

GLENCORE

GRAIN PTY LTD

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5 May 2010

Dr W Craik AM
Presiding Commissioner
Productivity Commission
Locked Bag 2, Collins St. East, Melbourne, VIC 8003
wheatexport@pc.gov.au

Dear Dr Craik,

Submission on draft report on Wheat Export Marketing Arrangements

Summary

Thank you for the opportunity to make this submission and to participate at the forthcoming hearing in Sydney on 11 May.

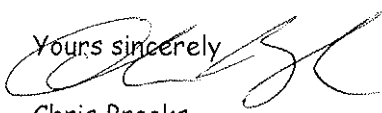
In summary we submit:

1. the access test must be retained and strengthened;
2. prices to growers must be expressed consistently or by means of a unit price such as a track price;
3. WEA is required to continue to monitor wheat pools and pool prices and to monitor access, although otherwise we support the abolition of its functions;
4. the access test may be removed when competition is introduced in a market served by a port terminal facility, but not before such competition;
5. the access undertaking must apply to all port capacity, not just spare capacity.

We support the abolition of the requirement for accreditation of wheat exporters.

The broad ground for these submissions is to counter the effects of the bulk handling monopolies in the export of wheat. Details of our submissions follow, including details of the regulatory changes sought.

Yours sincerely


Chris Brooks
Managing Director

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DETAILS OF SUBMISSION ON DRAFT REPORT ON WHEAT EXPORT MARKETING ARRANGEMENTS

1. WEMA is required to counter the port terminal monopolies

Glencore Grain Pty Ltd is an accredited wheat exporter and has traded grain in Australia for decades. Its group company Glencore Grain BV trades grain all over the world.

Like all other accredited wheat exporters Glencore Grain has to use the port terminal facilities of respectively CBH, Viterra and GrainCorp in order to load its ships to export the wheat it sells. There are no other ports we can use.

The three bulk handling companies hold a monopoly in respectively Western Australia, South Australia and Victoria/New South Wales/Queensland for port terminal facilities for the export of wheat in bulk (and other bulk grains).

Unless Glencore Grain can load for export at these port terminals it cannot export wheat in bulk at all. Nor can Glencore Grain use the terminals on punitive or unreasonable terms.

Glencore Grain, and the other grain traders, need actual rights to use the port terminal facilities. In the face of the long standing monopoly of each of the bulk handling companies and the foreseeable continuation of each monopoly we need an actual right to use the port terminal facilities, not the possible promise of a right of access (which is all you get under part IIIA of the Trade Practices Act). The need for this right is not transitional.

That the wheat export industry depends on three monopoly bulk handling companies that compete with us is the structure that we have to overcome in order to trade at all. It is this structural feature of the industry the needs to be corrected. Therefore the provisions of the Wheat Export Marketing Act 2008 that do this need to be retained and in fact be strengthened. The provisions for Wheat Export Australia to proactively monitor the conduct of the bulk handlers, both to actually provide access and to fairly conduct their wheat pools (a legacy of their monopoly or dominance in storage), need to be retained and strengthened. This can be done at the same time as removing the requirement for export accreditation under the Act.

In Western Australia this structural feature of the industry is also used by CBH to prevent other traders like Glencore Grain competing in the domestic wheat market.

2. *First submission*: access test must be retained and strengthened

The current access test which CBH, Viterra and GrainCorp must pass as a condition of their accreditations has to be retained and strengthened. In the case of Viterra and CBH this is because

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of their clear practice to penalise and exclude other exporters. In the case of GrainCorp we acknowledge that GrainCorp's access undertaking has worked practically.

3. CBH

3.1. CBH's passing the access test

CBH Grain Pty Ltd, a wholly owned subsidiary of Co-operative Bulk Holdings Limited (CBH), holds a renewal of accreditation dated 22 April 2010. CBH is understood to be the operator of the port terminal facilities associated with the CBH group.

CBH as an associated entity of CBH Grain which provides port terminal services is required to pass the access test to entitle CBH Grain to be accredited. CBH has passed the test by providing a Port Terminal Services Access Undertaking dated 24 September 2009 which the Australian Competition and Consumer Commission has accepted.

S 24(6) of the Wheat Export Marketing Act provides that a person fails the access test in relation to a port terminal service at a particular time if the person does not pass the access test in relation to the service at that time. Thus the access test has to be met continuously during accreditation. The point is that the access test is not merely a hurdle at the time of accreditation or renewal; it applies continuously.

