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29 May 2009

Mr Anthony Wing  
General Manager  
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ACCC  
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MELBOURNE VIC 3001

ATTENTION: Mr Anthony Wing

By post and email: [transport@accc.gov.au](mailto:transport@accc.gov.au)

Dear Mr Wing

**Port Access Undertaking Submissions - GrainCorp & CBH**  
Our Ref: AMH:GAD:2917177

We act on behalf of Riverina (Australia) Pty Ltd (**Riverina**), an accredited wheat exporter under the *Wheat Export Marketing Act 2008* (Cth) (**WEMA**).

## 1. Introduction and purpose

- (a) Riverina provides this submission on the proposed Access Undertaking (**Undertaking**) and supporting submission (**Submission**) provided to the Commission by:
  - (i) GrainCorp Operations Ltd (**GrainCorp**); and
  - (ii) Co-Operative Bulk Handling Ltd (**CBH**).
- (b) Riverina's submission is made on the basis of its concerns regarding aspects of the proposed Access Undertakings that engender uncertainty, lack of transparency and may possibly lead to discriminatory conduct in the treatment of users of Port Terminals and Port Terminal Services.

## 2. Summary

- (a) In order to provide certainty, transparency and non-discriminatory conduct, Riverina submits that amendments need to be made to the proposed Undertakings by GrainCorp and CBH.
- (b) For the GrainCorp Undertaking Riverina submits:
  - (i) That the Protocols be incorporated as part of the Undertaking; and

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- (ii) the Undertaking and Protocols are fixed until the expiry of those respective terms, being 2 years and 12 months respectively; and
- (iii) any discretion to change the terms of the Undertaking (2 years) or the Protocols (1 year and then a further 1 year) during their respective operative periods is removed, unless approved by the ACCC through an identical process to the current one occurs; and
- (iv) the Protocols are extended to include all grains exported through the Port Facilities using Port Terminal Services; and
- (v) in utilising the term “good faith” for conduct in negotiations, Riverina would like to see either:
  - (A) the establishment of an independent review board with authority to resolve all disputes pertaining to Port Terminal access where “good faith” negotiations have failed; OR
  - (B) specific identification of the types of conduct to demonstrate GrainCorp’s understanding of good faith in this commercial context;
- (vi) expand the dispute resolution/arbitration process to include access contract negotiations for price and non-price terms and more definition be given to what good faith is for the purpose of this Undertaking; and
- (vii) either:
  - (A) disclose to all Licence Holders of its new ‘STORM’ IT network details of the uncommitted grain stored in its upcountry facilities on a geographical manner (as opposed to an individual Grower basis) similar to the shipping stem, to avoid potential or perceived advantaging GrainCorp’s Trading Division, at the expense of competitor grain traders; OR
  - (B) define upcountry information of grain warehoused at GrainCorp sites listed as ‘uncommitted’ for shipping purposes, as ‘restricted information’ and subject to stronger protections than are currently set out in the GrainCorp Undertaking.
- (c) For the CBH Undertaking, Riverina submits Riverina would like to see an obligation in the proposed undertakings to provide timely access to stock information in a useable format into CBH’s undertaking.

