain" coordination services or transport services from a competitor of CBH.

Thus the condition notified is not about conduct of the kind in s 47(2). A consequence is that the notification to the commission of 11 June 2008 is not in accordance with s 93(1) because it is not about CBH engaging or proposing to engage in s 47(2) conduct. For this reason the notification does not have any effect and, it is submitted, the commission's decision of 8 September 2008, which treats the notification as in accordance with s 93(3), should be withdrawn.

## **10.1 Non Compliance With The Bulk Handling Act 1967 And Bulk Handling Regulations 1967**

### **10.1.1 Incorrect claims**

CBH's bulk handling function is regulated by the Bulk Handling Act 1967 and regulations under the Act. The Act and the regulations may thus affect Grain Express. This is explained in the CBH submission, which is by lawyers, at paragraph 3.23:

*Under Grain Express, the entitlement of the owner of grain in CBH's custody is*



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*to receive an equivalent quantity, specification and quality of grain at the Destination Site nominated by that owner. This is consistent with the Bulk Handling Act and the practical impossibility of identifying distinct volumes of grain within a co-mingled stack.*

The economic submission, by Synergies Economic Consulting, goes further. At paragraph 6.3 it says of "decentralised transport" or using "pricing signals to coordinate the supply chain" that this "would tend to result in marketers being conferred an entitlement to specific parcels of grain even though such a right does not exist under the Bulk Handling Act."

At paragraph 6.3.3 Synergies refer to ss 18 (CBH being custodian of grain received) and 44 (warrants) of the Bulk Handling Act and concludes:

*In other words, grain marketers are not entitled under the Act to direct how parcels of grain are to be handled – the Act specifically recognises that CBH is able to co-mingle grain as the proprietary interest of marketers is limited to securing equivalent quality grain from CBH's bulk stocks.*

*Consequently, approaching the management of the transportation task in any manner other than allowed for under Grain Express is likely to be at variance to the rights of marketers under the Bulk Handling Act.*

As to the first of the above claims, the right to receive grain under Grain Express was limited to "Destination Sites". At the time of the submission there were just 10 receival sites and the four ports (see paragraph 3.5 of the submission). CBH has now (see attachment 6) reduced the destination sites to just the four ports and the Metropolitan Grain Centre.

On the other hand regulation 20(1) of the Bulk Handling Regulations provides that subject to s 15 of the Bulk Handling Act, which deals with riots, unforeseen circumstances etc, "before 1 March in any year (CBH) shall deliver grain at any receival point or port in the State as required by the person entitled to grain" (emphasis added). Thus for the period before 1 March the regulation entitles the warrant holder to delivery to any receival point in the state, whereas under Grain Express the warrant holder is entitled only to delivery to the four ports and the Metropolitan Grain Centre. Clearly the Grain Express entitlement is not consistent with the entitlement made under the Bulk Handling Act, contrary to the claim in paragraph 3.23 of the CBH submission.

The claim in the Synergies submission that decentralised transport by marketers would "tend" to make them entitled to individual parcels of grain, even though such a right does not exist under the Bulk Handling Act, does not accord with practice and possible practice. A marketer may hold warrants for particular grain specifications. If the marketer wants to organise the transport to port of the grain covered by particular warrants, the marketer may either agree with CBH the transport required and pay for it, or require the grain to be outturned at a particular site up country and then organised the transport to port. In neither case does the marketer have entitlement to individual parcels of grain other than in accordance with a warrant under the Act.

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The further claim in the Synergies submission that marketers cannot under the Bulk Handling Act direct how grain is to be handled needs to be considered against the following: under regulation 19(1)(b) the person entitled to the grain who wants to obtain it from CBH shall "bear any transport charges incurred in respect of grain obtained from" CBH. If the marketer agrees or acquiesces in transport being organised by CBH, the marketer must pay for that transport. However neither this regulation nor any other provision of the Bulk Handling Regulations or the Bulk Handling Act says that only CBH may organise that transport – the marketer being free to organise the transport the regulation merely requires that he pay for it. Grain Express, specifically by means of cl 15.1(a) of the Grain Services Agreement on the other hand takes away this freedom of the marketer. Thus it is not correct to say that "grain marketers are not entitled under the Act to direct how parcels of grain are to be handled" or that transportation other than under Grain Express is "is likely to be at variance to the rights of marketers under the Bulk Handling Act"

## 10.1.2 Non compliance with the Bulk Handling Act

As the four grain ports of Western Australia are a monopoly of CBH, it is appropriate that the public have a right to load grain at the ports. This they have under s 19 of the Bulk Handling Act, which provides:

