

GLENCORE GRAIN PTY LTD

ABN 29 106 378 885

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

15 July 2010

Mr D Hatfield
Acting General Manager - Adjudication Branch
Australian Competition and Consumer Commission
23 Marcus Clarke Street
Canberra ACT 2601

david.hatfield@accc.gov.au

Your ref C2008/945-06

Also for the attention of gina.dettorre@accc.gov.au
gavin.jones@accc.gov.au

Dear Mr Hatfield,

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

Thank you for your letter of 18 June 2010 inviting comments on the commission's review of the exclusive dealing notification by CBH for Grain Express.

Glencore Grain confirms its request to the commission fully 11 months ago, by letter of 13 August 2009, to revoke the notification for Grain Express, by the commission notifying CBH, under s 93(3) of the Trade Practices Act on the grounds given in our letter, namely:

- 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.

GLENCORE GRAIN PTY LTD

ABN 29 106 378 885

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

Particulars of grounds to revoke

1. Substantial lessening of competition

1.1 Influences on competition in transport to port

Competition in the market for transport to port in Western Australia is influenced by the availability of grain transport services, the economics of building and operating ports and up country storages in competition with CBH and by the domestic market for grain.

1.2 WA grain transport services

Grain haulage services in Western Australia comprise the rail service of Australian Railroad Group, hundreds of road carriers operating semi trailers, B Doubles and road trains, and farmers with their own trucks.

In addition, to meet the increased or disaggregated demand since 2008, following export deregulation, it was possible for road and rail operators from other states to bring their equipment to the state. In the case of rail this was because of the open access regime on Western Australia's Westnet railways, the notorious underuse of those railways and thus its abundant capacity, and the relatively poor wheat crop in the east freeing up both standard gauge rolling stock that could be used on the line to Kwinana and narrow gauge rolling stock that was underutilised in Queensland for use on the narrow gauge Westnet network. Since 2008 SCT Logistics (which has operated Perth -Melbourne trains since 1995) and Freightliner have both been reported to be examining commencing bulk haulage train operations, making them potential entrants to the market to haul grain to port. Furthermore AWB and GrainCorp each had experience organising train services. As these companies were active in the WA grain export market they were a potential entrant to the grain transport market there.

Glencore Grain Pty Ltd buys and sells grain in Australia. In Victoria it has in recent years been the largest exporter of grain from that state. Glencore Grain operates a fleet of 100 trucks in New South Wales, Victoria, South Australia and Queensland. Glencore Grain had and has the capacity and operational experience to divert trucks to Western Australia if transport needs so warranted. Glencore Grain has vast experience in coordinating transport to port, for its worldwide operations handle a grain tonnage that dwarfs CBH's.

The railways of Western Australia had no legislated monopoly to haul grain to port and in fact the railways have had for years a declining share of the transport task to port and road has had an increasing share. The railways had been privatized in 2001 and since then the Westnet railway network, which served the wheat producing areas, was expressly open access.

GLENCORE GRAIN PTY LTD

ABN 29 106 378 885

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

Glencore Grain has an agreement with a train operator to haul grain to WA ports which cannot be activated because of Grain Express.

1.3 State of competition before Grain Express

Thus the state or condition of the market for transport of grain to port in all of Western Australia in late 2008 before Grain Express was one where there was actual competition between road and rail and there was potential for new road and rail entrants to meet the increased or disaggregated demand from the many new accredited exporters.

1.4 How Grain Express lessens competition to one provider, CBH

Grain Express requires CBH to be the sole provider of transport of grain to port. By CBH (i) making it a condition, under its 2008 Grain Services Agreement, of receipt of grain at its ports and receipt of grain at its upcountry storages that only CBH could organise transport of the grain to port and (ii) CBH controlling all the storages and all the ports, the only buyer of road and rail haulage of grain to port, and only provider of such haulage, was thus CBH.

