



Australian
Competition &
Consumer
Commission

GrainCorp Operations Limited

Port Terminal Services Access Undertaking

Draft Decision

24 March 2011



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Glossary

2009 Undertaking	Access undertaking for GrainCorp Operations Limited accepted by the ACCC on 29 September 2009
ABARES	Australian Bureau of Agricultural and Resource Economics and Sciences
ACCC	Australian Competition and Consumer Commission
AGEA	Australian Grain Exporters Association
BWPTS Agreement	Bulk Wheat Port Terminal Services Agreement
CBH	Cooperative Bulk Handling Limited
CNA	Cargo Nomination Application
CPI	Consumer Price Index
GrainCorp	GrainCorp Operations Limited
mt	Million tonnes
PC	Productivity Commission
Proposed 2011 Undertaking	Access undertaking received by GrainCorp Operations Limited on 22 September 2010
PTSP	Port Terminal Service Protocols
The Act	<i>Competition and Consumer Act 2010</i> (Cth) (previously the <i>Trade Practices Act 1974</i> (Cth))
Viterra	Viterra Operations Limited
WEA	Wheat Exports Australia
WEMA	<i>Wheat Export Marketing Act 2008</i> (Cth)

1 Executive Summary

This draft decision details the Australian Competition and Consumer Commission's (ACCC's) preliminary view of the proposed Undertaking lodged by GrainCorp Operations Limited (**GrainCorp**) on 22 September 2010 (**Proposed 2011 Undertaking**) for consideration under Division 6 of Part IIIA of the *Competition and Consumer Act 2010* (the *Trade Practices Act 1974* at the time of lodgement) (**the Act**). The Proposed 2011 Undertaking relates to the provision of access to services for the export of bulk wheat at seven grain terminals operated by GrainCorp in Queensland, New South Wales and Victoria. These terminals are:

- **Queensland:** Fisherman Islands, Gladstone and Mackay
- **New South Wales:** Carrington and Port Kembla
- **Victoria:** Geelong and Portland.

GrainCorp has submitted the Proposed 2011 Undertaking to meet the access test provisions of the *Wheat Export Marketing Act 2008* (**WEMA**) required for it to be re-accredited as a bulk wheat exporter from 1 October 2011.

GrainCorp's Proposed 2011 Undertaking is one of four port terminal services access undertakings being, or to be, considered by the ACCC. GrainCorp's is the first undertaking that the ACCC is required to consider in the 2011 round of undertakings. The ACCC has also received undertakings lodged by Viterro Operations Limited (**Viterro**) in relation to its operations in South Australia, and Australian Bulk Alliance (**ABA**) in relation to its operations at the Port of Melbourne in Victoria. A new undertaking is also expected from Co-operative Bulk Holdings (**CBH**) in relation to its operations in Western Australia.

In considering whether to accept an undertaking the ACCC has regard to the matters set out in s.44ZZA(3) of the Act. These include, *inter alia*, the objects of Part IIIA which are to:

- (a) *promote the economically efficient operation of, use of and investment in the infrastructure by which services are provided, thereby promoting effective competition in upstream and downstream markets; and*
- (b) *provide a framework and guiding principles to encourage a consistent approach to access regulation in each industry.*

GrainCorp, Viterro and CBH each has in place an access undertaking accepted by the ACCC in 2009 while ABA is proposing an undertaking to the ACCC for the first time. The ACCC will consider each undertaking on its own merits and notes that, while undertakings accepted by the ACCC from each bulk handling company (BHC) will reflect the particular circumstances of that company, there are certain aspects of the undertakings for which the ACCC will be seeking a consistent approach across the bulk wheat export industry. The ACCC has set out in this document those issues for which a consistent approach across the industry is particularly appropriate.

The ACCC considers that GrainCorp's 2009 Undertaking appears to have worked relatively well and GrainCorp has successfully negotiated access agreements with all

of its customers. No bulk wheat exporter has raised a dispute with the ACCC under the provisions of the 2009 Undertaking. Further, there is evidence that the existence of the dispute resolution provisions has facilitated customer agreements.

It is therefore the preliminary view of the ACCC that it is appropriate to maintain the overall approach to access provision. However, the ACCC considers that there are a number of areas where amendments to the Undertaking are required. GrainCorp has provided a draft revision of the Proposed 2011 Undertaking (**draft revision**) that appears to address many of these concerns. The ACCC welcomes comment on the proposed changes. In addition, one outstanding issue about which the ACCC has some concern and welcomes comments is the issue of capacity management arrangements.

The ACCC seeks comments from stakeholders by 5:00pm on **Friday, 22 April 2011**, after which the ACCC will form a final decision. The ACCC seeks comments on GrainCorp's proposed changes to the Undertaking and the issue of capacity management arrangements in particular, but welcomes comments on any other aspect of the proposed Undertaking.

1.1 The 2009 Undertaking

GrainCorp currently has in place a two-year Undertaking accepted by the ACCC in September 2009 (**2009 Undertaking**). The 2009 Undertaking provides a publish-negotiate-arbitrate approach to access provision by GrainCorp. The ACCC considered this approach to be relatively light-handed but appropriate at the time the decision to accept was made in September 2009.

In forming this view, the ACCC noted in its Decision to Accept¹ that the approach was supported by robust non-discrimination, no hindering access and continuous disclosure and reporting provisions. The transitional phase of the bulk wheat export industry at that time and the two-year term of the 2009 Undertaking were also relevant to the ACCC's view on the appropriateness of the 2009 Undertaking.

However, the ACCC noted in its Decision to Accept that the continuing appropriateness of the approach of the 2009 Undertaking would be reviewed when considering subsequent undertakings from GrainCorp. In particular the ACCC flagged in the 2009 Decision to Accept that future assessment would be made regarding:

- whether the publish-negotiate-arbitrate approach to access provision continues to be appropriate, or whether it is more appropriate to move to an ex ante price determination approach
- if the publish-negotiate-arbitrate approach to access provision is retained, whether it should be further strengthened by ring-fencing rules

¹ ACCC, *GrainCorp Operations Limited Port Terminal Services Access Undertaking decision to Accept*, 29 September 2009 p.223.

- whether GrainCorp's (first come, first served) capacity allocation approach is appropriate or whether alternative arrangements should be required for future undertakings
- whether the degree of flexibility afforded to GrainCorp by the 2009 Undertaking to vary its capacity management arrangements by varying its port terminal services protocols (**PTSP**) is appropriate.

1.2 Proposed 2011 Undertaking

GrainCorp's Proposed 2011 Undertaking continues the general approach of the 2009 Undertaking. Significant differences between the 2009 Undertaking and the Proposed 2011 Undertaking are:

- a three-year term (subject to commencement of publish-negotiate-arbitrate and dispute resolution provisions commencing from 1 August 2011)
- the standard terms available to access seekers as set out in the Indicative Access Agreement in (Schedule 5 to) the Undertaking have been updated to reflect the agreements negotiated by GrainCorp with customers in March 2010
- the PTSP have been updated in line with the variation process undertaken in April-May 2010.

The ACCC released an issues paper on GrainCorp's Proposed 2011 Undertaking on 7 October 2010. The ACCC invited public submissions by 4 November 2011 and received three submissions. While views provided by these stakeholders differed, the ACCC notes in particular comments received that:

- initial resistance on GrainCorp's part to meaningful negotiation was overcome
- capacity management arrangements had worked but were (at that time) yet to be tested under conditions of high demand
- market participants should be able to trade booked slots.

1.3 ACCC Draft decision

The ACCC has formed a preliminary view regarding the overall approach and specific provisions of the Proposed 2011 Undertaking. This preliminary view has been formed having regard to the matters specified under section 44ZZA(3) of the Act, taking into account the wider context within which GrainCorp has submitted the Proposed 2011 Undertaking (which are detailed in the Legislative Framework set out in Appendix 2 to this draft decision).

The ACCC notes in this regard that the matters specified under section 44ZZA(3) of the Act to which it may have regard when deciding the appropriateness of an undertaking include the objects of Part IIIA of the Act which are, in summary, to promote the economically efficient operation of and use of the infrastructure and encourage a consistent approach to access regulation in each industry.

In addition to the ACCC's preliminary views regarding the key issues for the Proposed 2011 Undertaking discussed in the executive summary, there are a number of further, minor issues dealt with in the draft decision.

1.3.1 Overall approach

The ACCC has reached a preliminary view that the overall approach to access provision as provided in the publish-negotiate-arbitrate arrangements of the Proposed 2011 Undertaking is appropriate and that prescriptive ex ante price regulation is not necessary in the case of GrainCorp's Proposed 2011 Undertaking. Further, it is the preliminary view of the ACCC that it is not appropriate to strengthen the publish-negotiate-arbitrate arrangements with ring-fencing rules at this time for GrainCorp. The experience during the term of GrainCorp's 2009 Undertaking and the ACCC's reasons for reaching these preliminary views is set out in chapter 3 of this draft decision.

The ACCC also is of the preliminary view that the three-year term of the Proposed 2011 Undertaking is appropriate.

Notwithstanding its preliminary view that the overall publish-negotiate-arbitrate approach of the Proposed 2011 Undertaking to access provision is appropriate, the ACCC is of the view that there are aspects of the approach that are not appropriate. GrainCorp has addressed most of these issues with its draft revision. These issues are discussed in the next two sections.

1.3.2 Publish-negotiate-arbitrate

The ACCC has reviewed the operation of the publish-negotiate-arbitrate provisions of the Proposed 2011 Undertaking and considers that, on balance, they have been effective in providing the transparency necessary for access seekers to obtain fair access to GrainCorp's port terminal services. It is therefore the ACCC's preliminary view that more prescriptive provisions, such as pricing or ring-fencing rules are not required to be provided if certain amendments are made. Those amendments include a requirement for GrainCorp to provide to the ACCC a copy of the port terminal services access undertaking entered into with its own trading division.

1.3.3 Capacity management

The ACCC notes that different arrangements for the allocation of capacity exist across the ports operated by the different BHC. In particular, an auction system operates in WA, whereas first come, first served arrangements operate along the east coast and in SA. In considering the appropriateness of the capacity arrangements operated by GrainCorp (a first come, first served system), the ACCC has considered the effectiveness of existing or past arrangements for the port facilities operated by GrainCorp. While the practice by other operators in other markets may provide useful intelligence in forming a view as to what is appropriate in particular circumstances, it is the individual circumstances themselves which are of most importance.

It is the preliminary view of the ACCC that the arrangements for allocating shipping slots established in GrainCorp's 2009 Undertaking has provided an appropriate basis for management of capacity at GrainCorp's port terminals. In particular, the ACCC notes that the increased flexibility available for shippers to change booking nominations allowed in GrainCorp's PTSP enables shippers an ability to respond to

changing circumstances. The ACCC considers that these arrangements promote economic efficiency at times when capacity at the port terminals exceeds demand.

However, it is also the ACCC's preliminary view that these arrangements may not result in economically efficient outcomes at peak times. In particular, when port terminal services are fully utilised the flexibility allowed in GrainCorp's protocols for operators to change shipping arrangements for a booked slot is not available in practice.

The ACCC is of the preliminary view that greater efficiency in the use of port terminal infrastructure may be achieved if exporters are able to transfer slots booked on the GrainCorp shipping stem. The ACCC seeks comment on this preliminary view, in particular in relation to the issues set out in the following box. These issues are discussed in chapter 5.

Transfer of booked slots—issues for comment

The ACCC seeks comments and supporting information (such as experience in overseas markets) on issues relevant to arrangements for transfer of slots, including the following:

- Possible benefits and risks of allowing transfers:
 - what are the potential gains arising from allowing transfers
 - do other mechanisms obviate the need for the transfer of slots
 - would such transfers lead to significantly greater speculation on the shipping stem than occurs already
 - would such speculation give rise to different or more adverse outcomes than those arising from the over booking that has occurred in recent seasons
- Provisions for transfer of slots:
 - specification of the rights/obligations that should be the subject of a transfer (eg as confirmed on the shipping stem at the time of transfer)
 - conditions to be met by the transferor and transferee
 - GrainCorp's role and rights and obligations
 - implications for GrainCorp's standard terms and conditions, PTSP and indicative access agreement
 - other necessary limitations or conditions on the transfer

1.3.4 Variation of protocols

Each of the 2009 undertakings accepted by the ACCC applying to GrainCorp, CBH and Viterra contain a version of port loading protocols, with a process for their variation. These differ to some extent between the different undertakings. Each operator has varied its protocols since acceptance by the ACCC and different issues have arisen with these variation processes.

In assessing the PTSP submitted by GrainCorp and the PTSP variation process, the ACCC has taken into consideration the experience of each of the bulk handlers' variation processes, because it considers that a consistent approach across the industry is appropriate. In chapter 5 of this draft decision is set out the minimum standards the ACCC considers necessary for an efficient, meaningful and transparent variation process. Application of these standards to GrainCorp's Proposed 2011 Undertaking requires the following changes, for which GrainCorp has proposed drafting in its draft revision:

- that the PTSP must be, and continue to be, a comprehensive statement of GrainCorp's policies and procedures for managing demand for the port terminal service
- inclusion of further provisions regarding GrainCorp's consultation process when varying its PTSP
- inclusion of a provision for the ACCC to object to a protocol variation in circumstances where:
 - the proposed variation is material; and
 - the proposed variation gives rise to concerns under either the anti-discrimination (clause 5.5) and/or the no hindering access (clause 9.4 in the Proposed 2011 Undertaking) provisions of the undertaking.

1.3.5 ACCC information gathering power

The ACCC is of the preliminary view that an information gathering power is necessary to enable it to properly discharge the functions required by the Proposed 2011 Undertaking and this is an issue for which the ACCC considers a consistent approach across the industry is appropriate. GrainCorp has proposed drafting in its draft revision to address this issue.

1.4 Revised Proposed 2011 Undertaking

The ACCC has conveyed the preliminary views set out in this draft decision to GrainCorp and GrainCorp has responded by providing a draft revision of the Proposed 2011 Undertaking (**draft revision**). The draft revision addresses most aspects of the Proposed 2011 Undertaking about which the ACCC is of the view that the undertaking is not appropriate in its current form. The outstanding issue is the that of capacity management.

The mark up of the draft revision, showing GrainCorp's proposed revisions to the lodged version of the Proposed 2011 Undertaking, is at Annexure A to this draft decision.

1.5 Stakeholder views

The ACCC welcomes comments on the preliminary views in this Draft Decision regarding the Proposed 2011 Undertaking lodged by GrainCorp on 22 September 2010 (as amended on 31 January 2011) and the response of GrainCorp as reflected in

the draft revision of 11 March 2011. The ACCC also welcomes comments on any other aspect of the proposed Undertaking.

The table below lists the issues which the ACCC considers to be necessary changes to the Proposed 2011 Undertaking, together with the drafting proposed by GrainCorp and the page references where the issues is discussed in this document.

Issue and GrainCorp's amendments to the Proposed 2011 Undertaking	Draft Decision reference
<p>Staggered commencement of Proposed 2011 Undertaking and transition between undertakings.</p> <p>GrainCorp proposes to amend clause 4.1 to state that the Proposed 2011 Undertaking applies to the negotiation of Access Agreements to be entered into during 1 October 2011 to 30 September 2014.</p>	Page 23
<p>Provision to ACCC of the terms and conditions on which GrainCorp provides port terminal services to its own trading arm.</p> <p>GrainCorp proposes to amend clause 5.5 to provide that within five business days of executing an Access Agreement with its own trading arm, it must provide the ACCC with a copy of the agreement.</p>	Page 34
<p>Capacity management – transfer of booked slots</p>	Pages 53-56
<p>Process for varying the PTSP</p> <p>GrainCorp proposes to amend clause 9.3, which sets out the procedure for varying the PTSP in the following terms:</p> <p>GrainCorp is required to consider responses to consultation on the variation in good faith. GrainCorp is required to publish written submissions within five business days of receipt. GrainCorp is not required to publish a submission if it is 'offensive, abusive or inappropriate for publication', however such submissions are to be provided to the ACCC within five business days.</p> <p>During the consultation period, GrainCorp may circulate a further variation to take into account feedback from interested parties. This does not require restarting the variation process.</p> <p>The variation must be published at least 20 business days prior to becoming effective.</p>	Pages 58-62
<p>Power to issue notice of objection to a proposed PTSP variation notice.</p> <p>GrainCorp proposes a new clause 9.4, which provides that the ACCC may object to a proposed variation of the PTSP.</p> <p>The ACCC must publish an objection notice at least 10 business days prior to the date the proposed variation is to become effective.</p> <p>At least five business days before issuing a notice, the ACCC must provide GrainCorp with a draft objection notice.</p> <p>The ACCC must have regard to whether the proposed variation is material and amounts to a breach of the anti-discrimination or no hindering provisions</p>	Pages 62-65

Issue and GrainCorp's amendments to the Proposed 2011 Undertaking	Draft Decision reference
<p>of the undertaking.</p> <p>The ACCC may withdraw a notice.</p> <p>Within three business days of the notice, GrainCorp will withdraw the variation and either commence a new variation process or confirm the existing PTSP.</p>	
<p>Information gathering power</p> <p>GrainCorp proposes adding a new clause 5.7 which provides that the ACCC may request that GrainCorp provide it with information or documents, which are required by the ACCC for it to exercise powers or functions. GrainCorp must provide the requested information within the timeframe given in the notice, being not less than 14 days.</p>	Pages 65-67
<p>Authorisation power</p> <p>GrainCorp proposes a new provision in clause 1.1 that the ACCC may authorise the RAPM Committee or a member of the ACCC to exercise the ACCC's decision making functions under the undertaking.</p>	Page 65

Submissions must be forwarded by 5:00pm on **Friday, 22 April 2011** to:

Mr Anthony Wing
General Manager
Transport and General Prices Oversight
ACCC
GPO Box 520
MELBOURNE VIC 3001

Email: transport@accc.gov.au

2 Procedural overview

2.1 GrainCorp's Proposed 2011 Undertaking

Under Division 6 of Part IIIA of the *Competition and Consumer Act 2010* (previously the *Trade Practices Act 1974*) (**the Act**), the Australian Competition and Consumer Commission (**ACCC**) may accept an undertaking from a person who is, or expects to be, the provider of a service, in connection with the provision of access to that service.

The ACCC received an access undertaking (the Proposed 2011 Undertaking) from GrainCorp Operations Limited (GrainCorp) on 22 September 2010 for consideration under Division 6 of Part IIIA of the Act. On 31 January 2011 GrainCorp submitted an amendment to the Proposed 2011 Undertaking lodged on 22 September 2010. The amendment made technical changes necessitated by the change in title of the Act and to avoid provide for the possibility that a new Undertaking may not be required if the legislative framework changes. The Proposed 2011 Undertaking being considered by the ACCC is the Proposed 2011 Undertaking (as revised on 31 January 2011).

The Proposed 2011 Undertaking relates to the provision of access to services for the export of bulk wheat at grain port terminals operated by GrainCorp in Queensland, New South Wales and Victoria.

GrainCorp has submitted the Proposed 2011 Undertaking in accordance with legislative requirements under the *Wheat Export Marketing Act 2008* (**WEMA**), further details of which are set out below in the Legislative Framework appendix.

2.2 Submissions from GrainCorp

GrainCorp has provided the following information in respect of the Proposed 2011 Undertaking:

- initial supporting information provided on 22 September 2010
- submission in response to third party submissions

In addition, GrainCorp has relied on information provided in its submission in support of the 2009 Undertaking lodged on 15 April 2009.

2.3 Draft revision if Proposed 2011 Undertaking

The ACCC has conveyed the preliminary views set out in this draft decision to GrainCorp and GrainCorp has responded by providing a draft revision of the Proposed 2011 Undertaking (**draft revision**). The draft revision addresses most aspects of the Proposed 2011 Undertaking which the ACCC considers are not appropriate in their current form.

The mark up of the draft revision, showing GrainCorp's proposed revisions to the lodged version of the Proposed 2011 Undertaking, is at Annexure A to this draft decision.

2.4 Public consultation process to date

The Act provides that the ACCC may invite public submissions on an access undertaking application.²

The ACCC published an Issues Paper on 7 October 2010 inviting submissions on the proposed Undertaking. The ACCC directly advised approximately 80 stakeholders, including accredited wheat exporters, grain growers, farming organisations and state regulatory bodies of the public consultation process.

2.4.1 Submissions received

The ACCC received public submissions from the following parties in relation to the proposed GrainCorp Undertaking:

Australian Grain Exporters Association (AGEA) – 10 November 2010

AGEA is a representative body of exporters of Australian grain, formed in 1980 to promote their philosophy that competition, represented by open and contestable markets, is the most effective and efficient means of delivering the maximum benefits to the grains industry, and the community as a whole.

Members of the AGEA are active participants in both domestic and export grain markets, with a particular focus on providing efficient access to international markets. Members of AGEA are Bunge Global Markets Australia Pty Ltd, Cargill Australia Limited, Louis Dreyfus Australia Pty Ltd, Glencore Grain Pty Ltd, Noble Grain Australia Pty Ltd, Goodman Fielder Limited, Emerald Pty Ltd and Elders Toepfer Grain Pty Ltd.³

AWB (Australia) Limited – 12 November 2010

AWB is an accredited wheat exporter under the WEMA.

Mr Timothy Bush – 4 November 2010

Mr Bush has been actively involved in the wheat export supply-chain.

2.5 Confidential submissions

The ACCC notes that it received a confidential submission from GrainCorp but that no third party made a confidential submission. In this regard, the ACCC notes that a party may request that the ACCC not make the whole or part of a submission available for confidentiality reasons.⁴ The ACCC acknowledges the need for a balance between allowing parties to submit relevant information on a confidential basis, where that information is commercially sensitive, and the need to allow parties whose legitimate interests may be adversely affected by an administrative decision the opportunity to respond to relevant material. In the current context, the ACCC considers that this balance is adequately found by giving weight to comments made in public submissions, and considering comments made in confidential submissions only

² *Competition and Consumer Act 2010* s 44ZZBD(1).

³ <http://www.agea.com.au/>

⁴ *Competition and Consumer Act 2010* s 44ZZBD.

where such comments are relevant, determinative of a particular issue and contribute considerations not already dealt with in a public submission. In this regard, limited weight has been given to confidential submissions made on this process.

2.6 Indicative timeline

Under the Act, the ACCC must make a decision on an access undertaking application within 180 days of the day it received the application. As noted above, the ACCC is considering GrainCorp's Proposed 2011 Undertaking, as revised on 31 January 2011 as if it were received on 22 September 2010.

Stop clock provisions apply for the calculation of the 180 days including when:

- a notice is given under subsection 44ZZBCA(1) requesting information in relation to the application
- a notice is published under subsection 44ZZBD(1) inviting public submissions in relation to the application
- an agreement in writing between the ACCC and the provider of the service is made in relation to the application.

The clock has now stopped twice and the statutory time limit for the ACCC decision has been extended by:

- 29 days for consultation on the ACCC Issues Paper
- 29 days for consultation on this Draft Decision.

The statutory time limit for the ACCC decision now expires on 19 May 2011.

GrainCorp currently has a two-year Undertaking accepted by the ACCC on 24 September 2009 (the 2009 Undertaking). In order to meet the accreditation requirements of the WEMA, GrainCorp must have in place an access undertaking accepted by the ACCC from 1 October 2011, when the 2009 Undertaking expires.

After considering submissions received on this draft decision, the ACCC proposes to issue an amendment notice pursuant to s.44ZZAAA of the Act to GrainCorp. (Information regarding the use of amendment notices is provided in Appendix 2.)

The ACCC expects that, following the response to the amendment notice by GrainCorp, it will release a finalised decision by 18 May 2011.

2.7 Consultation on the draft decision

The ACCC invites submissions from interested parties on its draft decision regarding GrainCorp's Proposed 2011 Undertaking and, in particular, seeks comments on aspects of its preliminary view regarding allowing exporters to transfer slots. Aspects of this issue which stakeholders may wish to consider when making comments are provided in the following box.

Transfer of booked slots—issues for comment

The ACCC seeks comments and supporting information (such as experience in overseas markets) on issues relevant to arrangements for transfer of slots, including the following:

- Possible benefits and risks of allowing transfers:
 - what are the potential gains arising from allowing transfers
 - do other mechanisms obviate the need for the transfer of slots
 - would such transfers lead to significantly greater speculation on the shipping stems than occurs already
 - would such speculation give rise to different or more adverse outcomes than those arising from the over booking that has occurred in recent seasons
- Provisions for transfer of slots
 - specification of the rights/obligations that are the subject of a transfer (eg as confirmed on the shipping stem at the time of transfer)
 - conditions to be met by the transferor and transferee
 - GrainCorp's role and rights and obligations
 - implications for GrainCorp's standard terms and conditions, PTSP and indicative access agreement
 - other limitations or conditions on the transfer

2.7.1 Making a submission

Submissions must be forwarded by 5:00pm on **Friday, 22 April 2011** to:

Mr Anthony Wing
General Manager
Transport and General Prices Oversight
ACCC
GPO Box 520
MELBOURNE VIC 3001

Email: transport@accc.gov.au

Submissions are to be sent preferably by email, in Microsoft Word or other text readable document form.