*Subject to this Act and the regulations, the Company shall allow a person, on payment of the prescribed charges, the use of any bulk handling facilities and equipment controlled by it at ports in the State. (emphasis added)*

The right to use a grain port is subject only to the Act and the regulations of which the relevant provisions are: s 34 under which CBH may charge for providing handling facilities; s 46 under which the warrant holder wanting shipment is to notify CBH after it has arranged its shipping charter and is to furnish prescribed particulars; and regulation 19 under which in the case of outturning at the port "charges that are ascertainable in the particular case" are to be paid and charges "not definitely obtainable" are to be paid subject to later adjustment, transport charges are to be paid and 14 days notice is to be given before delivery commences. There is no power in CBH to make delivery to port conditional, including conditional on it organising transport.

On the other hand cl 15.1(a) of the Grain Handling Agreement makes delivery conditional on CBH organising transport and charging for transport even if it does not take place.

The conflict between the right to use the ports subject to statutory obligations and the right to use subject to the transport obligation in the Grain Handling Agreement is resolved by s 41 of the Act which provides:

*Notwithstanding any contract or agreement to the contrary, the terms and conditions provided by, or prescribed under, this Act apply to every receipt, handling and delivery of grain by the Company.*

It is submitted that under s 41 the unconditional right to use the ports prevails over the contractual right made conditional on CBH organising transport.

## 10.1.3 How this affects the ACCC

# GLENCORE GRAIN PTY LTD

ABN 29 106 378 885

Level 6, 437 St Kilda Rd Melbourne, Vic, 3004

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A problem with the commission's decision of 8 September 2008 is that it sanctions the transport requirement of Grain Express even though that requirement does not have contractual force and is ineffective because of s 19 of the Bulk Handling Act.

As a matter of public policy or good order it is submitted that a decision of the commission should not sanction a trading practice which breaches state law where the decision does not have the effect of overriding the state law. Otherwise people will be misled: they may rely on the decision and not comply with the state law even though the state law is effective.

The present is such a case. The commission's decision of 8 September 2008 does not have the power to override s 19 of the Bulk Handling Act. People will be misled by the decision for they may rely on it as authorising CBH to make the transportation requirement in Grain Express, and treat s 19 as ineffective even though under that section and related provisions the requirement is not permitted.

It is further submitted that the problem is resolved by s 118 of the Australian Constitution which provides:

*Full faith and credit shall be given, throughout the Commonwealth to the laws, the public Acts and records, and the judicial proceedings of every State.*

It is submitted that the provision applies to the commission and is given effect by the commission faithfully recognising and giving credit for the relevant state Act, which in this case is the Bulk Handling Act. On the other hand that Act is not given effect if the commission sanctions a practice not permitted by the Act.

\* \* \*

**REQUEST BY GLENCORE GRAIN PTY LTD THAT THE  
AUSTRALIAN COMPETITION AND CONSUMER COMMISSION  
REVOKE  
COOPERATIVE BULK HANDLING LTD'S NOTIFICATION OF GRAIN EXPRESS**

**Attachment 1**

# GLENCORE GRAIN PTY LTD

ABN 29 106 378 885

15 Adelaide St, Level One, Fremantle, Western Australia

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Wednesday, 28<sup>th</sup> May 2008

To whom it may concern,

As active participants and stakeholders in the Western Australian grain industry we have been well briefed on Cooperative Bulk Handling's (CBH's) proposed Grain Express system.

We have been operating as exporters in Western Australia for the past 5 years and have continually argued that the old system was anti-competitive, cumbersome and ultimately set up to service only two customers - Grainpool/Agracorp and AWB.

The complete separation of CBH operations and its marketing arms of Grainpool and Agracorp is fundamentally important for this proposed system to work, otherwise the conflicts of interest between bulk handler and marketer make the system blatantly anti-competitive.

On the provision that there be absolute separation of CBH's bulk handling business and CBH marketers Agracorp/Grainpool, we give our support for the proposed Grain Express system to proceed. Also as a condition of our support we also fully expect that, since all freight and logistics will now be managed by CBH themselves, that they share 50/50 with us in any payable/receivable demurrage and despatch as per charter party rate.

The proposed system has numerous advantages, but at its core are the efficiencies which come from having all freight centrally coordinated. CBH are the only entity in the WA Grain industry which are in a position to make this transition, as they are the only ones who are across all aspects of the entire supply chain.

There are significant inefficiencies with the current system because grain movements are not effectively coordinated and cargos are often accumulated on a vessel by vessel basis, rather than on a whole of supply chain basis.