A modification occurred from 1 October 2009 when CBH supplemented its Grain Services Agreement with the Port Terminal Services Agreement which was part of its Port Terminal Services Access Undertaking. From that date the GSA dealt, relevantly, with receipt of grain into CBH upcountry storage whether from farmers or others such as Glencore Grain, and outturning of grain from that storage, including its outturning at ports. This was subject to the following provisions (with our emphasis) that make it express that CBH conducts all transport:

Recital A

CBH operates grain storage and handling facilities in Western Australia and conducts all transport between those facilities as a condition of access to the facilities.

Clause 17(1)(a)

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 PTSA relevantly dealt with receipt of grain into port. Cl 4 of the PTSA incorporated the Port Terminal Rules into the PTSA. The Port Terminal Rules provide for loading slots to be auctioned. A

GLENCORE GRAIN PTY LTD

ABN 29 106 378 885

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

successful bidder for a loading slot has but five days after the auction to advise CBH how it will transport grain to port. For rule 6.1(d) provides:

By no later than 5 Business Days after completion of each Phase 1 Auction and each Phase 2 Auction, a Customer must nominate the supply chain arrangements to be used to deliver the relevant Grain to the Port Terminal Facility (ie, whether serviced under a GSA or another supply chain solution not provided under a GSA).

The slot for which a bid would have been made would in practice be two to 11 months ahead and without a specific quantity and location of grain to fill the slot. Thus in the five days immediately after a successful auction bid there would be no particular grain as to which transport could be organised by the bidder. Consequently the only option for the bidder was to use Grain Express and to make a nomination to this effect for the purpose of rule 6.1(d). Rule 6.1(d) remains in force despite a variation proposal by CBH in recent days.

Thus under the two contracts that CBH used to receive its wheat, the only way that Glencore Grain could transport its wheat to port was:

- in terms of the GSA, by allowing CBH to conduct all transport from upcountry to port; and
- in terms of the PTSA, by allowing the same thing by nominating, in the jargon of Port Terminal Rule 6.1(d), the "supply chain service arrangements ... serviced under a GSA".

Both contracts give effect to Grain Express, the GSA expressly and the PTSA via the phoney nomination choice it requires under Port Terminal Rule 6.1(d).

1.5 Exclusion of Glencore Grain from transport to port

For Glencore Grain to conduct its own transport to port would have put it in breach of the GSA. For Glencore Grain to nominate its own transport to port after successfully bidding for a shipping slot was and is impossible because the grain to be transported was in almost all cases still to be sourced.

For barley and canola Glencore Grain is party to a "2009/10 Season Grain Services Agreement For Standard Grain Storage And Handling Services" with CBH which incorporates the above relevant features as to wheat so as to impose Grain Express as to these grains also.

1.6 Exclusion of other transport suppliers

Every other successful bidder for a shipping slot was and is in exactly the same position as Glencore Grain, and cannot use any other transport supplier but CBH.

GLENCORE

GRAIN PTY LTD

ABN 29 106 378 885

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

1.7 Substantial lessening of competition in transport to port

The direct result of Grain Express being imposed on Glencore Grain and the potentially up to 20 other grain marketers was that there was only one supplier of transport to port, namely CBH, and no competition in such supply. There has been a substantial lessening of competition or, to be correct, competition has been eliminated.

The commission's acceptance of CBH's notification of Grain Express has been to extend CBH's own iron curtain around its upcountry storages and around its ports - iron because of CBH's excessive withdrawal or outturning charges - to the road and rail lines and services from the storages to the ports. Thanks exclusively to Grain Express CBH has a monopoly of the road and rail lines and services.

The further consequence of Grain Express allowing CBH total control of transport to port is to allow it to organise transport to favour its own grain trading, processing and packing businesses, to the absolute disadvantage of other traders. Glencore Grain should have the same freedom and opportunity.

1.8 Competition from other ports and storages

The tying of upcountry transport to storage and port usage - which is Grain Express - would not lessen competition if there were storages and ports other than those of CBH.

As the commission would be aware, there are no other such ports or storages.

Nor is there the prospect of other ports and storages being developed (which would provide a form of competition) because of: (i) the ample capacity of the existing ports and storages and (ii) CBH's charging a levy, of approximately \$5 a tonne for storage regardless of the period of the storage as part of the port loading fees totalling \$17.10 (comprising \$3 upfront fee, \$14.10 export fee). We know that \$5 of the port loading fee is a levy because in the other states port loading fees are about \$10 a tonne. We know that the levy is to cover storage because CBH does not elsewhere charge for storage.