2.7.2 Confidentiality of submissions

As indicated above, the ACCC acknowledges the need for a balance between permitting the provision to a regulator of relevant information on a confidential basis, where that information is commercially sensitive or otherwise confidential, and the

need to allow parties whose legitimate interests are likely to be affected by an administrative decision the opportunity to respond to relevant material.

However, the ACCC strongly encourages parties who intend to provide submissions on the ACCC's draft decision to make public submissions. Unless a submission is marked confidential, it will be made available to any person or organisation on request. The sections of submissions that are confidential should be clearly identified.

2.8 Further information

The Proposed 2011 GrainCorp Undertaking and other relevant materials, including supporting submissions from GrainCorp and public submissions by interested parties, are available on the ACCC's website at www.accc.gov.au by following the links to 'For regulated industries' and 'Wheat Export,' or via the following link: [Wheat Exports: Port Terminal Services Access Undertakings](#).

If you have any queries in relation to the ACCC's process, or to any matters raised in this draft decision, please contact:

Ms Lyn Camilleri
Director
Transport & General Prices Oversight
Ph: (03) 9290-1973
Email: lyn.camilleri@accc.gov.au
Fax: (03) 9663-3699

3 Overall approach of Proposed 2011 Undertaking

3.1 GrainCorp's Proposed 2011 Undertaking

The Proposed 2011 Undertaking relates to the provision of access to services for the export of bulk wheat at seven grain terminals operated by GrainCorp in Queensland, New South Wales and Victoria. These terminals are:

- **Queensland:** Fisherman Island, Gladstone and Mackay;
- **New South Wales:** Carrington and Port Kembla;
- **Victoria:** Geelong and Portland.

GrainCorp's Proposed 2011 Undertaking rolls forward its current Undertaking (the 2009 Undertaking). Consistent with this approach, the Proposed 2011 Undertaking makes no changes to the 2009 Undertaking other than to:

- establish the term of the 2011 Undertaking to start at the expiration of the 2009 Undertaking and run to 30 September 2014
- incorporate changes to the Standard Terms as set out in the Indicative Access Agreement in line with the Bulk Wheat Port Terminal Services Agreements (**BWPTS Agreements**) entered into with customers in March 2010 under the 2009 Undertaking
- incorporate the revised PTSP as varied in May 2010
- make technical changes to reflect the change in the name of the *Trade Practices Act 1974* to the *Competition and Consumer Act 2010* (**the Act**) and to enable the Proposed 2011 Undertaking to remain in force if changes are made to the current legislative framework (outlined in Appendix 1).

This chapter considers the general approach adopted in the Proposed 2011 Undertaking, including the proposed three-year term and the appropriateness of maintaining the relatively light-handed approach to access provision established in the 2009 Undertaking.

Following chapters consider in detail the access arrangements (chapter 4) and capacity management (chapter 5) of the Proposed 2011 Undertaking.

3.1.1 Approach to access provision

The Proposed 2011 Undertaking is based on continuing the publish-negotiate-arbitrate model of access provision established in the 2009 Undertaking. This approach (details of which are set out in chapter 4) in summary provides:

- an overarching provision—supported by ACCC audit powers—that, in providing access, GrainCorp does not discriminate in favour of its own trading arm (subclause 5.5)
- publication of standard terms and conditions of access (clause 5)
- access seeker may negotiate non-standard price and non-price terms (clause 6)
- dispute resolution arrangements that provide for both formal and informal mediation and referral to arbitration by the ACCC or an independent arbitrator (clause 7)
- publication of information to increase transparency and assist access seekers in their negotiations (clauses 10 and 11).

The publish-negotiate-arbitrate model of access provision is one of a number of possible approaches to ensuring that third parties obtain access to port terminal services on a non-discriminatory basis. More prescriptive alternatives include formal ring-fencing arrangements and ex ante regulation of prices.

3.1.2 Three-year term and commencement

GrainCorp's Proposed 2011 Undertaking is to take effect from the expiration of the 2009 Undertaking on 30 September 2011 and run for three years to 30 September 2014.

The negotiate-arbitrate provisions of the 2009 Undertaking and the Proposed 2011 Undertaking apply only to negotiations regarding agreements entered into during their respective terms. To enable it to commence negotiation of access agreements that will have effect after 1 October 2011 prior to that date, GrainCorp is proposing a transition from the 2009 Undertaking to the Proposed 2011 Undertaking. The transition is achieved by providing a staggered start for the Proposed 2011 Undertaking as follows:

- all clauses relating to publish-negotiate-arbitrate provisions, including dispute resolution, commence from 1 August 2011.
- other clauses of the Proposed 2011 Undertaking to commence on 1 October 2011. These are subclause 5.5(b), 5.5(c), 9, 10, 11 and 12 which deal with:
 - the ACCC ability to have GrainCorp's compliance with the non-discriminatory access provisions audited
 - capacity management, including continuous disclosure rules, the PTSP, variation of the PTSP and no hindering access
 - publication of other port and vessel booking information
 - report on performance indicators.

3.1.3 Other establishment provisions of the Proposed 2011 Undertaking

Other changes to establishment provisions of the 2009 Undertaking contained in the Proposed 2011 Undertaking are set out in this section.

3.1.3.1 Background and objectives

The Proposed 2011 Undertaking includes changes in its background and objectives (clause 1) from those of the 2009 Undertaking to reflect the title change as of 1 January 2011 from the *Trade Practices Act 1974* to the *Competition and Consumer Act 2010*.

3.1.3.2 Variation and scope

The provisions in clause 3 that relate to early withdrawal and variation of the Proposed 2011 Undertaking and in subclause 4.2 that give the meaning of the services to which it applies have been changed from the provisions of the 2009 Undertaking. These changes recognise that the requirement for GrainCorp to have in place an access undertaking under Part IIIA of the Act may continue to apply:

- subject of different or amended legislation
- to access seekers that are not subject to a legislative requirement to be accredited.

Changes with a similar effect have been made elsewhere in the Proposed 2011 Undertaking as required (subclauses 6.3(b)(ii), 7.6, 7.7, 9.1 and 13.1).

3.2 GrainCorp and third party submissions

3.2.1 GrainCorp's submission in support of the Proposed 2011 Undertaking (22 September 2010)

GrainCorp states that it submits its Proposed 2011 Undertaking for approval by the ACCC under section 44ZZA of the Act in order to be re-accredited as a wheat exporter under the *Wheat Export Marketing Act 2008* (WEMA).

GrainCorp submits that its Proposed 2011 Undertaking should roll forward its 2009 Undertaking for a three-year period commencing 1 October 2011. GrainCorp supports this proposal in the following terms:

... in the context of an increasingly competitive industry, the Current [2009] Undertaking has:

- Provided an appropriate level of regulation over GrainCorp's bulk wheat export terminals in the context of the transition away from the AWB single desk monopoly;
- Ensured fair and transparent third party access to GrainCorp's port terminals in eastern Australia, evidenced by GrainCorp successfully entering into two year agreements for port access with all its customers under the framework of the Current [2009] Undertaking;
- Allowed GrainCorp sufficient flexibility in its port operations to meet the demands of its customers; and

- Successfully achieved the objectives of Part IIIA of the TPA [Act].⁵

GrainCorp also notes that it:

... negotiated in good faith with all of its customers as required by the Current [2009] Undertaking. The original negotiation period was scheduled to expire on 8 January 2010. GrainCorp extended this negotiation period for the benefit of its customers on four separate occasions between 8 January 2010 and 24 February 2010.

...

In March 2010, following extensive negotiations with customers, GrainCorp entered into final Bulk Wheat Port Terminal Services (BWPTS) Agreements with all customers.

...

GrainCorp made significant pricing and contract concessions for the benefit of all grain exporters.⁶

With respect to the term of the Proposed 2011 Undertaking, GrainCorp submits that:

The two year term of the Current [2009] Undertaking was appropriate given the transitional nature of the wheat industry at that time. However, on the basis of the previous export season and evidence that the Current [2009] Undertaking was effective, a longer term is now appropriate. The proposed term also aligns with the 3 year accreditation period WEA granted to all non bulk handlers.⁷

With respect to the staggered start of the Proposed 2011 Undertaking—that results in a term of three years and two months for the provisions which relate to the negotiation process and the dispute resolution process and a term of three years for all remaining provisions—GrainCorp submits that this is:

to ensure the negotiations with customers for access to port terminal services in the 2011/2012 season are subject to the Proposed [2011] Undertaking, but ... avoid overlap between the Current [2009] undertaking and the proposed [2011] Undertaking.⁸

3.2.2 Australian Grain Exporters Association (AGEA) submission

In its submission to the ACCC issues paper AGEA makes the following statement on the approach to pricing:

AGEA believes that the ‘publish and negotiate’ approach has worked in relation to the port terminal services agreements offered by GrainCorp.⁹

⁵ GrainCorp Operations Limited, *Submission to the Australian Competition & consumer Commission 2011 Port Terminal Services Undertaking*, 22 September 2010, p. 1.

⁶ GrainCorp Operations Limited, *Submission to the Australian Competition & consumer Commission 2011 Port Terminal Services Undertaking*, 22 September 2010, p. 7.

⁷ GrainCorp Operations Limited, *Submission to the Australian Competition & consumer Commission 2011 Port Terminal Services Undertaking*, 22 September 2010, p. 19.

⁸ GrainCorp Operations Limited, *Submission to the Australian Competition & consumer Commission 2011 Port Terminal Services Undertaking*, 22 September 2010, p. 2.

⁹ Australian Grain Exporters Association, *Submission to ACCC Issues Paper*, 10 November 2010, p. 1.

AGEA further states:

The measures have provided a framework that has allowed access seekers to commercially negotiate with GrainCorp. There were some initial challenges in achieving an agreement that was satisfactory to users as GrainCorp adopted a 'no-negotiate' approach', however this position changed in early 2010, and negotiation was entered into. AGEA understands that all port users have now signed agreements with GrainCorp.¹⁰

AGEA also states in its submission that it 'has no issues with the [three year] term of the Proposed Undertaking as put forward by GrainCorp'.¹¹

3.2.3 AWB (Australia) Limited submission

AWB raises a number of specific issues in relation to the terms on which it obtains access to GrainCorp's port terminal services but does not comment more generally on the success of the 2009 Undertaking approach, or the appropriateness of continuing that approach in the 2011 Undertaking.

3.2.4 Timothy Bush submission

Mr Bush states in his submission to the ACCC issues paper that he is not a direct stakeholder and he does not make submissions on GrainCorp's Proposed 2011 Undertaking.

3.2.5 GrainCorp submission in response to third party submissions

GrainCorp provided a submission responding to certain of the views expressed in the submissions made by interested parties. In that response it notes that AGEA's submission:

... clearly indicates that GrainCorp's efforts to build constructive commercial relationships with [AGEA's] members, who are both consumers of GrainCorp's grain handling services, and grain trading competitors, have been successful.¹²

3.3 ACCC view

The legislative framework governing the requirement for GrainCorp to pass an access test under the WEMA, and for the ACCC to consider the Proposed 2011 Undertaking under Part IIIA of the Act, are set out in Appendix 2 to this Draft Decision.

The ACCC notes that the Productivity Commission (PC) completed an inquiry into wheat export marketing arrangements and reported to the Government on 1 July 2010. The Government has released the PC report but has not, at the time of the release of this Draft Decision, provided its response to the PC's findings and recommendations.

The PC has recommended the following:

¹⁰ Australian Grain Exporters Association, *Submission to ACCC Issues Paper*, 10 November 2010, p. 1.

¹¹ Australian Grain Exporters Association, *Submission to ACCC Issues Paper*, 10 November 2010, p. 2.

¹² GrainCorp Operations Limited, *Response to third party submissions*, 13 December 2010, p. 1.

- the requirement for port terminal operators to pass access test as a condition for exporting bulk wheat should remain in effect until 30 September 2014 when it should be abolished
- the responsibility for determining if the access test is met should rest solely with the ACCC beyond 30 September 2011
- the Wheat Export Accreditation Scheme should be abolished on 30 September 2011.

While recognising that there may be future changes to the legislative framework, the ACCC notes that this Draft Decision is made in accordance with the current arrangements.

3.3.1 Overall approach to access provision

It is the preliminary view of the ACCC that the publish-negotiate-arbitrate model of access provision, as established in each of the 2009 Undertakings submitted by the three bulk wheat handlers is relatively light handed compared with alternative more prescriptive approaches that impose ring-fencing rules or an ex ante price regulation.

In its further draft decision of 23 September 2009, the ACCC noted the reasons it considered that the publish-negotiate-arbitrate, rather than an ex ante regulated price approach, was likely to be appropriate for the 2009 Undertaking at that time. The ACCC noted specific relevant features of the industry at that time that were relevant to its view on the appropriateness of the 2009 Undertaking.

In particular, the ACCC noted the transitional state of the bulk wheat export industry at that time and acknowledged that there is a risk that regulation in those circumstances that is not appropriate may distort the effective development of the industry. The ACCC considered this risk to be particularly pertinent to the regulation of prices and was mindful that setting regulated prices at that time may have unnecessarily constrained the ability of the industry to develop and effectively respond to changing circumstances. As the ACCC noted in its further draft decision, such an outcome would not be in the public interest.¹³

The ACCC view on the appropriateness of the publish-negotiate-arbitrate approach at that time was contingent on the Undertaking being certain and clear and providing fair and transparent access to access seekers.

However, the ACCC also emphasised that in its further draft decision that an absence of ex ante regulation of prices for port terminal services is not likely to be appropriate in all circumstances. Further, the ACCC expressly recognised

... the possibility that ex ante price regulation may be appropriate for port terminal services in certain circumstances, and takes no view on what may be appropriate in relation to any

¹³ ACCC, *GrainCorp Operations Limited Port Terminal Services Access Undertaking Further Draft Decision*, 23 September 2009, p. 142.

subsequent undertaking proposed by GrainCorp following the expiry of the current [2009] Undertaking.¹⁴

In its 2009 Further Draft Decision, the ACCC also noted the possible use of ring-fencing as a tool to ensure against anti-competitive discrimination. As it did in regard to ex ante price regulation, the ACCC took the view in 2009 that, in the circumstances of that time, ring-fencing was not appropriate, given the 2009 Undertaking contained:

- robust non-discrimination clauses and no hindering access clauses
- fair and transparent port terminal protocols and an indicative access agreement
- measures to deal with the potential for information about port terminal services to be used to the advantage of GrainCorp's wheat exporting arm.

The ACCC also considered the short duration of the 2009 Undertaking (two years) and the transitional state of the industry.

However, the ACCC noted the calls for ring-fencing from a number of interested parties and emphasised that, should the [2009] Undertaking not prove effective, the ACCC may impose ring-fencing in future regulatory arrangements.¹⁵

As discussed in its 2009 further draft decision, ring-fencing rules to increase the robustness of anti-competitive non-discrimination provisions may include the following:

A robust accounting separation framework would include:

- a robust accounting separation framework under which
 - the cost and revenue of port services are identified
 - direct and common costs are identified and common costs are allocated between port terminal services and other services in accordance with a predefined cost allocation rules
 - the methodology used in measuring cost elements (including valuation of assets) and allocating costs is explained.
- creation or designation of discrete organisational divisions so that the information obtained by GrainCorp in the provision of port terminal services is ring fenced from its trading arm
- governance arrangements under which GrainCorp's trading arm business unit would be separate to the port terminal services terminal services business unit with the two business units required to occupy separate premises and not share

¹⁴ ACCC, *GrainCorp Operations Limited Port Terminal Services Access Undertaking Further Draft Decision*, 23 September 2009, p. 143.

¹⁵ ACCC, *GrainCorp Operations Limited Port Terminal Services Access Undertaking Further Draft Decision*, 23 September 2009, p. 220.

staff; the arrangements would be reinforced by reporting lines,, remuneration and incentive packages and internal oversighting and reporting on the ring-fencing arrangements

- compliance measures including appropriate training of relevant staff
- independent audits, with the option for the ACCC to respond to complaints by requiring a spot audit if it is considered warranted.

The ACCC notes that the industry now has experience with the new bulk wheat export marketing regime but that the transition, while progressed, is not yet complete. It is the view of the ACCC that it is appropriate for it to consider the change that has occurred in the industry since the 2009 Undertaking was accepted and the experience of access seekers during the time of the 2009 Undertakings for each of the bulk wheat handlers.

In reviewing the experience of access seekers under GrainCorp's 2009 Undertaking the ACCC notes that no bulk wheat exporter raised a dispute under its provisions in relation either to discrimination or to hindering access. Also, while the ACCC notes the comments made by AGEA about the publish-negotiate-arbitrate approach to access provision and initial problems encountered in the negotiation process, no wheat exporter sought recourse to dispute resolution provisions during negotiation for access agreements; nor has any exporter submitted in relation to their experience during negotiations with GrainCorp to conclude the access agreements currently in effect.

That said, the ACCC is aware that at least one access seeker did encounter initial problems in their negotiations with GrainCorp. The concerns of Glencore in this regard were provided by it to the PC in its submission and aired at the PC's public hearings.¹⁶

The ACCC notes, in particular, Glencore's view that it was the threat of raising a dispute under the provisions of the 2009 Undertaking and seeking an arbitration that provided the necessary impetus for a resolution of its concerns.

It is the view of the ACCC that this incident and the fact that all GrainCorp's customers ultimately were able to reach access agreements with GrainCorp, demonstrate that the publish-negotiate-arbitrate provisions of the 2009 Undertaking are effective and that it is likely to be appropriate for the same arrangements to be continued in GrainCorp's Proposed 2011 Undertaking.

The ACCC notes that the views expressed in relation to the operation of the publish-negotiate-arbitrate arrangements of GrainCorp's 2009 Undertaking are made in the specific circumstances of GrainCorp. The ACCC will assess individually the overall approach to access provision proposed by each operator and may not necessarily reach the same conclusion as that for GrainCorp.

The ACCC also notes, in forming the preliminary views in the draft decision, that it is the view of the PC in relation to undertakings for the period 2011 to 2014 that, while

¹⁶ Productivity Commission, *Wheat Exports Marketing Arrangements report*, 1 July 2010, 181.

it is important for the ACCC to act where necessary to promote competition, it is important to avoid making unnecessary changes to avoid parties incurring additional future compliance and administrative costs in relation to the undertakings.¹⁷

It is the preliminary view of the ACCC, based on the practical experience under GrainCorp's 2009 Undertaking, that the non-discrimination, no hindering access and dispute resolution provisions of the Proposed 2011 Undertaking are sufficiently robust to ensure fair access for access seekers in the case of GrainCorp. Therefore, it is the ACCC's view that formal ring-fencing rules to support these arrangements are not appropriate at this time for GrainCorp's Proposed 2011 Undertaking.

As it did in its further draft decision on the 2009 Undertaking, the ACCC emphasises that this view applies to the circumstances at the present time and that the view may not apply in different circumstances for the bulk wheat export industry or to other industries.

Notwithstanding the ACCC's preliminary view that the overall approach is appropriate there are a number of issues discussed in this and the following chapters where amendment to the Proposed 2011 Undertakings is appropriate. As noted in chapter 2, GrainCorp has provided a draft revision of the Proposed 2011 Undertaking that addresses most of the ACCC's concerns. A remaining issue about which the ACCC seeks stakeholder comment is capacity management and, in particular, whether exporters should be able to transfer booked slots, discussed in chapter 5.

3.3.2 Term of the Undertaking

Three-year term

The ACCC notes that the three-year term of the Proposed 2011 Undertaking is in line with the recommendations of the PC regarding the continuing transition of the bulk wheat export industry from the single desk regime. The ACCC recognises that further regulatory changes are possible and that the timing of changes to the WEMA 'access test' recommended by the PC is 1 October 2014.¹⁸

The ACCC also notes that the Proposed 2011 Undertaking includes a practical approach to ensuring that GrainCorp is able to commence negotiations for access agreements with customers in time to have them ready to execute at the beginning of the 2011/12 year (commencing 1 October 2011).

The ACCC is of the view that the three-year term from 1 October 2011 to 30 September 2014 of the Proposed 2011 Undertaking is appropriate. Further, the ACCC is of the view that the transition arrangements proposed by GrainCorp to ensure negotiations with customers in relation to the next access agreements are covered by the Proposed 2011 Undertaking are appropriate.

¹⁷ Productivity Commission, *Wheat Export Marketing Arrangements – final report*, 1 July 2010, p. 191.

¹⁸ Productivity Commission, *Wheat Export Marketing Arrangements – final report*, 1 July 2010, p. 191.

Staggered commencement

The ACCC recognises GrainCorp's objective—to conclude 2011-2014 Access Agreements with customers—in providing a 1 August 2011 commencement date for all provisions of the Proposed 2011 Undertaking that relate to the publication-negotiation-arbitration arrangements. However, as a consequence, there is a two-month period during which the publish-negotiate-arbitrate provisions of both the 2009 Undertaking and the 2011 Undertaking will be in force. This concurrent operation of the two undertakings may give rise to some uncertainties as to what standard terms and conditions and which indicative access agreements apply to negotiations for a new access seeker approaching GrainCorp during this period.

It is the preliminary view of the ACCC that it would be appropriate for the Proposed 2011 Undertaking to clarify that those clauses and schedules with a commencement date of 1 August 2011 apply only to access agreements entered into in respect of port terminal services provided by GrainCorp during the period 1 October 2011 and 30 September 2014.

In its draft revision to the Proposed 2011 Undertaking GrainCorp has proposed the following amended drafting of the application provisions of the undertaking at clause 4.1 to address this concern:

4.1 Application of Undertaking

(a) This Undertaking applies to:

- (i) the negotiation of any new Access Agreement entered into, or to be entered into, by the Port Operator and a User in respect of Port Terminal Services to be provided by the Port Operator at any time during the period 1 October 2011 to 30 September 2014;*

The ACCC's preliminary view is that these changes adequately address its concerns.

3.3.3 Other establishment provisions of the undertaking

The ACCC notes that the technical amendments to the Proposed 2011 Undertaking provided by GrainCorp on 31 January 2011 reflect the change in title of the *Trade Practices Act 1974* to the *Competition and Consumer Act 2010*. The ACCC is of the view that this is appropriate.

The 2009 Undertaking was given by GrainCorp to the ACCC to meet the provisions of the WEMA that port terminal operators who are also accredited bulk wheat exporters must pass an access test. The 2009 Undertaking also envisages that access seekers for GrainCorp's port terminal services are bulk wheat exporters that are accredited by Wheat Exports Australia in accordance with the requirements of the WEMA.

As noted above, the PC has made recommendations which, if adopted by the Government, would change the legislative arrangements for the wheat export industry. This has resulted in uncertainty for port terminal operators about whether and when a change may occur to the legislative framework.

The ACCC notes that GrainCorp has sought to mitigate the regulatory uncertainty by drafting technical amendments to the Proposed 2011 Undertaking. In particular, the amendments have recognised:

- that the requirement for bulk wheat exporters to be accredited may be abolished during the term of the Proposed 2011 Undertaking
- the requirement for GrainCorp to pass an access test may continue, but under changed legislation.

It is the ACCC view that it is appropriate for the Proposed 2011 Undertaking to be drafted so as to avoid the necessity for GrainCorp to provide a new undertaking during the term of the Proposed 2011 Undertaking because of possible changes to the legislative framework that can reasonably be foreseen at this time. It is also the view of the ACCC that the amendments submitted on 31 January 2011 are appropriately responsive to possible legislative changes recommended in the PC's report. The ACCC notes that the Government is yet to respond to the PC report at the time of release of this draft decision.

However, it is the view of the ACCC that some minor changes to the drafting would be appropriate. In particular, the word 'currently' in the drafting of subclauses 1.1(f) and 6.3(b)(ii) does not give any certainty about which point in time is being referenced. The ACCC is of the view that it is more appropriate that the introduction to subclause 1.1(f) read:

- "The access test under the WEMA requires:", or
- "As at the date of acceptance of this undertaking by the ACCC, the access test under the WEMA requires:"

The ACCC is of the view that a similar wording change to subclause 6.3(b)(ii) also would be more appropriate.

The draft revised undertaking proposes replacing 'currently' in the drafting of subclauses 1.1(f) and 6.3(b)(ii) be replaced with 'at the date of this Undertaking'.

The ACCC considers that these changes adequately address its concerns.

