



Australian
Competition &
Consumer
Commission

GrainCorp Operations Limited

Port Terminal Services Access Undertaking

Draft Amendment Notice: Explanatory Statement

2 June 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
ABS	Australian Bureau of Statistics
ACCC	Australian Competition and Consumer Commission
AGEA	Australian Grain Exporters Association
AWB	AWB Limited
BHC	Bulk handling company
BWPTS Agreement	Bulk Wheat Port Terminal Services Agreement
CBH	Cooperative Bulk Handling Limited
CNA	Cargo Nomination Application
CPI	Consumer Price Index
Emerald	Emerald Group Australia Pty Ltd
GFL	Goodman Fielder Limited
GrainCorp	GrainCorp Operations Limited
mt	Million tonnes
PC	Productivity Commission
Proposed 2011 Undertaking	Access undertaking received from GrainCorp Operations Limited on 22 September 2010
PTSP	Port Terminal Service Protocols
The Act	<i>Competition and Consumer Act 2010 (Cth)</i> (previously the <i>Trade Practices Act 1974 (Cth)</i>)
Viterra	Viterra Operations Limited
WEA	Wheat Exports Australia
WEMA	<i>Wheat Export Marketing Act 2008 (Cth)</i>

1 Executive Summary

This Explanatory Statement expands on the Australian Competition and Consumer Commission's (ACCC's) reasons for a **Draft Amendment Notice** in relation to 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 Draft Amendment Notice is at Attachment A to this Explanatory Statement.

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 currently has in place a two-year Undertaking accepted by the ACCC in September 2009 (**2009 Undertaking**).

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

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.*

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.

The ACCC released a draft decision setting out its preliminary views regarding the Proposed 2011 Undertaking on 24 March 2011 (**Draft Decision**). The Draft Decision also sought comments on whether capacity bookings should be transferable. In submissions received to the Draft Decision, GrainCorp was opposed to bookings for its port terminal services being transferable while industry and access seekers were generally supportive.

GrainCorp has subsequently put forward proposals regarding its capacity management arrangements, particularly at peak times, as alternatives to transferability. GrainCorp has provided a second draft revised undertaking (dated 27 May 2011) that provides drafting for its proposals (**second draft revised undertaking**) which can be viewed on the ACCC website. The ACCC's view is that auctions and transferability of capacity is a preferred approach to promote economic efficiency in the operation of, use of and investment in infrastructure used for the provision of port terminal services to the wheat export market. However, the ACCC's view is that these proposals from GrainCorp provide an adequate response to its concerns regarding capacity management in the Proposed 2011 Undertaking.

The ACCC notes that this view is based on the particular circumstances relating to GrainCorp's Proposed 2011 Undertaking—including the market conditions in which GrainCorp operates and the experience with the capacity allocation arrangements operated by GrainCorp—and will not necessarily apply to the access undertakings submitted by other BHCs. The ACCC will monitor these arrangements under GrainCorp's 2011 Undertaking to assess their effectiveness.

The ACCC proposes to give GrainCorp an amendment notice under s. 44ZZAAA(1) of the Act setting out amendments that it considers necessary for the Proposed 2011 Undertaking to be appropriate following its consideration of the submissions received to the Draft Decision and any further submissions on the drafting of GrainCorp's latest proposals.

The ACCC is releasing a Draft Amendment Notice and this Explanatory Statement for consultation on the drafting of the latest proposals put forward by GrainCorp prior to giving the amendment notice to GrainCorp. The Draft Amendment Notice includes proposed amendments on matters for which the ACCC's view is unchanged from the Draft Decision as well as the new proposals.

The ACCC seeks comments from stakeholders by 5:00pm on **Wednesday, 15 June 2011**, after which the ACCC will consider all submissions and give an amendment notice to GrainCorp.

1.1 The 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 the 2009 Undertaking² 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
- 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 The 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.

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

² ACCC, *Final decision on GrainCorp Undertaking*, 29 September 2009.

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 Explanatory Statement on draft amendment notice

The ACCC set out preliminary views on the Proposed 2011 Undertaking in its Draft Decision. GrainCorp provided a response to these issues and proposed drafting in a draft revised draft undertaking (**first draft revised undertaking**) which was attached to the Draft Decision. This Explanatory Statement details how those preliminary views have been updated following public consultation and provides the reasons for the relevant amendments that the ACCC proposes should be made to GrainCorp's Proposed 2011 Undertaking.

The Draft Decision also sought comment on capacity transferability about which the ACCC had not formed a preliminary view. Following consultation on its Draft Decision, the ACCC has now updated its view regarding transferability of GrainCorp capacity bookings.

The ACCC continues to be of the view that transferability of shipping slots is a means by which the economically efficient utilisation of port terminal services can be achieved and that this option should be pursued. However, the ACCC has updated its view as to whether a Proposed 2011 Undertaking from GrainCorp that does not include transferability is appropriate. In this regard, GrainCorp has proposed a number of measures as an alternative to transferability for consideration by the ACCC. The second draft revised undertaking provided by GrainCorp includes drafting for the proposed responses on these issues. These proposals are also the subject of proposed amendments in the draft amendment notice and are discussed in 1.3.3.

The ACCC has formed the view regarding these latest proposals put forward by GrainCorp to address concerns regarding capacity management. That view is that an undertaking incorporating these changes goes some way toward addressing the ACCC's concerns and is likely to be acceptable with respect to these issues. However, the ACCC reiterates its continued view that transferability is a preferred approach which it will consider if it is required to decide on another undertaking proposed by GrainCorp after the expiration of the Proposed 2011 Undertaking.

The ACCC has updated its view regarding the overall approach and specific provisions of the Proposed 2011 Undertaking and formed a view on the further proposals put forward by GrainCorp. These views have been formed having regard to

the matters specified under s. 44ZZA(3) of the Act, taking into account the wider context within which GrainCorp has submitted the Proposed 2011 Undertaking (which are detailed in Appendix D: Legislative framework and outlook to this Explanatory Statement).

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

1.3.1 Overall approach

The ACCC considers 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 not necessary 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 views is set out in chapter 3 of this Explanatory Statement.

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

Notwithstanding its 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. 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 view that more prescriptive provisions, such as pricing or ring-fencing rules are not required to be provided if certain amendments are made. This view is based on the particular circumstances relating to GrainCorp's Proposed 2011 Undertaking and will not necessarily apply to the access undertakings submitted by other BHCs.

The amendments that the ACCC considers to be necessary are:

- include a requirement for GrainCorp to provide to the ACCC a copy of the port terminal services access undertaking with its own trading division (see proposed amendment 1.4)
- narrow the circumstances under which disputes can be raised to prevent price disputes where prices are varied solely to reflect changes in the CPI (see proposed amendments 1.6 and 1.7)

- notify the ACCC of the name of an arbitrator appointed by the parties (see proposed amendment 1.8).

1.3.3 Capacity management

The ACCC notes that different arrangements for the allocation of capacity exist across the ports operated by the different BHCs. 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 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 the ACCC considers when forming a view.

It is the 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 the relatively unconstrained nature of capacity at GrainCorp's port terminals and the increased flexibility available for shippers to change booking nominations allowed in GrainCorp's PTSP, which enables shippers to respond to changing circumstances. The ACCC considers that these arrangements contribute to achieving efficient use of port terminal services.

However, it is also the ACCC's 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.

As noted above, the ACCC has updated its view regarding transferable capacity booking following consultation on its Draft Decision. The ACCC's updated view is that options other than transferability may provide an adequate response to concerns regarding economic efficiency for the Proposed 2011 Undertaking under consideration. The ACCC has formed the view that proposed amendments put forward by GrainCorp are sufficient for its undertaking to be appropriate. These proposals are that:

- shippers with capacity booked for a peak period receive a partial refund of the booking fee if the capacity is subsequently taken up by another shipper (see proposed amendments 3.1 and 3.2)
- more detailed information on stocks at port to be published more frequently (see proposed amendments 1.15 and 1.16)
- improved transparency and certainty regarding capacity booking and management (see proposed amendments 3.3 and 3.4).

However, the ACCC considers that transferability of capacity bookings is a preferred approach and that it will reconsider this issue if it is required to decide on a future undertaking proposed by GrainCorp.

These issues are discussed in chapter 4 of this Explanatory Statement.

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 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 minimum standards which the ACCC considers are necessary for an efficient, meaningful and transparent variation processes are set out in chapter 5 of this Explanatory Statement. Application of these standards to GrainCorp's Proposed 2011 Undertaking requires the following changes, for which GrainCorp has proposed drafting in its second draft revised undertaking:

- 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 (see proposed amendment 1.9)
- inclusion of further provisions regarding GrainCorp's consultation process when varying its PTSP (see proposed amendment 1.10-1.13)
- 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 (see proposed amendment 1.14).

1.3.5 ACCC information gathering power

The ACCC is of the 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 (see proposed amendment 1.5).

1.3.6 Other changes

Further proposed amendments address the following more minor issues:

- technical drafting to allow for possibility of change in regulatory arrangements (see proposed amendment 1.1)

- ACCC authorisation power (see proposed amendment 1.2)
- prominent publication of key service performance indicators (see proposed amendment 1.7)
- publish performance reports in a prominent position on the GrainCorp website and notifying the ACCC when a performance report is published (see proposed amendment 1.16 and 1.17)
- inconsistency between wording in PTSP and Standard Port Terminal Services at Schedule 2 to the Proposed 2011 Undertaking (see proposed amendment 2.1).

1.4 Second draft revised Undertaking

GrainCorp has provided a second revised undertaking (dated 27 May 2011) showing the further proposed revisions to the lodged version of the Proposed 2011 Undertaking which can be viewed on the ACCC website.

1.5 Stakeholder views

The ACCC seeks stakeholder views on the Draft Amendment Notice. In particular, the ACCC seeks comment on the drafting of GrainCorp's proposals discussed in 1.3.3 above and set out in GrainCorp's second draft revised undertaking.

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 that made technical changes to reflect the change in title of the Act and to provide for the possibility of changes to the legislative framework during the term of the 2011 Undertaking. The Proposed 2011 Undertaking 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 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 in Appendix D.

2.2 Draft amendment notice

The ACCC intends to give GrainCorp an amendment notice under s. 44ZZAAA(1) of the Act (Amendment Notice). A Draft Amendment Notice is at Attachment A to this Explanatory Statement. The Draft Amendment Notice relates to those aspects of GrainCorp's Proposed 2011 Undertaking that the ACCC considers are not appropriate having regard to s. 44ZZA(3) of the Act. This Explanatory Statement on the Draft Amendment Notice sets out the ACCC's updated views on relevant matters.

The Draft Amendment Notice relates to a number of matters discussed in the ACCC Draft Decision released on 24 March 2011 and for which GrainCorp provided proposed revised drafting of the Proposed 2011 Undertaking (**draft revision**). The mark up showing GrainCorp's proposed revisions to the lodged version of the Proposed 2011 Undertaking, is at Annexure A to the ACCC's draft decision.

In addition, the Draft Amendment Notice includes amendments regarding capacity management arrangements under the Proposed 2011 Undertaking. In forming its view on the amendments included in the Draft Amendment Notice the ACCC has considered submissions received on its Draft Decision.

2.3 Agreement to disregard period

The ACCC agreed to a request from GrainCorp under s. 44ZZBC(4) of the Act that the period from 18 May 2011 to 21 June 2011 (inclusive) be disregarded in

calculating the Expected Period under s. 44ZZBC(1) of the Act. The clock for the expected period in which the ACCC is required to make its decision resumes on 22 June 2011.