Thus if Glencore Grain wanted to develop its own storage it would have to pay the costs of that storage as well as the \$5 levy component of CBH's port loading fees, which makes the development uneconomic, especially as Glencore Grain typically requires a month or two of storage, which in a free market, as in the other states, costs about a \$1 a tonne a month.

If, further, Glencore Grain wanted to develop its own port, using CBH storage upcountry it would have to pay an outturn fee of \$8.50 a tonne to CBH which makes the exercise uneconomic. Note that CBH does not charge itself or its customers this same outturn fee when it outturns grain from CBH upcountry sites for its own export.

GLENCORE

GRAIN PTY LTD

ABN 29 106 378 885

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

If there was no Grain Express there would be other grain transporters in the market who would expose the extortionate \$8.50 outturn fee and the levy component of the port loading fee. CBH's pricing structure would be challenged. However while Grain Express continues so does the pricing structure which in turn makes uneconomic the development of competitive ports and storages.

2 Detriment to the public

2.1 Demurrage and surge charges 2009

The direct effect of Grain Express was disastrously felt by Glencore Grain at the end of January 2009 when CBH failed to deliver grain to port to meet Glencore Grain's shipping slots, failed to use all the trains available to it and refused Glencore Grain permission to organise alternative road transport. The details follow.

Under the 2008-2009 version of the GSA to which Glencore Grain was party with CBH, Glencore Grain had five "EOI Export Windows" or shipping slots at Kwinana, Albany and Esperance for a total of 295,000 tonnes of barley and canola. The total export of barley and canola from Western Australia in 2008 - 2009 was of the order of 2 million tonnes making Glencore Grain's export shipping slots 15% of the total.

For the slot, or laycan, at Albany which was available from 23 to 31 January 2009, Glencore Grain nominated on 12 January 2009 the vessel "F&K" which nomination CBH accepted. Under the then version of the GSA CBH was then obliged to get the necessary quantity of barley and wheat (since by agreement some wheat had been substituted for barley) to Albany to enable loading within this laycan. From 23 January onward no loading had occurred or was in prospect.

At this time I had phone discussions on the problem of delays in transport to port with [REDACTED]

[REDACTED] all of CBH, and offered for Glencore Grain to itself truck the grain to port for the F&K and the other ships which we had chartered, and thus to reduce the delay in their loading. These offers were rejected by CBH.

The delays continued and the F&K was not loaded until 7 March 2009, which was 36.538 laytime days late, which incurred Glencore Grain demurrage of \$US155,000.

There were similar delays with the four other shipping slots, incurring for Glencore Grain further demurrage of \$US808,868.70, a total demurrage charge of \$US1,463,868.70.

The delays were exacerbated by CBH reducing the number of train sets it used by one in September 2008 to save money and not resuming using this set until the crisis in loading ships in February 2009.

GLENCORE GRAIN PTY LTD

ABN 29 106 378 885

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

The financial impact was exacerbated by CBH demanding on 17 February 2009 that Glencore Grain and other exporters pay a surge charge of between \$4.78 and \$6.14 a tonne and that the demand be accepted within 24 hours on penalty of loss of shipping slots. A total of \$515,837.64 in surge charges was paid by Glencore Grain to CBH under protest. Of this surge charge some 55% has been repaid to us without interest leaving the sum of \$232,000 unrefunded.

2.2 Demurrage charges 2010

In January this year we incurred demurrage charges of \$US274,000 due to CBH's late loading of the Priscilla Venture at Kwinana. CBH failed to bring grain to port for loading, advising us of this only at the last minute.

Without Grain Express Glencore Grain could have organised its own transport and eliminated or reduced substantially its demurrage charge, eg in the case of the F & K the laytime would have been either nil or say up to 4 days but not the astronomical 36 and a half days late that it took CBH. In the case of the Priscilla Venture CBH's negligence in not getting the grain to port in time would have been avoided altogether if we had been able to organise the transport ourselves.