## GRAINCORP ACCESS UNDERTAKING

### 3. Certainty

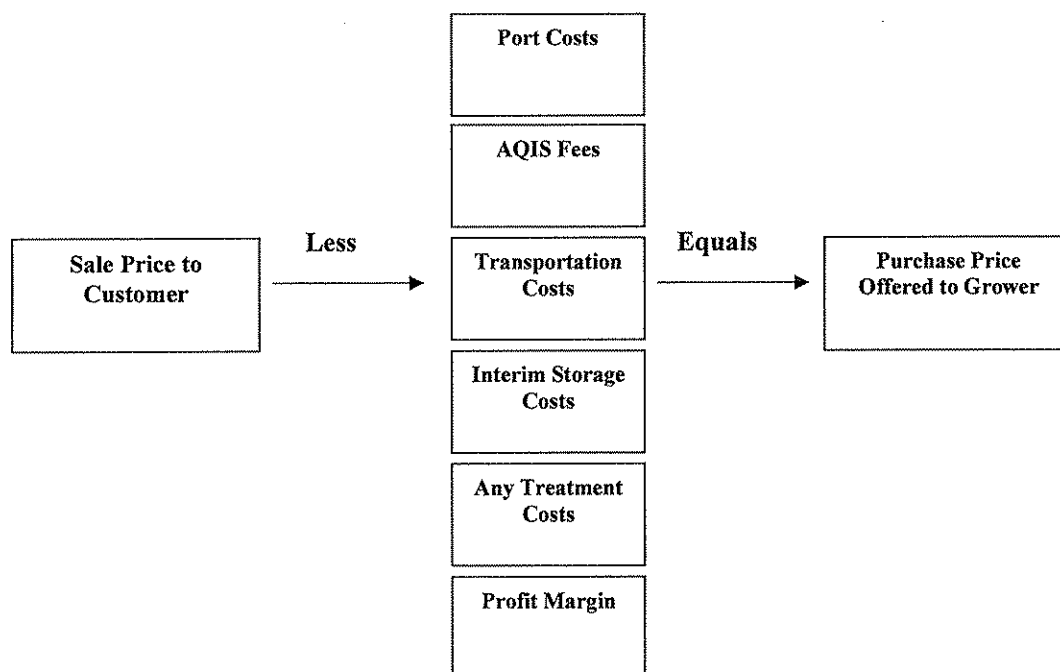
#### 3.1 Discretion

- (a) GrainCorp’s Undertaking has been deliberately drafted to “provide flexible processes for change in prices, Port Terminal Services Protocols and non-price items”<sup>1</sup>.
- (b) This provides GrainCorp with the discretion to change price and non-price items without consultation, with minimal notice to users of the facility and with no compensation for any losses that may be caused due to forward contract and export

<sup>1</sup> Submission, section 2.10, page 8

contract positions set for any time greater than 30 days after notification of the intended change.

- (c) Any discretion by a party to a contract to alter unilaterally the terms of a contract, especially for essential infrastructure services, places the party with that discretion in a position of substantial market advantage to the other.
- (d) The grain industry in particular is particularly sensitive to alteration to terms of performance of contracts. Grain trading makes considerable use of forward contracts, that is, contracts for the purchase of a set amount of grain at a fixed price at a future date, as a mechanism for conducting business.
- (e) These forward contracts can be for periods as short as a couple of days to as long as six months in advance of the harvesting of a crop.
- (f) Setting a purchase price for grain involves the purchasing party undertaking a backward calculation which in basic terms could be described as:



- (g) Profit margins on grain are best described as small often in the range between 1% and 2%.
- (h) Therefore the alteration of one variable in the calculation could turn what otherwise may have been a profitable contract agreed in advance based on at the time applicable information on prices into a loss.
- (i) In effect this discretion reduces certainty for Users of the Port Terminal Services.

### 3.2 Short term

- (a) Riverina understands that the Access undertaking is proposed for 2 years and that GrainCorp views this from its submission as a short period of time<sup>2</sup>.
- (b) To encourage certainty in interaction between parties over short periods of time certainty of terms of interaction is essential.

<sup>2</sup> Submission, section 2.2, page 4 and section 2.11, page 9.

- (c) As the Undertaking itself will only cover a period of 2 years and the services in the protocols are only envisaged to cover a 1 year period, providing GrainCorp with the ability to unilaterally and without consultation alter terms of access:
- (i) introduces uncertainty into what would otherwise be certain fixed costs for all Users of Port Terminal Services during a 12 month period;
  - (ii) would arguably see the Users being forced to financially or operationally support:
    - (A) inefficiencies in GrainCorp's operation and planning rather than GrainCorp being required to abide by terms published for the 'short' period of 12 months; or
    - (B) distortions in the supply chain through the forced usage of upcountry GrainCorp facilities as part of the access Protocol to being able to access Port Terminal Services.
  - (iii) permits GrainCorp the ability to dictate access terms to Users and alter commercial contractual arrangements solely as a result of its control of essential transport infrastructure required for grain export where, for example in Queensland:
    - (A) no alternative port facility is immediately interchangeable for utilisation as an alternative to GrainCorp's Queensland Ports;
    - (B) construction of any such facility would require longer than 12 months with site identification, development approvals from councils and service providers, tendering and construction of alternate facilities and essential supporting infrastructure and so on;
  - (iv) inhibits competition in upstream and downstream markets due to the risk of input costs changing mid-contract altering the effect of contractual decision making;
  - (v) damages confidence in the Australian supply chain infrastructure as a result of the lack of certainty, which with ready access to other international markets in North and South America, may cause a loss of export contracts for Australian Growers to overseas Customers.

