GrainCorp Operations Limited

Submission to the Australian Competition and Consumer Commission in response to Draft Determination issued on 6 August 2009

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1. Introduction

1.1 Purpose of submission

GrainCorp Operations Limited ("**GrainCorp**") makes this submission in response to the draft determination issued by the ACCC on 6 August 2009 ("**Draft Determination**") in relation to the Access Undertaking submitted by GrainCorp on 15 April 2009 ("**Undertaking**").

GrainCorp proposes to re-lodge an amended Undertaking addressing the issues raised by the ACCC in the Draft Determination. GrainCorp is prepared to work constructively with the ACCC and is confident that its revised Undertaking will be acceptable to the ACCC, having regard to the factors in section 44ZZA of the Trade Practices Act 1974 (Cth) ("**TPA**").

However, in light of comments made in the Draft Determination, there are certain matters, which GrainCorp wishes to address in this submission to assist the ACCC in its consideration of issues raised in the Draft Determination and GrainCorp's proposed approach in an amended Undertaking, including -

1. Further amendments to the Port Terminal Services Protocols dated 3 June 2009 (provided to the ACCC on 15 June 2009) arising from both discussions with exporters and the Draft Determination.
2. The inclusion of "re-opening' and 'holding over" provisions required by the ACCC.
3. The scope of dispute resolution processes under the Undertaking and the dispute resolution processes in the BWPTS Agreement and Port Terminal Services Protocols.
4. Differential grain receipt charges and shrink rates applied at port terminals for grain from storages other than those managed by GrainCorp.
5. The requirement for an annual audit of GrainCorp's capacity management processes.
6. The publication of stock levels at all GrainCorp port terminals and the publication of performance indicators.

1.2 Background

This submission compliments the following submissions made by GrainCorp to the ACCC since the submission of the initial Undertaking on 15th April 2009.

- 16th April 2009
  - Supporting Submission to the Draft Undertaking.
- 18th May 2009
  - Letter to the ACCC
  - Draft Wheat Port Terminal Services Agreement
  - Draft Wheat Port Terminal Services Schedule of Fees

  - Protocol for the Accumulation of Export Cargos from Non Approved Storages and Ex-Farm

- 22nd May 2009
  - Presentation to the ACCC

- 15th June 2009
  - Letter to the ACCC
  - Port Terminal Protocols revised 3rd June 2009

- 24th June 2009
  - Supplementary Submission and Attachments

- 15th July 2009
  - Letter to the ACCC

1.3 Structure of this Submission

The Submission contains the following sections -

- Section 1 presents details of the significant number of operational changes made by GrainCorp to the transparency of the allocation of port terminal elevation capacity. The changes are in GrainCorp's Port Terminal Services Protocols which will be included in the re-lodged Undertaking. These changes will result in increased clarity, certainty, and transparency in relation to GrainCorp's port terminal operations.
- Section 2 addresses certain matters raised by the ACCC in its draft determination.
- Appendix 1 details Clauses in the draft Undertaking that were subject to comment by the ACCC in its draft determination, and which GrainCorp will address in its revised Undertaking.

1.4 Summary

In summary, GrainCorp proposes to make changes in the Undertaking to be lodged with the ACCC, which address all the issues raised by the ACCC in its Draft Determination. Appendix 1 explains how GrainCorp proposes to address those issues.

In relation to the issues discussed in Section 2, GrainCorp sets out in more detail its proposed approach and why its approach is appropriate. In some cases, GrainCorp questions a number of issues and requirements raised by the ACCC but either agrees to those changes if the ACCC still wishes to pursue them or offers alternative approaches, which address the underlying concerns.

GrainCorp believes that the changes it proposes adequately and fully addresses the issues raised by the ACCC in the Draft Determination and that a revised Undertaking incorporating those changes will clearly meet the requirements for approval by the ACCC under Part IIIA of the TPA.

Section 1 - Part Terminal Services Protocols

1.1 Introduction Port Terminal Elevation Capacity Allocation Transparency

In its Draft Determination, the ACCC requested submissions on whether GrainCorp's revised Port Terminal Services Protocols would be appropriate (if attached to a revised undertaking submitted by GrainCorp).

The purpose of this section is to provide the ACCC with information on the changes GrainCorp is proposing to make to its Port Terminal Services Protocols and to demonstrate that these changes address the issues raised by the ACCC in its draft determination and the concerns raised by interested parties in their responses to the ACCC's Issues Paper dated 2 June 2009.

During the process of developing the draft Undertaking, GrainCorp sought to work cooperatively with all stakeholders to ensure that the introduction of the new regulated access regime presents as few disruptions as possible to the business of providing port terminal elevation services.

Following submission of the draft Undertaking on 15th April 2009, subsequent discussions with the ACCC, and on-going consultation with clients, GrainCorp took a number of steps including –

1) Introduction of a revised set of Port Terminal Protocols on 3rd June 2009, including the revision of a number of cargo nomination application criteria.
2) Allowing exporters to nominate cargos for a full shipping year (1st October to 30th September) and the publication on the web of shipping stem containing a full 'shipping year'.
3) The publication on 29th August 2009 of monthly estimated port terminal elevation capacities for all GrainCorp port terminals.
4) The development of a further revised set of Port Terminal Services Protocols for 1st October 2009.

The revised Port Terminal Services Protocols balance the interests of -

- The public, by ensuring that -
  - GrainCorp can comply with all laws, regulations and marine and other safety requirements,
  - the quality of export grain is not compromised, and
  - the safe operation of GrainCorp's port terminals continues,
- Exporters, by providing certainty, clarity and transparency in relation to GrainCorp's decision making under the Port Terminal Services Protocols, and
- GrainCorp, by enabling it to operate its Port Terminals efficiently and safely.

For the reasons set out above, the revised Port Terminal Services Protocols are appropriate to be included in GrainCorp's Undertaking. Further information is provided below.

1.2 Revised Port Terminal Protocols

The Port Terminal Protocols released on 3rd June 2009 contained several major changes to the assessment of Cargo Nomination Applications (CNA's), in particular –

a) Removal of the '49 day' rule.

b) The introduction of a 5-day CNA assessment period.

c) Allowing exporters to nominate vessels up to 28 days out from estimated time of vessel arrival.

d) Removing the cargo booking requirement that related to providing GrainCorp with information about holding 'sufficient stock' for timely cargo accumulation.

e) Allowing exporters to nominate cargoes for the full 2009/10 shipping year.

These changes reflect both -

- the ACCC's desire to remove provisions from within the CNA assessment process that the ACCC considered gave GrainCorp an inappropriate level of discretion, and
- feedback from exporters.

Of particular note is the removal of the '49 day' rule that effectively placed a cap on the maximum length of time before the proposed commencement of vessel loading that an exporter could nominate a cargo (previously exporters could not nominate a cargo more than 49 days out from the proposed commencement of vessel loading). This rule proved to be unworkable. It was replaced with a requirement that exporters could nominate a cargo for elevation at any time between the 30th September 2009 and the date 28 days before the proposed date of elevation. (See point 1.3 below).

To enhance the transparency of the CNA assessment, GrainCorp also introduced a 5 working day CNA assessment period. Prior to the introduction of this measure, there was no limit on the amount of time GrainCorp could take to assess a CNA.

The revised Port Terminal Services Protocols allow both GrainCorp and exporters to operate more efficiently and with greater certainty, using processes that are both easier to understand and more transparent.

1.3 Extended Cargo Nomination Period

Submissions to the ACCC from exporters, and feedback from exporters to GrainCorp, indicated that offering the ability for exporters to nominate 'longer term' shipping programs would offer greater certainty for their export activities.

GrainCorp responded to this feedback by allowing exporters to propose cargo nominations for the period 1st October to 30th September each year. This measure, together with the removal of the '49 day' rule, provides significantly greater transparency. Each nomination proposed by an exporter is now listed on the shipping stem as 'pending acceptance' the day after it is accepted.

Following acceptance, the status of a CNA is changed on the shipping stem and is listed as 'accepted'. As the cargo nears the date of elevation, any relevant matters relating to an individual are listed on the stem.

If a CNA is rejected, an exporter is notified of the rejection of a CNA in writing on the day in which the relevant decision is made and reasons for the decision to reject the CNA are provided. There is also an expedited process under the Protocols if an exporter wishes to have that rejection reviewed.

1.4 October 2009 'Interim' CNA assessment process.

The process of bulk wheat accreditation renewal by Wheat Exports Australia, and the order in which accreditation is granted to individual companies, has created some uncertainty in the lead up to 1st October 2009 (the date on which current accreditations lapse). The introduction of the access Undertaking(s) has also created uncertainty.

To alleviate the concerns of exporters raised directly with GrainCorp, on 13th July 2009 an arrangement was introduced[1] where exporters could fairly nominate cargos for elevation post 1st October 2009, prior to having their accreditation renewed.

The 'provisional' cargo nomination application process provides for the assessment of cargos nominated for elevation between December 2009 and the end of September 2010. To ensure that all exporters are treated fairly, the assessment of 'provisional nomination' will not occur until after the time in which Wheat Exports Australia is expected to have considered all applications for accreditation. The process for assessment of 'provisional nominations' will be consistent with the procedures for assessing CNAs in the Port Terminal Services Protocols (See Appendix 2).

GrainCorp has received more than 10 million tonnes of 'provisional' cargo nominations. Assessment of these 'provisional' nominations will occur between October 5th and 9th 2009.

1.5 Publication of Estimated Port Terminal Elevation Capacities

To manage the demand for elevation capacity for multiple bulk wheat (and other grain) exporters, and to provide a more transparent capacity management regime, GrainCorp has published on its website a table of estimated monthly elevation capacities, per port terminal[2].

The estimated elevation capacities provide exporters who have, or are considering, submitting a CNA to GrainCorp for assessment, a transparent reference for estimating the likely available elevation capacity for a particular terminal during a particular month.

GrainCorp expects that exporters will refer to both the shipping stem, and the estimated port terminal elevation capacity table, *prior* to submitting a CNA, as a method for ensuring that there is sufficient elevation capacity available at the time they wish to ship grain.

[1] For a copy of relevant correspondence, refer to Appendix 2.

[2] http://www.graincorp.com.au/prodserv/Ports/Pages/ShippingStem1.aspx

1.6 Development of Revised Port Terminal Protocols

In response to the ACCC's Draft Determination, GrainCorp has revised and restructured the Port Terminal Protocols that will be appended to the Indicative Access Agreement contained in the Undertaking.