2.3 Sharing of the transport task prevented

Glencore Grain have always recognised the value of central or joint organisation of transport. The task in hauling grain to port in Western Australia is enormous. It does not want to displace CBH in this task, nor does Glencore Grain wish to be excluded from the task. Like the airlines, CBH and Glencore Grain should be able to compete in transport to port, but at times loads will be shared and jointly organised and when there are delays one can help the other.

Grain Express prevents this cooperative approach to transport, which is a detriment to the public.

2.4 Cumulative demurrage and surge charges

Without Grain Express Glencore Grain would not have been held to ransom by CBH to pay the surge charge of over \$500,000, for CBH could have ignored the demand (which incidentally was entirely devoid of any contractual right) and organised its own transport. Indeed having organised its own transport the occasion for the demand would probably not have arisen.

Every exporter would have incurred or been at risk of incurring demurrage and surge charges of the kind Glencore Grain incurred. Each delayed loading would have caused breach of contract or penalty or embarrassment or the need to make amends with the export customer. Collectively these breaches lowered the reputation of Western Australia and exporters from the state as reliable suppliers of wheat and other grain.

GLENCORE

GRAIN PTY LTD

ABN 29 106 378 885

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

Together these demurrage and surge charges and the loss of reputation are a public detriment that has resulted from Grain Express.

2.5 Increased transport costs

Glencore Grain regularly and each month monitors road and rail transport costs by obtaining prices from carriers. We calculate average charges by road and rail carriers are as follows in the mainland states:

State	Average Road Rate CPK	Average Rail Rate CPK
QLD	8.5	8.5
NTH NSW	9.5	9.5
STH NSW	8.5	8.5
VIC	9.5	9.2
SA	9.5	9
WA	8	6

In the Kwinana zone Glencore Grain would assume that CBH would charge somewhere around 7 cents per kilometre given they do 75% of their movements on rail. However CBH's grower freight rates in the Kwinana zone average 8.3 cents per kilometre which would mean they could do everything by road and still make money. There is some narrow gauge rail in Kwinana zone which might run at 7 cents per kilometre but this should not push the average up anywhere near 8.3. Thus in the Kwinana zone CBH's transport charges are some 1.3 c a tonne higher than what would be available from others.

We refer you also to secs 3.2 to 3-4 of our letter of 13 August 2009 on increases in transport rates under Grain Express and attachment 3 showing increased transport rates.

2.6 Further public detriments caused by Grain Express include:

- the 2009 surge charges, which were nothing more than a levy for transport (see sec 2.4 of letter of 13 August last year), and the continuation of surge charges under the present PTSA and Port Terminal Rules,
- the denial of cheaper road transport (see sec 3.3 of 13 August letter) and overcharging (sec 3.4 of 13 August letter) and

arbitrage, that is (as set out in sec 3.10 of our submission of 5 May to the Productivity Commission) Grain Express allows CBH:

GLENCORE

GRAIN PTY LTD

ABN 29 106 378 885

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

- o freight arbitrage, that is agreeing to move to port at a set price to the customer or a marketer grain at an up country storage but meeting that obligation with grain closer to port - CBH pocketing the saving in transport costs.
- o quality arbitrage, that is agreeing to create at a port or other storage grain of a particular quality based on the cost of transport of the component grains to the storage, but meeting that obligation with grain closer to the storage - CBH pocketing the saving in transport costs.

4. Absence of public benefit

We have explained our position on this at sec 6 of our letter of 13 August 2009.

Since then CBH has had the opportunity to measure and publish public benefit from Grain Express before the Productivity Commission during its inquiry, and generally. There is not a scrap of measurable public benefit put forward by CBH.

However just seven days ago CBH emailed its growers to lobby Ms D'ettorre directly with the costs and benefits of Grain Express. The text of CBH's email (which we have put into a contrasting font) is as follows:

What happens if Grain Express goes?

As you may be aware, the Australian Competition and Consumer Commission (ACCC) recently notified the CBH Group of its intention to review Grain Express.

Grain Express is the logistics co-ordination system introduced by CBH in 2008 to ensure that, in the deregulated grain marketing environment, the right grain got to port at the right time and in the most efficient way possible.

