

GLENCORE GRAIN PTY LTD

ABN 29 106 378 885

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

12 January 2011

The General Manager
Adjudication Branch
Australian Competition and Consumer Commission
23 Marcus Clarke Street
Canberra ACT 2601
adjudication@accc.gov.au

Your ref C2008/945-06

Dear Sir,

SUBMISSION ON DRAFT NOTICE TO REVOKE EXCLUSIVE DEALING NOTIFICATION FOR GRAIN EXPRESS

Thank you again for Mr G Jones' letter of 6 December 2010 with the commission's Draft Notice to revoke this exclusive dealing notification.

We submit:

1. The exclusive dealing notification should be revoked for the reasons given in the Draft Notice.
2. Revocation would also enable CBH's domestic outturn fee - criticised in the Draft Notice - and related fees to be reset by commercial negotiation. This is essential to bring about a level playing field between CBH and its export competitors and between CBH and its transport competitors.
3. Revocation should be prompt, and not delayed, as detailed below.
4. Concern that grain quality and Grain Express are linked is misconceived. Grain Express is a freight issue and not a grain quality issue.
5. Concern that after revocation the clearing or emptying of up country storages will become expensive or impractical is unwarranted. Whether by means of stock swaps or other arrangements between traders, or by the volume a trader will require, it may be expected that

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up country storages could be cleared or emptied at reasonable cost (less than CBH's present flat fees of \$8.50 and \$11 a tonne) and in an efficient and timely manner.

The details of these submissions follow.

1. The Draft Notice should be upheld and finalised

The commission should revoke the exclusive dealing notice for Grain express as proposed in its Draft Notice. In our view the commission's finding that the tying of storage and handling to use of CBH's transport services resulted in a substantial lessening of competition in the market for grain transport in Western Australia (p vi, and also at paras 5.138 and 5.156) and that there was **no public benefit** in this (p vi-vii, and paras 5.266 and 5.267) and that Grain Express shifted congestion risk to growers and exporters and weakened CBH's incentive to efficiently deal with congestion (para 5.2.58) leave no scope for Grain Express to continue. Grain Express has been shown to be a heavy burden on grain trading in Western Australia. It has to go.

At the time of writing, in the five weeks since the commission's Draft Notice, there has been no submission to the commission whether by CBH or anyone else finding error in the reasons or other provisions of the Draft Notice. On the other hand it is significant that parties that have been directly affected by Grain Express, namely PGA Western Graingrowers (whose members have had to use CBH transport and storage to port and been denied the opportunity to use competitive transport), Mr K Halbert (the large grain grower with long experience of grain regulation in the state and elsewhere) and Asciano (entitled to run trains in the state and approached by potential grain customers in the state to do so) all support the Draft Notice and **welcome revocation**.

The one document on the commission's website that does not support the Draft Notice, apparently from the Department of Agriculture and Food Western Australia, requires comment. The document is undated, unsigned and not on letterhead. It is not the proper way to express considered views of an organ of government. **Secondly**, it does not examine any aspect of the Draft Notice. **Thirdly**, its claim that Grain Express's benefits outweigh its costs is not supported by any measurement or calculations, as would be expected from a government body with the resources to do this. CBH advised in Melbourne at a presentation about its new rail arrangements on Tuesday night, 11 January, that **rail costs grew 43%** under a period which included two years of Grain Express. CBH's proposed acquisition of railway rolling stock and appointment of Watco Companies to manage are designed to increase rail's share of the total grain haul but these measures in turn are not dependent on Grain Express. At yesterday's presentation **Watco expressly said that they can operate without Grain Express**.

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To have more grain on rail in a competitive environment it is useful to have more than one rail operator. If Grain Express is not revoked other rail operators will be locked out. Asciano and ARG plainly don't want to be locked out from the WA grain rail freight market. All these developments show Grain Express is bad for grain on rail. The DAFWA document should be rejected.