Subject to changes required by the ACCC, these new protocols will come into effect from 1st October 2009 and will contain all of the changes to the management of port terminal elevation capacity referred to in the above sections. The criteria against which a CNA will be assessed has been made more transparent and areas in which GrainCorp can exercise discretion have been minimised, as is set out below.

> ***5 Cargo Nomination Assessment Criteria***
>
> *The initial CNA Assessment will take consideration of the following:*
>
> *5.1. That the Client has used the approved method of lodging a CNA.*
>
> *5.2. Where the assessment of a CNA is for the export of bulk wheat, that the Client is accredited by Wheat Exports Australia to export wheat in bulk.*
>
> *5.3. That the Client has signed and lodged with GrainCorp a copy of the **Country Storage and Handling Agreement**.*
>
> *5.4. That, in the case of the export of regulated grain (bulk wheat), the Client has signed and lodged with GrainCorp a **Bulk Wheat Port Terminal Services Agreement**.*
>
> *5.5. That, in the case of the export of non-regulated grain, the Client has signed and lodged with GrainCorp a **Bulk Grain Port Terminal Services Agreement (Non-wheat)**.*
>
> *5.6. Whether GrainCorp has available sufficient intake, grain segregation, storage and grain elevation capacity at the port terminal that will allow accumulation of the nominated cargo at the port terminal, taking into account, other cargo(s) previously accepted by GrainCorp that appear as accepted cargo nominations on the GrainCorp Shipping Stem.*
>
> *5.7. Any Phytosanitary and Market Access Risks.*
>
> *5.8. Confirmation that the Client will/has contract(ed) sufficient rail and/or road transport prior to the nominated Load Laycan to accumulate the grain tonnage at the Port Terminal for the nominated cargo.*
>
> *5.9. In the event that two or more CNA's are received with Laycans commencing within five business days of each other, and providing that all prior conditions identified in Clause 0 have been met, GrainCorp will assign a **Load Date** based on the chronological order in which the CNA's were received for each port.*

1.7 Sufficient Grain

As stated above, the previous Port Terminal Services Protocols contained a provision that required an exporter to demonstrate to GrainCorp that it had *'sufficient grain ownership'* that would allow the exporter to assemble the nominated cargo in the relevant time.

This requirement has been removed. Accordingly, GrainCorp has -

a) Removed any ambiguity over the concept of 'sufficient grain' and,

b) Removed any perceived lack of transparency or arbitrariness associated with the nature of judgements made about what 'sufficient grain ' was.

Under the Port Terminal Services Protocols, it is the responsibility of an exporter to ensure that they can accumulate a cargo in a timely manner[3], and that GrainCorp accepts no liability related to the failure of an exporter to do so.

The process used by GrainCorp differs markedly from that used by both ABB and CBH. Exporters using the services provided by those companies are expected to demonstrate that they have ownership of the full tonnage of an intended cargo as a condition of the acceptance of a cargo nomination.

1.8 Initial Determination of Vessel Order

It is clear from submissions made to the ACCC, and from customer feedback to GrainCorp, that exporters considered vessel loading order should be determined chronologically based on the order of CNAs.

For the 2009/10 shipping year, GrainCorp has already received more than 10 million tonnes of 'provisional' cargo nominations. Should a 'provisional' CNA meet all of the assessment criteria noted above, the initial determinant for allocating a shipping stem position in any month will be based on the chronological order in which the CNA's were received.

Prior to the commencement of the 2008/09 shipping year, there was only one bulk wheat exporter. Management of the shipping stem was reliant on the planning of shipping by AWB in its role as the bulk wheat export monopolist. AWB would advise vessels of both the estimated time of arrival of a vessel and provide details of the manner in which cargos were to be assembled at the port. The order with which wheat vessels arrived and were loaded was at the direction of AWB.

For the allocation of load order on the shipping stem during the period 1st October 2008 to 3rd June 2009, GrainCorp primarily relied on stock ownership to determine the acceptance or rejection of a 'vessel nomination'[4]. This was in line with the conditions contained within the then current Port Terminal Protocols.

The principle of relying on the chronological order of receipt of a CNA is established in the new (post 1st October 2009) protocols, and thus it will continue beyond the 'provisional' CNA assessment process described in Appendix 2.

[3] 'Timely manner' is defined as having sufficient grain accumulated at a terminal by the assigned load date that will allow elevation of grain to a vessel and the completion of loading in the time allocated.

[4] A vessel nomination is now referred to as a 'cargo nomination'. This nomenclature is consistent with international practice.

1.9 Laycan[5] Nomination

GrainCorp also responded to feedback from exporters by broadening the period in which a CNA can indicate a vessel 'laycan'.

The previous protocols required the nomination of a 14 day laycan. Feedback from exporters indicated that it was not possible, in light of the additional transparency and freedoms provided to exporters under the new '12 month' shipping stem, to require the proposal of a laycan as short as 14 days.

The new protocols allow exporters to nominate a 30 day laycan, where the laycan commences on the first of each calendar month. This is another example of GrainCorp consulting with exporters and developing terminal elevation capacity management processes that take account of the requirements of clients.

1.10 Conclusion - Transparency of Capacity Management Processes

Australian grain exports compete in a global market dominated by a small number of global grain traders, each trading up to 10 or 20 times the total average Australian grain export task. The companies operate vertically integrated supply chains, where little or no access to port elevators is provided to trading competitors. Where access is granted, the owner of the elevator requires a competitor to purchase grain from the elevator owner.

There are some instances where global traders manage publicly owned port elevators, but they are managed in a vertically integrated manner and are not subject to the same level of regulation that is now imposed upon Australian port elevator owners. Put simply, the regulation that these companies have been lobbying for in Australia, is not imposed anywhere else in the grain trading world, and would certainly not be acceptable to the parent companies of the Australian operations.

In this international context, it is worthwhile emphasising that the capacity management processes used by GrainCorp, and the degree of transparency that is now part of the system, is not found to the same degree in any country that competes with Australia in the international grains market.

The new regulatory regime is, in this context, an experiment that may, or may not, affect the efficiency and thus the competitiveness of Australian grain exports.

[5] The term laycan is habitually used in the negotiation of charterparties to refer to the earliest date at which the laydays can commence and the date after which the charter can be cancelled if the vessel has not by then arrived. By extension the term is found in FOB sales, so as to provide that the seller can cancel the contract if the vessel, which it is the buyer's duty to procure, does not arrive at the port by the cancellation date. Per **Christopher Clarke J** in *SNV Gas Supply v Naftomer Shipping & Trading (The Azur Gaz)* [2005] EWHC 2528 Comm, [2006] 1 Lloyds Rep 163:

Section 2

2.1 ACCC Draft Determination Requirements

GrainCorp proposes to amend its Undertaking to reflect the majority of matters raised by the ACCC in the Draft Determination. These are set out in Appendix 1 to this submission. However, there are a number of matters arising from the Draft Determination on which GrainCorp will make further submission.

These include -

1. The "re-opening" and "holding over" provisions required by the ACCC.
2. The scope of dispute resolution under the Undertaking and the dispute resolution processes in the BWPTS Agreement and Port Terminal Services Protocols.
3. Differential grain receipt charges.
4. Shrink rates applied at port terminals for grain from storages other than those managed by GrainCorp.
5. The requirement for an annual audit of GrainCorp's capacity management processes.
6. The publication of stock levels at GrainCorp port terminals and publication of performance indicators.

2.2 "Holding over" or "reopening" provisions

In its draft determination, the ACCC indicated that the proposed Undertaking does not adequately provide for holding over arrangements -

(a) at the commencement of the Undertaking - the ACCC considers that the Undertaking *potentially prevents the application of the proposed Undertaking to Access Agreements for the 2009/10 season, on the basis that access seekers could sign agreements prior to the commencement of the proposed Undertaking, and then, by virtue of clause 3.7, be precluded from negotiating non-standard terms or prices*,

(b) while an access seeker is engaging in the negotiation process before an Access Agreement has been entered into - the ACCC considers that 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*.

GrainCorp's proposed approach to these situations is set out below.

Holding over or 're-opening' for pre-Undertaking agreements

GrainCorp is prepared to include in the Undertaking a provision that, within a one month window following the approval of the Undertaking, a Customer may seek to negotiate a variation to a Bulk Wheat Port Terminal Services Agreement ("BWPTS Agreement") executed before 1 October 2009. The Undertaking dispute resolution procedures, including binding arbitration, would apply to that negotiation.

This would operate as follows, assuming exporters will sign up to agreements before 1 October 2009 to enable exporting from the beginning of the season (which GrainCorp expects will occur) -

- Between 1 August 2009 and 30 September 2009 - Customers negotiate and sign BWPTS Agreements.
- 1 October 2009 - the signed BWPTS Agreements come into effect and GrainCorp provides Port Terminal Services subject to the prices and conditions in those agreements.
- If the ACCC requires GrainCorp to amend the Standard Terms after a Customer has entered into a BWPTS Agreement, GrainCorp proposes to offer to vary a signed BWPTS Agreement to reflect the Standard Terms. The Customer has 14 days in which to accept this offer.
- GrainCorp will provide a one month window in which exporters who have signed BWPTS Agreements can "reopen" the signed agreements and have the protection of the negotiate/arbitrate provisions under the Undertaking. To take advantage of this, the exporter would have to lodge an Access Application within that one month window with GrainCorp seeking to vary their BWPTS Agreements.
- Any variations to the BWPTS Agreement arising from an arbitration in relation to a dispute raised before 1 November 2009 will apply from 1 October 2009.

Allowing customers a one month window to lodge an access application in relation to a variation of a BWPTS Agreement signed before the Undertaking becomes effective balances the parties' interests by giving GrainCorp sufficient contractual certainty while enabling the Undertaking to apply for the 2009/2010 season. The one month window takes into account that the Standard Terms and Reference Prices have been publicly available since mid-August (and in fact, the Standard Terms were initially made publicly available on 15 June, albeit with a small number of amendments made in August 2009). GrainCorp considers that to allow any longer or an unlimited period would result in uncertainty for a significant proportion of the grain season.

GrainCorp is aware that under section 44ZZBA of the TPA that an Undertaking does not come into operation under the TPA until the expiry of 21 days after approval if no person has applied to the Australian Competition Tribunal or at the time of the Tribunal's decision if a person has applied for review. GrainCorp accepts the principle that exporters who have signed access agreements prior to the commencement of the Undertaking should have a limited window in which to "reopen" their signed agreement but wishes to discuss the mechanics of how this will work given section 44ZZBA.