### 3.3 All grains

- (a) Riverina supports the submission made by the Department of Agriculture and Food (DAFWA)<sup>3</sup> that the Standard Port Terminal Services Protocol should apply to all grains and not be limited to wheat.
- (b) The example referred to in section 5.5 of this submission, of the access problems experienced in the Fisherman Islands, Queensland port, in February/ March of this year, relates to export of sorghum.
- (c) The interchange ability of all grains and the systematisation of the processes adopted demonstrate the applicability to all grain exports from respective Ports.
- (d) GrainCorp has provided its draft sorghum protocol to Riverina for the coming year which contains some significant differences to that proposed for wheat, which can be detailed further if so required.

<sup>3</sup> Submitted by Mr Peter Metcalfe, Director Grains Industry Development on behalf of DAFWA

### 3.4 Certainty – Amendments to Undertaking

- (a) Riverina does not propose intrusive regulation of GrainCorp's activities merely:
  - (i) that the Protocols be incorporated as part of the Undertaking;
  - (ii) the Undertaking and Protocols are fixed until the expiry of those respective terms, being 2 years and 12 months respectively;
  - (iii) any discretion to change the terms of the Undertaking (2 years) or the Protocols (1 year and then a further 1 year) during their respective operative periods is removed, unless approved by the ACCC through an identical process to the current one occurs;
  - (iv) the Protocols are extended to include all grains exported through the Port Facilities using Port Terminal Services.
- (b) Riverina sees that as providing certainty for all users to enable forward budgeting, contracting and business development and ties in neatly with the setting of budgets, plans and estimation of expenses and revenues for any prudent corporation's normal 12 month forward planning processes.

## 4. Dispute resolution

### 4.1 Good faith

- (a) GrainCorp's submission proposes that the panacea for all disputes is for a clause to be incorporated into the Undertaking that GrainCorp will negotiate in good faith.
- (b) Regrettably this proposal fails to provide any further certainty to dispute resolution and market access as Courts in various jurisdictions interpret the meaning of "good faith" differently in different circumstances<sup>4</sup>.
- (c) "Good faith" in commercial contexts has certainly not been held by the Courts to mean that a party is not entitled to act in its own commercial interest.
- (d) Riverina queries how reliance on such a proposal adds certainty to the dispute resolution process.

### 4.2 Good faith – Amendments to Undertaking

- (a) As an alternative, Riverina would like to see either:
  - (i) the establishment of an independent review board with authority to resolve all disputes pertaining to Port Terminal access;
  - (ii) specific identification of the types of conduct to demonstrate GrainCorp's understanding of good faith in this commercial context.

## 5. Constrained by Users Market Power

### 5.1 Assumptions in GrainCorp's submission

- (a) Ports should be subject to economic regulation in circumstances where there is a clear and demonstrable need for such regulation in order to promote competition in upstream or downstream markets or to prevent the misuse of market power<sup>5</sup>.

<sup>4</sup> AutoMaasters Australia Pty Ltd v Burness Pty Ltd [2002] WASC 286

<sup>5</sup> Council of Australian Governments Competition and Infrastructure Reform Agreement, 10 February 2006.