Thus at present we submit the case for revocation of the exclusive dealing notification for Grain Express remains as sound as it is in the Draft Notice and that the notification should be revoked as proposed by the commission.

2. Revocation is necessary for a level playing field between CBH and its competitors

Glencore Grain, like other exporters, wishes to engage in commercial negotiations with storage and transport providers, including CBH, for future grain storage and for future transport of grain to port.

Under Grain Express the fees for such services are fixed by CBH and are not negotiable and they favour CBH. For wheat this may be illustrated by comparison with the like fees of the bulk handler GrainCorp for its storage and handling services in Victoria, as follows:

	CBH	GrainCorp
Receival	\$10/t	\$6.35/t standard grade
Storage	nil	5.52 (1.38/t/month assuming 4 months)
Outturn to bulk handler for transport to port	Nil	5.70
Outturn to third party for transport to port	8.50/11.00	5.70
Export outturn	17.10	7.50
Total handling fees for bulk handler transport to port	27.10	25.27
Total handling fees for third party transport to port	35.60	25.27

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The comparison shows that CBH's fees make no charge for storage up country as such. This feature favours CBH for it makes uneconomic development of alternative storage, which would cost at least \$1-2 a tonne or more. This feature also favours CBH which can use grain pools to keep grain in storage for a long period. On the other hand Glencore Grain buys for cash and exports at the first opportunity which may be after as little as four months of storage. Even if the storage is eight months Glencore would pay, by comparison, to GrainCorp \$31.78, but with the ability to make savings on transport to port it organised itself, an ability it does not have under Grain Express..

The fixed export outturn fee of \$17.10 a tonne is absurdly high, both by comparison to GrainCorp and charges outside Australia. CBH does not charge itself a fee for outturn upcountry to port whereas if a third party such as Glencore Grain sought such outturn a fee of \$8.50 (or \$11 for rail) a tonne is charged. The commission has criticised or questioned the justification for this charge commencing at para 5.157 of the Draft Notice.

These fees make it uneconomic for another exporter such as Glencore Grain to provide its own transport to port or for another rail or truck service to provide the transport: CBH is always \$8.50 or \$11 ahead of us on transport. The absence of a storage fee makes the development of competitive storage upcountry uneconomic. The fees tilt the field of competition in favour of CBH and against its transport and export competitors. Furthermore the fee structure exists only because alternative transport is prohibited by Grain Express which in turn is imposed by the exclusive dealing notification.

Revocation undoes this state of affairs and will permit exporters and transport operators to negotiate fees. The competitive pressure on CBH has the prospect of a level field of competition with CBH. Revocation is essential to permit such negotiations to begin.

As we have requested CBH, the \$8.50 outturn fee, should be immediately revoked by CBH and, consistently with observations by the commission in its draft notice, CBH should offer a fee that reflects the cost of outturning grain related to its location. Our further position on this issue will depend on CBH's response to our request.

Furthermore CBH should offer separate receival and storage fees and export outturn fees related to costs incurred. Failure to do so exposes it to monopolization in breach of s 46(1) of the now renamed Trade Practices Act, an issue raised by the commission at para 5.177 of its Draft Notice.

3. Revocation should be prompt

The timing of revocation now has to take account of CBH's entry into the rail haulage business from May 2012 with its own rolling stock managed by Watco, as announced on 13 December 2010. At the

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presentation by CBH and Watco on 11 January Watco advised that its arrangements contemplated hauling as little as 50% of the export tonnage to port. CBH's announcement itself said that its actions resulted in the introduction of competition in the Western Australian grain rail freight market. Thus there is an acknowledgement that another rail operator or operators, or road operators, will haul up to 50% of the export tonnage to port. It is necessary that there be no impediment to these operators hauling to port. This requires that the revocation be immediately effective to give the other operators the same period of preparation for the new competitive environment as CBH is giving itself.