Interim arrangements for new access applications lodged on or after 1 October 2009

The ACCC's view is that there should be an ability for an Access Seeker to obtain access to the Port Terminal Services while they are negotiating terms and prices (or arbitrating a dispute).

However, GrainCorp will not provide Port Terminal Services to a Customer in the absence of any executed agreement. It is not legally or commercially acceptable to require GrainCorp to provide services without any contractual protections.

Therefore, GrainCorp proposes to offer Port Terminal Services on the Standard Terms and at the Reference Prices during the period from the lodgement of an Access Application until a BWPTS Agreement is entered into. Once executed, that BWPTS Agreement would apply retrospectively to the date of the Access Application (or if an arbitration is initiated, to a date determined by the arbitrator but not earlier than the date of the Access Application).

To give effect to this arrangement GrainCorp would require a Customer to sign an 'interim agreement' consisting of the Standard Terms and Reference Prices. This agreement would be binding on the parties but does not preclude the Applicant from negotiating an Access Agreement. The interim agreement will continue until a BWPTS Agreement is executed or until the parties agree otherwise.

However, to appropriately balance the interests of the parties and ensure some degree of contractual certainty, the parties must negotiate a concluded BWPTS Agreement or the applicant must issue a formal dispute notice within the Negotiation Period under the Undertaking (currently 3 months) otherwise the interim agreement becomes binding for that period. If a dispute is raised, then the interim agreement will continue until the dispute is resolved or arbitrated.

If no dispute is raised and no negotiated agreement is reached in the Negotiation Period, it is open for an applicant to lodge another Access Application at that stage, although practically we assume that the applicant would lodge a dispute notice and bring the issues to 'a head'.

This is necessary or otherwise it is conceivable that it will be the end of, or even after, a season expires before the parties know the terms on which services were being provided. This is not commercially acceptable for GrainCorp or exporters.

2.3 The scope of a dispute under the Undertaking

We understand that the ACCC *considers it is appropriate that [the Undertaking] limit[s] the scope of the dispute resolution mechanism to 'Disputes' that arise during the negotiation of an Access Agreement. Once the parties have an access agreement, they have direct rights of enforcement in contract and need not revert to the proposed Undertaking*.

However, the ACCC has requested GrainCorp to specify the circumstances in which the dispute resolution mechanism will apply.

GrainCorp will make it clear that a Dispute that is subject to the dispute resolution procedures in the Undertaking are as follows:

At any time before an access agreement is executed

Any dispute arising in relation to the negotiation of -

- access to standard or non standard port terminal services,
- access on non standard terms (for port terminal services or standard port terminal services),
- prices, including reference prices for standard port terminal services or prices for non-standard port terminal services, or
- any combination of the above.

At any time after an access agreement is executed

- A dispute arising in relation to a decision by GrainCorp to unilaterally vary the prices under the BWPTS Agreement,
- A dispute in relation to the negotiation of access to Port Terminal Services in addition to Port Terminal Services already the subject of an executed BWPTS Agreement, i.e. this is essentially a new Access Application,

One month "reopening period"

- A dispute in relation to the negotiation of a variation to a BWPTS Agreement that was entered into prior to 1 October 2009 (see comments on the re-opening provisions above),

The following are not subject to the dispute resolution procedures in the Undertaking:

- A decision by GrainCorp to vary the Port Terminal Services Protocols - this is a contractual dispute in that GrainCorp has not complied with its contractual obligation to follow the process in the Undertaking (i.e. it can be disputed but it is not subject to ACCC arbitration) or it is a breach of the Undertaking which can be regulated by the ACCC.
- Disputes that arise under a BWPTS Agreement. These disputes would be resolved under the dispute resolution procedure in the BWPTS Agreement (see comments in below).
- Disputes that arise in relation to the application of the Port Terminal Services Protocols. These disputes would be resolved under the dispute resolution procedure in the BWPTS Agreement and the Port Terminal Services Protocols (see comments below).
- Disputes about the terms of the initial Port Terminal Services Protocols (i.e. the protocols attached to the Undertaking at the date of its approval) or the Protocols applying at the time of the Access Application.

2.4 Disputes resolution under the Bulk Wheat Port Terminal Services Agreement (including the Port Terminal Services Protocols)

It is appropriate that disputes arising under an executed BWPTS Agreement be treated as contractual disputes and be subject to the dispute resolution procedure in the BWPTS Agreement.

The Dispute Resolution provisions in the BWPTS Agreement are robust and appropriate for the following reasons:

- The dispute resolution mechanism provides for disputes concerning the grade, quality, sampling, testing, or classification of Wheat to be referred to an independent testing facility. Users have an ability to seek adjudication of a dispute in a timely manner by an independent party with the technical expertise necessary to determine such a dispute. Historically, this procedure has been appropriate for dealing with the type of technical disputes relating to sampling, testing or classifying Wheat.
- The Port Terminal Services Protocols which form part of the BWPTS Agreement include a very specific dispute resolution mechanism for rejection of CNAs by

GrainCorp. Note that given the minimisation of almost all GrainCorp's discretion in regard to the acceptance or rejection of CNAs under the revised Protocols discussed above, GrainCorp considers rejections can be tested against objective grounds and such disputes to be very unlikely.

- For all other disputes, the dispute resolution mechanism mandates the escalation of a dispute to chief executive level, prior to the commencement of court proceedings. The ACCC has indicated that the Dispute Resolution provisions in the BWPTS Agreement as currently drafted are not sufficient. In response to the ACCC's requirements, GrainCorp intends to amend the Dispute Resolution procedure to include:
  - a clear statement of the stages of the dispute resolution process, and
  - clear timeframes in which the parties must seek to resolve the dispute.
- It would not be appropriate for the dispute resolution provisions to mandate that the parties to refer a dispute to private arbitration, irrespective of the circumstances of the dispute. Private arbitration has the potential to be costly and drawn out, imposing an additional and unnecessary burden on both GrainCorp and exporters. The courts are appropriate for such disputes.
- Historically, Users have raised very few, if any, disputes in relation to the terms of the previous storage and handling agreements. Exporters have had access to binding dispute resolution under the Victorian Essential Services Commission regime for many years and have not resorted to it.

2.5 Operational disputes under the Port Terminal Services Protocols

GrainCorp understands the ACCC does not wish to arbitrate disputes in relation to operational decisions made by GrainCorp under the Port Terminal Services Protocols. Given the nature of disputes which are likely to arise under the Port Terminal Services Protocols, and the time in which resolution is required, it would be unworkable to attempt to invoke the arbitration procedure in clause 7 of the Undertaking for the resolution of disputes arising under the Port Terminal Services Protocols.

Referral of operational disputes to GTA is not appropriate

It is not practicable to require disputes in relation to operational decision making under the Port Terminal Services Protocols to be referred to an independent umpire. GrainCorp's decision making process is robust and a decision which gives rise to a dispute is likely to involve consideration of technical factors and other circumstances. GrainCorp is firmly of the view that an independent arbitrator:

- could not be fully cognisant of all relevant factors necessary to make an informed decision in the required timeframe about a complex common user port terminal operation,
- could make decisions which adversely impact on the operation of the port terminal and other users not party to the dispute.

In response to the submission made by GTA on 25 August 2009 (placed on the public register on 2 September 2009), it would not be appropriate for operational disputes under the Port Terminal Services Protocols to be arbitrated by a GTA member because:

- GTA arbitration typically deals with disputes in relation to grain trade and commodity standards. GrainCorp does not consider that GTA members have appropriate experience in logistical matters involving the assembly of cargos and the loading of vessels at port,
- Requiring GrainCorp to comply with the determination of an independent arbitrator which overrides GrainCorp's risk assessment and other decisions, exposes GrainCorp to an unreasonable liability resulting from increased operational, environmental and safety risks,
- GTA members may well have a conflict of interest in that decisions could directly or indirectly benefit their own operations or adversely impact their competitors.

To address the concerns of exporters, GrainCorp proposes that the dispute resolution procedures in the Port Terminal Services Protocols should apply only to a decision by GrainCorp to refuse a Cargo Nomination Application as discussed above.

All other disputes should be dealt with by the robust dispute resolution procedures in the BWPTS Agreement.

This dispute resolution procedure is appropriate for the following reasons:

- GrainCorp has amended its Port Terminal Services Protocols significantly since the Draft Determination. It has responded to the ACCC's guidance by limiting

GrainCorp's ability to exercise discretion. The result is that there are now very few areas which will give rise to disputes under the Port Terminal Services Protocols.

- The CNA rejection dispute resolution procedure provides for a rapid escalation process to GrainCorp senior management should an exporter be dissatisfied with GrainCorp's decision making.
- The requirement that GrainCorp provides reasons for a decision to reject a cargo nomination at the time the decision is communicated to the exporter, together with the obligation to publish the shipping stem on a daily basis, provide sufficient transparency for Users. In the event that GrainCorp did not comply with its obligations under the Port Terminal Services Protocols, Users have access to adequate information to identify these circumstance. This is in addition to the oversight already occurring by Wheat Exports Australia.
- GrainCorp will amend the Undertaking so that a breach of the Port Terminal Services Protocols is a breach of the Undertaking. A User who considers GrainCorp has breached the Port Terminal Services Protocols has the additional avenue of seeking that the ACCC enforce compliance with the Undertaking, including by commencing proceedings in the Federal Court of Australia. Accordingly, there are extremely serious consequences for GrainCorp should it breach the Port Terminal Services Protocols. These provide a strong incentive for GrainCorp to comply with the Port Terminal Services Protocols, and
- Any other breach of the Port Terminal Services Protocols is a breach of GrainCorp's contractual obligations. A User can seek to enforce its contractual rights by pursuing the dispute resolution procedures including the ultimate right to Court proceedings.

2.6 Non discriminatory access

In its Draft Determination, the ACCC proposed the following non-discrimination clause:

In providing access to Port Terminal Services, GrainCorp must not discriminate between different Applicants or Users (including its own Trading Division) in favour of its own trading Division, except to the extent that the cost of providing access to other Applicants or Users is higher.

GrainCorp understands the proposed non-discrimination clause is intended to apply only to preferential treatment of GrainCorp's Trading Division. Further, GrainCorp understands that the reference to cost in the clause is intended to include efficiency considerations.

GrainCorp has grave concerns about the narrowness of this provision and whether it enables GrainCorp to price differentially its services at the port to take into account efficiency, quality, safety, hygiene and other risk factors which are not always easily quantifiable. In this regard, GrainCorp strongly supports the position of CBH, expressed in its letter to the ACCC dated 24 August 2009, available on the ACCC's public register.