As a result of wheat deregulation, marketers' entitlements will be far more fragmented than ever before and the proposed Grain Express system is the only way to move forward whilst allowing multiple buyers, but centrally coordinating freight to maintain supply chain efficiencies. Unless this system is in place and operating this harvest, there is a good chance that the supply chain would be quite unmanageable and/or far more inefficient.

While there is still much detail which needs to be assessed, and while we reserve our right to withdraw our support at any time, at this point in time we consider Grain Express as the only viable structure being proposed at this point.

Yours Sincerely

Chris Brooks  
MANAGING DIRECTOR  
GLENCORE GRAIN PTY LTD

**REQUEST BY GLENCORE GRAIN PTY LTD THAT THE  
AUSTRALIAN COMPETITION AND CONSUMER COMMISSION  
REVOKE**

**COOPERATIVE BULK HANDLING LTD'S NOTIFICATION OF GRAIN EXPRESS**

## **Attachment 2**

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----- Forwarded by Kevin Tidmas/melbourne/glen on 24/07/2009 03:39 PM -----

From: "McMiles, Jody" <Jody.McMiles@cbh.com.au>

To:

Date: 17/02/2009 06:06 PM

Subject: **\*\*IMPORTANT NOTICE\*\* Accelerated Accumulations proposal**

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Dear Customer

As you may be aware, CBH operations has been working on options to increase accumulation capacity above normal export resources at the four WA ports over the past couple of weeks in order to deal with the congested shipping line up for February/March/April.

To date we have been able to introduce additional road transport resources, re-work rail resources and extended operating hours at loading and discharge points and feel confident that this will result in an increase in accumulation by an additional 21-42% across the port zones.

As all exporters have and will gain benefit from the accelerated accumulation in regard to reduced delays, it is proposed that the industry comes together and all current users of the export services contribute to the additional costs that the acceleration will bring on a proportionate basis, dependant on the tonnage to be shipped compared with the percentage of acceleration that can occur within the port zone.

Example

Exporter XYZ has a vessel for 50,000mt max in Esperance.  
Esperance can accelerate accumulations by 30%

Therefore 50,000mt x 30% = 15,000mt  
 15,000mt x \$5 p/t additional costs = \$75,000

It should be noted that this proposal can only work effectively in the way it is presented today if every exporter is prepared to contribute and we therefore ask that you consider this proposal and advise your acceptance by COB, Wednesday 18<sup>th</sup> February 2009.

If any exporter does not accept the proposal and additional costs, CBH will need to review the stem and loading dates and re-offer to those marketers that are willing participants.

**Additional capacity and freight rates that will apply per port zone.**

	% Increase	Rate p/t
Geraldton	30%	\$4.83
Kwinana	42%	\$6.14
Albany	21%	\$5.86
Esperance	32%	\$4.78

These costs are only valid to clear the current ships on the stem that will take us into the latter half of April for all zones. Using the example above, marketers can calculate the costs per ship.

**Shipping Stem and expected improved loading dates.**

The ETC column is the estimated load date based on normal export resources. The SURGE column is the estimated load dates using additional resources.

<b>GERALDTON TERMINAL</b>								
Vessel Name	Norm/Accept	Client	ETA	ETC	Surge	Quantity	+/-%	Other Port/s
Ikan Tambak	28/01	Louis Dreyfus	12/02	17/05		7,500	+/-10	
Horsham	22/01	Emerald	09/02	19/02		36,000	+/-5	Esperance
Uppercourt	23/01	Elders Toepfer Grain	12/02	22/02		34,896	+/-0	Kwinana
Alameda	28/01	Cargill	06/02	27/02		35,000	+/-1	
Savannah	28/01	Grain Pool	13/02	02/03	28/02	10,000	+/-5	
						2,000		
						15,156		
Rondeau	23/01	Grain Pool	18/02	15/03	10/03	56700	+/-5	Kwinana
Fu Tong	03/02	Cargill	02/03	19/03	13/03	17010	+/-5	
Saga Andorinha	19/01	Grain Pool	05/03	27/03	19/03	33000	+/-10	
TBN	03/02	Grain Pool	15-25/02	02/04	24/03	26250	+/-5	
Bogasari Dua	28/01	AWB	10-23/03	10/04	30/03	33000	+/-10	
TBN	23/01	Grain Pool	15/28/03	16/04	03/04	26250	+/-5	
Graceful	22/1	Grain Pool	21/04	26/04	11/04	42000	+/-5	Ex Albany
TBN	02/02	Grain Pool	15-28/03	01/05	16/04	27500	+/-10	
TBN	28/01	Cargill	20/03 - 03/04	08/05	22/04	33000	+/-10	
<b>KWINANA TERMINAL</b>								



