PORT TERMINAL SERVICES ACCESS UNDERTAKINGS BY

ABB GRAIN LIMITED, GRAINCORP OPERATIONS LIMITED AND CO-OPERATIVE BULK HANDLING LTD

AUSTRALIAN GRAIN EXPORTERS ASSOCIATION SUBMISSION

ON THE AUSTRALIAN COMPETITION AND CONSUMER COMMISSION'S DRAFT DECISION DATED 6 AUGUST 2009

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FURTHER SUBMISSION TO THE AUSTRALIAN COMPETITION AND CONSUMER COMMISSION BY THE AUSTRALIAN GRAIN EXPORTERS ASSOCIATION

Introduction

The Australian Competition and Consumer Commission ("**ACCC**") has invited public submissions on the ACCC's draft decision (**"ACCC's draft decision"**) not to accept the proposed access Undertaking applications of ABB Grain Ltd ("**ABB**"), GrainCorp Operations Limited ("**GrainCorp**") and Co-operative Bulk Handling Ltd ("**CBH**") (collectively referred to as "**bulk handling companies**" or "**BHCs**") and the reasons for its decision.

Australian Grain Exporters Association ("**AGEA**") is a representative body of exporters of Australian grain. It was formed in 1980. Its members include 16 Australian wheat exporters ("**AWEs**").

The ACCC has particularly sought submissions on whether:

(i) if the ACCC's recommendations were adopted by each individual bulk handler in a revised Undertaking, the revised proposed Undertaking would be appropriate;

(ii) each bulk handler's proposed standard port terminal services agreement (as attached to each draft decision) would form an appropriate Indicative Access Agreement (if attached to a revised Undertaking submitted by each bulk handler); and

(iii) each bulk handler's revised port terminal services protocols (as attached to each draft decision) would be appropriate (if attached to a revised Undertaking submitted by each bulk handler).

AGEA makes this further submission on the ACCC's draft decision on each of the BHCs' proposed access Undertakings and the reasons for the ACCC's draft decision (**"AGEA's further submission"**).

Should any of the BHCs make further submissions, AGEA requests the opportunity to respond before the ACCC makes its final decision.

AGEA is also agreeable to meet with the ACCC to discuss any issues that are relevant to the BHCs' proposed Undertakings.

The numbering and headings of the sections below reflects the aspects of the ACCC's draft decision and reasons on which the AGEA wishes to make a further submission.

This submission is additional to AGEA's original submission dated 29 May 2009 on the BHCs' Undertakings and the Confidential Submissions made on behalf of AGEA members separately (**"AGEA's original submission"**).

AGEA's Executive Summary

On 8 August 2009, the ACCC released its draft decision regarding CBH, ABB and GrainCorp's proposed Undertakings. The ACCC had reached a view that it would not accept the BHCs' proposed Undertakings in their then current form.

AGEA agrees with the ACCC's draft decision and reasons for not accepting the BHCs' proposed Undertakings, except where specifically noted in AGEA's further submission.

To avoid repeating or restating reasons with which AGEA agrees, the purpose and focus of AGEA's further submission is:

(a) to provide comment on specific aspects of the ACCC's draft decision and reasons where:

  (i) the ACCC's draft decision or reasons raise additional matters which AGEA did not address in AGEA's original submission; and

  (ii) AGEA considers that there are further considerations which should be taken into account by the ACCC in making its final determination;

(b) to provide comments on the BHCs' revised standard port terminal services agreement and port terminal services protocols, which are set out in Schedules 1 to 6.

(c) to respond to some of the further submissions that have been made by CBH since the ACCC's draft decision was published and up to the close of business, 2 September 2009.

AGEA requests a further opportunity to respond to matters raised in CBH's further submissions to which AGEA has not had an opportunity to respond.

Fair and transparent access to port terminal services requires, (at the minimum), that the proposed Undertakings, standard port terminal services agreements and port terminal services protocols provide clarity, certainty and transparency. The rules of access must be detailed and clear. The rules must be capable of objective application. Discretionary or subjective decisions must be kept to the absolute minimum. Decisions and the reasons for them must be disclosed in a timely way and open to effective and timely review.

By way of general comment in relation to the proposed Undertakings, port terminal services agreements and port loading protocols, greater clarity is required in terms of BHCs' accountability, transparency, non-discrimination, costs and charges and the proposed dispute resolution process. The proposed Undertakings (together with the port terminal services agreement and port loading protocols) must guarantee third party access to all port terminal services and, if they do not, the ACCC should reject or require amendment to the same.

The ACCC has specifically sought submissions as to whether, if its recommendations were adopted by each individual bulk handler in a revised Undertaking, the revised proposed Undertaking would be appropriate. In some cases, the "recommendation" made in the ACCC's draft decision is to reject a term of the proposed Undertakings on the basis that the term is not appropriate. In other cases, the "recommendation" appears to contain a suggestion or raise a matter which might be addressed by the BHCs in the revised proposed Undertaking, although there is no specific recommendation as to how that matter might be addressed. Thus, the ACCC's "recommendations" might involve deleting terms or proposing further terms in the revised proposed Undertakings.

For those reasons, whilst AGEA agrees with the ACCC's draft decision and reasons, AGEA is unable to say whether a revised proposed Undertaking adopting the ACCC's "recommendations" would be appropriate until AGEA has had the opportunity to review and consider the revised proposed Undertaking.

Accountability

The need for regulatory intervention and review could be lessened if the BHCs took responsibility for their services. The current BHCs' terms and conditions do not allow this occur.

Instead, they take on very little risk. They exclude consequential loss claims and exclude liability unless caused by negligence (gross or otherwise) or wilful default. Any liability is capped at commercially low levels, effectively transferring the vast majority of risk to the AWEs. Transparency is not provided to enable the ACCC to know whether such penalties and liability caps will be applied to the trading and marketing entities associated with BHCs.

AWEs are willing to share the benefits of increased port terminal efficiency, by sharing demurrage/despatch arrangements.

The AWEs are not entitled to limit any liability that they may have to the BHCs. This is a clear indication of the monopoly power enjoyed and exercised in a discriminatory and anti-competitive manner by the BHCs.

BHCs' reducing AWEs liquidity

The BHCs' terms and conditions significantly reduce AWEs' liquidity and ability to participate in the Australian bulk wheat market. For instance, the BHCs claim to be entitled to lien cargo for all monies owing to them and their related bodies corporate. The right to lien is not limited to the amount claimed to be owed. Further, they seek to be entitled to require various forms of security, prepayment and/or set-off monies that the BHCs may owe, without reciprocal rights (see schedules below for further comments). There is no transparency in how these rights are exercised. It is unlikely that the BHCs would impose the same obligation on their own trading arms, which would amount to discriminatory behaviour.

Adopting the numbering and headings of the sections in the ACCC's draft decision, AGEA makes the following further submissions:

1. Executive Summary

General approach to pricing and other terms and conditions

1.1 The ACCC considers and AGEA agrees that the proposed publish-negotiate-arbitrate framework needs to be underpinned by a robust set of mechanisms giving effect to the publication, negotiation and arbitration procedures.

1.2 Clarity on the terms and conditions for access that are offered by the BHCs is an important consideration in this respect. Further, given that the BHCs are vertically integrated, adequate non-discrimination obligations and appropriate transparency measures are also appropriate.

1.3 The ACCC also considers and AGEA agrees that it is appropriate that non-discriminatory measures prohibit the BHCs from discriminating in favour of their marketing arms, except to the extent that the cost of providing access to other operators is higher, as per section 44ZZCA of the TPA. As a transparency measure to support this, the ACCC states and AGEA agrees that it is appropriate to require the BHCs to publish a single set of prices for port terminal services. In AGEA's original submission, AGEA submitted that price and non-price terms should be part of the Undertaking. Whilst the ACCC agrees that the Undertaking should include an Indicative Access Agreement, the ACCC does not require price to form part of the Indicative Access Agreement. Instead, the ACCC has accepted an obligation for BHCs to publish prices by 31 August of the relevant year.

1.4 AGEA submits that in the interests of providing fair and transparent access to port terminal services and balancing the competing interests of BHCs and access seekers:

(a) BHCs should be required to publish prices before the ACCC decides whether to accept the Undertakings and, subsequently, by no later than 31 August of the relevant year;

(b) the published prices should include standard and non-standard services offered by the BHCs;

(c) the published prices should provide transparency in relation to BHCs' costs of providing the service to ensure prices are based on actual costs and are not discriminatory;

(d) prices should be sufficiently transparent so that it can be determined whether services are being provided in return for the prices paid;

(e) the published prices should not be subject to change during the term of the port terminal services agreement;

(f) alternatively to sub-paragraph (e), the opportunity to amend publish prices should be limited to the same circumstances in which a variation of the Undertakings are permitted.

1.5 BHCs should be required to publish price and non-price terms *before* the Undertakings commence to ensure there is transparency in relation to price and non-price terms, that prices reflect the BHCs' cost of providing the service and there is no opportunity to discriminate. The requirement to publish prices before the Undertakings commence will also provide a benchmark against which to measure any proposed change in price to again ensure there is transparency and that any increase in price reflects an increase in BHCs' cost of providing the service.

Commencement, term and variation

Scope

1.6 AGEA notes the ACCC's draft decision to limit the scope of the proposed Undertakings to wheat and to port terminal services (rather than including up-country services).

1.7 In the least, CBH's proposed Undertaking must include up-country services, where the port terminal services provided are part of the Grain Express service. This is necessary, as the up-country services are bundled with and intrinsically linked to the port terminal services.

1.8 AGEA makes the following comments regarding the scope of the proposed Undertakings:

CBH

AGEA strongly agrees with the ACCC that:

(i) it is not appropriate that CBH's proposed Undertaking only applies to port terminal services when they are not bundled with other CBH services;[1]

(ii) it is not appropriate that CBH's proposed Undertaking expressly excludes "fumigation of grain as a preventative measure";

BHCs generally

(iii) the scope of the BHCs' proposed Undertakings are not appropriate as they lack clarity and are not consistent with BHCs' obligations under the WEM Act;

(iv) in relation to the scope of the proposed Undertaking:

- the proposed Undertakings must encompass *all* services provided by the BHCs within the port terminal;
- as a result, the definition of "Port Terminal Services" must be amended to ensure any services necessarily required by access seekers to port terminal services are captured and to make it clear that the lists provided by the BHCs are not exhaustive;
- the ACCC's definition of "port terminal services" is appropriate (see, for example, p. 75 of the ACCC's draft decision on ABB's port terminal services access Undertaking);
- the same definition of "port terminal services" should apply uniformly across the proposed Undertaking, the port terminal services agreement and the port terminal protocols.

1.9 The ACCC is of the view that it is not necessary for the BHCs' proposed Undertaking to expressly provide for access to port terminals by employees of superintendence companies submissions. AGEA believes that there must be an obligation on the BHCs to allow an AWEs' superintendent (or independent third person nominated by the AWEs) access to the port to sample AWEs' wheat and inspect the loading of AWEs' stock onto vessels. This is essential to protect the AWEs' interests as regards any issues with the condition of the ship, that of the cargo being loaded on board the vessel and relevant sales terms.

[1] AGEA understands CBH now agrees to include bundled services within the scope of the proposed Undertaking – see letter dated 27 August 2009 to Sarah Sheppard of the ACCC from Corrs Chambers Westgarth, solicitors for CBH.

1.10 It is a common term under international sales contracts for both buyers and sellers to be entitled to have a representative present during the loading of the vessel. Certain markets require this, if the weight and quality is to be final at loadport.

1.11 Additionally, certain BHCs' terms require notification of claims for damaged wheat within two days of receipt (see GrainCorps' draft Wheat Port Terminal Services Agreement). The AWEs cannot report any such damage within that period, where they do not have access to inspect the grain upon receipt.

1.12 The above access is normal practice in the USA.

Indicative Access Agreement

1.13 AGEA agrees that the BHCs must include an Indicative Access Agreement in their proposed Undertaking. The agreement should be binding and should, ideally, include indicative prices for standard and non-standard services.

1.14 Including an Indicative Access Agreement in the proposed Undertaking would:

(a) provide a clear starting point for negotiations between an access seeker and each BHC. (It is critical to ensure access seekers can effectively negotiate with the BHC); and

(b) make it more likely that the costs of negotiation and/or arbitration are not excessive.

Variation of an Indicative Access Agreement

1.15 The ACCC considers and AGEA agrees that the BHCs' approach of retaining discretion to unilaterally vary their standard terms is not appropriate. It results in a lack of certainty and clarity for potential access seekers and undermines the benefits of inclusion of an Indicative Access Agreement in the proposed Undertaking.

1.16 The Indicative Access Agreement and port loading protocols should form part of the proposed Undertaking and the BHCs should not be able to withdraw or vary the terms of the Undertaking, the Indicative Access Agreement or the port loading protocols except as provided by section 44ZZA(7). AGEA notes that CBH now agrees that a variation or withdrawal of the proposed Undertaking must only occur in accordance with the provisions of the *Trade Practices Act.*[2]

Non-discrimination

1.17 It is imperative that the BHCs proposed Undertakings include robust and enforceable non-discrimination and no hindering access clauses. BHCs' compliance with these clauses should be subject to an annual audit by an independent third party.

1.18 The non-discrimination and no hindering access clauses proposed by the BHCs are not appropriate given the lack of clarity about their interpretation. The BHCs' non-discrimination clauses do not ensure the BHCs will be prohibited from discriminating in favour of their own marketing arm.

1.19 Specifically, the BHCs must not be able to discriminate between AWEs on any basis, including where grain was stored (i.e. whether it was stored in the BHCs' up-country storage and handling network, a third party storage network or on-farm) or how it was transported to the BHCs' facilities.

1.20 The non-discrimination no hindering access clauses must be wide enough to encompass all forms discrimination and hindrance, such as but not limited to, the prices charged and delays in obtaining access to the port terminal facilities.

[2] Letter dated 25 August 2009 to Sarah Sheppard of the ACCC from Corrs Chambers Westgarth.

Ring-fencing

1.21 AGEA believes that the ACCC should not discard the need for robust and enforced ring-fencing policies (with a requirement for an annual audit as to compliance with the ring-fencing provisions) even if the BHCs' Undertakings contain a robust non-discrimination and no hindering access clause. The respective histories of the BHCs suggest that without ACCC intervention, the BHCs will not provide ring-fencing policies that are adequate and they will in any event, be discarded when convenient to that BHC. Removing ring-fencing policies will take away any protection against the BHCs providing confidential information to their marketing arm. The result will be a complete failure of operators being required to provide *"fair and transparent access"* to their port terminal services to AWEs (see paragraphs 11.1 – 11.11 below).

Capacity Management

1.22 It is not appropriate that the BHCs proposed Undertakings do not include binding indicative policies and procedures for managing demand for the port terminal services (ie port loading protocols), as these documents set out the key processes by which the BHCs will allocate and manage port terminal capacity. AGEA understands from the materials provided by the BHCs that ABB's port terminal services protocols will be part of its proposed Undertaking and GrainCorp's port terminal services protocols will be part of its access agreement. However, CBH's port terminal services protocols will not be part of the proposed Undertaking or the access agreement. This needs to be addressed and consistency across the BHCs requires that the protocols be part of the proposed.

1.23 AGEA notes that the ACCC considers it desirable that the BHCs have flexibility to run their operations in an efficient manner.

1.24 The BHCs have been operating their business for a significant period of time. CBH was incorporated on 4 April 1933. There are likely to be very few, if any, events that will be unforeseen or of a material adverse nature, when the contract period only runs for 12 months.

1.25 The standard terms and conditions run for 12 months. The BHCs should not be permitted to vary prices or standard terms or the Port Loading Protocols during that 12 month period. If an amendment is required, the BHCs can rely upon section 44ZZA(7).

1.26 If the ACCC accepts that BHCs should be able to amend the port loading protocols during the 12 month term and that the circumstances in which amendment should be allowed should not be limited to section 44ZZA(7), then any variation must be strictly in accordance with a mechanism to be specified in the port loading protocols whereby:

(a) A robust industry consultation process must take place.

(b) The BHC must provide the AWEs at least 3 months notice of the proposed change, in order for the AWEs to consider the proposal and enter into meaningful negotiations with the BHC and if necessary, to give AWEs time to adjust.

(c) Any dispute in relation to variations may be referred to mediation or arbitration;

(d) Any variations must also be subject to the non-discrimination clauses in the proposed Undertaking.

Publication of stocks of grain at port

1.27 AGEA agrees that it is not appropriate that the BHCs' proposed Undertakings do not include an obligation to publish stocks of all grains at port.

1.28 Such an obligation would address concerns raised by AGEA that port operators have the potential to restrict access to port for bulk wheat services by exhausting the port terminal's capacity in favour of other grains.

Publication of key port terminal information

1.29 AGEA agrees that it is appropriate for the proposed Undertakings to address the potential for the BHCs marketing arm to misuse port terminal information to its advantage.

1.30 AGEA repeats that the BHCs must have in place a robust ring-fencing policy and refers to paragraphs 1.2111.1 – 11.11 below.

1.31 The ACCC considers that the appropriate approach to deal with this issue would be for the proposed Undertakings to require publication of key port terminal information (such as cargo nomination applications) on the shipping stem within a short time after it is received by the BHC.

1.32 AGEA agrees that this would increase transparency of nominations that have been made and lessen the opportunity for BHCs marketing arm to misuse key port terminal information. AGEA considers that such information must be provided within 24 hours of being received by the BHC.

1.33 It is important to note that any such discriminatory conduct must be prohibited by a robust non-discrimination clause.

Publication of key service standards

1.34 AGEA agrees that the BHCs' proposed Undertakings should include an obligation to report on a number of key service standards, including:

(a) port intake capacity;

(b) intake booking slots;

(c) port stocks by grain and grade;

(d) the shipping stem;

(e) ship rejections;

(f) cargo assembly times;

(g) transport queuing times;

(h) port blockouts; and

(i) overtime charged.

1.35 Such reporting would provide a degree of transparency around the level of service provided to AWEs and assist potential access seekers in assessing the appropriateness of the price offered for a service.

1.36 AGEA's further comments appear at paragraphs 13.1-13.8 below.

2. Procedural Overview

Indicative timelines

2.1 AGEA notes that the BHCs have been required to provide revised versions on both their proposed port terminal rules/protocols and proposed 2009/2010 port terminal services agreement. For the reasons set out in these submissions and the Schedules, the revised port terminal rules/protocols and revised proposed 2009/2010 port terminal services agreement do not achieve the requirement of providing fair and transparent access to port terminal services.

2.2 The BHCs have indicated that they may provide further versions of their proposed port terminal rules/protocols and 2009/2010 port terminal services agreements.

2.3 AGEA requests an opportunity to provide submissions on any further revised versions of the port terminal rules/protocols and 2009/2010 port terminal services agreements.

3. Legislative Framework - NO COMMENT REQUIRED

4. Industry Background - NO COMMENT REQUIRED

5. Background, Objectives and Structure section of the proposed Undertaking

Objectives of the proposed Undertaking

General

5.1 The Objectives section ties into key clauses and is critical to the working of the proposed Undertakings.

BHCs

5.2 The ACCC considers that the reference to 'reasonable costs' at CBH clause 2(e)(i)(A) [GrainCorp/ABB clause 1.2(e)(i)(A)] is ambiguous with respect to what costs an access provider may recover through charges levied on the access seeker.

5.3 The ACCC is of the view that the objective of balancing the legitimate interests of the BHCs with the interests of access seekers is more likely to be appropriate pursuant to section 44ZZA(3) of the TPA if the word 'efficient' is substituted for 'reasonable'. AGEA accepts that a reference to "efficient" costs, instead of "reasonable" costs, would be consistent with the pricing principles at section 44ZZCA of the TPA. However, AGEA is concerned that there will continue to be uncertainty as to the proper application and meaning of this clause as "efficient" costs cannot be objectively determined unless there is proper transparency and non-discrimination.

5.4 AGEA agrees with the ACCC's decision that the interpretation of CBH clause 2(e)(i)(D) [GrainCorp/ABB clause 1.2(e)(i)(D)] (which refers to the "Port Operator's ability to meet its own or its Trading Division's reasonably anticipated requirements for Port Terminal Services") in the context of an access Undertaking (rather than in relation to a Part IIIA arbitration) is unclear and that it is likely that difficulties would arise in determining the proper application of this clause.

5.5 As noted by the ACCC, one interpretation of the clause could be that BHCs intend to reserve and set aside their own or their Trading Division's 'reasonably anticipated requirements' for port capacity and then provide access to third parties for the remaining capacity.