2.4 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 on the issues paper
- submission in response to draft decision in relation to trading of shipping slots provided on 7 April 2011
- supplementary submission addressing remaining issues raised in the draft decision and providing further information in relation to the ACCC's proposal for a secondary market for the transfer of shipping slots provided on 18 April 2011
- submission in response to third party submissions on the draft decision

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

2.5 Public consultation process to date

The Act provides that the ACCC may invite public submissions on an access undertaking application.³

The ACCC published an Issues Paper on 7 October 2010 inviting submissions on the Proposed 2011 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.

The ACCC published a Draft Decision on 24 March 2011 in which it considered that GrainCorp's current access arrangements have successfully allowed access to GrainCorp's port terminal services by wheat exporters and that it is appropriate for the existing arrangements largely to continue.

The ACCC did identify some areas of the existing arrangements for improvement. These included that the ACCC have the ability to intervene if there is a material change to GrainCorp's port loading protocols.

Publication of the Draft Amendment Notice and this accompanying Explanatory Statement completes the ACCC public consultation on GrainCorp's Proposed 2011 Undertaking.

³ *Competition and Consumer Act 2010* s. 44ZZBD(1).

2.5.1 Submissions received

The ACCC received public submissions from the following parties in relation to GrainCorp's Proposed 2011 Undertaking:

- Australian Grain Exporters Association (**AGEA**) – 10 November 2010 and 2 May 2011
 - 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.⁴
- AWB (Australia) Limited (**AWB**) – 12 November 2010 and 15 April 2011
- Mr Timothy Bush – 4 November 2010
- Emerald Group Limited (**Emerald**) – 6 April 2011
- Victorian Freight and Logistics Council – 21 April 2011
- Port of Portland – 21 April 2011
- Goodman Fielder Ltd (**GFL**) – 27 April 2011

2.6 Confidential submissions

The ACCC notes that it received a confidential submission from GrainCorp and two confidential submissions from third parties in response to the draft decision. A comprehensive summary of the views put in these confidential submissions by third parties has been published on the ACCC website.

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.⁵ 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 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.

⁴ <http://www.agea.com.au/>

⁵ *Competition and Consumer Act 2010* s. 44ZZBD.

2.7 Consultation on the Draft Amendment Notice

The ACCC invites submissions from interested parties on the Draft Amendment Notice regarding GrainCorp's Proposed 2011 Undertaking. The ACCC notes that interested parties provided views on the majority of matters to which the Amendment Notice relates. Therefore, the ACCC seeks comments on the drafting of the Amendment Notice.

2.7.1 Making a submission

Submissions must be forwarded by 5:00pm on **Wednesday, 15 June 2011** to:

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

Email: transport@acc.gov.au

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

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.acc.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 the final decision, please contact:

Ms Lyn Camilleri
Director
Transport & General Prices Oversight
Ph: (03) 9290-1973
Email: lyn.camilleri@acc.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 Proposed 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 D: Legislative framework and outlook).

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.

3.1.1 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 are to commence on 1 October 2011. These are subclauses 5.5(b), 5.5(c), 9, 10, 11 and 12 that 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.

3.1.2 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.

3.1.2.1 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*.

3.1.2.2 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 to 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).

3.1.3 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 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 and Reference Prices. 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.

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.

3.2 GrainCorp and third party submissions

A detailed summary of submissions is contained in Appendix A: Submissions. This section includes a brief summary of themes and conclusions relating to the overall approach of the Proposed 2011 Undertaking in submissions by GrainCorp and third parties.

3.2.1 GrainCorp submissions

GrainCorp's initial submission stated that it submits the Proposed 2011 Undertaking to the ACCC for assessment in order to be re-accredited as a wheat exporter under the *Wheat Export Marketing Act 2008* (WEMA). Regarding its overall approach, GrainCorp considered that its Proposed 2011 Undertaking should roll forward its 2009 Undertaking for a three-year period commencing 1 October 2011.

In support of its approach, GrainCorp submits that:

- the 2009 Undertaking has provided an appropriate level of regulation and ensured fair and transparent third party access to GrainCorp's port terminals, as well as allowing GrainCorp sufficient flexibility to manage its operations⁶
- following extensive negotiations in good faith, GrainCorp entered into final access agreements with all customers, and in doing so it made significant pricing and contract concessions for the benefit of exporters⁷
- a three-year term is appropriate as the 2009 Undertaking has been effective and it aligns with the accreditation period Wheat Exports Australia (WEA) granted to all non-bulk handlers⁸
- a staggered start will ensure negotiations for the 2011/12 season are subject to the Proposed 2011 Undertaking and avoid overlap with the 2009 Undertaking⁹
- the Standard Terms have been updated to align with the final Bulk Wheat Port Terminal Services (BWPTS) Agreements entered into with customers in March 2010
- the eastern Australian grain industry is highly competitive and therefore the current level of regulation should not be increased¹⁰
- GrainCorp is currently the only bulk handler to have successfully entered into Access Agreements with all of its customers under a Port Terminal Services Undertaking, demonstrating the success of the 2009 Undertaking and GrainCorp's willingness to negotiate.¹¹

In response to AWB's concerns regarding the removal of the distinction between approved and non-approved storage, GrainCorp notes that this has not decreased grain handling efficiency and that the changes were driven by the market.¹²

In response to requests by third parties for despatch-demurrage arrangements, GrainCorp notes that it does not have full control over the grain delivered to its port elevators, and should not be responsible for failures by third parties. GrainCorp submits that despatch-demurrage arrangements would present an unacceptable commercial risk.¹³

GrainCorp submits that its current reporting of performance indicators is sufficient for the requirements of Part IIIA of the Act.¹⁴ GrainCorp also submits that it would not be appropriate to publish on its shipping stem the information requested by AWB, and

⁶ GrainCorp Operations Limited, *Submission to the Australian Competition & Consumer Commission 2011 Port Terminal Services Undertaking*, 22 September 2010, p. 1.

⁷ Ibid., p. 7.

⁸ Ibid., p. 19.

⁹ Ibid., p. 2.

¹⁰ Ibid., p. 3.

¹¹ Ibid., p. 7.

¹² GrainCorp Operations Limited, *Submission to the Australian Competition & Consumer Commission*, 13 December 2010, p. 4.

¹³ Ibid., pp. 4-5.

¹⁴ GrainCorp Operations Limited, *Submission to the ACCC in response to submissions*, 6 May 2011, p. 8.

that it has no impact on the management of port elevator capacity or grain cargo accumulation.¹⁵

GrainCorp submits that there is no statutory basis for AGEA's statement that the objective of the undertakings is to promote an efficient supply chain.¹⁶

3.2.2 Third party submissions

AGEA submits that the ACCC's approach should be to maximise supply chain efficiency and that access arrangements should promote an efficient supply chain.¹⁷

AGEA considers that the publish and negotiate approach has worked in relation to the port terminal services agreements offered by GrainCorp, and notes that access seekers have been able to sign agreements with GrainCorp.¹⁸ Regarding the dispute resolution provisions, AGEA notes that they have not been tested but does not anticipate problems. AWB agrees with the ACCC's recommendations in its Draft Decision regarding the publication of price and non-price terms and non-discriminatory access, dispute resolution, own trading terms and negotiation.

Regarding the lack of ring-fencing requirements, AGEA submits that the 2009 Undertakings have not dealt with sharing of information by the port terminal operator that can be used to the advantage of GrainCorp's trading arm.¹⁹

AGEA states that it does not have any issues with GrainCorp's proposed publication of key port information. AWB emphasises the importance of the shipping stem and submits that GrainCorp should provide more data.²⁰ Timothy Bush submits that the publication of information by GrainCorp under the 2009 Undertaking has not been adequate.²¹

AGEA and AWB both consider that GrainCorp should include despatch-demurrage arrangements in its Indicative Access Agreement.²²

AWB considers that the price differentials applied by GrainCorp are not appropriate as they do not reflect the quality of the various storage and handling facilities. AWB considers that GrainCorp's removal of the price differential previously applied to wheat from non-approved storage is discriminatory, and that the differential currently applied to all third party storage is an unjustifiable monopoly rent.²³

¹⁵ GrainCorp, 13 December 2010, p. 5.

¹⁶ GrainCorp, 6 May 2011, p. 18.

¹⁷ Australian Grain Exporters Association, *Response to the Draft Decision in relation to GrainCorp Operations Limited's proposed Port Terminal Services Access Undertaking*, 2 May 2011, p. 1.

¹⁸ Australian Grain Exporters Association, *Submission to ACCC Issues Paper*, 10 November 2010, p. 1.

¹⁹ AGEA, 2 May 2011, p. 3.

²⁰ AWB Limited, *Submission*, 11 November 2010.

²¹ Timothy Bush, *Submission*, 4 November 2010.

²² AGEA, 2 May 2011, p. 3; AWB, 11 November 2010.

²³ AWB, 11 November 2010.

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, is set out in Appendix D Appendix A: Submissions of this Explanatory Statement.

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 Explanatory Statement, provided its response to the PC's findings and recommendations.

The PC has recommended the following:

- the requirement for port terminal operators to pass the 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 has formed its view regarding whether or not the Proposed 2011 Undertaking is appropriate in accordance with the current arrangements.

3.3.1 Term of the Undertaking

Three-year term

The ACCC's Draft Decision noted 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 recognised that further regulatory changes are possible and that the timing of changes to the WEMA access test recommended by the PC is 1 October 2014.²⁴

The Draft Decision also noted 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 season (commencing 1 October 2011).²⁵

ACCC took the view that the three-year term from 1 October 2011 to 30 September 2014 of the Proposed 2011 Undertaking was appropriate. Further, the ACCC took 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.

²⁴ Productivity Commission, *Wheat Export Marketing Arrangements – final report*, 1 July 2010, p. 191.

²⁵ ACCC, *Draft Decision*, p. 22.

Following consultation on the Draft Decision, the ACCC remains of the view that the three-year term and the transition arrangements proposed by GrainCorp are appropriate, subject to the inclusion of Proposed Amendment 1.3 as discussed below.

Staggered commencement

The Draft Decision recognised 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.

The ACCC took the view 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 2014.²⁶

GrainCorp included a clause to that effect in its draft revision to the Proposed 2011 Undertaking provided to the ACCC. In its Draft Decision, the ACCC took the view that these changes adequately addressed its concerns.

Following consultation on the Draft Decision, the ACCC remains of the view that the drafting proposed by GrainCorp addresses its concerns. The ACCC considers that a revised undertaking incorporating Proposed Amendment 1.3, which incorporates the draft revision proposed by GrainCorp, would be more appropriate having regard to s. 44ZZA(3)(c) as it creates greater certainty and lessens possible confusion for access seekers.

3.3.2 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 WEA 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.

²⁶ ACCC, *Draft Decision*, 24 March 2011, p. 23.

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.

In its Draft Decision, the ACCC took the view that it would be 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 was also the view of the ACCC that the amendments submitted on 31 January 2011 were appropriately responsive to possible legislative changes recommended in the PC's report.²⁷

The ACCC notes that the Government is yet to respond to the PC report at the time of release of this Explanatory Statement.