The commission has noted the potential of revocation in mid harvest to cause significant disruption to the industry. However as we are well into the present harvest, much grain has already been cleared from upcountry storages and therefore revocation would not impact that grain. Some of what remains upcountry is the subject of firm commitments and plans by CBH to bring it to port. Revocation has the potential to disrupt these firm commitments and plans. The rest is merely in storage and subject to plans not yet made and, we understand, commitments not yet incurred by CBH to ARG to bring it to port. For this grain there are no commitments and plans which could be disrupted.

Accordingly we submit that the revocation should be immediate (after the 30 day period allowed by the legislation) with an exception for grain in CBH storage up country for which CBH has firm commitments and actual plans to haul the grain to port.

Where a grower has paid up front for transport to port but there is no firm commitment and actual plan to haul the grain to port, any upfront payment for such transport should be credited to any transport that the grower or exporter may choose.

A further issue is that all parties will need to have the ability to negotiate transport to port in time for the next harvest, that is by 31 October 2011. Thus in any event the revocation should be effective by 30 June 2011, which allows four months for new transport arrangements to be made. In our view it will be feasible for CBH to offer well before 30 June 2011 receival, storage and outturn fees based related to the costs incurred by CBH. Such new fees are necessary for CBH to avoid the monopolization contravention flagged by the commission.

On the basis of the foregoing, revocation should take effect 30 days after the commission's determination to revoke and no later than 30 June 2011 except for grain in CBH storage up country for which CBH has firm commitments and actual plans to haul the grain to port.

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4. Misconceived grain quality concern

The already mentioned DAFWA document raises concern about the quality of grain under Grain Express and states that "(t)raders and domestics processors have limited knowledge of the quality of the grain they will receive on outturn or where it has come from .."

This is a furphy and ignores the obnoxious feature of Grain Express, which is that growers and traders cannot choose their transport to port and other transport operators are excluded from the grain freight market.

It is true that exporters like Glencore Grain have limited knowledge about the quality of grain in CBH storage. But the reason for this is that CBH does not provide detailed quality information even though it has a technical laboratory allowing it to do so. It is a serious failure not to make the information available. With canola we have experienced CBH outturning say 40.1% oil quality canola from a notional 44% stockpile, wiping out our margin as a result. We believe CBH may favour its trades with the high quality grain in its storages. While the issue of CBH's failure to outturn requisite quality grain to ship may have implications under the state Bulk Handling Act 1967 and contractual and moral implications it is unrelated to Grain Express as claimed in the DAFWA document.

5. Unwarranted concern about clearing or emptying upcountry storages

At CBH's presentation in Melbourne on 11 January its representative said that if traders organised their own transport, following revocation, they could want access to upcountry storages at times and for small quantities which would be uneconomic. This was said in defence of the current \$8.50 domestic outturn fee.

Grain Express is not required for the efficient clearing of upcountry storages.

For its part CBH can organise the complete clearing or emptying of storages knowing that it needs particular quantities in storage at port for its own operations and for expected needs of other exporters. For its part Glencore Grain by itself or in combination with other traders can meet the reasonable costs of clearing a storage or it can procure a quantity at port by swapping an entitlement to grain with another trader.

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Conclusion

The Draft Notice has established that Grain Express is anti-competitive, has no public benefit and weakens CBH's incentive to deal with congestion in transport to port. The outturn and related fees of CBH are not based on the costs of providing the relevant services and discriminate in favour of CBH and against other exporters like Grain Express and other transport providers.

These problems of unfairness and discrimination are well understood and the attachment shows the Australian Financial Review's illustration of the problems among the three bulk handlers some two years ago. The problems are directly felt by Glencore Grain because unlike with the other bulk handlers we are unable to organise our transport to port in Western Australia.

Only revocation of the exclusive dealing notification will change this state of affairs which we request be done as soon as possible and by 30 June 2011.

We note that it may be necessary for us to address the position or issue to be raised by other interested parties attending the conference who have still to lodge submissions with the commission.

Yours sincerely



Chris Brooks
Managing Director

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