- (b) Two critical assumptions are contained in GrainCorp's submission, that *"the pricing power of Port owners is constrained when the customers in the downstream markets are able to choose between supply chains"*<sup>6</sup>. These appear to be:
  - (i) that all the Eastern Seaboard Ports can be interchanged and alternative existing ports are available if Users are dissatisfied with GrainCorp's operation of Port Terminals or performance of Port Terminal Service;
  - (ii) that all Users are of equal status in their ability to bargain with GrainCorp.
- (c) Riverina believes these assumptions are flawed in two respects:
  - (i) while some interchangeably or alternatives may exist, or may be brought into existence, in Ports in Victoria and South Australia, this is not the case in New South Wales and Queensland. A blanket use of the term 'Eastern Seaboard' fails to acknowledge the difference in GrainCorp's position as an operator of Port Terminals in Queensland and New South Wales;
  - (ii) not all Users are Multinational corporations and have equal standing to negotiate with GrainCorp.

## 5.2 Interchange ability / Alternatives

- (a) Variability in access terms to essential infrastructure services may be an outcome of negotiations due to:
  - (i) inequality of bargaining positions against an incumbent Operator of Port Terminals;
  - (ii) GrainCorp's commercial interests taking precedence over access to essential infrastructure to:
    - (A) set price margins that significantly affect competitors in upstream or downstream markets who utilise the Port Terminals and Port Terminal Facilities;
    - (B) dictate use of upcountry GrainCorp facilities by default financially benefitting from the use of its facilities and income flows for an area of its operations that has seen GrainCorp close 300 of its upcountry facilities prior to its submission, presumable on costs grounds.

For example: Say GrainCorp sets its protocol for all of its Port Terminals as requiring use of non-designated upcountry facilities as part of the process to be able to access Port Terminals.

In Queensland GrainCorp controls all but 4 of the upcountry bulk grain facilities, with AWB controlling the balance (albeit with capacity constraints: a maximum tonnage of 410,000 tonnes of wheat only can be accommodated).

Even if AWB facilities are used, as alternate facilities when capacity constraints are reached GrainCorp facilities by default must be used.

As compliance with GrainCorp protocols is required to gain access to the Port Terminals, GrainCorp derives a financial benefit with no alternative to Users who are not of sufficient size to negotiate alternate arrangements with GrainCorp, or utilise other systems previously in place due to the set protocol.

<sup>6</sup> Submission, section 3.2, page 11

### 5.3 Equal bargaining power

- (a) GrainCorp acknowledges that of the 23 Accredited Wheat Exporters, at least 5<sup>7</sup> are sophisticated purchasers of wheat, who are well resourced and this therefore may have constraining bargaining power on it<sup>8</sup>.
- (b) This statement raises the inference that if **only** 5 Accredited Wheat Exporters are named as sophisticated purchasers of wheat, who are well resourced and therefore potentially have 'constraining bargaining power' there are 18 Accredited Wheat Exporters that GrainCorp does not consider as falling into the category of users being able to constrain GrainCorp as operator of Port Terminal Services.
- (c) The ability of those 18 unsophisticated Accredited Wheat Exporters to negotiate with GrainCorp on price and non-price terms of access, without constraining bargaining power, raises the possibility that GrainCorp's commercial interests will dictate access to essential facilities putting GrainCorp in a position of commercial advantage to Users of the Port Terminals.

### 5.4 Constrained by Users Market Power – Amendments to Undertaking

- (a) Riverina agrees that GrainCorp should be permitted to obtain a commercial return for provision of Port Terminal Services but submits that like other commercial operations GrainCorp:
  - (i) not have discretion to alter the terms of price and non-price items for Port Terminals or Port Terminal Services during the period of the Undertaking;
  - (ii) that the Protocols be incorporated as part of the Undertaking and fixed for their respective terms;
  - (iii) expand the dispute resolution/arbitration process to include access contract negotiations for price and non-price terms and more definition be given to what good faith is for the purpose of this Undertaking.

## 6. Transparency

### 6.1 Existing disclosure

- (a) Pursuant to the "Access Test" in section 24 of the WEMA, GrainCorp is required to comply with continuous disclosure rules as a result of the Wheat Export Accreditation Scheme (**Scheme**).
- (b) Shipping stem information is publicly accessible under the continuous disclosure requirements of WEMA and Riverina considers that this is a laudable transparent process for detailing information to the public in general.
- (c) Timely access by all market participants to relevant information promotes competition and utilisation of facilities.

