

15 April 2011

Mr Anthony Wing
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Dear Mr Wing

Supplementary submission regarding ACCC's Draft Decision on GrainCorp's 2011 Port Terminal Services Undertaking

AWB appreciates this opportunity to provide further input into the ACCC's assessment of GrainCorp's 2011 Port Terminal Services Undertaking.

AWB believes that the ACCC should use the process of confirming the access test provisions for each of CBH, Viterra and GrainCorp to ensure as consistent approach as possible to the adoption of access regulation in the industry, as per page 3 of ACCC Draft Decision, that will provide greater consistency, efficiency and certainty of performance for all users of port terminal services across Australia.

In addition to this submission, I would refer you to another recent AWB submission, requested by the ACCC and addressed to Ms Kerry Leigh Taylor (7th of April), regarding the ACCC's investigation into Viterra's management of the 2012 season shipping stem. That submission outlines arguments in favour of the adoption of an auction system to allocate shipping slots and the adoption of a system to transfer shipping slots between exporters, as a more efficient and equitable solution than the 'first come, first served' approach, currently used by both GrainCorp and Viterra. This has particular relevance in relation to the issues raised by the ACCC regarding GrainCorp's capacity management processes and AWB's recommendations for improvements to this aspect of GrainCorp's port terminal operations.

To assist in referencing AWB's submission, we have provided our comments and arguments in an order that corresponds to the relevant sections of the ACCC's preliminary views contained within the Draft Decision, (sections of 3.3, 4.3 and 5.3).

Section 3.3 ACCC's view on Overall approach of Proposed 2011 Undertaking

3.3.1 - Overall approach to access provision

AWB accepts ACCC's propositions in relation to the 'publish-negotiate-arbitrate' approach to providing awareness of the terms and conditions of GrainCorp's port terminal services and as a methodology for seeking practical and pragmatic alterations to existing processes or decisions on a case by case basis as necessary.

3.3.2 - Term of GrainCorp's Proposed 2011 Undertaking

Three year term

Subject to the resolution of capacity management issues that are equitable for all exporters in particular, AWB accepts that a three year term, commencing in October 2011, is appropriate to provide certainty for market participants.

Staggered commencement

AWB has no objections to the proposed staggered commencement of the 2011 Undertaking.

3.3.3 - Other establishment provisions of the Undertaking

AWB appreciates the ACCC's position and also notes that there are currently a number of State and Federal (Senate) inquiries into the practices of, in particular the South Australian grain bulk handling sector, as well as the Federal Government's response to the Productivity Commissions report into the Wheat Export Marketing Act 2008 (Cth). While AWB appreciates GrainCorp's need for certainty well before the commencement of the 2012 shipping season, there remains the potential for further amendments to the WEMA as a result of these current investigations that may require access undertakings to be amended to meet new legislative requirements.

Section 4.3 ACCC's view on GrainCorp's Proposed 2011 Undertaking

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

AWB agrees with ACCC's views and recommended amendments to the 2011 Undertaking.

4.3.2 - Own trading terms

AWB agrees with ACCC's views and recommended amendment to the 2011 Undertaking.

4.3.3 - Indicative agreement

Service price differentials based on grain storage ownership: Given the entire industry adopts the same receival standards (GTA) and is required under various legislations to manage grain in storage similarly, AWB cannot understand the justification for the charge of a differentiated port receival fee based on the ownership of originating storage facilities. Claims that GrainCorp must price discriminate on the basis of the risk of receiving sub-standard quality grain from third party storages doesn't stand up to scrutiny based on recent performance.

Furthermore, AWB is of the view if robust competition were to be created for port terminal services, that this charge would immediately be withdrawn by GrainCorp in an effort to more effectively contest the receival of 'third-party' stored grain from up-country storage origins. AWB is of the view that these charges are an unjustifiable monopoly rent that can be extracted by GrainCorp, as is the case in South Australia by Viterro and in WA by CBH, due solely to the lack of sufficient competition in port terminal services.

AWB notes that ACCC has not provided a preliminary view in its draft decision and would encourage the ACCC to require this charge to be dispensed with by all port terminal service providers. GrainCorp has other provisions within its proposed Undertaking that adequately deal with the cost of receiving sub-standard grain in their port terminals (clause 29).

Despatch-demurrage arrangements: AWB continues to hold the view that this mechanism is the most effective tool that could be introduced to drive efficiency into the operation of GrainCorp's vertically integrated supply chain network. AWB makes the observation that in many US based terminals these terms exist and that in all instances in the US, terminals are subject to competition and not fully integrated along the supply chain. AWB believes that GrainCorp have not adequately considered this mechanism and how it could be effectively and fairly implemented for their port terminal facilities.

Force Majeure event and the payment of fees: AWB can envisage events that might occur within the operation of GrainCorp's port terminals that may trigger a force majeure event. It is therefore questionable, in AWB's view, to include a requirement for clients of GrainCorp to be required to pay fees to GrainCorp for an event that impacts the provision of GrainCorp port terminal services. In AWB's view the ability to claim force majeure may specifically permit a client to legally avoid the payment of fees. In AWB's view the drafting of this clause (9.10) of the Undertaking needs revising.