If the ACCC revokes its decision to allow Grain Express, you will notice:

- Total freight COSTS WILL INCREASE
- Storage and Handling Costs WILL INCREASE
- Grower Weighted Averaging - will be HIGHLY UNLIKELY to go ahead
- LESS EFFICIENCY at CBH sites
- LESS CAPACITY available at ports
- LIMITED ACCESS to marketers

GLENCORE

GRAIN PTY LTD

ABN 29 106 378 885

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

Grain Express has delivered a huge range of benefits to growers and marketers in the past two years of operation. There has been **NO increase in storage and handling costs**, growers received a total of **\$8 million in freight rebates** and it's provided **easy access to all marketers**. Click [here](#) for a full list of the benefits Grain Express has delivered to growers and marketers.

With more than 25 buyers requesting to access and transport individual parcels of grain stock from 190-plus country receival sites the Western Australian grain storage, handling and transport system is under threat of severe disruption without Grain Express.

What can you do to help?

If you want to ensure Grain Express remains in place and protects the benefits of YOUR CBH system, then please share your support of Grain Express with the ACCC by contacting:

Gina D'Ettorre, Contact Officer for the Grain Express Review

Em: gina.dettorre@accc.gov.au

gavin.jones@accc.gov.au

Ph: (03) 9290 1483

Fax: (02) 6243 1199 - - - Click [here](#) for an easy-to-use fax template.

All feedback must be provided to the ACCC by **Thursday, 15 July 2010**.

Need more information on the Grain Express review?

Please contact the CBH Group Grower Service Centre on 1800 199 083 or visit us at www.cbh.com.au

We request the commission note:

- a. The CBH email provides a link to the "full benefits" of Grain Express. That link does not work and the CBH website does not appear to contain the "full benefits" of Grain Express.
- b. The email contains no calculations or supporting material for the claims of increased cost and lower efficiency and capacity if Grain Express ended.
- c. The meaning of 'grower weighted averaging' is unclear. This might be a reference to comingling which elsewhere CBH have claimed would be threatened if Grain Express ended. However the facts are that on the east coast where there is competition in storage and

GLENCORE

GRAIN PTY LTD

ABN 29 106 378 885

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

logistics a commingled system has been running for many years. Glencore Grain organises its own truck and trains with the many road and rail providers and coordinates these movements with the bulk handlers with no major problems. If we own grain in the same silo as another marketer it is commingled and we are only guaranteed the minimum standard for that grade. CBH run more or less the same system because they do not guarantee that you get the grain that you purchased. They again only guarantee the minimum receipt standard. None of this is threatened or affected by Grain Express coming to an end.

- d. As to efficiency at CBH sites, outturning grain into a dozen trucks or a train is exactly the same, and involves the same spout mechanism whether the trucks or the train are under CBH's control or someone else's. Truck drivers generally know the procedure at a terminal whoever they work for.
- e. That there has been no increase in storage and handling costs is difficult to claim because the costs are not transparent and are bundled, and the claim is grossly untrue if you add the outturn fee that CBH would impose on us if we transported grain to port.
- f. The claimed \$8 million rebate to growers is merely a symptom of over levying and not providing a competitively priced service. Elsewhere we have submitted that the rebate corresponds with the interest earned by CBH on freight charges.

It is submitted that there is no public benefit resulting from Grain Express, there was never any prospect of it and there is none. CBH have had two years to prove Grain Express and quantify the benefits of Grain Express and they have failed. The commission should give no sanction to this port and should revoke the exclusive dealing notification for Grain Express.

5. Other particulars of grounds to revoke

Other particulars of grounds to revoke the notification are in our submissions to the Productivity Commission and our memorandum given to the commission at our meeting on 3 June.

GLENCORE GRAIN PTY LTD

ABN 29 106 378 885

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

6. Matters in the commission's email of 23 April 2010

The matters in this email of Dr Chadwick to our solicitor do not provide an explanation for Grain Express continuing. In particular the email anticipated that there would be changes to Grain Express. There have been no material changes to Grain Express since its introduction.

Yours sincerely



Chris Brooks
Managing Director