### 6.2 Restricted information

- (a) GrainCorp's Submission however limits proposed ring fencing to information obtained relating to nomination forms for shipping purposes only (**restricted information**). In effect this is information which is required to be publicly released under the Scheme within 7 days later on shipping stems.
- (b) The proposed Undertaking does not:

<sup>7</sup> Named as Cargill, Elders Toepfer, Glencore, at section 3.2, page 11

<sup>8</sup> Submission, section 2.2, page 3

- (i) address other commercially sensitive information obtained by GrainCorp in the course of its Port Terminal Services operations; nor
- (ii) seek to extend the ring fencing proposal to capture other sensitive commercial information obtained by GrainCorp through the operation of its Port Service Terminals and provision of Port Service Facilities.
- (c) Riverina submits that it is appropriate to include in the definition of 'restricted information' details about uncommitted grain<sup>9</sup> 'warehoused' in GrainCorp storage facilities and that this is quarantined from distribution amongst GrainCorp Divisions.

### 6.3 Other 'restricted information'

- (a) An ability to source uncommitted grain 'warehoused' in storage facilities to meet Customer demand requires an ability to locate and contract with those owners of uncommitted grain sources, so as to be able to fill ships and utilise Port Terminal Services.
- (b) By way of background:
  - (i) GrainCorp operates a significant amount of upcountry sites along the Eastern Seaboard.
  - (ii) In order to assess its storage capabilities and move grain between sites for export it has Silo Committees which report information on committed and uncommitted grain stores and storage capacity for specific geographic sites to GrainCorp for assessment of its business needs.
  - (iii) Whether this information is shared between GrainCorp's Port & New Business and Trading Divisions is not clear.
  - (iv) However, it is interesting to note that in the start of any harvesting season, GrainCorp performs relatively poorly in competing to obtain grain released by Growers into the open market for sale. GrainCorp's posted prices are generally seasonally averaged at lower than the highest bidders<sup>10</sup>. This implies that GrainCorp would be unlikely to secure contracts as its prices would not be competitive to Growers due to higher prices being available.
  - (v) After the initial first part of the season where good prices are usually obtainable, a mini-slump in price usually occurs, due to an initial oversupply of grain.
  - (vi) Growers with no immediate need to sell may elect to 'warehouse' grain for later sale, generally at a time when prices achieved for sale are higher.
  - (vii) At the end of a season or when prices have normalised, GrainCorp manages to lock in contracts to obtain sufficient grain to services export contracts, in excess of competitors, despite its apparent inability to compete in an open market during the start of the season. GrainCorp's performance in this aspect compared with the start of season is surprising.
- (c) The potential access by GrainCorp's Trading Division to information obtained on the geographical location or specific Grower details where any uncommitted grain is stored, would provide GrainCorp with a competitive advantage in securing exporting sales and thus use of Port Terminals and Port Terminal Services.
- (d) GrainCorp's ability to contact Growers directly in the Silo storing area and contract for significant amounts of uncommitted grain from Growers through access to this

<sup>9</sup> Grain put into storage by Growers for storage and later sale or use which is not contracted to any other party.

<sup>10</sup> Documentary evidence to support this upon request.



information disadvantages GrainCorp's competitors who would be denied this information.

#### 6.4 Transparency – Amendment to Undertaking

- (a) Riverina submits that either:
  - (i) GrainCorp disclose to all Licence Holders of its new STORM IT network details of the uncommitted grain stored in its upcountry facilities on a geographical manner (as opposed to an individual Grower basis) similar to the shipping stem, to avoid potential or perceived advantaging GrainCorp's Trading Division, at the expense of competitor grain traders; or
  - (ii) upcountry information on grain warehoused at GrainCorp sites listed as 'uncommitted' for shipping purposes, be defined as 'restricted information' and subject to stronger protections than are currently set out in the GrainCorp Undertaking.
- (b) See section 9 for a revised set of restrictions for GrainCorp.