However, the Draft Decision also stated 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 was of the view that it would be more appropriate that the introduction to subclause 1.1(f) read:

At the date of this Undertaking, the 'access test' under the WEMA requires:²⁸

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

GrainCorp proposed changes in accordance with the ACCC's Draft Decision in its draft revised undertaking. Following consultation on the Draft Decision, the ACCC remains of the view that these changes adequately address its concerns, and proposes the inclusion of the drafting provided by GrainCorp as per Proposed Amendment 1.1. The ACCC considers that a revised undertaking incorporating this amendment would be more appropriate having regard to s. 44ZZA(3)(c) as it creates greater certainty and lessens possible confusion for access seekers.

3.3.3 Overall approach to access provision

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 the ACCC's Draft Decision.²⁹ As noted there, the views

²⁷ ACCC, *Draft Decision*, 24 March 2011, pp. 22-3.

²⁸ *Ibid.*, p. 23.

²⁹ ACCC, *Draft Decision*, 24 March 2011, pp. 19-22.

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 BHC and may not necessarily reach the same conclusions that for GrainCorp.

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

3.3.3.1 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 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, in its Draft Decision the ACCC took the view 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.³⁰

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.

³⁰ Ibid., p. 33.

Compliance with requirements

In its Draft Decision the ACCC took the view that GrainCorp had complied substantively with the requirement to publish price and non-price terms, but that there was ambiguity around the status of the 10 February 2010 version of the BWPTS Agreement. The ACCC took the view 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.³¹

The ACCC notes GrainCorp's submission in response to the Draft Decision, which stated that:

To address the ACCC's concerns, GrainCorp will in future clearly indicate the standard terms on its website.³²

The ACCC considers that this is appropriate as it 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.

Following consultation on the Draft Decision, the ACCC remains of the view 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.

3.3.3.2 Own trading terms

The Draft Decision noted that 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 took the preliminary view that subclause 5.5 had been effective in ensuring that GrainCorp did not discriminate against access seekers in favour of its own trading division. However, the Draft Decision noted that there is currently no requirement for GrainCorp to publish the terms on which it provides access to its own trading division.³³

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 Draft Decision noted 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 took 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.³⁴

³¹ ACCC, *Draft Decision*, 24 March 2011, p. 33.

³² GrainCorp, 18 April 2011, p. 6.

³³ ACCC, *Draft Decision*, 24 March 2011, p. 34.

³⁴ *Ibid.*

Following consultation on the Draft Decision the ACCC remains of the view that it would be 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. GrainCorp included a clause to this effect in its draft revision to the Proposed Undertaking. The ACCC considers that a revised undertaking incorporating this clause, through Proposed Amendment 1.4, would be more appropriate having regard to the interests of access seekers in accordance with s.44ZZA(3)(c) as it would facilitate the ACCC's assessment of GrainCorp's compliance with its non-discrimination obligations.

3.3.3.3 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 resulted from negotiation between stakeholders, the ACCC took the preliminary view that the Indicative Access Agreement was likely to be appropriate. The ACCC considered the issues raised by AWB in its submissions on the Issues Paper and the Draft Decision relating to the removal of a price differential between third party approved and non-approved storage, and the inclusion of dispatch-demurrage arrangements in the proposed Indicative Access Agreement.

In its Draft Decision the ACCC took the view that price differentials are justified to the extent that they reflect differences in costs of receipt and handling relating to the source of the wheat.³⁵ The ACCC noted GrainCorp's previous submission to the ACCC, which explained the differential as compensating for a higher level of risk associated with receipts from third party storages:

...to account for the increased level of risk, some measure of additional surety is required.³⁶

The ACCC notes the relatively low quantum of the differential charged by GrainCorp compared with that charged by other port terminal operators. The ACCC remains of the view that it is appropriate for GrainCorp to charge price differentials based on the supply chain through which wheat has arrived at port, provided these differentials are reflective of costs.

The ACCC took the view in its Draft Decision that demurrage and liability arrangements are contractual issues to be resolved through commercial negotiation between parties, and that the liability arrangements in the proposed Indicative Access Agreement were likely to be appropriate as a starting point for commercial negotiation.³⁷ The ACCC remains of this view following consultation on the Draft Decision, and notes that parties seeking to negotiate in relation to the liability provisions of the Indicative Access Agreement may avail themselves of the dispute resolution procedures in clause 7 of the Proposed 2011 Undertaking.

³⁵ ACCC, *Draft Decision*, 24 March 2011, pp. 34-5.

³⁶ GrainCorp Operations Limited, *Submission to the ACCC in response to Draft Determination issued 6 August 2009*, 3 September 2009, p.19.

³⁷ ACCC, *Draft Decision*, 24 March 2011, p. 35.

3.3.3.4 Negotiation

The ACCC noted in its Draft Decision that GrainCorp negotiated access agreements with all of its customers during the term of the 2009 Undertaking.³⁸ 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. 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.

Glencore submitted to the PCn inquiry regarding its 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.³⁹

The ACCC took the view in its Draft Decision 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.⁴⁰

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 remains of the view 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 3.3.3.5, are an effective restraint should GrainCorp seek to avoid its obligation to negotiate in accordance with the Proposed 2011 Undertaking.

3.3.3.5 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.

³⁸ Ibid.

³⁹ Productivity Commission 2010, *Wheat Export Marketing Arrangements*, Report no. 51, Canberra, p. 181.

⁴⁰ ACCC, *Draft Decision*, 24 March 2011, p. 36.

While the Dispute Resolution provisions have not yet been tested, it is likely that the threat of arbitration by the ACCC has been effective in ensuring that GrainCorp negotiates with access seekers as required by the 2009 Undertaking.

The ACCC took the view in its Draft Decision that the dispute resolution framework in the 2009 Undertaking has worked well and therefore considered it appropriate that GrainCorp has submitted a similar framework for the Proposed 2011 Undertaking.⁴¹

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, attached to the Proposed 2011 Undertaking, exempts disputes based on a change to fees due solely to a change in the Consumer Price Index (CPI). The dispute resolution provisions of the Proposed 2011 Undertaking do not explicitly exempt disputes based on price increases in fees to reflect changes in the CPI.

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 Draft Decision took the view that this inconsistency needed to be rectified. Specifically, the ACCC considered it is appropriate to narrow the circumstances under which Disputes can be raised under the Proposed 2011 Undertaking to prevent price disputes where prices are varied solely to reflect changes in the CPI.⁴²

The ACCC considers that a revised undertaking incorporating Proposed Amendment 1.6 would be more appropriate having regard to s. 44ZZA(3)(a) and (c), as it would balance the legitimate business interests of GrainCorp, in raising prices in line with inflation, with the interests of access seekers, in disputing price increases they consider to be unreasonable.

The ACCC has also proposed that the definition of CPI should be clarified in GrainCorp's Proposed 2011 Undertaking (Clause 13.1) as per Proposed Amendment 1.7, as the Australian Bureau of Statistics (ABS) publishes a number of CPI indices. The ACCC considers that this would increase certainty for access seekers and that a revised undertaking incorporating Proposed Amendment 1.7 would be more appropriate having regard to s. 44ZZA(3)(c).

The ACCC notes that clause 7.7 of the Proposed 2011 Undertaking sets out the arbitration provisions where the ACCC is not the arbitrator. The process allows for ACCC involvement and requires the arbitrator to keep the ACCC informed about progress. However, the Proposed 2011 Undertaking does not require GrainCorp to notify the ACCC the name of an arbitrator when one is appointed. The ACCC considers that revised undertaking incorporating a requirement for it to be informed of the name of an arbitrator as given in Proposed Amendment 1.8 would be more appropriate having regard to s. 44ZZA(3)(c).

⁴¹ Ibid.

⁴² ACCC, *Draft Decision*, 24 March 2011, p. 36.

3.3.3.6 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
- 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 receival rate (to be provided monthly)
- cargo nomination applications rejected
- monthly tonnes shipped
- port blockouts
- 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.⁴³

In its Draft Decision the ACCC reviewed the operation of the 2009 Undertaking and noted that GrainCorp has published the average daily road receival rate over 'days of receival' only, excluding days where no grain is received via road transport. The ACCC considered that the average daily road receival 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

⁴³ ACCC, *GrainCorp Operations Pty Ltd Port Terminal Services Access Undertaking - Decision to Accept*, 29 September 2009, p. 315.

ACCC considered that for this purpose it would be appropriate for GrainCorp to exclude the days on which no grain is received via road transport in its calculation of the Daily Road Receival Rate. Also, the ACCC noted that GrainCorp did not publish the road receival rate monthly as required under clause 11.⁴⁴

The ACCC took the view in its Draft Decision 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. The ACCC remains of the 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.⁴⁵

The Draft Decision noted 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 was concerned that the reports of performance indicators by GrainCorp had 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 the ACCC. Therefore, the ACCC took the preliminary 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.⁴⁶

GrainCorp provided drafting to this effect in its draft revised undertaking, which the ACCC has incorporated in Proposed Amendment 1.18. Proposed Amendment 1.17 also provides that GrainCorp will publish the key service performance indicators in a prominent position on its website. It is the ACCC's view that a revised undertaking incorporating these amendments would be more appropriate having regard to s. 44ZZA(3)(c) as it would provide sufficient transparency and accountability to access seekers.

⁴⁴ ACCC, Draft Decision, 24 March 2011, pp. 38-9.

⁴⁵ Ibid., p. 39.

⁴⁶ Ibid.

4 Capacity Management

4.1 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.

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 are considered in this chapter.

4.1.1 Continuous disclosure rules

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

- 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
- A Shipping Stem (to be updated each Business Day) setting out specified details in relation to nominations of cargos to be shipped.

4.1.2 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 five 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.⁴⁷ 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 were detailed in the ACCC Draft Decision. The ACCC notes that the variations were the subject of industry consultation by GrainCorp and that submissions on the Draft Decision did not raise issues with this aspect of capacity management. The ACCC does not consider that it is necessary for this Explanatory Statement to repeat that discussion.

4.2 GrainCorp and third-party submissions

Details of submissions on the ACCC's Draft Decision on the Proposed 2011 Undertaking are provided in Appendix A. The key themes emerging from submissions in relation to GrainCorp's capacity management arrangements and the issue of whether transferability of capacity should be allowed (on which the ACCC specifically sought comment on in its Draft Decision) are set out below:

4.2.1 GrainCorp's submissions

GrainCorp argued strongly against introduction of transferability which it submitted was not required and would have a number of negative consequences. GrainCorp is of

⁴⁷ GrainCorp Operations Limited, *Submission to the Australian Competition & Consumer Commission 2011 Port Terminal Services Undertaking*, 22 September 2010, p. 11.

the view that transferability will necessitate a ‘fundamental restructuring of GrainCorp’s complete capacity booking system’⁴⁸ and that it would have to ‘commoditise’ port elevation capacity, and therefore offer it for sale at a tightly defined ‘futures’ contract ... GrainCorp would be required to price elevation capacity bookings at an equivalent to the basic cost of the service to be delivered, in the same way a wheat futures contract represents the value of a tonne of wheat.’⁴⁹ GrainCorp also argues that the introduction of transferability will lead to speculation by marketers, including entities with no involvement in the Australian grain export market. GrainCorp is of the view that the participation of speculators would result in:

- higher costs of exporting grain, particularly at times of peak demand, and a fall in returns to producers
- increased uncertainty resulting in impediments to necessary planning by supply-chain providers, including GrainCorp
- capacity going unused
- smaller exporters who do not have the financial resources to speculate being disadvantaged.
- GrainCorp also submits that transferability would be ‘experimental’⁵⁰ and that the only experience with elevation capacity trading is the secondary market operated by CBH in Western Australia which GrainCorp considers is a failure.