5.6 For the reasons given in AGEA's original submission, AGEA remains concerned that BHCs' Objectives clause makes the undertaking circular and biased in favour of BHCs by allowing BHCs to make decisions which are consistent with the objectives of the undertaking, when the objectives of the undertakings provide the opportunity for BHCs to favour their own interests. The problems created by the Objectives clause are exacerbated by weak ring-fencing policies and an overall lack of transparency in relation to BHCs' operational decisions and costs and charges.

5.7 As long as one of BHCs' stated Objectives is biased in favour of their own interests, the ACCC should continue to reject BHCs' Undertakings.

Structure of the proposed Undertaking

Specific terms and conditions in the Port Schedules

5.8 AGEA agrees that the structure of the proposed Undertaking is not appropriate given the proposed reference to terms and conditions in the "Port Schedule" (even with the statement that terms in the "Port Schedule" will prevail over the General Terms*)*. All of the proposed terms and conditions of access should be clearly set out in the standard port terminal services agreement offered to accredited wheat exporters. Having other or further terms and conditions in the "Port Schedules" is likely to create confusion and uncertainty.

6. Term of, and variation to, proposed Undertaking

Term

6.1 AGEA notes that the ACCC has accepted that the Undertakings should be for a term of two years. AGEA agrees with this aspect of the ACCC's draft decision.

7. Scope

Scope of the proposed service definition

7.1 AGEA does not agree with the ACCC's draft decision to limit the scope of the proposed Undertaking to wheat and to port terminal services (rather than including up-country services). AGEA submits that in the least, CBH's proposed Undertaking must include up-country services, where the Port Terminal Services provided are part of the Grain Express service. This is necessary as the up-country services are bundled with and intrinsically linked to the Port Terminal Services.

7.2 AGEA agrees that publication of *all* grain stocks at port is appropriate. AGEA agrees with the ACCC's recognition that providing a greater level of transparency over stocks at port would assist access seekers and would alleviate the potential for port operators to engage in discriminatory behaviour.

7.3 AGEA agrees that the drafting of the definition of "Port Terminal Services" in the proposed Undertakings lack clarity and is therefore not appropriate pursuant to section 44ZZA(3).

7.4 AGEA agrees with the ACCC that the BHCs' definition should be substituted with the following definition proposed by the ACCC :

> "***Port Terminal Services*** *means the services described in [the Port Schedules] in relation to Bulk Wheat provided by means of a Port Terminal Facility, and includes the use of a Port Terminal Facility and the use of all other associated infrastructure necessary to allow an Accredited Wheat Exporter to export Bulk Wheat through that Port Terminal*."

7.5 AGEA also agrees with the ACCC that the BHCs' definition of "port terminal services" must be amended to make it clear that the lists of port terminal services in the Port Schedules or definitions are not exhaustive. The definition of "port terminal services" must include all services provided by means of the port terminal facilities to which the proposed Undertaking applies, as well as the use of the port terminal facilities

7.6 CBH's revised definition on the meaning of "port terminal services" is too narrow and satisfies only the latter requirement of making the definition inclusive.[3] The revised clause 5.3 of CBH's proposed Undertaking, which seeks to set out what the Undertaking does not cover, is not acceptable. As a drafting point, the application of the proposed Undertaking is determined by the clauses which define the scope and it should be obvious from the scope what the Undertaking does not cover. Revised clause 5.3 is unnecessary and potentially makes the Undertaking confusing.

7.7 AGEA further submits that the definition of "Port Terminal Services" should be the same across the proposed Undertaking, the port terminal services agreement and the port loading protocol.

[3] Letter dated 27 August 2009 to Sarah Sheppard of the ACCC from Corrs Chambers Westgarth.

7.8 AGEA agrees that it is not appropriate that CBH's proposed Undertaking expressly excludes "fumigation of grain as a preventative measure". In CBH's further submission on this point[4], CBH does not deny that preventative fumigation occurs at port (CBH merely states it does not normally occur during cargo accumulation at port). Preventative fumigation is an essential part of port terminal services and, to the extent that the service is offered at port, it must be part of the proposed Undertaking.

BHCs - Not necessary for proposed Undertaking to expressly provide for access to employees of superintendence companies

7.9 AGEA refers to and repeats paragraphs 1.9 and 1.10 above.

[4] Letter dated 20 August 2009 to Sarah Sheppard of the ACCC from Corrs Chambers Westgarth.

8. Publish/Negotiate/Arbitrate

8.1 AGEA agrees that the BHCs' Undertakings must be certain and clear and provide fair and transparent access to port terminal services. This will rely upon a robust publish-negotiate-arbitrate mechanism being in place. At the very least, a robust ring-fencing policy is required to ensure fair and transparent access and minimise the risk of discriminatory practices and must exist, regardless of whether the proposed Undertakings contain what the ACCC considers a robust non-discrimination and no hindering access clause. AGEA submits that the current mechanisms fall short of the "robust" mechanisms the ACCC might have in mind and, on that basis alone, the ACCC could not accept the proposed Undertakings.

Timing for publication of standard terms and reference prices

8.2 In AGEA's original submission, AGEA submitted that price and non-price terms should be part of the proposed Undertaking. The ACCC has not accepted that submission.

8.3 In light of the ACCC's position, AGEA agrees with the ACCC that proposed prices must be published within a sufficient time for access seekers to negotiate access agreements before those prices come into force. Historically, BHCs have published prices as late as mid-October, which is not acceptable.

8.4 The BHCs have provided proposed port terminal services agreement (which may be revised), but have not published prices. AGEA is concerned that the BHCs will delay publishing prices until after 1 October 2009, as they have done in the past.

8.5 AGEA submits that:

(a) BHCs should also be required to publish the prices of those port terminal services before the ACCC decides whether to accept the Undertaking and, subsequently, by no later than 31 August of the relevant year;

(b) the published prices should include standard and non-standard services offered by the BHCs;

(c) the published prices should provide transparency in relation to BHCs' costs of providing the service to ensure prices are based on actual costs and are not discriminatory;

(d) prices should be sufficiently transparent so that it can be determined whether services are being provided in return for the prices paid;

(e) the published prices should not be subject to change during the term of the port terminal services agreement;

(f) alternatively to sub-paragraph (e), the opportunity to amend published prices should be limited to the same circumstances in which a variation of the Undertaking is permitted.

8.6 Unless prices are published before the ACCC accepts the proposed Undertakings, there will be no real opportunity to ensure that BHCs do not hinder access to port terminal services or discriminate through the charges imposed. The following examples are provided to demonstrate the potential for this to occur:

(a) ABB charges a transfer fee of $0.50 per tonne (manual) or $0.25 per tonne (using ABB's electronic system) which discriminates against AWEs that do not use ABB's other services. There is no transparency as to whether this fee is based on the cost of providing the service. Historically, all BHCs have charged a transfer fee. Prices need to be published so that the ACCC and access seekers will know whether BHCs propose to charge a transfer fee in the future (as to transfers, see clause CBH clause 9.1(v), ABB clause 7.12 and GrainCorp clause 6.1-6.22).

(b) ABB has increased port storage charges to $1.00 per tonne per week, whereas storage charges upcountry are $1.00 per tonne per month. AWEs have no control over when the grain is relocated and a higher fee of $1.00 per tonne per week can be imposed on exporters for the entire accumulation period. Whilst there should be some incentive to move wheat to port, there should be a limit on the period over which a higher charge can be imposed (ie. to cap the storage fee at port where accumulation occurs for more than 30 days) and a process to ensure that storage and movement to port is properly non-discriminatory.

(c) GrainCorp recently posted some charges on its website, however, they have been withdrawn[5]. GrainCorp proposed to charge $12.38 per tonne to receive grain by rail "ex other approved Bulk Handling company" or $10.84 per tonne "ex GrainCorp Storage Receival". The list of services to be provided for each fee was the same – a clear case of discrimination, which is uncompetitive and unreasonable.

(d) GrainCorp lists charges for handling infested loads from other AWEs. However, GrainCorp also reserves the right to reject infested loads. GrainCorp cannot justify these charges if it subsequently rejects an infested load (clause 3.11). Query also why GrainCorp is willing to absorb the cost of handling infested grain which comes from its upcountry network?

(e) Where bulk wheat exports are required to transfer stock ownership to a financial institution (as security over borrowings), BHCs impose an additional fee of $0.15 – 0.30 per tonne, which is unrelated to the cost of providing any service. This fee can become very substantial. One AGEA member has been charged up to $600,000 per annum.

8.7 AGEA is very concerned that the BHCs have not published prices and there will not be a proper opportunity to negotiate before the proposed Undertakings are due to take effect on 1 October 2009. Limited opportunity to negotiate puts undue pressure on AWEs to sign agreements to avoid the risk of not being able to export wheat.

8.8 CBH and GrainCorp have advised that they will publish prices by 31 August in the relevant year. The ACCC has specifically sought submissions from interested parties on ABB's intention to not publish prices until 30 September, the day before the terms and prices are to come into effect. This is not indicative of a robust publish-negotiate-arbitrate framework, as one day is not allow enough time to properly consider and negotiate the proposed prices.

8.9 Contrary to ABB's assertions, historically, ABB has delayed releasing its terms and prices, let alone negotiate on them, until after they are due to come into force.

8.10 ABB has advised that it may be necessary in the first year of the proposed Undertaking to retain a small degree of flexibility, having regard to the process for (and progress of) the Commission's consideration of the Access Undertaking, (page 31 *ABB Supplementary Submission dated 23 June 2009*).

8.11 It is unclear what is meant. However, it is not appropriate or necessary for ABB's prices to be delayed (or possibly altered) depending upon whether its proposed Undertaking is accepted by the ACCC. It is not clear whether ABB is trying to gain some advantage from publishing its prices last or after the proposed Undertaking is accepted. In the interest of transparency and fairness, BHCs' prices should all be published at the same time (AGEA refers to paragraph 1.5 above).

[5] The fact that GrainCorp did this and the withdrew its charge indicates that despite the ACCC process, it has no real commitment or understanding of the obligations that are to be accepted by a BHC throughout the Undertaking process and generally.

8.12 Prices should have been published by 31 August of each year, including the 2009/2010 season. AWEs must know the proposed charges, so that they are able to properly plan for the upcoming wheat season.

General Issues – negotiation, dispute resolution, arbitration

8.13 An accredited AWE must comply with WEA's stringent accreditation scheme, which includes having regard to the "*financial resources available to the company*" (s.13(1)(c)(i) of the WEM Act). It is unacceptable that after AWEs obtain accreditation, BHCs can still seek to impose Prudential Requirements upon AWEs that are not reasonable (CBH clause 7.4(b)(iv), GrainCorp and ABB clause 6.4(b)(iv)).

8.14 If the ACCC accepts that the BHCs are entitled to impose reasonable Prudential Requirements, it is essential that there be a dispute resolution mechanism in place to deal with disputes arising out of the BHCs' application and decisions based on their Prudential Requirements.

8.15 Disputes can arise at various times on a number of issues, such as:

(a) securing capacity or determining load position, which is allocated by BHCs in advance of the vessel's estimated time of arrival ("**ETA**") at their discretion with reference to "operational efficiencies" that are not transparent to access seekers;

(b) at the time of loading, in relation to insect infestation, late changes in load order, operational changes at port and so on.

8.16 It is critical that dispute resolution and arbitration is efficient and timely. Certain disputes such as the substitution of vessels in shipping stems or any dispute affecting the timing of a vessel's loading require a resolution by an umpire within 24 hours and the umpire's decision must be binding. Longer issues should be resolved by "fast track" mediation or arbitration. The referring must party to act reasonably when determining whether to invoke this dispute resolution process. The umpire could be chosen from a panel that is either agreed each year between the BHCs and AWEs, or in the alternative appointed by the ACCC.

Timeframes

8.17 AGEA agrees that in general the timings proposed by the BHCs ([CBH: clauses 7 and 8] and [GrainCorp and ABB: clauses 6 and 7]) are not appropriate. Specifically:

(i) In relation to CBH (clause 7.4(a)) and GrainCorp/ABB (clause 6.4(a)), the lack of any timeframes for the performance of obligations creates uncertainty and is not appropriate.

(ii) In relation to CBH clause 7.4(b)(iii) and GrainCorp/ABB (6.4(b)(iii)), it is not appropriate that CBH may, at *any time, before or during the negotiation process*, require the Applicant to demonstrate that it can meet the Prudential Requirements.

If the ACCC accepts that the BHCs can impose Prudential Requirements, it is more appropriate that the proposed Undertaking specifies a particular point in time at which the AWEs must demonstrate that it can meet the Prudential Requirements, and a particular timeframe within which CBH must confirm that those requirements have or have not been met. CBH should be required to respond within 3 business days.

(iii) In relation to CBH (clause 7.4(b)(v)) and GrainCorp/ABB (clause 6.4(b)(v)), it is not appropriate for the BHCs to have 10 Business Days to provide reasons for refusing to negotiate with AWEs in the circumstances described.

The BHCs should provide reasons to the AWEs at the time the BHCs refuse to negotiate, i.e. within 2 business days.

(iv) In relation to CBH (clause 7.5(b)(i)) and GrainCorp/ABB (clause 6.5(b)(i)), it is not appropriate that the BHCs be permitted to take 5 Business Days to acknowledge receipt of an access application. This should only take 2 business days.

(v) The timings in CBH (clause 7.5(b)(iii) and (iv)) and GrainCorp/ABB (clause 6.5(b)(iii) and (iv)) are also not appropriate. Five business day should suffice, particularly for CBH clause 7.5(b)(iv) (GrainCorp/ABB clause 6.5(b)(iv)).

(vi) CBH (clause 7.6(a)) and GrainCorp/ABB (clause 6.6(a)) should be required to be ready to negotiate within 1 business day.

(vii) CBH clause 7.6(b)(iv) and GrainCorp/ABB (clause 6.6(b)(iv)) is inappropriate. It has the effect of entitling the BHC to cease negotiations at their discretion.

(viii) CBH clause 7.7(c) (GrainCorp/ABB clause 6.7(c)) should require the BHC to provide a final access agreement within 1 business day of the terms being agreed.

(ix) CBH must be required to comply with clause 7.7(d) (GrainCorp/ABB 6.7(d)) as all times, not just "*as soon as practicable*" ("*as soon as reasonably practicable*" for GrainCorp/ABB).

(x) CBH's clause 8.2 (GrainCorp/ABB clause 7.3) does not acknowledge the serious nature of access disputes and the urgency with which they must be dealt.

(xi) For general disputes, the dispute resolution procedure must provide for authorised representatives to meet immediately, with the senior representatives of the parties to otherwise meet within 48 hours of notification of a dispute and endeavour to resolve the dispute;

(xii) If the above negotiation is not successful and mediation is to take place, AGEA believes that the dispute should be referred to Grain Trade Australia ("**GTA**") within 72 hours of the dispute notice. It is possible for GTA to agree to perform the mediation within defined terms and time limits to be set out in a predetermined dispute resolution agreement. As such, it is possible to specify that each party is to provide each other and the mediator with their summary of the dispute within 7 business days of the reference to GTA with the mediation to take place within a further 7 business days.

(xiii) AGEA's comments on arbitration are set out at paragraphs 8.23 – 8.35 below.

8.18 In relation to CBH's further submission and revised clause 7 of the proposed Undertaking,[6] AGEA makes the following comments:

(a) CBH clause 7.2(b): it is not appropriate that CBH has ten business days to respond to a request for information. CBH should be able to respond within five business days, at the most.

[6] Letter dated 24 August 2009 to Sarah Sheppard of the ACCC from Corrs Chambers Westgarth.

(b) CBH clause 7.2(e): it is not appropriate that CBH has ten business days to meet with AWEs applying for access. CBH should be able to meet with AWEs within three business days, at the most.

(c) CBH clause 7.4: it is not appropriate to require AWEs to satisfy CBH's eligibility criteria. Accredited AWEs must comply with WEA's stringent accreditation scheme. Clause 7.4(1)(vi) and (vii) are matters for WEA, given its functions under the WEM Act. Clause 7.4(c) gives CBH a wide discretion to cease or refuse to negotiate with an applicant "*for any reason*". It is not appropriate that an applicant must wait ten business days before referring a dispute to arbitration (clause 7.4(d)). (Note that "Material default" in clause 7.4(a)(iv) is not defined).

8.19 CBH clause 7.5(a) should require CBH to provide a final access agreement within 1 business day of being advised by the AWEs that the terms are agreed.

8.20 Clause 7.6 (c) and (e): it is not appropriate for AWEs to be forced to wait three months before they can activate the dispute resolution clause. AWEs must be entitled to commence the dispute resolution process at any time.

Lack of clarity and certainty

8.21 AGEA agrees with the ACCC's decision that CBH's clauses 6-8 (GrainCorp/ABB's clauses 5-7) lack clarity and certainty. AGEA makes the following further comments in relation to the drafting of CBH's clauses 6-8 (GrainCorp/ABB's clauses 5-7):

(i) In relation to CBH clauses 7.4(a)(ii)(B)-(C) (GrainCorp/ABB clauses 6.4(a)(ii)(B)-(C)), where the applicant agrees to pay the reasonable costs, the BHC must be required to provide the information.

(ii) CBH clause 7.4(b)(i) (GrainCorp/ABB clause 6.4(b)(i)), is not appropriate as it entitles the BHCs to cease negotiations as its discretion. The clause should be deleted.

(iii) AGEA agrees that the BHCs must provide reasons for ceasing or refusing to negotiate under any circumstances (CBH clause 7.4(b)(v)) (GrainCorp/ABB clause 6.4(b)(v)). Reasons should be provided within 1 business days.

(iv) CBH clause 7.5(a)(ii) (GrainCorp/ABB clause 6.4(a)(i)) should be amended to require the BHCs to attend any meeting requested within 1 business day.

(v) AGEA agrees that CBH clause 7.6(b)(v) (GrainCorp/ABB clause 6.4(b)(v)) is not appropriate, as it essentially repeats the Prudential Requirements matter referred to in clause 7.4(b)(iii) (GrainCorp/ABB clause 6.4(b)(iii)).

(vi) In relation to CBH clause 8.1(a) (GrainCorp/ABB clause 7.1), AGEA refers to paragraph 8.17 above.

(vii) In relation to CBH clause 8.3(d) (GrainCorp/ABB clause 7.1), AGEA refers to paragraph 8.17(x) and (xi) above.

Negotiation component – further issues

Disproportionate discretion on BHCs

8.22 AGEA agrees that the negotiation component does not achieve an appropriate balance between the interests of the access provider and access seekers in that there is disproportionate discretion on the part of the access provider to refuse to negotiate, which undermines the possibility of a robust negotiate-arbitrate mechanism. Specifically:

(i) In relation to CBH clause 7.4(a)(ii) (GrainCorp/ABB clause 6.4(a)(ii), the discretion that the BHCs have to refuse a request for information from an Applicant, including where the Applicant does not agree to pay 'reasonable costs' incurred by the BHCs (which, as noted above, is itself not appropriate).

(ii) In relation to CBH clause 7.4(b)(i) (GrainCorp/ABB clause 6.4(b)(i)), the discretion that BHCs have not to negotiate with an Applicant if the BHC considers the Applicant does not materially comply with the requirements and processes set out in the proposed Undertaking.

(iii) In relation to CBH clauses 7.4(b)(iii) & (iv), and clause 7.6(b)(v) (GrainCorp/ABB clauses 6.4(b)(iii) & (iv) and clause 6.6(b)(v)), the discretion that the BHCs have to at any time, before or during the negotiation process, to require the AWEs to demonstrate that it meets the Prudential Requirements, and to cease or refuse to commence negotiations if the Applicant does not meet those requirements (see further below).

(iv) In relation to CBH clause 7.4(b)(vii) (GrainCorp/ABB clause 6.4(b)(vii), the discretion that the BHCs have to refer an application to the arbitrator if the BHC is of the view that the application is frivolous in nature or that the Applicant is not negotiating in good faith, and for BHCs to seek reasonable costs.

(v) In relation to CBH clause 7.5(b) (GrainCorp/ABB 6.5(b)), the discretion that the BHCs have in relation to the acknowledgement of an Access Application, and to request further information or clarification from AWEs.

(vi) In relation to CBH clause 7.6(b)(iv) (GrainCorp/ABB 6.6(b)(iv)), the discretion that the BHCs have to cease negotiations if the BHCs believe that the negotiations are not progressing in good faith towards the development of an Access Agreement within a reasonable time period;

(vii) The discretions effectively created by the uncertain time periods in CBH clauses 7.6(a), and 7.7(c) and (d) (GrainCorp/ABB clauses 6.6(a) and 6.7(c) and (d)) (see above).