A consideration of the costs and benefits of the Act, the Wheat Export Marketing Scheme, and the access undertaking required by the Act and the appropriateness and effectiveness of the undertaking required, in accordance with the terms of reference, all mean that the commission has to look at the undertaking of CBH and the conduct of CBH (as well as of the other two bulk handling companies) in the present 2009-2010 wheat export season.

3.2. CBH auction system rules

In brief the CBH access undertaking grants access to port terminal services in accordance with a standard Port Terminal Services Agreement. That agreement requires the parties, the Port Operator (CBH) and the customer (the wheat exporter such as Glencore Grain), to comply with the Port Terminal Rules.

The Port Terminal Rules allow CBH to create lots (slots or Shipping Windows) at port bulk loaders and to auction the lots.

3.3. Transport election rule only allows Grain Express to be chosen

Within five days of completion of an auction for the Annual Shipping Period (which covers almost all of the season, from 16 January to 31 October 2010, the customer must

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nominate its arrangements for delivery of grain to port, whether under a "GSA" or another 'supply chain solution" (rule 6.1(d))

The first auction takes place at the beginning of the season before the harvest is in and purchases have been made. It is impossible for a trader to have its transport arrangements in place at this time. Accordingly Port Terminal Rule 6.1(d) forces the trader to use "GSA ". For the present for GSA read "Grain Express".

Thus in answer to the commission's observations and questions on this issue at pages 170-171 of the draft report:

- It is not seven days that you have to choose your transport to port but a mere five after auction (although 7 days may apply at a later auction).
- Rule 6.1(d) does not merely make it more likely or a question of choice as to whether the trader users Grain Express. There is no choice at all: you have to decide how you will transport to port and since you would not have any specific grain as to which you could arrange transport you are forced to use GSA, in other words Grain Express.
- Grain Express is forced on you not just in the secondary market, as discussed on p 171, but in your own use of the very slot for which you bid. This is blatant third line forcing, which closes the land transport market to the trader and others supplying to the trader.

The trader gets no benefit by being forced to take Grain Express and CBH gives nothing in return at the time of choice. We agree with AGEA, at p 170 of the draft report, that it should be sufficient to nominate transport when the ship to be loaded itself is nominated.

3.4. CBH can manipulate capacity

CBH is able to turn capacity on and off at whim, for the auction is not of capacity generally but tranches of capacity chosen by CBH, including the totally fictitious "surge capacity" which is based not on additional ship loading speed or spouts but the trader paying for additional transport to get grain to port (Port Terminal Rule 4.2(b)(i)).

3.5. CBH does not allow a secondary market

Port Terminal Rule 7 allows trading in capacity purchased at auction which might suggest there is a secondary market. But contrary to the observations at p 171 of the draft report there is no secondary market, primarily because CBH Grain, which is estimated to hold at least 40% of all booked loading slots has no incentive to trade in surplus slots since CBH as a group suffers no default penalty if a slot is unused. This is because the deposit and

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other fees forfeited remain within the CBH Group. As a result there is no liquidity in the secondary market. Other aspects of rule 7 deter trading: you have to use Grain Express, which is expensive and unreliable; you cannot trade if the transferor has Grain Express and the transferee has its own transport arrangements, or vice versa; you have to pay a 5c a tonne fee to CBH; and CBH has to approve the transfer.

3.6. How CBH benefits from unused capacity bid at auction

A successful bid for capacity at auction incurs a deposit of \$3 a tonne and a premium which may be in the range \$1 to \$17 a tonne. The bidder has to pay elevation fees of \$14.10 a tonne. Assuming a premium of \$12 total fees may thus amount to \$29.10.

If you use the slot the premium less auction expenses is rebated.

If the slot is not used you forfeit all the fees, which is punitive. In relation to the premium of \$12 a tonne, CBH does not incur any cost additional to the auction expenses whether or not you use your slot, and thus the net premium should be refundable in all circumstances. As to the elevation fees some portion of these should be refundable where CBH is saved elevation expenses, say 40%; but the whole elevation expenses should be refunded if the slot is resold.

CBH Grain on the other hand can afford to overbid for capacity or have unused capacity because the fees it forfeits are forfeited to its own group company.

Allocating capacity in this way, which is under the Auction Rules, which are a schedule to the Port Terminal Rules, inhibits bidding by traders like Glencore Grain because of the forfeiture risk but encourages bidding by CBH Grain because they have no such risk.