Vessel Name	Nom/Accept	Client	ETA	ETC	Surge	Quantity	+/- %	Other Port/s
Go'den Shadow	08/01	AWB	06/02	17/02		20,000	+/-10	
Bao Xing	19/01	Joe White	19/02	19/02		11,500	+/-5	
Grand Victoria	22/01	AWB	14/02	20/02		30,000	+/-10	
Uppercourt	22/1	Elders Toepfer Grain	24/02	02/03	28/02	31,038	+/-0	Ex Geraldton
Lord Byron	23/01	Cargill	07/02	03/03	02/03	50,200	+/-0	
Barra	21/01	Grain Pool	16/02	06/03	04/03	33,000	+/-10	
Great Chance	27/01	AWB	12/02	08/03	06/03	27,500	+/-10	
Accord	22/01	AWB	20/02	11/03	08/03	21,000 10,500	+/-5	
B Indonesia	4/2	Cargill	11/02	16/03	12/03	68,680	+/-1	
Lok Rajeshwari	23/01	Grain Pool	17/02	18/03	13/03	24,200	+/-10	
Spar Neptun	23/1	Elders Toepfer Grain	21/03	21/03	15/03	36,290	+/-0	Ex Albany
John F	23/01	AWB	20/02	25/03	18/03	40,590	+/-10	
ALIM	28/01	Cargill	01/03	26/03	18/03	5,250	+/-5	
Fadelsia	03/02	AWB	22/02	28/03	20/03	27,500	+/-10	
Bogasari Empat	23/01	Grain Pool	05/03	31/03	22/03	33,000	+/-10	
TBA	22/01	Grain Pool	1-14/03	02/04	23/03	26,250	+/-5	
TBN	22/01	Glencore	01-15/03	05/04	25/03	33,000	+/-10	
TBN	28/01	Grain Pool	10-23/02	06/04	25/03	1,260	+/-5	
TBN	3/01	Grain Pool	5-19/03	09/04	27/03	30,690 5,170 4,400	+/-10	
TBN	22/01	Grain Pool	6-20/03	11/04	29/03	22,050	+/-5	
Ocean Pearl	03/02	Elders Toepfer Grain	06/03	13/04	30/03	27,500	+/-10	
Bulk Leo	21/01	Hunter Grain	09/03	14/04	31/03	6,600	+/-10	
TBN	30/01	Grain Pool	10-23/03	19/04	03/04	56,700	+/-5	
TBA	23/1	Grain Pool	15-28/03	20/04	03/04	6,050	+/-10	
TBN	29/01	Cargill	16-30/3	22/04	05/04	21,630	+/-3	
TBN	30/01	Emerald	16-30/03	24/04	06/04	21,630	+/-3	
Iran Golestan	03/02	Cargill	28/04	28/04	08/04	30,906	+/-1	Ex Albany
Iran Gilan	15/01	AWB	26/04	01/05	10/04	30,450	+/-5	Ex Esperance
TBA	03/02	Riverina	23/03	03/05	11/04	21,630	+/-3	
TBN	02/02	Grain Pool	25/03 - 08/04	05/05	12/04	26,250	+/-5	
Bogasari Dua	02/02	Elders Toepfer Grain	01/04	08/05	14/04	33,000	+/-10	
TBN	30/01	AWB	20/04-4/05	14/05	18/04	68,250	+/-5	
<b>ALBANY TERMINAL</b>								
Vessel Name	Nom/Accept	Client	ETA	ETC	Surge	Quantity	+/- %	Other Port/s
MV Go Star	9/1	Grain Pool	29/01	24/02		30,000	+/-10	
Lupinus	16/01	Glencore	05/02	26/02		25,000	+/-5	
Serenata	20/01	Graincorp	11/02	27/02		45,000	+/-10	
Karim	23/12	Cargill	31/01	02/03	01/03	32,000	+/-1	Esperance

