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By email and post:

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Mr Richard Chadwick
Australian Competition and Consumer
Commission
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Dear Mr Chadwick

Review of CBH Grain Express notification N93439

We refer to the meeting between CBH and ACCC representatives on 22 March 2011. This letter contains CBH's submissions in relation to the timing of effect of a decision by the ACCC to revoke notification N93439 (**Notification**). For ease of reference, CBH's view is summarised in the following paragraphs.

1 Summary of submission

1.1 CBH maintains its position that the ACCC should not revoke the Notification because:

- (i) there is an insufficient basis for the ACCC to conclude that the notified conduct has the purpose, effect or likely effect of substantially lessening competition in the market for grain transport in Western Australia;
- (ii) as has been recognised by the Western Australian Department of Agriculture and Food¹, the Western Australian Minister for Transport², the Western Australian Farmers' Federation³, Westnet Rail⁴ and numerous other industry participants (including transporters themselves⁵) the revocation of the Notification would result in a substantial net erosion of efficiency in the WA grain supply chain; and
- (iii) there is no evidence to support the theory that revocation would increase competition in grain transport by better enabling grain marketers to outturn grain from CBH storage facilities (presumably in small volumes onto road) for the purpose of independently transporting that grain to port, where it would be re-introduced into CBH custody for loading onto

¹ Western Australian Department of Agriculture and Food submission

² Minister for Transport submission dated 2 February 2011

³ WAFarmers' submission dated January 2011, page 2

⁴ Westnet submission dated 11 January 2011

⁵ See for example, the recently reported comments of the General Manager of Esperance-based OD Transport Peter Holdman, published in the Countryman 31 March 2011

vessels. Indeed, the principal support for such a theory comes from grain marketers who, unlike CBH, would be likely to make a profit margin from the supply of transport services.

- 1.2 However, if the ACCC resolves to issue a Final Notice revoking the Notification, then CBH submits that the notice should take effect from the time when grain movements for the 2011/2012 season have been completed, which is **1 October 2012**.
- 1.3 The evidence presented in this submission establishes that revocation will require CBH to implement substantial changes to its operations, which will include changes to contracts, pricing structures and staff training. The industry needs time to plan and implement those changes. If a revocation takes effect prior to or during the 2011/2012 harvest, CBH will be unable to plan and prepare effectively, will suffer substantial financial loss and third parties may also be adversely affected.
- 1.4 Both ARG and Glencore have made unsubstantiated assertions in recent submissions to the Commission that any potential revocation of notification is a simple matter and requires no advance notice. These assertions are incorrect and the ACCC should not rely on them. CBH deals with these submissions below.

2 Advance notice of decision is essential

- 2.1 Supply chain logistics is a complex task in which changes to an element of a system can affect all elements or have serious unintended consequences. The implementation of Grain Express, which required years of design and months of planning and implementation, recognised this.
- 2.2 The Productivity Commission also recognised this when considering the ACCC's review of the access undertakings regulating the relevant port terminal services access that:

[s]hould the ACCC wish to make significant changes to the undertakings, it should provide stakeholders with plenty of advance notice.⁶

- 2.3 CBH pricing for storage, handling and transport is done on a "whole of season" basis, so that growers and other participants have certainty for an upcoming season. This means that changes cannot be easily made to terms and conditions (including pricing) mid-season. For example, before harvest, CBH posts transport pricing on a whole of season basis, which means that it locks itself into the assumptions it makes in relation to volume and other determinants of cost at that time. CBH does not know when it will move a particular grower's grain, so transport rates are set as a blended figure based on the rates charged by the transport providers that will service a particular site for the period between 1 October and 30 September.

2.4 Confidential -

⁶ Productivity Commission 2010, *Wheat Export Marketing Arrangements*, report No. 51, Canberra, page 191.

3 Revocation will require substantial changes to CBH's pricing and processes

3.1 Revocation will require CBH to make substantial changes to its operations. In particular, CBH will need to:

- (i) **Confidential -;**
- (ii) review its price and non-price terms and conditions to ensure that, in the absence of the Notification, it is not exposed to allegations of conduct in contravention of the CCA⁷;
- (iii) implement new processes at country storage facilities to provide for a potential increase in the occurrence of up-country outturns for export grain (as opposed to domestic grain outturns, the volume of which can be accurately forecast);
- (iv) employ additional staff to outturn grain up-country;
- (v) appropriately inform growers of changes in terms, conditions and processes;
- (vi) implement changes in its stock management and IT systems to provide for both a "site-based" and "port-based" entitlement system.