The observation in the draft report that CBH would incur real costs in "booking out the stem" (p 169) is not correct because any fees CBH pays it forfeits to itself. As to the premium rebate that it might have to forego to bidders who actually shipped, the rebate is first a net rebate, after auction costs, and secondly it depends on whether CBH Grain did pay any rebate. The CBH rebate does not reward the other shippers.

3.7. Grain Express as a monopoly and a levy

Grain Express is understood to be CBH's transport requirement, that grain growers or marketers acquire supply chain coordination services from CBH, being conditions of its offering to supply storage and handling services.

The requirement may be imposed as a condition of the grower or marketer being given storage under a Grain Services Agreement. It may be imposed as a single election that has to be made within just five days of a successful auction bid for shipping capacity.

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It gives CBH exclusivity over transport from up country storage to a port and it operates as a levy with which CBH meets the costs of the transport.

CI 17.1(a) of The "2009/10 Season Bulk Wheat Grain Services Agreement For Standard Grain Storage and Handling Services" on the CBH website reveals how Grain Express works:

It is a condition of CBH offering the Services under this Agreement that CBH transports the Grain between the Receival 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.

Grain Express is an impost or a levy in respect of transport to port but the transport does not have to occur.

As a requirement that CBH have exclusivity over transport from up country to a port, Grain Express prohibits a trader such as Glencore Grain arranging transport to port. By comparison in the eastern states we organise trucks and sometimes trains to take wheat we have purchased to port. In Western Australia this is prohibited.

3.8. Grain Express is inefficient

In the first few months of 2009, under Grain Express Glencore Grain incurred 123 laytime days and consequent demurrage charges of over \$1.4 million and "surge" charges of over \$500,000 (a proportion of which surge charges have belatedly been repaid; but not the demurrage). Generally there were massive delays in transport to the CBH ports. Glencore Grain is pursuing a claim against CBH for these losses.

Even in February this year we incurred demurrage costs of \$300,000 due to late transport under Grain Express.

3.9. Grain Express prevents us carrying grain

Grain Express excludes us from:

- Transport of grain from up country storage to port
- Transport of grain from up country storage to a domestic customer, or alternatively if the relevant agreement allows the transport, a fee of \$8.50 a tonne is imposed by CBH and as well the grower under its agreement with CBH is required to pay a fee to CBH in respect of transport that CBH would have charged – which two fees make the domestic transport uneconomic.

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3.10. Grain Express gives CBH arbitrage

On the other hand Grain Express allows CBH:

- 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.
- 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.
- To charge for transport without competitive pressure. Under Grain Express transport charges by CBH have increased by 20-30%.

4. VITERRA

4.1. Viterra and the access test

Viterra Inc's wholly owned subsidiary ABB Grain Ltd (refer to p 1 of submission of ABB Grain of 13 November 2009) holds a renewal of accreditation dated 18 December 2009.

ABB Grain's subsidiary AusBulk Ltd is a provider of port services (as mentioned in the third paragraph of the ABB Grain submission).

AusBulk as an associated entity of ABB Grain which provides port terminal services is required to pass the access test to entitle ABB Grain to be accredited. AusBulk has passed the test by providing a Port Terminal Services Access Undertaking dated 24 September 2009 which the Australian Competition and Consumer Commission has accepted.

We submit that the two features of the Port Terminal Services Access Undertaking of AusBulk which are inappropriate and ineffective in providing equal access to terminals as between ABB Grain and other exporters, and which lump other exporters with costs that ABB Grain does not have to wear are (i) the ship loading slot booking system and (ii) the additional throughput charges for non-ABB sourced grain.

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4.2. Ship loading slot booking system

The Port Terminal Services Access Undertaking of AusBulk includes the Port Loading Protocols¹.

Cl 2 and Table A of the Port Loading Protocols provide for the client (the exporter) to book a 30 day ship loading slot greater than 60 days in advance and paying a non-refundable booking fee which, under sec C 1 of the Reference Prices is \$5 per mt, payable within 14 days of invoice (cl 1.2 of the payment terms in the Reference Prices). ABB is required to accept or refuse a slot booking within two days (cl 4 of the protocols).

Cl 2.6 of the protocols provides:

Bookings accepted by ABB are allocated personally to the Client and are not transferable.

The slot is reduced to a 15 day period 30 days in advance of its commencement (item 3, table A to the protocols). Handling and shipping fees are required to be paid 18 days in advance (item 4).

Cl 12 of the protocols permits, but does not require, AusBulk to refuse slot bookings if it suspects that bookings are above reasonably anticipated requirements. The clause provides for the inconceivable scenario of a lesser company in the Viterro Inc group, AusBulk – three rungs down – having the power to tell its holding company ABB Grain, the accredited exporter, that it is seeking to book loading slots above its reasonable requirements and accordingly that the slots should be refused. In other words cl 12 would never be exercised against ABB Grain, although it is possible that other exporters who sought to overbook could have their bookings refused.

