

# **The Grain Trade Australia Voyage Charter 2013 – AusGrain 2013**

## **Presentation to the Institute of Chartered Shipbrokers**

**Melbourne, 29 September 2013**

**Geoff Farnsworth,  
Principal, M+K Lawyers  
Director, Grain Trade Australia Ltd**

**Copies of AusGrain 2013 may be found here:**

<http://www.graintrade.org.au/sites/default/files/file/Contracts/2013/Ausgrain%202013.pdf>

### **Introduction and Caution**

The preparation of the AusGrain 2013 was a project of Grain Trade Australia. That project is now completed. The resulting document, AusGrain 2013, is a template voyage charter tailored for use in the Australian grain export trade.

It represents the starting point for commercial negotiation, not the conclusion.

The failings or merits of the document, and its construction and interpretation are now a matter for the Trade, its advisors, and possibly arbitrators (and/or judges).

Comments and feedback are always welcome and should be directed to GTA.

### **Why AusGrain?**

Australia is a significant grain exporter. Its significance as a grain exporter, particularly into Asia, is likely to increase, as is the proportion of bulk shipments.

For the last 20+ years, the Australian Wheat Charter 1990 (“AUSTWHEAT 1990”) has been the most recognizable and accepted form of voyage charter for the export of grain (particularly wheat) from Australia. That charter was formulated by the Australian Wheat Board (“AWB”), and approved and recommended by BIMCO.

The Australian Wheat Board was corporatised in 1999 and acquired by Agrium in 2010. With de-regulation and corporatization of the bulk wheat export market, a number of the industry-good functions which had been performed by AWB were in limbo. One of these functions was responsibility for AUSTWHEAT.

The market hates a vacuum and into the void left by deregulation stepped the market, which created a multiplicity of new forms, including several new unofficial forms of AUSTWHEAT (including AUSTWHEAT 2008 and 2009 both of which somewhat mischievously featured the AWB logo).

Grain Trade Australia has been responsible for assuming some of the industry-good functions performed by AWB and in approximately 2010, GTA agreed to be the custodian for AUSTWHEAT and set about conducting a review with the objective of producing a contemporary and relevant grain voyage charterparty.

### **The Review Process**

In 2012 GTA notified the market that it intended to conduct a review of AUSTWHEAT and constituted a committee made up of representatives of Australia's major grain exporters. As a director of GTA, I was asked to chair that committee.

The first step was to consider terms of reference. These terms of reference included a consideration of whether a review was necessary and whether a new form of charter was required. The Committee answered yes to both questions.

The Committee also considered the involvement of BIMCO and resolved that while BIMCO approval in due course would be desirable, that was something that could be pursued further down the track.

Shipowners and brokers were not represented on the Committee.

The simple reason is because no ship-owners or ship-brokers are members of GTA.

However it was always accepted by the Committee that owners and brokers would be consulted. Moreover, it was always accepted by the Committee that any document produced should be balanced and fair and not unreasonably favourable to owners or charterers.

There would be no utility in producing a document which owners and brokers simply refused to use.

The Committee then conducted a review of the more recent iterations of AUSTWHEAT and from that process prepared a first draft of AusGrain. This draft was subject of targeted discussions with the ship-owning and broker fraternity.

Perhaps the best advice we received from one broker was that content was largely irrelevant, so long as it was clear and consistent. This would allow brokers in particular to advise their owners accurately about the characteristics of the contract; to identify risks and advise on how those risks could be managed either through rates, or amendments.

Suggested changes were incorporated into the next draft which was considered by the Committee and subsequently published to industry for comment.

Feedback was received and considered by the Committee and the final form of the AusGrain was published in June 2013.

## **Relevant Factors and Features of AusGrain.**

### **Pre-loading vessel inspection**

One of the consequences of deregulation has been issues associated with management of shipping slots at export terminals specifically when vessels fail the inspection required by DAFF Biosecurity (formerly AQIS) and under the *Export Control (Plant and Plant Products) Order 2011 (Cth)*.

The seriousness of this issue is reflected in the report published by the Victorian Grain Logistics Taskforce which highlighted the issue of the cleanliness of vessels when presenting at Australian ports.

This problem is exacerbated by the fact that vessels must be inspected twice; first by an independent surveyor, and second by DAFF Biosecurity. Passing one survey is no guarantee of passing the second.

Further, for OHS reasons DAFF inspectors would not inspect a vessel at anchorage, but only once she had come alongside.

This has to some extent been ameliorated by the new system of DAFF Authorised Officers. These AOs are now more willing to engage in inspections at anchorage, which should in theory mean that any issues can be addressed well before the vessel comes alongside.

Clause 15 of AusGrain deals with inspection at loading port.

It seeks to facilitate and encourage inspections at anchorage. It also provides that the Charterers are to appoint the independent surveyor (acceptable to Owners, acting reasonably) but the cost of the surveyor is for Owners' account.

This was a suggestion from a broker. He took the view that given the limited choice in available surveyors, owners and charterers would draw from the same pool in any event.

### **Tender of NOR**

Perhaps the most controversial aspect of AusGrain is clause 19.8 which provides that an invalid NOR (for example, where the holds are subsequently failed for being unclean) is a nullity such that time will not count until a valid NOR has been given.

This is a change from AUSTWHEAT, but reflects the trend in the later unauthorized versions of AUSTWHEAT.

It was the Committee's view that this reflected the importance of vessels being ready in all respects when NOR is tendered.

It seemed appropriate that this was the starting point, even if the parties then chose to vary the position during negotiation.

### **Berth Charter**

Recent decisions of the UK Courts have considered the importance of the distinction between port and berth charterparties.

Given that few Australian ports have more than one grain berth it seemed appropriate, for the avoidance of doubt, to clearly designate AusGrain as a berth charter meaning that a valid NOR can only be tendered when the vessel is either in the loading berth, or on arrival at the port if the designated the berth is occupied (as it will usually be).

This is another example of attempting to be clear.

### **BIMCO Clauses**

AusGrain makes use of several standard BIMCO clauses, particularly

- VOYWAR 2004
- the BIMCO Piracy Clause, and
- the BIMCO ISPS/MTSA Clause.

### **Arbitration**

AusGrain includes a referral of disputes to arbitration; administered by GTA for events occurring in Australia, and by LMAA otherwise.

While the Committee was mindful of the recent Federal Court decision in *Norden*, it did not believe that this needed to be taken into account in drafting the arbitration agreement given;

- the parties are free to amend the arbitration agreement as they wish, in any event,
- the decision is subject to an appeal; and
- the first part of the clause at least should be consistent with section 11(3) of the *Carriage of Goods by Sea Act 1991* (Cth).

### **BIMCO**

The form is not currently BIMCO recommended and BIMCO has not been consulted in relation to the document.

I anticipate that the document will be subject to an industry review possibly as early as mid-2014. By that stage hopefully the document will have been more widely used and feedback from Owners, Brokers and Charterers can be incorporated.

The next step would be engage with BIMCO to investigate the process of obtaining BIMCO recommendation.