4.2.2 Third party submissions

Submissions from a number of third parties supported transferability⁵¹ and a number provided suggestions to limit opportunity for speculative activity. Emerald submits⁵² that, while trading has superficial appeal, it considers that there are dangers with the approach. In its submission AGEA states that:

...in its submission to the ACCC Issues Paper in relation to GrainCorp revised undertaking indicated that GrainCorp’s port loading protocols had not been fully tested yet in terms of the ability to efficiently allocate port loading capacity due to the small crop on the east coast in 2009. It was envisaged that this would be tested and it has eventuated resulting in considerable delays and costs for exporters.

AGEA believes the allocation system can be enhanced through expanding the flexibility associated with shipping slots including extending the transferability to counterparties as well as elevation periods and ports.

⁴⁸ GrainCorp, *Submission to the Australian Competition & Consumer Commission Draft Decision*, 18 April 2011, p.5.

⁴⁹ GrainCorp, 18 April 2011, p.17.

⁵⁰ GrainCorp Operations Limited, *Consultation on the Draft Decision dated 24 March 2011: Transfer and Trading of Booked Capacity*, 7 April 2011, p.4.

⁵¹ Australian Grain Exporters Association, *Response to the Draft Decision*, 2 May 2011; AWB, *Supplementary submission regarding ACCC’s draft decision*, 15 April 2011; Goodman Fielder, *Submission to the ACCC in relation to GrainCorp Operations Limited port terminal access undertaking*, 27 April 2011, p. 4.

⁵² Emerald Group Australia Pty Ltd, *Submission regarding ACCC Review of GrainCorp Port Access Undertaking*, 6 April 2011.

AGEA is seeking a system that provides exporters with certainty to acquire and execute slots without encouraging overt speculation.⁵³

A number of submissions also raised concerns regarding the lack of competitive neutrality between GrainCorp's trading division and other wheat exporters. Submissions noted that the \$5 per tonne booking fee was not a cost to GrainCorp which did not face the same disincentive to hoard or make speculative bookings as did other exporters. Submissions included suggested mechanisms to increase competitive neutrality, including holding all booking fees in escrow until the booking is executed, requiring that GrainCorp permanently forfeits the booking fee when its trading division does not execute a booking and requiring that booking allocation be managed by an independent body.

4.3 ACCC view

The ACCC is required to form a view regarding capacity management arrangements proposed in undertakings offered by the four BHC. The ACCC considers that capacity management arrangements should be assessed for each on the basis of their circumstances and notes that these circumstances differ as between the four BHCs (GrainCorp, Viterra, CBH and ABA) and the markets in which they operate.

However, while the ACCC is not of the view that capacity management arrangements should necessarily be consistent across operators, it does consider that it should apply a consistent approach when forming its view on each of the proposed undertakings. The ACCC has analysed the similarities and differences between the BHCs and the markets in which they operate so that its views regarding capacity management arrangements are made on a consistent basis across undertakings. This analysis is outlined below and in Appendix B, which includes further details of the information the ACCC has used to form its view. This section provides the ACCC's views on the capacity management arrangements of GrainCorp's Proposed 2011 Undertaking, including transferability, in light of that analysis.

4.3.1 Port terminal services markets

Capacity allocation arrangements include two main components:

- Primary allocation arrangements by which capacity is rationed between competing users and which are broadly categorised as either price or non-price rationing. Primary allocation arrangements currently operated by the BHCs include both non-price administered allocation (as in the case of the first come, first served arrangements of GrainCorp, Viterra and ABA) and price rationing (as under the CBH auction system). Primary allocation systems of both types typically require exporters to make at least some capacity commitments before production outcomes, and hence export shipping requirements, are fully known.
- In-season arrangements that facilitate exporters adjusting to any divergence between actual outcomes and ex ante planning regarding demand for export capacity. These adjustment mechanisms include flexibility for shippers to move booked capacity between geographic and/or temporal locations (such as exists under GrainCorp's PTSP) and the ability for shippers to transfer bookings in a

⁵³ Australian Grain Exporters Association, *Response to the Draft Decision*, 2 May 2011, p. 1.

secondary market (as occurs under CBH's arrangements in Western Australia). In-season response to changed, unforeseen or unplanned needs may also occur through grain trading or swapping along the supply chain, including by use of grain trades and stock swaps.

Two key market characteristics relevant to the view formed on the appropriateness of particular capacity management arrangements in specific market circumstances are:

- the relationship between total port elevation capacity and average annual and seasonal demand for it
- the extent to which the incentive exists for vertically integrated BHCs to pursue self preferential treatment—including blocking other exporters from accessing port services.

The following sections discuss the relevance of these factors to a decision regarding the appropriateness of capacity management arrangements proposed by a port operator. An assessment in particular cases will be informed also by the current arrangements the operator has in place and the effectiveness of those arrangements in achieving fair and efficient outcomes.

4.3.1.1 Extent of capacity constraint

The PC stated in its Inquiry Report on Wheat Export Marketing Arrangements that auctions can play a significant role in efficiently allocating limited port capacity.⁵⁴ This general economic principle, that allocative efficiency is best achieved through a price mechanism, has greatest application when supply is limited relative to demand. When no binding capacity constraint exists the demands of all users can be met and the means by which allocation occurs is not as critical to achieving efficiency.

In all Australian states from which wheat is exported there are periods when demand port capacity is more highly valued. These periods follow harvest when new season grain is available to be shipped and vary from season to season and between the ports operated by the BHCs.

The PC noted that port operators other than CBH might also consider adopting a similar [auction] system where there is a likelihood of excess demand for port capacity at certain points in time (effectively, a shifting peak demand problem driven by movements in the supply and demand for wheat and other grains).⁵⁵

While the ACCC is also of the view that an auction system is to be preferred when capacity is limited it notes that it may, nevertheless, form a view that access arrangements employing a non-price system of allocating capacity are appropriate. on the ACCC's view will take into account the degree of the capacity constraint evident and a judgement as to whether resultant inefficiencies warrant requiring the operator to employ an auction system for primary allocation arrangements. Also relevant is the extent to which allocative inefficiencies arising under the first come, first served arrangements are mitigated by other measures such as capacity transferability,

⁵⁴ Productivity Commission, *Wheat Export Marketing Arrangements*, 1 July 2010, p. 205.

⁵⁵ Ibid.

incentives for unwanted capacity to be returned to the shipping stem and greater flexibility to move capacity bookings.

Appendix B provides information on estimated capacity available in the (east coast and on demand for that capacity by grain exporters. The ability to compare the extent to which capacity is constrained on the east coast and in South Australia and Western Australia is made difficult because both Viterra and CBH do not report capacity on the same basis as GrainCorp.

For purposes of assessing the extent to which capacity is limited relative to the grain export task, the ACCC has used estimates of capacity to receive and store grain for cargo accumulation and to load ships. These estimates abstract from the impact of freight capacity limits and other up-country bottlenecks on the grain supply chain and exports. The ACCC recognises the significance of up-country bottlenecks in the grain export supply chain but notes that, in forming a view on wheat access undertakings, its concern is access to port terminal services. For this, the capacity of the port to in-load is relevant but the capacity of the up-country supply chain to deliver is not.

Estimates of the grain export task are derived from ABS data on grain production, domestic demand and the accumulation and run down of grain stocks.

To obtain an indicative measure of the extent to which port terminal capacity is constrained the ACCC has used an average monthly ‘capacity utilisation’ calculated from the estimates of supply and demand for port capacity. These capacity utilisation measures are used to obtain an indication of the intensity with which capacity is used within regions and to compare that across regions. The ACCC recognises certain limits in using such an ‘average’ measure. In particular such a measure provides no indication of the impact on demand of seasonality or of production conditions; nor does it take into account the preference of exporters for particular port terminals or time periods.

Nevertheless such an average does provide a high level indication of capacity constraint. Two capacity utilisation measures have been obtained. The first is for the most recent year when demand has been very strong. The second is an average across a number of years to even out the impact of production variation.

On the basis of the information available to it, the ACCC is of the view that the port terminal capacity is subject to some constraints during peak periods in high demand years. However, the ACCC is of the view that the level of capacity constraint on the east coast is relatively low.

4.3.1.2 Incentive for self-preferential treatment

A vertically integrated operator may have an incentive to utilise bottleneck infrastructure it controls to block competitors in upstream or downstream markets in order to gain market share at the expense of access seekers. The strength of such an incentive will be influenced by the existence or threat of competition to the integrated monopolist’s position. Where actual or potential competition exists, the incentive to block competitors is moderated by the threat that the blocking behaviour may not deliver the intended gain of market share in upstream or downstream markets but instead result in loss of throughput to an alternative supply chain or use.

However, where competition to the integrated monopolist is weak and the incentive to hoard capacity and so block others from accessing export capacity is strong, this will inform an assessment as to the appropriateness of proposed capacity allocation arrangements. Where the incentive to block out access seekers is strong, so too is the argument that allocation arrangements should incorporate measures to prevent such behaviour.

Auctions provide such a mechanism as they are a fair, transparent and efficient means of allocating capacity under which the incumbent faces the same limits on its ability to acquire capacity as other users.

It is also possible to design non-price allocation systems in such a way as to prevent or reduce anti-competitive behaviours by the operator. Such measures include use of an independent body to manage the shipping stem and requiring that the access provider faces the same financial disincentive to hoard as do access seekers.

In the context of the Australian wheat export industry competition to the bulk shipment of wheat through an operator's ports comes from a number of sources:

- extent of vertical integration and alternative up-country supply chains
- domestic demand for wheat relative to production
- competition from ports in other regions
- threat of bypass by customers
- containerised exports.

A high level summary of the key features of each region (including the differences that exist) in terms of their existing supply-chain characteristics and competitive dynamics is outlined in Appendix B.

In summary, the ACCC considers that each of the different regions can be distinguished on the basis of the different characteristics that relate to each (as outlined above). In particular, the ACCC considers that:

- there is a significantly higher level of competition in the east coast for up-country supply chain services than in South Australia and Western Australia
- there is a significantly higher level of competition in the east coast between wheat supplied into the domestic market and export wheat compared to South Australia and Western Australia and from the development of the non-bulk export market
- there is a higher level of competition between port terminals located in sections of the east coast (New South Wales, Victoria and the easternmost parts of South Australia) compared to port terminals in South Australia and Western Australia where there are no competing ports
- there is evidence of possible competition from access seekers prepared to bypass port terminals on the east coast.

The ACCC recognises that GrainCorp has a degree of market power in relation to its control of its port facilities and incentive to advantage its activities upstream and downstream of the port. However, given the countervailing competitive constraints noted above, the ACCC considers that GrainCorp has a significantly lower incentive for self preferential treatment in its capacity management relative to that of either Viterra or CBH. However, the ACCC notes that these competitive pressures are less evident in Queensland, particularly for GrainCorp's facilities at Mackay.

In conclusion, the ACCC recognises that one way of dealing with problems of hoarding capacity is by independent management of the shipping stem and/or the booking fees. For the reasons given above, the ACCC does not consider that these are required of GrainCorp at this point in time but it will continue to monitor the situation.