4.3. ABB Grain hoards slots under this system

The AusBulk undertaking commenced on 1 October 2009 which is when bookings for slots opened. In terms of table A of the protocols which require bookings two months in advance, bookings would have then been required for loadings in December 2009.

ABB Grain exported some 49% of the wheat and other grain of South Australia in 2008-2009. Its conduct thus influences bookings. If ABB Grain books progressively, other exporters are likely to do the same and will themselves have a better chance of making

¹ In the undertaking AusBulk offers Standard Port Terminal Services by means of a ship loader and the use of a ship loader to export bulk wheat through the relevant AusBulk port terminal in accordance with "Standard Terms" and "Reference Prices" (cls 5.1 and 5.2(a) and (b) of the undertaking). The Standard Terms, in schedule 3 to the undertaking, include in cl 4.1(b), provision that the Standard Port Terminal Services are provided subject to the Port Loading Protocols, subject to availability (cl 4.2) and subject to the capacity management undertaking in cl 9 of the access undertaking. The capacity management undertakings also require compliance with the Port Loading Protocols.

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sales on the basis of loading slots being available. On the other hand if ABB Grain books for the majority of the season at the beginning it forces other exporters to make bookings simply so as not to be devoid of loading slots if they can secure a sale.

In October 2009 ABB Grain booked 2.6m tonnes of loading slots which would have attracted a booking fee of \$13 million. Glencore Grain booked 220,000 tonnes of slots. In fact as of 16 April 2010 ABB Grain has cancelled 1,046,000 tonnes, at a nominal penalty or loss, payable to AusBulk, of \$5,230,000.

On average ABB Grain cancels 50,000 tonnes of booked slots each week, at a nominal penalty or loss of \$250,000.

The extent of exclusion may be seen at Port Lincoln last March where of the usual monthly throughput of about 175,000 tonnes ABB Grain cancelled a total of 119,000 slots; that is in March 68% of the tonnage capacity of Port Lincoln was closed to competitors of ABB Grain.

ABB Grain never surrenders slots that it does not need.

ABB Grain hoards unfilled 15 day slots until the last of those days, ensuring they can never be reallocated.

By comparison as of 16 April 2010 the total of all other cancellations of slots was 276,000 tonnes spread among six traders, an average of 46,000 tonnes per trader at an average real loss or penalty, payable to AusBulk, of \$230,000. **ABB Grain's cancellations were 3.78 times the level of the cancellations of its competitors.**

4.4. SA market context

To further put this in context for the 2009-2010 season the total export crop from South Australia is expected to be 6 million tonnes of which 5.7 million tonnes is in ABB Grain storage. In estimating how much of this ABB Grain would export one would take into account:

- ABB Grain's share of the total crop last year, namely 49%.
- growers wanting to hold onto grain because of the present very low prices (\$A300 in 2008-2009 as opposed to \$220 and falling in October 2009).
- price volatility, the continuing effects of the GFC and the trend to just in time delivery making buyers buy at short notice.
- an increase in the number of accredited exporters from 23 to 29
- reasonably expected sales, not possible sales

Thus a reasonable estimate in October 2009 of the tonnage for which ABB Grain would need loading slots would be something well under 49% of 5.7 million tonnes, or 2,793,000

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tonnes. The spread and the actual amount of the total tonnage would only become progressively known during the 12 month season. We do not believe that during the course of October 2009 ABB Grain could have reasonably expected that it would need 2.6 million tonnes of particular loading slots.

If ABB Grain's six competitors had to suffer the monthly rate of cancellations that ABB Grain presently suffers – 50,000 tonnes – they would between them lose \$250,000 a month which would make their business in the state ruinous: they would withdraw.

4.5. Creating “additional capacity” to benefit ABB Grain

Finally, the Viterra shipping stem for 20 April 2010 showed that at Port Lincoln “Additional Capacity” is available in the period 1 May to 30 July 2010 subject to the exporter meeting possible additional transport costs, expected to be about \$1.75 a tonne. Given that ABB Grain has a surplus of slots it is not apparent why “additional capacity” should be created.

If Glencore Grain was competing with ABB Grain to fill a tender that corresponded with this period, Glencore would be at the disadvantage of a possible \$1.75 tonne overhead, which ABB Grain would not have to incur.