While GrainCorp intends to amend the Undertaking to reflect the ACCC's proposed non-discrimination provision, subject to the removal of the bracketed words (including its own Trading Division), GrainCorp would appreciate the ACCC's further explanation

of its proposed clause in its Final Determination on how this wording addresses the issues discussed above and raised in the CBH letter.

2.7 Reference prices - justification of differential grain receipt charges

Risk Charging Regime for Grain Receival

In the Draft Determination, the ACCC noted that *'Given the pricing principles, and in particular pricing principle b(ii), the ACCC considers it would be appropriate if, as a transparency measure, appropriate measures would required prices to be transparently specified for a standard set of port terminal service to all parties, including GrainCorp, with any special requirements due to different origin being separately enumerated and priced.'*

GrainCorp will amend Annexure A - Bulk Wheat Port Terminal Services and Fee Schedule to separately enumerate and price special requirements due to grain being sourced from a non-approved source.

Part of the service provided by GrainCorp can be viewed as a 'guarantee' that grain dispatched to a domestic or export customer from a GrainCorp site will meet customer requirements. This is a component of the service provision agreement GrainCorp has with all customers. If GrainCorp fails to deliver grain that complies with specification, and the fault is that of GrainCorp, the cost of any such failure is the liability of GrainCorp.

Where grain is received into a GrainCorp port terminal from third party storages, GrainCorp is exposed to the potential losses caused by failures on the part of those storing grain prior to delivery to a port terminal to classify, treat, or handle grain correctly. GrainCorp is exposed to increased risk levels due to -

- The risk of receiving grain which has been inappropriately treated with pesticides or chemicals which GrainCorp is unable to test for at the point of receival, and
- The risk that GrainCorp's testing and sampling procedures may not identify wrongly graded or contaminated grain.

To account for the increased level of risk, some measure of additional surety is required.

While GrainCorp does have some contractual protections in the BWPTS Agreement, this is by no means fully protects GrainCorp from the consequences of contaminated or incorrectly classified wheat coming from unapproved sources. For example, GrainCorp has never sought to recover the full costs from an exporter of a port 'blockout' caused by such an occurrence.

GrainCorp will restructure the Port Terminal Fee Schedule to provide more transparency about the fee differentials that apply to grain received from different storages at GrainCorp port terminals.

2.8 Application of Shrink at GrainCorp Port Terminals

Stakeholders raised concerns in response to the ACCC Issues Paper over the manner in which shrink[6] was applied on grain receivals, GrainCorp has restructured its shrink calculations. On further review, from 1st October 2009 –

- All grain received by rail or road regardless of its origin will be shrunk from the gross weight by 0.25%.
- All grain elevated to a vessel regardless of its origin will be shrunk from the gross weight by 0.25%.
- All grain out loaded from a port terminal to road or rail transport will be shrunk from the gross weight by 0.25%.

This measure has removed the differential shrink rate applied to grain received from non-GrainCorp storage. GrainCorp believes this will address any concerns over this issue.

[6] The practice of 'shrinking' grain is common across the world. Grain shrink accounts for grain lost during handling, the extraction of dust, and weight lost due to the transpiration of moisture from the grain in storage.

2.9 Annual Audit of Capacity Management Processes

In its Draft Determination, the ACCC supported the submission by the Australian Grain Exporters Association (AGEA) for the inclusion of a requirement for an annual audit of GrainCorp's compliance with the non-discrimination obligations under the Undertaking. Such an audit is not warranted for the following reasons -

- Submissions from interested parties have not demonstrated a need for the inclusion of an audit obligation. The cost of such an audit will be considerable, possibly up to $100,000, and would place an additional and unwarranted regulatory burden unfairly upon GrainCorp, a burden not carried by other exporters.
- There are inherent difficulties in auditing GrainCorp's compliance with an obligation not to engage in discriminatory behaviour. Such an audit would be seeking to prove a negative and it is not clear that the audit would provide any meaningful insight into GrainCorp's conduct.

  The new cargo nomination processes provide a high level of transparency, such that there is little additional information which an audit of GrainCorp's internal processes will reveal.
- GrainCorp is subject to audit by Wheat Exports Australia of matters relating conditions of its accreditation, including compliance with the Access Test. The consequences of a finding that GrainCorp did not satisfy the Access Test would expose GrainCorp to serious sanctions under the WEMA, including loss of its bulk wheat export accreditation.

  GrainCorp's internal independent auditor, KPMG conducts an annual audit of all GrainCorp internal processes. All company processes that relate to port terminal capacity management will be subject to annual audit by KPMG.

  The additional burden of an audit requirement places GrainCorp at an unfair disadvantage when compared to the operators of the Melbourne Port Terminal who are not required to meet the Access Test under the WEMA.

Any discrimination in favour of GrainCorp Trading through the allocation of elevation capacity will become apparent in either the Wheat Exports Australia directed audit or the KPMG internal audits. The requirement for an audit of the type suggested by the AGEA, and supported by the ACCC, should it be enforced, would lead to a situation where the same processes would be audited three times, by three separate auditors.

This represents a potentially onerous direct and indirect cost burden on GrainCorp, and a needless triplication of regulation. If such an audit is imposed, it would be reasonable for GrainCorp to seek to recover from exporters relevant direct and indirect costs.

GrainCorp has offered to undertake to provide the ACCC with the results of any relevant audit conducted at the direction of the industry regulator (Wheat Exports Australia), or by the internal independent audit conducted by KPMG. Accordingly, GrainCorp believes that no additional audit requirement is warranted.

If, despite the above, the ACCC still requires an external audit, GrainCorp is willing to accept that the ACCC can reserve the right to direct the conduct of an audit should

it not be satisfied with the conduct or scope of an internal audit or one directed by Wheat Exports Australia.

2.10 Publication of Stock Levels and Performance Indicators

The ACCC has directed that GrainCorp include in the Undertaking the publication of a number of 'transparency measures' and 'performance indicators'.

Information on Stock Held at Port

GrainCorp currently publishes on its website[7] the following information.

- Cargo nominations pending assessment.
- Cargo nominations that have been accepted and allocated an Assigned Load Date (confirmed cargo 'bookings').
- Updates on the status of vessels and / or port terminal, including maintenance shutdown periods.
- Estimated monthly port terminal elevation capacity.

GrainCorp does not agree with the requirement to publish stocks held at port on a weekly or other basis.

GrainCorp understands the request for publishing port stock information originates from a submission made by the AGEA to the ACCC which suggests that GrainCorp could favour unregulated grains at the port terminals at the expense of Bulk Wheat exporters.

The ACCC's proposed solution is unnecessary. The Port Terminal Services Protocols and Shipping Stem make it obvious what commodities are being shipped at what time. Stocks of grains will be accumulated at the port terminal to service the vessels on the shipping stem. There can be no incentive on GrainCorp to block the port out with unregulated grains and then put itself in a position that it cannot meet its obligations to load vessels booked for bulk wheat.

Currently Published Information is Sufficient

Simple calculation of the tonnage accepted for elevation in a given month, deducted from the estimated elevation capacity for the relevant terminal, will provide an indication of the capacity that has been allocated for a particular month.

Example.

- The Carrington terminal currently has approximately 485,000 tonnes of elevation capacity provisionally booked for January 2009.
- The estimated monthly elevation capacity for Carrington is 175,000 tonnes.
- This indicates that there is 310,500 tonnes of elevation capacity requested that is not available.

In assessing the relevant CNA's, GrainCorp has to reject all but the 175,000 tonnes available.

[7] http://www.graincorp.com.au/prodserv/Ports/Pages/ShippingStem1.aspx

During the month of January, GrainCorp will manage, via the Site Assembly Plans developed with exporters, grain intake, and elevation to vessel in a manner that should, discounting external limiting factors, allow 175,000 tonnes to be shipped.

GrainCorp reiterates that publication of any port terminal stock level information is potentially misleading as a method for assessing port terminal 'performance', will not increase the 'transparency' of elevation capacity allocation (as this is addressed the information published on the shipping stem), and increases the likelihood that traders who are short stock will be 'gamed' by other traders.

While GrainCorp objects to the requirement to publish stocks held at port on a weekly basis by commodity type, the company has advised the ACCC that if it requires such a provision in the Undertaking, GrainCorp will comply.

Report on Performance Indicators

GrainCorp has agreed to provide the following information required by the ACCC.

a) vessels failing survey,

b) average daily road receival rate (to be provided monthly),

c) CNA's rejected,

d) monthly tonnes shipped,

e) port blockouts, and

f) average CNA assessment times.

The current GrainCorp shipping stem provides a status report that notes when a vessel has failed survey, when a CNA is rejected and when a terminal is blocked out.

The information required by the ACCC can be provided in a form that would detail the following.

a) The exporter and vessel name of all vessels that fail regulatory (marine and quarantine) surveys.

b) Average daily road intake rates.

c) A list of wheat CNA's rejected, including details of the exporter, tonnage and proposed laycan.

d) A monthly total of grain elevated to vessel.

e) Dates on which port terminals may be blocked out.

f) A monthly average of CNA assessment times.

GrainCorp notes that provision of information relating to point b) may lead to confusion. The rate at which grain is received by road is heavily influenced by the following factors.

- The timing of when road deliveries of grain arrive at the terminal, and the frequency with which vehicles arrive,
- Vehicle configuration, particularly B-double configuration, and the rate at which configuration influences the speed at which trucks can tip.

- Commodity mix and grade mix being received, and the requirement for grain path cleaning.
- The occurrence of rain, which may limit receival, where road intake is not covered.
- The testing requirements related to individual cargo assembly, including the need for time consuming tests such as the falling number test, or assessment of pesticide residues.
- The rate at which road receivals fail quality testing.
- The presence of fumigants in grain and if vehicles are rejected.

The Draft Determination also suggested the following possible indicators which are not appropriate -

- overtime charged,
- demurrage - GrainCorp does not have this information. This is confidential information between exporters and the vessel providers.

The 2009/10 Schedule of fees removes overtime charges and contains 'normal working hours' charges.

Where required and at the request of an exporter, GrainCorp will work additional 'overtime' shifts, during which normal charges will apply.

However, where an exporter requests additional shifts for vessel loading or grain receival, and these are cancelled, or where an exporter's vessel fails to arrive, or where grain deliveries by rail or road fail to arrive, a cancellation fee will apply.

All relevant fees are contained in Annexure A to the 2009/10 Bulk Wheat Port Terminal Services Agreement.

2.11 Conclusion

GrainCorp would be pleased to provide any further information the Commission requires.