4.3.1.3 Conclusion

In forming its view regarding the capacity management arrangements proposed by GrainCorp, the ACCC considers that the following conclusions from the above analysis are relevant:

- GrainCorp's port terminals are subject to peak periods of excess demand driven by movements in the supply and demand for wheat and other grains (a shifting peak demand problem)
- the duration and extent of the periods in which there is excess demand can be significant, particularly in years of large harvest such as the current (2010/11) year when capacity has been booked out for extensive periods at a majority of GrainCorp's ports
- while capacity constraint is an issue at certain times at ports operated by GrainCorp, overall level of capacity constraint on the east coast is relatively low
- GrainCorp faces a level of competition to its port terminal services that is significant and that is greater than competition to the port terminal services provided in South Australia and Western Australia.

4.3.2 Capacity allocation arrangements

The ACCC set out its preliminary view on whether GrainCorp's Proposed 2011 Undertaking to continue its existing capacity allocation and management arrangements is appropriate. In particular the ACCC considered the implementation of the first come, first served approach to primary allocation of capacity and the effectiveness of the capacity management arrangements to ensure efficient capacity use outcomes. The following discussion updates the ACCC views in light of public consultation on the Draft Decision.

4.3.2.1 Primary allocation arrangements

GrainCorp allocates elevation capacity on a first come, first served basis, with Cargo Nomination Applications (CNA) 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).⁵⁶

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 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 offered by GrainCorp are demonstrated to be inappropriate with regard to the provisions of Part IIIA. In this regard the ACCC notes that s.n 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'.⁵⁷ Section 44ZZA(3) also includes as matters that the ACCC may have regard to 'the legitimate business interest of the provider' and 'the interests of persons who might want access to the service'.

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.

Shifting peak demand is an issue at GrainCorp ports and, in these circumstances, capacity allocation arrangements that rely on mechanisms that do not allocate capacity to those that value it most highly will result in economically inefficient outcomes. This is a situation for which the PC considers that other port operators might also consider adopting a similar [auction] system to that used by CBH in Western Australia.

The ACCC also considers that a market mechanism will promote economic efficiency in the use of scarce resources. However, in forming its view on whether or not to accept an undertaking the ACCC considers a number of matters and may accept arrangements which it does not consider to be the best in some respects.

⁵⁶ Productivity Commission, *Wheat Export Marketing Arrangements – final report*, 1 July 2010, p. 205.

⁵⁷ *Competition and Consumer Act 2010*, s. 44AA(a).

The ACCC formed the preliminary view that it was appropriate that the Proposed 2011 Undertaking continued the allocation of capacity under GrainCorp's first come, first served arrangements.⁵⁸ In forming this preliminary view the ACCC had regard to the publication by GrainCorp of availability of capacity on its shipping stem and of its shipping stem in conformity with the continuous disclosure requirements set out in clause 9.1 of the Proposed 2011 Undertaking. The continuous disclosure of its shipping stem enables access seekers to monitor when, and by whom, bookings are being made, as well as when and where capacity constraints are emerging.

In forming its preliminary view the ACCC also considered submissions from stakeholders regarding the operation of the first come, first served booking system and concerns that there may be over booking by some exporters, including GrainCorp.

As noted in its Draft Decision, 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.⁵⁹ The ACCC inquired into the bookings made by GrainCorp on its stem during the 2010-11 season and did not find 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.

The ACCC also noted in its Draft Decision that it 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.

Update of ACCC views

The ACCC received a number of submissions on the appropriateness of auction mechanisms to allocate capacity. In particular, GrainCorp has submitted that the auction system operated by CBH in Western Australia 'has flaws and inefficiencies'.⁶⁰ This view is not shared by other stakeholders that have submitted that the CBH auction system has worked well in 2010/11 following adjustments made by CBH to the initial auction design. Stakeholders have also provided positive comments on the CBH auction system in their submissions on the ACCC Issues Paper on the Viterra 2011 undertaking and on the ACCC Issues Paper on the CBH 2011 undertaking.

⁵⁸ ACCC, *GrainCorp Operations Limited Port terminal Services Undertaking Draft Decision*, 24 March 2011, p. 53.

⁵⁹ *Ibid.*, p. 52.

⁶⁰ GrainCorp, 7 April 2011, p. 5.

CBH itself considers ‘the short comings of first come, first served are particularly apparent in high demand conditions, as is becoming evident in this year’s harvest in NSW, Victoria and South Australia.’⁶¹

GrainCorp has also made reference⁶² to auction arrangements developed by Port Waratah Coal Services Limited in 2004. The ACCC notes that the success of an auction system depends on the appropriateness of the auction design to the needs of the market to which it applies and that limited inferences can be drawn from one set of arrangements for a different market and for different purposes.

As noted above in section 4.3.1, the extent to which capacity is constrained relative to the grain export task—as evidenced by average utilisation rates and the frequency and persistence of periods of excess demand—is the critical consideration to forming a view regarding the need for capacity allocation to be via auction. This is because an auction based allocation will result in capacity going to its highest value use and, hence, being allocated in an economically efficient manner.

In contrast, a first come, first served arrangement provides no certainty that the most economically efficient allocation of capacity occurs when capacity is constrained. Other factors, such as the incentive for self preferential treatment, may strengthen or lessen the imperative for an auction, but the need for an efficient allocation of scarce capacity is, in the ACCC’s view, the overriding consideration in examining the appropriateness of the proposed capacity allocation arrangement..

There is clear evidence that capacity constraints exist at GrainCorp ports during periods of peak demand and that, in years of high production and exports, peak periods can extend over a number of months. The ACCC has considered whether this level of capacity constraint warrants a change from the existing first come, first served booking arrangements to an auction. In forming its view the ACCC has noted that ‘average capacity utilisation’ of ports on the east coast in this high demand year is around 50 per cent and that this may fall to around 30 per cent in years of more average harvest. The ACCC has formed a view on the evidence available that, overall, the level of capacity constraint on the east coast is relatively low. The ACCC has also noted that operation of GrainCorp’s first come, first served booking system has been orderly and that competitive pressures lessen somewhat the incentive for self preferential treatment by GrainCorp.

Also, the ACCC notes that while a number of stakeholders are of the view that auctions are to be preferred as a means of allocating all grain port capacity in Australia, there have been limited specific calls for auctions to be put in place for the east coast ports.

Accordingly, and following public consultation on its Draft decision, the ACCC remains of the view that it is appropriate for the GrainCorp Proposed 2011 Undertaking to continue the first come, first served system of capacity allocation.

However, the ACCC continues to be of the view set out in the Draft Decision that GrainCorp’s port allocation capacity management arrangements give rise to avoidable

⁶¹ Co-operative Bulk Handling Limited, *Public Submission to ACCC*, 1 April 2011, p.13.

⁶² GrainCorp, 6 May 2011, p. 4.

inefficiencies that it is necessary for GrainCorp to address in its Proposed 2011 Undertaking.

In considering the capacity allocation methodology proposed by GrainCorp, the ACCC has had regard to matters listed in section 44ZZA(3) of the Act. In particular, s. 44ZZA(3)(aa) requires the ACCC to have regard to the objects of Part IIIA which include to promote the economically efficient operation of, use of and investment in the infrastructure by which services are provided. Further matters of particular relevance to the ACCC in forming a view on capacity management arrangements are the legitimate business interests of the provider (s. 44ZZA(3)(a)) and the interests of persons who might want access to the service (s. 44ZZA(3)(c)).

It is in the interests of access seekers that access to capacity is provided on a fair and efficient basis and that a change to an auction system is warranted if existing arrangements do not provide fair and efficient access. However, it is contrary to GrainCorp's interests for it to change its primary allocation from first come, first served to an auction system unless such change is necessary to provide fair access and for reasons of economic efficiency. The ACCC is of the view that, while there is a strong case for the use of auctions to allocate scarce capacity, the balance of these interests is met, in the case of GrainCorp, by modifications to the first come, first served allocation arrangements rather than by replacing existing arrangements with an auction.

The view on an administered primary allocation system is informed by the extent to which an economically inefficient initial allocation of capacity can be corrected by existing or proposed in-season adjustments to capacity utilisation. This aspect of GrainCorp's capacity management arrangements is discussed in the following section.

4.3.3 Post allocation capacity management

As noted above, there can be no presumption that a first come, first served initial allocation of capacity results in an economically efficient outcome when capacity is limited relative to demand. Moreover, divergence between ex ante planning and realised outcomes may result in execution difficulties for exporters and give rise to unmet demand while capacity is unutilised.

In forming its view regarding appropriate capacity management arrangements, the ACCC has considered whether mechanisms exist to:

- allow economically inefficient allocation resulting from a first come, first served booking system to be redressed through subsequent transactions
- ensure that capacity does not go unutilised during peak periods.

4.3.3.1 Transferable capacity

In its Draft Decision the ACCC noted that a system of transferable capacity would provide mechanisms to both enable exporters who value capacity most highly at peak times to acquire it from a shipper who places a lower valuation on it and to enable an exporter to acquire capacity that is unwanted by the holder of the booking.

In forming its preliminary view the ACCC noted:

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.⁶³

The ACCC acknowledges that GrainCorp has allowed significant flexibility for exporters to move capacity forward in the first months of 2011 despite the capacity already being fully booked in the forward months. However, the ACCC also notes that this flexibility is greater than is anticipated in the PTSP which indicate that a change in elevation period will be contingent on capacity being available, as provided in clauses 11.3 and 7.5 of the PTSP in Schedule 3 of the Proposed 2011 Undertaking.

The ACCC is of the view that the flexibility for exporters to move the time and location of a booking is desirable as it enables response to changed or unforeseen circumstances and increases the likelihood that an exporter will be able to execute a booking.

However there are limits to the effectiveness of this flexibility as it provides no incentive for exporters to return unwanted capacity to the stem. Rather, the incentive is for the exporter to persist until the time allowed to execute the booking expires.

The ACCC formed a preliminary view, as set out in its Draft Decision,⁶⁴ that allowing exporters to transfer booked slots would reduce the risk that capacity is unused or not put to its most economically efficient use at peak times. It also provides a mechanism for 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.

As noted in section 4.2 above and detailed in Appendix AB, GrainCorp argued against transferability in its two submissions on the draft decision (dated 7 April 2011 and 18 April 2011) and also in its response to submissions supporting transferability made by a number of stakeholders, including the industry body, AGEA, access seekers and an end user.

The ACCC makes the following comments on the major concerns raised by GrainCorp:

- A system of transferability limited to existing stem bookings, as contemplated by the ACCC, could operate with existing allocation arrangements. However, to the extent that a secondary market developed, the ACCC recognises that GrainCorp may perceive a benefit to it of restructuring its system of capacity management.
- Pricing of scarce capacity at peak times, and the consequences of that for producers and traders, is positive for allocative efficiency. Participation of 'speculators' has a positive impact of facilitating allocative efficiency. That said, the ACCC recognises that there may be incentives for strategic behaviour by some

⁶³ ACCC, *Draft Decision*, 24 March 2011, p. 53

⁶⁴ ACCC, *Draft Decision*, 24 March 2011, pp. 53.-7.

market participants which would need to be taken into account in the design of a system of transferability.