4.3.4 - Negotiation

AWB agrees with ACCC's views on clause 6 of the 2011 Undertaking.

4.3.5 - Dispute resolution

AWB agrees that the dispute resolution mechanism as proposed in the 2011 Undertaking by GrainCorp provides for an effective and workable process.

4.3.6 - Publication of information

In relation to the publication of vessel booking applications, AWB would stress the point that under the current and proposed Undertaking, GrainCorp Operations unilaterally assign a load date (Assigned Load Date - ALD) to all nominated vessels and this date becomes the accepted date that GrainCorp Operations will plan around when determining the commencement of vessel loading. Therefore in AWB's view the ALD is a critical date that requires publication and also, due to the decision by GrainCorp to assign these dates, the ALD decision making process should be audited on a regular basis by ACCC to ensure that GrainCorp are applying this process in a non-discriminatory manner for all exporters.

4.3.7 - Publication of performance indicators

AWB recommends that the following performance indicators should be required to be produced by GrainCorp on their website within a reasonable period. AWB would define 'reasonable period' as being within a period that is useful for users of the port terminal, therefore in the case of the following performance indicators, the 'reasonable period', in AWB's view, is as follows:

Vessels failing survey – Daily

Average daily road receipt rate – Weekly

Cargo Nominations Applications rejected – Daily (by default)

Assigned Loading Date – Daily

Monthly Tonnes shipped – Five days after month end

Port Block-outs – Daily

Average cargo nomination application assessment times – Five days after month end

AWB also recommends that the key service performance indicators should be published within five business days of every month end date. The deferred release of this information reduces the value of the information and GrainCorp should be able to provide this information in a timelier manner to the benefit of all potential users and the wider industry (rail and road transport service providers, growers) as well as investors.

Section 5.3 ACCC's view on Capacity Management

5.3.1 - Continuous disclosure rules

In AWB's experience GrainCorp has endeavoured to accurately maintain the required level of information under its continuous disclosure obligations under the current 2009 Undertaking.

5.3.2 - Substance of the PTSP in the proposed 2011 Undertaking

AWB believes that the significant number of new processes that GrainCorp is proposing to introduce in the 2011 Undertaking (REP/CEP and the operational rules regarding CNA and AOA's) could be replaced by a simpler approach to the utilisation of available capacity if GrainCorp applied a uniform and transparent auction process to allocate elevation capacity and created simple workable rules to permit the transferability of shipping slots between exporters.

AWB appreciates that with a significant number of demanding customers and an inefficient supporting infrastructure in the form of out-dated road, rail and many up-country receival points, planning and executing efficient port terminal operations is a challenging exercise.

However AWB believes that the majority of GrainCorp's customers want a rigid framework of simple rules to establish a boundary within which an exporter can utilise a GrainCorp port terminal. Within these boundaries exporters are seeking as much operational flexibility and collaboration that GrainCorp can allow to tailor vessel loading requirements to achieve an efficient loading outcome while working to optimise the utilisation of the port terminal. AWB would note at this point that GrainCorp's staff have demonstrated significant willingness to provide flexibility to exporters within the rules of the current Undertaking. AWB maintains there is a better way to allocate shipping capacity but would encourage the current intent of GrainCorp operational staff to remain innovative in maximising port terminal capacity on behalf of their customers.

The most effective way to establish 'ownership' of the slot, a requested/confirmed elevation period and acknowledgement of the acceptance of the shipping slot is to auction '30 day window' shipping slots. The 'owner' of a slot would still need to nominate within a reasonable period of time as to the required elevation dates within the slot period, as well as allowing the 'slot owner' to trade these slot positions, under agreed terms, to other potential willing buyers as necessary. ETA Nominations and Assigned Load Dates within a month period would still be required to be declared to facilitate orderly utilisation of the shipping capacity in any given month.

Presumably sufficient 'spare or surge' capacity is built into the operation of each port terminal to allow for overruns in time required to load late vessels and rules that determine how this 'additional capacity' can be accessed and the cost of this additional capacity should be clearly determined to assist exporters in developing contingency plans and mitigate exposures of GrainCorp as the port terminal operator, as well as other exporters who 'own' slots at the port terminal.

AWB has previously proposed to the ACCC that both GrainCorp and Viterra adopt a similar approach to CBH in auctioning shipping slots and facilitating the transfer of slots between exporters. In AWB's experience with both models of shipping slot allocation, CBH's is more efficient, equitable and creates an effective non-discriminatory mechanism to ensure CBH's trading arm are not unduly favoured in the slot allocation process.

AWB would also make the point, in defence of the willingness of GrainCorp to provide flexibility to exporters to, where possible, move slots between port terminals or to move slots across time within a port terminal is a very welcome initiative and should be adopted by Viterra in particular. Adding the capability to resell (transfer) a slot to another exporter would add further efficiency to the operation of the industry.