4.6. The result is an inappropriate and ineffective slot booking system

In the words of the terms of reference, is an access undertaking that allows the above conduct appropriate or effective? The answer is clearly no:

1. It was not appropriate for ABB Grain to book 2.6 million tonnes of loading slots at the beginning of the season. They would not have had the anticipated sales to justify this plunge, as confirmed by the cancelling 1,046,000 of the slots, cancelling on average 50,000 tonnes a week and cancelling 3.78 times the level of its competitors.
2. Overbooking by ABB Grain, and the impossibility of transfer of ABB Grain's surplus slots, prevents Glencore Grain and other traders bidding for tenders that would use those slots. The extent of exclusion may be seen at Port Lincoln last March where due to cancellations by ABB Grain 68% of the tonnage capacity of the port was closed to competitors of ABB Grain.
3. It is not appropriate, in fact it is grossly unfair, that ABB Grain **forfeits its deposit to itself** if it cancels a booked loading slot but its competitors pay their deposit if they cancel to AusBulk and thus ultimately to the parent of ABB Grain. Yet the required access undertaking, including the port loading protocols, allows this.

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4. It is not effective to have a sanction for cancelling booked loading slots – as a way of ensuring genuine bookings – not apply to AusBulk. The commission would be pretty certain that if ABB Grain stood to lose any of its deposit on slots booked it would be careful not to over book, with obvious benefits to competition.
5. It is not appropriate for ABB Grain to overbook by some 40% and not to ever surrender slots that would not be required, because those two practices keep all of ABB Grain's competition out of the market comprised of those slots. Furthermore these two practices of ABB Grain, as a related body corporate of AusBulk, are actually prohibited by cl 9.4(a) of the access undertaking, which provides as follows:

The Port Operator, or a related Body Corporate of the Port Operator, must not engage in conduct for the purpose of preventing or hindering access to the Port Terminal Services by any other Applicant or User in the exercise of a right of access under this Undertaking.

6. It is neither appropriate nor effective to completely prohibit transfers of booked loading slots, under cl 2.6 of the port loading protocols, which are part of the access undertaking. This means that on average 50,000 tonnes of slots a week that are surplus to ABB Grain are locked up: Glencore Grain cannot offer to buy them. By comparison GrainCorp, on the east coast, does allow loading slot transfers and they do take place. In all other wheat markets where Glencore Grain trades, including Russia and Ukraine, loading slots as a matter of practice are transferrable.

The possible claim that the prohibition is justified by counterparty risk is wrong: the purchaser of a slot would have to be another accredited, and therefore usually a financially sound, exporter; furthermore any exceptional risk can be met by the original slot holder covering the risk of default by the purchaser.

In Glencore Grain's experience if a trader cannot fill a slot the trader will make every effort to transfer it so as not to incur a lost deposit, even to the extent of entering into back to back deals that do not offend cl 2.6 of the port loading protocols. But the access undertaking has no such efficiency incentive for ABB Grain.

7. The access undertaking is not effective in that it does not provide for surrender or transfer of hoarded or surplus bookings, which could be made available to other traders without the transport surcharge that is attracted when, as at Port Lincoln in May-July 2010, "additional" loading capacity is created by AusBulk.

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8. Cl 12 of the Port Loading Protocols, which are part of the access undertaking, is ineffective in preventing overbooking by ABB Grain.

4.7. Additional throughput charges

A further aspect of the AusBulk port access undertaking is its additional imposts for wheat sourced from outside ABB storage.

The Reference Prices incorporated into the AusBulk Access undertaking add throughput charges to such outside wheat totalling up \$5.75 a tonne, made up of:

- an additional .35% for shrinkage, adding about 80c a tonne for shrinkage;
 - a "receival at port service fee" of \$2.50 a tonne, additional to the charge of \$2.20 which is all that is charged ABB-sourced grain and
 - between \$1.95 and \$2.45 a tonne for using ABB's transport to port (Export Select)
- The additional costs imposed by ABB for wheat sourced from outside ABB storage are so great that we are forced to use ABB to transport the grain to port.

As a result ABB is acquiring a monopoly of land transport to port in a similar way CBH has such a monopoly through its Grain Express.

5. GRAINCORP

Our experience with GrainCorp shows the worth of having an access undertaking in place.

Glencore Grain were effectively eliminated from participating in the 2009-2010 harvest accumulation for shipping wheat of the east coast in any way shape or form because we did not agree to the Port Terminal Services Agreement proposed to us by GrainCorp under its access undertaking. In our view the terms proposed were uncommercial. GrainCorp refused to negotiate with us in any form until we initiated the dispute resolution provisions of the access undertaking, after which GrainCorp immediately negotiated a realistic agreement with us.