- Concerns regarding logistical planning may be overstated as it is unlikely that an exporter would acquire capacity through a transfer without also having the necessary grain sourcing and logistical planning in place. If that was not the case, this would be a problem for the exporter rather than GrainCorp.
- The ACCC considers that it is unlikely that speculative activity would result in capacity going unused unless there was no demand for it, as a rational speculator would seek to minimise a loss rather than let the capacity expire.
- The ACCC does not consider the CBH auction and secondary market system to be a failure or that that view is held by others, including CBH itself. In respect of the transferability of capacity the ACCC notes that 63 transfers occurred in 2009/10 which was a high demand year and that CBH does not make any negative comments on that experience. This indicates that this mechanism operated effectively to achieve within season adjustments to enable exporters to match supply and demand. The market has not been active in 2010/11 which is consistent with expected needs in a low demand year.

The ACCC considers that there are strong in-principle arguments for capacity allocation or re-allocation mechanisms that promote economic efficiency. The ACCC is of the view that, in the case of GrainCorp, transferability is an effective means of achieving that without requiring a move to auction for primary allocation of capacity and that risks of undesirable strategic behaviour could be addressed in the design of such a system.

However, GrainCorp has proposed alternative mechanisms to improve capacity allocation outcomes under the Proposed 2011 Undertaking as an alternative to transferability at this time. These measures are discussed in the following section.

4.3.4 Options to improve efficiency of capacity management

GrainCorp has provided measures to:

- create incentives for wheat exporters to make decisions regarding execution of capacity in a timely manner to enable other access seekers to obtain unwanted capacity at peak times
- assist exporters to develop strategies to use stock swaps for shipments and to assess the level of potential congestion at port
- improve transparency and certainty regarding its capacity booking arrangements and port information.

These are discussed below.

4.3.4.1 Peak period elevation capacity management

GrainCorp proposes a conditional 50 per cent refund of the booking fee when capacity booked for a peak period is surrendered at least 35 days prior to the first day

of a confirmed elevation period. A peak period is defined as one for which total tonnage showing as 'accepted' on the shipping stem equals the published total tonnage of elevation capacity for the corresponding elevation period.

Payment of the refund is conditional on a new booking for equivalent or greater tonnes by a customer other than the surrendering customer.

The ACCC notes that AGEA submitted that the forfeiture of the booking fee should escalate as the shipping date approaches.⁶⁵ The proposal put by GrainCorp is more focused, applying only at peak times. The proposed approach applies only at peak times and includes conditions that eliminate incentives to 'game' the refund arrangement.

The ACCC is of the view that this proposal will promote efficient use of port terminal capacity while balancing the interests of GrainCorp and access seekers. The proposal creates an incentive for GrainCorp customers with unwanted capacity to return that capacity to the stem for access by others. The conditional nature of the refund ensures that the incentive operates only at times when capacity is limited relative to demand (peak periods) and that an opportunity is not created for shippers to hoard or manipulate the proposed arrangements.

Proposed amendment 3.2 of the draft amendment notice makes these changes to the port terminal services protocols. The ACCC is of the view that the proposed change to capacity management arrangements will result in a reduced risk that capacity will go unused during peak demand periods and, hence, will promote economic efficiency. The ACCC is also of the view that the proposal appropriately balances the interests of GrainCorp and the interests of access seekers and that, if GrainCorp were to make this amendment to Schedule 3 of its Proposed 2011 Undertaking it would be more appropriate.

The ACCC seeks comments on the drafting of proposed amendment 3.2 of the Draft Amendment Notice that deals with this issue.

4.3.4.2 Additional stocks at port information

GrainCorp proposes to publish more detailed information on stocks at port and to enshrine recently initiated more frequent publication of stocks at port information.

Clause 10.1 of the current 2009 Undertaking requires GrainCorp to publish and update monthly the tonnage of bulk wheat stocks at port and the aggregate total of stocks of other grain at port. Since May 2011 GrainCorp has increased the frequency with which it publishes stocks at port information to weekly.

GrainCorp has proposed to reflect that change to its practices in the Proposed 2011 Undertaking and to provide more detailed information on stocks. In particular, GrainCorp will publish the tonnage of more commodities (wheat, barley, canola, sorghum and all other grains) rather than wheat and all other grains. Also, GrainCorp will disclose the top three wheat grades at each port (but not the tonnage of each grade).

⁶⁵ AGEA, *Submission on ACCC Draft Decision*, 2 May 2011, p. 3.

The ACCC is of the view that this greater transparency regarding stocks at port is in the interests of access seekers as it improves information relevant to developing strategies to swap wheat and to assess the level of potential congestion at port. The ACCC acknowledges that the level of blending at port and the number of grades handled creates difficulties in providing grades by volume. The ACCC also notes that the publication of such information may disclose customers' grain quality and blending strategy for shipment.

The ACCC is therefore of the preliminary view that this proposal is appropriate. In forming this view the ACCC has had regard to matters listed in section 44ZZA(3) of the Act. In particular the proposal will improve efficiency in the wheat export market and appropriately balances the legitimate business interests of the access provider, the interests of access seekers wanting more stock information and also those shippers whose interests may be disadvantaged by more detailed disclosure of stocks for shipment.

The ACCC seeks comment on the drafting of proposed amendment 1.15 of the draft amendment notice which deals with this issue.

4.3.4.3 Elevation capacity booking, allocation and management

GrainCorp proposes measures to improve certainty and transparency of its capacity booking, allocation and management processes by including provisions in its PTSP that allow for:

- opening of the shipping stem by the end of June at the latest each year for the following season (1 October to 30 September)
- provide to all customers with current Bulk Wheat or Bulk Grain Port Terminal Services Agreements with GrainCorp two weeks notice in writing of the date and time of the stem opening and publish the announcement on the GrainCorp website
- publish applicable elevation capacity at each port, as required under the current Undertaking
- provide to all customers with current Bulk Wheat or Bulk Grain Port Terminal Services Agreements with GrainCorp two weeks notice in writing when nominated capacity at the port is altered, and the applicable elevation capacity at each port
- manage all bookings via the GrainCorp Workflow platform and allocate capacity in accordance with the relevant provisions in the PTSP including that CNAs be assessed in chronological order of receipt
- all matters related to the management of NAAN upon which the date and time of receipt will be recorded.

The ACCC considers that this proposal will provide GrainCorp's customers with greater confidence that elevation capacity is allocated on a fair and transparent basis. It will also assist access seekers to better manage logistics and export sales. These

outcomes will promote the economically efficient use of capacity at GrainCorp's port terminals and promote competition in upstream and downstream markets.

Proposed amendment 3.3 of the draft amendment notice is for GrainCorp to amend clause 10.1 of the Proposed 2011 Undertaking. The ACCC's view is that, if GrainCorp were to make this amendment to Schedule 3 of its Proposed 2011 Undertaking, it would be more appropriate because greater transparency and certainty for access seekers would result.

4.3.4.4 Measures to counter anti-competitive behaviours

As noted in section 4.2.2 above, some stakeholders submitted that the \$5 booking fee paid by GrainCorp's trading division is an internal transfer and does not impose a cost on it. Stakeholders submitted that measures should be required that ensure that capacity allocation and management occurs in a competitively neutral way. In particular, stakeholders submitted that:

- GrainCorp be required to face a financial disincentive to hoarding by requiring all booking fees be held in escrow until the booking is executed or expires. If GrainCorp fails to execute its own booking the fee should be forfeited to an industry or charity
- An independent body should administer capacity allocation arrangements.

The ACCC considers that, as a general principle, capacity allocation arrangements should be competitively neutral and that ring fencing or other arrangements such as an independent capacity manager may be effective mechanisms to avoid self preferential treatment on the part of a vertically integrated operator of bottleneck capacity. However, the ACCC notes that the need for measures to combat incentives for anti-competitive behaviour is lessened when countervailing competitive pressures exist. ACCC analysis (see 4.3 above and Appendix B) indicates that GrainCorp faces competitive pressures from a number of sources, including from domestic grain uses, on up-country supply chains and from the threat of by-pass. The ACCC has therefore formed the view that the need to require measures such as those proposed by stakeholders or ring fencing rules to ensure competitive neutrality is not strong in the case of GrainCorp.

The ACCC also notes that the Proposed 2011 Undertaking includes robust non-discrimination provisions, continuous disclosure rules and publication requirements. The ACCC is of the view that, given the level of competitive pressure it faces, these arrangements are sufficient to protect against anti-competitive behaviour in the case of GrainCorp. In its Draft Decision the ACCC stated its preliminary view that it is not necessary in order for the Proposed 2011 Undertaking to be acceptable that ring fencing be required. The ACCC's updated view in regard to this issue is the further measures to ensure competitive neutrality proposed in submissions are not necessary.

In forming this view the ACCC has had regard to matters listed in section 44ZZA(3) of the Act. In particular, the ACCC is of the view that wheat exporters can obtain access to GrainCorp's port terminal facilities on an equitable basis and that their interests are adequately met without further measures to ensure competitive neutrality.

4.3.5 Publication of information

4.3.5.1 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.⁶⁶

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.

4.3.5.2 Publication of other 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 generally provided access seekers with sufficient information on key operational matters at GrainCorp's port terminals whilst not imposing unduly prescriptive regulation on GrainCorp.

⁶⁶ *Wheat Export Marketing Act 2008*, s. 24(4).

However, the ACCC considers that publication of more detailed information on stocks at port more frequently will better assist shippers to plan and execute their wheat export program. This issue was addressed by GrainCorp in the proposals it has made as alternatives to the option of transferability and were discussed in 4.3.4.2 above.

The ACCC is of the 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.

4.3.6 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 view that it is appropriate for GrainCorp to consult directly with access seekers regarding proposed changes to the PTSP.

However, for purposes of immediate clarity the Draft Amendment Notice includes an amendment to remove the typographical error in the PTSP at Schedule 3 to the Proposed 2011 Undertaking. In particular, the definition of 'Vessel Nomination' in clause 1 of Schedule 3 references clause 20. Proposed amendment 3.1 of the Draft Amendment Notice is an amendment regarding correction of this referencing.

A revised undertaking incorporating this amendment is likely to be appropriate having regard to s 44ZZA(3)(c) as it removes ambiguity and avoids confusion for access seekers.

4.3.7 Supply chain management

The ACCC notes the views of the Victorian Freight and Logistics Council regarding the desirability of a grain supply chain logistics group similar to the Hunter Valley

Coal Chain to work on grain logistics optimisation. The ACCC considers such arrangements can have efficiency benefits and encourages such measures and the championing of them by government. However establishment of such arrangements is a matter for industry and the ACCC notes that such an arrangement does not yet exist.

4.3.8 Conclusion

GrainCorp proposes measures to encourage shippers to return unwanted capacity to the stem at peak times, to provide more frequent and detailed information on stocks at port and to provide more certainty and transparency of its capacity booking and allocation processes.

The ACCC considers that, while these proposals go some way to further promote efficiency in the use of port terminal services and the interests of access seekers, they do not achieve the economic efficiency benefits that would result if booked capacity was transferable..

The ACCC has considered whether the alternative proposals put forward by GrainCorp provide an adequate interim response to its concerns regarding port allocation capacity management. The ACCC has formed the preliminary view, having regard to the matters listed in s. 44ZZA(3), that these measures are appropriate and adequately address its concerns regarding the Proposed 2011 Undertaking for the reasons set out in this chapter.

However, the ACCC reiterates its view that capacity transferability is a mechanism that will promote economic efficiency and notes that this option will be a matter for consideration if the ACCC is required to decide whether to accept a future undertaking after the expiration of the Proposed 2011 Undertaking. The ACCC notes that whether this is required will depend on the Government's response to the report by the PC on its inquiry into wheat export marketing arrangements.