Specifically in relation to the issue of the transferring of booked slots that the ACCC is seeking comments from market participants, AWB holds the following views:

Potential gains:

- Reduces the quantum and incidence of financial loss to exporters from not utilising a purchased slot;
- Improves the ability of a customer to move shipments between load-ports as necessary – this can assist in avoiding logistical constraints in loading vessels and improve the ability of the exporter to load grain to the requirements of the customer, once regional grain quality is established;
- Improves the liquidity of the FOB market to buyers;
- Reduces the tendency of capacity being overbooked in advance of sales;
- Reduces the incentive for speculative purchasing of slots in advance of sales and harvest;
- Reduces the risk that a slot will not be utilised, thereby reducing the 'opportunity cost' of wasting elevation capacity for the Australian grains industry.

Other mechanisms that obviate slot transfers:

1 - FOB purchases: Reduces the attractiveness for exporters with both up-country grain origination and ocean freight trading capability (for CNF sales) or for those buyers with specific quality requirements or identifiable parcels of grain that are sourced from up-country for sale to an off-shore end user.

2 - Permitting the in-store purchasing of terminal stock and concurrently allowing the seller of this stock to temporarily record a 'negative' stock balance: Operationally more complex and only effective in utilising a slot in 'near to real time' or close to 'spot position'.

Speculation/Hoarding: AWB believes that slot transfers will reduce the risk of not being able to initially acquire a slot at auction or secure a slot that is associated with the current 'first-come, first served' method of allocation thereby increase the certainty of securing slot capacity as well as increasing the potential depth and selling participants in the 'slot market'. The reduced risk and increase certainty thereby reduces the incentive of speculators to 'hoard' slots by effectively removing the 'risk premium' associated with the current 'first come, first served' approach.

Additionally, AWB argues that if, or as, greater competition enters port terminal markets, port terminal operators will adopt more flexible terms and conditions to encourage exporters to utilise their capacity and are likely to unilaterally adopt the policy of permitting shipping slots to be transferred within their facility or across their facilities, in order to attract more contestable business.

Likely outcomes:

- An orderly market will develop for slot transferral based on a rational desire on the behalf of the exporter to minimise operational risk and the associated potential for financial loss;
- The port terminal operator develops a set of workable rules to facilitate the maximum elevation through their port terminal;
- Less 'wasted' slots and less money lost by exporters on unutilised slots, and
- Less aggressive discounting of Australian grain into international markets by owners of slots that they otherwise can transfer to an alternative willing buyer of the slot.

Provisions for transfer of slots:

The rights and obligations that should accrue to the owner of a slot include:

- Volume and timing of access to grain receipt and elevation capacity at the port terminal as per the dimensions allocated to the initial owner of the slot, and
- Obligations on vessel nominations and the associated costs including the costs of securing acceptable grain in port within the terms of the PTSP.

The conditions to be met by the transferor and transferee to include:

- Both parties have met their obligations of payment to GrainCorp

GrainCorp's role, rights and obligations:

- Facilitate the transfer of slots where and when terms align;
- Set the timing limitations for the transferral of slots in sufficient time to perform the task of securing grain of acceptable quality to meet the slot owners CAP, and
- A full set of 'slot transfer' terms and conditions should be included in the PTSP as a standard feature of the service offering.

5.3.3 Changes in the 2010 PTSP

As outlined earlier in this submission, AWB has concerns regarding the past application of the "Assigned Load Date" and also whether due process in relation to clause 21, in particular the notification requirements (section 21.2) have been consistently applied by GrainCorp. AWB believes that a regular audit of the combined actual process used for 'ETA Nomination', 'Assigned Load Date' and 'Vessel Nomination' as well as vessel loading order would be appropriate.

5.3.4 Variation of PTSP

AWB agrees with the ACCC's recommendations outlined in the ***Summary of required changes (page 61)*** to ensure the PTSP is comprehensive and yet can be varied by GrainCorp without unfairly impacting market participants.

5.3.5 Information gathering powers

AWB agrees that in order for the ACCC to more effectively monitor the performance of GrainCorp in executing its rights and obligations under the 2011 Undertaking, that enhanced information gathering powers are required.

In conclusion AWB recognises that the development of port terminal services access undertakings by each provider has been an evolutionary process and it is appropriate that, through experience, the port terminal services providers refine their service terms and conditions. It is also appropriate, given the natural monopolies that exist in most port zones, that the ACCC refine the obligations of the port terminal service providers to access seekers.

AWB is strongly in favour of achieving as much uniformity as possible in the provision of terminal services because this creates more certainty and efficiency in planning the export task for each exporter. Essentially each port terminal is providing the same service from the point at which grain is received into the terminal and all terminals operate in conjunction with road and rail transportation providers to receive grain. Common industry rules will also reduce operational risks for exporters when contracting with offshore buyers of Australian grain which will reduce financial risk, as well as create greater confidence in the capability of the Australian grain industry for international buyers as a reliable supplier destination.

AWB would be pleased to assist the ACCC with its further deliberations in relation to the GrainCorp 2011 Port Terminal Services Access Undertaking.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Morison', with a large, stylized initial 'M'.

Mitch Morison
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AWB Limited