Azim	21/01	GrainPool	08/02	11/03	08/03	49,612	+/-5	
F&K	12/01	Glencore	27/01	16/03	12/03	24,675	+/-5	
						2,515		
Spar Neptun	23/1	Elders Toepfer Grain	12/02	21/03	16/03	29,210	+/-0	Kwinana
Hellenic Wind	23/01	GPPL	18/02	31/03	24/03	58,000		Esperance
Genco Acheron	20/01	GPPL	20/02	09/04	01/04	54,000		
Ace Bridge	20/01	AWB	12-26/02	14/04	05/04	26,250	+/-5	
Graceful	22/01	GPPL	28/02	21/04	11/04	40,000		Geraldton
Iran Golestan	03/02	Cargill	12/02	28/04	16/04	39,460	+/-1	Kwinana
TBN	02/02	AWB	1-14/03	03/05	20/04	27,500	+/-10	
TBN	30/1	Grain Pool	15-29/03	07/05	23/04	21,000	+/-5	
TBN	03/02	Grain Pool	15-28/03	14/05	29/04	38,500	10% less	
<b>ESPERANCE TERMINAL</b>								
Vessel Name	Nom/Accept	Client	ETA	ETC	Surge	Quantity	+/-%	Other Ports
Elegant Sky	13/01	Grain Pool	01/02	14/02		20,000	+/-5	
						20,000		
Orchid Ocean	19/01	Grain Pool	04/02	22/02		30,000	+/-10	
Captain Diamantis	22/01	Glencore	03/02	27/02		55,000	+/-10	
Joalmi	22/01	Grain Pool	06/02	01/03		30,000	+/-10	
Karim	23/12	Cargill	04/03	05/03	04/03	18,000	+/-1	
Horsham	22/01	Emerald	23/02	09/03	07/03	25,200	+/-5	Geraldton
Lake Dahlia	23/01	Toepfer Int	14/02	20/03	16/03	60,500	+/-10	
New Dynamic	29/01	AWB	22/02	27/03	21/03	38,500	+/-10	
Hellenic Wind	23/01	Grain Pool	31/03	31/03	23/03	12,600	+/-5	Ex Albany
Shi Dai 3	03/02	Grain Pool	17/02	10/04	30/03	55,000		
Baltic Frontier	23/01	Grain Pool	16/03	14/04	02/04	21,000	+/-5	
Gant Vision	03/02	Grain Pool	03/03	20/04	06/04	21,000	+/-5	
						10,500		
Iran Gilan	15/01	AWB	17/03	28/04	12/04	43,050	+/-5	Kwinana
TBA	03/02	Grain Pool	1-14-03	03/05	16/04	26,250	+/-5	

Please note that whilst CBH Operations will be putting in every effort and resource to improve all loading dates in all zones, that port terminal space, insect detections, fatigue breaks, fumigation cycles, customer specifications etc can all impact on the final dates and these can only be used as a guide and are subject to change.

Your response by COB, Wednesday 18<sup>th</sup> Feb with acceptance of this proposal is requested, and if you would like to discuss further please contact us.

Kind regards

**Jody McMiles**  
 Manager Customer Accounts  
 CBH Group  
 30 Delhi Street, West Perth WA 6005

M: 0427 385 004  
P: (08) 9237 9776  
F: (08) 9237 9827  
E: Jody.McMiles@cbh.com.au



**Bulkwest | CBH Grain | Grain Pool | Grain Operations**

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**REQUEST BY GLENCORE GRAIN PTY LTD THAT THE  
AUSTRALIAN COMPETITION AND CONSUMER COMMISSION  
REVOKE**

**COOPERATIVE BULK HANDLING LTD'S NOTIFICATION OF GRAIN EXPRESS**

**Attachment 3**

Receival Site	Destination	CBH 04/05	CBH 05/06	CBH 06/07	CBH 07/08	CBH 08/09	Surf
AINSWORTH	Kwinana Terminal	16.40	16.84	17.06	21.38	23.88	
ALDERSYDE	Kwinana Terminal	12.14	12.57	12.62	15.80	17.06	
ARDATH	Kwinana Terminal	17.30	17.86	17.99	22.73	25.44	
ARRINO	Geraldton Terminal	10.44	10.86	10.86	13.09	14.81	
AVON	Kwinana Terminal	7.99	10.61	8.31	10.63	12.17	
BADGEBUP	Albany Terminal	14.64	15.30	15.23	18.47	21.24	
BALLAYING	Albany Terminal	15.37	16.91	15.98	19.08	21.37	
BALLIDU	Kwinana Terminal	16.08	18.41	16.72	20.64	22.77	
BEACON	Kwinana Terminal	19.27	22.91	20.16	24.81	27.53	
BEAUMONT	Esperance	6.43	6.65	6.68	7.25	8.32	
BENCUBBIN	Kwinana Terminal	18.08	20.11	18.81	23.57	26.21	
BENDERING	Kwinana Terminal	18.07	20.55	18.79	23.57	26.53	
BEVERLEY	Kwinana Terminal	10.28	10.73	10.69	13.38	14.58	
BINDI BINDI	Kwinana Terminal	15.23	16.48	15.84	20.23	22.03	
BORDEN	Albany Terminal	6.49	8.29	7.50	9.53	11.00	
BROOKTON	Kwinana Terminal	8.85	10.77	9.46	11.98	13.05	
CALINGIRI	Kwinana Terminal	10.81	13.74	12.13	15.70	16.93	
CARNAMAH	Geraldton Terminal	9.66	14.42	12.05	14.59	16.13	
CRANBROOK	Albany Terminal	5.97	7.87	6.33	7.71	8.70	
MERREDIN	Kwinana Terminal	14.22	12.98	15.85	20.12	22.36	
MGC	Kwinana Terminal	0.66	0.66	2.50	5.22	6.00	
MINGENEW	Geraldton Terminal	6.83	9.31	7.73	9.38	10.46	
NARRAKINE	Kwinana Terminal	12.00	11.96	12.35	12.45	13.90	
WAGIN	Albany Terminal	13.41	16.84	15.13	18.27	19.73	
average		\$ 11.94	\$ 13.48	\$ 12.78	\$ 15.82	\$ 17.59	