5 Variation of PTSP

5.1 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 2011 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).⁶⁷

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.⁶⁸

⁶⁷ GrainCorp Operations Limited, *Port Terminal Access Undertaking*, 22 September 2010, subclauses 9.3(a)(i)-(ii).

⁶⁸ *Ibid.*, Schedule 3, subclauses 9.3(a)(iii)-(iv), 9.3(c).

5.2 GrainCorp and third-party submissions

A detailed summary of submissions is contained in Appendix A. This section includes a brief summary of themes and conclusions relating to the PTSP variation process by GrainCorp and third parties.

5.2.1 GrainCorp's submissions

GrainCorp noted in its original submission in support of the Proposed 2011 Undertaking that the 2009 Undertaking allowed sufficient flexibility to manage the demands of customers.⁶⁹ GrainCorp also noted in response to the submission by AGEA that it does not have the flexibility to unilaterally vary the PTSP, and that the variation process is subject to consultation with third parties and the ACCC must be notified.⁷⁰

While GrainCorp submits that the changes proposed by the ACCC are not necessary, it has proposed revisions to the port protocol variation process to address the recommended changes considered necessary by the ACCC, including a draft clause dealing with an objection notice.

GrainCorp will make the required change to clause 9.1(a) of the 2011 Proposed Undertaking to ensure the PTSPs are a comprehensive statement of GrainCorp's policies and procedures for managing demand for the port terminal service.

5.2.2 Third party submissions

In response to the ACCC's issues paper, AGEA submitted that the flexible approach under the 2009 Undertaking whereby GrainCorp is able to vary the PTSP without formal approval from the ACCC had not caused any concerns.⁷¹

AWB agrees with the ACCC's recommendations outlined in the Summary of required changes to ensure the PTSP is comprehensive and yet can be varied by GrainCorp without unfairly impacting market participants.⁷²

5.3 ACCC view

5.3.1 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

⁶⁹ GrainCorp Operations Limited, *Submission to the ACCC*, 22 September 2010, p. 9.

⁷⁰ GrainCorp Operations Limited, *Response to third party submissions*, 13 December 2010, p. 1.

⁷¹ Australian Grain Exporters Association, *Submission to ACCC Issues Paper*, 10 November 2010, p. 1.

⁷² AWB, *Submission*, 15 April 2011, s. 5.3.4.

- 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.

5.3.1.1 The comprehensive nature of the PTSP

The variation process followed by GrainCorp under the 2009 Undertaking 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.

The Draft Decision considered that two issues arose as a result of this:⁷³

- 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.

⁷³ ACCC, *Draft Decision*, 24 March 2011, p. 58.

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.

As noted in the Draft Decision, 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 took 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.⁷⁴

Following consultation on the Draft Decision the ACCC remains of the view that the PTSP should be explicitly required to be a comprehensive document, and proposed a clause to that effect in Proposed Amendment 1.9. It is the ACCC's view that a revised undertaking that incorporated Proposed Amendment 1.9 would be more appropriate having regard to s. 44ZZA(3)(c) as it creates greater certainty and lessens possible confusion for access seekers. The ACCC will actively monitor future compliance by GrainCorp in this area.

5.3.1.2 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.⁷⁵

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.

⁷⁴ ACCC, *Draft Decision*, 24 March 2011, pp. 58-9.

⁷⁵ ACCC, *GrainCorp/Viterra/CBH Operations Limited Port Terminal Services Access Undertaking Further Draft Decision*, 23 December 2009, p. 223.

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 BHCs 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
- 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

In its Draft Decision, the ACCC took the preliminary view that clause 9.3(a)(iii)(A) of GrainCorp's Proposed 2011 Undertaking fulfilled this minimum standard.⁷⁶ The ACCC remains of this view following consultation on the Draft Decision.

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 Draft Decision took the preliminary view is that this was appropriate.⁷⁷ The ACCC remains of this view following consultation on the Draft Decision.

⁷⁶ ACCC, *Draft Decision*, 24 March 2011, p. 60.

⁷⁷ *Ibid.*

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. In its Draft Decision, the ACCC took 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 noted that this requirement is contained in the existing undertakings applying to other port operators.⁷⁸

GrainCorp's Proposed 2011 Undertaking does not provide for the publication of written submissions received during the variation process. The ACCC also took the preliminary view in its Draft Decision 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 included amendments to address the ACCC's concerns in its Draft Decision.

Following consultation on the Draft Decision the ACCC remains of the view that amendments in line with those proposed by GrainCorp would adequately address its concerns. Proposed Amendments 1.10 and 1.11 in the draft amendment notice provide a mechanism to facilitate this. The ACCC considers that a revised undertaking that incorporated these proposed amendments would be more appropriate having regard to the interests of access seekers in accordance with s. 44ZZA(3).

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's Draft Decision took 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 stated that it was 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 in the Draft Decision was 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.⁷⁹ GrainCorp provided drafting to address the ACCC's concerns in the draft revised Proposed 2011 Undertaking.

⁷⁸ ACCC, *Draft Decision*, 24 March 2011, pp. 60-1.

⁷⁹ *Ibid.*, p. 61.

Following consultation on the Draft Decision, the ACCC remains of the view that the Proposed 2011 Undertaking should explicitly recognise the ability of GrainCorp to amend a proposed variation based on consultation, without commencing a new variation process. It is the ACCC's view that a revised undertaking incorporating Proposed Amendment 1.12 would be more appropriate having regard to the interests of access seekers in accordance with s. 44ZZA(3)(c).

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. In its Draft Decision the ACCC took the preliminary view that the current proposed timeframe was likely to be appropriate.⁸⁰ GrainCorp has proposed to amend the timeframe from 30 days to 20 Business Days, in order to be consistent with other timeframes in the variation process which are measured in Business Days. The ACCC considers that a 20 business day period is appropriate as it provides GrainCorp and access seekers with sufficient time to prepare for the implementation of the varied PTSP. Accordingly, the amendment notice includes Proposed Amendment 1.13 to facilitate this change.

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, the amendment notice includes Proposed Amendments 1.10, 1.11 and 1.12 to meet these concerns. It is the ACCC's view that an amended undertaking that includes these provisions is more likely to be appropriate.

5.3.1.3 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.⁸¹

The ACCC's Draft Decision acknowledged that the PTSP is an operational document and, as such, a degree of flexibility is required to ensure efficient operations at port. However, the ACCC noted that the wide scope of the PTSP means that quite significant aspects of port operations, such as capacity allocation, can be altered

⁸⁰ ACCC, *Draft Decision*, 24 March 2011, p. 61.

⁸¹ ACCC, *Further Draft Decision*, 23 December 2009, p. 288.

through a variation to the PTSP without the ACCC having any role in the variation process.⁸²

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 considered it important for port operators to have sufficient flexibility to manage operations at port, the Draft Decision stated that *in certain limited circumstances* the lack of regulatory oversight is inappropriate.⁸³ 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.

The Draft Decision proposed that if these circumstances arise, 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 considered it necessary to support this notice making power with an information gathering provision. This issue is discussed in section 5.3.2.

The Draft Decision stated that an approval role in respect of each proposed variation is inappropriate as the ACCC considered that certainty, flexibility and timeliness regarding the operation of the PTSP are of critical importance, given the PTSP is the document by which the port operates.⁸⁴ The suggested role would be specifically limited to the circumstances set out above.

Hence, the ACCC took the preliminary view that the undertaking was unlikely to be appropriate unless it included:

- a) the ability of the ACCC to:
 - gather the necessary information to assess whether the ‘limited circumstances’ exist
 - 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 Draft Decision sought comment from stakeholders on this preliminary view. Following consultation on the Draft Decision, the ACCC remains of the view that the inclusion of a role for the ACCC in the variation process is necessary in order for the Proposed 2011 Undertaking to be appropriate.

⁸² ACCC, *Draft Decision*, 24 March 2011, p. 62.

⁸³ ACCC, *Draft Decision*, 24 March 2011, p. 62.

⁸⁴ *Ibid.*, pp. 62-3.

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

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

The Draft Decision provided that 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.⁸⁵

The ACCC considered that in practice 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 considered 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 Draft Decision noted that the effect of the ACCC issuing a notice and the proposed variation to the PTSP not taking effect would depend on whether the notice related to the entire variation or only part of it. If the notice related to the entire variation, the variation could not take effect and the port operator would be required to commence a new variation process (if it still wished to vary the PTSP), that had been amended to address the ACCC's concerns. Correspondingly, if only part of the proposed variation was the subject of a notice, it would not prevent the variation in respect of those changes not a subject of the notice. It would only be possible for the ACCC to disallow the variation in part where the proposed varied terms were not intrinsically related.⁸⁶

Suggested form of the provision

The Draft Decision included proposed provisions for the ACCC to have the ability to issue an objection notice. In its draft revised undertaking provided to the ACCC, GrainCorp included provisions 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. Also, GrainCorp's revised draft adopted 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 took the preliminary view in its Draft Decision that a requirement for it to issue a draft notice of objection prior to issuing a final notice is appropriate. However, the ACCC noted 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 noted 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

⁸⁵ ACCC, *Draft Decision*, 24 March 2011, p. 63.

⁸⁶ *Ibid.*

of the undertaking. The ACCC anticipated that, in these circumstances, it will have time to identify the concern and act if necessary.⁸⁷

The ACCC remains of the view that the drafting proposed by GrainCorp is appropriate and has reflected this drafting in Proposed Amendment 1.14. The ACCC considers that a revised undertaking incorporating the proposed amendment would be more appropriate having regard to s. 44ZZA(3)(a) and (c) by providing sufficient flexibility to GrainCorp in managing its operations and sufficient certainty to access seekers regarding the terms of access.

Other mechanics

In its Draft Decision the ACCC noted 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 considered that due to the introduction of a decision making role into the undertaking and the short timeframes attaching to that role, the authorisation provisions should be extended and should apply to all ACCC functions under the Undertaking. GrainCorp included a provision to that effect in its revised draft of the undertaking provided in response to the ACCC's preliminary views.

Following consultation on the Draft Decision, the ACCC remains of the view that this change adequately addresses its concerns, and has provided a mechanism to facilitate this change in Proposed Amendment 1.2.

5.3.2 Information gathering provision

The Draft Decision considered that for the ACCC to make an effective and appropriate decision in relation to the Proposed 2011 Undertaking—including, for example, on whether to issue an objection notice in the terms specified above—it would be necessary to increase the ACCC's current ability to obtain relevant information from the port operator in a timely manner.⁸⁸

At present, the ACCC can obtain information from the port operator through an ACCC directed audit or on a voluntary basis. The Draft Decision stated that neither of these methods represented an appropriate way for the ACCC to obtain the relevant information it requires to exercise the proposed objection notice provision.

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 Draft Decision noted that conducting an audit would provide the ACCC with some relevant information to make the decision as to whether to issue the notice, but

⁸⁷ ACCC, *Draft Decision*, 24 March 2011, pp. 64-5.

⁸⁸ *Ibid.*, p. 66.