Dispute resolution component – further issues

Involvement of GTA

8.23 It is AGEA's preference for there to be only one body to whom mediations are referred. AGEA would prefer mediations (and arbitrations) to be referred to GTA as it has the requisite industry experience to conduct mediations (and arbitrations).

8.24 GTA must be required to enforce a strict policy to ensure that any mediator, arbitrator or umpire does not have a conflict of interest in the matter. That would include any nominated person that is also employed or retained as an agent advisor or legal representative of parties that could have an interest in the outcome.

8.25 The local State laws must apply to the dispute resolution process and the right to appeal on an error of law must be preserved.

Selection of the arbitrator

8.26 AGEA note that the ACCC considers that GrainCorp/ABB clause 7.5 is not appropriate having regard to the public interest and that the ACCC considers it is more likely to be appropriate for the ACCC to have a role.

8.27 If the dispute cannot be resolved by expedited negotiation or mediation, AGEA agrees that the ACCC should have some involvement in any arbitration process. CBH has filed a further submission and accepts that disputes under the proposed Undertaking should be referred to the ACCC in the first instance for arbitration.[7]

8.28 To be effective, any arbitration must be conducted in accordance with arbitration rules to be specified in the proposed Undertakings, which must include an obligation to keep confidential any information disclosed during the arbitration.

8.29 The arbitration rules must require both parties to serve relevant materials including evidence within 7 days and the dispute be heard and concluded within 14 days of the notice of referral to the ACCC. The ACCC must endeavour to make a determination within 14 days.

8.30 Where arbitration is to be conducted by private arbitration, the dispute should be referred to GTA, with a copy of all materials, including the award, to be provided to the ACCC.

8.31 GTA should be able to administer the arbitration within the time frame as set out in paragraph 8.29 above.

8.32 Alternatively, AGEA seeks an opportunity to discuss other forms of dispute resolution with the ACCC.

8.33 At all times during any dispute resolution process, BHCs must continue to negotiate access agreements and provide full access to port terminal services.

8.34 In relation to CBH's further submission and revised clause 8 of the proposed Undertaking,[8] AGEA makes the following comments:

(a) Clause 8.2: it is not appropriate that negotiations occur within five business days of a dispute notice. The parties' representatives should be able to meet within two business days.

(b) Clause 8.3(b) should include a requirement that both parties provide each other and the mediator with their summary of the dispute within five business days of the reference to mediation.

(c) Clause 8.4: the referral to arbitration should occur within two business days after mediation under clause 8.3.

(d) Clause 8.4(c) should include a requirement that the ACCC will endeavour to make a determination within 14 days.

(e) Clauses 8.4 and 8.5 should include a provision that requires both parties to serve relevant materials including evidence within 7 days of the referral to arbitration and that the dispute will be heard and concluded within 14 days of the date when the ACC determines that it shall conduct the arbitration or 14 days from the reference to a private arbitrator.

[7] Letter dated 25 August 2009 to Sarah Sheppard of the ACCC from Corrs Chambers Westgarth.

[8] Letter dated 25 August 2009 to Sarah Sheppard of the ACCC from Corrs Chambers Westgarth.

(f) Clause 8.5 should include a requirement that the private arbitrator will endeavour to make a determination within 14 days.

(g) Clause 8.5(f) should be deleted. The parties are entitled to refer a dispute to arbitration and have the right to have their dispute heard and determined.

(h) Clause 8.8(b) is contrary to CBH's obligation to provide access and should be deleted. Regardless of whether an applicant has complied with a determination, CBH is required to continue negotiations and provide access to port terminal services. If an applicant does not comply with a determination, CBH will be able to protect its position by pursuing other remedies.

Appropriate clauses

8.35 AGEA agrees either party must be able to unilaterally refer a dispute to arbitration. AGEA also considers that throughout the dispute resolution process, all parties must be obliged to act in good faith.

8.36 The proposed undertaking should require that all information relevant for the negotiate-arbitrate processes should be protected by robust confidentiality requirements that protect both the BHC and the AWEs.

Holding over arrangements

8.37 It is essential that AWEs are able to access to port terminal services during the period that they are negotiating access and also during any periods of dispute.

8.38 The BHCs proposed Undertakings apply where AWEs are negotiating access to the port terminals.

8.39 As such, holding over arrangements are an important aspect of the negotiate-arbitrate approach and it is not appropriate for an access seeker to be delayed in obtaining access because they are engaging in the negotiation process in the proposed Undertaking, including where the dispute resolution and arbitration processes are invoked.

8.40 This must apply to all port access negotiations, whether they be under the standard terms offered by the BHCs or any variations.

8.41 AGEA refers to CBH's revised submission relating to section 6 of its proposed Undertaking[9]. In relation to CBH's holding over arrangements, AGEA refers to paragraphs 8.37 – 8.41 above.

[9] Letter dated 31 August 2009 to Sarah Sheppard of the ACCC from Corrs Chambers Westgarth.

9. Indicative Access Agreement

Inclusion of an Indicative Access Agreement as part of the proposed Undertaking

9.1 AGEA agrees that the non-inclusion of an Indicative Access Agreement in the proposed Undertaking results in a lack of certainty and clarity for potential access seekers and is, therefore, not appropriate having regard to the matters set out in section 44ZZA(3) of the TPA.

9.2 The Indicative Access Agreements should ensure:

(a) transparency in relation to port stocks (for wheat and other grains), accumulation plans (including incoming rail/road slots) and ship load order;

(b) accountability of BHCs, for example, in relation to demurrage/despatch and port inload spots

9.3 The Indicative Access Agreements should include prices (for standard and non-standard services) and be binding. Alternatively, BHCs should be required to publish prices (for standard and non-standard services) by 31 August at the latest. AGEA further refers to and repeats paragraphs 8.2 to 8.12 above.

9.4 AGEA's submission and further comments regarding the BHCs' proposed terms and conditions for 2009/2010 and proposed port terminal protocols are set out in the Schedules.

Variation of Standard Terms or Reference Prices

9.5 AGEA agrees that the BHCs' approach to variation of the standard terms are not appropriate.

9.6 The ability for the BHCs to unilaterally change the Indicative Access Agreement would result in a lack of certainty and clarity for potential access seekers and undermine the benefits of inclusion of the Indicative Access Agreement in the undertaking.

9.7 As noted by the ACCC, the Undertakings are for a short period.

9.8 AGEA submits that any variation of the Indicative Access Agreement (and the port loading protocols, which should both form part of the proposed Undertakings) should be in accordance with the process under section 44ZZA(7) of the TPA. AGEA understands CBH now agrees with that position.

9.9 In relation to BHCs' published prices, the above principle for amendment should also apply.

10. Non-discrimination

Appropriate to include a non-discrimination clause in the proposed Undertaking

10.1 AGEA agrees that it is appropriate for the BHCs proposed Undertakings to include a non-discriminatory access clause obliging it to not discriminate against access seekers in favour of its affiliated trading business.

10.2 The anti-discrimination clause must be robust in order to avoid regional monopolies unfairly controlling infrastructure necessary to export wheat in bulk quantities, to the detriment of other accredited exporters.

10.3 AGEA agrees with the ACCC's proposed non-discrimination clause, which is straightforward and clear. As the ACCC suggests, price discrimination should only be permitted where it aids efficiency and therefore should be limited to circumstances where the cost of providing access to other access seekers is higher. If price discrimination is permitted in circumstances where the cost or providing access is higher, there must also be transparency in relation to such costs so that access seekers know the differential in price is justified.

10.4 The alternative clause recently proposed by CBH is not appropriate. CBH has proposed that its obligation not to discriminate should be "subject to" CBH's entitlement to discriminate if CBH determines on subjective grounds that:

(a) the cost of providing access to other Applicants or Users is higher, *including where the Applicant or User utilises capacity less efficiently than other Applicants or other Users*;

(b) it is necessary on the grounds of hygiene, grain quality, health and safety and Legislative Requirements.[10]

10.5 Adding the words "*including where the Applicant or User utilises capacity less efficiently*" is not appropriate. It introduces subjective decision making and does not reflect the principle accepted by the ACCC in relation to permissible price discrimination. CBH's decision could not be determined by reference to objective factors and its decision making process on the issue lacks transparency. Incorporating a reference to the efficient utilisation of capacity does not reflect the ACCC's view on the circumstances in which price discrimination is permitted. Price discrimination should only be permitted where it aids efficiency, that is, where the cost of providing access to access seekers is higher. CBH's proposed non-discrimination clause goes beyond this principle and is not acceptable.

10.6 The ACCC has stated that price discrimination in favour of BHCs' trading operations should not occur except to the extent that the cost of provision of services to other users is higher than provision of the service to itself.

10.7 However, unless there is transparency in relation to BHCs' operational decisions and costs and charges and binding terms and conditions of access, including binding indicative pricings for their standard and non-standard services which are published in advance of the commencement of the Undertakings, it will not be possible to determine whether discrimination has taken place. To ensure fair and transparent access to port terminal services, BHCs' compliance with the non-discrimination clause, ring-fencing policies and the proposed Undertaking generally must be the subject of an annual audit by an independent third party.

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[10] Letter dated 24 August 2009 to Sarah Sheppard of the ACCC from Corrs Chambers Westgarth. The subsequent proposed amendment as contained in the letter dated 31 August 2009 to Sarah Sheppard of the ACCC from Corrs Chambers Westgarth, contains the same inadequacies. Additionally, it is arguably narrower in its application, as the phrase "including, but not limited to", in clause 6.2(a) has been removed.

Non-discrimination in making Operational Decisions

10.8 Although there should be a general umbrella obligation of non-discrimination in the negotiation and provision of port terminal services, AGEA accepts the ACCC's position that it is appropriate for BHCs to include a non-discrimination clause in relation to its operational decisions. However, AGEA agrees with the ACCC's reasons for rejecting proposed CBH clause 9.2(b)(ii) and 9.2(d) (GrainCorp/ABB clause 8.3 and 8.4) which makes the ability to discriminate in relation to operational decisions 'subject to' other clauses, the combined effect of which would not achieve the objective of prohibiting BHCs from discriminating in favour of its own business.

A more appropriate non-discrimination clause

10.9 AGEA agrees with the ACCC's proposed non-discrimination clause, save that the requirement to not discriminate must also extend to the negotiation process of the provision of port terminal services and the dispute resolution process.

11. Ring-Fencing

11.1 The ACCC considers, and AGEA agrees, that the BHCs' current ring-fencing rules are not an effective safeguard against anti-competitive discrimination in the provision of port terminal services.

11.2 However, AGEA does not agree with the ACCC's view that if the BHCs' proposed Undertakings are amended to contain "*robust non-discrimination and no hindering access clauses, fair and transparent port terminal protocols and an indicative access agreement (as well as measures to deal with the potential for information about port terminal services to be used to the advantage of [the BHCs'] wheat exporting arm), then, in the circumstances, it would not be necessary for ring-fencing measures to be included in [the BHCs'] undertaking at this particular point in time*."

11.3 As is clear from the above, the BHCs are not offering to provide access to terminal services in accordance with the above principles. As such, and for the further reasons set out immediately below, a robust ring-fencing policy is essential to ensure BHCs provide fair and transparent access to port terminal services to all AWEs.

11.4 The ACCC has taken the above view due to transitional nature of the industry and the short duration of the proposed Undertaking.

11.5 AGEA recognises that the duration of the Undertaking may be considered to be short. However, in an industry that is in transition and now involves 23 companies that are accredited to AWEs, it is essential that robust ring-fencing rules are out in place.

11.6 The substantial number of failings identified by the ACCC in the BHCs proposed Undertakings which require wholesale rectification is telling.

11.7 The BHCs have shown that they will not provide fair and transparent access to port terminal facilities to AWEs, unless required to do so under the risk that their trading arm losing export accreditation.

11.8 As noted by the ACCC, some BHCs have drawn out this proposed Undertaking process. They have not been open and frank. Each revised submission has in reality, been an attempt to have the ACCC accept their proposed Undertakings with as little as possible monopolistic advantages surrendered.

11.9 The majority of the BHCs' submissions to the ACCC have been timed so as to exclude the possibility of those submissions being subjected to proper public scrutiny and consultation before the ACCC provided its draft decisions.

11.10 Twenty three newly accredited companies have been identified by WEA as being worthy of exporting bulk wheat from Australia. At the same time that these newly accredited AWEs are trying to gain a foothold in the Australian bulk wheat market, the BHCs should not be allowed the opportunity to provide port terminal services without robust ring-fencing rules being part of their proposed Undertakings.

11.11 History has shown that the information exchange between BHCs and their respective trading arms is impossible to deter. To avoid the opportunity for discrimination, quality and quantity data on receivals and other stock information should be publicly available information and should be updated daily.

12. Capacity Management

12.1 The port loading protocols are not appropriate for the reason that they lack sufficient clarity, certainty and transparency in relation to decision making about capacity management. Intake capacity at all ports is known. BHCs should be accountable for intake delays, which it is within their capacity to manage and control. In the case of GrainExpress, the intake capacity is controlled by CBH and CBH is accountable for intake and freight. Graincorp/ABB both accept intake from third party shippers. For Graincorp/ABB, the intake needs to be carefully controlled to ensure efficient utilisation of port capacity. This could be achieved by Graincorp/ABB being held accountable at the time accumulation starts.

12.2 The port loading protocols do not make BHCs accountable. Transport is pre-booked and confirmed with BHCs to meet their schedule. Late arrivals or transport delays are penalised, thereby minimising the risk of delays. BHCs should be held accountable for stocks, which are within their control at port, and delays.

12.3 Any adjustment in the shipping stem has the potential to expose AWEs to demurrage. Accordingly, the shipping stem must not be subject to change except in certain, specified circumstances and with full transparency in the decision-making process. To ensure BHCs are accountable for shipping performance and the efficient operation of the facilities, AWEs should be compensated for delays caused by BHCs' including vessel demurrage. Conversely, BHCs should be entitled to be rewarded by way of a share in despatch rates if vessels are unloaded at a faster than expected rate. The BHCs' exposure to demurrage, (and conversely right to despatch), should be calculated by reference to the vessel loading window which is provided by the BHCs and the demurrage rate linked to the Baltic Exchange.

Nature of the inclusion of the PLPs in the proposed Undertaking and Access Agreements

12.4 As the port terminal protocols set out the key process by which the BHCs will allocate port terminal capacity, they must be included in the proposed Undertakings and in a form that is binding. Certainty and clarity in the provision of access to port terminal services cannot be achieved without this as the minimum requirement. For similar reasons, the port terminal services agreement must also be included in and form part of the proposed Undertakings.

Varying the Port Terminal Protocols

12.5 As the port terminal protocols must form part of the key processes by which the BHCs will allocate port terminal capacity and form part of the proposed Undertakings, the opportunity to amend the protocols must be limited to the circumstances in which amendment of the proposed Undertakings is permitted (ie. in accordance with section 44ZZA(7).

12.6 Alternatively, any variation of the port loading protocols must only take place after consultation with the port users and within strict binding confines of terms that form part of the proposed Undertaking.

12.7 The ACCC refers to p 12 of GrainCorp's supplementary submissions, at which GrainCorp stated:

"*GrainCorp envisages that it will prepare proposed changes and circulate those proposals to interested parties, along with an explanation for the amendments. The consultation process will give all interested parties sufficient time to review and respond to the proposals submitted. GrainCorp will discuss the proposals, collate, review and actively consider the responses from interested parties. Depending on the level and nature of the responses, the initial proposals may be changed in order to ensure that any proposed amendments to the Undertaking are appropriate.*"

12.8 The above is a vague, non-binding description as to what GrainCorp may or may not do.

12.9 AGEA agrees that the process to be applied in the proposed CBH Undertaking when seeking a variation of the port terminal protocols provides too much discretion to CBH and insufficient certainty for access seekers.

12.10 The discretion is such that the proposed Undertaking does not in any way ensure fair and transparent access to port terminal services.

12.11 AGEA agrees that any proposed Undertaking should include a provision allowing the ACCC to treat a breach of the amended port terminal protocols as a breach of the Undertaking

Interaction of the Operational Decisions clause and the PLPs

12.12 As 'Operational Decisions' are stated to constitute all decisions made in the course of providing the Port Terminal Services, they must form part of the proposed Undertaking.

Whether the Operational Decisions clause provides an appropriate balance between providing access seekers with sufficient certainty and clarity as to their terms, effect and operation and the BHCs with sufficient flexibility in their management of the Port Terminal Services

12.13 AGEA agrees with the ACCC's position.

12.14 Additionally, AGEA makes the following comments:

(i) GrainCorp/ABB clauses 8.4(b) and (c): do not provide any transparency or benchmarks to show that the Operational Decisions are made to ensure that fair access is provided to all AWEs.

(ii) GrainCorp/ABB clause 8.4(d)(i): it is the BHCs that control the movement and accumulation of wheat at port.

CBH - Considerations that the ACCC may take into account in assessing any future PTRs

12.15 AGEA notes that the ACCC has no in-principle objection to the use of a well designed auction process run by an independent third party under which capacity is allocated as, in very general terms, a well functioning price mechanism can ameliorate circumstances of 'excess demand'. However, AGEA considers that CBH's proposed auction model will not achieve these objectives.

12.16 Port terminal facilities tend to be underutilised in Australia. The real inefficiencies occur upcountry and in the process of transporting wheat to port. An auction process will not address upcountry inefficiencies, encourage efficient utilisation of resources or provide incentives to upgrade facilities. These issues need to be addressed to properly address access to port terminal services.

12.17 Auctioning shipping slot windows will not improve access to port terminal services for the following reasons :

(a) An auction of shipping slots is not equivalent to access to ports. By its nature, not everybody can be successful at an auction. Those that miss out must turn to the secondary market, thus creating a demand for a secondary market and driving up prices in the primary and secondary market.

(b) CBH admits that ship loading capacity is in excess of historical exports and, therefore, it is clear that what is being auctioned is the supply chain, not shipping capacity. CBH has consistently failed to stipulate what is the limiting factor to capacity in each port and continues to confuse the issue by vaguely claiming it depends on a wide range of factors and circumstances.

(c) CBH treats shipping capacity at a specific port zone in a specific window as a commodity of which a fixed quantum is available. However, CBH is the sole arbiter of the quantum and no independent verification is available. CBH is proposing to offer 70% of whatever volume it decides to offer, in its absolute discretion. CBH has too much control over the decision-making at this point and its decision is not subject to scrutiny.

(d) CBH distinguishes between "core" capacity and "surge" capacity. Yet, core capacity can only be known when crop size and volume is known. CBH should be able to advise what core capacity is available at any point in time. AGEA strongly opposes any auction process based on notions of "core" and "surge" capacity.

(e) CBH claims that the reason for auctioning shipping slots is that they anticipate that demand exceeds supply after the harvest period and therefore additional capacity, in the form of "surge" capacity, will be made available at a premium over the base core price. However, the capacity either exists or it does not. Describing it as "surge" capacity is a misnomer – it is the capacity at which CBH charges a premium for the service.

(f) The auction will cover shipping slots until October 2010. 70 pct of the "core" capacity from November 2009 to October 2010 will be auctioned by mid October 2009. Successful bidders have to declare then whether they will make use of Grain Express or select Direct Access. No change is allowed after that date. It should be sufficient to declare the option of Grain Express of Direct Access when nominating the ship. This is another attempt by CBH to provide "direct access" on paper but in reality force exporters to lock themselves into one or the other for one year in advance.

(g) CBH intends to impose internal "soft caps" on individual exporters, which will only be known to the Auction Review Committee. Apparently, the caps will depend on trade history of individual exporters – but there is no trade history at the moment. Thus, the trigger points for the soft caps are totally subjective and there is no transparency on this issue.

12.18 AWEs sell to their overseas customers under forward contracts. These may range from prompt shipment to up to six months' forward, depending on customer requirements and market view. In order for AWEs to fill their requirements to execute sales contracts, they potentially will need to go through three different phases in order to achieve this:

(a) the First Phase Auction - 70 pct of core capacity for whole year ;

(b) Second Phase Auction - balance 30 pct core plus surge 2 months prior shipping window with surge price only known before that auction ;

(c) Secondary market at unknown cost.

12.19 The risk for AWEs is that they do not know the actual cost of shipping until they have completed the acquisition of shipping slots. Further, they assume the risk that, in the end, they may still be short. In order to avoid these risks, exporters may try to confirm an overseas sale once they have secured shipping slots for the positions sold. However, this is unrealistic as the overseas customer needs to decide on his purchases within hours, not weeks or months. The consequence may be the loss of export market share to other (easier) origins.

