

GLENCORE GRAIN PTY LTD

ABN 29 106 378 885

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

2 September 2009

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Dear Scott,

Proposed CBH 2009/10 Grain Services Agreement, Port Terminal Services Agreement and Port Terminal Rules

Thank you for sending us these draft or proposed terms with your email of 17 August and inviting our queries and feedback, which follow. We have also looked at version 2.0 of the Auction Rules dated 7 August 2009.

1. Auction system

- 1.1. We support, with other marketers, an auction system for fairly allocating physical capacity at the ports that is in short supply or which is constrained. However the auction system proposed in the Auction Rules does not identify any physical capacity for auction. The rules merely refer to lots without saying what the lots are – notwithstanding that 1000t features in an aspect of the lots.
- 1.2. The Port Terminal Rules are unclear and confusing as to what is being auctioned. They refer to “shipping” then “Capacity” then “Shipping Windows for a Defined Tonnage”: cl 6.1(b) – (d). The “Frequently Asked Questions: Port Capacity Access Allocations” refer to “around 70% of CBH’s Core Capacity” and for Phase Two Auctions “remaining Core Capacity and any Surge Capacity”. The capacity terms are defined in the Frequently Asked Questions to include “transport”. However if what is being auctioned is a slot at a berth there is no transport to auction. If the transport refers to transport from domestic receipt point to port, which could be transport paid for by the grower under the Grain Services Agreement or Grain Express, it is wrong for CBH to charge for the same transport again by auction.
- 1.3. Surge Fees or Surge Capacity should not form any part of an auction system. They are a discretionary cost and not a constrained feature of a port. Thus also the Surge Fee should not be part of the start price under Auction Rule 8.2. If Surge Capacity is not the subject of auction, and if an auction premium had been paid, it should be clear that no surge charge would be imposed. The rules around the surge charge need to be made much clearer.
- 1.4. Please give an example in terms of tonnages, slots, time period, transport to port arrangements etc of “70% of CBH’s Core Capacity”. Will the remaining 30% be available at the time of auction or later or will it be locked up? Will the 30% be available by outturn request form or in some other way? The answers in the FAQs leave open the possibility that after some sort of capacity had been

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purchased at auction similar capacity may be acquired without auction, which of course would be unfair. The present details do not allow the capacity on auction to be objectively valued.

- 1.5. CBH's ability to ration a type of capacity gives it the ability to manipulate to its advantage, eg:
- it enables it to limit the market for capacity and thus to push up the value of capacity, at least some of which would improve CBH's own earnings.
 - it could be used to favour its own marketing arm, eg if the CBH board fixed the percentage to be auctioned it is a fair bet that the marketing arm would learn of this before other marketers, and the marketing arm would be able to decide earlier than its competitors whether to bid at auction or acquire non-auctioned capacity.

These powers of CBH will need to be deleted. If there is an auction of a type of capacity the capacity should be objective and observable, eg (if it is the case) particular shipping windows for which there is an excess of demand over supply; or particular slots at the grid for which there is an excess of demand over supply.

- 1.6. CBH's control of every aspect of the auction – the auction phases, auction catalogue of lots, alterations, round timing, start prices – means that the auction is not independently managed by Tradeslot. This makes the statement in this regard in Auction Rule 5 misleading.
- 1.7. A registered bidder agreement is superfluous if bidders are already required to be party to a GSA or other agreement with CBH. The form of the agreement has not been provided.
- 1.8. The simultaneous auctioning of all slots at all ports over a period of up to five days is impractical, complex and too time consuming. An auction should be completed well within a day and what is not auctioned should be disposed of by a simplified auction, informal offerings or through brokers. Any slots purchased at auction should be disposable at any future auction or offering of slots.
- 1.9. Overshoot in Auction Rule 10.7 needs to be explained with an example.
- 1.10. The Port Terminal Rules refer to the Auction Rules for the meaning of the 'Secondary Market' but the Auction Rules have nothing on the Secondary Market.
- 1.11. The 5 cents per tonne fee to CBH for registering the transfer of shipping slots equates to - \$2,500 per Panamax vessel. As the act of registering a transfer is little more than a click on a mouse, this fee is grossly excessive. A reasonable fee would be up to \$10 per 1000 tonne traded.
- 1.12. The Auction Premium rebate scenarios at FAQs p 6 are of rebates to people who purchase capacity, thus marketers, whereas under sch 7 of the GSA and sch 2 of the PTSA the rebates are payable to "customers" who could include growers. Please clarify this aspect of the rebates and also provide us a copy of the modelling on which the scenarios were based. The cost of developing and running the auction system, which is to be deducted from the rebates, could be considerable. The modelling is necessary for us to see the true intent and scope of the rebates and the cost of the auction system.
- We would like to make it clear that we would want CBH to benefit from the auction premiums to develop its port facilities.