Harvest planning for 2011/12 has already commenced

- 3.2 When considering the timing for the revocation of the Notification, it is important to take into account that significant planning for the coming harvest occurs in the period between March and August.
- 3.3 This is reflected in CBH's existing and proposed access undertaking which requires that, other than in the first year of the undertaking, CBH must notify its pricing by the end of August at the latest. This is approximately 4 months away. Of course, this assumes the ACCC will issue a Final Notice within days of receiving this submission. Therefore, realistically CBH is likely to have less than 3 months to adapt to the revocation. While CBH may commence this process now, CBH will be unable to meaningfully design processes which satisfy the ACCC's concerns until the release of the Final Notice.
- 3.4 CBH is concerned that if the revocation occurs prior to 1 October 2012 that it will not have enough time to correctly amend its processes. It will be extraordinarily difficult to make all the required changes to CBH's transport arrangements, train CBH staff, communicate all the changes to the industry and test the necessary systems before the start of harvest and the subsequent delivery and nomination of grain.
- 3.5 There is a good historical basis for CBH's view that there is now insufficient time to implement the required changes to its system. The original concept for Grain Express was conceived in 2005 and was the subject of internal study and

⁷ CBH does not consider that its conduct would contravene the CCA even without the Notification in place. However, the ACCC Draft Notice's comments on the effect of CBH's domestic outturn charge give rise to real concern that the ACCC may have a different view. In these circumstances, a review of terms and conditions is essential.

consideration for several years. In January 2008, CBH commenced the process of planning detailed changes for Grain Express. This 9 month window was barely enough time for CBH to complete this task in order to provide services for the 2008/09 harvest. Following this implementation a further detailed program entitled Grain Express to continue into the following year to be processed before 1 October 2009. CBH has less than 4 months now to unwind nearly 2 years worth of development. Further, Grain Express was the implementation of an efficient single system. In this case, CBH must build a system for the alternative unbundled system proposed by the ACCC as well as make changes to the core Grain Express systems and then ensure that the interaction of the two systems do not produce unintended consequences. For example, the testing of the billing system alone is likely to take 8 to 10 weeks.

- 3.6 It will be inefficient and detrimental to CBH and the industry generally if CBH does not complete these changes prior to the harvest planning in August 2011, or gets it wrong due to the time pressure to have the system in place by August 2011. It will also be disruptive, costly and time consuming for CBH and the industry if CBH is required to establish new processes, fix new processes or further amend processes as a result of having to rush the implementation of the processes by August 2011.
- 3.7 Conversely, if CBH does not amend its processes by August then the delays in finalising the processes will adversely impact the ability of CBH to offer any services to growers or marketers until all arrangements are settled, tested and contractual arrangements entered. This delay will have serious consequences for growers who require timely storage and transportation of their bulk wheat. For example, if CBH is not entitled to move grain it may have to close sites after they initially fill.
- 3.8 In **Confidential Appendix A** to this letter, we set out the high level potential system changes which will be required to implement the revocation of the Notification. They are significant and it is self evident that CBH will require longer than 4 months to implement them.
- 3.9 The ACCC is aware of the port congestion that occurred in Western Australia in 2009 following deregulation of wheat export marketing. One of the contributing factors to that problem was the fact that despite warnings from CBH, marketers failed to accept CBH's proposal to allocate capacity prior to the likely peak of demand and CBH had insufficient time to implement a capacity allocation system that year. If any revocation is implemented without sufficient notice, similar unintended consequences may result.

CBH will suffer financial penalties

- 3.10 In July 2010 CBH requested that, if the Commission intended to revoke the Notification, it do so by December 2010. CBH made this request because it was at that time planning its medium-term acquisition of rail haulage services and wanted to provide for any revocation in the terms of any new contracts if possible.

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3.12 **Confidential**

3.13 **Confidential**

Impact on third parties

- 3.14 CBH currently transmits stock information to 12 active marketers who are set up to receive Stock Position Transmissions. The revocation of the Notification will require CBH to change the format of the transmissions to cater for the non Grain Express information and to clearly indicate grain that is unbundled and grain that is contained in the Grain Express system. This will require some marketers to change their systems to continue to receive stock information from CBH.
- 3.15 Changes to the system may cause unintended consequences in the Western Australian Wheat Futures Market. There are currently 16,840 open contracts in West Australian Wheat Futures with a maturity date of 19 January 2012 and the number may be expected to change significantly as harvest approaches. The value of the wheat futures is linked to the cost of service under Grain Express to place entitlement at Kwinana. Details of the open contracts can be found at <http://www.asx.com.au/asx/markets/futuresPrices.do?by=underlyingAsxCode&underlyingCode=waw&expiryDate=> CBH will require time to consider the consequences of the revocation on the Western Australian Wheat Futures Market in order to prevent any unintended consequences or loss in value as a result of the ACCC's decision.
- 3.16 Third parties with systems linked to CBH, such as DailyGrain, will be impacted by the changes and will need time to prepare for the change in their systems. Unless significant testing is carried out, any third parties with a link could suffer detriment due to the failure of the link or an incorrect interpretation of information leading to incorrect assumptions or positions being taken. This later error could result in parties taking action with an incorrect view of their grain ownership and suffering considerable expense to correct their positions.
- 3.17 Processes will need to be developed to ensure that conflicts do not occur between marketer transport and CBH arranged transport at both receival site and port terminals. This will be a significant piece of work and will require considerable consultation with both the trade and the transportation industry to ensure the new processes are fair and efficient for all parties.