Appendix 1

Table of Changes to Port Terminal Services Undertaking Required by the ACCC

	Clause	Page ref in Draft Decision	ACCC requirement	GrainCorp proposed changes	Comments
Objectives		**53**			
1	1.2(e)(i)(A)	59	ACCC suggested amendment: *The recovery of all efficient costs associated with the granting of access to the Port Terminal Services.*	Amend as per ACCC proposal.	GrainCorp will amend clause 1.2(e)(i)(A) to refer to 'efficient costs' rather than 'reasonable costs' as proposed by the Draft Determination.
2	1.2(e)(i)(D)	59	Delete *'GrainCorp's ability to meet its own or its Trading Division's reasonably anticipated requirements for Port Terminal Services'.*	Delete clause.	While GrainCorp was of the view that clause 1.2(e)(i)(D) was appropriate, GrainCorp agrees to delete clause 1.2(e)(i)(D).
Structure		**53**			
3	2.2	60	Amend clause 2.2 so that only the Port Schedules (Schedules 1 and 2) take priority over the General Terms.	Amend so that the General Terms and the Schedules apply in the following order of priority: **Schedule 1 and 2;** **General terms;** **Schedules 3 to 5.**	GrainCorp notes the ACCC's concern that the previous clause 2.2 had the effect that Schedule 3, the Port Terminal Services Protocols (which may be amended without ACCC approval), took priority over the General Terms of the Undertaking. GrainCorp always intended that any variation to the Port Terminal Services Protocols would be consistent with the terms of the Undertaking. This is expressly

	Clause	Page ref in Draft Decision	ACCC requirement	GrainCorp proposed changes	Comments
					provided for in clause 8.3(a)(i). However, GrainCorp will amend clause 2.2 to comply with the ACCC's requirement.
4	2.3	60	Remove the words *'reasonable endeavours to'* from clause 2.3. The clause relates to procuring a related body corporate of GrainCorp to take some action (or refrain from taking some action).	Delete the words 'use reasonable endeavours'.	GrainCorp will amend clause 2.3 so that it now has an absolute obligation to procure a related body corporate to take some action or refrain from taking action.
Term and Variation					
5	3.1	67	The clause should specify that a commencement date of 1 October 2009 is appropriate only for the purposes of section 24 of the WEMA.	Amend so that the clause specifies that the 1 October 2009 commencement date applies only for the purposes of the WEMA. For all other purposes the Undertaking commences 21 days after it is accepted by the ACCC.	GrainCorp will amend the Undertaking to address the ACCC's comments
6	3.3 - 3.5	68	It is unnecessary for the undertaking to specify the particular circumstances in which GrainCorp may seek the withdrawal or variation of the undertaking as this process is provided for in section 44ZZA of the TPA. It is unnecessary for the ACCC to form a view as this clause is merely descriptive.	N/A	As it is unnecessary for the ACCC to form a view, and the ACCC has confirmed that the clauses in no way fetter the discretion of the ACCC in relation to circumstances in which GrainCorp may seek approval to vary the Undertaking under section 44ZZA of the TPA, the clauses will be retained.
7	3.6(a)	68	This clause is not appropriate as it is inconsistent with the obligation in section 44ZZBC of the TPA for the	Delete clause 3.6.	

	Clause	Page ref in Draft Decision	ACCC requirement	GrainCorp proposed changes	Comments
			ACCC to use reasonable endeavours to make a decision on an access undertaking application within 6 months of receiving the application. It is not appropriate to second guess when an extension may be granted, or the time it will take to achieve one. Delete clause 3.6(a).		
Scope					
8	4		Broadly, although the ACCC recognises that GrainCorp has attempted to draft the scope of the Undertaking to be consistent with the service definition in the WEMA, the scope of the Undertaking lack clarity and is therefore not appropriate pursuant to section 44ZZA(3) of the TPA	Refer to specific amendments set out below.	GrainCorp will amend the Undertaking to improve the clarity, certainty and transparency of the definition of Port Terminal Services and the scope of the Undertaking. GrainCorp always intended that the definition of Port Terminal Services in the Undertaking would be consistent with the WEMA and considers that the proposed amendments achieve this result.
9	4.1(b)	87	Substitute the definition of Port Terminal Services with: '*Port Terminal Services means the services described in Schedule 2 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 [provided by GrainCorp at a Port Terminal] necessary to allow an Accredited*	Amend the clause to read: '*Port Terminal Services means the services described in Schedule 2 in relation to Bulk Wheat owned, operated or controlled by means of a Port Terminal Facility, and the use of a Port Terminal Facility and the use of all other associated infrastructure [provided by GrainCorp at a Port Terminal] necessary to allow an Accredited Wheat Exporter to*	GrainCorp considers the definition of Port Terminal Services proposed by the ACCC, with the additional wording proposed by GrainCorp, provides sufficient certainty and clarity as to the scope of the Undertaking. The additional words 'provided by GrainCorp at a Port Terminal' are included to clarify that the Undertaking applies to Port Terminal Services provided by

	Clause	Page ref in Draft Decision	ACCC requirement	GrainCorp proposed changes	Comments
			Wheat Exporter to export Bulk Wheat through that Port (text in square brackets in addition to proposed ACCC wording)	*export Bulk Wheat through that Port* (text in square brackets in addition to proposed ACCC wording).	GrainCorp at the Port Terminal. This is consistent with the requirements of the WEMA in relation to the scope of the Undertaking. GrainCorp's intention is that the definition of Port Terminal Services reflects the requirements of the WEMA. The proposed amendment addresses the ambiguity which the Commission identified in its Draft Determination as to the scope of the Undertaking and eliminates the risk of inadvertently excluding a service which should properly be characterised as a port terminal service.
10	4.3	87	Include cargo accumulation services within the scope of the Undertaking.	Amend clause 4.4 so that the Port Terminal Service includes "preparation of a Site Assembly Plan".	'Cargo accumulation' refers specifically to the accumulation of wheat in the up-country storage and handling network (either at GrainCorp operated facilities or non-GrainCorp facilities). However, GrainCorp is of the view that the 'preparation of a Site Assembly Plan', which will be defined to mean a document recording among other things the approximate tonnage of Bulk Wheat to be delivered and accumulated by the User at the Port Terminal will address the ACCC's concern.
11	Schedule 2	87	The inclusion of conditions of access in Schedule 2 creates confusion as	Delete clause 2.4(b) of Schedule 2	GrainCorp agrees to the amendment proposed by the

	Clause	Page ref in Draft Decision	ACCC requirement	GrainCorp proposed changes	Comments
	(clause 2.4(b))		they are also set out in the standard terms. Delete clause 2.4(b) of Schedule 2.		ACCC so that Schedule 2 only describes the Port Terminal Services and does not purport to set out terms and conditions of access.
12	4.4(d)	88	The clause creates uncertainty and the rationale and implications are unclear. Delete clause.	Delete clause.	
Publish/negotiation/ arbitrate					
13	5, 6 and 7	115	Broadly, clauses 5, 6 and 7 are not acceptable in their current form. General ACCC comment: "*the negotiation component does not achieve an appropriate balance between the interests of the access provider and access seekers…this discretion creates the potential for the negotiation process to be delayed or frustrated and therefore creates uncertainty*"	Refer to specific amendments below.	GrainCorp will substantially amend clauses 5, 6 and 7. The changes: • Remove the uncertainty and ambiguity identified by the ACCC in its draft determination; • Clearly identify the circumstances in which a Dispute arises and in which an access seeker may refer a matter to arbitration; • Include specific timeframes to ensure GrainCorp cannot delay or frustrate the negotiation process; • Remove GrainCorp's discretion in areas which the ACCC identified as inappropriate; • Include a provision for the ACCC to arbitrate disputes where appropriate.

	Clause	Page ref in Draft Decision	ACCC requirement	GrainCorp proposed changes	Comments
					The amended clauses are appropriate having regard to section 44ZZA of the TPA.
Standard Terms					
14	5.2	118	In light of the view that the standard terms should be included in the Undertaking, the obligation to publish should be limited to an obligation only to publish prices.	Amend so that the obligation to publish is only in relation to prices.	GrainCorp agrees that it will be required to publish Reference Prices by no later that 31 August each year. To promote transparency, if GrainCorp varies either the Reference Prices or the Standard Terms (in accordance with the Undertaking) GrainCorp must publish the variation at least 30 days prior to the date on which it is to become effective in the same locations as it publishes its Reference Prices and Standard terms).
15	5.2	118	Publication by 30 September is not appropriate. Change to 31 August.	Amend to reflect this change.	GrainCorp notes the ACCC 's views that any time for publication of prices must allow sufficient opportunity for access seekers to negotiate access agreements before those prices become effective. GrainCorp considers this issue is addressed by the inclusion of holding over provisions (discussed in the covering submission). However GrainCorp has amended the Undertaking so that Reference Prices must be published by 31 August in the relevant year. Based on previous industry experience, GrainCorp considers this is sufficient

	Clause	Page ref in Draft Decision	ACCC requirement	GrainCorp proposed changes	Comments
					time for access seekers to negotiate the prices at which the Port Terminal Services will be provided.
16	5.2(c)	118	A period of 3 Business Days is more likely to be appropriate than 15 Business Days	Amend to reflect this change.	
Negotiate/arbitrate					
17	6.3(c)	124	The clause introduces a 'pre-condition' to invoking the dispute resolution mechanism which adds delay and lacks clarity. Delete words "*which, after reasonable negotiation, the parties are unable to resolve to their mutual satisfaction*".	Delete.	GrainCorp considers it reasonable, and reflective of a commercial situation, to require the parties to engage in 'reasonable negotiation' prior to referring a Dispute to arbitration. GrainCorp did not intend to rely on this clause as a pre-condition' to invoking the dispute resolution provisions. However, GrainCorp will amend the clause to remove the requirement that the parties first engage in 'reasonable negotiation' before referring a matter to arbitration.
18	6.4(a)	119	There should be a timeframe specified in which GrainCorp must respond to a request for information by an Applicant in relation to access to the port terminal service.	Amend so that information will be provided within a defined time frame or that GrainCorp advises the Applicant that clarification of the request is required within a defined time of receiving the request.	
19	6.4(a)(ii)(B) and	121, 122	ACCC considers there is too much discretion for GrainCorp, especially	Amend so that GrainCorp may only refuse to comply with an information	GrainCorp considers that this amendment adequately balances