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2. Necessary modifications to the auction system

- 2.1. The true source of delay in loading ships is both CBH's delay in transporting grain to port to meet a particular shipping window and insufficient numbers or sizes of grid at port through which the potential trucks or trains deliver grain.

The transport delay may be solved by marketers making they own arrangements and does not require any auction system. The grid constraint is only temporary until new or improved grids are constructed. While it exists an auction system could raise funds to deal with this source of delay. But under the proposed auction system auction premiums paid to CBH are to be paid back to customers as a rebate (FAQs, p 6 and GSA cl 12.9). This leaves no prospect of funds to improve or increase port intake capacity. The proposed auction system will merely preserve the present sources of delay.

In whose interest is such an auction system? Not the growers and marketers because they want to deliver grain to port without transport delay and without grid delay. But such an auction system does favour CBH's control of transport to port because it reduces shipping windows to those that can be matched with what wheat CBH can deliver to port.

- 2.2. Thus the auction system needs to be modified to be for the auctioning of access to the port over the grid and the income from the auction must be applied to the removal of this constraint by improving and increasing grids. The berth slots do not need to be auctioned because once marketers have fixed rights to deliver to a port they can organise their shipping to fit in with what can be outloaded. Such capacity which is passed in at auction can be sold by a later simplified auction, informal offerings or through brokers.

Generally this modification will solve most of the earlier mentioned defects. As there are at least two allocation systems in use in Australia, - the vehicle booking system in ports and the slot system at Sydney airport – these will need to be examined for pointers or details.

- 2.3. The auction system will need paper trials.

- 2.4. In summary if there is to be an auction system all the defects mentioned in sec 1 have to be fixed up and the system needs to deal with constrained grid capacity.

3. Port Terminal Rules

- 3.1. The Port Operator is not identified.

- 3.2. Rule 2.3(b) includes an acknowledgement by the customer that the rules are necessary and reasonable and that they comply with the related access undertaking. The acknowledgement is misleading and involves matters of fact not rules. It should be deleted.

- 3.3. The EOI procedure does not appear to serve any purpose if marketers are bidding for actual usable capacity. The EOI procedure should be deleted and the auction brought forward.

- 3.4. Rule 7.1 says that "PTSA and Negotiated Agreement Customers should note that this (referring to queues) will place additional constraints on the cargo accumulation process." This is vague and

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could be used to give precedence for the reception of CBH-organised transport at port over marketers who organise their own transport. Such precedence could undermine the firmness of shipping windows allocated by auction or otherwise. Rule 7.1 in its present form should be deleted.

- 3.5. A demurrage/despatch arrangement should generally apply between the port user and CBH. It is necessary to give incentives to both sides to not delay delivery to port and to not delay loading..
- 3.6. The Port Terminal Rules should only deal with the use of a port, the fees for such use and the fees for additional services such as blending, cleaning, or screening, operating times and overtime rates. This practical information is missing from the rules.
- 3.7. Please provide an example of a Negotiated Agreement or the key terms of such an agreement.