12.20 AGEA's position regarding the auction model contained in CBH's further revised proposed access allocation policy remains that it is labour intensive, time consuming and complicated. Loading ships with grain is a relatively straightforward activity. The proposed detail in CBH's auction system will make the auction model unnecessarily rigid and complex. The auction process needs to match the fluidity of the grain and shipping markets, otherwise it will likely lead to confusion and chaos.

12.21 Furthermore, there is no proposed limit on capacity for any single party. The proposed auction model will not prevent related parties of CBH bidding up the auction and securing as many slots as required to the detriment of AWEs.

12.22 The failure to have a robust ring-fencing policy in place, means that any overpayment by CBH's trading arm, can be transferred back from CBH to GrainPool.

12.23 Although an Auction Review Committee (ARC) is proposed, the committee comprises 1 CBH person, 1 Tradeslot person and 1 accountant. Tradeslot has been hired by CBH to run the auction, so in fact there are two persons on the panel who may have biased views when it comes to decision making. The powers of the ARC include cancellation of auction trades and suspension and cancellation of bidder registration. These powers have serious economic consequences if used against any one bidder, including denial of export rights granted by WEA. There are no clear guidelines in relation to the circumstances in which the ARC can use its powers and no audit process to ensure the system is fair and equitable.

12.24 There is no transparency in relation to actual cost (either surge fees, auction fees, secondary market transfer fees, late fees and so on). Most of these charges will be borne by the exporters, but there is no transparency provided to determine whether the charges reflect or are disproportionate to the cost of providing the services. Although a rebate on the cost might be proposed, there is no transparency as to how the rebate will work.

12.25 The auction process allows CBH at least two further income windfalls and creates inefficiencies.

12.26 The first, is by allowing CBH to sell vessel allocations at a premium, which is in no way linked to the cost of providing the service.

12.27 The second, is by allowing CBH to recover the "cost" of implementing the auction system. CBH intends to charge for and therefore recover the cost of the administration of the service, without there being any required audit process to ensure that CBH is not making a further profit on a process imposed by CBH. It also appears that CBH proposed to charge:

(a) A secondary market transfer fee of $0.05 per tonne. This fee (based on tonnage) is not related and likely to be disproportionate to the cost of the service .

(b) A fee if the exporter does not utilise CBH's upcountry services, which is discriminatory .

12.28 The auction system will do nothing to ensure fair and transparent access to vessel slots.

12.29 The auction system will increase the cost of exporting wheat from Australia, reducing the competitiveness of accredited exporters compared to suppliers of wheat from other countries and reduce the returns of Australian farmers. It will also place in jeopardy long term sales arrangements as it will undermine the security of shipping supply inevitably necessary to ensure performance of long term sales contracts.

12.30 There must be complete transparency in relation to capacity allocation or an independent person should be appointed to make decisions about capacity allocation. An option would be a process where capacity is allocated by way of an auction process whereby AWEs can bid for capacity by port, for any month at par (ie. the export out-loading charge).

12.31 The initial tender should take place as early as possible, with the **full annual capacity put up for tender**. By not releasing the full capacity, CBH is artificially increasing the price of each slot.

12.32 In each tender, AWEs can bid for a maximum of 25% capacity in each port.

12.33 The tender should be operated by an independent third party (eg PriceWaterhouseCoopers, or similar). Tenders for under-subscribed capacity could then be held at intervals to be determined. Where a tender is oversubscribed, the capacity should be issued on a pro-rated basis.

12.34 A secondary market should then be allowed to develop, without the interference of CBH.

12.35 Certainly, CBH should not be entitled to profit from the secondary market, by charging fees that are in excess of any costs incurred by it.

12.36 Logically, if there is to be a secondary market, there is a question of whether this should exclude the BCHs' own trading arm from participating as a seller of excess capacity. Any participation must be subject to stringent auditing process to ensure non-discriminatory access is provided.

12.37 AGEA refers to CBH's revised submission relating to capacity allocation[11]. The revised submissions contain the same flaws as highlighted above.

12.38 In addition to the above, the following comments are made:

(a) CBH requires EOIs for no later than 15 September. It will be difficult to confirm commodity/grade splits for forecast sales over the requisite period [clause 2.1(i)];

(b) CBH does profit from limiting capacity (see paragraph 12.27 above) [cl.4.3(i)];

(c) The likelihood of a new entrant establishing a new port terminal to compete with port operators is negligible given the cost and current geographical spread of port terminals servicing the grain belt (see AGEA's original Submission at paragraph 3.21 [4.3(ii)];

(d) CBH controls the performance of supply chain to port [clause5.7].

(e) Most of the matters referred to in CBH's revised submission relating to capacity allocation contain assertions that are not supported by any independent economic analysis and should be regarded with caution due to their self-serving nature

12.39 In summary, CBH is the party setting capacity on an arbitrary basis and determining when or if such capacity is made available for auction.

12.40 CBH expect AWEs to bid for capacity without the true transparency of knowing how much capacity is actually available, nor at what marginal cost additional capacity can be released.

12.41 CBH has elected to be deeply involved in the capacity management market at all times, rather than allowing the market forces to apply.

[11] Letter dated 30 August 2009 to Sarah Sheppard of the ACCC from Corrs Chambers Westgarth.

12.42 CBH is attempting to control a process in which they should remain disengaged in once capacity is initially allocated.

12.43 CBH is also charging fees for services that should not be providing, at a rate that is not linked to the associated cost.

12.44 AGEA refers to CBH's revised submission relating to Part 12 of the ACCC's draft decision[12]. Specifically:

(a) CBH states that it will provide a further draft Port Terminal Rules "as soon as possible, with a supporting submission. AGEA is unable to say whether a revised proposed Port Terminal Rules would be appropriate until AGEA has had the opportunity to review and consider the revised documents. AGEA requests an opportunity to do so;

(b) Clause 10.1(b): CBH "may" require the users of its port terminal facilities to comply with the Port Terminal Rules. This discretion upon which CBH can base its decision is not objectively ascertainable and there is no transparency as to how the discretion will be exercised or whether it will be applied to all access seekers equally;

(c) Clause 10.2: The rights to vary the Port Terminal Rules are tainted with the same flaws as the processes listed ("Non- discrimination" see paragraphs 10.1 – 10.9 above ; "No Hindering": this clause reference does not appear to exist. In any event. See also paragraphs 1.17 to 1.20 above);

(d) Clause 10.3: Does not provide any time frames within which steps are to be completed, any obligation on CBH to take into account and comments. There is no transparency as to how the discretion will be exercised.

[12] Letter dated 31 August 2009 to Sarah Sheppard of the ACCC from Corrs Chambers Westgarth.

13. Other issues

Publication of key port terminal information

13.1 AGEA agrees with the ACCC that it is not appropriate that the BHCs' proposed Undertakings do not include a requirement to report on a number of service performance levels. Such reporting would provide a degree of transparency around the level of service being provided to AWEs and assist potential access seekers in assessing the appropriateness of the price offered for a service.

13.2 AGEA agrees with the ACCC that the BHCs should publish the following performance indicators below, which should be specified and included in the BHCs proposed Undertakings:

(i) The shipping stem

(ii) Ship rejections;

(iii) Cargo assembly times;

(iv) Transport queuing times;

(v) Port blockouts; and

(vi) Overtime charged.

13.3 In addition to the above, the BHCs should provide the following information:

(i) Port intake capacity;

(ii) Intake booking slots

(iii) Port stocks by grain and grade

(iv) Refusal of request for acceptance of cargo receival;

(v) Refusal of request for cargo outturn;

(vi) Acceptance of vessel nominations regardless of stock;

(vii) Changes to vessel slots and cargo accumulation;

(viii) Unloading of trains/road transport within six hours;

(ix) Load rates and time to count as per Austwheat 2008 charterparty (as amended from time to time);

(x) Benchmark criteria for grading, fumigation, weighing,

(xi) Compliance with AQIS requirements, loading to receival standards. The grain loaded to the ship should be of a standard not less than that delivered to the port terminal by or on behalf of the exporter. The terminal should provide running samples and/or analysis during loading so that any deviation from the required quality is known by the exporter prior to the completion of loading;

(xii) Settling despatch demurrage at the applicable vessel rate.

13.4 The above information in paragraphs 13.2 and 13.3 should be broken down on a port by port level and updated every 24 hours

13.5 As noted by the ACCC, increased transparency lessens the opportunity for BHCs marketing arm to misuse key port terminal information. The above is essential if the ACCC maintains its position not to require a robust ring fencing policy. (AGEA refers to paragraphs 11.1 – 11.11 above).

13.6 A further useful indicator as to whether non-discriminatory port terminal access is being provided, could be the percentage of vessel slots that are allocated to the BHCs' trading arms. Further guidance may be attained by determining the number of vessel slots that are subsequently traded by the BHCs' trading arms to AWEs.

13.7 CBH's revised submission relating to Part 13 is too narrow.[13]. Specifically::

(i) The level of information CBH proposes to publish is manifestly inadequate to accurately determine performance levels and to ensure all AWEs have access to the same levels of information. Without a robust ring-fencing system in place, the BHCs' ability to discriminate is greatly increased.

(ii) In its further Submission on capacity allocation dated 30 August 2009, CBH noted that the port capacity is a function of the following factors:

(a) port intake capacity;

(b) intra-port transport capacity;

(c) labour deployment;

(e) fumigation demands;

(f) port terminal storage;

(g) outtloading speed; and

(h) berth capacity.

Yet, CBH does accept that it should provide performance levels concerning the above.

(iii) Cargo accumulation times do form part of the information required to determine performance levels (paragraph 2.2(i);

(iv) CBH has control over the receival of wheat into the port terminal facilities (paragraph 2.2(ii). As such, it is imperative that its performance is able to be monitored.

(v) CBH claims to not have knowledge of demurrage and that in any event, it "*is not indicative of the Port Operator's performance*".

Pursuant to **clause 2.1(c)** of CBH's Port Terminal Rules a primary object of CBH is to exercise its direction base upon “minimisation of demurrage at the Port Terminal Facilities over a given period".

Pursuant to **clause 9.2** of CBH's Port Terminal Rules:

*"(a) The Port Operator **may permit the amendment** of a Vessel Nomination for operational reasons **where, in its reasonable opinion,** accepting the amendment:*

(ii) is to assist achievement of:

*(A) **minimising demurrage** at the Port over a given period; or*

[13] Letter dated 30 August 2009 to Sarah Sheppard of the ACCC from Corrs Chambers Westgarth.

Pursuant to clause **7.4** of the Port Terminal Service Agreement,

"*In making any decision to accept or reject the Outurn Request, CBH shall make its determination in accordance with the terms of the Undertaking and in particular having regard to the following:*…"

(d) "*taking into account in particular, the objectives of:*

(i) minimising Demurrage at the Port over a given period; and

(ii) maximising throughput of Grain at the Port over a given period; "

The above runs contrary to CBH's position that it is not necessary to publish demurrage information.

AGEA welcomes the opportunity to discuss this further submission with ACCC staff.

Australian Grain Exporters Association
3 September 2009

SCHEDULE 1

ABB's REVISED PORT LOADING PROTOCOLS

Adopting the headings used in the revised ABB Port Loading Protocols, AGEA makes the following comments in relation to the ABB Protocols:

1. Clause 3 Acceptance of Booking and Ongoing Compliance

"*The following conditions must be satisfied before a booking will be accepted by ABB:*

3.1 compliance with Table A requirements (to the extent they are required at the time of booking);

3.2 ABB must have sufficient intake, grain storage and shipping capacity to honour the booking, taking into account the status of the Shipping Stem; and

3.3 the booking when aggregated with other bookings of the Client must not expose ABB to undue Performance Risk (refer clause 12)".

The ABB booking process is vague and unworkable. Further, there is no transparency and the factors which ABB can take into account in deciding whether to honour a booking are not objectively ascertainable.

AWEs must be able to access a port slot in a shorter period than 60 days. It is unlikely that AWEs wheat exporter will have the following details more than 60 days before they wish to export wheat

Additionally, it is not clear what is meant in Table A by the requirement to provide details on "*sales*".

Under the protocol, ABB is entitled to charge a new booking fee for any minor change to details that are provided 60 days in advance of shipment, such as destination, regardless of the cost incurred by ABB by reason of the change. Unless ABB is able to provide transparency in relation to the costs incurred as a result of changes to any details required, ABB should not be entitled to require payment of new booking fees (see Note to Table A(2)).

2. Clause 4.4 Advice of Acceptance or Non-Acceptance

ABB will reply to the Client within 2 business days following the receipt of fully completed Booking Form, with notification of:

"*4.4 in circumstances where ABB cannot satisfy the Client's booking in full due to operational factors (including a lack of available capacity or existing commitments to other export shippers)".*

ABB has stated that its determination whether to accept a nomination is based on "*operational factors (including a lack of available capacity or existing commitments to other shippers)"*. This clause is vague and there is no certainty provided to exporters - – the so-called “operational factors” upon which ABB can base its decision are not objectively ascertainable and there is no transparency as to how the discretion will be exercised.

3. Clause 4.5 Advice of Acceptance on Non-Acceptance

"4.5 ABB cannot guarantee acceptance of a booking within 2 business days where the Client and ABB have entered into discussions and/or negotiation in relation to the booking Slot."

Clause 4.5 provides that by entering into discussions and/or negotiations, ABB does not have to comply with any time frame within which to advise the AWEs whether a booking enquiry will be accepted.

Again, this is vague and not transparent. There is no obligation on ABB to make a decision and no certainty for access seekers as to how the matter should proceed and be resolved.

4. Clause 5 Allocation of Load Date

"*As soon as reasonably practicable after the Client names its vessel and its ETA (and, in any event, within 2 business days), ABB will assess its terminal services capacity and notify the Client of the vessel's estimated load date ("**Load Date**")."*

It is not clear how ABB will assess terminal services capacity and there is no transparency in relation to ABB's decision making process. Additionally, ABB does not link the assessment with the actual allocation of vessel slots.

5. Clause 6.1 Notification of Changes in Slots and Load Dates

"*ABB will endeavour to ensure that the Client's Slot and Load Date will be held for the Client. However, in certain circumstances, ABB may make changes to the Slot or Load Date for the following reasons:*

6.1.1 If the cargo is not in an export ready and shippable position by the relevant Load Date;

6.1.3 If there is a change of Terminal Services Priority in accordance with these Protocols (see clauses 7-8)."

The protocol provides that ABB will merely "*endeavour*" to hold the vessel slot for the AWEs. Clause 6.1 is vague and non-binding.

Clause 6.1 then states that the vessel slot may be changed for reasons that are within ABB's control. For example "*the cargo is not in an export and shippable position*", "*change in Terminal Services Priority*". The effect of this clause could be to disadvantage access seekers for events which are within ABB's control without any right of recourse.

Further, there is no obligation for ABB to provide the AWEs with any input as to the time of the amended vessel slot.

6. Clause 6.3 Notification of Changes in Slots and Load Dates

"*In the event that a Slot is vacated (for example because of a failure to adhere to Table A requirements) the Shipping Stem will be updated and Clients may apply to book the vacated Slot on a "first come first served" basis.*"

As ABB does not have a proper ring-fencing policy in place, ABB's trading arm will have access to the above information before AWEs.

7. Clause 7.1.5 Guiding Principles for determining Terminal Service Priority

"*ABB may load Clients' vessels out of arrival order where the required stock is either available at the Port Terminal or can be made available without unduly prejudicing vessels that were initially prioritised over another and ABB has reasonable grounds to believe that the overall speed and efficient of the Port Terminal will be enhanced on an objective and ascertainable basis."*

Clause 7.1.5 permits ABB to load Clients' vessels out of arrival order where the required stock can be made available "*without unduly prejudicing vessels that were initially prioritised over another*" and "*ABB has reasonable grounds to believe that the overall speed and efficiency of the Port Terminal will be enhance on an objective and ascertainable basis."* Decision-making based on vague or subjective criteria (such as "*unduly prejudicing*" and "*reasonable grounds*") are not consistent with fair and transparent access to port terminal services. Decisions need to be based on objective criteria and subjective decisions need to be kept to a minimum. Even if the phraseology was acceptable, the lack of transparency means there is no benchmark and no means by which access seekers can be assured that access has been provided to the extent possible.

Further, ABB does not undertake to indemnify the accredited grain exporter for the additional demurrage and losses under the sales contract caused by ABB's unilateral decision.

8. Clause 8 Changes to Nomination and Failure to Meet Table A Requirements

"*8.1 Where a Client does not meet the timeframes set out within Table A then a new nomination will be deemed to have occurred, a new booking fee will be payable and the vessel will be re-prioritised in accordance with these Protocols.*

8.2 Where the arrival of the vessel varies from ETA by greater than 3 days or is outside of the last declared booking Slot, ABB may re-prioritise terminal services."

Unless ABB provides transparency in relation to the costs incurred as a result of changes to any details required, ABB should not be entitled to require payment of new booking fees

9. Clause 9 Demonstrating Stock Entitlement

"*9.1 The Client is required by Table A to demonstrate at various points of time its entitlement to stock.*

9.2 Stock entitlement may be demonstrated by the Client providing:

9.2.1 details of commodity held by the Client at ABB sites that meets the Client's nomination;

9.2.2 details of commodity held at Third Party Sites (refer clause 10) that meets the Client's nomination;

9.2.3 adequate evidence of forward purchases and sales commitments going to meeting the Client's nomination; and

9.2.4 any other form of evidence of entitlement which shows that the Client will have sufficient stock to load the Client's vessel at the load dates indicated by the vessel's priority on the Shipping Stem."

There is no reason why access seekers should be required to demonstrate stock entitlement. There is no prejudice or risk to ABB which is not compensated for by the forfeiture of the booking fee. The AWEs have assumed the risk and associated fees payable to ABB by booking a vessel slot. It is not in the interests of the AWEs to book a slot they do not require or fail to produce the wheat for loading. The AWEs will suffer financial loss if the wheat is not accumulated.

Additionally, the information required by ABB is commercially sensitive. As ABB does not have an adequate ring-fencing policy in place, ABB's trading arm will obtain valuable commercial information.

10. Clause 10 Stock at Third Party Sites

"*In order to qualify for stock entitlement for the purposes of Table A, commodities held at a Third Party Site will only be take into account if:"*

AGEA refers to its comments in relation to clause 9 above.

11. Clause 12 Performance Risk / Anti-hoarding

"*12.1 ABB may decide not to accept a booking if it considers (acting reasonably and in good faith) that the booking, taken in aggregate with other Slots of the Client (collectively, the "**Nominations**") involves an attempt by the Client to reserve Slots in excess of its reasonably anticipated requirements in order to prevent the Client's competitors from obtaining access to Slots at any of ABB's Port Terminals or limit throughput at the Port Terminal.*

12.2 In forming its reasonable opinion pursuant to clause 12.1, ABB must have regard to:

12.1.1 The quantity or grade of the Nominations relative to the forecast quantity or grade of the relevant commodity in the relevant port zone;

12.1.2 The share of the market for the relevant commodity accumulated by the Client in the previous three years;

12.1.3 Any previous failures of the Client within the preceding three calendar years to perform to its Nominations;

12.1.4 Where available in published annual reports and accounts readily available from the Client's corporate website, the Client's profit and annual revenue in the preceding financial year relative to the quantity of the Nominations;

12.1.5 The availability of transport to port;

12.1.6 The extent of economic damage to ABB's investment in infrastructure and the supply chain which could be caused by non-performance (e.g. a reduction in efficient throughput); and

12.1.7 Any other information provided to ABB by the Client."

AGEA refers to its comments in relation to clause 9 above.

Subjective decision making of the kind proposed here is not consistent with fair access. Further, there is no transparency in relation to ABB's decision making process. ABB is effectively taking on the role of determining who is able to export bulk wheat.

ABB does not suffer damage for any unused vessel slots (clause 12.1.6), as it receives payment up front. In fact, it is likely to enjoy a windfall, as it will not incur certain expenses that have been paid for by the AWEs. Clause 12 is not required to protect ABB's interests.

12. Clause 13 Dispute Resolution

"*In the event that the Client disputes ABB's adherence to these Protocols (including, without limitation the acceptance or rejection of a vessel nomination, or re-prioritisation of terminal services), the following procedures will apply:*

*13.1 The Client must notify ABB in writing of the dispute, the reasons for the dispute and the resolution which the Client requests ("**Dispute Notice**").*

13.2 In the case of a dispute regarding rejection of a booking, the Dispute Notice must be received by ABB by 16:00 Australian Central Standard Time on the next business day following receipt of the notice from ABB that it does not intend to accept the booking (see clause 4.3);"

ABB's dispute resolution process is vague and slow and as a result is ineffectual.