#### 7. Historical access

- (a) GrainCorp asserts that there is a history of open access and no history of access disputes for its Port Services Terminals.
- (b) Riverina disagrees with this statement and refers by way of example to three incidents that occurred between it and GrainCorp in February/March 2009:
  - (i) GrainCorp rejected a Nomination submitted by Riverina for a laycan period in April outside the terms of the 2008/2009 Grain Handling and Storage Agreement (**Agreement**) on the basis that:
    - (A) GrainCorp had too many nominations that month;
    - (B) Riverina did not have sufficient grain in GrainCorp's handling system to support provision of a laycan period;
  - (ii) GrainCorp announced in a letter emailed to Riverina's Grain Manager on 5 March 2009, that the Agreement which included an earlier version of the draft Port Access Protocol as a schedule, would be unilaterally changed so that from that period forward GrainCorp would not receive grain ex-farm at the Fisherman Islands Terminal; and
  - (iii) GrainCorp communicated to Riverina that despite the terms of the Agreement in force until 30 September 2009, it was changing the protocol so that Users of the Port facilities would be required to use approved upcountry storage facilities for introducing grain ex farm into the GrainCorp grain handling system and that transport of grain into the Fisherman Islands Port would need to occur by 1/3 rail and 2/3 road.
- (c) These incidents are examples relating to denials of access to Port Terminals, exercise of position as incumbent Operator of the Port without consultation and at significant financial loss to Users of Port Terminals who are usually competitors of GrainCorp and financial advantage to GrainCorp<sup>11</sup>.

<sup>11</sup> Further details will be supplied if required on request.

## **8. Non-discrimination**

### **8.1 Decouple upcountry with port access**

- (a) The Access Undertaking is not required to, and does not, relate to any part of the export grain supply other than "Port Terminal Services"<sup>12</sup>.
- (b) Riverina's experience with GrainCorp in February/March this year indicates that Port Terminal Services extends under the Protocol requirements, to cover utilisation of upcountry GrainCorp facilities to gain access to Port Terminal Services. See section 5.2 of this submission.
- (c) The reasoning provided by GrainCorp for mandating these changes around contamination concerns and testing requirements can be managed through other measures. These include:
  - (i) Grower/Trader declarations;
  - (ii) Testing Certification production;
  - (iii) Sample litmus testing on grain in transit; and
  - (iv) other measures which have been partially implemented in this season by GrainCorp.
- (d) For this reason Riverina submits that the Protocols should be made part of the Undertaking and fixed to provide certainty to Users/ Competitors of GrainCorp's Port Terminals.

## **9. Amendments**

### **9.1 To Undertaking**

- (a) Riverina submits that in line with its submission in this letter the amendments set out in Schedule A be made to the Undertaking and that it is redrafted to introduce those items contained in the summary.

### **9.2 To Protocols and Ring fencing proposal**

- (a) Riverina submits that in accordance with its submission in this letter the amendments in Schedule B should be made to the Undertaking and that it is redrafted to reflect those items contained in the summary.

## **CO-OPERATIVE BULK HANDLING LTD ACCESS UNDERTAKING**

## **10. Information Distribution Systems**

### **10.1 Comparative of GrainCorp and CBH**

- (a) GrainCorp's Information Distribution System are to be commended. GrainCorp provides 24-hour, real time access to stock information on grain held in GrainCorp facilities.
- (b) At any given time, anyone with grain in GrainCorp's storage and handling facilities may log onto GrainCorp's website and view their stocks.

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<sup>12</sup> Submission, page 1

- (c) The trader may, after purchasing uncommitted grain, may then view the amount of grain they have purchased. This information allows the trader to provide instant proof of the size of the stock to the lenders. The lenders will therefore release the funds and the trader can then pay the grower much quicker than under CBH's process in WA.
- (d) In contrast, when CBH is requested to provide information it:
  - (i) takes several days to receive the information from CBH.

This is an issue because Riverina, and presumably all traders, endeavour to pay growers within a certain amount of time.

The amount of time it takes to receive the information from CBH greatly limits the trader's ability to pay the grower within the agreed timeline.

For example, when a trader purchases uncommitted grain that is held in CBH handling facilities, before the trader can pay the farmer, it needs proof of exactly how much grain is being transferred. This proof is required by lenders who provide the financing to purchase the grain.
  - (ii) The information is emailed or faxed to the trader in a raw format that is uneditable and therefore cannot be easily meshed into other non-CBH traders systems, requiring manual keying into the trader's computer systems.