4. 2009/10 Season Grain Services Agreement

- 4.1. Please let us have a marked up copy of this agreement showing changes from the previous season's GSA.
- 4.2. In Recital A the words that CBH "conducts all transport between these facilities as a condition of access to the facilities" is not correct and is misleading, eg some growers and marketers deliver or may wish to deliver to port. The words should be deleted.
- 4.3. The terms Core Capacity, Surge Capacity and Spare Capacity are defined but have no operation in the agreement. The terms should be deleted if they have no function.
- 4.4. Cl 4.6: HMMS is objected to as it gives CBH or its beneficiaries a windfall if a truck is overloaded. Instead, it is requested that the clause provide that overloaded trucks will be reported to police – this is the practice in some other countries. Cl 4.6 appears to apply the HMMS policy to non-growers. Please clarify whether it applies to growers, as otherwise it would be discriminatory.
- 4.5. The calculation of Grain Entitlement under cl 7.4 allows a deduction for shrinkage and five other matters whereas Bulk Handling Regulation 8 allows only a deduction for shrinkage and under s 41 of the Bulk Handling Act 1967 the other matters would have to be disregarded. The clause should conform to the regulation.
- 4.6. In relation to cl 17.1 please advise with details whether CBH's services to our company are equally also available otherwise than on the condition that CBH transports the grain between Receiving Site and Destination Site.
- 4.7. In cl 20.1(b) the customer gives acknowledgments about the costs of CBH's services and the amount of any loss CBH may suffer. However these costs and losses are or would be known only to CBH and certainly not to customers who are in no position to give the acknowledgement set out. The clause is misleading and should be deleted.

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- 4.8. In cl 21.1 CBH's lien for all of its charges, entitled "statutory lien", contrasts with s 35(1) of the Bulk Handling Act which gives CBH only a lien for charges under that Act. The clause is misleading and should be deleted or made consistent with s 35(1).
- 4.9. In cl 29(b) the proprietary interest in grain is said to be subject to cl 21 whereas the corresponding provision in s 18 of the Bulk Handling Act is not so qualified. The reference to cl 21 should be removed.
- 4.10. Cl 31.1 allows CBH to disclose some information about customers to Grain Pool. We request that as a general rule no information should be given to Grain Pool unless it is simultaneously given to other marketers including our company.
- 4.11. Cl 32.11(a)(ii) refers to the Ring Fencing Rules, but no such rules are identified.
- 4.12. Please let us have the schedule of charges which were omitted from schedule 1. Your reason for not giving the charges, namely uncertainty over the impact of the ACCC's requirements to the access undertaking, does not prevent CBH objectively projecting charges for the coming year. Not showing the charges prevents us assessing whether they would be reasonable.
- 4.13. The title of Schedule 2 should be 'Domestic Site Outturn Guidelines'
- 4.14. Schedule 3 is not referred to in the body of the GSA. How does it operate? The rates of billing under the schedule are unclear.
- 4.15. In cl 3.1 of Schedule 3 'Grain Express' is undefined. What does it refer to?

5. Port Terminal Services Agreement

- 5.1. Cl 5.5 (i) : as the Customer may not always be the owner, this clause should be deleted or modified.
- 5.2. Cl 5.5(v): the term "crop year" covering 1 October to 30 September is requested – the more limited period presently in the clause is impractical.
- 5.3. HMMS is objected to as it gives CBH or its beneficiaries a windfall if a truck is overloaded. Instead it is requested that the clause provide that overloaded trucks will be reported to police – this is the practice in some other countries.
- 5.4. The calculation of Grain Entitlement under cl 6.4 allows a deduction for shrinkage and five other matters whereas Bulk Handling Regulation 8 allows only a deduction for shrinkage and under s 41 of the Bulk Handling Act the other matters would have to be disregarded.
- 5.5. Cl 7.1(a): "export accumulation only" is superfluous. The clause does not appear to add anything and should be deleted.

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5.6. Cl 7.4: in the case of a successful bidder at auction an Outturn Request with the appropriate laycan should be automatically accepted, otherwise the auction result is undermined. In other cases the complex array of considerations on whether to accept an Outturn Request goes much further than the qualifications to the entitlement to use bulk handling facilities at a port under s 19 of the Bulk Handling Act, namely meeting prescribed charges, the charter being in place, prescribed particulars and 14 day notice. The clause should be cut back to be consistent with the statutory provisions.

5.7. In cl 10.1 CBH's lien for all of its charges, entitled "statutory lien", contrasts with s 35(1) of the Bulk Handling Act which gives CBH only a lien for charges under that Act. The clause is misleading and should be deleted or made consistent with s 35(1).

6. Compliance with Bulk Handling Act 1967

6.1. S 34 of the Act states that CBH's authorised charges are those "from time to time fixed by the Company's board of directors". Please let us have a copy of the charges as presently fixed.