AGEA refers to paragraphs 8.16, 8.17(xi)-(xii), 8.23 – 8.39 above.

13. Clause 14 Review of these Protocols

"*14.2 ABB may vary these Protocols at any time if it:*

14.2.1 commences consultation with major Users in relation to the proposed variation at least 30 days before the variation takes effect; and

*14.2.2 provides Major Users with written notice of the proposed variation ("**Variation Notice**") at least 10 business days before the proposed variation takes effect (which, for the avoidance of doubt, can be given before or after the expiry of the 30 day period set out in clause 14.22.1) by publishing the Variation Notice in a prominent place on its website.*

14.3.5 b. making any modifications to the variation proposal to reflect the feedback (if any) received from interested parties;

14.4 ABB will be deemed to have satisfied its obligations to consult with Major Users in clause 14.2.1 if it complies with the requirements set out in clause 14.3, even if no Major User or other interested party provides any response to the Consultation Notice issued by ABB."

The ABB Protocols should form part of the Undertaking and should not be varied or amended, except variation in the same circumstances permitted for variation or amendment of the Undertaking, that is, in accordance with section 44ZZA(7).

Alternatively, if variations are to be permitted, any variation must be strictly in accordance with a mechanism whereby:

(a) A robust industry consultation process must take place.

(b) The BHC must provide the AWEs at least 3 months notice of the proposed change, in order for the AWE to consider the proposal and enter into meaningful negotiations with the BHC and if necessary, to give AWEs time to adjust.

(c) Any dispute in relation to variations may be referred to mediation or arbitration;

(d) Any variations must also be subject to the non-discrimination clauses in the proposed Undertaking.

SCHEDULE 2

ABB's DRAFT PORT TERMINAL SERVICES AGREEMENT

1. **Clause 1.3 Discretions and Approvals**:

First, it is unnecessary and inconsistent with the port loading protocols (which set out the manner in which ABB is to make certain decisions) for the port terminal services agreement to deal with the manner in which ABB is to make decisions regarding access to port terminal services.

Secondly, where the port terminal services agreement or the port loading protocols provides that ABB is required to make a decision, the factors that ABB may take into account in making that decision should be specifically set out and should not be able to be capable of being qualified, contradicted or overridden by a general discretion of the kind in clause 1.3.

Thirdly, there is an imbalance between the objective manner in which the Client is required to make decisions and the subjective manner in which ABB is able to make decisions.

(a) "*Whenever the Client is required to form an opinion, give approval, exercise a discretion or perform any act under this Agreement, it must be done reasonably in the circumstances, and based on reasonable grounds, and not capriciously, or arbitrarily refused or unduly delayed*".

ABB is not required to comply with the above standards. Instead:

"*(b) In making any decision pursuant to this Agreement the Company* [ABB] *shall have regard to the efficient running of the relevant Port Terminal Facility and balancing of all users of that Port Terminal Facility.*

(c) Any refusal to accept a request for a Port Terminal Service will not be a breach of this Agreement for making a decision which in its reasonable opinion is in the best interests of the overall performance of the Port Terminal Facility and the Bulk Grain export market as a whole."

The above criteria pursuant to which ABB is held to account is vague, opaque and uncertain.

It is not appropriate that ABB's subjective view is the basis of its absolute discretion whether or not to refuse a request to provide services.

2. **Clause 2.1 Commencement, duration and application**

"*(b) If the Client:*

(i) is provided with any Port Terminal Services on or after the Commencement Date; but

(ii) has not executed this Agreement,

the Client will be deemed to have:

(iii) accepted the terms and conditions set out in this Agreement; and

(iv) all such Port Terminal Services will be deemed to have been provided by the Company under this Agreement."

The above is contrary to a "publish/negotiate/arbitrate model".

3. **Clause 3 Acknowledgement of limited application**

"*Despite anything to the contrary contained in, or which in the absence of this clause 3 may be implied into, this Agreement:*

(a) this Agreement applies only to the provision of Port Terminal Services in respect of Bulk Wheat and to the extent regulated by the Access Undertaking;"

ABB's definition of Port Terminal Services does not comply with WEM Act. ABB is not entitled to narrow the services that are encompassed by the proposed Undertaking. ABB's definition of Port Terminal Services must include all services that are provided and must be consistent with the definition in the Undertaking. AGEA agrees with the ACCC's proposed definition (see p. 75 of the ACCC's draft decision on ABB's port terminal services access undertaking).

4. **Clause 4.2 Availability**

"*Subject to clause 4.3, the Company's obligation to provide a particular Port Terminal Service at a Port Terminal at a point in time is subject to the availability of the Port Terminal Facility required for that Port Terminal Service at that time."*

This clause provides ABB with a discretion whether or not to provide port terminal services. The purpose of the proposed Undertaking is to provide access to port terminal services. The obligation to provide access is subject to certain constraints (such as vessel nominations) which will be specified in the port terminal services agreement and the port loading protocol. Clause 4.2 is contrary to ABB's obligation to provide access. Further, there is no transparency regarding the availability (or lack thereof) of the port terminal facility and therefore no basis for determining whether it is a valid justification for not providing access to port terminal services.

If there are events which justifiably excuse a BHC from providing access to port terminal services, those events can be clearly specified in the agreement and protocols and the BHCs will be protected.

5. **Clause 5.3 Acceptance of Bulk Wheat from third parties on behalf of the Client**

"*(a) Before accepting Bulk Wheat at* ***a*** *Port Terminal Facility from a third party for sale to the Client and subsequent storage at the Port Terminal Facility on the Client's behalf, the Company will assess and classify the Bulk Wheat and require the person who has tendered the Bulk Wheat to sign a receival docket setting out, amongst other things, the origin, weight, variety, quality, payment grade, the Purchase Option selected by the person and (if applicable) the price payable by the Client."*

There is no transparency as to:

(a) what is meant by ABB assessing and classifying the wheat;

(b) when the above will be completed;

(c) what results will determine whether ABB will accept the wheat.

6. **Clause 5.7 No Capacity**

"*Subject to its obligations under clause 4.3, the Company may decline to receive Bulk Wheat for storage on behalf of the Client in a Port Terminal Facility if:*

(a) the capacity in that Port Terminal Facility allocated to a particular Binned Grade fills; and.."

As ABB determines whose and how much grain will be allowed into port, without full transparency as to how port capacity is utilised, it will not be possible to determine whether fair access is being provided to AWEs.

By way of general comment, the port terminal services agreement should also contain a right for access seekers to nominate a person to inspect the wheat and any records made by ABB in relation to the weight, variety, quality, grade and contamination of the wheat.

7. **Clause 5.8 Reservation of Cell**

"*(a) Subject to prior Company approval and agreement between either the Company's Logistics Manager or the Company's Client Services Manager (or their nominated delegate) and the Client, the Client may request the Company to Reserve a Cell.*

(b) The Company has no obligation to accede to a request to Reserve a Cell for the Client, but if it does, then the Company is entitled to charge the Client a Cell reservation fee (with price on application)."

ABB fails to provide any transparency as to how it will exercise its discretion to reserve a Cell in which AWEs can store grain.

Nor does ABB provide any transparency as to whether it will exercise its discretion to charge a fee for the Cell. The price to be charged for this and any other service offered by the BHCs must be included in the price list to be published by BHCs.

8. **Clause 6.5 Right to move Bulk Wheat**

"*(a) The Company reserves the right to either move or swap Bulk Wheat either within a Port Terminal Facility or to another Company Facility if:*

(i) *sufficient evidence exists to indicate the quality of the Bulk Wheat or Port Terminal Facility may be adversely affected if the Bulk Wheat remains in any particular location;*

(ii) *the Port Terminal Facility fills (or is expected to fill during the Season); or*

(iii) *the Company determines (in the Company's reasonable opinion) that it is operationally efficient to move the Bulk Wheat.*

(b) Any movements described in clause (a) will be at the expense of the Client. The Company will use freight rates published by the Company prior to the commencement of the Season in order to charge the Client for the movement (and fuel variations may apply)."

ABB has an unfettered discretion to move AWEs' grain out of the port terminal to any of ABB's facilities, including those that are up-country. The discretion may be exercised by reference to matters that are not objectively ascertainable and there is no transparency in relation to the decision making process.

ABB will then charge the AWEs for the cost of moving the grain, using the freight rates published by ABB.

That results in ABB possibly manipulating stock positions for its own advantage and making a profit from unilaterally moving AWEs' grain, as ABB is not charging the freight at a cost rate.

The above is not consistent with fair and transparent access to port terminal services.

9. **Clause 7.4 Outturn standards**

"*(a) Subject to clause 7.4(b), Bulk Wheat will be Outturned to the standards prescribed by the Receival (Classification).Standards.*

(b) The Company may agree to Outturn to a more stringent standard than the applicable outturn standard, but a charge may be applied for this service….

(d) If, at the request of the Client, the Company undertakes any classification testing at the time of Outturn which is over and above that normally conducted by the Company to ensure Outturned Bulk Wheat meets the minimum standard for the Binned Grade stored, the Company may charge the Client for that classification testing."

ABB retains the discretion whether to apply a charge for the above service.

There is no transparency provided as to what the charge might be and when the charge may be applied. These charges and charges for other services to be provided by BHCs should be included in the price list to be published by BHCs.

10. **Clause 7.7 Delays**

"*Factors outside the control of the Company (such as variation in vessel arrival times; failure of vessel to pass quarantine; stability and ship worthiness inspections; vessel congestion; variation in cargo requirements; lack of performance of freight providers) mean the Company cannot guarantee all of the Bulk Wheat will be available for loading when the vessel berths and is ready to commence loading. The Company will make reasonable efforts to ensure the Bulk Wheat is available to load without delay and will advise the Client of any potential delays."*

ABB has listed various events which are meant to excuse it from responsibility to perform a task for which it has been paid.

Of the factors listed, failure to pass quarantine, stability and ship worthiness inspections should have no impact upon when the vessel will actually arrive a the port.

ABB should only be entitled to be excused for non-performance for failure to accumulate cargo where there is a breach by the AWEs that is not causative of the failure to accumulate.

11. **Clause 7.8 Cleanliness**

"(b) The Company has no obligation to inspect any vessel for cleanliness, but if it does inspect, then the Company, acting reasonably at all times, is entitled to reject the vessel as unfit for the transportation of Bulk Wheat and to refuse to load the vessel.

(c) The Company is not liable for any loss, cost, damage or expense (including Indirect or Consequential Loss) caused as a result of a rejection of the vessel.

(d) The Client agrees to pay the Company for any costs incurred by the Company as a result of the rejection of a vessel by the Company, AQIS or a marine surveyor."

It is not appropriate that ABB is able to exercise a discretion to reject a vessel as being unfit. AMSA and AQIS inspect the vessels and are responsible for determining cleanliness. It is unnecessary for ABB to take on this role if the vessel has already passed the customary surveys. Clause 7.8 might be intended to provide further justification for rejecting or delaying vessels to change the vessel line-up to suit ABB. If it wishes to take on that role, it must be fully responsible for the consequences. It should not be entitled to be indemnified for exercising the discretion.

No transparency is provided as how ABB will exercise its discretion.

12. **Clause 7.11 Company's right to move Bulk Wheat**

"*Notwithstanding anything to the contrary contained in, or which in the absence of this clause would be implied into, this Agreement, the Company reserves the right to move any Export Select Grain within a Port Zone to any Company Facility within that Port Zone at any time and without the requirement for authorisation from the Client."*

ABB has an unfettered discretion to move AWEs' grain out of the port terminal to any of ABB's facilities, including those that are up-country.

ABB may move the wheat to a new location that will be "not freight advantaged to the Port Terminal".

ABB has not provided any transparency as to when and why it will move AWEs' wheat.

The above is not consistent with fair and transparent access to port terminal services.

13. **Clause 8.1 Charges**

14. "*The charges of the Company for the provision of Port Terminal Services will be as set out in, or as determined in the manner described in, Schedule 1."*

BHCs should be required to publish prices before the ACCC decides whether to accept the Undertaking and, subsequently, by no later than 31 August of the relevant year.

The published prices should include standard and non-standard services offered by the BHCs.

The published prices should provide transparency in relation to BHCs' costs of providing the service to ensure prices are based on actual costs and are not discriminatory.

The published prices should not be subject to change during the term of the port terminal services agreement. Alternatively, the opportunity to amend publish prices should be limited to the same circumstances in which a variation of the Undertaking is permitted.

15. **Clause 8.5 No set off**

"*The Client is not entitled to withhold payment of any disputed amount the subject of an invoice issued by the Company, or to set off against the amount of an invoice any other claim that it has against the Company."*

Including as a term of the access agreement a clause which gives ABB the right to demand payment for disputed monies is not consistent with fair access to port terminal services. There is no transparency as to whether ABB has the same requirement for its trading division. It is neither necessary nor appropriate that a "set off" clause be contained in the minimum terms and conditions in an access agreement. It is open to ABB to negotiate a clause of this kind with access seekers.

16. **Clause 8.8 Default in payment**

"*If the Client fails to make payment of an invoice in accordance with this clause 8, then:*

(a) all existing invoices will become immediately due and payable; and

(b) the Company may, in its absolute discretion, suspend the provision of any or all Port Terminal Services until such time as all outstanding invoices have been paid."

ABB's discretion is unfettered. Regardless of its obligation to provide access and how minor the amount is claimed by ABB to be owed (the amount may be disputed), ABB is entitled to demand payment of all invoices and may "in its absolute discretion" refuse to provide port terminal services.

17. **Clause 8.10 Security**

"*(a) The Client will, if required by the Company:*

*(i) arrange for its directors and/or shareholders to personally guarantee the Client's performance under this Agreement by signing a written guarantee in a form and on conditions specified by the Company (**Guarantee**); or*

*(ii) obtain or deposit with the Company an unconditional bank guarantee or bond in a form and for an amount required, and given by a bank or insurer approved, by the Company by way of guarantee for the performance by the Client of its obligations under this Agreement (**Security**)."*

The security requirements are excessive. An accredited AWE must comply with WEA's stringent accreditation scheme, which includes having regard to the "*financial resources available to the company*" (s.13(1)(c)(i) of the WEM Act). It is unacceptable that ABB can unilaterally and without reference to any benchmarks, require any such security, especially from shareholders of an accredited wheat exporter.

18. **Clause 9.2 Company's right**

"*Subject to clause 9.3, where the Client's Bulk Wheat is Common Stocked, the Company may nominate and identify any particular quantity of Bulk Wheat within a site comprising the Common Stocked Bulk Wheat as being the Client's Bulk Wheat for the purposes of this Agreement, including, for the purposes of Outturn at the direction of the Client,* "

As ABB may have co-ownership of wheat in a co-mingled stack, there must be stringent port terminal protocol and ring-fencing policies in place to ensure that ABB does not "cherry pick" higher quality of wheat from co-mingled stacks.

ABB has failed to provide any transparency as to how ABB will exercise its right to identify any particular quantity.

19. **Clause 10.1 Lien**

"*The Company will have a first and paramount lien on the Client's Bulk Wheat for all monies due and payable (on any account whatsoever) by the Client to the Company under this Agreement or otherwise, or to any other ABB Group Company."*

It is not appropriate that ABB has the discretion to exercise a lien for all monies owing to any ABB Group Company.

If ABB had a proper ring-fencing policy in place, it is unclear how it and its related bodies corporate would be aware of the various transactions that provide for the opportunity to exercise a lien.

20. **Clause 11.2 Publication**

It should be made clear that the policies, procedures and induction requirements in relation to the operation, management and control of ABB's facilities are not intended to amend the port loading protocols.

21. **Clause 13.3 Limitations on Company's liability**

"The Company's obligation to Outturn the Client's Bulk Wheat is modified by the following provisions of this clause:

(a) the Company is only liable for damage, destruction or contamination by the Company of the Client's Bulk Wheat if caused by the Gross Negligence or willful default of the Company or its employees, contractors or agents;

(b) the liability of the Company to the Client for any such damage, destruction or contamination of Bulk Wheat, if caused by Gross Negligence will not exceed the sum of $250,000 (two hundred and fifty thousand dollars) per event or per series of related events;

(c) the Company's liability to compensate the Client for Accidental Loss or Damage to the Client's Bulk Wheat (other than Export Select Grain) is limited to the Client's proportion (based on ownership of the Common Stock) of the proceeds of insurance recovered by the Company in respect of such event;

(d) notwithstanding any other provision of this Agreement, but subject to any extraneous agreement in writing between the Parties to the contrary, the Company will not be liable for any of the following:

(i) claims for Indirect or Consequential Loss…"

Liability terms and limits must reflect commercial reality and contain realistic limits on liability. Given the volume of stock ABB handles, ABB should not be able to exclude or limit liability (including consequential loss). Requiring BHCs to be responsible for loss or damage caused would improve efficiency.

Further, ABB has unjustifiably limited its liability for Accidental Loss or Damage to the proportion of insurance recovered by ABB.

22. **Clause 15 Force Majeure**

The force majeure clause is extensive and excessive. "Breakdown" should not be considered a force majeure event, particularly where breakdown might be the cause of mechanical maintenance within the control of ABB.

23. **Clause 16.2 Arbitration**

"(a) If the Patties cannot resolve a Dispute themselves within 30 days of one Party giving notice of the Dispute to the other Party, they will immediately:

(i) appoint an arbitrator to determine the dispute within the following 30 day period; or

(ii) if the Parties are unable to agree upon an arbitrator, either Party may refer the Dispute for arbitration by an arbitrator nominated by the then President of the Law Society of South Australia.

(b) Any arbitration will be conducted in Adelaide in accordance with the Commercial Arbitration Act 1986 (SA,) except that:

(i) the arbitrator must observe the rules of natural justice but is not required to observe the rules of evidence;

(ii) a Party may have legal representation; and

(iii) the arbitrator must apportion costs of the arbitration and each Party's costs of and incidental to the arbitration as the arbitrator sees fit."

ABB's dispute resolution process is slow and thus ineffectual.

AGEA refers to paragraphs 8.16, 8.17(xi)-(xii), 8.23 – 8.39 above.

24. **Clause 18 Indemnity**

The indemnity clause is unnecessarily extensive and excessive.

SCHEDULE 3

GRAINCORP's REVISED PORT TERMINAL SERVICES PROTOCOL

AGEA makes the following comments in relation to GrainCorp's Initial Port Terminal Services Protocols.

By way of general comment, GrainCorp's protocols do not provide transparency in relation to the exercise of GrainCorp's discretion(s) or to demonstrate how the protocol will be applied to all exporters equally. The latter comment applies to every clause in GrainCorp's protocols and is emphasised, although not repeated below to avoid repetition.

Further, it will enable the ACCC to monitor how GrainCorp allocates vessel slots to its own trading arm. For example, when GrainCorp released vessel slots, indicatively its trading arm was successful in securing 59 from 101 slots from October 2009 to September 2010.

1. **Clause 1 Cargo Nomination Application Procedure**

   "*If the Client requests GrainCorp to load grain on a vessel at a Port Terminal operated by GrainCorp, the Client must:*

   *1.1 Submit to GrainCorp on the relevant form a Cargo Nomination Application (**CNA**) on a date not less than 28 days prior to the commencement date of the Load Laycan (**Laycan**).*

   *1.2 The Client may nominate a cargo with an Initial Expected Date of Arrival of less than 28 days; however **acceptance of the nomination is at the sole discretion*** [emphasis added] *of GrainCorp acting reasonably*".

   The above time frame is too long a lead time. GrainCorp should only need between 14 and 21 days' notice.

   Acceptance of the nomination should not be at GrainCorp's discretion. Acceptance of nomination must be in accordance with strict rules and regulations that are objectively ascertainable, so that it can be determined whether fair and transparent access is being provided to AWEs.

2. **Clause 1.3 Cargo Nomination Application Procedure**

   "*A Cargo Nomination Application must include ...*"

   The onerous requirements imposed on the access seeker cannot be satisfied at the time of completing the cargo nomination application because the information required to be provided may not be available when booking port capacity.

3. **Clause 2.1 Cargo Nomination Application Review and Acceptance Procedure**

   "*GrainCorp will complete a **Risk Assessment** of a Cargo Nomination Application within a maximum of 5 business days following receipt of a completed **CNA** form. The 5 business day Risk Assessment period will commence from 8.00 AM on the first business day following receipt of a CNA., Cargo Nomination Applications will be Assessed in chronological order of receipt, using the information supplied by the Client in the **CNA**. The **Risk Assessment*** will take into account all particulars of the Client's request, including …*"*.

Five days to complete a Risk Assessment is too long. In this five day period, GrainCorp will have sensitive market information and AWEs face significant risk if the information is misused due to inadequate ring fencing policies. GrainCorp should be able to advise AWEs whether it has accepted the nomination within 1 business day.