	Clause	Page ref in Draft Decision	ACCC requirement	GrainCorp proposed changes	Comments
	(C)		through the phrases "*unduly onerous*", "*disproportionate to the benefit to be obtained*", "*reasonable costs incurred*" and "*information that is not ordinarily and freely available*". 6.4(a)(ii)(B) may be more appropriate if it is amended as suggested by GrainCorp's submission.	request, where the information request is unduly onerous, having regard to GrainCorp's capability to gather and present the information requested, the volume of and timeframe within which information is requested and whether it is readily at hand or required collation or analysis, the ability of the Applicant to obtain the information elsewhere and the purpose for which the Applicant seeks the information.	the interests of Applicants in obtaining access to the information they require to negotiate on an informed basis, with GrainCorp's interests in protecting itself from vexatious information requests. An Applicant may also seek arbitration if it believes GrainCorp is refusing to respond to an information request as required by the Undertaking.
20	6.4(a)(ii)(C)	122	GrainCorp's discretion to refuse a request for information from an Applicant (including due to non-payment of "reasonable costs") is too broad and not appropriate.	Delete.	GrainCorp agrees to delete the clause.
21	6.4(b)(i)	121, 122	The reference to non-compliance that GrainCorp considers is *material* is not appropriate because it appears to depend on GrainCorp's subjective view at its absolute discretion	Delete "considers".	GrainCorp will amend the clause so that there is no reliance on GrainCorp's subjective view of what constitutes "material non-compliance". If an Applicant considers that GrainCorp has inappropriately ceased negotiations, it can seek arbitration in relation to GrainCorp's decision.
22	6.4(b)(iii) and (iv) and 6.6(b)(v)	119, 122, 123	GrainCorp's discretion to require Applicant to meet Prudential Requirements at any time before or during negotiations is too broad and not appropriate - The Undertaking should specify a particular point in time at which the Applicant must	Amend to provide more detail about the information GrainCorp requires to determine whether the Prudential Requirements are met and include timeframes in relation to that assessment.	GrainCorp considers it appropriate that the Undertaking allows GrainCorp to require an Applicant to demonstrate it can satisfy the Prudential Requirements and that GrainCorp can revisit the issue of creditworthiness during the

	Clause	Page ref in Draft Decision	ACCC requirement	GrainCorp proposed changes	Comments
			demonstrate that it can meet the Prudential Requirements and a particular timeframe in which GrainCorp must confirm that those requirements have or have not been met.		negotiation period if there is a material change. This achieves an appropriate balance between the legitimate interests of GrainCorp in ensuring that its customers have appropriate financial resources to meet their obligations to GrainCorp upon entering into a BWPTS Agreement and the legitimate interests of Applicants in understanding the information required and the process involved.
23	6.4(b)(iv)(B) and (C)	123	The clauses are inappropriate as currently drafted, as they create too wide a discretion for GrainCorp, lack clarity and create uncertainty. The ACCC considers there is too much discretion for GrainCorp, especially through the phrases "*unduly onerous*", "*disproportionate to the benefit to be obtained*", "*reasonable costs incurred*" and "*information that is not ordinarily and freely available*". 6.4(a)(ii)(B) may be more appropriate if it is amended as suggested by GrainCorp's submission.	Amend so that GrainCorp may only refuse to comply with an information request, where the information request is unduly onerous, having regard to GrainCorp's capability to gather and present the information requested, the volume of and timeframe within which information is requested and whether it is readily at hand or required collation or analysis, the ability of the Applicant to obtain the information elsewhere and the purpose for which the Applicant seeks the information.	The amendment creates an appropriate balance between GrainCorp's interests and the interests of access seekers by requiring GrainCorp to respond to legitimate information requests but specifying the circumstances in which an information request is 'unduly onerous'. GrainCorp considers that it is appropriate to specify such circumstances to provide GrainCorp with the ability to refuse to respond to an information request which is not made in good faith.
24	6.4(b)(v)	119, 121	The undertaking should require GrainCorp to provide reasons to the access seeker at the time that GrainCorp decides not to negotiate. 10 Business days is too long.	Amend so that GrainCorp must provide reasons for its decision not to negotiate at the time the decision is communicated to the Applicant.	

	Clause	Page ref in Draft Decision	ACCC requirement	GrainCorp proposed changes	Comments
			GrainCorp should also provide reasons if it decides not to negotiate in all circumstances, not just those in 6.4(b)(I) and (iii).		
25	6.4(b)(vii)	122	GrainCorp's discretion to refer an application to the arbitrator if it considers the application is frivolous or the Applicant is not negotiating in good faith is noted as very broad.	The reference to frivolous will be removed.	GrainCorp considers that it is reasonable to enable GrainCorp to cease negotiations if a request for access is not in good faith or the Applicant is not negotiating in good faith. GrainCorp has also inserted the following: '*The arbitrator may consider whether or not an Applicant is negotiating in good faith as a preliminary or threshold question in any arbitration.*
26	6.5(a)(ii)	121	It is not appropriate that the clause merely recognises the ability of the Applicant to seek a meeting with GrainCorp - there is no obligation to actually have the meeting. Amend to read '*at the request of an Applicant, GrainCorp will conduct initial meetings…*'	Amend so that GrainCorp will, if requested, conduct initial meetings with the Applicant within three Business Days.	The proposed amendment rectifies any uncertainty in relation to GrainCorp's obligation to meet with an Applicant upon request by the Applicant. The clause also now includes a requirement for any such meeting to take place within three Business Days from GrainCorp receiving the request.
27	6.5(b)(i)	119, 122	GrainCorp's discretion relating to acknowledgement of application and to request further information is too broad and not appropriate. For example, the ability to seek further information may lead to delay in commencement of negotiations. 5 days in which to acknowledge	Amend to 3 Business Days.	

	Clause	Page ref in Draft Decision	ACCC requirement	GrainCorp proposed changes	Comments
			receipt of an access application is unnecessarily long. The ACCC is concerned that this will delay the commencement of the negotiation period. Amend to "*[within 3] Business Day of its receipt*".		
28	6.5(b)(iii) and (iv)	119, 122	The time frames are also not appropriate as they provide GrainCorp with discretion to seek further information and therefore "*delay the commencement of the 'official' negotiation*".	Amend so that GrainCorp must respond within 3 Business Days.	The proposed timeframes are appropriate and adequately balance the legitimate interests of GrainCorp against the interests of an Applicant. As set out above, GrainCorp considers that both parties have an incentive to move through the negotiation period quickly to obtain certainty and clarity.
29	6.6(a)	120, 122	The clause lacks certainty ("*as soon as reasonably possible*") and should refer to a specified period of time in which to commence negotiations	Amend so that GrainCorp must offer to commence negotiations within 10 Business Days (or such longer period as agreed between the parties).	By removing the reference to 'as soon as reasonably possible' clause 6.6(a) provides the Applicant with certainty that GrainCorp will offer to commence negotiations within 10 Business Days (unless the Applicant agrees to a longer period).
30	6.6(b)(iv)	120	GrainCorp discretion to cease negotiations if GrainCorp believes they are not progressing in good faith is too broad and not appropriate. The reference to 'a reasonable time period' lacks certainty and is therefore not appropriate.	Amend to *'a reasonable time period, but no less than 8 weeks'*.	GrainCorp considers that 8 weeks is an appropriate time after which GrainCorp may cease negotiating if an Applicant is not negotiating in good faith towards the development of an Access Agreement. GrainCorp considers that this amendment, together with the Applicant's ability to seek arbitration if it thinks GrainCorp has

	Clause	Page ref in Draft Decision	ACCC requirement	GrainCorp proposed changes	Comments
					inappropriately ceased negotiations, balances GrainCorp's interests with those of the Applicant.
31	6.6(b)(v)	121, 122	It is not appropriate that this clause essentially repeats the prudential requirements in clause 6.4(b)(iii). Amend undertaking so that clauses relating to prudential requirements are grouped together.	Clauses relating to Prudential Requirements will be grouped together in a new clause.	
32	6.6	123	The undertaking must recognise the ability of an access seeker to re-apply for access in circumstances where negotiations may cease and an access agreement has not been executed - should reflect the position as outlined in GrainCorp's supplementary submission of 23 June 2009.	Amend so that if, for any reasons, the Negotiation Period ceases and an Access Agreement has not been executed, the Applicant may restart the negotiation process.	GrainCorp considers that the proposed amendment adequately balances the interests of GrainCorp with the interests of Applicants by ensuring that an Applicant is not precluded from re-commencing negotiations, in the event that an Access Agreement was not concluded during the negotiation period.
33	6.7(c) and (d)	120	These clauses should include short, specified timeframes to provide clarity. The references to *as soon as reasonably practicable' and 'reasonable endeavours'* are not appropriate.	Amend to within 10 Business Days.	GrainCorp will include short, specific timeframes for the execution of an Access Agreement. GrainCorp considers that the ACCC's concern that the clause as originally drafted created the potential for delay once the parties essentially reached agreement but prior to execution of an Access Agreement was unwarranted. However, GrainCorp has includes timeframes to eliminate any risk of delay on GrainCorp's behalf prior to execution of an

	Clause	Page ref in Draft Decision	ACCC requirement	GrainCorp proposed changes	Comments
					Access Agreement GrainCorp also notes that it has a strong incentive to execute an Access Agreement as quickly as possible following the conclusion of negotiations to achieve certainty.
34	-		The ACCC requires more clarity in relation to the types of documents which are required to demonstrate that an Applicant meets the Prudential Requirements	See discussion above	See discussion above.
35	6.8		Delete clause 6.8 as it repeats clause 5.4	Delete to reflect ACCC's requirement.	
Negotiate/arbitrate					
36	6.2	126	The ACCC made the following general comments: • The undertaking should clearly specify the circumstances to which the dispute resolution mechanism will apply. • It is appropriate that the dispute resolution provisions of the Undertaking relate only to access negotiations prior to agreement. • ACCC does not understand distinction between discrimination in relation to the terms of the access agreement (which is a breach of the undertaking) and discriminatory	Clause 7.1 will now specify that the Dispute resolution procedure applies to any Dispute arising in relation to: • The negotiation of new Access Agreements • The negotiation of access to Port Terminal Services in addition to Port Terminal Services already the subject of an executed Access Agreement • Negotiations commenced by an Applicant during a limited time period in the order of 30 days from the Undertaking taking effect in relation to a variation to an Access Agreement executed	The changes will make the scope of the undertaking clear and include a "reopening" provision within a limited period for agreements signed before the Undertaking takes effect. Otherwise, GrainCorp is strongly of the view that any disputes relating to a signed access agreement should be dealt with in accordance with the terms of that agreement. See discussion in the covering submission.