4 The Publish-Negotiate-Arbitrate model

4.1 GrainCorp's Proposed 2011 Undertaking

GrainCorp has proposed to roll forward the publish-negotiate-arbitrate approach from the 2009 Undertaking. This approach provides that:

- GrainCorp will publish the standard price and non-price terms on which it will provide access. Clause 5 outlines the standard price and non-price terms and requires GrainCorp to provide non-discriminatory access. Schedule 5 of the Proposed 2011 Undertaking contains the proposed Indicative Access Agreement (the standard terms). GrainCorp publishes the Reference Prices on its website.
- GrainCorp and an access seeker may negotiate price and non-price terms other than the standard terms contained in the Indicative Access Agreement. Clause 6 outlines the process by which this negotiation will take place.
- Where there is a dispute between GrainCorp and an access seeker relating to the negotiation of new or additional access agreements, or a dispute is raised by an access seeker regarding a decision by GrainCorp to unilaterally vary the Reference Prices, the dispute will be resolved through the Dispute Resolution process outlined in clause 7 of the Proposed 2011 Undertaking.
- The Dispute Resolution process includes a negotiation period between parties, provision for both formal and informal mediation, and referral to arbitration by the ACCC or an independent arbitrator.
- GrainCorp will publish information on the stock at port, vessel booking applications, and performance indicators to assist access seekers in their negotiations and increase the transparency of GrainCorp's operations, as outlined in clauses 10 and 11.

4.1.1 Publication of price and non-price terms and non-discriminatory access

The provisions in clause 5 of the Proposed 2011 Undertaking, relating to price and non-price terms, are unchanged from those in the 2009 Undertaking. Subclause 5.1 provides that GrainCorp will offer to supply Standard Port Terminal Services to an applicant on request at published Reference Prices on Standard Terms. An Applicant may also negotiate for access to:

- non Standard Port Terminal Services
- non Standard Terms
- prices other than Reference Prices, or
- any combination of the above.

The Standard Port Terminal services are set out in Schedule 2.

The Reference Prices on which GrainCorp will offer to provide access are to be published each year in accordance with subclause 5.3(a) of the Proposed 2011 Undertaking, and will apply until 30 September of the following year unless varied in accordance with subclause 5.6. Where GrainCorp varies the Reference Prices it must provide copies of variations to the ACCC within three Business Days of publication.

The Standard Terms are set out in the Indicative Access Agreement in Schedule 5. Unless GrainCorp receives approval from the ACCC to vary these terms in accordance with subclause 5.6(b), these Standard Terms will apply for the term of the Proposed 2011 Undertaking. Subclause 5.4(c) specifies that the Standard Terms must include the Port Terminal Services Protocols as varied from time to time.

Subclause 5.5 requires that GrainCorp must not discriminate between different Applicants or Users in favour of its own Trading division, except to the extent that the cost of providing access to other Applicants or Users is higher.

The ACCC may audit GrainCorp's compliance with this requirement up to twice in every 12 month period in accordance with the provisions in Schedule 6.

4.1.2 Indicative Access Agreement

GrainCorp's Indicative Access Agreement, which represents the Standard Terms, is attached to the Proposed 2011 Undertaking at Schedule 5.

GrainCorp successfully completed negotiation of new Access Agreements with all of its clients in March 2010. These Access Agreements contained different terms to those in the Indicative Access Agreement under the 2009 Undertaking and did not vary substantively between clients. GrainCorp has published a 'generic' version of this Agreement on its website.

GrainCorp has not varied the Standard Terms (the Indicative Access Agreement) under the 2009 Undertaking. Consequently, any new access seeker would currently be entitled to access to port terminal services under the terms of the 2009 Indicative Access Agreement, and would need to negotiate a new access agreement to receive the terms currently in the agreements held by other clients.

The Indicative Access Agreement in Schedule 5 of the Proposed 2011 Undertaking has been updated to reflect the changes negotiated with access seekers in individual Access Agreements in March 2010.¹⁹ The key differences between the proposed Indicative Access Agreement and the 2009 Indicative Access Agreement are outlined below:

- The period of the proposed Indicative Access Agreement has been adjusted to 1 October 2011 to 30 September 2014 to align with the term of the Proposed 2011 Undertaking.

¹⁹ The marked-up version of the Indicative Access Agreement lodged by GrainCorp on 22 September 2010 was not based on the current Schedule 5. GrainCorp lodged a revised mark-up to correct this on 31 January 2011.

- Provisions allowing for the negotiation of agreements directly before and after the commencement of the 2009 Undertaking have been removed, as the Proposed 2011 Undertaking will be in place prior to the commencement of negotiations for new agreements.
- The distinction between ‘Approved’ and ‘Non-Approved’ storage classifications in subclause 6.25 has been removed, and replaced with ‘Third Party Storages’. This is defined in subclause 14.2 as ‘any grain storage facilities operated from time to time by any party other than GrainCorp, including on farm storages’.
- The access seeker has the right to negotiate and raise a dispute in respect of any variations to fees (contained in Annexure A to the Indicative Access Agreement). GrainCorp has introduced an exception where the variation is to reflect changes in the Consumer Price Index (**CPI**).
- The exporter’s shrinkage allowance has been reduced from 0.5 to 0.25 per cent.
- Additional payments and refunds where wheat out-turned is more or less than the quantity invoiced are now required within 21 days of out-turning (previously required within 30 days).
- Where an exporter procures rail services from GrainCorp, the terms and conditions in the agreement for GrainCorp’s rail services will supersede the terms in subclause 4.5 of the Indicative Access Agreement relating to the Client’s rail service provider.
- The occurrence of a Force Majeure Event does not affect the Client’s liability to pay the fees to GrainCorp.

4.1.3 Negotiation

The process by which GrainCorp will negotiate with an Applicant for access to the Port Terminal Services is outlined in clause 6 of the Proposed 2011 Undertaking, and is unchanged from the process in the 2009 Undertaking.

The process involves a Preliminary inquiry, which includes exchanges of information and meetings to enable an Access Application to be lodged. The Access Application is a formal request for access by the Applicant and must include the information specified in Schedule 4 of the Proposed 2011 Undertaking.

Following submission of the Access Application, GrainCorp and the Applicant will negotiate the terms of access in accordance with the process in subclause 6.6 of the Proposed 2011 Undertaking.

If requested, GrainCorp will provide the Applicant with access to the Standard Port Terminal Services on the Standard Terms at the Reference Prices prior to finalising an Access Agreement. This arrangement involves executing an ‘Interim Agreement’ to apply until it is replaced by a negotiated Access Agreement.

GrainCorp’s obligation to negotiate with an Applicant is subject to the Applicant satisfying Prudential Requirements outlined in subclause 6.7. These requirements

include that the Applicant must be Solvent, must not be in Material Default of any agreement with GrainCorp based on financial issues, and must have a legal ownership structure.

4.1.4 Dispute resolution

The dispute resolution process proposed by GrainCorp is contained in clause 7 of the Proposed 2011 Undertaking. This process is essentially unchanged from the 2009 Undertaking.

GrainCorp has removed subclause 7.1(a)(iii) from the 2009 Undertaking. This subclause was applied to the transition between access arrangements prior to 1 October 2009, and access under the 2009 Undertaking. This allowed for parties with access agreements in place prior to the commencement of the 2009 Undertaking to utilise the dispute resolution provisions in negotiation of variations to their agreement following the introduction of the 2009 Undertaking.

The dispute resolution process under the Proposed 2011 Undertaking 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, and
- a decision by GrainCorp to unilaterally vary the prices at which Port Terminal Services are provided, if a dispute is raised by a Client within 30 days of publication of the new prices.

The Dispute Resolution process commences with a negotiation period of five Business Days, where the parties will meet and attempt to resolve the dispute. If the parties fail to resolve the dispute within the negotiation period, they may attempt to resolve the dispute by mediation. This may be either informal mediation between the chief executive officers of both parties, or formal mediation by a single mediator appointed in accordance with subclause 7.3(c). Either party may also refer a dispute to arbitration by the ACCC or an independent arbitrator at any time following the issue of a Dispute Notice. The process for referring a dispute and the arbitration procedure is outlined in subclauses 7.4-7.7.

4.1.5 Publication of information and Performance Indicators

Clauses 10 and 11 of the Proposed 2011 Undertaking require GrainCorp to publish certain information relating to the Port Terminal Services. This information will assist access seekers in their negotiation of the terms of access, and increases the transparency of GrainCorp's operations of the Port Terminal Services.

Publication of information

Clause 10 is unchanged from the 2009 Undertaking, and requires GrainCorp to publish and update monthly:

- total stocks of bulk wheat held at each Port Terminal

- total stocks of all other grain held at each Port Terminal on an aggregated basis
- cargo nominations, and
- nominated monthly export capacity.

GrainCorp is also required to include on its shipping stem the name of the exporter and the volume of grain to be exported for any booking application that it receives.

Performance indicators

The timeframes for reporting on the performances indicators under clause 11 have been updated to reflect the term of the Proposed 2011 Undertaking. Clause 11 is otherwise unchanged from the 2009 Undertaking, requiring GrainCorp to publish for each port:

- vessels failing survey
- average daily road receival rate (to be provided monthly)
- CNA's rejected
- monthly tonnes shipped
- port blockouts; and
- average CNA assessment times.

4.2 GrainCorp and third party submissions

4.2.1 GrainCorp's submission in support of the Proposed 2011 Undertaking (22 September 2010)

GrainCorp's submission highlights the success of the arrangements under the 2009 Undertaking. GrainCorp submits that the eastern Australian grain industry is highly competitive, and that the current level of regulation is therefore appropriate and should not be increased.²⁰ GrainCorp submits that the 2009 Undertaking has provided:

an appropriate regulatory framework to manage negotiations with access seekers and ensured open, efficient and non-discriminatory access to its port terminal services.²¹

GrainCorp notes that it is currently the only bulk handler to have successfully entered into Access Agreements with all of its customers under a Port Terminal Services Undertaking.²² GrainCorp considers that this demonstrates both the success of the 2009 Undertaking as a framework for negotiation and GrainCorp's desire to deal with exporters in a commercial manner.

²⁰ GrainCorp Submission, 22 Sep 2010, p. 3

²¹ GrainCorp Submission, 22 Sep 2010, p. 8.

²² GrainCorp Submission, 22 Sep 2010, p. 7

GrainCorp submits that the proposed publish / negotiate / arbitrate model creates incentives for GrainCorp to reduce costs and improve productivity, and adequately protects users through:

the requirement to publish pricing for standard services, the obligations not to discriminate and the detailed negotiate/arbitrate mechanisms.²³

GrainCorp notes that it has amended the Standard Terms to align with the final Bulk Wheat Port Terminal Services Agreements entered into with customers in March 2010.

GrainCorp submits that given the structure of the eastern Australian grain market, GrainCorp's compliance with the 2009 Undertaking and its willingness to negotiate Access Agreements with customers,

GrainCorp should not be subject to a 'one size fits all' regulatory regime and should not be subject to the same judgements made against other service providers.²⁴

4.2.2 Australian Grain Exporters Association (AGEA) submission

AGEA submits that the publish-negotiate-arbitrate framework has allowed access seekers to commercially negotiate with GrainCorp. AGEA notes that there were initially some challenges as:

GrainCorp adopted a 'no-negotiate approach', however this position changed in early 2010, and negotiation was entered into. AGEA understands that all port users have now signed agreements with GrainCorp.²⁵

AGEA similarly notes that the Standard Terms proposed initially were not acceptable but that 'the GrainCorp approach improved in March 2010 and negotiation became possible.'²⁶ AGEA also notes that it was not clear that the Standard Terms could be varied, and suggests that the ACCC have a clarifying role:

AGEA believes it would assist if ACCC provided clear guidelines on the ability to vary standard terms to deliver a better outcome... and that such terms should not be less advantageous than those applying to the GrainCorp trading division where similar benchmarks apply.²⁷

AGEA notes that while the dispute resolution provisions have not been tested, in principle AGEA does not expect any issues with the provisions. AGEA also states that it does not have any issues with GrainCorp's proposed publication of key port information.

4.2.3 Australian Wheat Board (AWB) submission

AWB notes that GrainCorp has removed the price differential that previously applied between wheat arriving from approved and non-approved third party storage. AWB

²³ GrainCorp Submission, 22 Sep 2010, p. 21

²⁴ GrainCorp Submission, 22 Sep 2010, p. 15

²⁵ AGEA Submission, 10 Nov 2010, p. 1.

²⁶ AGEA Submission, 10 Nov 2010, p. 2.

²⁷ AGEA Submission, 10 Nov 2010, p. 2.

considers that this increases the costs to investments in quality storage and logistics infrastructure as they are placed in the same position as infrastructure of varying quality. AWB submits that this:

discourages investment in competing upcountry storage and rail capacity, and directly discourages the use of non-GrainCorp supply chain into port. AWB views these changes as discriminatory towards previously 'approved' storage handlers and the efficient movement of grain for export.²⁸

AWB is concerned that under the proposed Indicative Access Agreement it is the shippers, rather than GrainCorp, that will be required to meet the costs of delay where GrainCorp allows its capacity to be overbooked in order to maximise throughput. AWB considers:

a market based approach of demurrage and dispatch will be the fairest system of allocating risk. Under this system GrainCorp will not be able to over allocate slots as they will be liable for demurrage claims.²⁹

AWB emphasises the importance of the shipping stem and submits that its transparency under the 2009 Undertaking should be maintained and its scope expanded:

AWB would like more data to be available through the stem including commodity, and country of destination, such information is critical to an efficient market place.³⁰

4.2.4 Timothy Bush submission

Mr Bush's submission discusses the publication of information by GrainCorp under the 2009 Undertaking.

GrainCorp is required under subclause 11(a)(vi) of the 2009 Undertaking to provide details on the 'average daily road receival rate'. Mr Bush argues that GrainCorp's publication of the average on the days of road receival is insufficient to meet this requirement, and that GrainCorp should specify how many days of grain receival there were in the month.

Mr Bush also raises concerns regarding the timeliness of GrainCorp's publication of the 'End of Month Stock Report' under subclause 10.1 of the 2009 Undertaking.

4.2.5 GrainCorp response to third party submissions (13 December 2010)

GrainCorp submitted that AGEA's comments on the approach to pricing in the 2009 Undertaking indicated that 'GrainCorp's efforts to build constructive commercial relationships with its members... have been successful'.³¹

In response to AWB's concerns regarding the removal of the distinction between approved and non-approved storage, GrainCorp notes that

²⁸ AWB Submission, 11 Nov 2010

²⁹ AWB submission, 11 Nov 2010

³⁰ AWB Submission, 11 Nov 2010

³¹ GrainCorp submission 13 December 2010, p. 1

...this has not decreased grain handling efficiency, and AWB has failed to provide any evidence to sustain its claim. The changes were driven by the changing demands of the market...³²

In response to AWB's request for changes to despatch-demurrage arrangements, GrainCorp notes that the supply chain delivering grain to GrainCorp's port elevators is not integrated. Consequently, GrainCorp does not have full control over the grain delivered to its port elevators, particularly the grades or commodity to be shipped, the quality of the grain, and the method of transport. GrainCorp does not consider it should be responsible for failures by third parties, including:

- failure to accumulate sufficient grain for a cargo to be loaded on time
- failure of transport not provided by GrainCorp
- failure of grain to meet relevant receival standards or the exporter's own contract standards.

GrainCorp considers that a despatch-demurrage arrangement as proposed by AWB would effectively transfer all supply chain risk onto GrainCorp and present an 'unacceptable commercial risk'. GrainCorp also notes that an integrated supply chain as experienced in Western Australia 'has proven to be inefficient, unworkable and not favoured by industry participants'.³³

In response to AWB's suggestion that GrainCorp should publish additional data on its shipping stem, GrainCorp submits that the nominated commodity has been published on the shipping stem since 2008, and that it would not be necessary or appropriate to publish information relating to customer destinations. GrainCorp considers that the country of destination has no impact on the management of port elevator capacity or grain cargo accumulation and is therefore not relevant or critical information for an efficient market place.³⁴

4.3 ACCC's view

The ACCC notes that the publish-negotiate-arbitrate framework as set out in the 2009 Undertaking appears to have operated well in the case of GrainCorp, and that under this framework GrainCorp has successfully negotiated access agreements with access seekers. The ACCC's preliminary view regarding the continuation of the publish-negotiate-arbitrate approach to access provision as per the Proposed 2011 Undertaking is set out in chapter 3.

The following sections discuss the ACCC's preliminary view regarding the operation of specific aspects of the framework under the 2009 Undertaking.

4.3.1 Publication of price and non-price terms

GrainCorp is required under the 2009 Undertaking to publish the Standard Terms and Reference Prices which apply to Port Terminal Services. GrainCorp is also required to

³² GrainCorp submission 13 December 2010, p. 4

³³ GrainCorp submission 13 December 2010, pp. 4-5

³⁴ GrainCorp submission 13 December 2010, p. 5

notify the ACCC of any changes in the Reference Prices, and may request ACCC approval for changes to the Standard Terms.

Standard Terms

The ACCC notes that GrainCorp published on its website the 'Interim Bulk Wheat Port Terminal Services Agreement' for 2009/10, which comprised the Standard Terms which were accepted as part of the 2009 Undertaking. GrainCorp also published the 'Bulk Wheat Port Terminal Services Agreement', an updated version of the Standard Terms dated 10 February 2010. GrainCorp placed this updated version in the same location on its website as the Standard Terms.

GrainCorp has not varied the Standard Terms which were accepted as part of the 2009 Undertaking during the term of the Undertaking. To do so, GrainCorp would require approval from the ACCC as outlined in subclause 5.6(b) of the 2009 Undertaking. However, the ACCC considers that by publishing the 10 February 2010 version of the agreement GrainCorp may have created some uncertainty for access seekers around which agreement comprises the Standard Terms on which they may receive access to Port Terminal Services and which form the starting point for negotiation for access.

Reference Prices

GrainCorp published Reference Prices on its website in Annexure A to the 'Bulk Wheat Port Terminal Services Agreement'. The initial prices to apply for the 2009-10 season were varied in April 2010 following consultation with GrainCorp's customers. GrainCorp agreed to backdate the revised prices for existing customers to 1 October 2009. GrainCorp notified the ACCC that it had varied the Reference Prices in accordance with subclause 5.6(a) of the 2009 Undertaking on 22 April 2010.

GrainCorp published new prices to apply for the 2010-11 season on 30 August 2010. GrainCorp also published the '2010/11 Port Elevator Fee Schedule Summary', a two-page summary of the fees which apply to Port Terminal Services. This summary notes that customers should consult the relevant Agreement(s) and appropriate Reference Price Schedules, and not rely solely on the summary. GrainCorp notified the ACCC that it had varied the Reference Prices in accordance with subclause 5.3(d) of the 2009 Undertaking on 30 August 2010.

Compliance with requirements

The ACCC considers that GrainCorp has complied substantively with the requirement to publish price and non-price terms. However, there is currently ambiguity around the status of the 10 February 2010 version of the Bulk Wheat Port Terminal Services (BWPTS) Agreement. The ACCC considers that, when GrainCorp publishes more than one BWPTS Agreement on its website, it should clearly identify which of them represents the Standard Terms under an accepted undertaking. This will improve transparency around the terms on which customers may gain access to the Port Terminal Services, and provide a clear starting point for negotiation of the terms of access to GrainCorp's services.

The ACCC considers that in all other respects a roll-over of the arrangements for publication of price and non-price terms from the 2009 Undertaking to the Proposed 2011 Undertaking is likely to be appropriate.

4.3.2 Own trading terms

The ACCC has not considered it necessary to audit GrainCorp's compliance with the non-discrimination requirement contained in subclause 5.5 during the term of the 2009 Undertaking. The ACCC considers that subclause 5.5 appears to have been effective in ensuring that GrainCorp does not discriminate against access seekers in favour of its own trading division. However, the ACCC notes that there is currently no requirement for GrainCorp to publish the terms on which it provides access to its own trading division.

During the term of the 2009 Undertaking, GrainCorp negotiated access agreements with its customers—including the GrainCorp Trading Division—that differed from the standard terms and conditions as set out in the Indicative Access Agreement at Schedule 5 of the 2009 Undertaking. The ACCC notes that, pursuant to the non-discriminatory provisions of the Proposed 2011 Undertaking, GrainCorp must not discriminate between different applicants or users in favour of its own Trading Division.

The ACCC is of the preliminary view that, to enable it to assess GrainCorp's compliance with its non-discrimination obligations, it is necessary for it to know details of the access agreement reached by GrainCorp with its Trading Division.

The ACCC is of the preliminary view that it would be more appropriate for the Proposed 2011 Undertaking to include a provision for GrainCorp to provide the ACCC with a copy of the access agreement entered into with its Trading Division.

In the draft revision to the Proposed 2011 Undertaking provided in response to the ACCC's preliminary views GrainCorp has proposed the inclusion of the following subclause in clause 5:

- (b) *Within five Business Days of executing an Access Agreement with its own Trading Division, GrainCorp must provide to the ACCC a copy of that Access Agreement.*

The ACCC's preliminary view is that this change adequately addresses its concerns.

4.3.3 Indicative agreement

GrainCorp has proposed to update the Indicative Access Agreement in the Proposed 2011 Undertaking to reflect the changes made during negotiation with access seekers in March 2010. Given that the changes have resulted from negotiation between stakeholders, the ACCC is of the view that the Indicative Access Agreement is likely to be appropriate. The ACCC has considered the issues raised by AWB in its submission relating to the removal of a price differential between third party approved and non approved storage, and the dispatch-demurrage arrangements in the proposed Indicative Access Agreement.

Price differentials based on grain storage location

Price differentials typically have been applied by bulk wheat handlers depending on the supply chain through which wheat has arrived at port. While such differentials are justified to the extent that they reflect differences in costs of receipt and handling related to the source of the wheat, they also have the potential for a port terminal

operator to advantage providers of some up-country supply chain providers relative to that of others.

GrainCorp has removed the distinction between grain arriving from third party approved and non-approved storage which was contained the 2009 Indicative Access Agreement. This is reflective of the fact that grain from all third party storage sites is treated the same on arrival at GrainCorp's Port Terminal Facilities, and therefore incurs the same costs. The ACCC considers that GrainCorp's decision to remove this distinction is appropriate as it ensures that any price differentials are reflective of differences in costs.

However, the ACCC notes that GrainCorp has retained the price differential between grain received from third party storage and GrainCorp's own up-country storage. This price differential is appropriate only if the cost of receiving and handling grain from GrainCorp storage facilities is less than from third party facilities. GrainCorp explains this differential as due to a higher level of risk associated with receivals 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...

To account for the increased level of risk, some measure of additional surety is required.³⁵

Dispatch-demurrage arrangements

The ACCC notes the concerns raised by AWB in relation to the dispatch-demurrage arrangements in the proposed Indicative Access Agreement. The ACCC considers that demurrage and liability arrangements are contractual issues to be resolved through commercial negotiation between parties. The liability arrangements in the proposed Indicative Access Agreement are likely to be appropriate as a starting point for commercial negotiation.

4.3.4 Negotiation

GrainCorp negotiated access agreements with all of its customers during the term of the 2009 Undertaking. The negotiations were conducted in accordance with clause 6 of the 2009 Undertaking, which specifies timeframes for provision of information, the lodgement of an Access Application, and negotiation of terms by GrainCorp and the Applicant.

GrainCorp is required under the Proposed 2011 Undertaking to provide access to eligible customers on the Standard Terms discussed in section 4.3.1. However, the Proposed 2011 Undertaking also provides that customers may negotiate different terms than the Standard Terms with GrainCorp to deliver a better outcome for one or both parties. GrainCorp is required to negotiate these different terms with the customer in good faith. If the customer considers that GrainCorp is not negotiating as required by clause 6 of the Proposed 2011 Undertaking, the customer may issue a Dispute Notice and potentially bring the matter to the ACCC for arbitration.

³⁵ GrainCorp, *Submission to the ACCC in response to Draft Determination issued 6 August 2009*, 3 September 2009, p.19.

The ACCC notes the submission by Glencore to the Productivity Commission inquiry regarding Glencore's experience negotiating with GrainCorp:

GrainCorp refused to negotiate with us in any form until we initiated the dispute resolution provisions of the access undertaking, after which GrainCorp immediately negotiated a realistic agreement with us.³⁶

The ACCC considers that Glencore's experience indicates that the dispute resolution provisions have functioned as an effective deterrent against GrainCorp refusing to negotiate with access seekers in accordance with requirements in the 2009 Undertaking.

GrainCorp is also bound by the non-discrimination requirement in subclause 5.5 to ensure that the terms negotiated with access seekers are not on the whole less advantageous than those applying to GrainCorp's own trading division.

The ACCC considers that the process in clause 6 of the Proposed 2011 Undertaking is effective in enabling access seekers to negotiate the terms of access with GrainCorp. The ACCC also considers that the dispute resolution provisions, discussed in section 4.3.5, are an effective restraint should GrainCorp seek to avoid its obligation to negotiate in accordance with the Proposed 2011 Undertaking.

4.3.5 Dispute resolution

GrainCorp is required to provide the ACCC with an annual report of any material disputes in relation to Access Agreements, and any Disputes raised by Applicants, Users, or GrainCorp during the previous 12 month period. At the time of writing, the ACCC has not been notified of any formal disputes under the 2009 Undertaking between GrainCorp and access seekers.