The concept of Risk Assessment has not been properly defined. GrainCorp has merely set out a number of elements that it will take into account as part of the process.

The matters which GrainCorp may take into account in making the Risk Assessment give GrainCorp the discretion to reject a nomination application on a technicality.

The elements which GrainCorp will take into account are not all consistent with the requirements that must be satisfied when the AWEs submits the nomination. For example:

Clause 2.1.3 requires:

"*The Client provides written confirmation to GrainCorp that it* ***has contracted*** [emphasis added] *sufficient rail and/or road transport to accumulate the grain tonnage to the Port Terminal for the nominated cargo prior to the nominated* ***Load Laycan****…".*

However, under clause 1.3.6, to submit the Cargo Nomination Application, the AWEs need only provide:

"*Confirmation that the Client* ***will/has*** *contract(ed) sufficient rail and/or road transport to accumulate the grain tonnage to the Port Terminal for the nominated cargo prior to the nominated Load Laycan*" [Emphasis added].

Further to the above, it may not be possible for AWEs to actually comply, as GrainCorp retains the discretion to move grain to other GrainCorp sites, (see clause 6.23 -6.24 of the PTSA).

Clause 2.1.5(b) requires:

"*Sufficient capacity to receive and handle grain under the applicable protocol for accumulation by road of grain into GrainCorp Port Terminals from ex-farm and non-approved storage facilities as advised by GrainCorp from time to time;*"

GrainCorp can discriminate when determining whether to accept a nomination if the grain enters the port from a non-GrainCorp source.

4. **Clause 2.3 Cargo Nomination Application Review and Acceptance Procedure**

"*If GrainCorp accepts a* ***Cargo Nomination Application****, GrainCorp:*

…2.3.2 ***may impose*** [emphasis added] *reasonable conditions in accepting a* ***Cargo Nomination including*** [emphasis added], *the mode of transport, port operating arrangements, requirement for overtime, source of grain and if applicable, the application of the relevant protocols and procedures, as advised by GrainCorp* ***from time to time*** [emphasis added] *for the relevant Port Terminals from non-approved storage facilities; and*"

If GrainCorp accepts a cargo nomination, it still may impose further conditions at any time and at its discretion.

There is no defined date by which GrainCorp will advise of the Assigned Load Date, nor when it will provide reasons for declining a cargo nomination (clause 2.3.3).

5. **Clause 2.7 Cargo Nomination Application**

*"Where a **Cargo Nomination** requires loading from two Port Terminals, an **Assigned Load Date** will be allocated at both Port Terminals ..."*

Clause 2.7 may result in AWEs incurring penalties at both ports, even though it is required to pay for the service at both ports.

6. **Clause 3.1 Vessel nomination**

*"No later than 21 days before the first date of the **Laycan** the Client will inform GrainCorp by providing an update to Section 1 of the relevant **Cargo Nomination** the following information that will constitute a **Vessel Nomination**:*

• The name of the Vessel…

…Contact details of ship's Captain,

…Details of the last three (3) cargoes carried the last three (3) ports of call and information relating to any preparations made to the vessel to ensure it passes the regulatory Marine and AQIS pre-loading surveys. ",

Clause 3.1 imposes onerous requirements on AWEs. Failure to comply with the requirements may result in forfeiture of the nomination and booking fee. The requirement to confirm a booking no later than 21 days severely restricts the exporter's ability to secure the most effective chartering option and could result in additional costs of US$ 5 – 7 per tonne.

The requirement to have chartered a vessel is a detail that is not relevant to the provision of GrainCorp's port terminal facilities. To require this level of detail imposes a burden on AWEs to book vessels further ahead of time than is usual practice. This results in the AWEs incurring greater costs as a result of having to charter vessels with longer lead time and reduced flexibility in marketing strategies. It is not commercially viable.

The stipulation that nominations must be provided within the hours of 8.00am to 4.00pm is not consistent with business practice and is onerous given the five day time frame.

7. **Clause 3.2 Vessel Nomination – 21 Day Notice**

"*If GrainCorp at its sole discretion acting reasonably assesses that the readiness of a vessel to load (**Vessel Readiness to Load**) presents a higher than acceptable risk of failing a Marine, AQIS or related survey, GrainCorp may request that the customer provide assurances of the fitness of a vessel in the form of an 'in-transit' marine surveyor report. GrainCorp may refuse to accept a vessel 'alongside' to present for the Marine, AQIS or related survey required under Regulation if such a request is not complied with."*

It is not appropriate that GrainCorp is able to exercise discretion a reject a vessel as being unfit. If it wishes to take on that role, it must be fully responsible for the consequences. No transparency is provided as how GrainCorp will exercise its discretion.

8. **Clause 3.4 Vessel nomination – record of information**

"*GrainCorp may record any and all information relating to the Vessel Readiness to Load performance of the Client, its shipping agents and shipping liens, and may incorporate this information into relevant cargo* ***Risk Assessment*** *procedures."*

AWEs may have numerous clients who may charter a vessel on a range of different terms. AWEs should not be penalised for a FOB vessel it had no role in chartering.

9. **Clause 4.1 Site accumulation**

"*No later than 21 days before the Assigned Load Date the Client will provide stock information that will allow GrainCorp to develop a Site Assembly Plan ...."*

There is no rigour placed on GrainCorp to perform this function within an effective time period.

10. **Clause 4.4 Site accumulation**

"*Without limitation, GrainCorp is not liable to the Client or any third party, or any person claiming through or on behalf of the Client, for any costs, losses or delays, whether direct or indirect, that may arise if grain is not accumulated at the Port Terminal before the* ***Assigned Load Date*** *for any reason."*

GrainCorp is entitled to charge a fee for a service that it does not complete within the agreed times.

11. **Clause 5.1 Booking Fee**

"*To confirm a* ***Cargo Nomination*** *the Client must pay to GrainCorp a non-refundable booking fee .... Failure to make payment in cleared funds within 3 days of such notification will cause the Client to lose any allocated* ***Assigned Load Date.***"

3 days to provide cleared funds is harsh and unreasonable. Clause 5.1 would require exporters to pay without invoice or face losing a shipping position.

12. **Clause 5.2 Booking Fee**

"*In a circumstance where the Client nominates a cargo and pays the* ***Booking Fee*** *but it is subsequently found that the Client has failed to comply with the requirements of Clauses 1.2, 2.1.1-2.1.4, 2.3.2, 3.1, or 4.1, the* ***Assigned Load Date*** *can be cancelled by GrainCorp and the Client forfeits any* ***Booking Fee***".

GrainCorp has the discretion whether or not to cancel a load date, without any benchmark against which the discretion is exercised and no transparency in relation to the decision making process.

13. **Clause 6.1 Substituting Vessels Outside the 21 Day Period**

"*Subject to Clause 5.2, no later than 21 days before the first date of the* ***Laycan****, the Client may, by submitting amendments to Section 1 of the relevant* ***CNA****, substitute the nominated vessel with another vessel ....*"

The 21 day notice period effectively denies the client the ability to perform this task.

14. **Clause 6.2 Substituting Vessels Within the 21 Day Period**

"*The Client may apply to substitute a vessel at the nominated Port Terminal for the same cargo (+/- 5% tolerance on cargo tonnes) within the 21 day period, provided that the **ETA** is the same at the original **ETA**. If GrainCorp in its sole discretion acting reasonably approves the substituted vessel, the Client may be required to pay a new **Booking Fee** and may be required to re-nominate under the procedures outlined in Clause 1*."

GrainCorp has the discretion whether or not to accept a substitute vessel and whether or not to apply a fee. GrainCorp's discretion can be exercised on subjective grounds, without reference to clearly ascertainable factors, and no transparency is provided as to how these discretions are to be exercised.

The requirement that the Client pay a new Booking Fee is a penalty. If a substituted vessel arrives and performs a service, GrainCorp does not incur any cost due to vessel substitution. GrainCorp may incur some administration cost (effectively the cost of updating a spreadsheet), however, a charge of $5 per tonne is excessive. A 25,000 tonne vessel could incur a charge of AU$125,000, even though it has performed its intended service. Any proposed fee should be proportionate to the cost incurred.

15. **Clause 7.3 Loading of Vessels**

"*The Client acknowledges that GrainCorp has the right to mitigate dust emissions at the Port Terminal. Such mitigation may include moisture conditioning of grain paths."*

GrainCorp's emission mitigation should be tightly regulated, which it is not. Adding moisture directly affects grain performance functionality. Water added to a load should be reimbursed to an exporter's grain entitlement.

16. **Clause 7.4 Loading of Vessels**

"*...the Client understands and accepts that matters and events beyond GrainCorp's control may occur ... which means GrainCorp cannot guarantee that all cargos will be ready for loading, or that they can or will be loaded as scheduled ....."*

GrainCorp has an obligation to provide access to port terminal services. To promote efficiency, GrainCorp should only be excused for non-performance for failure to accumulate cargo where there is a breach by the bulk handler that is not causative of the failure to accumulate.

The client should be entitled to compensation for GrainCorp's non-performance.

17. **Clause 8 Late or Cancelled Vessels**

"*If a vessel's **Authority to Load** or **ETA** advised under Clause 3.1 is later than 5 days ....."*

A five day performance restriction is unreasonable and does not take into account real world conditions of vessel chartering, weather conditions and market. Further, the imposition of charges does not correlate with costs incurred by BHCs. BHCs may commingle stock, yet AWEs may be charged until a performing vessel is reinserted into the queue.

18. **Clause 9.2 Changing Load Port**

"*If the Client changes the Load Port ... the Client forfeits any **Booking Fee** previously paid ...."*

The client may decide to mitigate costs due to GrainCorp's poor performance by moving a vessel to a different port. In that event, the client should not forfeit the booking fee and GrainCorp should be required to re-pay the booking fee.

19. **Clause 10 Vessels Failing Regulatory Survey**

"The Client is responsible for the condition and state of readiness of vessels ...."

In many cases, the client does not directly engage the vessel and should not be responsible for the condition and state of readiness of the vessel.

20. **Clause 11.1 Insufficient Grain Accumulated to Load Vessel**

"*GrainCorp is not liable for, and does not guarantee, cargo availability at a Port Terminal by the* ***Assigned Load Date****, regardless of the period of notification provided by the Client, and the Client accepts full responsibility for the accumulation of any and all cargos.*"

Notwithstanding the obligation to provide access to port terminal services, GrainCorp purports to exclude any responsibility for complying with its contractual obligations. GrainCorp formulates site assembly plans and controls port access. GrainCorp also controls significant upcountry resources for accumulation. GrainCorp should not be excused from performance or be able to exclude liability for failing to perform its contractual obligations or charge additional fees for a task it controls.

Further, the AWEs are required to accept responsibility for services that it has paid GrainCorp to perform.

21. **Clause 13 Dispute Resolution**

AGEA refers to its comments at item 32 in Schedule 4.

SCHEDULE 4

GRAINCORP's DRAFT WHEAT PORT TERMINAL SERVICES AGREEMENT

1. **Clause 1 Consideration and Term of Agreement**

The definition of "Services" is too narrow. "Services" is defined as:

"*services [provided] to the Client at a nominated Port Terminal owned by GrainCorp for the storage, handling, sampling, testing, weighing and loading to vessel, rail wagon (where available) or road truck of the Client's Wheat*".

The definition of "Services" under the port terminal services agreement must encompass all services provided by GrainCorp within the port terminal facility. The GrainCorp definition does not do that. By way of example, GrainCorp does not include fumigation and accumulation in its terms of reference. These services are provided at GrainCorp's port terminals and must be within the scope of the definition.

AGEA agrees with the definition of "port terminal services" proposed by the ACCC (see p. 87 of the ACCC's draft decision on GrainCorp's proposed Undertaking). That definition should apply to the proposed Undertaking, the port terminal services agreement and the port loading protocol.

2. **Clause 1.3 (see also clause 4.1) Consideration and Term of Agreement**

"*This Agreement shall be deemed to have been accepted by the Client and the Client and GrainCorp will be bound by the terms and conditions of this Agreement from the earlier of:*

(i) …; or

(ii) the date that GrainCorp provides any Services at a Port Terminal for or on behalf of the Client during the Term."

The above is contrary to a "publish/negotiate/arbitrate model".

3. **Clause 2.5 Scope of Agreement**

"*This Agreement is not an open offer or a representation that GrainCorp will provide the Services to the Client for any minimum or maximum quantity or quality of Wheat, nor is it a representation that GrainCorp will provide the Services for all of the Client's requirements. Where GrainCorp does provide the Services.*."

Clause 2.5 provides GrainCorp with the unfettered discretion whether or not to provide port terminal services to AWEs. Clause 2.5 is unnecessary and inconsistent with the obligation to provide access to port terminal services. If there are events which justifiably excuse a BHC from providing access to port terminal services, those events can be clearly specified in the agreement and protocols and the BHCs will be protected.

4. **Clause 2.6 Scope of Agreement**

"*…The Client acknowledges that Annexure A [pricing schedule] which forms part of this Agreement may be amended by GrainCorp providing at least 30 days prior written notice to the Client… Following this notice period, the revised Annexure A will form part of the Agreement and shall apply retrospectively unless*"

GrainCorp has not included an indicative prices schedule upon which AGEA is able to comment.

However, that GrainCorp is able to unilaterally amend its fees with only 30 days notice and charge the new prices retrospectively, is not consistent with a "publish/negotiate/arbitrate model".

For the reasons discussed in paragraphs 8.4 of AGEA's further submission, GrainCorp should be required to publish prices for standard and non-standard services before the ACCC accepts the proposed Undertaking.

5. **Clause 3.1 Receival of Wheat**

"*During the Term of this Agreement GrainCorp* ***will use its reasonable endeavours*** *to receive Wheat into the Port Terminal in accordance with the Client's request and subject to any restrictions, limitations or other conditions in this Agreement.* ***At all times GrainCorp retains the final discretion as to what specifications and quantities of Wheat it will receive into the Port Terminal.***" [emphasis added]

Clause 3.1 is entirely unacceptable. It provides GrainCorp with the absolute and final discretion as to whether to allow AWEs' grain into its port terminal facilities and is inconsistent with the obligation to provide access to port terminal services. Any discretions must be kept to a minimum and must be exercisable based on criteria that is objectively ascertainable. Further, there is no transparency in relation to GrainCorp's decision making process and GrainCorp is not obliged to provide reasons for its decision.

6. **Clause 3.2 Receival of Wheat**

"*GrainCorp will only receive Wheat at Port Terminals from sources other than Country Sites where the Client and the Wheat it seeks to deliver, satisfy the terms and conditions specified in Annexure A:* Wheat Port Terminal Services and Fees Schedule *and Annexure B:* Port Terminal Services Protocol."

GrainCorp has not included Annexure A. As a result, AGEA is not able to comment as to, and the ACCC is unable to determine, whether it ensures fair and transparent port terminal access.

7. **Clause 3.3 (b) Receival of Wheat**

"*Wheat received and stored by GrainCorp of Feed Grade for stock feed consumption may be commingled with Wheat of the same type and grade but of a different growing season;*"

Sales contracts often contain warranties that the grain being sold is of a particular season. Before blending grain from different seasons, GrainCorp must first obtain the AWEs' written permission. Otherwise, GrainCorp must be solely responsibly for the resulting losses.

8. **Clause 3.9 Pest Control**

"*If the Client requests and GrainCorp agrees to a different chemical or treatment strategy for a specific Port Terminal,* ***an additional fee may be charged*** *by GrainCorp and payable by the Client for the agreed treatment.*" [emphasis added]

GrainCorp should not have the discretion whether or not to charge an additional fee.

The above discretion is not transparent and fairness cannot be shown.

9. **Clause 3.10 Pest Control**

"*Where fumigation or other certificates are required by the Client,* ***GrainCorp will apply a charge*** *for the administration of these certificates. Any certification requirements must be lodged as part of a Cargo Nomination Application.*" [emphasis added]

There is no reference as to how that charge will be determined.

Again, there is no transparency provided by GrainCorp. GrainCorp should be required to publish all costs and charges which GrainCorp proposes to charge for standard and non-standard services.

10. **Clause 3.12 Outloading of Wheat**

"*The Client must ensure that its road transport provider advises GrainCorp of vehicle registration details in writing,* ***by 5pm*** *on the business day prior to the date when the outloading services are to be performed. If the* ***Client uses the GrainCorp web truck booking program*** *(available at www.graincorp.com.au) this notice period will be* ***extended to 6:00am*** *on the day of outloading…*

The ***outloading notification requirement may change from time to*** *time and if so, it will be advised by GrainCorp. The loading out of* ***Wheat is subject to local operating arrangements, availability of rail and road transport, fumigation requirements and periods of non access and prevailing weather conditions****.*" [emphasis added]

Preferential treatment is provided by GrainCorp in the event that the AWEs use other GrainCorp services. Discrimination of this kind is contrary to the proposed Undertaking (for the reasons explained in the ACCC's draft decision).

The clause also provides that the terms may change. GrainCorp has the discretion to amend at any time and without notice. This is not representative of a "publish/negotiate/arbitrate model".

The loading of the wheat is subject to variables that are vague. The clause does not specify how the loading out will change. Further, there is no obligation for GrainCorp to consult the AWEs about the failure to perform.

11. **Clause 3.14(b) Outloading of Wheat**

"*the GrainCorp Stock Management System will be updated either manually or automatically to reflect the remaining Interest (if any) of the Client.*" [emphasis added].

All stock levels must be updated automatically, at least every 24 hours.

In view of GrainCorp's failure to implement a proper ring-fencing system, information such as stock levels must be made publicly available and not just GrainCorp's trading arm.

12. **Clause 3.16 Precondition to Any Outturning or Outloading Services**

"*GrainCorp determines that the Client's selected mode of transportation is not clean, fit for loading or carriage then it may suspend or refuse to provide and outturning or outloading Services and in no circumstances will GrainCorp be liable for any Loss or Claim and the Client shall meet all of GrainCorp's costs, expenses or losses associated with the rejection or cancellation of the scheduled outturning or outloading services*".

It is not appropriate that GrainCorp is able to reject a vessel as being unfit. AMSA and AQIS inspect the vessels and are responsible for determining cleanliness. It is unnecessary for GrainCorp to take on this role if the vessel has already passed the customary surveys. Clause 3.16 might be intended to provide further justification for rejecting or delaying vessels to change the vessel line-up to suit GrainCorp. If GrainCorp wishes to take on that role, it must be fully responsible for the consequences. It certainly should not be entitled to exercise the discretion and have the AWEs indemnify GrainCorp for its action.

13. **Clause 3.17 Precondition to Any Outturning or Outloading Services**

"*Prior to physically outturning or outloading any Wheat, GrainCorp reserves the right to invoice the Client and receive payment in full for any related outturning or outloading services, failing which GrainCorp is not required to commence any such outturning or outloading services.*"

AWEs must comply with WEA's stringent accreditation scheme. Among other things, WEA must have regard to the "*financial resources available to the company*" (s.13(1)(c)(i) of the WEM Act). It is unnecessary for BHCs to require AWEs to pay for services up front.

Additionally, GrainCorp has not provided any benchmark against which it will exercise its discretion to require pre-payment, and at what point pre-payment will be required.

14. **Clause 4.2 Hours of Operation**

"*GrainCorp and the Client may agree that additional (overtime) shifts will be provided for the handling of the Client's Wheat. This applies to both shipping services and the unloading of road and rail transport. If GrainCorp provides additional overtime…*"

GrainCorp has the discretion whether or not to provide overtime. There is no transparency as to when overtime will be charged and whether it is required. For example, if a client is required to pay for overtime, how can they be satisfied that another client is not unloading at the same time? GrainCorp may charge twice for one shift. Under the proposed Undertaking, BHCs should be obliged to report on overtime charges and other key service standards.

15. **Clause 4.4 Hours of Operation**

"*Notification of a request to load a vessel requiring overtime or weekend shifts must be provided to GrainCorp prior to cut off times* ***as specified from time to time*** *by the Port Terminal.* ***GrainCorp cannot guarantee and does not represent that it will accept any such requests***." [Emphasis added]

GrainCorp does not provide any transparency as to whether cut off times will be changed.

Additionally, GrainCorp retains the discretion to refuse to accept these requests. There is no transparency as to how GrainCorp will determine whether or not to accept such request.

16. **Clause 4.5(a)(4) Rail Transport Providers**

"*…provides an acceptable audit system for the notification of defects in rail wagons….*"

GrainCorp does not specify what will be an "*acceptable audit system*".