	Clause	Page ref in Draft Decision	ACCC requirement	GrainCorp proposed changes	Comments
			conduct in relation to services provided under an executed access agreement, which is covered by the access agreement. • ACCC cannot "*reach a view on whether it is appropriate for disputes in relation to an executed access agreement to be dealt with under that agreement, as such an agreement does not form part of the Undertaking*". • The ACCC can also not reach a view on the appropriateness of clause 7.1(c), which obliges GrainCorp to report 'material disputes' in relation to an Access Agreement to the ACCC, without an indicative access agreement forming part of the proposed undertaking.	before the Undertaking takes effect. • A decision by GrainCorp to unilaterally vary the prices a which Port terminal Services are provided under an executed Access Agreement provided the user issues a Dispute Notice within 30 days of the publication of the variation in accordance with clause 5.6(c)	
37	7.1(a)	121	Reasonable endeavours is not appropriate in light of the timeframes set out in clause 7. Amend "*as soon as is practicable*" to "*in accordance with this clause 7*".	Amend clause to reflect the ACCC's comments	GrainCorp considers that the Applicant's right to refer a dispute to arbitration at any time provides sufficient protection to the Applicant in the event it is not satisfied with the terms of access which GrainCorp offers. However, GrainCorp will amend clause 7.1(a) to remove the reference to reasonable endeavours. Under the amended clause, both parties must act in good faith to settle the Dispute "in

	Clause	Page ref in Draft Decision	ACCC requirement	GrainCorp proposed changes	Comments
					accordance with this clause 7."
38	7.3(a)(ii) and 7.4(c)	121	It is not appropriate to refer to providing a notice to the arbitrator as it appears an arbitrator has not yet been appointed. Delete reference "*and the arbitrator*" in 7.3(a)(ii) and insert '*on appointment of an arbitrator*" in 7.4(c).	Amend to reflect the ACCC's proposal.	
39	7.3(c)	120	The timeframe should be 5 Business Days rather than 10 Business Days.	Amend to 5 Business Days.	
40	7.3(c)	126	It is appropriate for a mediator to be appointed by IAMA but it is also appropriate for the mediator to be appointed by GTA.	A mediator can be appointed by either IAMA or GTA, at GrainCorp's election.	This amendment is in response to submissions by interested parties. GrainCorp considers it appropriate for a mediation to be conducted by a mediator appointed by either IAMA or GTA. Which of these is appropriate will depend on the circumstances of the particular Dispute.
41	7.3(d)	120, 121	Not appropriate to have no specified time period for conduct of mediation. There should be a specified timeframe. It should be clearly specified that clause 7.3(d) applies to formal mediation conducted either by a mediator appointed by agreement between the parties or as appointed by IAMA. Also note comments that interested parties have indicated it would be	No change to be made. The clause provides for formal mediation by a mediator elected by the parties. If the parties cannot agree on a mediator GrainCorp will elect for a mediator to be appointed by either IAMA or GTA.	As either party can refer the matter to arbitration at any time, a specified timeframe would not achieve a different result. GrainCorp considers that an Applicant is adequately protected by its ability to refer a matter to arbitration at any time.

	Clause	Page ref in Draft Decision	ACCC requirement	GrainCorp proposed changes	Comments
			appropriate for the mediator to be appointed by GTA.		
42			Clause is more likely to be appropriate if: the arbitrator can conclusively resolve a dispute in the matter referred to it, rather than requiring recommencement of the negotiations;	New clause will provide that a private arbitrator may conclusively resolve all disputes in a matter referred to it, rather than requiring commencement of negotiations.	GrainCorp considers that enabling an arbitrator to conclusively resolve all disputes in a matter referred to it balances the interests of GrainCorp and the interests of Applicants.
43	7.4	123	Applicant can refer to the arbitrator in all circumstances (as the ACCC considers the Undertaking currently limits the Applicant's ability to refer matters to arbitration).	Add new clause setting out the scope of the dispute resolution rights. Refer to discussion in relation to clause 6.2.	GrainCorp did not intend to restrict the circumstances in which an Applicant can seek arbitration of a Dispute under the Undertaking.
44	7.4(b)	120	GrainCorp should be required to notify the ACCC of any dispute referred to arbitration within a specified timeframe (but see further recommendations on arbitration provisions below which puts ACCC in centre of the process)	Amend so that GrainCorp must notify the ACCC within two Business Days of a Dispute being referred to arbitration.	
45	7.5	126	Clause 7.5 is not appropriate having regard to the public interest. The ACCC should have a role as arbitrator, as it would be better placed than a private arbitrator to arbitrate some matters, particularly due to its experience in economic regulation and in arbitrating matters with public interest considerations. It would also enable the ACCC to maintain an additional degree of oversight in relation to the proposed	The arbitration clause will be amended to provide separate processes for an arbitration to be conducted by either the ACCC or a private arbitrator.	

	Clause	Page ref in Draft Decision	ACCC requirement	GrainCorp proposed changes	Comments
			Undertaking. The Undertaking should be amended so that: ▪ when a dispute is referred to arbitration, it is referred to the ACCC in the first instance ▪ it includes a mechanism by which the ACCC may consider whether or not it wishes to arbitrate the Dispute; and a Dispute may be arbitrated by the ACCC if it so chooses, or for the Dispute to be arbitrated by a private arbitrator if the ACCC so chooses		
46	7.7(a)	127	The clause lacks clarity and to some extent replicates clause 7.7(b). It is appropriate for the arbitration component to include the matters acknowledged in clause 7.7(a)(iv) and (v). The arbitration component should also recognise differences in the circumstances depending on whether the arbitrator is the ACCC or a private arbitrator. The arbitration component should: • require a private arbitrator to keep the ACCC informed of the progress of the arbitration, including timelines and processes for making submissions		GrainCorp will substantially amend the arbitration procedure in the Undertaking, including providing for separate processes depending on whether the ACCC is the arbitrator or a private arbitrator has been appointed.

	Clause	Page ref in Draft Decision	ACCC requirement	GrainCorp proposed changes	Comments
			• allow the ACCC to make submissions in its absolute discretion in relation to an arbitration conducted by a private arbitrator • permit the ACCC to conduct an arbitration in accordance with the provisions of Part IIIA of the TPA if it chooses to be the arbitrator		
47	Schedule 4	121	The Access Application should be amended in light of GrainCorp's further submission	The Access Application specifies that a website should be provided only where available.	
48	**Confidentiality**				
49	6.2, 6.3(b) and 7.8(d)	122, 124	The undertaking should include a general mechanism for dealing with confidential information that covers negotiation, dispute resolution and arbitration (i.e. replace current clauses). Confidentiality clause also needs to contemplate disclosing confidential information to the ACCC and arbitrator.	Provisions relating to confidentiality will be grouped together in clause 7.8.	
50	11.1	124	Definition of Dispute not appropriate. Though it may be appropriate to include a reference to a "bona fide dispute", it is not appropriate for GrainCorp to have discretion to decide what is and is not a bona fide dispute.	No change	However, see discussion above - the Undertaking will now very clearly set out the scope of the dispute resolution clause.

	Clause	Page ref in Draft Decision	ACCC requirement	GrainCorp proposed changes	Comments
Holding over provisions					
51	3.7	128	The clause is inappropriate as it is currently drafted because it applies only to the negotiation of new access agreements and therefore may not apply to agreements for the 09/10 season. The undertaking should include a mechanism that ensures that the negotiate arbitrate process is available to access seekers who wish to negotiate non-standard terms or prices for the 09/10 season. It should include a clause that obliges GrainCorp to negotiate under the negotiate/arbitrate mechanism for variations to Access Agreements.	GrainCorp will include a right to reopen agreements signed before the Undertaking commences for a limited period to address this issue.	See discussion regarding clause 6.2 and covering submission.
52	3.7	128	The clause is also inappropriate because it does not adequately provide holding over arrangements, whereby an access seeker may obtain access to the port terminal services while they are negotiating terms of access.		GrainCorp will address the comments in the ACCC's draft determination by including a new clause enabling Applicants to access Port Terminal Services on the Standard Terms and at the Reference Prices until they execute an Access Agreement or they issue a Dispute Notice. See discussion in the covering submission.
Indicative access agreement					
53		133	An indicative access agreement ("**IAA**") should be included.	Amend to reflect this change.	GrainCorp has agreed to include an Indicative Access Agreement in the

	Clause	Page ref in Draft Decision	ACCC requirement	GrainCorp proposed changes	Comments
					Undertaking. The IAA will form part of the Undertaking and be approved by the ACCC.
54		134	Any variation of the IAA should take place in accordance with the process under section 44ZZA(7) of the TPA.	Amend to reflect this change.	
Non-discrimination					
55	5.4 and 5.5	150	Clauses 5.4. and 5.5 (new clauses 5.5 and 5.6) are not appropriate as drafted. ACCC general comments include: • a non-discrimination clause is appropriate, but the current provisions are not appropriate • legislative requirement to provide "fair access" is equated by the ACCC with non-discriminatory access • ACCC "*recognises that a service provider may engage in price discrimination where it aids efficiency. In fact, price discrimination may be an essential tool to enable a network owner to recover the legitimate costs of its investment*" But price discrimination should "*only occur in specified circumstances, that is, where the cost of providing access to other operators is higher.*	See comments below	See comments below.

	Clause	Page ref in Draft Decision	ACCC requirement	GrainCorp proposed changes	Comments
			Therefore, price discrimination in favour of GrainCorp's trading operations should not occur except to the extent that the cost of provision of the services to other users is higher than provision of the service to itself"		
56	5.4 (new 5.5)	154	Replace with '*In providing access to Port Terminal Services, GrainCorp must not discriminate between different Applicants or Users (including its own Trading Division) in favour of its own Trading Division except to the extent that the cost of providing access to other Applicants or Users is higher* This should remove the need for clause 5.5 (new clause 5.6).	See covering submission..	See covering submission.
57	5.5 (new clause 5.6)	150	See amendment to clause 5.4 (new clause 5.5) 5.5(b), (c), (h), (j), (n), (p), (q), (r), (s), (u) are inappropriate (b) (which deals with costs incurred by the Port Operator) should replace "*all costs*" with "*efficient costs*" (h) the ACCC notes GrainCorp's submission regarding the intended interpretation but does not consider this interpretation is clear from the clause's drafting. It also does not form a view on the interpretation	Deleted clause 5.6.	