Costs	Total Surge + Frt	04/05 VS 05/06	05/06 VS 06/07	06/07 VS 07/08	07/08 VS 08/09	Total Surge + Frt
6.14	30.02	2.65%	1.31%	25.35%	11.68%	25.71%
6.14	23.20	3.53%	0.44%	25.20%	7.97%	35.99%
6.14	31.58	3.28%	0.71%	26.35%	11.93%	24.13%
4.83	19.64	4.00%	0.00%	20.50%	13.18%	32.61%
6.14	18.31	32.76%	-21.68%	27.92%	14.53%	50.43%
5.86	27.10	4.51%	-0.46%	21.29%	14.97%	27.59%
5.86	27.23	10.04%	-5.50%	19.41%	12.01%	27.42%
6.14	28.91	14.52%	-9.18%	23.47%	10.29%	26.97%
6.14	33.67	18.89%	-12.00%	23.07%	10.96%	22.30%
4.78	13.10	3.43%	0.52%	8.53%	14.82%	57.42%
6.14	32.35	11.23%	-6.47%	25.28%	11.23%	23.42%
6.14	32.67	13.74%	-8.56%	25.42%	12.57%	23.14%
6.14	20.72	4.30%	-0.34%	25.15%	9.02%	42.10%
6.14	28.17	8.17%	-3.86%	27.69%	8.93%	27.87%
5.86	16.86	27.66%	-9.48%	27.05%	15.46%	53.27%
6.14	19.19	21.72%	-12.18%	26.61%	8.99%	47.03%
6.14	23.07	27.15%	-11.75%	29.40%	7.85%	36.27%
4.83	20.96	49.25%	-16.42%	21.06%	10.60%	29.94%
5.86	14.56	31.76%	-19.53%	21.87%	12.84%	67.32%
6.14	28.50	-8.73%	22.13%	26.94%	11.14%	27.46%
6.14	12.14	-0.53%	280.81%	108.82%	14.95%	102.32%
4.83	15.29	36.25%	-16.93%	21.33%	11.53%	46.18%
6.14	20.04	-0.33%	3.26%	0.85%	11.59%	44.18%
5.86	25.59	25.57%	-10.15%	20.75%	8.02%	29.69%
\$	23.45	14.37%	6.03%	26.22%	11.54%	38.78%

**REQUEST BY GLENCORE GRAIN PTY LTD THAT THE  
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**COOPERATIVE BULK HANDLING LTD'S NOTIFICATION OF GRAIN EXPRESS**

## **Attachment 4**

	Road	CBH current
	\$ per ton	\$ per ton
<b>Geraldton Zone</b>		
Mingenew	9.6	10.78
Carnamah	15.85	16.63
<b>Kwinana Zone</b>		
Avon	11	12.17
Wongan Hills	18.4	21.04
Calingari	14.72	17.45
Merridin	24	23.05
Corrigin	19.6	22.09
Brookton	12.32	13.45
Narrakine	16	14.3
<b>Albany</b>		
Wagin	18.4	20.34
Cranbrook	8.4	8.97
Borden	10	11.34
Lake Grace	28	21.22
<b>Esperance</b>		
Beamont	10	8.32
Lake King	22	20.8
Cascade	8.8	9.4
Raventhorpe	15.6	15.15



**REQUEST BY GLENCORE GRAIN PTY LTD THAT THE  
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**COOPERATIVE BULK HANDLING LTD'S NOTIFICATION OF GRAIN EXPRESS**

## **Attachment 5**

13:56 24Jun09 RTRS-INTERVIEW-UPDATE 1-Australia's CBH sees grain delays solved

- \* CBH expects strong start to 09/10 grain export programme
- \* Western Australia supply reliability improved
- \* CBH plans expansion into eastern Australia

(Adds quotes, detail, background)

By Bruce Hextall

SYDNEY, June 24 (Reuters) - Australia's largest grain handler, CBH Group, expects a strong start to exports when the country's next wheat harvest cranks up at the end of the year, saying transport bottlenecks will be addressed by then.