17. **Clause 4.7(4) Road Transport Providers**

"*Notwithstanding this minimum notice period,* ***GrainCorp does not guarantee the availability of outloading operations regardless of the period of notice****. GrainCorp* ***may levy additional charges*** *as described in Annexure A where this minimum notice period is not observed…*"[emphasis added]

GrainCorp does not provide any transparency as to availability of the outloading operations, despite compliance with requirements by the AWEs.

Additionally, GrainCorp retains the discretion whether or not to levy additional charges.

18. **Clause 6.7 -6.9 Co-ownership**

"*GrainCorp may become a Co-owner by adding Wheat to the Stored Wheat. In accordance with Clause 6.1, full ownership in any Wheat added to the Stored Wheat by GrainCorp is transferred to the Co-owners. In return, the Co-owners transfer to GrainCorp an Interest..."*

GrainCorp as the provider of port terminal services, is entitled to receive, store and outturn its own bulk wheat.

There is no attempt to separate GrainCorp as provider of port terminal services and GrainCorp as trader of Australian bulk wheat.

19. **Clause 6.10 Transfer of Title**

"6.10. If a Client (as seller) wishes to transfer a tonnage of Wheat…to another GrainCorp client… the Client must either:

(a) complete and execute a Buyer to Buyer Title Transfer Form (or Stock Swap Form)… Wheat is not transferred until the Buyer to Buyer Title Transfer Form.. is also ***executed*** *by both the GrainCorp client receiving the transfer and* ***GrainCorp.*** *The GrainCorp* ***Stock Management System will be updated manually*** *to reflect the revised Interests of the Client and the transferee. The transfer (swap) is effective, after execution by all parties, on the date on which the seller (initiator) signs the Buyer to Buyer Title Transfer Form…; or*

(b) complete and execute the Buyer to Buyer Title Transfer Form on the GrainCorp web page ***using the GrainCorp Buyer to Buyer Software*** *as per* ***Clauses 6.11*** *to* ***6.23*** *and follow the procedures as agreed to between the Client and GrainCorp from time to time. Title will transfer in the GrainCorp Stock Management System upon the Client clicking on the 'Confirm' button. The transfer (swap) is effective on the date on which the seller (initiator) processes the transfer of title on the GrainCorp web page*". [emphasis added]

GrainCorp retains the control as to if and when stock swaps can occur and there is no transparency in relation to its conduct.

Further, if option (a) above is used, GrainCorp will update the Stock Management System manually. There is no benchmark as to when the update will occur.

Further, AWEs that use GrainCorp's Buyer to Buyer Software obtain a higher level of service.

20. **Clause 6.19 Transfer of Title**

"*GrainCorp may reverse any transfer if:*

(a) the user is in default of payment of ***any Fees*** *to GrainCorp; or…*

*(c) in **GrainCorp's opinion**, the security of the Client has been breached; or*

*(d) the user is in **breach of any term of this Agreement**; or*

in which case GrainCorp has no liability to the Client in connection with the reversal". [Emphasis added]

GrainCorp's discretion is unfettered. Regardless of GrainCorp's obligation to provide access or how minor the amount claimed by GrainCorp (the amount may be disputed), GrainCorp is entitled to reverse the transfer of grain, without being liable.

The transfer could cause significant losses to the AWEs.

GrainCorp is not required to advise the AWEs of the reversal of title.

21. **Clause 6.20 Transfer of Title**

"*GrainCorp may at any time add, remove, change or impose restrictions on the functionality of the service without limitation and without recourse by the Client.*"

GrainCorp's discretion is unfettered. GrainCorp is not required to provide any notice before unilaterally removing the service from the AWEs. The basis upon which GrainCorp makes its decision is not objectively ascertainable and there is no transparency.

22. **Clause 6.23 and 6.24 Stock Swaps**

"*The Client acknowledges that for Operational Reasons, GrainCorp can swap a grade of Wheat with the same grade of Wheat between Country Sites in the Natural Port Zone, and by entering into this Agreement the Client consents to any such stock swap occurring.*"

Operational reasons is defined as meaning *" delays or Wheat unavailability due to weather problems, grain infestation or fumigation, grain quality problems, inaccessible Wheat, mechanical failure, rail availability or rail delays and last of grain in storage being outloaded.*"

GrainCorp has the discretion to move the AWEs' wheat that is held at port awaiting loading onto a vessel back up-country.

GrainCorp is not required to provide any notice, nor compensation for the damages that flow from the AWEs not being able to access their grain.

23. **Clause 6.27 Shrinkage**

"*…Where a shrinkage allowance is deducted under **Clause 6.25** and **6.26** title in the shrinkage residue (being a volume of Wheat representing the amount deducted) will transfer to GrainCorp (and not the Co-Owners pursuant to **Clause 6.1**)….*"

The above is an example where GrainCorp obtains a benefit over and above its co-owners of a co-commingled stack.

24. **Clause 6.41 Provision of Stock Information**

AGEA refers to paragraphs 1.27 and 1.28 above.

25. **Clause 7.2 Invoices**

"*…GrainCorp may amend these credit terms at any time if the Client does not strictly adhere to these payment terms, and may reject Wheat from any party where they have outstanding accounts under this Agreement or any other agreement the Client has with GrainCorp or its Related Bodies Corporate which breach the terms of credit of the relevant agreement.*

GrainCorp reserves the right to make adjustments for any error in the calculation of Fees in one invoice in any subsequently issued claim for payment."

GrainCorp is entitled to refuse to provide port terminal services, despite the AWEs disputing an invoice from GrainCorp or GrainCorp's Related Bodies Corporate, for example, from GrainCorp's trading arm. If GrainCorp had a proper ring-fencing policy in place, it is unclear how it and its related bodies corporate would be aware of the various transactions that provide for the opportunity to exercise a lien.

26. **Clause 7.12 Set-off**

"*At its sole discretion, GrainCorp may apply any amounts whatsoever then due and payable by it to the Client in satisfaction of any amounts whatsoever then due and payable by the Client to GrainCorp under this or any other agreement between the Client and GrainCorp or its Related Bodies Corporate.*"

It is not appropriate that GrainCorp has the discretion to set-off any amounts owing by it or any of its related bodies corporate to the AWEs whether under this or other agreements. It is neither necessary nor appropriate that a "set off" clause be contained in the minimum terms and conditions in an access agreement. It is open to GrainCorp to negotiate a clause of this kind with access seekers.

Further, it is unacceptable that the right is unilateral.

If GrainCorp had a robust ring-fencing policy in place, it is unclear how it and its related bodies corporate would be aware of the various transactions that provide for the set-off opportunity.

27. **Clause 8.3 Damages**

"*Where a Claim is recognised by GrainCorp to be valid and GrainCorp agrees to compensate the Client or, in any other event where GrainCorp is liable to compensate or indemnify the Client, then GrainCorp's maximum liability in respect of any Claim shall not exceed $500,000 for Wheat outloaded on any shipping vessel and $10,000 for Wheat outloaded on to rail or road trucks on any one day for the Port Terminal.*"

Liability terms and limits must reflect commercial reality and contain realistic limits on liability. Given the volume of stock BHCs handle, BHCs should not be able to exclude or limit liability (including consequential loss, see clause 8.6). Requiring BHCs to be responsible for loss or damage caused would improve efficiency.

28. **Clause 8.4.**

"*GrainCorp's liability for a Claim under this Clause 8 is subject to the Client:*

(a) advising GrainCorp immediately of suspecting downgraded Wheat, cease discharging suspected loads, and allow GrainCorp to inspect suspected downgraded Wheat."

This may not be possible. Often the damage is not discovered until it is being discharged, at which time the AWEs are unlikely to have title and control over the wheat.

"*(b) allowing GrainCorp every possible opportunity to mitigate all actual or potential losses.*"

AGEA refers to (a) above.

"*(c) informing GrainCorp of any potential Claim which it has against GrainCorp in respect of downgraded Wheat received by the Client within 2 business days of receiving the Wheat; and*"

This may not be possible. Often the damage is not discovered until it is being discharged, which will be more than two days of the wheat being received into the vessel. Further, GrainCorp has the discretion to exclude any representative of the AWEs from being present during the loading into the vessel (clause 12.10).

"(d) providing GrainCorp with a sample of the downgraded Wheat subject to the Claim; and"

AGEA refers to sub-paragraph (a) above.

"*(e) allowing GrainCorp to test this sample and compare this sample with sample of Wheat retained by GrainCorp on the outloading of Wheat from the Country Site or the Port Terminal.*"

AGEA refers to sub-paragraph (a) above.

29. **Clause 91 – 9.4 Exclusion of Liability**

"9.1. Unless specifically provided otherwise in this Agreement, GrainCorp is not liable for any Loss or Claim including damage, destruction, contamination or loss of Wheat unless and then only to the extent such is caused directly by the negligence of GrainCorp or its employees."

Liability terms and limits must reflect commercial reality and contain realistic limits on liability. Given the volume of stock BHCs handle, BHCs should not be able to exclude liability unless caused by negligence and where negligence is shown, set a cap on damages that can be claimed.

9.2. The Client acknowledges that GrainCorp is unable to test Wheat on receival (whether received from the Client or from another person) for toxic or other chemical residues, genetically modified seed or other contamination. GrainCorp is not liable for any direct or Consequential Loss suffered or incurred by the Client caused by or otherwise relating to the storage or handling of contaminated Wheat at the Port Terminal.

9.3. The Client acknowledges that any transportation of Wheat is at the Client's risk, including transportation of Wheat arranged by or on behalf of or at the request of either the Client or GrainCorp. To the fullest extent permitted by law, GrainCorp is not liable for any direct or Consequential Loss incurred by the Client caused by or otherwise relating to the transportation of Wheat.

It is not appropriate that GrainCorp is entitled to contract out of responsibility for transporting the wheat when it is under its control.

30. **Clause 10.1 Termination**

"*10.1. Further to Clause 1, GrainCorp may terminate this Agreement:*

(a) immediately upon written notice to the Client if the Client:

(i) ***fails to pay any amount*** *that is due and payable under this Agreement* ***or any other agreement*** *between the Client and GrainCorp or its* ***Related Bodies Corporate****;*

(ii) breaches a warranty as set out in this Agreement or any other agreement between the Client and GrainCorp or its ***Related Bodies Corporate****;*

(iii) ***fails to follow a direction of GrainCorp*** *made reasonably and lawfully;*

(iv) commits an act or omission which compromises the safety of any

person or brings GrainCorp in to ***disrepute****; or*

(v) fails to have in place or accurately declare the status of an Accreditation Requirements as set out in this Agreement

(b) upon 14 days written notice to the Client if the Client breaches any other provision of this Agreement or any other agreement between the Client and GrainCorp or its ***Related Bodies Corporate****, and does not remedy the breach* ***to GrainCorp's satisfaction within GrainCorp's stipulated time frame****.*" [emphasis added]

The above entitles GrainCorp to cease providing services without any consideration as to the significance of the monies owing or breaches in contracts in relation to it or its Related Bodies Corporate.

GrainCorp is entitled to make any direction, whether or not related to the provision of port terminal services.

If GrainCorp had a robust ring-fencing policy in place, it is unclear how it and its related bodies corporate would be aware of a breach of any other agreement between GrainCorp or its Related Bodies Corporate .

31. **11.1 – 11.2 Disputes**

"*11.1 Any dispute concerning the grade, quality, sampling, testing or classification of Wheat which GrainCorp and the Client cannot resolve themselves after using reasonable endeavours to do so may be referred to a mutually agreed independent testing facility for resolution in accordance with the provisions of this Agreement. GrainCorp and the Client agree to be bound by the decision of the mutually agreed independent testing facility. GrainCorp and the Client shall bear their own costs in determining the resolution to the dispute.*"

11.2. If any dispute between the parties however relates to access to the Port Terminal and arises in connection with the protocols and procedures set out in Annexure B, then the parties shall resolve such disputes in accordance with the dispute resolution provisions contained in Annexure B."

GrainCorp's dispute resolution process is vague and slow. The dispute resolution clause must contain a clear and well defined process.

AGEA refers to paragraphs 8.16, 8.17(xi)-(xii), 8.23 – 8.39 above.

32. **Clause 12.10 Site Access**

"GrainCorp may, in its absolute discretion, refuse or reject a visitation request or propose alternative times and/or places for the visit and the Client shall not attend at any GrainCorp site without receiving the prior consent of GrainCorp for each visit and shall not enter or stay on any GrainCorp site without appropriate GrainCorp supervision."

As noted in paragraph 1.10 of AGEA's further submission, it is a common term under international sales contracts for both buyers and sellers to be entitled to have a representative present during the loading of the vessel. Certain markets require this if the weight and quality is to be final at loadport.

That GrainCorp retains the discretion whether or not to grant access, without any benchmarks against which it is to exercise its discretion, does not provide transparent access to port terminal services.

The problems created by a lack of transparency in relation to access are magnified by reason of the lack of a robust ring-fencing policy.

SCHEDULE 5

CBH's REVISED PORT TERMINAL RULES

On the whole, CBH's proposed Port Terminal Rules ("**PTRs**") do not provide sufficient certainty and clarity in its terms, effect and operation in order to enable the access provider and access seekers to be adequately aware of their respective rights and obligations, and thereby avoid unnecessary costs, monetary or otherwise, when seeking to export bulk wheat from Western Australia. AGEA makes the following comments in relation to the PTRs

1. "***Auction Rules*** *means the rules of that name published by the Port Operator from time to time attached as Schedule 1 to the Port Terminal Rules*".

   The above is not clear and transparent.

   AGEA cannot properly comment on terms and conditions that may be introduced in the future.

   AGEA's comments in relation to CBH's proposed auction model is set out in paragraphs 12.15 – 12.43 of AGEA's further submission.

2. **Objects**

   2.1 Primary Objects

   CBH's objects clause should be clear and concise, providing the structure around which the AWEs will be provide with fair and transparent access to CBH's port terminal services.

   The objects clause gives CBH the discretion to determine who will have access to the port terminal services and when that access will be granted, without any benchmark against which those discretionary decisions can be measured. Discretionary or subjective decisions must be kept to the absolute minimum. Decisions should be made based on objectively ascertainable criteria and transparency should be provided in relation to the decision making process.

   Clause 2.1(c) entitles CBH to exercise its direction base upon "*minimisation of demurrage at the Port Terminal Facilities over a given period*". This clause suggests that discrimination and the calling of vessels to berth out of order might be permitted according to which vessel has the highest demurrage rate. It is unclear how this clause would operate because demurrage rates ordinarily are confidential between the parties to the vessel charterparty and BHCs should not be privy to vessel demurrage rates. In any event, a AWE's ability to negotiate a low demurrage should not result in that AWE being penalised by having another vessel being given priority at berthing, because it has a higher demurrage rate.

3. **2.3(a) Variation**

   The PTRs should form part of the proposed Undertaking (together with the port terminal services agreement) and CBH should not be able to vary the terms of the PTR (or the proposed Undertaking or the port terminal services agreement) except in accordance with section 44ZZA(7).

Alternatively, if CBH is permitted to vary the PTRs, then any variation must be strictly in accordance with a mechanism whereby:

(a) A robust industry consultation process must take place.

(b) The BHC must provide the AWEs at least 3 months' notice of the proposed change, in order for the AWE to consider the proposal and enter into meaningful negotiations with the BHC and if necessary, to give AWEs time to adjust.

(c) Any dispute in relation to variations may be referred to mediation or arbitration;

(d) Any variations must also be subject to the non-discrimination clauses in the proposed Undertaking.

4. **2.3(b) Variation**

Pursuant to clause 2.3 (b), the Customer acknowledges and agrees that the Port Terminal Rules may include provisions that are necessary for, or reasonably required by, the Port Operator to comply with :

"*(i) the requirements of the Undertaking;*

(ii) changed or unforeseen technical or operational circumstances; and

(iii) obligations arising under contractual or other operational arrangements with third parties on which the provision of the Port Terminal Services are dependent."

The above is vague and does not provide a transparent means by which CBH may vary its PTRs. There is no definition as to what constitutes a "*changed or unforeseen technical or operational circumstances*".

Variations are binding on the AWEs (clause 2.3(c)(ii)) and variations may be further varied from time to time (clause 2.3(c)(iii)).

5. **Clause 3 - Customer's General Obligations**

"(b) Upon request, all Customers must provide the Port Operator with relevant, complete and accurate information in a timely manner."

The above obligation is vague and open to misuse. CBH does not define what is to be considered "*relevant*".

As there is not a robust ring-fencing policy in place, the further information can be provided to CBH's trading arm, without recourse.

6. **Clause 4 - Services Forecast**

Pursuant to this clause, CBH obtains from all AWEs details of the following:

"*(a) anticipated gross tonnage of Bulk Wheat;*

(b) anticipated gross tonnage of other grains;

(c) anticipated tonnage to be shipped by Customers under each GSA, PTSA and Negotiated Agreement; and

(d) anticipated shipping programme."

As there is not a robust ring-fencing policy in place, the further information can be provided to CBH's trading arm, without recourse.

7. **Clause 5.1 Acquiring Harvest Capacity**

The CBH process is overcomplicated, unwieldy and opaque. There is no transparency in relation to CBH's decision making and this clause allows open discrimination to occur.

CBH should not . There is no definition as to what constitutes a "*changed or unforeseen technical or operational circumstances*". There is no definition as to what constitutes a "*changed or unforeseen technical or operational circumstances*" separate or discriminate between those entities requiring vessel slots that have utilised CBH's upcountry services (GSA Customer) and those that merely enter into a contract for the use of port terminal services (PTSA Customer).

Similarly, CBH should not separate or discriminate port capacity according to whether the AWEs are a GSA customer or a PTSA customer (clause 5.1(b)).

A PTSA customer that is an AWEs would compete for PTSA customer port capacity with exporters of non-wheat products. As such, they are treated differently to those AWEs that use CBH up-country services.

CBH proposes to hold auctions for shipping slots. CBH provides for these auction periods to be extended if the demand for Harvest Capacity "*significantly exceeds the Advised Harvest Capacity in a majority of Shipping Windows*" (clause 5.1(d)). This statement of intent is vague and entitles CBH to exercise its directions without notice or recourse. It will inhibit AWEs' ability to ship wheat from Western Australia.

Clause 5.1(e) provides that "*The Port Operator may accept all or part of a Harvest Period EOI before 1 October in each Year, or such later date as the Port Operator may determine."*

The above is vague and uncertain. The AWEs are not provided with any certainty as to whether they will be able to perform their sales contracts.

8. **Clause 5.2 Trading Harvest Capacity**

It is unacceptable that an AWEs' ability to trade wheat is dependent upon CBH providing its permission.

Only parties with the same type of contractual relationship with CBH may trade grain (clause 5.1(a)(i)).

The above restriction, will inhibit the development of any secondary market.

CBH is not required to provide any reasons for stopping the trading of wheat.

As a result CBH is not allowing fair and transparency in the trade of wheat capacity.

CBH should not be entitled to charge a fee (clause 5.2(f)) for a service that is not actually required from CBH. Certainly any fee that is charged should be minimal and not linked to the tonnage transferred as any administrative cost that is incurred by CBH is not related to the tonnage amount.

9. **Clause 6.1 Acquiring Capacity in Annual Shipping Period**

AGEA refers to paragraphs 12.15 – 12.43 above.

10. **Clause 7 Nominating Vessels for Shipping Windows during the Harvest Period**

AWEs will be treated differently by CBH when seeking to accumulate wheat at port for export depending on whether they are a PTSA Customer, Negotiated Agreement Customer or GSA Customer.

At clause 7.1 (c), the PTRs prescribe that "*PTSA and Negotiated Agreement Customers should note that this will place additional time constraints on the cargo accumulation process*". This warning is not provided to AWEs that utilise CBH's up-country services. This would appear to indicate that that those parties using CBH's other services will receive preferential treatment.

CBH fails to set out what these delays will practically mean. Nor does it provide that fair and transparent access will continue to be provided.

CBH says that it "*may*" waive certain obligations, such as sampling and fumigation (clause 7.1(d)). However, this is at CBH's sole discretion and no bench mark is provided as to how and when such discretion will be exercised is provided.

11. **Clause 8 Nominating Vessels for Shipping Windows in the Annual Shipping Period**

8.1 Direct to Port Process

Once again, AWEs that do use CBH up-country services will be discriminated against.

Clause 8.1(b) provides that deliveries to the port are subject to the port's capabilities, which are controlled by CBH. The PTRs do not provide for equal access as between those AWEs that utilise CBH's up-country services and those that only use the port terminal facilities.

Acceptance into the port terminal facilities is subject to CBH's "*agreed timetable for deliveries to the Port Terminal Facility; fitting in with pre-planned deliveries*". No explanation is provided as to what make up these "*pre-planned deliveries*". Again, there is a failure to provide fair and transparent access.