Without the access undertaking we would not have resolved our issues. Instead we would have had to move the National Competition Council for a declaration, which as your commission would be aware from the Pilbara railway saga is fraught with problems.

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6. *Second submission: consistent pricing to growers*

6.1. Misleading wheat pool price claims

In our experience the operators of wheat pools, often bulk handling companies, may make claims about the high return to growers who deliver into the pool which do not take into account: interest charges; management charges; country storage; hedging fees; transport, risk management and other fees.

Although the claims are predictions they can be tested against past pool returns, known fees, and indexes at the Chicago Board of Trade.

To claim a pool price to a grower at Geelong of \$200 a tonne of itself is misleading since one grower may be deducted \$20 a tonne for transport and another \$40.

A gross pool price from which is deducted \$30 for transport to Asia is going to be more than one from which \$45 is deducted for transport to North America. However setting out these factors is difficult in marketing.

On the other hand Glencore Grain pays a fixed price for wheat. There is nothing to deduct from the price.

In our experience claims for pool prices which on their face are higher than the price we would offer are misleading when the deductions for charges that reduce the pool prices are ignored or buried by those making the claims.

6.2. Consistent pricing

The solution to the problem of misleading wheat pool price claims is a requirement for unit or consistent pricing, both for pool prices and prices offered by traders, so that growers can fairly compare prices.

We request the commission recommend that the Act or the Scheme require unit or consistent pricing to growers, and specify the unit, eg pricing on a track basis. Thus "\$200 track Geelong" would mean \$200 for a tonne of wheat in storage in Geelong. From this the grower would be able to make his or her own adjustments for transport or any other charges to get the wheat to Geelong.

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7. *Third submission: WEA to continue to monitor wheat pools and pool prices and to monitor access*

Wheat Exports Australia already proactively monitors prices to growers. Its staff have specialised knowledge of the industry. Last year WEA requested ABB Grain and others to justify pool price claims. ABB Grain responded by *lowering* its price claims.

By comparison the ACCC does not proactively monitor anything to do with the wheat industry. Its staff do not have specialised knowledge of the industry. An example of the ACCC approach to investigation of the wheat industry is its ratification of Grain Express as a form of acceptable exclusive dealing under the Trade Practices Act. On 13 August 2009 we requested the ACCC to revoke this ratification for detailed reasons including that it gives CBH a monopoly of transport to port. In response the ACCC had a high level discussion with CBH and did nothing. *No response was given to our request.*

The right of access to the port terminal facilities of CBH and Viterra must be visible and clear as otherwise parties in Western Australia and South Australia other than CBH and Viterra cannot export wheat at all from those states.

It is generally not feasible for wheat exporters themselves to enforce their right of access because they are at the mercy of the bulk handling companies and because of the demands of the harvest, which is when the exclusion is felt.

For example last September 2009, Glencore Grain sought modifications to the port terminal services agreement proposed by GrainCorp (under its access undertaking). In recent years Glencore Grain had been the largest user of the port terminal services of GrainCorp in Victoria. But in the 2009-2010 harvest we did not use their services at all because we could not agree with a host of excessive charges under their port terminal services agreement. As mentioned above we invoked the dispute resolution provisions of the undertaking and quickly thereafter matters were resolved. However this was a very high price to pay to resolve the dispute. If WEA is seen to play an active role in monitoring access we would have had a less costly alternative to resolving the dispute.

Wheat Exports Australia is a body with specialised knowledge and experience of wheat exports.

It is submitted that Wheat Exports Australia should be retained to continue to monitor wheat pools and pool prices, and to monitor and enforce the right of wheat exporters to use the port terminal facilities owned and operated by their competitors. In other respects it is agreed that WEA should be abolished as recommended in draft recommendation 4.4.

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8. *Fourth submission: access test to be removed when competition introduced*

As recognised in the commission's report, the wheat export market in Australia is in transition. It may be expected that there will be new port terminal facilities in the future competitive with the existing port terminal facilities of CBH, Viterra and GrainCorp. When that occurs there will be a case for reviewing the need for access undertakings for either the existing terminal facility or the new facility or both. The experience with the *reduction* of access regulation for the Moomba Sydney pipeline since it became competitive with the Eastern Gas pipeline serving Sydney from Bass Strait illustrates how access regulation may be wound back if there is competition.

But there is no case for winding back access obligations before there is any competition.