This causes further delays in payment to the grower and increases costs to the trader money to enter the data and encourages inaccuracies in data transfer.
- (e) The problem lies in the method that CBH's distributes information concerning grain held in CBH facilities.

## 10.2 Disadvantages

- (a) CBH which is presumed to hold the grain trade data on a automated computer system but does not provide access to third party users of its services.
- (b) This withholding of delivery of information in a timely and useable manner reduces certainty, transparency and provides its internal trading arm (if it has access to this data) with a competitive advantage ahead of market competitors.

## 10.3 Proposed Amendments to CBH Undertaking

- (a) Riverina would like to see an obligation in the proposed undertakings to provide timely access to stock information in a useable format into CBH's undertaking.

Please contact me if you have any details with respect to this submission.

Yours faithfully

**DibbsBarker**



Alicia Hill

Partner

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## SCHEDULE A

### Terms of Access Undertaking

In light of Riverina's submission Riverina proposes that the Proposed Access Undertaking be amended as set out below.

#### 11. Requested amendments

- (a) Clause 1.2 (e)(D) – delete.

Linking the Trading Division's requirements for port services with the Ports and New Business Division of GrainCorp as legitimate business interests encourages:

- (i) the consideration of the Trading Division as something other than another user of Port Terminals and Port Terminal Services; and
- (ii) discriminatory treatment between other Users of Port Terminals and Port Terminal Services and GrainCorp's Trading Division.

- (b) Clause 2.2 – Query

It is curious that the terms of the Schedule prevail over the body of the document, particularly as the Schedules include the Standard Port Terminal Services proposed to be offered.

It is submitted that the body of the undertaking should prevail over the schedules and be the primary reference point for understanding the terms of the Undertaking offered which will be binding once finalised. Permitting a schedule to override the principal document does not promote transparency and understanding.

- (c) Clause 2.3 – Query

If it is necessary for a related Body corporate of GrainCorp to do something, should this not be identified now and that entity also be a party to the Undertaking.

- (d) Clause 3.5(a)(i) – Delete in part “*it is no longer commercially viable for GrainCorp or*”.

For the short period for which the Undertaking will be in operation prior to review it is submitted that GrainCorp should be bound to the terms of the Undertaking, Protocols and fees set to permit certainty, transparency and non-discriminatory access amongst competitors in the grain trading market in Australia.

- (e) Clause 4.1(b) – insert after “...Bulk Wheat” “*and all other export grain*”.

- (f) Clause 4.2 – insert a new (f1) – “*any intake and receival services or grain storage and handling services which is required to utilise the Port Terminal Facility.*”

- (g) Clause 4.4(a)(ii) – insert after (inland) “*other than as referred to at 4.2(f1)*”;

- (h) Clause 4.4(a)(iii) – insert after “...Port facilities)” “*other than as referred to at 4.2(f1)*”;

- (i) Clause 4.4(b) – delete in part from 4.4(b)(i) “*in relation to Bulk Wheat*” and insert “*other than as referred to at 4.2(f1)*”, insert at 4.4(b)(ii) after “...facilities” “*other than as referred to at 4.2(f1)*”, delete 4.4(b)(iii), 4.4(b)(iv) and 4.4(b)(v).

- (j) Clause 5.1(b) delete – “*Unless varied in accordance with clause 5.6,*” and capitalise “the” to read “*The Reference....etc*”

- (k) Clause 5.4(b) delete *"and the differentiation is for the purpose of substantially damaging a competitor or conferring upon GrainCorp or its Trading Division any unfair competitive advantage over a competitor in the marketing of Bulk Wheat"* and insert *"unless prior variation to those terms is obtained from the ACCC after receipt of submissions from GrainCorp and affected parties"*.
- (l) Clause 5.5(a) – delete;
- (m) Clause 5.5(h) – delete;
- (n) Clause 5.5 (i) – delete;
- (o) Clause 5.5(p) – delete;
- (p) Clause 5.5(u) – delete;
- (q) Clause 5.6 – delete.