CBH at clause 8.1(b)(ii) specifically provides that:

"*(ii) For the avoidance of doubt, the Port Operator is not required to allow a PTSA Customer or Negotiated Access Customer access to rail access train paths utilised by the Port Operator.*"

CBH is attempting to close AWEs out from those train paths, regardless of whether CBH is utilising that service at the time sought by the AWEs.

12. **Clause 9.2 Amendment of Vessel Nominations**

"(a) The Port Operator ***may permit the amendment*** *of a Vessel Nomination for operational reasons* ***where, in its reasonable opinion,*** *accepting the amendment:*

(i) would not constitute a departure from the principles outlined in ***clauses 6.4, 6.5 and 9.2 of*** *the Undertaking entered into by the Port Operator;*

(ii) is to assist achievement of:

(A) ***minimising demurrage*** *at the Port over a given period; or*

(B) ***maximising throughput*** *at the Port over a given period;*

*(iii) does **not materially alter the outcome or adversely affect Customers** participating in the Harvest Period EOI or Annual Shipping Period Auctions;*

*(iv) would not result in **other Customers incurring materially greater demurrage** than would be the case if the amendment had not been accepted."*

The above is not fair and transparent access for the following reasons:

(a) CBH has the absolute discretion to determine whether it is acting reasonably when amending vessel nominations;

(b) there is no transparency in relation to CBH's decision making process and the matters CBH may take into account are not objectively ascertainable;

(c) CBH would not have access to information about demurrage rates, save for those rates being paid by its trading arm. Further, if that information was known, a party that could negotiate a lower rate should not be penalised;

(d) maximising throughput should not be a reason to penalise AWEs for complying with CBH vessel nomination protocols and paying the prescribed fees;

(e) "*materially alter the outcome or adversely affect Customers*" is too vague and cannot be objectively determined;

(f) "*materially alter the outcome or adversely affect Customers*" also, contradicts clause 9.2(a)(ii)(A). CBH is entitled to alter vessel nominations where it increases demurrage rates paid.

13. **Clause 9.3 Additional Charges**

"*Additional charges may be payable to the Port Operator to cover the Port Operator's costs incurred where a Customer requests amendments to the Vessel Nomination*."

However, there is no transparency and CBH is not required to provide documentary proof as to what additional costs were incurred and how they were quantified. Instead, CBH is entitled to unilaterally apply ad hoc charges. CBH should be required to publish all costs and charges it proposes to charge for standard and non-standard services. Further, there must be transparency in relation to CBH's costs to ensure fair and transparency access is given, with no hindering of access or discrimination.

14. **Clause 10 Lost Capacity**

Pursuant to clause 10.1(c):

(c) Where:

*(i) the Customer does not submit **and have accepted by the Port Operator** a Vessel Nomination for Harvest Capacity more than 22 days before the last day of the Grace Period; or*

(ii) the Customer does not ship all acquired Harvest Capacity within the Harvest Shipping Period, then:

*the Customer will be regarded as not to have shipped the Grain in the relevant Shipping Window, the Harvest Capacity shall be treated as Lost Capacity and the Customer shall pay the fees specified as payable for Lost Capacity in the Access Agreement".[*emphasis added]

The above results in the AWEs being exposed to paying fees to CBH as a direct result of CBH exercising its discretion not to accept a Nomination for Harvest Capacity. See also clause 12.2.

Additionally, there is no transparency and CBH is not required to provide any justification for not accepting the Nomination.

15. **11.2 Adjustments to the Stem**

"*The Port Operator may adjust the Shipping Stem to cater for extraordinary or unusual circumstances including, but not limited to:*

(a) Customer's requests to defer Vessels;

(b) Customer's requests to bring Vessels forward;

(c) *accepting a Vessel Nomination with less than the required notice having been provided by the Customer…*

where the Port Operator is reasonably of the opinion that to do so will not cause any material detriment to the Port Operator or other Customers "

The above makes it impossible for there to be any way to determine whether fair and transparent port terminal access is being provided to AWEs.

There is no transparency. There is no definition provided as to what qualifies as "*extraordinary or unusual circumstances*". The discretion is with CBH and CBH determines whether it is acting reasonably. AGEA refers to paragraphs 4.12, 14.5 and 14.6 of its original submission in relation to the shipping stem.

There is no definition as to what constitutes "*material detriment*".

16. **11.3 Discretion to Accept Vessel Nominations**

"*Notwithstanding that the Port Operator may in its reasonable discretion accept a Vessel Nomination that does not comply fully with the requirements of* ***rule 9.1****…"*

Again, there is no transparency and no benchmark to determine when CBH is able to exercise its discretion. Discretionary or subjective decisions must be kept to the absolute minimum. Decisions should only be made on the basis of objectively ascertainable criteria with full transparency.

SCHEDULE 6

CBH's DRAFT PORT TERMINAL SERIVCES AGREEMENT

AGEA makes the following comments in relation to CBH's proposed port terminal services agreement.

1. Clause 1.1(b) Commencement:

"The terms and conditions set out in this Agreement shall be deemed to be accepted by the Customer if the Customer utilises any of the Services contained in this Agreement notwithstanding the fact that the Customer has not executed this Agreement"

The above is contrary to a "publish/negotiate/arbitrate model".

2. **Clause 3.5** Discretions and Approvals:

(a)Whenever the Customer is required to form an opinion, give approval, exercise a discretion or perform any act under this Agreement, it must be done reasonably in the circumstances, and based on reasonable grounds, and not capriciously, or arbitrarily refused or unduly delayed.

(b) In making any decision pursuant to this Agreement CBH shall have regard to the efficient running of the CBH Port Terminal Facility and balancing of the interests of all Customers of the Port Terminal Facility.

(c) CBH's refusal to accept a request for Service will not be a breach of the Agreement for making a decision which in its reasonable opinion is in the best interests of the overall performance of the Port Terminal Facility and the Bulk Grain export market as a whole."

First, it is unnecessary and inconsistent with the port loading protocols (which set out the manner in which CBH is to make certain decisions) for the port terminal services agreement to deal with the manner in which CBH is to make decisions regarding access to port terminal services.

Secondly, where the port terminal services agreement or the port loading protocols provides that CBH is required to make a decision, the factors that CBH may take into account in making that decision should be specifically set out and should not be able to be capable of being qualified, contradicted or overridden by a general discretion of the kind in clause 3.5.

Thirdly, there is an imbalance between the objective manner in which the Customer is required to make decisions and the subjective manner in which CBH is able to make decisions. The criteria pursuant to which CBH is held to account is vague, opaque and uncertain.

It is not appropriate that CBH's subjective view is the basis of its absolute discretion whether or not to refuse a request to provide services.

3. **Clause 5.1 Service Availability**

"*(a) Grain Receival Services are provided by CBH under this Agreement for the purpose of export accumulation only and will not be available more than 21 days before the ETA.*

(b) CBH agrees to make Grain Receival Services available at the Port Terminal Facilities in accordance with the terms and conditions of this Agreement and the Port Terminal Rules.

(c) Prior to requesting Grain Receival Services, the Customer must acquire Capacity.

(d) If the Customer requires Grain Receival Services, the Customer must submit a Cargo Request Form to CBH no later than 30 days prior to the Nominated Vessel's ETA.

(e) At least 22 days prior to the Nominated Vessel's ETA, the Customer must submit a valid Vessel Nomination (in accordance with the Port Terminal Rules)."

There is no reason why AWEs should be required to demonstrate stock entitlement. There is no prejudice or risk to CBH which is not compensated for by the forfeiture of the booking fee. The AWEs have assumed the risk and associated fees payable to CBH by booking a vessel slot. It is not in the interests of the AWEs to book a slot they do not require or fail to produce the wheat for loading. The AWEs will suffer financial loss if the wheat is not accumulated. CBH should not require the vessel's name until 5 days prior to slot date.

4. **Clause 5.2 Before Delivery**

"*(f) Each acceptable sample analysis will permit the Customer to deliver the Grain to the Port*".

The above criteria pursuant to which CBH is held to account is vague, opaque and uncertain.

There is no benchmark against which CBH is required to accept the wheat. It is not appropriate that CBH's subjective view is the basis of its absolute discretion whether or not to refuse a request to provide services.

5. **Clause 5.3 During Delivery**

"(f)(iii) *[CBH shall not be required to] warrant or promise that grain in any Stack Segregation meets any grade specification*

(iv) provide multiple Stack Segregations by grade if, at the relevant time, there is insufficient storage capacity in the relevant Port Terminal Facilities to provide multiple Stack Segregations without:

(A) substantially reducing the efficient use of the Port Terminal Facility; or

(B) adversely affecting the existing cargo accumulation or loading plans for other users of the Port Terminal Facility."

CBH should be required to warrant that the grain in all stack segregation is outturned to the same quality and quantity as received by CBH (clause 5.3(f)(iii).

Pursuant to Clause 5.3(f)(iv), CBH is entitled to unilaterally refuse to provide essential services.

It is not appropriate that CBH's subjective view is the basis of its absolute discretion whether or not to refuse a request to provide services. Discretionary or subjective decisions must be kept to the absolute minimum. Decisions should only be made on the basis of objectively ascertainable criteria with full transparency.

6. **Clause 5.6 Harvest Mass Management Scheme.**

"(b) If as part of CBH's HMMS the Customer gives CBH a Forfeiture Approval Authority to forfeit Grain in excess of the Acceptable Vehicle Mass (as that term is defined in the HMMS), CBH is entitled to deduct, in accordance with the HMMS and the Forfeiture Approval Authority, the relevant tonnage from the delivered Grain when calculating the Customer's Grain Entitlement in accordance with clause 6.4. Title to any Grain deducted under this clause vests in CBH and CBH may donate the Grain or the proceeds from its sale to a charity or local government at CBH's discretion."

Clause 5.6(b) entitles CBH to take title to grain from its owners.

It is inappropriate that CBH is entitled to profit from any breach of legislation or regulation.

If grain is to be forfeited, such requirement must come from the applicable legislative authority. Title should certainly not be vested in a competitor of the AWEs to deal with the wheat as it pleases, including by sale and retention of proceeds.

7. **Clause 6.9 Title to surplus Grain:**

"*Title in any Grain remaining in the CBH system which is surplus to the Customer's Grain Entitlement shall transfer to CBH and CBH shall be entitled to sell or dispose of any surplus Grain as it sees fit and retain any proceeds.*"

CBH should not be entitled to retain surplus amounts of grain in its system. That CBH retains surplus grain illustrates the effect of CBH applying the substantial shrinkage and dust rates (see clauses 6.6 and 6.7).

8. **7.3 Export Outturn Request Form:**

"*On receipt of an Export Outturn Request, CBH will determine its ability to meet the request and advise the Customer if CBH has:*

(a) accepted the Outturn Request; or

(b) rejected the Outturn Request."

The above is not a robust non-discriminatory access clause.

The above lacks clarity and certainty and provides CBH with the disproportionate discretion to deny AWEs the ability to outturn their own grain from CBH facilities.

If CBH fails to meet an outturn request, CBH must within 24 hours of receiving the request, advise the AWEs in writing why that request was denied.

9. **7.4 Operational Decision Making**

"*Operational Decision Making In making any decision to accept or reject the Outurn Request, CBH shall make its determination in accordance with the terms of the Undertaking and in particular having regard to the following:…*"

Again, this clause lacks clarity and certainty and provides CBH with a disproportionate discretion to deny AWEs the ability to outturn their own grain from CBH facilities. In particular, CBH is entitled base its decisions whether to outturn wheat and when, on:

(a) the "*balance conflicts of interests of Customers of the Port Terminal Facilities*".

However, there is no benchmark as to what value or priority each of the conflicting interests are to be given.

(b) "*the application by CBH of objective commercial criteria and practices and policies to promote fair, reasonable and non-discriminatory Operational Decision making*"

The above is vague and meaningless.

(c) the "*giving priority to vessels based on the lead time given between nomination and vessel ETA, and the likely availability of sufficient Grain Entitlement at the Port prior to vessel ETA, the likely uncommitted storage capacity at the Port Terminal Facility and the uncommitted inloading capacity necessary to make a Nominated Vessel's Nominated Tonnage*";

(d) "*taking into account in particular, the objectives of:*

(i) minimising Demurrage at the Port over a given period; and

(ii) maximising throughput of Grain at the Port over a given period; "

CBH is not privy to vessel demurrage rates, except for those of its trading arm.

Again, the above is vague and meaningless. CBH does not state what it will do as a result of any of the above mentioned elements.

The clause continues to set out events that entitle CBH to exercise complete discretion as to who and when grain is to be outturned. There is no transparency or tangible basis upon which to assess actual compliance. Decisions should be based on objectively ascertainable criteria.

10. **7.10 Right to Invoice Prior to Outturning**

"*If Grain is scheduled to be Outturned into a ship's hold from a Port Terminal Facility, CBH reserves the right to invoice the Customer and receive payment for the Port Outturning Service charges prior to the Grain being Outturned onto a ship."*

AWEs must comply with WEA's stringent accreditation scheme. Among other things, WEA must have regard to the "*financial resources available to the company*" (s.13(1)(c)(i) of the WEM Act). It is unnecessary for BHCs to require AWEs to pay for services up front.

Additionally, CBH has not provided any benchmark against which it will exercise its discretion to require pre-payment, and at what point pre-payment will be required.

11. **7.13 Cleanliness**

"(b) CBH is not obliged to inspect any vessel for cleanliness but if it does inspect then CBH, acting reasonably at all times, is entitled to reject the vessel as unfit for the transportation of Grain and to refuse to load the vessel."

It is not appropriate that CBH is able to reject a vessel as being unfit. AMSA and AQIS inspect the vessels and are responsible for determining cleanliness. It is unnecessary for CBH to take on this role if the vessel has already passed the customary surveys. Clause 7.13 might be intended to provide further justification for rejecting or delaying vessels to change the vessel line-up to suit CBH. If it wishes to take on that role, it must be fully reasonable for the consequences.

12. **8 ADDITIONAL INFORMATION AND SERVICES**

"***Service Description:*** *CBH may also provide additional information or services over and above the standard information and services that CBH has agreed to provide under this Agreement…*

(c) The decision of CBH whether to provide any additional information or services requested by the Customer will be at CBH's absolute discretion unless it is required to provide such additional information by any law..."

Despite the AWEs requesting additional information and services, CBH advising the AWEs of the cost and the AWEs agreeing to the cost, CBH retains the discretion to refuse to provide the information and service. This is not fair and transparent access.

The discretion to refuse to provide the information and service is unfettered. There is no obligation to provide reasons for the refusal**.**

13. **PAYMENT**

Clause 9.1 Fees and Charges

CBH requires payment on uncommercial terms. For instance, Upfront Marketer Fee and Auction Premium fess are payable within 5 business days of date of the CBH invoice.

It is possible that the AWEs may not have received the invoice at that time, let alone had the opportunity to arrange payment (see comments on clause 9.4 below).

Conversely, where CBH is overpaid pursuant to clause 7.10, it has 30 days to refund those monies.

Clause 9.1 (c) provides:

"*(c) The Customer acknowledges that:*

(i) the fees set out in Schedule 1 represent the cost to CBH of providing the service to which the fees relate

(ii) the charges set out in Schedule 1 are a realistic assessment of the loss and damage

that CBH will suffer as a result of a failure by the Customer to comply with their obligations under the Agreement and the Port Terminal Rules;."

AWEs are not able to acknowledge the above. There is no transparency in relation to the cost of providing the service. CBH should be required to publish the charges it proposes to charge for standard and non-standard services. CBH's costs for those charges should be transparent.

14. **Clause 9.5 Invoicing**

"*(b) CBH will endeavour to issue invoices pertaining to bulk vessel shipments within 14 days of the vessel departure.*"

However, pursuant to:

Clause 9.6 Payment terms

"*(a) If credit terms are made available by CBH at its discretion, then the Customer must pay the amount set out in any invoice provided by CBH within 14 days of the date of the invoice*".

Read together, a CBH invoice can be due before it is actually sent by CBH.

CBH charges interest on late payment at the rate of 5% above the 90 day Bank bill rate offered by the Commonwealth Bank of Australia as at 31st October each year or as otherwise amended (clause 9.8(a)).

Further to the above, CBH should not be entitled to take any prejudicial steps against the AWEs where the invoice is disputed.

15. **9.10 Notice**

"CBH shall provide the Customer with at least sixty (60) days' written notice of any changes to the charges specified in Schedule 1."

The above does not accord with a proper "*publish-negotiate-arbitrate approach*".

CBH has not made any allowance for the negotiation of changes to its unilaterally imposed charges.

CBH should not be able to amend prices within the term of the agreement. Alternatively, if CBH is permitted to amend price (or any other term of the agreement), that right should be limited to the same circumstances in which amendment of the proposed Undertaking is permitted (see section 44AAZ(7)).

16. **9.11 Set off**

"*(a) Any amounts owing by CBH or any of its Related Bodies Corporate to the Customer whether under this Agreement or otherwise, may, at the election of CBH, be set off (without prior notice) against any amounts owing by the Customer to CBH or any of its Related Bodies Corporate, whether under this Agreement or otherwise.*"

It is not appropriate the CBH is entitled to set-off any amounts owing by it or any of its related bodies corporate to the AWEs whether under this or other agreements, at CBH's sole discretion. It is neither necessary nor appropriate that a "set off" clause be contained in the minimum terms and conditions in an access agreement. It is open to ABB to negotiate a clause of this kind with access seekers.

Further, it is unacceptable that the right is unilateral. Clause 9.11(d) expressly prohibits the AWEs from enjoying the same right.

However, if CBH had a ring-fencing policy in place, it is unclear how it and its related bodies corporate would be aware of the various transactions that provide for the set-off opportunity.

17. **9.12 Security**

"*The Customer shall provide such security to CBH as CBH reasonably requires (including the execution of personal guarantees by the Customer's signatories to this Agreement, directors, shareholders or beneficiaries of the Customer).*"

AGEA refers to its comments in relation to clause 7.10 above. An accredited AWE must comply with WEA's stringent accreditation scheme, which includes having regard to the "*financial resources available to the company*" (s.13(1)(c)(i) of the WEM Act). It is unacceptable that CBH can unilaterally and without reference to any benchmarks, require any such security, especially from shareholders of an accredited wheat exporter.

18. **10.1 Statutory Lien**

"*CBH has, in priority to all other claims, liens or security, a lien over any Grain received by it, in respect of any fees and charges payable to CBH in respect of that Grain.*"

CBH is granting itself a right to lien over wheat for invoices that are due but may have even left CBH's office, let alone been received by the AWEs or for there to have been an opportunity for the applicable accounts department to make payment.

19. **Clause 13 CBH Liability**

Liability terms and limits must reflect commercial reality and contain realistic limits on liability. Given the volume of stock BHCs handle, BHCs should not be able to exclude or limit liability. Requiring BHCs to be responsible for loss or damage caused would improve efficiency.

CBH seeks to cap its liability to $100,000 for any single event and limited to a maximum in aggregate of $250,000 for the term of this agreement (clause 13.2), including where cause by negligence of CBH's breach of agreement.

CBH excludes delay claims (clause 13.5).

CBH excludes consequential loss claims (clause 13.8).

20. **17.1 Access Procedure**

"*(b) CBH may, in its absolute discretion, refuse or reject any visitation request or propose alternative times and/or places for the visit.*"

As noted in paragraph 1.10 above, it is a common term under international sales contracts for both buyers and sellers to be entitled to have a representative present during the loading of the vessel. Certain markets require this, if the weight and quality is to be final at loadport.

21. **18 CONFIDENTIALITY**

Clause 18 permits information to be disclosed to the extent necessary for the provision of advice from legal advisers, financiers, accountants or other consultants. The only situation where disclosure of confidential information should be permitted is where such disclosure is required by law. Despite this, there is no obligation on third parties to also maintain confidentiality. The obligation on the third parties only extend to where they have a "*legal obligation not to disclose*". To be effective, the contractual obligation must be extended to cover the third parties. Further there is no requirement for the BHCs to indemnify for any loss and damage suffered a AWE as a result of the confidentiality obligation being breached. There should also be an obligation upon the BHCs to notify the relevant AWE of any event that has or could likely result in a breach of the confidentiality obligation. This would be along the same lines as the notification obligation under section 17 of WEA Act.

22. **19 DISPUTE RESOLUTION**

CBH's dispute resolution clause is unduly complex and unwieldy.

AGEA refers to paragraphs 8.16, 8.17(xi)-(xii), 8.23 – 8.39 above.