6.2. Please let us have a statement, made under s 40 of the Bulk Handling Act, of the prescribed terms, conditions and charges which are in force and under which grain is received in bulk by CBH at the points at which CBH operates.

6.3. If the auction system, the GSA, the PTSA and the Port Terminal Rules are to the contrary of the terms and conditions provided for or prescribed under the Bulk Handling Act to apply to every receipt, handling and delivery of grain by CBH, it is those terms and conditions which apply by s 41 of the Act. It seems to us that to the extent of those terms and conditions the auction system, the GSA, the PTSA and Port Terminal Rules would not have effect or would not be binding. It seems to us that:

- the requirement under s 34 that charges be fixed by the board is to the contrary of charges being fixed by auction; and
- the rationing of a type of capacity to 70% is contrary to the right to use bulk handling facilities under s 19.

There is no power in CBH under the Bulk Handling Act to make delivery to or receipt into port conditional on it organising transport to port. On the other hand cl 17.1(a) of the GSA 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 GSA is resolved by s 41 of the Act in favour of the former.

As the auction system, the GSA, the PTSA and the Port Terminal Rules would involve CBH handling grain otherwise than in accordance with the Bulk Handling Act, we request that these documents be amended as necessary to accord with the Act.

7. These documents prevent Access Undertaking being accepted

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The GSA, the PTSA and the Port Terminal Rules in their present form would involve CBH giving access to ports otherwise than in accordance with the Bulk Handling Act. Business by CBH built on access in breach of the Bulk Handling Act is not a legitimate business.

When the ACCC is considering acceptance of CBH's port access undertaking it "may accept the undertaking, if it thinks it appropriate to do so having regard" to, relevantly, under para (a) of s 44ZZA(3) of the Trade Practices Act, "the legitimate business interests of the provider" (CBH) and under para (c) "the interests of persons who might want access to the service", in this case Glencore Grain and other marketers. These interests do not include interests built on breach of the Bulk Handling Act.

At present the only access business interest which the ACCC could have regard to would be that which breached the Bulk Handling Act. As this interest does not fall within the relevant paragraphs (a) and (c) of s 44ZZA(3) there is no scope for the ACCC to accept the undertaking.

S 118 of the Australian Constitution 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.

In our view this provision applies to the ACCC and is given effect by the ACCC faithfully recognising and giving credit for the relevant state Act, which in this case is the Bulk Handling Act. The Bulk Handling Act would be given full faith and credit by the ACCC not sanctioning or condoning access conduct in breach of that Act.

In our view also, since access comes from successful bidding at auction (at least in the majority of cases as envisaged under the FAQ answers) any access undertaking required by s 24(2)(c) of the Wheat Export Marketing Act 2008¹ should contain undertakings as to the auction system.

As the present access undertaking does not directly or expressly relate to the auction system it is questionable whether it is truly one relating to access to the CBH ports and whether the ACCC can make all the positive findings which it must, under s 44ZZA(3), to be able to accept the undertaking. For the undertaking to relate to the auction system in the sense of an undertaking to hold auctions at certain times and as to certain capacity, such as the capacity of the grid, the auction system will need to change as we have requested in secs 1 and 2 above.

7. Conclusion

- 7.1. To deal with the immediate problem of constrained grid capacity at the CBH ports we support a simple auction of capacity or slots at the grids.

¹ being the provision CBH or Grain Pool appears to be relying on.

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- 7.2. However the auction system you have proposed is of a different kind, is complex and time consuming and needs to be changed as we have indicated in sections 1 and 2 above. We have also requested clarifications and details, including the presently fixed charges and the prescribed terms, conditions and charges.
- 7.3. The Port Terminal Rules should be rules for using the terminal and should include fees, times, overtime and a provision for a demurrage/despatch arrangement.
- 7.4. We need a marked up copy of the Grain Services Agreement, subject to which that agreement should be amended in technical ways and to ensure consistency with the Bulk Handling Act as indicated in section 4 above.
- 7.5. The auction system being an important part of access to the ports the access undertaking should directly relate to it. The way it is at present the auction system is, in our view, an impediment to the undertaking being accepted by the ACCC.
- 7.6. Surge Capacity and Surge Fees should be removed entirely from the auction system.

We ask that the necessary be changes be made to the documents as soon as possible.

Yours sincerely



Chris Brooks

Managing Director