As noted in section 4.1.4, access seekers are able to raise a dispute regarding a decision by GrainCorp to unilaterally vary the prices at which Port Terminal Services are provided under an executed Access Agreement. GrainCorp's proposed Indicative Access Agreement has exempted fee variations reflecting changes in Consumer Price Index (CPI) from the client's right to negotiate and raise a dispute. The ACCC notes that subclause 2.2 provides that where there is any inconsistency between components of the Proposed 2011 Undertaking, the general terms will take priority over the terms in the Indicative Access Agreement in Schedule 5. The ACCC considers that this inconsistency needs to be rectified.

While the Dispute Resolution provisions have not yet been tested in practice by GrainCorp or access seekers, the ACCC considers that the mere existence of the provisions may have facilitated negotiations. As noted in section 4.3.4, it is likely that the threat of arbitration by the ACCC has been effective in ensuring that GrainCorp negotiate with access seekers as required by the 2009 Undertaking.

The ACCC considers that the dispute resolution framework in the 2009 Undertaking has worked well. The ACCC therefore considers it appropriate that GrainCorp has submitted a similar framework for the Proposed 2011 Undertaking.

³⁶ Productivity Commission 2010, *Wheat Export Marketing Arrangements*, Report no. 51, Canberra, p. 181.

The draft revised undertaking exempts price rises to reflect CPI changes from the dispute resolution provisions of the Proposed 2011 Undertaking. It is the ACCC's preliminary view that this change adequately addresses this issue.

4.3.6 Publication of information

The ACCC considers that unequal access to key port terminal information confers a marketing advantage on GrainCorp relative to other non-vertically integrated wheat exporters using GrainCorp's port terminals. In order to address this issue and to introduce a greater level of transparency, an obligation was imposed on GrainCorp under the 2009 Undertaking to publish key port terminal information.

During the term of the 2009 Undertaking GrainCorp has published information on key port terminal information, including in relation to the stocks of bulk wheat and other grain at each port terminal, cargo nominations, and nominated monthly export capacity. GrainCorp is obliged to report on each of the above matters on a monthly basis.

The ACCC considers that the obligation on GrainCorp to publish key port terminal information (such as vessel nomination applications) under clause 10 of the 2009 Undertaking appropriately balances the legitimate business interest of the provider and the interests of persons who might want access to the service by increasing transparency of nominations that have been made and lessening the opportunity for GrainCorp's marketing arm to misuse key port terminal information relating to other wheat exporters. The ACCC considers that clause 10 of the 2009 Undertaking has provided access seekers with sufficient information on key operational matters at GrainCorp's port terminals whilst not imposing unduly prescriptive regulation on GrainCorp.

In addition, the ACCC considers that port terminal capacity information forms a part of the benchmark for the commencement of negotiations around port terminal access, service pricing and performance. The ACCC notes that GrainCorp publishes information on available capacity at each of its terminals on a voluntary basis. GrainCorp's performance in this regard was a relevant factor informing the ACCC's preliminary view that the overall approach of the undertaking and the capacity allocation arrangements are appropriate (discussed in chapters 3 and 5).

The ACCC is of the preliminary view that it is appropriate that GrainCorp will continue to have an obligation to publish key port terminal information under clause 10 of the Proposed 2011 Undertaking.

4.3.7 Publication of performance indicators

In its Decision to Accept the 2009 Undertaking, the ACCC, while not seeking to be prescriptive of what service performance indicators should be included in an undertaking, noted the following possible indicators:

- Ship rejections;
- Cargo assembly times;
- Transport queuing times;

- Port blockouts;
- Overtime charged; and
- Demurrage.

During the term of the 2009 Undertaking GrainCorp has published performance indicators in accordance with clause 11 of the 2009 Undertaking in relation to:

- Vessels failing survey;
- Average daily road receipt rate (to be provided monthly);
- Cargo nomination applications rejected;
- Monthly tonnes shipped;
- Port blockouts; and
- Average cargo nomination application assessment times.

In its Decision to Accept the 2009 Undertaking, which involved assessing whether the indicators proposed by GrainCorp satisfied the ACCC's requirements (as set out above), the ACCC stated that the indicators proposed by GrainCorp would:

appropriately balance the legitimate business interests of the provider and the interests of persons who might want access to the service by providing a degree of transparency around the level of service being provided to wheat exporters, and

assist potential access seekers in assessing the appropriateness of the price offered for a service.³⁷

In reviewing the operation of the 2009 Undertaking the ACCC notes that GrainCorp has published the average daily road receipt rate over 'days of receipt' only, excluding days where no grain is received via road transport. The ACCC considers that the average daily road receipt rate is published to provide transparency around the rate at which GrainCorp is able to receive grain from road transport, in order to inform negotiations between GrainCorp and access seekers. The ACCC considers that for this purpose it is appropriate for GrainCorp to exclude the days on which no grain is received via road transport in its calculation of the Daily Road Receipt Rate. Also, GrainCorp did not publish the road receipt rate monthly as required under clause 11.

With respect to the performance indicators on which GrainCorp reports, the ACCC notes that the 2009 Undertaking requires GrainCorp to report the indicators disaggregated by port within two months of the end of the period to which they relate. The ACCC is concerned that the reports of performance indicators by GrainCorp have not been at the required level of disaggregation. Also the two-month window for compliance with the reporting provision creates an unnecessary monitoring burden on

³⁷ ACCC, *GrainCorp Operations Pty Ltd Port Terminal Services Access Undertaking - Decision to Accept*, 29 September 2009, p. 315.

the ACCC. Therefore, the ACCC is of the view that the Proposed 2011 Undertaking would be more appropriate if a provision was included that GrainCorp will notify the ACCC within five business days that it has published a report on its website.

The ACCC considers that the key performance indicators against which GrainCorp has reported under the 2009 Undertaking have provided access seekers with sufficient information on the level of service provided by GrainCorp. It is therefore of the preliminary view that it is appropriate that GrainCorp continue to report against these performance indicators (on a port-by-port basis) under the Proposed 2011 Undertaking.

The draft revised undertaking adequately addresses the preliminary view that GrainCorp will notify the ACCC within five business days of publishing a report pursuant to clause 11. It is the view of the ACCC that this change adequately addresses this issue.

5 Capacity Management

5.1 GrainCorp's Proposed 2011 Undertaking

Capacity management provisions are at Clause 9 of GrainCorp's Proposed 2011 Undertaking. These provisions include requirements to publish information regarding availability, booking and use of capacity at GrainCorp's port terminals.

Clause 9 also includes provisions regarding variation of the Port Terminal Services Protocols (PTSP) and a requirement to refrain from conduct that hinders access to the Port Terminal Services by third parties.

Notwithstanding the general approach taken with the Proposed 2011 Undertaking to roll forward the 2009 Undertaking, there are some aspects of the provisions regarding the management of capacity that differ from the arrangements that the ACCC accepted in 2009. In particular, the PTSP in Schedule 3 have been varied from those that were a part of the 2009 Undertaking accepted by the ACCC.

These changes to the PTSP and the application and operation of the variation provisions of the 2009 Undertaking to effect those changes are considered in this chapter.

5.1.1 Continuous disclosure rules

Continuous disclosure rules set out in clause 9.1 of the Proposed 2011 Undertaking make provisions unchanged from the 2009 Undertaking that GrainCorp will publish on its website:

- (a) A statement setting out GrainCorp's policies and procedures for managing demand for the port terminal service—the PTSP set out in Schedule 3 to the Proposed 2011 Undertaking
- (b) A Shipping Stem (to be updated each Business Day) setting out specified details in relation to nominations of cargos to be shipped.

5.1.2 Substance of the PTSP

The PTSP are central to the relationship between GrainCorp and customers accessing its port terminal facilities. Clause 9.2 of the Proposed 2011 Undertaking requires GrainCorp to comply with the PTSP, as varied from time to time, and the PTSP is a part of concluded access agreements between GrainCorp and its customers.

PTSP as accepted in 2009 Undertaking

Under the PTSP at Schedule 3 of the 2009 Undertaking, customers made a cargo nomination application (CNA) to book capacity. GrainCorp accepted bookings, including from its own trading arm, on a first come, first served basis if capacity was available for the nominated period.

The 2009 PTSP allowed GrainCorp clients some limited flexibility to change the specifications of booking once made. If a client was unable to execute the booking the booking fee was forfeited. The flexibility available under the 2009 PTSP included:

- Substituting a nominated vessel that is a similar performing vessel and that will arrive within 5 days of the most recent nominated estimated time of arrival (ETA)
- Changing load port no later than 21 days from the assigned load date, subject to certain conditions
- Two port loading
- Undertake stock swaps with another GrainCorp client holding suitable grain

In February 2010, during the first year of its 2009 Undertaking, GrainCorp offered exporters a one off option to review their requirements for unpaid cargo nominations on the stem for the May to September period which was taken up by a number of exporters.³⁸ The explanation for this over booking of capacity by exporters is not clear; however as grain export volumes from the eastern States did not fall in 2009/10 despite the poor harvest the excess of capacity booked may be due to misjudgement on the part of exporters or the impact on the east coast market of events in the market in Western Australia.

GrainCorp has emphasised that this was a one off option that will not be repeated in future years.

PTSP in Proposed 2011 Undertaking

In May 2010 GrainCorp completed a variation of the PTSP in accordance with the provisions of clause 9.3 of the 2009 Undertaking and the PTSP of the Proposed 2011 Undertaking (2010 PTSP) reflect those variations. The variations made were principally to increase the flexibility available to exporters in the operation of GrainCorp's first come, first served capacity allocation arrangements. The variations included changes to the provisions for cargo nomination and inclusion of provisions for wheat exporters to change aspects of confirmed bookings. The variations also included minor changes to terminology and the inclusion of a terms and conditions clause.

The differences between the 2009 PTSP and the 2010 PTSP are detailed in this subsection.

5.1.2.1 Terms and Acronyms

A new clause 1 sets out definitions of terms and acronyms used in the 2010 PTSP.

5.1.2.2 Requested elevation period (REP) and confirmed elevation period (CEP)

The 2010 PTSP include a distinction between a requested elevation period and the confirmed elevation period and provides more flexibility in the elevation periods that GrainCorp customers can nominate in a cargo nomination application.

Under the 2009 PTSP customers were able to nominate a one month elevation period with a starting date of either the first or fifteenth day of the month. Under the 2010 PTSP, customers can also request, and have confirmed, a 15 day elevation period.

³⁸ GrainCorp Operations Limited, *Submission to the ACCC*, 22 September 2010, p. 11.

The two elevation period definitions are:

- **Request Elevation Period (REP).** This is the period in which the customer has requested Elevation Capacity. The REP can be a period of one month, commencing on either the first or the fifteenth day of a calendar month, or a period of any 15 days within the CEP, as nominated no less than 28 days prior to the commencement of the elevation period.
- **Confirmed Elevation Period (CEP).** This is the period of time in which Elevation Capacity is confirmed as being accepted by a customer, and will be available at a particular Port Terminal. The CEP can be a period of one month, commencing on either the first or the fifteenth day of a calendar month, or a 15 day period within the CEP, as nominated no less than 28 days prior to the commencement of that CEP.³⁹

5.1.2.3 Submission of Cargo Nomination Application (CNA) 28 days prior to requested elevation period

Subclause 3.4.1 of the 2010 PTSP clarifies that GrainCorp will automatically reject a CNA submitted less than 28 days prior to the commencement of the REP.

5.1.2.4 Acknowledgement of Acceptance (AOA) of a CNA, a requested elevation period and booking fee

Changes have been made regarding the acceptance by a customer of a CNA at clause 9 of the 2010 PTSP as follows:

- Subclause 9.1.1 of the 2010 PTSP clarifies that a CNA will lapse if the customer does not submit an AOA within two business days of 5.00 pm AEST of the day of notification of acceptance of a CNA.
- Subclause 9.2 clarifies that a customer may only accept or reject the offer made on an AOA.

Clause 9 now also clarifies arrangements regarding the Booking Fee when the executed tonnage differs from the tonnage for which the Booking fee has been paid. Added provisions are:

- Where a customer executes Booked Elevation Capacity and the total tonnage is less than the booked tonnage for which a Booking Fee has been paid, GrainCorp will rebate to the customer an amount at the relevant Booking Fee rate for the equivalent to the difference between the booked tonnage and the actual tonnage elevated up to a maximum of 10% of the original Booking Fee amount.⁴⁰
- Where a customer executes Booked Elevation Capacity and the total tonnage is more than the booked tonnage for which a Booking Fee has been paid, GrainCorp will invoice the customer an amount at the relevant Booking Fee rate for the

³⁹ GrainCorp Operations Limited, *Port Terminal Access Undertaking*, 22, September 2010, Schedule 3, clause 1.

⁴⁰ GrainCorp Operations Limited, *Port Terminal Access Undertaking*, 22, September 2010, Schedule 3, clause 9.8.

equivalent to the difference between the actual tonnage elevated and the original Booking Fee.⁴¹

5.1.2.5 Execution of booked elevation capacity

New provisions now make specific provisions in relation to the execution of booked capacity. Booked elevation capacity must be executed within the CEP and cannot be carried forward to the next shipping year. The Booking Fee is forfeited if the customer does not execute Booked Elevation Capacity within the CEP plus a 5 day grace period at the end of the CEP.⁴²

5.1.2.6 Request for a change load port and/or confirmed elevation period

Changes made to the PTSP in 2010 allow customers to make changes to approved cargo nominations in relation to the time period when the cargo will be shipped. This change is in addition to the ability for customers to make changes to the port from which a cargo, or part of a cargo is to be shipped which was in place in the 2009 PTSP.

The 2010 PTSP provide that a customer may request to change the load port or the confirmed elevation period showing on the GrainCorp shipping stem up to 21 days prior to the nominated estimated time of arrival of a vessel. GrainCorp will assess the request subject to all relevant clauses in the PTSP.⁴³

5.1.2.7 Managing booked elevation capacity

Changes included in the 2010 PTSP also allow customers to divide booked elevation capacity into more than one parcel during the CEP and so have the capacity delivered as multiple lifts into multiple vessels. The ability of GrainCorp to meet a request for a change to the CNA will depend on other elevation bookings for the period.⁴⁴

5.1.2.8 Reducing and increasing booked elevation tonnage

The 2010 PTSP amendments include new provisions specifying the process for decreasing booked tonnage (clause 13) and increasing booked tonnage and clarifying the application of the Booking Fee when either of these events occur.⁴⁵

5.1.2.9 Vessel nomination

In its submission in support of the Proposed 2011 Undertaking GrainCorp states that the 2010 variation to the PTSP included a reduction of the period within which the vessel could be swapped or changed from 21 days to 10 days.⁴⁶ The ACCC notes that this change to the PTSP occurred prior to acceptance of the 2009 Undertaking and

⁴¹ GrainCorp Operations Limited, *Port Terminal Access Undertaking*, 22, September 2010, Schedule 3, clause 9.9.

⁴² GrainCorp Operations Limited, *Port Terminal Access Undertaking*, 22, September 2010, Schedule 3, clause 10.

⁴³ GrainCorp Operations Limited, *Port Terminal Access Undertaking*, 22, September 2010, Schedule 3, clause 11.

⁴⁴ GrainCorp Operations Limited, *Port Terminal Access Undertaking*, 22, September 2010, Schedule 3, clause 12.

⁴⁵ GrainCorp Operations Limited, *Port Terminal Access Undertaking*, 22, September 2010, Schedule 3, clause 14.

⁴⁶ GrainCorp Operations Limited, *Submission to the ACCC*, 22 September 2010, p. 1.

was incorporated in the PTSP that formed part of the Undertaking accepted on 24 September 2009. Clause 11 of the 24 September 2009 PTSP (which, unchanged, becomes clause 17 in the 2010 PTSP) provides that a vessel nomination must be made a minimum of 10 days prior to the nominated vessel estimated time of arrival.

5.1.2.10 Estimated time of arrival

The 2010 PTSP clarify that the vessel estimated time of arrival nominated by the customer must be within the CEP.⁴⁷

5.1.2.11 Assigned Load date

The 2010 PTSP includes the obligation on GrainCorp that its notification to the customer of an Assigned Load Date will occur within 1 business day of receipt of an estimated time of arrival (ETA) Nomination.⁴⁸

5.1.2.12 Vessels arriving outside the confirmed elevation period – no amendment to assigned load date requested

The 2010 PTSP includes a new clause to establish arrangements for vessels arriving outside their CEP where no amendment to the assigned load date was made. These arrangements cover arrangements when a new load date may be assigned and when the booking fee is forfeited.⁴⁹

5.1.2.13 Vessels failing regulatory survey

Provisions in the 2010 PTSP regarding vessels failing regulatory survey have been augmented to deal with situations where failing regulatory survey results in the vessel not being able to load until an elevation period following the CEP. Subclause 36.3 provides for application of an additional storage fee from ten days after the assigned load date and the assigning of a new load date. Subclause 36.4 clarifies loading priority when these circumstances arise.⁵⁰

5.1.2.14 Late or cancelled vessels

Under the PTSP forfeiture of the Booking Fee and additional storage charges apply when a vessel is not available for loading. The 2010 PTSP changes increased the grace period allowed before these penalties apply from five days⁵¹ to ten days⁵² of the Assigned Load Date.

⁴⁷ GrainCorp Operations Limited, *Port Terminal Access Undertaking*, 22, September 2010, Schedule 3, clause 15.2.

⁴⁸ GrainCorp Operations Limited, *Port Terminal Access Undertaking*, 22, September 2010, Schedule 3, clause 16.1.

⁴⁹ GrainCorp Operations Limited, *Port Terminal Access Undertaking*, 22, September 2010, Schedule 3, clause 22.

⁵⁰ GrainCorp Operations Limited, *Port Terminal Access Undertaking*, 22, September 2010, Schedule 3, subclauses 36.3-4.

⁵¹ GrainCorp Operations Limited, *Port Terminal Access Undertaking*, 24, September 2009, Schedule 3, clause 25.

⁵² GrainCorp Operations Limited, *Port Terminal Access Undertaking*, 22, September 2010, Schedule 3, clause 37.

5.1.3 Variation of PTSP

Subsection 9.3 of the Proposed 2011 Undertaking—which is unchanged from the 2009 Undertaking—sets out certain requirements regarding variations made to the PTSP and the process for variation of the PTSP.

The requirements regarding the varied PTSP are that they must:

- be consistent with:
 - the objectives of the undertaking (set out in clause 1.2 of the Proposed 2010 Undertaking)
 - GrainCorp’s obligations to provide non-discriminatory access in accordance with clause 5.5
- include an expeditious dispute resolution mechanism for dealing with disputes relating to decisions made by GrainCorp under the PTSP (but need not include independent binding dispute resolution).⁵³

The elements of the variation process are that:

- before GrainCorp can vary the PTSP, it must conduct a consultation process which involves:
 - preparing and circulating proposed changes to interested parties, and to the ACCC, along with an explanation for the amendment
 - allowing users and applicants at least 10 Business Days to review and respond to the proposed changes
 - GrainCorp collating, reviewing and actively considering the responses received from interested parties
- Any variation must be published at least 30 days prior to the date on which it is to become effective in the same locations as it publishes its PTSP
- GrainCorp must provide the ACCC with copies of the variations to the PTSP promptly following publication.⁵⁴

⁵³ GrainCorp Operations Limited, *Port Terminal Access Undertaking*, 22, September 2010, subclauses 9.3(a)(i)-(ii).

⁵⁴ GrainCorp, *Port Terminal Services Access Undertaking*, dated 22 September 2010, Schedule 3, subclauses 9.3(a)(iii)-(iv), 9.3(c).

5.2 GrainCorp and third-party submissions

5.2.1 GrainCorp's submission in support of the Proposed 2011 Undertaking (22 September 2010)

In its submission in support of the Proposed 2011 Undertaking, GrainCorp states that the 2009 Undertaking allowed it sufficient flexibility in its port operations to meet the demands of customers.⁵⁵ With respect to the 2010 PTSP it states that it:

... made the following port protocol changes for the benefit of customers:

- Shipping windows were increased from 5 days to 10 days before penalties were applicable.
- The period in which a vessel could be swapped or changed was reduced from 21 days to 10 days.
- Once elevation capacity was booked by customers, flexibility to move the time in which this service was delivered was increased, without any additional fees applying to move booked elevation from month to month, forward or back, split tonnage, change grain type and move from port to port if capacity was available.
- Booking fee forfeiture was changed to allow a customer one shipping month plus 5 days to 'perform' (i.e. accumulate a cargo or supply a fit vessel within the time periods provided by the Protocols). Previously, the booking fee was forfeited where a customer where a customer was unable to perform within 5 days of the ETA.⁵⁶

In addition, GrainCorp notes that the issue of superintendents' access to inspect cargo samples was resolved through provisions in the access agreements concluded with clients, with the Grain and Feed Trade Association (GAFTA) acknowledging changes.⁵⁷

5.2.2 Australian Grain Exporters Association (AGEA) submission to the ACCC Issues Paper

AGEA provides comments on a number of aspects of GrainCorp's Proposed 2011 Undertaking, including the substance of, and the process for variation of, the PTSP. Comments are also made on the substance of the indicative access agreement which is addressed in chapter 5 of this draft decision.

In its submission AGEA stated that it 'does not believe that GrainCorp's port loading protocols have been fully tested in terms of the ability to efficiently allocate port loading capacity due to the small crop on the east coast in 2009. This is likely to be tested in the current season.'⁵⁸

AGEA also states that '[s]imilarly, it is hard to be definitive on whether the "first come, first served" approach to allocation of capacity is sufficient to efficiently allocate resources in a year where demand exceeds supply as this has not yet been tested. In principle, AGEA believes that the "first come, first served" approach can

⁵⁵ GrainCorp Operations Limited, *Submission to the ACCC*, 22 September 2010, p. 9.

⁵⁶ GrainCorp Operations Limited, *Submission to the ACCC*, 22 September 2010, p. 9.

⁵⁷ GrainCorp Operations Limited, *Submission to the ACCC*, 22 September 2010, p. 9.

⁵⁸ Australian Grain Exporters Association, *Submission to ACCC Issues Paper*, 10 November 2010, p. 2.

work efficiently, however, the effectiveness will be impacted by a couple of factors, such as whether:

- GrainCorp over-allocates or favours its trading division (this has not been evident to date)
- inland inefficiencies/capacity allocation overrides port capacity allocation.⁵⁹

With respect to the provisions in the Proposed 2011 Undertaking regarding variation of the protocols, AGEA states:

‘The flexible approach to the port loading protocols [i.e. allowing GrainCorp to vary the port loading protocols without seeking formal approval from the ACCC] has not caused any concerns. AGEA supports this flexibility as part of the framework and is not aware of any issues for Australian wheat exporters as a result of this flexibility.’⁶⁰

5.2.3 AWB (Australia) Limited submission to the ACCC Issues Paper

In its submission AWB comments on the offer made by GrainCorp in February 2010 for exporters to review their requirements for the May-September 2010 period and withdraw unwanted nominations without forfeiting the booking fee. AWB states it was prevented from booking required slots during that period and implies that this inability was due to the bookings made by GrainCorp’s trading arm. AWB further states that ‘its analysis indicates that GrainCorp’s trading arm represented as much as 41% of all slots booked through the Period [May to September 2010]’.

It is also AWB’s assessment that this one-off decision by GrainCorp is evidence that ‘GrainCorp’s proclaimed “disincentive” in reality only applies to true third parties.’⁶¹

The AWB submission also provides views on the 2010 variation to GrainCorp’s PTSP. It is AWB’s view that:

... the lack of rigidity in relation to capacity, shifting slots across time and geographic location effectively means that AWB’s exporting activities often take place in accordance with the subjective views of GrainCorp port operations. AWB would prefer to see the market deal with surplus slots, and a secondary market should be able to trade slots freely. Such an approach has no negative effect on GrainCorp (as it still receives its “take or pay” fee), but has the positive effect of augmenting an exporter’s ability to directly influence its operational outcomes, rather than having to rely on uncertain outcomes associated with GrainCorp’s purported port “flexibility”.⁶²

5.2.4 Timothy Bush submission to the ACCC Issues Paper

Mr Bush’s submission provides views on the quantification and utilisation of capacity at GrainCorp port terminals, and of the extent to which capacity exceeds utilisation. In particular the submission notes that ‘the “average utilisation” of “nominal port terminal capacity” i.e. 23-24% is calculated over the last 6 years; the period of the

⁵⁹ Australian Grain Exporters Association, *Submission to ACCC Issues Paper*, 10 November 2010, p. 2.

⁶⁰ Australian Grain Exporters Association, *Submission to ACCC Issues Paper*, 10 November 2010, p. 1.

⁶¹ AWB (Australia) Limited, *Submission to ACCC Issues Paper*, 12 November 2010, p. 1.