Response to other submissions as to timing

- 3.18 CBH notes that the ACCC has received a few submissions which assert that the Notification should be revoked prior to the 2011 to 2012 harvest. In each case the submissions are not backed by any evidence and often consist of one sentence at the conclusion of the submission. CBH does not propose to respond to these submissions other than to note that the ACCC should place no weight on any submission that merely contains opinion with no supporting evidence. Further, these submissions do not address the significant amendments required to the existing processes as a result of a revocation of the Notification.
- 3.19 ARG and Glencore Grain Pty Ltd (**Glencore**) have both made a number of assertions in relation to the timing of revocation.

- 3.20 Mr Chris Brooks, the managing director of Glencore has stated that revocation “*be immediately effective to give the other operators the same period of preparation for the new competitive environment as CBH is giving itself*”.⁸ As stated in CBH’s earlier submission dated 3 February 2011, the allegation that CBH is operating a rail business is not correct. To the extent that a rail operator needs time to prepare for the “new competitive environment” as set out above, a shorter time period will be detrimental to industry participants as a result of the significant amendments which are required. There is no benefit to any party (and certainly not CBH).
- 3.21 Mr Brooks admits that revocation “*has the potential to disrupt*” firm commitments and plans.⁹ CBH welcomes this recognition. However, as set out above, the entire system will need to be amended which will affect all commitments not just existing firm commitments. In this regard, CBH notes that contractual entitlements (existing and future) are merely one part of the issue.
- 3.22 Mr Brooks notes that in its 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*”. It provides no basis for this assertion.¹⁰ As set out above, it will not be feasible.
- 3.23 Finally, Mr Brooks states that parties will require 4 months to negotiate transport arrangements. CBH does not accept that time period, it considers that it is too short. However, even if it is correct then Mr Brooks’ comments demonstrate that the revocation should not occur prior to 1 October 2012 (that is, prior to the next harvest). As set out above, parties generally enter into arrangements in *August*. That is approximately 4 months from now. Therefore, even accepting Mr Brooks’ assertion (which CBH does not) and assuming that the systems will be able to be amended in 4 months (which they will not) there is not enough time for parties to meaningfully enter into transport arrangements for the current harvest.
- 3.24 In its further submission to the ACCC, Mr Brooks states that there are no contractual, financial or operational reasons for such a delay. Mr Brooks provides no further information to support this assertion other than it has consulted ARG.¹¹ Mr Brooks also provides no information as to why it has changed its stance on the firm commitments identified in its submission dated 12 January 2011.
- 3.25 CBH has not been privy to any of Glencore’s discussions with ARG. However, examining ARG’s submissions, ARG only makes assertions about the effect of the revocation on its own business and does not provide any evidence on the effect of the revocation on CBH’s business. For example, ARG states in its public submissions:

ARG would also like to re-iterate its oral submissions at the public hearing on this matter that if the notified conduct were to be revoked, the effect of such revocation should take place as soon as practicable to

⁸ Glencore submission to the ACCC dated 12 January 2011, page 5.

⁹ Glencore submission to the ACCC dated 12 January 2011, page 5.

¹⁰ Glencore submission to the ACCC dated 12 January 2011, page 5.

¹¹ Glencore submission to the ACCC dated 28 February 2011, page 1.

enable ARG to compete effectively. Any lengthy transition period will potentially affect how ARG allocates its existing dedicated grain rollingstock.¹²

3.26 It has also stated:

ARG does not believe its grain haulage services would be disrupted by revocation immediately or in mid harvest.¹³

3.27 The ACCC should place no weight on Glencore's first submission for the reasons set out above and that it provides no evidence beyond mere assertion. It should also place no weight on Glencore's second submission as it is based on ARG's assertions (which only concern ARG's business and which provide no supporting evidence). Further, ARG has significant incentives for the revocation to occur prior to October 2012 as:

- for the reasons set out above, under CBH's existing rail haulage contract with ARG, CBH will be exposed to significant penalties payable to ARG if the revocation occurs prior to October 2012; and
- there is no simple method to reconcile between transport done by ARG on behalf of CBH and transport done by ARG on behalf of any other grain owner. This could result in CBH paying for the transportation of non-Grain Express grain and potentially for ARG to be paid twice for the same work.

3.28 Therefore, it would be unreasonable for the ACCC to place weight on Glencore's or ARG's submissions.

3.29 If the ACCC has received further information or allegations concerning the alleged effects (or lack thereof) on CBH of the revocation of the Notification prior to 1 October 2012 then, given the detriment to CBH identified above, the ACCC should put that before CBH and seek a response from CBH prior to issuing a Final Notice.

Yours faithfully
Corrs Chambers Westgarth



Bill Keane
Partner

¹² ARG submission to the ACCC dated 11 February 2011, page 1.

¹³ ARG submission to the ACCC dated 12 January 2011, page 5.

CONFIDENTIAL APPENDIX A