The farmer-owned firm, which handles most of the grain in the country's top wheat-exporting state of Western Australia, said on Wednesday that port and land-transport logistics would be better managed for the next harvest starting in November.

The government's commodity forecaster expects Western Australia's 2009/10 wheat crop to yield 7.482 million tonnes, less than the 8.9 million tonnes harvested last year, but rain forecast for the remainder of this week over the state's key cropping areas could boost the estimate.

"We think the world can rest easy and think of Western Australia as a reliable origin and will be at next harvest," CBH's new chief executive, Andy Crane, told Reuters in an interview.

Earlier in the year, a surge in export demand as the Western Australian wheat crop was harvested stretched the firm's grain handling capacity to the limit, causing shipping delays.

CBH blamed the problems on the poor state of the Western Australian rail network which limited its ability to move grain to port to fill waiting ships.

Crane said CBH planned to use more road transport and it was talking to the state government about improving the rail system.

"The problem is not the capacity of the up-country receival sites. We have capacity that far exceeds the largest crop ever produced, and we have capacity at the ports to outload the crop several times in a year but the problem is the pipeline between the two," said Crane.

"Without investment, we will see a continuing drift from rail to road."

Privately owned rail track operator WestNet Rail is planning to close some country rail lines unless state and federal governments commit A\$400 million (\$318 million) to upgrading Western Australia's grain freight network.

"We're trying to get certainty from government and rail operators as to the balance between road and rail, so we can manage the logistics and have grain arrive at port in a timely manner, is still a challenge," said Crane.

CBH is prepared to divert investment into improving the rail network if it sees similar support from the rail lines themselves, Crane added, saying CBH believed at least 50 percent of the state's grain should be transported by rail.

The group is also preparing to invest in expanding its grain accumulation and marketing activities, and is eyeing opportunities to expand into eastern Australia.

Crane said its farmer ownership structure may give it an edge when competing against existing east coast players such as GrainCorp Ltd. <GNC.AX> and Cargill Inc [CARG.UL].

The sector is ripe for consolidation, with Canadian group Viterro's <VT.TO> moving ahead with a \$1.2 billion takeover of Australia's largest listed grain handler, ABB Grain Ltd <ABB.AX>.

CBH's farmer ownership structure is seen by some as an obstacle to it taking part in industry consolidation, but Crane disagrees.

"There are many ways in which CBH can take part in consolidation if it is in the interests of our growers and the other parties that are interested are open minded in how to do that."

(\$1=A\$1.26)

(Editing by Ben Tan)

((bruce.hextall@thomsonreuters.com; +612 93731236; Reuters Messaging  
[bruce.hextall@thomsonreuters.com](mailto:bruce.hextall@thomsonreuters.com)))

((If you have a query or comment on this story, send an email to  
[news.feedback.asia@thomsonreuters.com](mailto:news.feedback.asia@thomsonreuters.com)) Keywords: AUSTRALIA CBH/INTERVIEW

Wednesday, 24 June 2009 13:56:29

RTRS [Historical News] {EN}

ENDS

REQUEST BY GLENCORE GRAIN PTY LTD THAT THE  
AUSTRALIAN COMPETITION AND CONSUMER COMMISSION  
REVOKE

COOPERATIVE BULK HANDLING LTD'S NOTIFICATION OF GRAIN EXPRESS

## **Attachment 6**

~~I would very much appreciate some confirmation of this email and the previous two emails so we can make arrangements to meet and supply the relevant evidence to support our claims in the very near future.~~

CHRIS BROOKS  
Managing Director  
GLENCORE GRAIN  
Phone 03 9864 2000  
Mobile 0419 505404

----- Forwarded by Chris Brooks/melbourne/glen on 25/06/2009 04:15 PM -----

From: "McMiles, Jody" <Jody.McMiles@cbh.com.au>

To:

Date: 25/06/2009 03:35 PM

Subject: Changes to Grower Nomination Sites and Domestic Outturns for 09/10 season

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Dear Customer

As you are aware CBH Operations introduced Grain Express last year to simplify the management of the grain logistics task in Western Australia.

At the outset we expected Grain Express to be a three year project in order to continually review and identify key changes to ensure the system was being utilised to its full advantages.

A review of the first year of operation has identified a number of changes that will be implemented for the 09/10 season that will impact primarily on grower nominations and the domestic users of the network.