⁶² AWB (Australia) Limited, *Submission to ACCC Issues Paper*, 12 November 2010, p. 2.

longest running, most widespread drought in the eastern Australian states.’⁶³ The submission does not comment on the approach to capacity allocation used by GrainCorp.

5.2.5 GrainCorp response to third party submissions (13 December 2010)

GrainCorp provided a submission responding to certain of the views expressed in the submissions made by interested parties.

Response to submission by AGEA

GrainCorp notes in reference to AGEA’s comments regarding the protocol variation process that it ‘cannot unilaterally modify the Protocols. GrainCorp is required to notify the ACCC of any proposal to modify the Protocols, and any proposed modification is subject to a formal consultation process and period.’⁶⁴

Response to submission by AWB (Australia) Limited

GrainCorp responds to a number of the statements in the submission by AWB. In particular:

- GrainCorp acknowledges that its booking fee is a means by which port elevator booking speculation can be prevented and stated that the waiver of booking fees in February 2010 was ‘in recognition of the dramatic changes in the availability of exportable grain that occurred during the preceding three months.’⁶⁵
- In response to AWB statements that it was prevented from booking elevation capacity for the period May to September 2010 because of the slots already booked by the GrainCorp trading arm, GrainCorp states:

...under the first-in-first-served port elevation booking process, *all* exporters have an equal opportunity to make bookings ... [and] ... exporters can consult the daily shipping stem to see what capacity has been booked and which exporter has booked the capacity.⁶⁶

GrainCorp also states that bookings in favour of its own trading operations were not excessive and did not prejudice any other exporter given its ‘elevation bookings [during the May to September 2010 period] represented 41% of bookings made (being 30% of available capacity) and GrainCorp’s bookings, therefore, represented only 13% of total elevation capacity available during the period.’

In response to AWB’s submission regarding the bookings for GrainCorp’s trading arm GrainCorp further notes that each of the three bulk handlers conduct most of their export activity in the states where they have their storage network.

GrainCorp states that ‘the comparisons made by AWB between the quantum of bookings made by GrainCorp on the eastern Australian shipping stem, and the

⁶³ Timothy Bush, *Submission to ACCC Issues Paper*, 12 November 2010, p. 9.

⁶⁴ GrainCorp Operations Limited, *Response to third party submissions*, 13 December 2010, p. 1.

⁶⁵ GrainCorp Operations Limited, *Response to third party submissions*, 13 December 2010, p. 2.

⁶⁶ GrainCorp Operations Limited, *Response to third party submissions*, 13 December 2010, p. 2.

quantum of GrainCorp's bookings on the South Australian shipping stem, is contextually misleading.⁶⁷

- In response to AWB comments on the 2010 PTSP, GrainCorp disagrees with the AWB view that the subjective views of GrainCorp impact AWB's export activities.
- GrainCorp expresses strong views against the AWB proposal for a secondary market to trade booked slots. GrainCorp's concerns are that:
 - ... 'creation of a secondary market for port elevation capacity would lead to:
 - speculative booking of capacity by traders at peak times ...,
 - an increase in the cost of elevation [due to] the "premium" demanded by the secondary market ...,
 - false market signals based not on export demand, but on the activities of parties seeking to speculate in, and make windfall gains from, trading elevation capacity,
 - a decrease in port elevator efficiency driven by uncertainty created by speculative trading of elevation capacity.⁶⁸

5.3 ACCC view

5.3.1 Continuous disclosure rules

GrainCorp publishes its shipping stem, updated daily, on its website in accordance with the continuous disclosure requirements of subclause 9.1 of the 2009 Undertaking. The ACCC notes that subclause 9.1 aligns with continuous disclosure rules contained in the WEMA.⁶⁹

GrainCorp also publishes grain elevation capacity at each of its ports and a table showing remaining, unbooked capacity on a daily basis. When available capacity is affected by external factors, GrainCorp provides an explanation of the circumstances on its website and the consequences for available capacity. Two instances have arisen where this has been necessary in the 2010/11 season.

First, capacity at Geelong port was reduced as storage available for export cargo accumulation was limited by an anticipated large local harvest and consequent high demand for storage of grain received ex-farm. Second, the Queensland floods have severely damaged rail infrastructure and Fisherman Islands is consequently likely to be dependent on receivals by road only for an anticipated three months.

The ACCC is of the view that, during the period of operation of the 2009 Undertaking, GrainCorp's disclosure of information regarding total and remaining available capacity assists the market and enables access seekers to plan and to obtain needed capacity.

⁶⁷ GrainCorp Operations Limited, *Response to third party submissions*, 13 December 2010, p. 3.

⁶⁸ GrainCorp Operations Limited, *Response to third party submissions*, 13 December 2010, p. 4.

⁶⁹ *Wheat Export Marketing Act 2008*, s. 24(4).

5.3.2 PTSP

Capacity management

GrainCorp allocates elevation capacity on a first come, first served basis, with CNAs prioritised in the order they are received. Exporters book slots on the GrainCorp shipping stem for which a non-refundable booking fee is paid.

The ACCC notes that the PC final report discussed alternative approaches to capacity allocation and noted the significant role that auctions can play in efficiently allocating limited port capacity. The PC stated that, while the auction system operated by CBH could be improved, it should be continued and that

... other port operators might also consider adopting a similar system where there is a likelihood of excess demand for port capacity at certain points in time (a shifting peak demand problem driven by movements in the supply and demand for wheat).⁷⁰

The ACCC acknowledges the economic benefits of market arrangements to allocate scarce port terminal services. However, the ACCC also notes that introduction of an auction system involves considerable costs for both GrainCorp and its customers, including of design, implementation and transition and has not been raised by stakeholders in submissions to the ACCC issues paper.

The ACCC is required to form a view on the appropriateness or otherwise of an undertaking. Therefore, the ACCC's view is that it is likely only to be appropriate to propose an alternative capacity management system—such as an auction system—if the arrangements of the Proposed 2011 Undertaking are demonstrated to be inappropriate with regard to the provisions of Part IIIA. In this regard the ACCC notes that section 44ZZA(3), which sets out the matters the ACCC should have regard to in forming its view, includes the objects of Part IIIA. In part, these objects are 'to promote the economically efficient operation of, use of, and investment in the infrastructure by which services are provided, thereby promoting effective competition in upstream and downstream markets'.⁷¹

The ACCC notes that the appropriateness, or otherwise, of a particular capacity allocation arrangement depends, *inter alia*, on the effectiveness of existing or past arrangements for the port facilities under consideration. While the practice by other operators or in other markets may provide useful intelligence in forming a view as to what is appropriate in particular circumstances it is the individual circumstances themselves which are of most importance.

The ACCC is of the view that, for a capacity allocation method to effectively promote economic efficiency, it should meet the following key conditions:

- access seekers have information regarding available capacity necessary to plan export activities and obtain needed port services and capacity booking arrangements operate efficiently and fairly

⁷⁰ Productivity Commission, *Wheat Export Marketing Arrangements – final report*, 1 July 2010, p. 205.

⁷¹ *Competition and Consumer Act 2010*, s. 44AA(a).

- exporters have reasonable flexibility to enable execution of booked capacity
- at peak times, when demand for port services by grain exporters exceeds available capacity, there are mechanisms to ensure that capacity does not go unused.

The ACCC notes that different arrangements for the allocation of capacity exist across the ports operated by the different BHC. In particular, an auction system operates in Western Australia, whereas first come, first served arrangements operate along the east coast and in South Australia. In forming a view as to the appropriateness of a proposed capacity management system, the ACCC considers how well it meets, or is likely to meet, these conditions. That one particular capacity management system satisfies the conditions does not preclude a different system also performing satisfactorily against them in the same or different circumstances.

The following discussion considers the capacity management system that GrainCorp has in place and which it is proposing should continue for the 2011-14 period.

Information regarding available capacity

On the first point, as noted above, GrainCorp has met its continuous disclosure obligations and has also published information concerning available capacity on its website. Clarity in the specification and quantification of the capacity to which access undertakings relate is a precondition for effective access arrangements.

The capacity of a port terminal to outturn grain into bulk carrier vessels depends on factors including the type of port facility, the hours of operation, receipt and storage capacities, in addition to the capacity of the ship loader. In turn, these factors are not fixed, but may vary depending on the influence of factors such as weather, the choice of transport for delivery to port or the speed with which a vessel can be safely loaded.

GrainCorp publishes on its website an estimate of monthly elevation capacity for each of its port terminals which is the capacity available to be booked on GrainCorp's shipping stem (estimated capacity). In its submission in support of its 2009 Undertaking lodged in April 2009, GrainCorp provided information in relation to the aspects of capacity—shipping, storage and intake—which together determines 'nominal' port capacity (nominal capacity).⁷² Estimated port capacity is determined by nominal capacity and also by expectations as to how a facility is used—for example the number of different grains and grades being through-putted.

GrainCorp has informed the ACCC that the values assigned to each of these main determinants of port capacity are calculated on the basis of factors such as the proportion of intake arriving by rail and road and the speed with which vessels can be safely loaded. As the GrainCorp April 2009 submission shows, the limiting factor on overall port capacity differs from port to port depending on the characteristics of the terminal facility.

The ACCC notes that the nominal capacity at each port is determined by which of the aspects of capacity is the limiting factor and that the estimated capacity available for

⁷² GrainCorp Operations Limited, *Submission to the ACCC – Port terminal services undertaking*, 16 April 2009, Table 11 p. 32 (available on ACCC website).

booking by grain exporters differ from this nominal capacity data provided by GrainCorp. In situations where GrainCorp has needed to adjust available capacity it has provided its explanation of where the tighter constraint has emerged—such as available storage at Geelong during December 2010 and January 2011 and road receival capacity at Fisherman Islands during the period when rail transport is out of commission.

Publication by GrainCorp of its shipping stem in conformity with the continuous disclosure requirements set out in clause 9.1 of the Proposed 2011 Undertaking enables access seekers to monitor when, and by whom, bookings are being made, as well as when and where capacity constraints are emerging.

Allocation of capacity

As noted, bookings for shipping slots are taken by GrainCorp on a first come, first served basis. The information provided by GrainCorp regarding its shipping stem and the elevation capacity available at its ports allows access seekers to assess the availability of capacity against their export needs and to make bookings in required months before all slots are booked. It also provides transparency regarding the bookings made by GrainCorp for its trading arm.

The ACCC notes concerns expressed by AWB that GrainCorp held an estimated 41 per cent of the bookings on its shipping stem for the May to September 2010 period and that this exceeded bookings by any other trader. The ACCC also notes that GrainCorp has stated in its submission in response to third party submissions that total bookings for the period in question were 30% of port elevation capacity and that its own bookings were 13% of that capacity.

In its submission AGEA noted that there was no evidence that GrainCorp over allocates or favours its trading division, but also noted that the first come, first served approach to allocation had yet to be tested in a year when demand exceeds capacity.

The ACCC considers that hoarding of capacity on its stem by GrainCorp would raise serious concerns in relation to compliance with the no hindering access provision of its current Undertaking. The ACCC has inquired into the bookings made by GrainCorp on its stem during the 2010-11 season and, to date, has not found evidence that bookings by GrainCorp's trading division blocked out capacity on the stem. Rather, bookings by all traders have appeared on the stem progressively and this is true for bookings by GrainCorp's trading division as well as for other exporters. These bookings by all traders resulted in capacity being fully booked for some port services on the GrainCorp shipping stem.

However, the ACCC considers that concerns expressed by stakeholders regarding the practice of 'speculative' bookings made when a trader does not have a sale booked do not, alone, warrant a discontinuation of the 'first come, first served' system of capacity allocation in the case of GrainCorp. Rather, the ACCC is of the view that the 2009 Undertaking enables access seekers to obtain necessary information regarding total and remaining capacity at GrainCorp ports and that booking arrangements appear to have operated effectively and in accordance with the non-discrimination provisions of the 2009 Undertaking. The ACCC is therefore of the preliminary view that continuing the first come, first served capacity allocation arrangements in Proposed 2011 Undertaking is likely to be appropriate.

It is also the view of the ACCC that the 2009 Undertaking enables access seekers to obtain necessary information regarding total and remaining capacity at GrainCorp ports and that booking arrangements operate efficiently and in a non-discriminatory manner. The ACCC is therefore of the view that it is appropriate that the Proposed 2011 Undertaking continues these arrangements.

Executing booked capacity

With respect to the second condition effective capacity management should meet, the ACCC notes that there are many factors that can impact exporter plans. These include disruption to the supply chain—from weather conditions that impact harvest timing and grain quality through up-country storage and transport to port, as well as events at port.

Variations to the PTSP made by GrainCorp in May 2010 provided shippers with further options to use a booking once made—including by changing the elevation period and splitting cargos into multiple lifts as well as by changing the load port for a nomination, subject to availability given other bookings on the shipping stem.

These changes support greater efficiency in the utilisation of port capacity by allowing shippers greater flexibility to execute slots they have booked on the stem. Bulk wheat exporters are now able to make changes to shipping arrangements in light of supply chain developments not in accord with expectations at the time a booking was made. A shipper encountering difficulties accumulating a cargo within the booked elevation period can apply to GrainCorp to move the booking to a later elevation period in which capacity is still available provided it is within the shipping year.

However, it is the ACCC considers that this benefit is likely to be limited to periods when ports are operating with spare capacity and that GrainCorp is therefore able to accommodate requests from shippers to move shipping dates into later elevation periods or to split cargos between elevation periods.

Minimising unused capacity at peak times

The ACCC is of the view that the main concerns regarding the effectiveness of GrainCorp's capacity allocation system relate to peak periods when the flexibility built into the PTSP is not available in practice due to congestion on the stem. The ACCC notes that while total available capacity across GrainCorp's port facilities is significantly greater than average annual demand, annual demand is very variable and grain exports are highly seasonal. As a consequence, there can be significant periods when capacity at a particular facility is fully booked and flexibility available to shippers is severely limited. Moreover, there are limits on the extent to which the elevation services can be substituted between GrainCorp's port facilities.

At times of peak capacity at a port terminal, the likelihood is that, if an exporter is unable to execute a booking it will not be possible for the booking to be moved. Instead, the booked elevation capacity may go unused while other exporters, who may have been able to utilise the slot, are unable to do so. This is true for bookings by GrainCorp's trading arm as well those made by third party users.

Moreover, there is no incentive for the exporter to acknowledge a problem executing a booking early and return the capacity to GrainCorp as the booking fee is still

forfeited. Rather, the incentive is for the exporter to persist until the time allowed to execute the booking expires.

The ACCC sees two possible approaches to reduce the risk that capacity may go unexecuted at times of peak utilisation:

- GrainCorp to have the ability to pro-actively manage its shipping stem when the stem is fully booked to identify emerging problems with cargo accumulation and take action to ensure capacity does not go unused
- exporters to have the ability to trade bookings so as to enable an exporter, who is encountering difficulties executing a booking and who is able to reach a commercial agreement with another shipper able to utilise the slot, to transfer the booking.

The ACCC considers that the first option is not appropriate as, to allow GrainCorp discretion with regard to utilisation of booked capacity would result in uncertainty for access seekers and the possible perception, or reality, of discriminatory outcomes.

However, the ACCC is of the view that allowing exporters to transfer booked slots would reduce the risk that capacity would go unused at peak times. It also enables an exporter who does not need a slot booked at a non-peak time to seek a commercial arrangement that reduces the loss incurred by the forfeiture of the booking fee.

The ACCC notes the proposal made by AWB for a secondary market for capacity booked at GrainCorp terminals and possible concerns that such arrangements may lead to traders making speculative bookings on the shipping stem with negative consequences for the wheat export market. The ACCC considers that it is appropriate for the opportunities to improve efficient allocation and use of capacity by allowing the exchange of booked slots between shippers to be explored further.

However, the ACCC acknowledges that there may be risks with such an approach and it is cognisant of the need to consider how arrangements that allow for the transfer of slot bookings between exporters may affect the legitimate business interests of GrainCorp and whether port operations are likely to be significantly adversely affected.

To come to a view as to the appropriateness of allowing exporters to transfer shipping slots it is necessary to make a judgement as to the extent to which adverse outcomes may outweigh the benefits of allowing transfers.

The ACCC has identified the following issues as relevant in assessing the benefits and risks of allowing transfers:

- what are the potential gains arising from allowing transfers; do other mechanisms obviate the need for the transfer of slots
- would such transfers lead to significantly greater speculation on the shipping stems than occurs already

- would such speculation give rise to different or more adverse outcomes than those arising from the over booking that has occurred in recent seasons

As noted above, the ACCC considers that allowing transfer of slots may result in more efficient use of capacity at peak times by reducing the likelihood of capacity going unutilised and facilitating the use of capacity by those who value it most highly. Under a system where commercial transfer of a slot booking is permitted, such transfers may be at a premium or discount to the original booking fee, depending on demand for, and availability of slots as the confirmed elevation period of the booked slot approaches. In either case, the transfer is ensuring the capacity is utilised and is going to the highest value in use. This is the case, whether or not the booking was made originally for speculative reasons or to meet planned export needs.

The ACCC also notes that some market mechanisms already exist whereby the slots booked by a trader can be used to execute another trader's export task. These are the practices of stock swaps and selling grain free on board (FOB).

The ACCC recognises that it is established practice for exporters to make arrangements to accumulate cargos for other traders to ship when they are not, themselves, in a position to execute a booking. The ACCC understands that these arrangements between exporters occur without giving rise to operational efficiency issues at the port facilities. It is the ACCC's view that allowing exporters to transfer bookings on commercial terms takes this arrangement a step further by enabling exporters to transfer the rights and obligations associated with the booking to the shipper that is using it.

With respect to the practice by traders of utilising slots to make FOB sales, the ACCC understands that traders actually make speculative bookings on the shipping stem on the expectation that there will be an opportunity to make an FOB sale. While there are no doubt instances where the acquisition of grain FOB may suit an exporter's circumstances this is unlikely to always be the case and some exporters may prefer to make their own up-country and cargo accumulation arrangements. Allowing transfer of slots allows traders caught short of necessary ship loading capacity the opportunity to access additional capacity.

As noted, speculative booking of shipping slots by traders already occurs to a significant extent. In each of the last two completed shipping seasons bookings on GrainCorp's shipping stem was approximately double the volumes actually shipped. It therefore seems likely that allowing transfer of slots may change how those who take speculative positions on the stem utilise the slots booked rather than the actual level of speculative bookings.

The ACCC notes also that there are inherent curbs on the incentive to speculate on the shipping stem as capacity constraints may not emerge at the times and ports anticipated when the booking is made. This has been clearly demonstrated in the current 2010-11 season when weather has significantly affected timing of the harvest and grain quality. In these circumstances, acquisition of shipping slots in the first months of the 'normal' peak period for speculative purposes would be likely to have resulted in losses for the speculator.

The ACCC recognises that arrangements by which exporters can transfer bookings would have to be subject to appropriate conditions. It is the ACCC's view that such arrangements are best made by industry participants but notes the following as being appropriate conditions for transfer of slots:

- transfers to be between customers with whom GrainCorp has an access agreement in place
- the transferor must meet GrainCorp's usual trade terms, including in relation to any monies owed
- the booking that is transferred carries all booked arrangements as confirmed with the transferor—such as port, elevation period, assigned load date, vessel
- the transferee acquires all obligations, and rights, held in relation to the booking by the transferor at the time of the transfer.

The ACCC notes that provision for transfers in both the PTSP and the indicative access agreement would be necessary.

The ACCC seeks views from stakeholders regarding benefits and risks of allowing transfer of booked slots and any conditions considered necessary to ensure regarding effective arrangements shipping slot transferability.

Transfer of booked slots—issues for comment

The ACCC seeks comments and supporting information (such as experience in overseas markets) on issues relevant to arrangements for transfer of slots, including the following:

- Possible benefits and risks of allowing transfers:
 - what are the potential gains arising from allowing transfers
 - do other mechanisms obviate the need for the transfer of slots
 - would such transfers lead to significantly greater speculation on the shipping stems than occurs already
 - would such speculation give rise to different or more adverse outcomes than those arising from the over booking that has occurred in recent seasons
- Provisions for transfer of slots:
 - specification of the rights/obligations that are the subject of a transfer (eg as confirmed on the shipping stem at the time of transfer)
 - conditions to be met by the transferor and transferee
 - GrainCorp's role and rights and obligations
 - implications for GrainCorp's standard terms and conditions, PTSP and indicative access agreement
 - Other limitations or conditions on the transfer

In summary, ACCC is of the preliminary view that trade in book slots may improve outcomes but that risks are recognised. The ACCC invites comments on whether the trade of slots booked on the GrainCorp stem be permitted and on the arrangements necessary to enable the transfer of booked slots between exporters in a manner consistent with GrainCorp's PTSP and contractual arrangements with its customers.

5.3.3 Changes in the 2010 PTSP

As noted above, the ACCC considers that the introduction of greater flexibility into the PTSP through the May 2010 variation process has improved GrainCorp's capacity management arrangements, particularly at times when spare capacity exists. However, it is the view of the ACCC that the variation has resulted in lack of clarity with respect to some aspects of the PTSP.

In particular the ACCC notes the following:

- definitions in clause 1 regarding 'requested elevation period' and 'confirmed elevation period' lack clarity with respect to when these periods are 15 day periods
- the definition of 'vessel nomination' in clause 1 makes an incorrect clause reference; the reference to clause 20 should be to clause 17
- interaction of clauses 15, 16 and 17 dealing with ETA (estimated time of arrival), assigned load date, and vessel nomination is not clear.

It is the view of the ACCC that any ambiguity or uncertainty regarding the operation of the PTSP is not appropriate.

GrainCorp has informed the ACCC that it has identified the need to undertake a PTSP variation process to address ambiguities and uncertainties that have become evident since the last variation process was completed in May 2010. The ACCC is of the preliminary view that it is appropriate for GrainCorp to consult directly with access seekers regarding proposed changes to the PTSP.

5.3.4 Variation of PTSP

The provisions for variation of the PTSP contained in the Proposed 2011 Undertaking roll forward the provisions of the 2009 Undertaking which applied to the variation process conducted in April-May 2010.

This section discusses those provisions, with a focus on the following issues:

- the comprehensive nature of the PTSP
- the process for varying the PTSP
- the ACCC's role in the process for varying the PTSP.

Each of the 2009 undertakings accepted by the ACCC applying to GrainCorp, CBH and Viterra contain a version of port loading protocols, with a process for their variation. These differ to some extent between the different undertakings. Each

operator has varied its protocols since acceptance by the ACCC and different issues have arisen with these variation processes.

In assessing the PTSP submitted by GrainCorp and the PTSP variation process, the ACCC has taken into consideration the experience of each of the bulk handlers' variation processes. The ACCC considers this to be appropriate given the object of Part IIIA of the Act specified in s. 44AA(b) to

provide a framework and guiding principles to encourage a consistent approach to access regulation in each industry.

5.3.4.1 The comprehensive nature of the PTSP

The variation process followed by GrainCorp conformed to the provisions of subclause 9.3, including a consultation process which began on 21 April 2010.

However, prior to undertaking the variation process, GrainCorp published Port Terminal Protocols Guidelines (Guidelines) in January 2010. Stakeholders expressed concerns to the ACCC about the introduction of the Guidelines and the ambiguity of the Guidelines' legal status. GrainCorp explained to the ACCC that the Guidelines were developed to clarify and improve the operation of the PTSP in response to feedback and questions from industry. In February 2010, the ACCC had discussions with GrainCorp and expressed concerns about the Guidelines. This resulted in GrainCorp adding the following text to its website:

Note - The Guidelines do not form a part of the Undertaking and are intended to assist with interpretation of the Port Terminal Protocols only.

The Guidelines detailed such matters as elevation timeframes and the scope of refunds. In effect, GrainCorp's development of the Guidelines to be read in conjunction with the PTSP resulted in it having two documents in place that dealt with access to port terminal services by wheat exporters. Two issues arose as a result of this.

First, notwithstanding the stated intent of developing the Guidelines to clarify and improve the PTSP, the existence of two documents gave rise to the potential for uncertainty for shippers to the extent that there was inconsistency between the Guidelines and the PTSP.

Second, and more important, the access undertaking given by GrainCorp to the ACCC is structured to incorporate the PTSP which set out the key processes by which GrainCorp will allocate port terminal capacity. The effect of the Guidelines was to put in place additional or alternative arrangements that may impact access to port terminal services but which did not form a part of the access undertaking.

In March 2010, the ACCC had further discussions with GrainCorp, which resulted in GrainCorp agreeing to proceed with a formal variation of the PTSP in accordance with the terms of its 2009 Undertaking. However, there was a lengthy period from GrainCorp's initial publication of the Guidelines on its website to the formal variation process, which commenced on 21 April 2010 and concluded in May 2010.

The ACCC considers that clause 9.1(a) of the Proposed 2011 Undertaking (which incorporates the Continuous Disclosure Rules as set out in section 24(4) of the

WEMA), requires the published PTSP to be comprehensive. The ACCC is concerned that GrainCorp has not complied, at all times, with this requirement.