It is submitted that there should be provision for the access test applying to the present port terminal facilities to be reviewed if a port terminal facility is subject to competition from a new port terminal facility, for the purpose of the test being reduced or abolished.

9. *Fifth submission: access undertaking to apply to all port capacity, not just spare capacity.*

We support the submission of AGEA of April 2010 on this issue, at pages 2 and 9.

10. *Regulatory changes sought*

It is submitted that the above changes to regulation may be reflected in provisions along the following lines:

- a. The Wheat Export Marketing Act and scheme being shorn of the provisions for accreditation but providing a plain statement of the obligation to grant access to a port terminal facility. S 19 of the Bulk Handling Act 1967 of Western Australia, which is referred to in the draft report, is an example of such a statement.
- b. The existing access undertakings of the bulk handling companies being kept in force after any changes to the Act and the scheme, subject to the following.
- c. Loading slots which have been paid for are to be transferrable on reasonable terms.
- d. Deposits for loading slots which have been acquired by a company or an associate of a company that operates a port terminal facility to be paid into an independent fund which at the conclusion of the harvest is to be distributed in accordance with the use made of

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booked slots. [Thus in the case of Viterra, if it booked 1 million tonnes of slots at \$5 a tonne – the current fee - \$5 million would be paid into an independent fund. If Viterra used 50% of its slots it would be entitled to \$500,000 the balance being fairly apportioned between other exporters in accordance with the use they made of their slots.]

- e. The charge for a loading slot which has been paid for but not used to be only a reasonable deposit paid on that slot. [Thus in the case of CBH where the deposit payable on purchase of a loading slot is \$3 a tonne only \$3 a tonne should be retained by CBH if the slot is not used. This would be instead of charges imposed by CBH at present of between \$25 and \$35 a tonne.]
- f. Transport arrangements from up country to a port terminal are to be at the choice of the exporter and not specified by the company or an associate of the company that operates the port terminal. [Thus Grain Express would be voluntary, as already are the rail arrangements of GrainCorp.]
- g. The Wheat Export Marketing Act or a scheme under the Act containing provision for Wheat Exports Australia to monitor and enforce the right of wheat exporters to use the port terminal facilities owned and operated by their competitors/ the port terminal facility operators; and to monitor wheat pools and prices. [Thus WEA's information gathering powers could be retained for this purpose.]
- h. The Wheat Export Marketing Act or a scheme under the Act containing provision for Wheat Exports Australia to review the access test applying to the present port terminal facilities if a port terminal facility is subject to competition from a new port terminal facility. The access test would be reduced or abolished as appropriate.

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11 May 2010

GLENCORE GRAIN SUBMISSIONS - CBH, VITERRA AND AWB PERSPECTIVES

- We have examined the CBH (03/10) and Viterro (23 April 2010) submissions on the draft report of the commission for issues they take about matters in Glencore Grain's submissions.
- We have also examined the views of AWB on the submissions we have raised. AWB's views should be given weight since AWB is a very significant user of port terminal facilities.

1. Glencore Grain's submission that the access test must be retained and strengthened

AWB supports retention of access test

At pp 8-9 of the AWB submission AWB outline their own practical difficulties negotiating with the bulk handling companies, and their reliance on the access undertaking.

We submit that the commission should give great weight to this submission, coming from a very substantial trader. It may be expected that other traders who are smaller will be in the same position. We are.

CBH secondary market

As stated in sec 3.5 of our submission, the CBH secondary market requires a 5c a tonne fee to CBH, CBH approval of transfers, and transferee and transferor have, in effect, to use Grain Express (which is CBH transport). Thus **the CBH secondary market is entirely dependent on CBH.**

CBH states at sec 5.3(b)(x), p 5, of its submission as an objective in implementing port capacity that the secondary market should "operate independent of CBH".

Lest this objective be disingenuous, the rules have to change so that the secondary market does indeed operate independently of CBH.

Without the undertaking required by the access test there would be no procedure for such a change.

CBH auction system

CBH propose at sec 5.3(c)(v), p 8, of their submission nine changes to the auction system.

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CBH say that the details will be shortly advised to the trade and be subject to a period of industry consultation.

In fact sec 10.3 of the CBH access undertaking provides for notice and consultation and the involvement of the ACCC in variations to the port terminal rules.

Clearly a variation to the port terminal rules is needed because (i) the present rules force Grain Express on traders, CBH can manipulate capacity and CBH benefits from forfeited fees for unused capacity (see secs 3.3 to 3.6 of our submission) and (ii) CBH sees the need for change. (At this stage it is not necessary to consider the details of what CBH proposes.)

