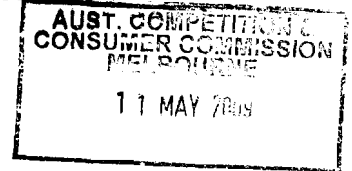


## AUSTRALIAN GRAIN EXPORTERS ASSOCIATION

(A B N – 08 080 034 135)

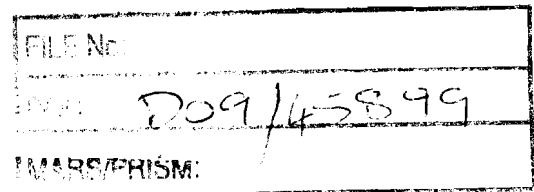
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7 May 2009

Mr Anthony Wing  
General Manager  
Prices Oversight & Monitoring Branch  
Australian Competition and Consumer Commission  
GPO Box 520  
Melbourne, VIC, 3000



Dear Anthony,

### Port terminal services access undertakings

I write in relation to the proposed access undertakings submitted by CBH, GrainCorp and ABB and the ACCC Issues Paper inviting public submissions on them.

The proposed undertakings are deficient because they do not include binding prices or terms and conditions upon which these bulk handlers propose to provide access to port terminal services.

ABB and GrainCorp have not provided any proposed terms and conditions at all, and CBH has merely provided "indicative" terms and conditions that are not binding and provide no certainty about the basis on which CBH proposes to provide access to port terminal services. None of the bulk handlers have provided any indication of their proposed pricing of port terminal services. It is AGEA's view that, without the opportunity to review the actual terms and prices on which bulk handlers intend to provide access to port terminal services, interested parties are unable to make meaningful submissions and the ACCC cannot properly evaluate the undertakings.

I note that, in considering whether to accept the undertakings, the ACCC must consider whether the undertakings meet the objects of Part IIIA of the *Trade Practices Act* and the relevant pricing principles.

Unless the ACCC has the opportunity to assess key elements such as prices and terms and conditions with the proposed undertakings, it cannot properly assess whether they meet the objects of Part IIIA or the pricing principles for the following reasons:

- (i) Any 'transparency' allegedly provided by the undertaking cannot be achieved without reviewing key elements of access to port terminal services, such as the proposed pricing and terms and conditions on which access is proposed to be provided.
- (ii) The promotion of effective competition requires reliability of service. Practically, the level of service and the terms and prices on which port terminal services are to be provided will be set out in the bulk handlers' terms and conditions. Access seekers need to be given timely information about the pricing and terms and conditions on which port terminal services are proposed to be provided, in order to compete in the wheat export market. If this information is not available, the ACCC cannot assess whether the undertakings will promote the efficient operation of the ports or the ability of grain marketers to compete in the wheat export market.
- (iii) In the form lodged with the ACCC, the proposed undertakings contemplate that the actual prices and terms and conditions on which access would be provided to port terminal services can be provided as late as 15 business days **after** the commencement of the date when the bulk handlers' storage and

handling contracts are due to commence. Wheat exporters enter into forward sale contracts well before that time, with the export season beginning in earnest about the time that both the new storage and handling contracts and access undertakings are proposed to commence. This means that grain marketers could be forced to enter into export wheat contracts without knowing the price or level of service available at port and the associated key bulk handling services which need to be priced into those contracts. The alternative would be that grain marketers would be prevented from entering into wheat export contracts until the terms and conditions and pricing of port terminal services are provided, reducing the level of competition and the overall efficiency of the industry. The promotion of effective competition requires that customers of bulk handlers have reasonable notice of the prices and terms and conditions on which services will be provided (and preferably an opportunity to negotiate fair terms) to enable customers to effectively plan, budget, enter into forward sale and other contracts and make investment decisions.

- (iv) If terms and conditions, including pricing, are not provided with the undertakings, the ACCC cannot assess the circumstances in which the terms and conditions may be changed and whether, for example, bulk handlers assert a right to unilaterally change the terms and conditions without negotiation with their customers.
- (v) Without seeing the actual proposed terms and conditions on which port terminal services are proposed to be provided, it will be difficult for the ACCC to assess whether those terms and conditions are likely to promote effective competition by applying equally to the trading and marketing entities associated with the bulk handlers. For example, the bulk handlers' current storage and handling agreements impose monetary penalties and contain liability caps, effectively transferring the vast majority of risk to the users. In order to assess the impact of the bulk handlers' proposed level of access to port terminal services on competition in the wheat export market, the ACCC would benefit from knowing whether such penalties and liability caps will be applied to the trading and marketing entities associated with bulk handlers in the same way as they are applied to unrelated wheat exporting customers.
- (vi) In 2008, the Victorian Essential Services Commission rejected access undertakings submitted by bulk handlers on the basis that the proposed terms and conditions failed to provide adequate non-discriminatory access to grain exporters. The ACCC's review of the terms and conditions upon which the services will be provided would be assisted if the ACCC has the opportunity to assess whether they are substantially the same as those previously rejected by the Victorian Essential Services Commission. I note that GrainCorp's access undertaking, which was rejected in 2008 by the Victorian Essential Services Commission, contained a proposed storage and handling agreement, as well as details of GrainCorp's proposed pricing structure, details which are absent from the access undertakings submitted to the ACCC<sup>1</sup>.

In summary, it is crucial that the bulk handlers make available the terms and conditions, including pricing, on which they intend to provide access to port terminal services in order for interested persons to make meaningful submissions and for the ACCC to properly evaluate these proposed access undertakings.

Noting that the Issues Paper calls for submissions by 29 May 2009, we request that you require CBH, GrainCorp and ABB to provide the prices and terms and conditions upon which they propose to provide port terminal services **by no later than 11 May 2009** so that interested parties have the opportunity to review and make proper submissions on them, and the ACCC can properly perform its statutory functions.

Yours faithfully



Robert Green  
President

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<sup>1</sup> See <http://www.esc.vic.gov.au/NR/rdonlyres/5C167112-EDC2-4FE4-B0E9-5EAA1853FBB9/0/GrainCorpGrainUndertakingforpublicconsultation.pdf>