	Clause	Page ref in Draft Decision	ACCC requirement	GrainCorp proposed changes	Comments
			put forward in GrainCorp's submission. (u) which deals with credit risk would be more appropriate in clause 6. (a), (d), (e), (f), (g), (i), (k), (l), (m), (o) and (t) - the ACCC states "*it is unclear why GrainCorp considers it is necessary for them to be expressly mentioned…these factors appear to relate to normal commercial reasons for differentiating between services provided to different access seekers…a robust non-discrimination clause aims to prevent discrimination by the bulk handler against access seekers in favour of its affiliated business*" Treating access seekers differently purely because of legitimate commercial factors will not be caught by a properly drafted non-discrimination clause.		
58	8.4	154	Clause 8.4 should not include provisions relating to prioritising vessels and varying cargo assembly plans and all such clauses should be included in the Port Terminal Services Protocols ("**PTSP**")	Delete clause 8.4.	
59	8.5	155	The clause should reflect section 44ZZ of the TPA – Prohibition on hindering access to declared services.	Amend to reflect section 44ZZ of the TPA.	

	Clause	Page ref in Draft Decision	ACCC requirement	GrainCorp proposed changes	Comments
60	Audit procedure	155	The ACCC supports the inclusion of an annual audit procedure of compliance with the Undertaking's non-discrimination clause.	GrainCorp considers an annual audit procedure is unduly onerous.	Please refer to the covering submission.
Ringfencing					
61		163	At pg 164 the ACCC states that ringfencing would not be necessary if the Undertaking contains robust non-discrimination and no hindering access clauses, fair and transparent port terminal protocols and an IAA.	Ringfencing protocols have been removed.	GrainCorp strongly agrees with this finding for the reasons set out in its previous submissions.
Capacity Management					
62	8.2(a)	203	The clause is inappropriate. There should be a provision in the standard terms that obliges GrainCorp to comply with the PTSPs when providing the Port Terminal Services on the terms contained in the PTSPs that are in existence at the date the access undertaking came into operation or, if relevant, as varied from time to time.	Insert new clause requiring GrainCorp to comply with the Port Terminal Services Protocols as varied from time to time.	
63		209	There should be a variation methodology that requires consultation but permits GrainCorp to vary the PTSPs unilaterally. The variation methodology should include: ▪ an adequate consultation	Amend so that: • GrainCorp must prepare proposed changes, circulate those proposals to interested parties, along with an explanation for the amendments. • Interested parties have 10 Business Days to review and respond to the proposals	GrainCorp considers these amendments address the ACCC's requirements.

	Clause	Page ref in Draft Decision	ACCC requirement	GrainCorp proposed changes	Comments
			process (such as the methodology set out on pg 12 of GrainCorp's supplementary submission) where access seekers are given a sufficient degree of notice about amendments, with the PTSPs as varied from time to time being required to be published on its website and provided to the ACCC within 5 days. ▪ in recognition of the fact that parties may not respond to GrainCorp's communications regarding proposed changes, in certain specifically defined circumstances (ie force majeure situations) that are set out clearly in the Undertaking, the amendments may be implemented unilaterally. ▪ a clause requiring GrainCorp to comply with the PTSPs (as amended from time to time).	submitted. • GrainCorp will collate, review and actively consider the responses from interested parties. • GrainCorp will have the right to unilaterally amend the protocols temporarily in cases of force majeure for the period of force majeure.	
64	8.4	210	The ACCC's preliminary view is that it is more likely to be appropriate that the provisions under clause 8.4 are included in the PTSPs. Refer to the non-discrimination section.	Delete	
65		210	The ACCC refers to the inclusion of a provision allowing the ACCC to treat	Amend to reflect ACCC's requirements	

	Clause	Page ref in Draft Decision	ACCC requirement	GrainCorp proposed changes	Comments
			a breach of the amended PTSPs as a breach of the Undertaking.		
66	8.4(b) and (c)	211	The clause should expand on the 'objective commercial criteria'.	The clause has been removed.	
67	8.4(d)(i)	211	The clause is inappropriate because the criteria used and the process to be applied in GrainCorp's assessment of the *'likely availability of sufficient Bulk Wheat'* is unclear.	The clause has been removed.	
68	8.4(d)(ii)(A) and (B)	211	The clauses are inappropriate as the criteria that are within GrainCorp's control or require subjective determinations by GrainCorp when determining whether the objective of minimising demurrage or maximising throughput 'over a given period' is unclear and require further explanation. The 'over a given period' qualifiers should be removed	The clause has been removed.	
69	8.4(d)(iii)		Further explanation should be given of the criteria that are within GrainCorp's control or require subjective determinations by GrainCorp when varying a cargo assembly plan or queuing order.	The clause has been removed.	
70	8.5		The clause is not appropriate. See the non discrimination chapter.	This clause has been amended to reflect the Trade Practices Act.	

	Clause	Page ref in Draft Decision	ACCC requirement	GrainCorp proposed changes	Comments
Other issues					
71	N/A	219	There should be a requirement to publish information about stock held at port. Publication of key port terminal information (such as CNAs) on the shipping stem a short while after its receipt should be required. There should be a requirement to report on a number of service performance levels eg ship rejections, cargo assembly times, port blockouts, overtime charged, demurrage.	GrainCorp will i provide for the publication of information about stock held at port and performance indicators. GrainCorp is unable to report on demurrage as it is not privy to that information.	Refer to the covering submission.

Appendix 2

Correspondence sent to Exporters detailing Provisional Cargo Nomination Application Process

Monday, 13 July 2009

Dear Customer

I am writing to you to clarify the current GrainCorp policy on the receipt of Cargo Nomination Advices (CNA's) for cargos with a laycan after 30th September 2009.

1. Background

GrainCorp's 2009/10 Storage and Handling Agreement and the 2009/10 Bulk Wheat Port Terminal Services Agreement (BWPTSA) are being prepared for distribution to customers by August 7, 2009.

Both of these Agreements will contain Port Terminal Services Protocols (Protocols) that will govern the manner in which GrainCorp receives and assesses CNA's and allocates positions on the GrainCorp shipping stem.

The Wheat Export Marketing Act 2008 (the Act) requires that on or after 1st October 2009 any company accredited as a bulk wheat exporter that also provides port terminal services has to have in place an access Undertaking approved by the ACCC in order to retain that accreditation.

In the lead up to 1st October 2009 and the renewal of bulk wheat accreditations by Wheat Exports Australia, there is a degree of uncertainty over the form that port terminal service agreements will take and how they relate to the proposed Undertaking.

To reduce uncertainty, GrainCorp is providing the following transitional arrangements that will apply to the receipt of CNA's for cargos to be loaded at GrainCorp terminals after 30th September 2009 and will cease on 4.00 PM 9th October 2009.

2. Transitional Arrangements for Post 30th September 2009 CNA's

a. Cargo Nomination Advices for the shipment of regulated and non-regulated grains through GrainCorp port terminals after 30th September 2009 will be received and noted on the shipping stem as **'Provisional' nominations** the business day following receipt.

b. These 'Provisional' nominations will not be processed or assessed under the relevant provisions of the GrainCorp Port Terminal Protocols until an exporter has;

    1. Received confirmation from Wheat Exports Australia that their bulk wheat export accreditation has been granted or renewed and, as the case requires;

        i. Signed a 2009/10 GrainCorp Storage and Handling Agreement for the export of non-regulated grains, or;

        ii. Signed a 2009/10 GrainCorp Bulk Wheat Port Terminal Services Agreement for the export of regulated grain (bulk wheat).

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c. An exporter making a 'Provisional' nomination of a cargo under these transitional arrangements will not be invoiced for the CNA Booking Fee until the relevant Agreement has been signed.

3. Receipt of cargo nominations as 'Provisional' up to 2nd October

The process of accreditation of bulk wheat exporters between now and the beginning of October will mean that some companies receive accreditation before others.

To ensure that all parties are treated fairly and transparently **from the date of this correspondence** to 4.00 pm Friday 2nd October 2009 all cargo nominations for cargos to be shipped post 30th September 2009 received will be considered to be 'Provisional' nominations.

All 'Provisional' nominations will be placed on the GrainCorp shipping stem on the business day following receipt.

4. Assessing 'Provisional' nominations

1. For fairness and transparency, 'Provisional' nominations will be only be assessed between 8.00 AM Monday 5th October 2009 and 4.00 PM Friday 9th October 2009. This will allow all companies submitting nominations prior to 4.00 PM Friday 2nd October to meet the accreditation and agreement criteria listed in 2. b. 1 (above).
2. Exporters that have submitted 'Provisional' nominations before meeting the criteria listed in 2. b. 1 will have to meet that criteria by 4.00 pm Friday 2nd October 2009 to ensure that 'Provisional' cargo nominations can be assessed.
    a. Exporters should forward the following advice to GrainCorp Logistics to support any 'Provisional' nominations as soon as practical;
        i. The date on which they received Bulk Wheat Exporter Accreditation from Wheat Exports Australia; and,
        ii. The date on which they sign either the Storage and Handling Agreement and / or the Bulk Wheat Port Terminal Services Agreement.
3. Any 'Provisional' cargo nomination that is not supported in the abovementioned manner will not be assessed and will be removed from the shipping stem.
4. 'Provisional' nominations will be assessed between 8.00 AM 5th October 2009 and 4.00 PM 9th October 2009 and will be placed on the shipping stem as 'Pending' if they pass the assessment process.
5. Exporters will then have to pay the Booking Fee detailed in the 2009/10 GrainCorp Port Pricing Schedules for 'Pending' cargo nominations in the manner specified in the GrainCorp Port Terminal Protocols[8].
    a. Once the Booking Fee has been paid, the 'Pending' CNA's will be 'Confirmed' on the GrainCorp shipping stem.
6. If the Booking Fee is not paid in the manner specified in the GrainCorp Port Terminal Protocols, 'Pending' nominations will be removed from the GrainCorp shipping stem.
7. In the event that two or more 'Provisional' nominations are made for the same laycan period at a single port, shipping stem priority will be given to the nominations in the chronological order in which they were received by GrainCorp as 'Provisional' nominations.

[8] http://www.graincorp.com.au/prodserv/Ports/Pages/PortTerminalServiceProtocol.aspx

5. Cessation of Transitional Arrangements

These provisional arrangements will cease at 4.00 PM 9th October 2009.

I trust that you will see the transitional arrangement detailed above as a bone fide attempt on the part of GrainCorp to clarify and provide certainty during a period that is unique.

GrainCorp will work with customers during August to ensure that relevant Agreements are signed and in place, and that the transition to the new port terminal access regulations provides little disruption to grain export activities.

Yours sincerely

Bruce Griffin

General Manager, Storage & Logistics