#### **Destination Sites for Grower Nominations**

The actual nominations by growers to Domestic Destination Sites for the 08/09 season were less than one percent (1%). Subsequently, the access of stocks for outturns from these sites was managed between customers and CBH with stock entitlement being moved from the ports back to the Domestic Destination Sites post harvest for outturn.

Therefore, this harvest we will be reducing the number and function of the 'destination sites' growers can nominate grain to down to the four (4) ports and MGC.

This means that customers will only receive grain entitlement at the four (4) ports and MGC should they decide to set up services. However, customers will still have options to move entitlement back to the up-county 'Domestic Sites' for grain outturn and does not mean that there will be a reduction in service or grain availability for the domestic market

#### **Domestic Outturn Sites**

The sites that will be available for outturn will be determined and communicated later in the year through the 'Domestic Site Guidelines'.

It is envisaged that there will be similar outturn sites as last year that will operate under specific timeframes and outturn capacities to provide flexibility and access to the domestic users.

#### **Freight**

Where customers move their entitlement back to the Domestic Outturn Sites, CBH Operations will rebate 100 percent (%) of the freight from the nomination site. Movements of entitlement towards port as in the case of MGC to Kwinana, the customer will pay the difference.

When the season and variable freight rates have been determined later in the year we will be in a better position to provide additional information, however it is anticipated that the freight rates to MGC will be significantly better than last year, making it a freight friendly site for domestic outturns.

Please accept this correspondence as forward notice of the changes that will be taking place for the 09/10 season. Later in the year we will arrange meetings where necessary to go through the changes in more detail, however if you have any concerns or questions in the meantime please do not hesitate to contact [customersupport@cbh.com.au](mailto:customersupport@cbh.com.au) and we will get back to you.

Kind regards

Jody McMiles  
Manager Customer Accounts  
CBH Group  
30 Delhi Street, West Perth WA 6005  
M: 0427 385 004  
P: (08) 9237 9776  
F: (08) 9237 9827  
E: Jody.McMiles@cbh.com.au



**Bulkwest | CBH Grain | Grain Pool | Grain Operations**

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COOPERATIVE BULK HANDLING LTD'S NOTIFICATION OF GRAIN EXPRESS

## **Attachment 7**

# Rail rolling stock given away to grain firm

Debra Jopson is a Senior Regional Reporter at the Sydney Morning Herald.

THE NSW Government has given away 18 locomotives and 180 wagons worth millions of dollars to a giant grain company just months before a federal inquiry is due to report on whether rail is the best way to transport the state's wheat.

GrainCorp, a publicly listed company, was given the trains at the end of May as part of a deal to keep railway lines operating, even though the Federal Government's \$3 million NSW Grain Freight Review is yet to recommend the best way to move grain in this state.

The Minister for Transport, David Campbell, did not tell the public about the agreement, leaving it to GrainCorp to make an announcement to the stock exchange on May 29, the day it took possession of the trains.

Timothy Bush, a former Cowra Shire councillor who made a submission to the federal review, said: "The recommendations were supposed to help the NSW and federal governments make the decision. The largest part of the decision has already been made - to keep the trains running - and the minister has said nothing about it."

The review chairman, Des Powell, is finalising his report and would give it to Mr Campbell and the federal Transport Minister, Anthony Albanese, a spokesman for the Canberra inquiry said.

GrainCorp, which has assets of \$440 million, including silos, mills and port terminals, has made the government deal as it faces prosecution by the RIA for

alleged offences as a receiver of grain delivered by severely overloaded vehicles.

A spokesman for GrainCorp, David Ginns, would not comment on the Supreme Court action, but the corporation's 2007 annual report said it faced \$18.2 million in fines and that it denied liability.

Mr Campbell did not respond to a *Herald* question about the value of the trains, but said the deal had secured a grain haulage operator to service the branch lines for a further five years after a transparent competitive process.

It did not pre-empt the federal review, which would identify the most sustainable long-term solutions for moving grain efficiently, he said.

Mr Ginns said GrainCorp had not yet put a value on the trains, but their real worth was in having them run by a capable organisation, rather than being lost to the industry.

The agreement follows a push by farmers' groups and the Greens to keep grain lines open, averting any switch to road freight after the previous train operator, Pacific National, announced a withdrawal by the end of the financial year just gone.

However, just as rains have produced hope of a big crop, five councils around Cowra - which will spend \$50,000 on a consultant to support the case for the trains to run - fear the train deal will lead to wheat from their area being pushed onto trucks. GrainCorp has given no undertaking it will operate five lines in the area that the NSW Government has marked for closure.