To ensure clarity and certainty, the ACCC takes the preliminary view that subclause 9.1(a) of the Proposed 2011 Undertaking should be amended to provide that the PTSP must be, and continue to be, a comprehensive statement of GrainCorp's policies and procedures for managing demand for the port terminal service.

The ACCC will actively monitor future compliance by GrainCorp in this area.

5.3.4.2 Process for varying protocols

In 2009 the ACCC accepted a PTSP variation mechanism based on an industry consultation process rather than a formal ACCC consultation process. In its Further Draft Decision on GrainCorp's 2009 Undertaking the ACCC stated that it would monitor the success of this variation model and take its findings into account in any future review of access undertakings.⁷³

The ACCC recognised at that time that the model accepted for variation of the PTSP carried some risks as the ACCC would not review all proposed amendments to determine their appropriateness. The ACCC further noted that this risk was mitigated by:

- the inclusion of a robust consultation mechanism
- the inclusion of a provision allowing the ACCC to treat a breach of the amended PTSP as a breach of the Undertaking
- the recommendation of a robust non-discrimination provision and the inclusion of a provision that any variation to the PTSP must be made in accordance with and subject to the non-discrimination provisions of the Undertaking.

As mentioned above, in assessing the appropriateness of the variation process contained in the Proposed 2011 Undertaking, the ACCC has taken into account the experience of each of the bulk handlers in making variations to their protocols. The ACCC considers that there are a number of minimum standards that should apply to a variation process, in order to ensure an efficient, meaningful and transparent consultation process. This is addressed to the object in s. 44AA(b) aimed at a consistent approach to access regulation across the industry.

The minimum standards that the ACCC considers are necessary for an efficient, meaningful and transparent variation process are:

- a draft variation and an explanation for the changes, circulated to interested parties and the ACCC
- a reasonable consultation timeframe, which allows for meaningful consultation between industry participants and the port operator

⁷³ ACCC, *GrainCorp/Viterra/CBH Operations Limited Port Terminal Services Access Undertaking Further Draft Decision*, 23 December 2009, p. 223.

- an obligation on the port operator to consider submissions in good faith, with submissions to be made publicly available
- an ability for the port operator to amend the draft variation based on consultation, without having to withdraw the draft variation and start another process
- a reasonable period of time following publication of a finalised variation before the variation takes effect.

The ACCC considers that these standards should apply consistently across the industry, while not necessarily resulting in identical variation processes.

The ACCC has assessed the variation process in the Proposed 2011 Undertaking against these proposed minimum standards in the discussion that follows. While the variation process meets some of these standards, the ACCC considers that some changes are necessary.

A draft variation and an explanation for the changes, circulated to interested parties and the ACCC

The ACCC takes the preliminary view that clause 9.3(a)(iii)(A) of GrainCorp's Proposed 2011 Undertaking fulfils this minimum standard.

A reasonable consultation timeframe, which allows for meaningful consultation between industry participants and the port operator

GrainCorp's Proposed 2011 Undertaking allows for a 10 business day consultation period. The ACCC's preliminary view is that this is appropriate.

An obligation on the port operator to consider submissions in good faith, with submissions to be made publicly available

GrainCorp's Proposed 2011 Undertaking contains a requirement for GrainCorp to 'actively consider' responses received in consultation. The ACCC takes the preliminary view that the Proposed 2011 Undertaking is unlikely to be appropriate unless the current requirements are extended so that GrainCorp is required to consider responses to consultation in good faith. The ACCC notes that this requirement is contained in the existing undertakings applying to other port operators.

GrainCorp's Proposed 2011 Undertaking does not provide for the publication of written submissions received during the variation process. The ACCC takes the preliminary view that the Undertaking is unlikely to be appropriate unless it contains a provision specifying that GrainCorp must publish on its website written submissions received during the variation process consultation.

In the revised version of the Proposed 2011 Undertaking provided to the ACCC in response to this preliminary view GrainCorp has amended clause 9.3(a)(iii) to read:

- (C) *GrainCorp collating, reviewing and considering the responses from interested parties in good faith.*

Also the following provisions have been included:

- (iii) (D) *subject to clause 9.3(a)(iv), within 5 business days of publishing on its website any written submissions received from interested parties under this clause 9.3(a)(iii).*
- (iv) *GrainCorp is not required under clause 9.3(a)(iii)(D) to publish on its website any written submissions which are offensive, abusive or inappropriate for publication. GrainCorp will however provide any such submissions to the ACCC within 5 Business Days.*

The ACCC considers that these changes adequately address its concerns and is of the preliminary view that were the Proposed 2011 Undertaking amended in line with this revision it would be more likely to be appropriate.

An ability for the port operator to amend the proposed variation based on consultation, without having to withdraw the current variation and start another process

The ACCC takes the view that, while not explicitly provided for, the Proposed 2011 Undertaking does allow GrainCorp to consider responses from interested parties and amend its proposed variation in response to consultation before publishing the final variation notice. However, problems have arisen with the variation processes of other operators, resulting in the need for a variation process to be restarted to accommodate desired changes to a proposed variation. The ACCC is concerned that this is not in the interests of efficiency and that port operators should be able to amend a proposed variation, taking into account submissions made during the consultation process. In the interests of certainty and transparency for users, the ACCC's preliminary view is that the Proposed 2011 Undertaking is unlikely to be appropriate unless it explicitly recognises the ability of GrainCorp to amend a proposed variation based on consultation, without commencing a new variation process.

In the draft revised Proposed 2011 Undertaking provided to the ACCC GrainCorp has amended clause 9.3(a)(iii) to read:

- (E) *at any time during the consultation process under this clause 9.3(a)(iii) GrainCorp may prepare and circulate a further variation to the proposed changes to take into account feedback from interested parties or from the ACCC. To avoid doubt, this clause 9.3(a)(iii)(E) does not require GrainCorp to recommence the consultation process under clause 9.3(a)(iii).*

The ACCC is of the preliminary view that this proposed change adequately address its concerns and that were the Proposed 2011 Undertaking amended in line with this revision it would be more likely to be appropriate.

A reasonable period of time following publication of a finalised variation before the variation takes effect.

Clause 9.3(a)(iv) of GrainCorp's Proposed 2011 Undertaking provides that the variation must be published at least 30 days prior to the date on which it is to become effective. The ACCC's preliminary view is that the current proposed timeframe is likely to be appropriate.

Summary of required changes

The ACCC takes the preliminary view that GrainCorp's Proposed 2011 Undertaking is unlikely to be appropriate unless it is amended to reflect the following:

- the inclusion of a requirement on GrainCorp to consider responses received in the consultation process on a proposed variation in good faith
- publication on GrainCorp's website, of written submissions received during the variation process consultation
- a provision explicitly recognising the ability of GrainCorp to amend a proposed variation based on consultation, without commencing a new variation process.

As noted above, GrainCorp has proposed revisions to meet these concerns. It is the ACCC's preliminary view that an amended undertaking that includes these provisions is more likely to be appropriate.

5.3.4.3 The ACCC's role in the process for varying the PTSP

As noted above, in the Further Draft Decision on GrainCorp's 2009 Undertaking, the ACCC considered the variation process for the PTSP and at that time decided that it was appropriate for GrainCorp to retain flexibility for varying the PTSP without the ACCC determining the appropriateness of the proposed variation, noting that the variation mechanism could be strengthened in any future undertaking, if necessary.⁷⁴

The ACCC acknowledges that the PTSP is an operational document and, as such, a degree of flexibility is required to ensure efficient operations at port. However, the wide scope of the PTSP means that quite significant aspects of port operations, such as capacity allocation, can be altered through a variation to the PTSP without the ACCC having any role in the variation process.

During the operation of the 2009 undertakings from GrainCorp, Viterra and CBH, the ACCC has gained insight into the scope of the potential changes that could be made through a variation to the PTSP. While the ACCC still considers it important for port operators to have sufficient flexibility to manage operations at port, *in certain limited circumstances* the ACCC considers that the lack of regulatory oversight is inappropriate. These limited circumstances are where:

- the proposed variation is material
- the proposed variation gives rise to concerns under either the anti-discrimination (clause 5.5) and/or the no hindering access (clause 9.4) provisions of the undertaking.

If these circumstances arise, then the ACCC may send a written notice to the port operator outlining its concerns, with reasons. Upon receipt of the notice, or earlier, the port operator must withdraw the proposed variation. The ACCC considers it necessary to support this notice making power with information gathering powers. This issue is discussed below (5.3.5).

As the ACCC considers that certainty, flexibility and timeliness regarding the operation of the PTSP are of critical importance, given the PTSP is the document by

⁷⁴ ACCC, *GrainCorp/Viterra/CBH Operations Limited Port Terminal Services Access Undertaking Further Draft Decision*, 23 December 2009, p. 288.

which the port operates, an approval role in respect of each proposed variation is inappropriate. The suggested role would be specifically limited to the circumstances set out above.

Hence, the ACCC takes the preliminary view that the undertaking is unlikely to be appropriate unless it includes:

- a) the ability of the ACCC to:
 - gather the necessary information to assess whether the ‘limited circumstances’ exist
 - to issue a notice that the proposed variation raises concerns in relation to the provider’s anti-discrimination and/or no hindering access obligations.
- b) an obligation on the port operator to withdraw the proposed variation upon receipt of the notice.

The ACCC seeks comment from stakeholders on this preliminary view.

5.3.4.4 The mechanics of an ACCC role in the PTSP variation process

How the proposed ACCC role would be applied to the variation process

Where the ACCC has concerns with the port operator’s proposed variations, it would raise those concerns with the port operator, and access seekers if appropriate, prior to issuing a notice.

In practice, the ACCC considers that the assessment and notification would be applied within the current timeframe for variation. Clause 9.3(a)(iv) of the Proposed 2011 Undertaking provides that the variation must be published at least 30 days prior to the date it is to become effective (the effective date). As noted earlier, the ACCC is acutely aware of the importance of timeliness in the variation process and the consideration of operational certainty for the port operator and access seekers.

The ACCC considers that it would be required to issue the notice no less than ten days before the effective date, taking into account the overall period of time specified for the variation process in the Proposed 2011 Undertaking. Such a notice would include reasons.

Effect of the proposed ACCC role once exercised

The effect of the ACCC issuing a notice and the proposed variation to the PTSP not taking effect will depend on whether the notice relates to the entire variation or only part of it. If the notice relates to the entire variation, the variation cannot take effect and the port operator will be required to commence a new variation process (if it still wishes to vary the PTSP), that has been amended to address the ACCC’s concerns. Correspondingly, if only part of the proposed variation is the subject of a notice, it will not prevent the variation in respect of those changes not a subject of the notice. It will only be possible for the ACCC to disallow the variation in part where the proposed varied terms are not intrinsically related.

Suggested form of the provision

Notice of objection

- 9.4(a) If GrainCorp seeks to vary the Port Terminal Services Protocols in accordance with clause 9.3, the ACCC may object to the proposed variation (or part thereof). If the ACCC objects to a proposed variation (or part thereof) it must:
- (a) issue a notice to GrainCorp stating that it objects to the proposed variation (or part thereof), and why. Any such notice must be published on the ACCC website.
 - (b) Any such notice must be issued at least 10 days prior to the date on which the variation is proposed to become effective.
 - (c) In issuing a notice under this provision, the ACCC must have regard to:
 - a. whether the proposed variation is material; and
 - b. whether the proposed variation gives rise to concerns under either the anti-discrimination provision at clause 5.5 or the no hindering access provision at clause 9.5.
 - (d) The ACCC may withdraw a notice issued under this provision if in all the circumstances it becomes aware that the reasons specified in the notice issued under clause 9.4(a) no longer exist.
 - (e) If the ACCC issues a notice under clause 9.4(a), GrainCorp will:
 - a. withdraw the proposed variation and commence a new variation process by placing a notice to that effect in a prominent place on the GrainCorp website and notifying the ACCC in writing; or
 - b. withdraw the proposed variation as published in accordance with 9.3(a)(iv) and confirm the status of the existing Port Terminal Services Protocols by publishing a notice in a prominent place on the GrainCorp website and notifying the ACCC in writing.

In the draft revised undertaking provided by GrainCorp, it has included provisions for the ACCC to have the ability to issue a notice of objection. This is in line with the drafting proposed by the ACCC with an additional provision that the ACCC must issue a draft notice five business days before issuing a notice of objection.

GrainCorp's revised draft is:

9.4 Objection notice

- (a) If GrainCorp seeks to vary the Port Terminal Services Protocols in accordance with clause 9.3, the ACCC may object to the proposed variation (or part thereof). If the ACCC objects to a proposed variation (or part thereof), it must issue a notice to GrainCorp stating that it objects to the proposed variation and providing reasons for its objection. The ACCC will publish any notice issued under this clause 9.4(a) on the ACCC website;*
- (b) Any notice issued under clause 9.4(a) must be issued at least 10 business days prior to the date on which the variation is proposed to become effective.*
- (c) At least 5 business days before issuing a notice under clause 9.4(c), the ACCC must provide GrainCorp with a draft notice stating that it objects to the proposed variation and providing reasons for its objection.*

(d) In issuing a draft notice under clause 9.4(c) or a final notice under clause 9.4(a), the ACCC must have regard to whether the proposed variation:

(i) is material; and

(ii) amounts to a breach of the anti-discrimination provision in clause 5.5 or the no hindering access provision in clause 9.5.

(e) The ACCC may withdraw a draft notice issued under clause 9.4(c) or a notice issued under clause 9.4(a) if in all the circumstances it becomes aware that the reasons specified in the draft notice issued under clause 9.4(c) or the notice issued under clause 9.4(a) no longer exist.

(f) If the ACCC issues a notice under clause 9.4(a), GrainCorp will, within 3 business days:

(i) withdraw the proposed variation and commence a new variation process by placing a notice to that effect in a prominent place on the GrainCorp website and notifying the ACCC in writing; or

(ii) withdraw the proposed variation and confirm the status of the existing Port Terminal Services Protocols by publishing a notice in a prominent place on the GrainCorp website and notifying the ACCC in writing.

Also, GrainCorp's revised draft adopts a consistent approach to the specification of timeframes within the variation process. The minimum period between publication of the variation and the date on which it becomes effective is at least 20 business days (compared to 30 days previously).

The ACCC is of the preliminary view that a requirement for it to issue a draft notice of objection prior to issuing a final notice is appropriate. However, the ACCC notes that the time between publication of the variation notice—after the minimum 10 business day consultation period—and the issuing of a draft notice is 5 business days. This is a very short time for the ACCC to respond but the ACCC also notes that this function is intended to be used only where a variation is material and raises concerns in relation to the non-discrimination or no hindering access provisions of the undertaking. The ACCC anticipates that, in these circumstances, it will have time to identify the concern and act if necessary.

Other mechanics

The ACCC notes that the Proposed 2011 Undertaking includes provisions for the ACCC to authorise ACCC Commissioners to exercise its powers in relation to its functions regarding non-discrimination and arbitration provisions. The ACCC considers that the introduction of a decision making role into the undertaking and the short timeframes attaching to that role, that the authorisation provisions should be extended and should apply to all ACCC functions under the Undertaking.

The revised draft of the undertaking provided in response to the ACCC's preliminary views by GrainCorp includes in clause 1.1 the provision:

(b) The ACCC may authorise the Regulated Access and Price Monitoring Committee or a member of the ACCC to exercise a decision making function under this Undertaking on its behalf and that authorisation may be subject to any conditions which the ACCC may impose.

The ACCC's preliminary view is that this change adequately addresses its concerns.

5.3.5 Information gathering powers

The ACCC considers that for it to make an effective and appropriate decision in relation to the Proposed 2011 Undertaking—including, for example, on whether to issue a notice in the terms specified above—it is necessary to increase the ACCC's current ability to obtain relevant information from the port operator in a timely manner.

At present, the ACCC can obtain information from the port operator through an ACCC directed audit or on a voluntary basis. The ACCC considers that neither of these methods represents an appropriate way for the ACCC to obtain the relevant information it requires to exercise the proposed power.

An ACCC directed audit only assesses whether the port operator has complied with clause 5.5(a) which requires it not to discriminate between access seekers in favour of its own Trading Division, except to the extent that the cost of providing access to the other access seekers is higher. Assessing the port operator's performance against the non-discrimination clause may be a relevant consideration for the decision on whether to issue the notice; however, it does not encapsulate all the information that the ACCC would need in making the decision. For example, it does not provide information on the port operator's compliance with the no hindering access requirements in clause 9.4.

The ACCC notes that conducting an audit would provide the ACCC with some relevant information to make the decision as to whether to issue the notice, but the information would be incomplete, and it may not be possible for the ACCC to receive the information within the variation timeframe. Timeliness regarding the variation process is discussed above, but the ACCC further notes that any extension of the variation timeframe, even for the ACCC to investigate whether or not to make use of this notice power, may give rise to uncertainty regarding port operations and should be avoided if possible.

Given the nature of the proposed ACCC power, it is appropriate for the ACCC to have the ability to compel port operators to provide specified information in a timely fashion. Information gathering powers would allow the ACCC to obtain information from the port operator so that the ACCC can make a sound decision into whether or not to issue a notice regarding a proposed variation.⁷⁵

The ACCC notes that if such provisions were inserted into the undertaking, a failure by the port operator to provide the information requested by the ACCC would result in a breach of the undertaking.

The draft revision to the Proposed 2011 Undertaking provided by GrainCorp regarding information gathering powers includes within clause 5 the following draft provision.

⁷⁵ The ACCC notes that there is precedent for the inclusion of information gathering powers in undertakings, as these powers are inserted into section 87B court enforceable undertakings given to the ACCC with respect to potential breaches of section 50 of the CCA.

5.7 Request for Information

- (a) The ACCC may, by written notice, request GrainCorp to provide information or documents that are required by the ACCC for the reasons specified in the written notice to enable it to exercise its powers of functions in relation to this Undertaking.
- (b) GrainCorp will provide any information requested by the ACCC under clause 5.7(a) in the form and within the timeframe (being not less than 14 days) specified in the notice.

The ACCC is of the preliminary view that that an amendment to the Proposed 2011 Undertaking to include this proposed revised drafting in relation to an information gathering power for the ACCC is appropriate.

6 Conclusion

Overall approach

The ACCC has reached a preliminary view that the overall approach to access provision as provided in the publish-negotiate-arbitrate arrangements of the Proposed 2011 Undertaking is appropriate and that prescriptive ex ante price regulation is not necessary in the case of GrainCorp's Proposed 2011 Undertaking. Further, it is the preliminary view of the ACCC that it is not appropriate to strengthen the publish-negotiate-arbitrate arrangements with ring-fencing rules at this time for GrainCorp. The experience during the term of GrainCorp's 2009 Undertaking and the ACCC's reasons for reaching these preliminary views is set out in chapter 3 of this draft decision.

Notwithstanding its preliminary view that the overall publish-negotiate-arbitrate approach of the Proposed 2011 Undertaking to access provision is appropriate, the ACCC is of the view that there are aspects of the approach that are not appropriate. GrainCorp has addressed most of these issues with its draft revision.

Publish-negotiate-arbitrate

The ACCC has reviewed the operation of the publish-negotiate-arbitrate provisions of the Proposed 2011 Undertaking and considers that, on balance, they have been effective in providing the transparency necessary for access seekers to obtain fair access to GrainCorp's port terminal services. It is therefore the ACCC's preliminary view that more prescriptive provisions, such as pricing or ring-fencing rules are not required to be provided if certain amendments—including inclusion of a requirement for GrainCorp to provide to the ACCC a copy of the port terminal services access undertaking entered into with its own trading division.

Capacity management

The ACCC notes that different arrangements for the allocation of capacity exist across the ports operated by the different BHC. In particular, an auction system operates in WA, whereas first come, first served arrangements operate along the east coast and in SA. In considering the appropriateness of the capacity arrangements operated by GrainCorp (a first come, first served system), the ACCC has considered the effectiveness of existing or past arrangements for the port facilities operated by GrainCorp. While the practice by other operators in other markets may provide useful intelligence in forming a view as to what is appropriate in particular circumstances, it is the individual circumstances themselves which are of most importance.

It is the preliminary view of the ACCC that the arrangements for allocating shipping slots established in GrainCorp's 2009 Undertaking has provided an appropriate basis for management of capacity at GrainCorp's port terminals. In particular, the ACCC notes that the increased flexibility available for shippers to change booking nominations allowed in GrainCorp's PTSP enables shippers an ability to respond to changing circumstances. The ACCC considers that these arrangements promote economic efficiency at times when capacity at the port terminals exceeds demand.

However, the ACCC is of the preliminary view that greater efficiency in the use of port terminal infrastructure may be achieved if exporters are able to transfer slots

booked on the GrainCorp shipping stem. The ACCC seeks comment on this preliminary view, in particular in relation to the issues set out in the following box.

Transfer of booked slots—issues for comment

The ACCC seeks comments and supporting information (such as experience in overseas markets) on issues relevant to arrangements for transfer of slots, including the following:

- Possible benefits and risks of allowing transfers:
 - what are the potential gains arising from allowing transfers
 - do other mechanisms obviate the need for the transfer of slots
 - would such transfers lead to significantly greater speculation on the shipping stem than occurs already
 - would such speculation give rise to different or more adverse outcomes than those arising from the over booking that has occurred in recent seasons
- Provisions for transfer of slots
 - specification of the rights/obligations that should be the subject of a transfer (eg as confirmed on the shipping stem at the time of transfer)
 - Conditions to be met by the transferor and transferee
 - GrainCorp's role and rights and obligations
 - implications for GrainCorp's standard terms and conditions, PTSP and indicative access agreement
 - other necessary limitations or conditions on the transfer

Variation of protocols

Each of the 2009 undertakings accepted by the ACCC applying to GrainCorp, CBH and Viterra contain a version of port loading protocols, with a process for their variation. These differ to some extent between the different undertakings. Each operator has varied its protocols since acceptance by the ACCC and different issues have arisen with these variation processes.

In assessing the PTSP submitted by GrainCorp and the PTSP variation process, the ACCC has taken into consideration the experience of each of the bulk handlers' variation processes, because it considers that a consistent approach across the industry is appropriate. The ACCC has set out the minimum standards the ACCC considers necessary for an efficient, meaningful and transparent variation process. Application of these standards to GrainCorp's Proposed 2011 Undertaking requires the following changes, for which GrainCorp has proposed drafting in its draft revision:

- that the PTSP must be, and continue to be, a comprehensive statement of GrainCorp's policies and procedures for managing demand for the port terminal service

- inclusion of further provisions regarding GrainCorp's consultation process when varying its PTSP
- inclusion of a provision for the ACCC to object to a protocol variation in circumstances where:
 - the proposed variation is material; and
 - the proposed variation gives rise to concerns under either the anti-discrimination (clause 5.5) and/or the no hindering access (clause 9.4 in the Proposed 2011 Undertaking) provisions of the undertaking.

ACCC information gathering power

The ACCC is of the preliminary view that an information gathering power is necessary to enable it to properly discharge the functions required by the Proposed 2011 Undertaking and this is an issue for which the ACCC considers a consistent approach across the industry is appropriate. GrainCorp has proposed drafting in its draft revision to address this issue.

Appendices

7 Appendix 1: Industry Overview

7.1 GrainCorp Operations Ltd

GrainCorp Operations Ltd (GrainCorp) is an Australian agribusiness company listed on the Australian Securities Exchange. GrainCorp operates primarily in Queensland, New South Wales and Victoria, but also provides services across all mainland Australian states as well as to customers and suppliers internationally. GrainCorp was the first government authority in the Australian grain industry to be privatised in 1992.⁷⁶

GrainCorp owns and operates 270 receival sites throughout New South Wales, Victoria and Queensland, with a total storage capacity of 20 mt.⁷⁷ GrainCorp also owns and operates seven grain export terminals on the eastern seaboard.

GrainCorp's principal business activities are aligned into three business units – grain trading, ports, and storage and handling. These comprise the following activities:

- storage and logistics—provision of receival, handling and storage of wheat and other bulk commodities as an agent for marketing organisations, end users and growers in relation to both domestic and export markets
- transport—rail operations are primarily for the use of GrainCorp's own grain trading and exporting operations, but excess rail haulage capacity is provided to other grain traders and exporters.⁷⁸
- port terminals—provision of receival, handling and storage of grain and other products
- Grain Trading and Hunter Grain—trading of grain, meals and other bulk commodities and the operation of grain pools in relation to both domestic and export markets
- Merchandising—provision of farm input products
- Allied Mills—flour milling and mixing services
- GrainCorp Malt—malt production and export.⁷⁹

Background information on the grain industry in New South Wales, Victoria and Queensland is presented below.

⁷⁶ GrainCorp Operations Limited, *Submission to the ACCC*, 15 April 2009, Schedule 1, p. i.

⁷⁷ Productivity Commission (2010) *Wheat Export Marketing Arrangements*, Report no. 51, Canberra, p. 254.