Without the undertaking required by the access test there would be no procedure for such a change.

Whether Grain Express meets market need

The only way to find out whether Grain Express, that is transport to port organised by CBH, meets the needs of the market is to allow choice as to transport to port.

As pointed out in secs 3.3 and 3.7 – 3.9 of our submission there is no such choice under the port terminal rules, Grain Express is expensive and its cost is a levy, that is it is not a fee for service.

On the other hand CBH says at sec 5.3(c)(ix), p 9, of its submission:

To date CBH has had an extremely limited interest in Direct to Port access (ie access to CBH port terminals through an alternative supply chain). CBH contends that this is because the basic CBH service is addressing the market needs as there is no discrimination between grain delivered from the CBH supply chain versus that from an alternate supply chain.

However the plain facts are:

- Traders have to use Grain Express at present. Direct to Port cannot be chosen at the only time allowed for choice, which is within 5 days of buying a slot.
- In the last season we incurred demurrage and surge costs exceeding \$2.3m and this season \$300,000 demurrage costs because Grain Express transport in both seasons has been slow

It is submitted that CBH's statement is unfounded and cannot be relied on.

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Whether others should be allowed to transport grain to port

CBH say at sec5.3(f), p 16:

Quite simply, if Grain Express does not perform for exporters, they will seek to establish alternate supply chains. Exporters are seeking their grain at port at the required time at the required specification. If CBH fail to provide comfort that it will deliver this, exporters will seek to go around CBH.

That is, CBH recognises the need for others to be allowed to compete against Grain Express. Consistently with this admission, CBH's access undertaking and the agreements and rules it incorporates need to be amended to allow others to transport grain to port as freely as CBH.

Whether the access test creates investment uncertainty

The main thrust of Viterra's submission is that the access test should go because it is a "strong disincentive for future efficient investment in infrastructure" (p 2, first paragraph).

There are two points to note:

- Viterra have not given a single example of cancelled investment. Contrast the specific cancellations or deferrals of projects by mining companies following the recent super profits tax announcements, eg actual deferrals in relation to Olympic Dam.
- In South Australia, the total export crop, including non-wheat this year is understood to be 6m tonnes. ABB is understood to have storage and handling facilities for some 8 million tonnes. The state had more export ports than any other state. The issue of further investment in storage and port terminals is entirely academic.

We submit that there is no evidence whatsoever of the access test causing investment uncertainty.

2. Prices to growers must be expressed consistently or by means of a unit price such as a track price

CBH say at sec 3.3, p 2 of the submission:

Anecdotal evidence suggests that some pool managers inflate estimated pool returns at harvest time to attract grain with prices subsequently declining post harvest.

AWB say:

The Australian grains industry would benefit from pool operator guidelines to enhance and promote further transparency in the industry. (p 3, first sentence)

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AWB list at sec 1, p 3, the many factors affecting pool price, such as foreign exchange, commodity derivatives, and risk profile.

We submit these admissions from significant pool operators show the need for a consistent system of pricing pool returns that enables the grower to make fair comparisons, and the need for oversight by WEA, both as submitted in sec 6 of Glencore Grain's submission.

3. The access undertaking must apply to all port capacity, not just spare capacity.

The case for the access test applying to all capacity and not just spare capacity is correctly put by AWB at pp 9-10 of their submission. We respectfully commend their submission in this regard to the commission.

The sole basis for the commission's considering linking the test to only spare capacity appears to be chance remarks of the NCC's Executive Director to a hearing of the commission: see p 140 of the draft report.

We agree with the AWB submission that the NCC interpretation is flawed.

We strongly submit that the access test must continue to apply to all port capacity.

4. Regulatory change: item 10 f in our submission- an independent fund to hold ship loading slot deposits.

AWB support an independently operated process for allocating shipping slots, p 9, second last paragraph.

This is consistent with but goes further than our submission. The only explanation for such a strong submission is that CBH and Viterro are too conflicted. They cannot be trusted with the allocation of ship loading slots.

5. Despatch and demurrage system

AWB at p 9, 6th paragraph, correctly point to the flaw in the auction system not having demurrage despatch.

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In our experience CBH will not agree to any demurrage despatch terms. If Grain Express was as reliable as it should be CBH would accept the demurrage costs and benefits that should flow from it. Secondly if Grain Express is the only transport system allowed by CBH, CBH should not be permitted to walk away from the cost of delays when the system fails, as it has even this year.
