

# GLENCORE GRAIN PTY LTD

ABN 29 106 378 885

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

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2 September 2009

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Dear Andy,

**Further access undertaking documents to ACCC including  
Corrs' letters on capacity allocation and Grain Express and  
Synergies' report on hygiene**

There are now 14 additional CBH documents on the ACCC website amending or explaining CBH's port terminal access undertaking. With the Auction Rules, GSA, PTSA, Port Terminal Rules and Registered Bidder Agreement, several submissions from your solicitors and economists, FAQs and the original undertaking, the undertaking now comprises at least 23 documents.

As accredited wheat exporters we need to easily see among this collection of documents an express and practical undertaking by CBH relating to the provision to us of access to CBH's four ports for the purpose of loading our ships with wheat. The collection as a set of rules and agreements focussing on the exporter's conduct and statements of what CBH may do in the future is not an undertaking. The collection lacks such essentials for an undertaking as rates of, and times for, storing and loading grain at the ports. The collection does not assist access to the ports but hinders access.

Among the further documents which have made their way to the ACCC website in recent days the following require comment.

**1. Corrs' letter of 24 August 2009, para 2.3**

"The Grain Express service is an alternative, voluntary service that uses additional, duplicable facilities to provide a complete country to vessel solution"

In the notification to the ACCC of 11 June last year the Grain Express conduct was described as:

*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).*

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The conduct notified makes compulsory for anyone taking storage and handling services from CBH that they acquire the supply chain coordination services and the transport services. The notification and its acceptance by the ACCC reinforced the impression that Grain Express was compulsory. This is the opposite of Grain Express being an alternative service or one that is voluntary to the person taking services from CBH, as now claimed.

If Grain Express is no longer forced on growers and marketers, but they can now freely choose whether or not to take Grain Express, then the notification of Grain Express should be withdrawn. While the notification stays Grain Express will appear to be compulsory. Removal of the notification will show that Grain Express is truly voluntary and an alternative to other arrangements, such as organising one's own transport to port.

We thus request that CBH immediately withdraw from the ACCC the notification of Grain Express.

## **2. Synergies on hygiene**

Synergies, in their undated memo accompanying Corrs' letter of 24 August, give as a reason for the access undertaking applying only to Direct to Port wheat and not to Grain Express wheat that the two types of wheat cannot be comingled because the former may have insects, contaminants or chemical residues.

However both types of wheat have to undergo the same grading according to standards, under s 6A of the Bulk Handling Act 1967, and if either type were contaminated so that it was unsound or inferior to the lowest grade CBH would be required, under s 42(2)(a) of the Act, to accept the grain but under special arrangement. And grain from either source which did contain insects or was contaminated is not deliverable to CBH without CBH's prior consent, under Bulk Handling Regulation 13(1)(e) and (ha).

Both Direct to Port and Grain Express wheat are subject to the same testing for standards for quality, and if they pass their tests there is no logical reason not to comingle the two types.

Regulation 13(1)(i) does allow rejection of wheat that may contaminate the average quality of other grain in the custody of CBH, a situation which would arise from the testing of the grain but not from its 'Direct to Port' provenance. This last regulation, which accords with common sense, amply protects the commercial interests of growers in non-contamination so that they can achieve higher returns.

In our view Synergies' memo falsely claims that Direct to Port wheat cannot be comingled with Grain Express wheat. If such comingling can take place then on CBH's reasoning the access undertaking should apply to Grain Express as well as to Direct to Port wheat.

## **3. Corrs' letter of 30 August**

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3.1. "secondary market business rules in the Port Terminal Rules". There are no rules identified as such.

3.2. "Published prices will be the same whether or not exporters have acquired or agreed to acquire services through Grain Express." We need to see not only the actual prices but be satisfied that each price does not overcharge for the particular service. This is another reason why actual rates in an access undertaking have to be published: they are a very good guide to the reasonableness of the undertaking.

3.3. Secs 5 and 6

3.3.1. "Port intake capacity" (cl 5.1): this is the constraint, which until relieved, may be the subject of auction.

3.3.2. "For this reason, before allocating capacity, CBH must consider factors including the harvest size and characteristics as well as the likely performance of the supply chain to port." (cl 5.7). CBH's practical duty, also under s 19 of the Bulk Handling Act, is to grant access to anyone wishing to use its port loaders, a task which requires no consideration of the harvest size or transport to port, merely how long the person wishes to use the port loader, and if there is excess demand for the loader fairly allocating access, such as by auction. The size of the harvest and transport to port is a matter for growers and marketers and does not affect how port intake capacity or berth capacity is allocated.

3.3.3. Surge in cl 5.9 now has a new feature, namely that some exporters do not have to pay for it. As we have already said the rules around surge need to be clarified.

3.3.4. The remainder of sec 5 and sec 6 describes CBH's manipulation of capacity and its management of auctions whereas what is required is a simple auction of the capacity that is constrained, which is at the grid, after which marketers will be able to book shipping to meet the capacity booked at auction.

The above features of the access undertaking show that it should not be proceeded with.

Yours sincerely



Chris Brooks

Managing Director