⁷⁸ GrainCorp Operations Limited (2010), *GrainCorp Shareholder Review*, p. 6.

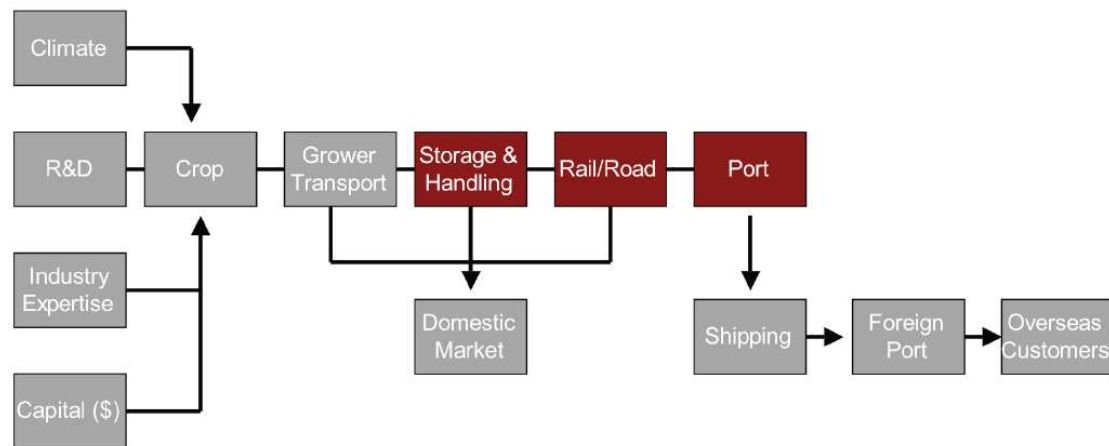
⁷⁹ GrainCorp Operations Limited, *Submission to the ACCC*, 15 April 2009, Schedule 1, p. ii; GrainCorp Operations Limited, *GrainCorp at a Glance*, accessed on 9 February 2011 at <http://www.graincorp.com.au>.

7.2 The wheat industry in Eastern Australia

Figure 1 sets out the grain supply chain for eastern Australia and includes primary inputs (climate, research and development, industry expertise and capital), grain production, transportation (road, rail and ship), storage and handling and the domestic and foreign markets.⁸⁰

Figure 1

GRAIN INDUSTRY SUPPLY CHAIN



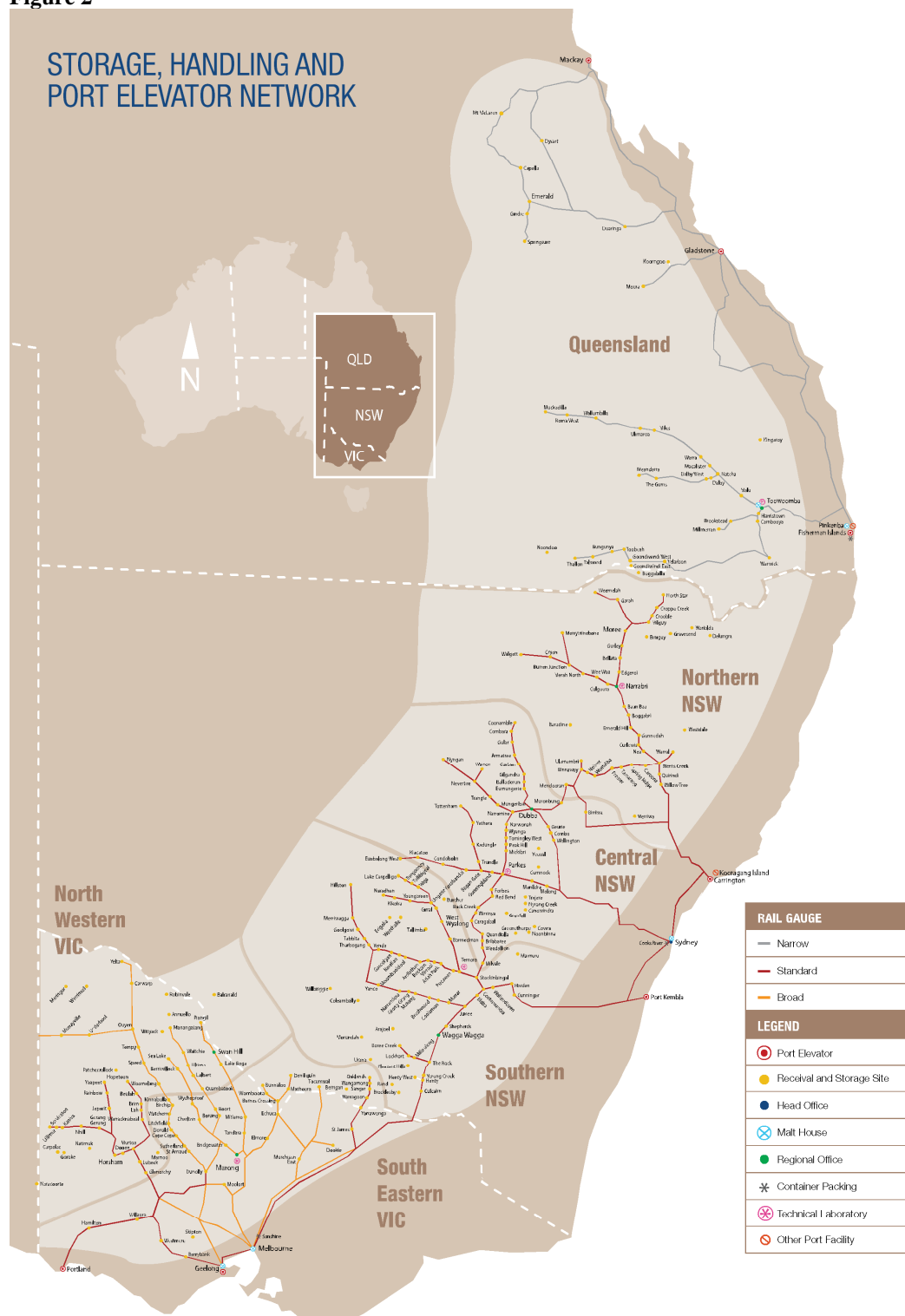
Source: Ernst & Young (2008)

Source: Ernst & Young (2008), in Allen (2008).

Figure 2 sets out GrainCorp's storage, handling and port elevator network.

⁸⁰ Allen Consulting Group (2008) Competition in the Export Grain Supply Chain, March, p. 11.

Figure 2



Source: GrainCorp Operations Limited, (2010).

ABARES forecast that winter crop production in the eastern states for the 2010-11 would reach a total of 27.5 mt with wheat representing 17.7 mt. On 31 January 2011 GrainCorp announced that its receivals for the 2010 grain harvest were complete at a

total volume of 13.3 mt.⁸¹ The remainder of this chapter expands on the key segments of the supply chain for New South Wales, Victoria and Queensland on a state by state basis.

7.2.1 New South Wales

Grain production in New South Wales

New South Wales is Australia's second largest grain producing state and supplies around 29 per cent of the country's wheat.⁸² The area planted to wheat in New South Wales in 2009-10 is estimated to have fallen to just over 4 million hectares. Total wheat production is estimated at 5.3 mt in 2009-10, which is around 1.6 mt less than what was produced in the 2008-09 season. Wheat production for the 2010-11 season is forecast at 11.8 mt, which represents a substantial increase on previous seasons.⁸³

Grain production in New South Wales is widely distributed and reliant on well coordinated storage and transportation links at harvest. The storage and transportation links are also integrated with port facilities.

GrainCorp divides grain production and storage in the eastern States into three areas: the Southern, Central and Northern Divisions. The grain market in New South Wales is covered by the Central and Northern Divisions, with grain produced and stored from Brocklesby in New South Wales' south to Coonamble in the State's north being exported or shipped through GrainCorp's Port Kembla grain terminal. Grain produced and stored in areas from Weemelah and North Star in the north of New South Wales to Merriwa further south is trafficked through GrainCorp's Newcastle grain terminal.

Up-country storage and handling in New South Wales

Three companies own and operate the majority of grain storage and handling facilities in New South Wales. GrainCorp handled approximately 82 per cent of the state's wheat receivals for the five years to 2005-06. This was achieved through a network of sub-terminals (with a combined storage capacity of 1.2 mt), over 30 primary sites (which are permanently staffed and handle the majority of the grain), and over 60 storage sites (which either handle the variable grain crop or are exclusively designated for particular grain commodities or domestic customers).⁸⁴

The second largest storage and handling company in New South Wales is AWB Grainflow, which handled approximately 14 per cent of the state's wheat receivals between 2001-02 and 2005-06. The company has 10 grain centres in New South Wales.

The smallest of the three storage and handling companies in New South Wales is Australian Bulk Alliance (ABA). It owns four receival sites in the state located in the

⁸¹ ABC (2011), *Wheat Harvest Over at Last: GrainCorp*, accessed 8 February 2011 at <http://www.abc.net.au/rural/news/content/201101/s3125966.htm?site=sydney>.

⁸² ABARES (2010) Australian Crop Report, report no. 156, December 2010.

⁸³ ABARES (2010) Australian Crop Report, report no. 156, December 2010.

⁸⁴ Allen Consulting Group (2008) *Competition in the Export Grain Supply Chain*, March, p. 9.

Riverina and the South West, which handled approximately 3 per cent of the state's wheat receivals between 2001-02 and 2005-06.⁸⁵

Transportation in New South Wales

Rail is the dominant method of transporting grain from receival sites in New South Wales. The average export haul distance in New South Wales is around 450 km and the industry relies heavily on rail to move at least 90 per cent of exports and about 75 per cent of wheat for milling.⁸⁶ The volume of annual grain exports from New South Wales ranges from less than 1 mt to over 5 mt.⁸⁷ Exports are sourced largely from the northern and south-western regions.

Rail also serves a large percentage of domestic demand, with flour mills and feed mills regularly requiring 1mt of wheat and other grains delivered by rail. The largest mill is at Manildra in the central west which consumes over 2 000 tonnes of grain per day from the surrounding region.⁸⁸

Concern over the NSW rail network's ability to handle an increase in grain rail freight led to the announcement of an audit and a review of New South Wales grain freight in October 2008 by the Federal Department of Infrastructure, Transport, Regional Development and Local Government. The final report was released on 21 October 2009 and contained eighteen recommendations designed to support the industry's access to reliable, well maintained transport infrastructure, including:

- stabilising specific branch lines, and appropriate cost-sharing arrangements between the NSW government and owners for upgrading infrastructure
- a review of access charges to determine an appropriate level of user contribution to ongoing maintenance of the network
- investigating options to address capacity constraints on the track to Newcastle
- that the branch line network should remain in public ownership, with management and maintenance consolidated in the hands of ARTC
- planning a dedicated grain road network to support rail
- a government/industry grain logistics coordination group, which would assist in managing the challenges of bumper harvests and peaks in demand.⁸⁹

⁸⁵ Allen Consulting Group (2008) *Competition in the Export Grain Supply Chain*, March, p. 10.

⁸⁶ Single Vision Grains Australia (2007) *Transport Infrastructure Issues paper One – Network Review for the Australian Grains Industry*, January, pp. 17-19.

⁸⁷ Department of Infrastructure, Transport, Regional Development and Local Government, *NSW Grain Freight Review – Final Report*, September 2009, p. 25.

⁸⁸ Single Vision Grains Australia (2007) *Transport Infrastructure Issues paper Two – Commercial Aspects for the Australian Grains Industry*, January, pp. 7-8.

⁸⁹ Department of Infrastructure, Transport, Regional Development and Local Government, *NSW Grain Freight Review – Final Report*, September 2009, pp. 8-14

Port terminals in New South Wales

There are two port terminals for bulk grain export in New South Wales, both operated by GrainCorp.

The terminal located at Carrington in Newcastle has overall storage capacity of 164 400 tonnes. It is serviced by both road and rail and can handle bulk exports of wheat, barley, oilseeds, legumes and sorghum. The Carrington terminal also receives and stores bulk orange juice under refrigeration and is the largest facility of this type in Australia.⁹⁰

The terminal at Port Kembla (near Wollongong) has 30 storage bins and a storage capacity of 260 000 tonnes. Port Kembla is serviced by both road and rail, and at the time of completion in 1989 was considered to be the most advanced grain elevator in the world. The terminal can handle bulk exports of all cereal grains, sorghum, legumes and oilseeds.⁹¹

7.2.2 Victoria

Grain production in Victoria

Victoria produces around 11 per cent of wheat in Australia.⁹² The area planted to wheat in Victoria in 2009-10 is estimated at just over 1.7 million hectares. Total wheat production is estimated at about 2.9 mt for 2009-10, which is around 1.2 mt more than what was produced in the previous season. Wheat production for the 2010-11 season is forecast to increase further and is estimated at 4.4 mt.⁹³

The grain industry contributed nearly 17 per cent of Victoria's gross value of agricultural production in 2001-02, and in 2003-04 it accounted for 30 per cent of the state's direct agricultural exports.⁹⁴

Up-country storage and handling in Victoria

The up-country storage facilities are largely controlled by three firms: GrainCorp, AWB GrainFlow (a subsidiary of AWB), and Australian Bulk Alliance (ABA).

Approximately 76 per cent of wheat receivals in Victoria were handled by GrainCorp between 2001-02 and 2005-06, achieved with a network of two sub-terminals, 27 primary sites and 63 storage sites. Sixteen per cent was handled by AWB Grainflow which owns and operates five receival sites.⁹⁵ The remainder was handled by ABA at its four receival sites, and Viterro which also operates two up-country receival sites in Victoria. An increasing proportion of grain destined for the domestic market is being stored on-farm and transported to market by road.

⁹⁰ GrainCorp Operations (2010), *Port Operations*, pp. 10-11

⁹¹ GrainCorp Operations (2010), *Port Operations*, pp. 10-11

⁹² ABARES (2010) Australian Crop Report, report no. 156, December 2010.

⁹³ ABARES (2010) Australian Crop Report, report no. 156, December 2010.

⁹⁴ Victoria Department of Primary Industries (2005) *Priorities for Action: Victoria's Grain Industry*, p. 2.

⁹⁵ Allen Consulting Group (2008) *Competition in the Export Grain Supply Chain*, March, p. 11.

Transportation in Victoria

The majority of Victorian export grain is moved to port by rail. Rail has significant advantages over road for transporting export grain as it can transport larger volumes in shorter periods to meet shipping requirements and minimise at-port storage. However, transport to port by road has been increasing since the deregulation of the wheat industry.⁹⁶

A large amount of the Victorian rail network is a broad gauge network. The Melbourne and Geelong port terminals both have dual gauge rail access, while the Portland terminal has only standard rail gauge access. Following the withdrawal of Pacific National from the management of Victoria's freight lines, El Zorro entered into an agreement with AWB Grainflow to operate two trains to transport grain from its inland facilities, while GrainCorp has entered into a five year contract with Asciano. Viterra has a memorandum of understanding with Genesee and Wyoming to operate one train on Victoria's broad gauge lines to rail grain from Viterra and ABA sites.

Port terminals in Victoria

There are three export grain terminals in Victoria—namely, Geelong, Portland, and Melbourne Port Terminal. Both Geelong and Portland are owned and operated by GrainCorp. Melbourne Port Terminal at Appleton dock in the port of Melbourne is owned by a joint venture of ABA and AWB, with each owning 50 per cent. ABA has operational management and control of the terminal, and during 2010 ABA became a wholly-owned subsidiary of Sumitomo Corporation.⁹⁷

Geelong is the largest of the terminals in terms of storage, with a total vertical storage capacity of 225 000 tonnes (wheat equivalent).⁹⁸ It has 99 concrete silos and 66 inner spaces, and can therefore provide a high degree of segregation between types and grades of grain. As well as grains and pulses, Geelong terminal handles woodchips and imports of fertiliser. Geelong is the largest regional port in Victoria and an important hub for the movement of cargo into and out of Victoria. It is situated at the western end of Port Phillip Bay, in reasonably close proximity to Melbourne Port Terminal (50 km).

The Portland grain terminal facility is situated in the far west of Victoria near the border with South Australia (approximately 300 km from Geelong Port and 350 km from Melbourne Port Terminal). It is a deep-water bulk port strategically located between the ports of Melbourne and Adelaide. It is the international gateway for the Green Triangle Region, an area with an abundance of natural resources and exports grain, woodchips, logs, aluminium ingots and livestock, while import commodities

⁹⁶ Productivity Commission (2010) *Wheat Export Marketing Arrangements*, Report no. 51, Canberra, p. 257.

⁹⁷ The ACCC notes that on 23 December 2010 ABA submitted an access undertaking for the Melbourne Port Terminal to the ACCC. Wheat Exports Australia has previously stated that the operator of the Melbourne Port Terminal is not required to be the subject of an access undertaking for accreditation purposes as it is neither an accredited exporter, nor is it an associated entity of any companies which are accredited exporters. See: http://www.wea.gov.au/Publications/FactSheets/090623_MPT.pdf.

⁹⁸ GrainCorp Operations, *Port Operations*, pp. 10-11

are alumina, liquid pitch and fertiliser products. The port is served by rail as well as by road which bypasses the City of Portland to allow 24-hour access. No wheat has been exported from the Portland terminal during the 2008-09 and 2009-10 seasons.⁹⁹

Melbourne Port Terminal was commissioned in 2000 and has 20 steel bins of various sizes holding a total of 48 000 mt storage.¹⁰⁰ It is designed to operate as a high throughput just-in-time facility, and typically handles prime grades of wheat, as well as barley, canola and rice. On average, approximately 50 per cent of wheat exported from Victoria is shipped from Melbourne Port Terminal.¹⁰¹

7.2.3 Queensland

Grain production in Queensland

Queensland is the smallest grain producer of the five mainland states and is responsible for 5 per cent of Australia's total wheat production.¹⁰² In 2004-05, the gross value of Queensland's production of field grains was \$475 million, or 6 per cent of the gross value of the state's total farm production.¹⁰³ The area planted to wheat in Queensland in 2009-10 is estimated at just under 1 million hectares. Total wheat production is estimated at just under 1.4 mt for 2009-10, which is around 0.6 mt less than what was produced in the previous season. Wheat production for the 2010-11 season is forecast to increase to just over 1.4 mt.¹⁰⁴

The major grain production areas in Queensland are the Darling Downs (stretching from Toowoomba and Warwick in the east to Roma and Thallon in the West) and Central Queensland.¹⁰⁵

Up-country storage and handling in Queensland

Grain storage and handling infrastructure in Queensland is predominately owned and operated by two companies. The largest of these is GrainCorp, which handled approximately 79 per cent of the state's wheat receivals between 2001-02 and 2005-06.¹⁰⁶ It did so through a network of 10 primary sites and 32 storage sites.¹⁰⁷

The second storage and handling company in Queensland is AWB GrainFlow, which handled approximately 21 per cent of the State's wheat receivals for the five years to

⁹⁹ Wheat Exports Australia (2010), *2009/10 Marketing Year: Report for Growers*, December, p. 13.

¹⁰⁰ Australian Bulk Alliance, *Export Operation Guidelines for Melbourne Port Terminal*, accessed 9 February 2011 at <http://www.bulkalliance.com.au/ShippingStem/tabid/154/Default.aspx>

¹⁰¹ Wheat Exports Australia (2010), *2009/10 Marketing Year: Report for Growers*, December, p. 13.

¹⁰² Allen Consulting Group (2008) *Competition in the Export Grain Supply Chain*, March, p. 66; ABARES (2010) Australian Crop Report, report no. 156, December 2010.

¹⁰³ Australian Bureau of Statistics (2006) *Value of Agricultural Commodities Produced*, Australia 2004-05, Catalogue No. 7503.0, Canberra.

¹⁰⁴ ABARES (2010) Australian Crop Report, report no. 156, December 2010.

¹⁰⁵ Allen Consulting Group (2008) *Competition in the Export Grain Supply Chain*, March, p. 66.

¹⁰⁶ ITS Global (2007) *Grain Marketing Transition Factsheets: Competition in the Domestic Grain Supply Chain*, prepared for AWB, Melbourne.

¹⁰⁷ Allen Consulting Group (2008) *Competition in the Export Grain Supply Chain*, March, p. 12.

2005-06.¹⁰⁸ AWB GrainFlow maintains four receival sites in Queensland, all of which are located in the Darling Downs.¹⁰⁹

Transportation in Queensland

Transport of grain for export from receival sites in Queensland is delivered by rail, where transport of grain for domestic milling is delivered by road. The volume of grain for export is generally three times larger than that for milling.¹¹⁰

Rail services in Queensland are provided by QR National, a state-owned corporation which provides both track and above rail services. The Queensland Competition Authority has the responsibility of setting the rail tariff rates for services offered by QR National, and accepted an access undertaking from QR National on 1 October 2010.

Port terminals in Queensland

There are three grain terminals in Queensland, all of which are owned and operated by GrainCorp. The three terminals are all serviced by both road and rail.

The most significant of these is located at Fisherman Islands, near Brisbane. It uses a combination of multi-commodity sheds, pads and bins to store grain, and has a total capacity of 192 700 tonnes fumigable. As well as grain for export, the Fisherman Islands port can handle legumes, cottonseed, mineral sands, sugar and woodchips.¹¹¹

A further grain terminal is located at Gladstone. It uses a combination of silos and bulk sheds to store grain, and has a total capacity of 86 000 tonnes. The Gladstone elevator can handle wheat, barley, sorghum, legumes and oilseeds, as well as the export of magnesite.¹¹²

GrainCorp also has a grain terminal at Mackay. It has eight concrete silos and pads, with a total storage capacity of 74 000 tonnes. As well as wheat, the Mackay elevator can handle barley, sorghum, legumes, oilseeds and maize.¹¹³

7.3 Industry structure – GrainCorp submissions

7.3.1 GrainCorp 2009 Submission

GrainCorp submitted to the ACCC in 2009 that unlike Western Australia and South Australia, the Eastern Australian Grain market is highly complex and fragmented, where:

¹⁰⁸ ITS Global (2007) *Grain Marketing Transition Factsheets: Competition in the Domestic Grain Supply Chain*, prepared for AWB, Melbourne.

¹⁰⁹ Allen Consulting Group (2008) *Competition in the Export Grain Supply Chain*, March, p. 12.

¹¹⁰ Allen Consulting Group (2008) *Competition in the Export Grain Supply Chain*, March, p. 13.

¹¹¹ GrainCorp Operations (2010), *Port Operations*, accessed 9 February 2011 at <http://www.graincorp.com.au/Documents/Port%20Operations.PDF>.

¹¹² GrainCorp Operations (2010), *Port Operations*, accessed 9 February 2011 at <http://www.graincorp.com.au/Documents/Port%20Operations.PDF>.

¹¹³ GrainCorp Operations (2010), *Port Operations*, accessed 9 February 2011 at <http://www.graincorp.com.au/Documents/Port%20Operations.PDF>.

- in excess of 10 000 active grain growers produce around 15 mt of grain annually. Wheat represents around 60 per cent of this grain production
- there is significant production and consumption variability. No other grain producing country experiences such variability in grain production. Accordingly the ‘residual’ bulk export volumes are highly variable, where GrainCorp’s annual bulk grain exports can range from 0.8 to 10 mt
- Eastern Australia is serviced by over 40 mt of country storage, comprising of GrainCorp, AWB, ABA, ABB (now Viterro), other independent storage providers and on farm storage. GrainCorp receives on average 9 mt of grain, which accounts for approximately 60 per cent of grain produced
- a large number of grain traders aggressively compete for the purchase of wheat from growers to supply both domestic and export customers, as well as trading between each other for the purposes of speculation, and managing customer orders and logistics—this means that the ownership of the wheat may change hands many times through the supply chain
- the distinguishing feature of the grain and wheat industry in Eastern Australia is the primary focus in the supply of grain to domestic customers. Domestic end users have ‘first call’ on grain produced, currently consuming at least 9.5 mt of grain annually. GrainCorp handles around 4.5 mt of domestic grain, around 45 per cent of grain consumed domestically
- the export market consumes the ‘residual’ grain that is not consumed locally. This is handled at GrainCorp export terminals, Melbourne Port Terminal and via the expanding container market. GrainCorp handles on average 4 mt of bulk grain, of which 80 per cent is generally wheat.¹¹⁴

GrainCorp also provided answers to several questions posed by the ACCC. Their answers included the following points:

- Rail is, in almost all circumstances on the east coast, the most efficient and cost effective means of moving grain to port.
- Evidence given by WEA to the Senate Estimates Hearing on 25 May 2009 included that ‘there is grain travelling from Queensland down to Victoria...’¹¹⁵
- There are key differences between grain growing and handling industries in the northern hemisphere and in Australia:

The geographical distribution of northern hemisphere grain growing regions and the tonnages (higher) and volatility (lower) of production there make infrastructure service provision a significantly different commercial proposition. The development of grain handling infrastructure in Europe has been significantly different from the growth of the industry in Australia. The

¹¹⁴ GrainCorp Operations Limited, *Submission to the ACCC*, 15 April 2009, para. 4.1, p. 14.