- (i) Clause 6.1 insert definition of exact measures GrainCorp will adopt to be defined as "Good Faith" for the purpose of the Access Undertaking.

- (r) Clause 6.4(b)(iii) and Clause 6.4(b)(iv) – delete.

This is a subjective measure able to be determined at GrainCorp's sole discretion without review. It also enables GrainCorp to request sensitive commercial information from competitors regarding financial support which would not otherwise be disclosed between competitors.

Replace with provision by Applicants with a non-refundable deposit bond to be offset against future costs as evidence of fulfilment of prudential requirements. Set at say \$10,000.

- (s) Clause 6.7 (b)(i)– delete *"subject to the Applicant satisfying the Prudential Requirements"*.
- (t) Clause 7.3 Mediation – delete sub-clauses (a) through to (b) inclusive and renumber (c) as (a) etc.

For the new (a) delete *"after being referred to the chief executive officers under clause 7.3(b),"* as these paragraphs have been deleted.

If good faith negotiations between the parties have been unsuccessful it is unlikely informal mediation between the CEOs of the parties will resolve the matter and adds an extra step in a process that would unnecessarily delay speedy resolution of disputes.

Access to an independent third party mediator to facilitate dispute resolution with authorised representatives in a formal mediation process immediately after negotiations are unsuccessful would bring an objective, neutral third party to facilitate dispute resolution in a timelier manner.

- (u) Clause 7.5 – delete "ACCC" and replace with "LAMA". The ACCC does not need to be responsible for appointing arbitrators which an independent body may do without any requirement for ACCC involvement. Obligations for notification to the ACCC of such disputes are already contained in the Undertaking.
- (v) Clause 7.6 (c)(vii) – delete. This should not be mandatory but be left to the discretion of the arbitrator.
- (w) Clause 8.2 (b) – delete in its entirety.
- (x) Clause 8.2 (c) – delete in its entirety.

- (y) Clause 8.2(e) – delete.
- (z) Clause 8.4(d)(i) – the mechanism for assessing the “likely availability of sufficient Bulk Wheat at the Port Terminal” is not stated.

To remove this assessment being totally subjective to GrainCorp, it is submitted a mechanism of seeking confirmation from the Applicant of availability of wheat and a non-refundable bond to be offset against Port Terminal Service fees would be a preferable mechanism to enable certainty and transparency in assessment.

- (aa) Clause 8.4(d)(iii)(A) – similarly the mechanism suggested above should be applied to this clause.
- (bb) Clause 8.4(d)(iii)(K) – delete. This is simply a matter of scheduling and should not be a factor due to the discriminatory nature of this as a criterion.
- (cc) Clause 11.1 – delete the following definitions: Credit Support, Parent Guarantee, Prudential Requirements, Solvent.

**SCHEDULE B****Terms of Standard Port Terminal Services****12. Requested Amendments**

- (a) Clause 2.1 - delete in part "*that in GrainCorp's absolute opinion*"
- (b) Clause 2.4 (b)(ii)(A)– delete as this discriminates against those Users who can make alternate arrangements for delivery of grain to Port Terminals
- (c) Clause 2.4 (b)(ii)(F)– delete "before rail"
- (d) Clause 2.4 (b)(ii)(A)– delete in its entirety as this only introduces uncertainty into the provision of services and potentially discriminatory practice in granting access.
- (e) Clause 3.1 references the Access Agreement which may be different for each user of facilities promoting uncertainty and lack of transparency on access requirements. It is submitted that testing and sampling are generic requirements that should be applied equally to all users and therefore as uniform measures incorporated directly into the Standard terms.

**Initial Port Terminal Services Protocols****13. Requested Amendments**

- (a) Clause 3.3.2 – delete, as this discriminates against Users utilising non-approved storage facilities. Where other measures relating to grain grade, testing and other issues are met through the proscribed measures in the standard terms this is not required and introduces discriminatory treatment.

**Ring fencing Rules****14. Requested amendments**

- (a) As discussed unless the uncommitted upcountry grain data is shared to all users in a timely manner it is submitted that the definition of restricted information should be expanded to cover all uncommitted upcountry grain data.