¹¹⁵ Parliament of Australia, Hansard, *Senate Standing Committee on Rural and Regional Affairs and Transport*, 25 May 2009, p. 54.

Australian industry is shaped by its history as a collection of statutory organisations and the 69 year presence of the bulk wheat export monopoly.

Therefore it is not relevant to compare the structure of service provision in the northern hemisphere to that available in Australia; it is an apples and oranges comparison.¹¹⁶

7.3.2 GrainCorp 2010 Submission

GrainCorp's submission to the ACCC in 2010 states that the eastern Australian grain industry is a highly competitive commodity market, where:

- the supply of grain to domestic customers is the primary focus. Eastern Australia produces 17 mt of grain crop annually, of which 10 mt is consumed domestically and 7 mt is exported
- of the 7 mt exported annually from eastern Australia, 5 mt is in bulk and 2 mt is in containers
- of the 5 mt bulk exports, 4 mt is exported via GrainCorp's bulk elevators and 0.5-1 mt is exported from the Melbourne Port Terminal.¹¹⁷

GrainCorp also provided information around changes to capacity:

- Total GrainCorp terminal capacity for the 2010-11 season increased from 12 mt pa to 15.12 mt. This was achieved through improvements in supply chain efficiency, including improved rail, road and shipping accumulation planning and execution.
- Total eastern Australian bulk grain export capability will expand to approximately 20 mt following completion of new project and upgrades.
- Capacity expansion projects for bulk and container grain export include:
 - commissioning of the Wilmar Gavilon former sugar export terminal in Queensland, which will add 0.5 mt of bulk export grain capacity
 - upgrade of the former Dunavant Cotton grain storage and container packing capacity at Moree and Narrabri, which will increase container export capacity by 0.5 mt
 - the P&O berth at Kooragang Island, Port Waratah at Newcastle, and the Lascelles Wharf Project at Geelong, which together will add up to 2 mt of bulk elevation capacity.¹¹⁸

¹¹⁶ GrainCorp Operations Limited, *Supplementary submission to the ACCC*, 24 June 2009, pp. 23-25

¹¹⁷ GrainCorp Operations Limited, *Submission to the ACCC*, 22 September 2010, pp. 3-4.

¹¹⁸ GrainCorp Operations Limited, *Submission to the ACCC*, 22 September 2010, pp. 3-4, 9.

7.4 Regulatory Regimes

Since 1 October 2009, access to GrainCorp's port terminals for the export of bulk wheat has been regulated via an access undertaking accepted by the ACCC. The Melbourne Port Terminal currently does not have an ACCC access undertaking in place. However, on 23 December 2010 Australian Bulk Alliance submitted an access undertaking for the Melbourne Port Terminal to the ACCC for assessment.

The regulatory framework applying to port terminal operators under state-based regulators in New South Wales, Victoria and Queensland is outlined below.

7.4.1 New South Wales

No regulatory framework specifically applies to port terminal operators in New South Wales other than the 2009 Undertakings. Rather, there are commercial agreements with the port corporations, and with stevedores or land and sea transport operators. Agreements are either based on common user access or directly with clients if they are able to offer guaranteed allocations.

The terms and conditions offered by the port corporations for port access are not specified by the regulatory framework. In practice, most key port facilities make their terms and conditions publicly available so that potential customers are able to assess and potentially negotiate charges. Port corporations lease facilities they own or control to other service providers and this usually gives the tenant exclusive long-term access. In addition to this, some port charges are specified under Part 5 of the *Ports and Maritime Administration Act 1995* (NSW).

There has been much discussion over the regulatory framework in place for New South Wales ports themselves (as opposed to the port terminal operators). New South Wales committed to the National Reform Agenda (NRA) and the Competition and Infrastructure Reform Agreement in February 2006.

7.4.2 Victoria

In 1995, as part of the privatisation of the Grain Elevator Board, the Victorian Government introduced specific legislation in the form of the *Grain Handling and Storage Act 1995* (Vic) to regulate specific prescribed grain shipping services at Portland and Geelong. The purpose of this legislation is to promote competition in the storage and handling of grain, ensure charges are fair and reasonable, and ensure reasonable access to grain facilities.

Following amendments made in 2003 to the Grain Handling and Storage Act, direct price regulation of the services at the ports of Geelong and Portland was replaced by a negotiate-arbitrate access regime.¹¹⁹ Under the new framework, GrainCorp, the owner/operator of the regulated terminals, was required to provide access to its export grain handling and storage facilities on 'fair and reasonable terms'. Under the access regime, an access seeker can request an access provider to provide it with prescribed services from a significant infrastructure facility.

¹¹⁹ Regulation of prices for prescribed services was discontinued on 9 October 2003.

Under the Grain Handling and Storage Act, the ESC is responsible for the regulation of significant infrastructure facilities in the industry of facilitating the export shipping of grain. Section 14 of the Grain Handling and Storage Act sets out the specific objectives of the ESC in regulating the grain handling and storage industry:

- to promote competition in the storage and handling of grain
- to protect the interests of users of the grain handling and storage facilities in terms of price by ensuring that charges across users and classes of services are fair and reasonable
- to ensure users and classes of users have fair and reasonable access for grain to the port facilities whilst having regard to the competitiveness and efficiency of the regulated industry.

Also under the Grain Handling and Storage Act, the ESC is confined to resolving access disputes between access seekers and access providers and to arbitrate any disputes over the conditions of access that could not be resolved through commercial negotiation. Under the negotiate/arbitrate framework, the ESC will only make a determination concerning prices if notified that parties cannot agree on terms and conditions of access to the prescribed services.

In January 2008, ABA and GrainCorp made an application to the ESC for general access determinations (seeking approval of the proposed undertakings) under section 19 of the Grain Handling and Storage Act. The ESC final determination (16 April 2008) was not to make general access determinations mainly on the basis that the ESC was not satisfied that the access providers substantially addressed the specific requirement of the ESC as to non-discriminatory access.¹²⁰

In May 2009, the ESC released its final review of the Victorian grain handling and storage access regime, which considered whether access regulation through the Act should continue to apply to any or all bulk grain handling terminals in Victoria, and if so what changes would need to be made to the Act to ensure that it could be certified as an effective state-based access regime.

The ESC previously found that increased competition between facilities had reduced the need for regulation, and the ESC was not convinced that the risk of misuse of market power was sufficient to warrant the continuation of access regulation. The ESC recommended that the Grain Handling and Storage Act cease to apply on 1 October 2009 in order to ensure a smooth transition to federal regulatory arrangements.

In accordance with this recommendation, on 28 September 2009 the Minister for Finance, Workcover and the Transport Accident Commission determined that the facilities used for grain bulk handling in the ports of Geelong, Melbourne and Portland are no longer 'significant infrastructure facilities'. The effect of this

¹²⁰ Section 17(1) of the GHS Act states that a provider must provide access to the prescribed services on fair and reasonable terms and conditions. Subsection (5) states that the terms and conditions of access must not vary according to the identity of the person seeking access.

determination is that the Grain Handling and Storage Act regulatory framework ceased to apply to those ports from 1 October 2009.¹²¹

7.4.3 Queensland

The Queensland Competition Authority (QCA) determines the fair and reasonable terms and conditions of access to terminals which have been ‘declared’ for third party access under the *Queensland Competition Authority Act 1997*. The Authority’s responsibilities in relation to Ports are to:

- assess and approve access undertakings for ports declared for Third Party Access
- arbitrate access disputes
- enforce breaches of access obligations
- investigate and monitor prices for ports declared for monopoly prices oversight
- assess competitive neutrality.

At present, no grain port terminals are the subject of a QCA-administered access regime.

7.5 The Productivity Commission inquiry

The Productivity Commission (PC) conducted an inquiry into wheat export marketing arrangements, publishing its final report on 1 July 2010. In its final report, the PC stated that access to port terminal facilities represented the most significant issue in its inquiry, and that the ability of wheat exporters to access port terminal facilities is critical to the success of the deregulated market.¹²²

The PC identified several characteristics particular to the wheat export industry in the eastern states:

- *A significant proportion of wheat is consumed domestically.* Wheat is exported and consumed domestically. Wheat destined for domestic markets is often delivered directly from farms to end users.¹²³
- *Bulk wheat transport faces competition from transport in containers and bags.* The bulk supply chain competes with exports in containers and bags and the storage and transport of grain for sale in the domestic market.¹²⁴ There is also a wider choice of storage service providers in the eastern states as the major bulk

¹²¹ Essential Services Commission (2009) *Review of the Victorian Grain Handling and Storage Access Regime*, Final Report, May, pp. 11-12.

¹²² Productivity Commission (2010) *Wheat Export Marketing Arrangements*, Report no. 51, Canberra, p. 173.

¹²³ Productivity Commission (2010) *Wheat Export Marketing Arrangements*, Report no. 51, Canberra, p. 255.

¹²⁴ Productivity Commission (2010) *Wheat Export Marketing Arrangements*, Report no. 51, Canberra, p. 68.

handlers storage networks overlap to some extent, and compete with independent storage providers.¹²⁵

- *Bulk wheat storage faces competition from on-farm storage.* The east coast typically has more private on-farm storage, more competition in bulk handling facilities and more contestability in the supply chain than the west coast.¹²⁶ Major bulk handler storage capacity is approximately 20 mt and on farm storage is 12 mt.¹²⁷ The trend toward on-farm storage began prior to deregulation, but it is likely that a deregulated environment gives increased incentives for growers to use on-farm storage.¹²⁸ Since deregulation, uneconomic bulk storage facilities have been closed down due to the increase in site-based costing.¹²⁹
- *There may be competition in provision of port services.* Bulk grain export terminals in New South Wales, Victoria and South Australia operated by GrainCorp, Melbourne Port Terminal and Viterra are in relatively close proximity and might compete for some grain throughput.¹³⁰
- *The share of wheat transported by road has increased relative to rail transport.* Prior to deregulation, 80-100 per cent of export wheat was transported by rail in the eastern states, excluding road transport from farm to bulk receival sites. Since then it is likely that the share of grain transported by road has risen.¹³¹ This is partly a result of the privatisation of rail and deregulation of the wheat export industry, as:
 - the cost efficiency of road compared with rail transport has improved due to investment in road infrastructure and increased capacity of heavy vehicles.
 - competition in the wheat export market puts increased pressure on peak periods, resulting in increased use of trucks in conjunction with rail transport.
 - more cost reflective freight rates are being set across the different segments of the network. This has meant that in some areas road transport is now more cost effective.¹³²

¹²⁵ Productivity Commission (2010) *Wheat Export Marketing Arrangements*, Report no. 51, Canberra, p. 67.

¹²⁶ Productivity Commission (2010) *Wheat Export Marketing Arrangements*, Report no. 51, Canberra, p. 251.

¹²⁷ Productivity Commission (2010) *Wheat Export Marketing Arrangements*, Report no. 51, Canberra, p. 69.

¹²⁸ Productivity Commission (2010) *Wheat Export Marketing Arrangements*, Report no. 51, Canberra, p. 259.

¹²⁹ Productivity Commission (2010) *Wheat Export Marketing Arrangements*, Report no. 51, Canberra, pp. 261-2.

¹³⁰ Productivity Commission (2010) *Wheat Export Marketing Arrangements*, Report no. 51, Canberra, p. 68.

¹³¹ Productivity Commission (2010) *Wheat Export Marketing Arrangements*, Report no. 51, Canberra, p. 257.

¹³² Productivity Commission (2010) *Wheat Export Marketing Arrangements*, Report no. 51, Canberra, pp. 263-5.

- *Investment in transport infrastructure is likely to be required in the future.* The Productivity Commission suggested that a thorough cost-benefit analysis, taking into account the economic and social costs and benefits of road and rail use, is required.¹³³

7.6 Impact of flooding on the 2010-11 harvest

In response to flood events in eastern Australia in January 2011, ABARES published a special report outlining the effects of the flood on various commodities. Recent flooding in eastern Australia is estimated to have reduced agricultural production by at least \$500-600 million. At the time of publication it was considered too early to estimate the likely total losses in grain production, however, ABARES noted that if 1 million tonnes of the production not yet received by grain handlers or held on farm was lost, the total cost would be around \$250 million.¹³⁴ Heavy rainfall during November and December 2010 has had broader effects on the quality of production and delays to the winter grain harvest.¹³⁵

The effects of the rainfall and associated flooding have been varied throughout the eastern states:

- *Queensland:* The harvest is already complete in central Queensland. In southern Queensland, the harvest was 70-80 per cent complete prior to the floods and is unlikely to progress further, resulting in the abandonment of unharvested winter crops. The rail line between Toowoomba and the Fisherman Islands grain terminal in Brisbane is damaged and could take months to repair, and may cause some disruption to the transport of grain for export.¹³⁶
- *New South Wales:* The harvest in the north was largely finished prior to flooding and has sustained limited impact, and the harvest in the south was progressing at the time of publication. Significant rainfall has affected grain quality.
- *Victoria:* The winter crop harvest is around 80 per cent complete in Victoria and is currently a month behind schedule. Further harvest of weather damaged crops in the flood affected regions, such as the Wimmera, is likely to be limited.¹³⁷

While the rainfall and flooding has caused significant short term damage, there may be some benefit to agriculture production in the medium to long term through increases in soil moisture, improved pasture growth and increased water storages.¹³⁸

¹³³ Productivity Commission (2010) *Wheat Export Marketing Arrangements*, Report no. 51, Canberra, p. 251.

¹³⁴ ABARES (2011), *The impact of recent flood events on commodities*, ABARES Special Report, Canberra, January 2011, p. 1.

¹³⁵ ABARES (2011), *The impact of recent flood events on commodities*, ABARES Special Report, Canberra, January 2011, p. 3

¹³⁶ ABARES (2011), *The impact of recent flood events on commodities*, ABARES Special Report, Canberra, January 2011, p. 10.

¹³⁷ ABARES (2011), *The impact of recent flood events on commodities*, ABARES Special Report, Canberra, January 2011, p. 11.

¹³⁸ ABARES (2011), *The impact of recent flood events on commodities*, ABARES Special Report, Canberra, January 2011, p. 3.

In the current season, the value of winter crop exports is not expected to be significantly reduced further. Adverse effects on the quality and volume of exports are likely to be offset by higher grain prices on world markets.¹³⁹

¹³⁹ ABARES (2011), *The impact of recent flood events on commodities*, ABARES Special Report, Canberra, January 2011, p. 10.

8 Appendix 2: Legislative Framework and outlook

8.1 Access test

The *Wheat Export Marketing Act 2008* (Cth) (**the WEMA**) came into effect on 1 July 2008. The WEMA Act and associated transitional legislation replaced the Export Wheat Commission with a new statutory body, Wheat Exports Australia (**WEA**), which has the power to develop, administer and enforce an accreditation scheme for bulk wheat exports, including the power to grant, vary, suspend or cancel an accreditation.¹⁴⁰

Under the WEMA, parties without WEA accreditation are prohibited from exporting wheat in bulk from Australia. Parties seeking accreditation as bulk wheat exporters must be deemed by the WEA to be ‘fit and proper’ having regard to certain criteria. The WEMA further provides that parties seeking bulk wheat export accreditation that also provide ‘port terminal services’ (Port Terminal Operators) must satisfy an additional ‘access test.’

Part of the ‘access test’ is linked to Part IIIA of the *Competition and Consumer Act 2010* (**the Act**), (previously the *Trade Practices Act 1974*). The relevant part of the access test will be satisfied if either:

- the ACCC has accepted from a person who owns or operates a port terminal facility used to provide a port terminal service an access undertaking under Division 6 of Part IIIA of the Act, and that undertaking relates to the provision to accredited wheat exporters of access to the port terminal service for purposes relating to the export of wheat; or
- there is in force a decision under Part IIIA of the Act that a State or Territory regime is an ‘effective access regime’ and that regime provides for access to the port terminal service for purposes relating to the export of wheat.

Under the ‘access test’ providers of port terminal services must also comply with ‘continuous disclosure rules’ set out in subsection 24(4) of the WEMA. In summary, the continuous disclosure rules require the Port Terminal Operators to publish on their website:

- their policies and procedures for managing demand for port terminal services (which GrainCorp has titled its Port Terminal Services Protocols (**PTSP**))
- a statement, updated daily, setting out, amongst other things, the name of each ship scheduled to load grain using port terminal services, the estimated date on which grain will be loaded into the ship, the date on which the ship was

¹⁴⁰ The relevant transitional legislation is the *Wheat Export Marketing (Repeal and Consequential Amendments) Act 2008* (Cth).

nominated and the date on which the nomination was accepted (this statement is commonly termed the Shipping Stem).¹⁴¹

GrainCorp has submitted its Proposed 2011 Undertaking to the ACCC pursuant to Part IIIA of the Act for the purpose of satisfying the access test.

8.2 Productivity Commission inquiry

The Productivity Commission (PC) completed an inquiry into the wheat export marketing arrangements following the deregulation of the industry. The PC has provided a final report to the government which was released on 1 July 2010. The report made several findings and recommendations, including:

- The accreditation scheme has facilitated a smooth transition but the benefits will rapidly diminish in the post-transitional phase. Accreditation and Wheat Exports Australia should be abolished on 30 September 2011.
- The access test has provided greater certainty for traders and made access easier, more timely, and less costly compared to reliance on Part IIIA of the Act. The access test should remain in place for a further three years until 30 September 2014.
- The benefits of the access test will diminish and could become costly in the long term. Therefore, from 1 October 2014 regulated access should rely on Part IIIA of the Act supported by mandatory disclosure and a voluntary code of conduct.

The full report is available on the PC website at

<http://www.pc.gov.au/projects/inquiry/wheatexport/report>.

As at the date of release of this issues paper, the government has not yet responded to the PC's report.

8.3 Legal test for accepting an access undertaking under Part IIIA

Part IIIA of the Act establishes a regime to assist third parties to obtain access to services provided through facilities with natural monopoly characteristics to promote competition in upstream or downstream markets.

Part IIIA provides three main mechanisms by which access can be obtained to infrastructure:

- declaration of a service (under section 44H) and arbitration (under section 44V);

¹⁴¹ See subsection 24(4) of the WEM Act for detail about the continuous disclosure rules.

- access undertakings and access codes (under sections 44ZZA and 44ZZAA respectively); and
- decision that a State or Territory access regime is effective (under section 44N).

In relation to access undertakings, a provider of a service (or a person who expects to be the provider of a service) may give an undertaking to the ACCC in connection with the provision of access to the service. An undertaking may specify the terms and conditions on which access will be made available to third parties. The ACCC may accept the undertaking if it thinks appropriate to do so after considering the matters set out in subsection 44ZZA(3).

If the ACCC accepts the undertaking, the provider is required to offer a third party access in accordance with the undertaking. An access undertaking is binding on the access provider and is able to be enforced in the Federal Court upon application by the ACCC.

An undertaking may be withdrawn or varied at any time, but only with the ACCC's consent.

In assessing a proposed access undertaking under Part IIIA of the Act, the ACCC must apply the test set out in subsection 44ZZA(3), which provides that the ACCC may accept the undertaking if it thinks it appropriate to do so, having regard to the following matters:

- the objects of Part IIIA of the Act, which are to:
 - promote the economically efficient operation of, use of and investment in the infrastructure by which services are provided, thereby promoting effective competition in upstream and downstream markets; and
 - provide a framework and guiding principles to encourage a consistent approach to access regulation in each industry;
- the 'pricing principles' specified in section 44ZZCA of the Act (see further below);
- the legitimate business interests of the provider of the service;
- the public interest, including the public interest in having competition in markets (whether or not in Australia);
- the interests of persons who might want access to the service;
- whether the undertaking is in accordance with an access code that applies to the service; and
- any other matters that the ACCC thinks are relevant.

- In relation to the pricing principles, section 44ZZCA of the Act provides that regulated access prices should:
 - be set so as to generate expected revenue for a regulated service that is at least sufficient to meet the efficient costs of providing access to the regulated service or services; and
 - include a return on investment commensurate with the regulatory and commercial risks involved; and
- that access price structures should:
 - allow multi-part pricing and price discrimination when it aids efficiency; and
 - not allow a vertically integrated access provider to set terms and conditions that discriminate in favour of its downstream operations, except to the extent that the cost of providing access to other operators is higher; and
 - access pricing regimes should provide incentives to reduce costs or otherwise improve productivity.

8.4 ACCC View

The ACCC considers that the regulatory scheme established by the WEMA, and the rationale for the inclusion of the access test in the statute are, under section 44ZZA(3)(e), matters relevant to the current decision.

In particular, the ACCC acknowledges that the intention of Parliament to promote competition in the export of bulk wheat has various dimensions, including:

- the promotion of competition between marketers for the acquisition of bulk wheat from growers;
- the promotion of competition between exporters for the export of wheat from Australia; and
- the concomitant promotion of competition for associated products and services, such as supply chain services and grower services.

The ACCC further acknowledges Parliament's recognition that the promotion of competition in the form described may potentially be limited by anti-competitive conduct associated with port terminal facilities, and that the inclusion of the access test demonstrates a clear intention to legislate measures to mitigate the possibility of such conduct undermining the broader intent of the legislation.

8.5 Recent changes to Part IIIA

The *Trade Practices Amendment (Infrastructure Access) Act 2010* (Cth) took effect on 14 July 2010 and introduced changes to Part IIIA of the Act, including to the procedures set out in Part IIIA for the assessment of access undertakings.

8.5.1 Timeframes for ACCC decisions and stopping the clock

Subsection 44ZZBC(1) of the Act now provides that the ACCC must make a decision on an access undertaking application within the period of 180 days starting at the start of the day the application is received (referred to as ‘the expected period’).

If the ACCC does not publish a decision on an access undertaking under section 44ZZBE of the Act within the expected period, it is taken, immediately after the end of the expected period, to have:

- made a decision to not accept the application; and
- published its decision under section 44ZZBE and its reasons for that decision: see subsection 44ZZBC(6).

The changes to the Act also introduce provisions for ‘stopping the clock’ that mean certain time periods are not taken into account when determining the expected period (see subsection 44ZZBC(2)). In particular, the ACCC may disregard a period:

- by written agreement between the ACCC and the access provider, and such agreement must be published: subsections 44ZZBC(4) & (5);
- if the ACCC gives a notice under subsection 44ZZBCA(1) requesting information in relation to the application;
- if a notice is published under subsection 44ZZBD(1) inviting public submissions in relation to the application;
- a decision is published under subsection 44ZZCB(4) deferring consideration of whether to accept the access undertaking, in whole or in part, while the ACCC arbitrates an access dispute.

8.5.2 Amendment notices

Subsection 44ZZAAA(1) provides that the ACCC may give an ‘amendment notice’ in relation to an undertaking before deciding whether to accept the undertaking.

An ‘amendment notice’ is a notice in writing to the access provider that specifies:

- the nature of the amendment or amendments (the ‘proposed amendment or amendments’) that the ACCC proposes be made to the undertaking; and
- the ACCC’s reasons for the proposed amendment or amendments; and
- the period (the ‘response period’) within which the person may respond to the notice, which must be at least 14 days after the day the notice was given to the person: see subsection 44ZZAAA(2).

An access provider may give a revised undertaking in response to the notice (within the response period), incorporating amendments suggested in the notice, and provided that undertaking is not returned to the provider by the ACCC, that revised undertaking is taken to be the undertaking the ACCC is assessing under Part IIIA: see subsections 44ZZAAA(5) & (7). In other words, the access provider may ‘swap over’ the revised

undertaking for the original undertaking if it agrees to the amendments suggested by the ACCC in the notice.

If the access provider does not respond to the notice within the response period, it is taken to have not agreed to the proposed amendment: subsection 44ZZAAA(8). If the access provider provides a revised undertaking that incorporates one or more amendments that the ACCC considers are not of the nature proposed in the amendment notice, and which do not address the reasons for the proposed amendments given in the amendment notice, the ACCC must not accept the revised undertaking and must return it to the provider within 21 days of receiving it: subsection 44ZZAAA(6).

The ACCC is not required to accept the revised undertaking under section 44ZZA even when it incorporates amendments (see subsection 44ZZAAA(9)) and does not have a duty to propose amendments when considering whether to accept the undertaking (see subsection 44ZZAAA(10)).

8.5.3 Other changes

Information requests

Subsection 44ZZBCA(1) provides that the ACCC may give a person a written notice requesting the person give to the ACCC, within a specified period, information of a kind specified in the notice that the ACCC considers may be relevant to making a decision on an access undertaking application.

As noted above, the period within which the ACCC requests information constitutes a clock-stopper.

Fixed principles

Section 44ZZAAB of the Act now provides that an access undertaking given to the ACCC under subsection 44ZZA(1) may include one or more terms that, under the undertaking, are fixed for a specified period (known as ‘fixed principles’). Such principles must extend beyond the term of the undertaking: subsection 44ZZAAB(3).