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 in section 5.3.1.4, but the Draft Decision further noted 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.⁸⁹

Given the nature of the proposed ACCC power, the Draft Decision considered it 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 could make a sound decision into whether or not to issue a notice regarding a proposed variation.⁹⁰ The Draft Decision noted 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.⁹¹

GrainCorp included an information gathering provision in its draft revision to the Proposed 2011 Undertaking provided to the ACCC. Following consultation on the Draft Decision, the ACCC remains of the view that that an amendment to the Proposed 2011 Undertaking to include GrainCorp's proposed revised drafting is appropriate. Accordingly, the ACCC has provided a mechanism to facilitate this in Proposed Amendment 1.5.

It is the ACCC's view that a revised undertaking incorporating this proposed amendment would be more appropriate having regard to s. 44ZZA(3)(a) and (c), by facilitating sufficient flexibility to GrainCorp in managing its operations and sufficient certainty to access seekers regarding the terms of access.

⁸⁹ ACCC, *Draft Decision*, 24 March 2011, p. 66.

⁹⁰ 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.

⁹¹ ACCC, *Draft Decision*, 24 March 2011, p. 66.

6 Conclusion

Overall approach

The ACCC reached a preliminary view in its Draft Decision 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 these issues with its draft revision.

Following consultation on its Draft Decision, the ACCC is of the updated view that the overall approach of the Proposed 2011 Undertaking is appropriate but that in certain respects changes are necessary for it to be acceptable.

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. The ACCC formed the preliminary view, set out in the Draft Decision, 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. The ACCC's updated view is unchanged from its preliminary view on this issue.

Capacity management

The ACCC notes that different arrangements for the allocation of capacity exist across the ports operated by the different BHCs. 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 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.

The ACCC formed 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 also noted in its 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 continues to be of the view that a system of transferable capacity would promote economically efficient use of port terminal services. Following consultation on the Draft Decision, GrainCorp has provided alternative proposals to encourage return of unwanted capacity to the stem, to increase competitive neutrality and to increase confidence on the part of access seekers that capacity is allocated and managed in a non-discriminatory way.

The ACCC is of the view that, while these proposals fall short of achieving the economic efficiency outcomes that transferability would achieve, they will result in improved capacity allocation and management arrangements.

GrainCorp has provided drafting of its proposals in the second draft revised undertaking (dated 27 May 2011) and the draft amendment notice published adopts that drafting. The ACCC seeks comments on GrainCorp's latest proposals and requests that any submissions address the extent to which the drafting of the in the second draft revised undertaking provided by GrainCorp achieves the objectives of:

- encouraging the return of unwanted capacity at peak times
- providing information on stocks at port that adequately meets the needs of all parties
- creates greater certainty regarding the operation of the first come, first served capacity allocation system.

In making this request, the ACCC notes that extensive submissions have previously been received on the substantive aspects of the undertaking in relation to the ACCC's 7 October 2010 Issues Paper and 24 March 2011 Draft Decision.

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
 - 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.

The draft amendment notice incorporates proposed amendments on each of these issues.

ACCC information gathering power

In the Draft Decision, the ACCC stated its 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. The ACCC's view on this issue is unchanged from its preliminary view and the draft amendment notice includes a proposed amendment giving effect to this.

Appendices

7 Appendix A: Submissions

The ACCC has sought comments from stakeholders on GrainCorp's Proposed 2011 Undertaking via:

- An Issues Paper released on 7 October 2010
- A draft Decision released on 24 March 2011.

This appendix provides a detailed summary of submissions received from stakeholders and submissions received from GrainCorp responding to comments from third party stakeholders. The summary is organised in line with the chapter structure of this Explanatory Statement for ease of reference

7.1 Submissions on the overall approach

7.1.1 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].⁹²

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.

⁹² GrainCorp Operations Limited, *Submission to the Australian Competition & consumer Commission 2011 Port Terminal Services Undertaking*, 22 September 2010, p. 1.

...

GrainCorp made significant pricing and contract concessions for the benefit of all grain exporters.⁹³

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.⁹⁴

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.⁹⁵

GrainCorp's submission also highlights the success of the publish-negotiate-arbitrate 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.⁹⁶ 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.⁹⁷

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.⁹⁸ 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.

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

⁹³ GrainCorp Operations Limited, *Submission to the Australian Competition & consumer Commission 2011 Port Terminal Services Undertaking*, 22 September 2010, p. 7.

⁹⁴ GrainCorp Operations Limited, *Submission to the Australian Competition & consumer Commission 2011 Port Terminal Services Undertaking*, 22 September 2010, p. 19.

⁹⁵ GrainCorp Operations Limited, *Submission to the Australian Competition & consumer Commission 2011 Port Terminal Services Undertaking*, 22 September 2010, p. 2.

⁹⁶ GrainCorp Submission, 22 Sep 2010, p. 3

⁹⁷ GrainCorp Submission, 22 Sep 2010, p. 8.

⁹⁸ GrainCorp Submission, 22 Sep 2010, p. 7

the requirement to publish pricing for standard services, the obligations not to discriminate and the detailed negotiate/arbitrate mechanisms.⁹⁹

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.¹⁰⁰

7.1.2 Australian Grain Exporters Association (AGEA) submission

7.1.2.1 AGEA response to Issues Paper (10 November 2010)

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.¹⁰¹

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.¹⁰²

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'.¹⁰³

With respect to the publish-negotiate-arbitrate framework, AGEA submits that it 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.¹⁰⁴

AGEA similarly notes that the Standard Terms proposed initially were not acceptable but that 'the GrainCorp approach improved in March 2010 and negotiation became

⁹⁹ GrainCorp Submission, 22 Sep 2010, p. 21

¹⁰⁰ GrainCorp Submission, 22 Sep 2010, p. 15

¹⁰¹ Australian Grain Exporters Association, *Submission to ACCC Issues Paper*, 10 November 2010, p. 1.

¹⁰² Australian Grain Exporters Association, *Submission to ACCC Issues Paper*, 10 November 2010, p. 1.

¹⁰³ Australian Grain Exporters Association, *Submission to ACCC Issues Paper*, 10 November 2010, p. 2.

¹⁰⁴ AGEA Submission, 10 Nov 2010, p. 1.

possible.’¹⁰⁵ 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.¹⁰⁶

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.

7.1.2.2 AGEA response to Draft Decision (2 May 2011)

AGEA submits that the ACCC’s approach should be to maximise consistency in application of access arrangements across Australia, and that ‘the objective of port access arrangements must be to promote an efficient supply chain’.¹⁰⁷

AGEA submits that the port terminal operators should be:
accountable for services provided including implementation of commercially based risk sharing of activities, such as demurrage and despatch.
[and that]

...appropriate demurrage/despatch clauses should be created within the Port Access Undertakings in line with the global grain industry to encourage greater efficiencies through Australian ports.¹⁰⁸

Regarding ring-fencing, AGEA does not consider that the arrangements in the Proposed 2011 Undertaking are adequate, and considers that the 2009 Undertakings have not dealt with sharing of information by the port terminal operator that can be used to the advantage of GrainCorp’s trading arm. In this regard, AGEA submits that ‘anything that a BHC trading team sees/receives should be made available to the market’.¹⁰⁹

7.1.3 AWB (Australia) Limited submissions

7.1.3.1 AWB response to the Issues Paper (11 November 2010)

In its submission dated 11 November 2010, 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.

With regards to publish-negotiate-arbitrate framework AWB notes that GrainCorp has removed the price differential that previously applied between wheat arriving from approved and non-approved third party storage. AWB considers that this increases the

¹⁰⁵ AGEA Submission, 10 Nov 2010, p. 2.

¹⁰⁶ AGEA Submission, 10 Nov 2010, p. 2.

¹⁰⁷ AGEA Submission, 2 May 2011, p. 1.

¹⁰⁸ AGEA Submission, 2 May 2011, p. 3.

¹⁰⁹ AGEA, Submission, 2 May 2011, p. 3.

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.¹¹⁰

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.¹¹¹

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.¹¹²

7.1.3.2 AWB response to the Draft Decision

In its supplementary submission in response to the ACCC's Draft Decision, AWB raised no objections to the proposed staggered commencement of the 2011 Undertaking and has accepted the ACCC's propositions regarding the publish-negotiate-arbitrate approach in its Draft Decision as:

providing awareness of the terms and conditions of GrainCorp's port terminal facilities and as a methodology for seeking practical and pragmatic alterations to existing processes or decisions on a case by case basis as necessary.¹¹³

AWB also agreed with the ACCC's views and recommendation in the Draft Decision regarding the publication of price and non-price terms and non-discriminatory access, dispute resolution, own trading terms and negotiation.

There were a number of issues where AWB had another view to that contained in the Draft Decision, including:

- AWB does not understand the justification for the charge of a differentiated port receival fee based on grain storage ownership and considers these charges to be an unjustifiable monopoly rent.
- AWB believes that despatch-demurrage arrangements should be used to drive supply chain efficiency.

¹¹⁰ AWB Submission, 11 Nov 2010

¹¹¹ AWB submission, 11 Nov 2010

¹¹² AWB Submission, 11 Nov 2010

¹¹³ AWB submission, 15 April 2011

- AWB questions the inclusion of a requirement to pay fees in relation to force majeure events.
- AWB recommends certain performance indicators should be published on GrainCorp's website within a reasonable period.

7.1.4 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 receipt rate'. Mr Bush argues that GrainCorp's publication of the average on the days of road receipt is insufficient to meet this requirement, and that GrainCorp should specify how many days of grain receipt 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.

7.1.5 GrainCorp submission in response to third party submissions

7.1.5.1 GrainCorp's response to submissions on Issues Paper (13 December 2010)

GrainCorp provided a submission responding to certain of the views expressed in the submissions made by interested parties to the ACCC's Issues paper. 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.¹¹⁴

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

...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...¹¹⁵

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

¹¹⁴ GrainCorp Operations Limited, *Response to third party submissions*, 13 December 2010, p. 1.

¹¹⁵ GrainCorp submission 13 December 2010, p. 4.

- 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'.¹¹⁶

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.¹¹⁷

7.1.5.2 GrainCorp's response to submissions on Draft Decision (6 May 2011)

GrainCorp also provided a submission responding to certain views expressed in the submissions made by interested parties to the ACCC's Draft Decision in which it states that it has dealt with many of the issues in past submissions to the ACCC, including price differentials, dispatch-demurrage arrangements and ring-fencing.¹¹⁸

GrainCorp submits that there is no statutory basis for AGEA's statement that the objective of the undertaking to promote an efficient supply chain.¹¹⁹

Regarding AWB's views on payment of fees in relation to force majeure events, GrainCorp submits that it is beyond the terms of the legislation to link matters affecting cargo accumulation in other parts of the supply chain to port elevator services.¹²⁰

GrainCorp submit that their current reporting of performance indicators is sufficient, stating that:

...the current reporting requirements, when combined with the daily shipping stem and the daily Elevation Capacity Available email sent to all customers, is sufficient information to meet the objectives of Part IIIA of the *Competition & Consumer Act* (2010) (CCA) as set out in 44AA.¹²¹

¹¹⁶ GrainCorp submission 13 December 2010, pp. 4-5.

¹¹⁷ GrainCorp submission 13 December 2010, p. 5.

¹¹⁸ GrainCorp submission, 6 May 2011, pp. 6, 20.

¹¹⁹ GrainCorp submission, 6 May 2011, p. 18.

¹²⁰ GrainCorp Submission, 6 May 2011, p. 7.

¹²¹ GrainCorp submission 6 May 2011, p. 8.

7.2 Submissions on capacity management

7.2.1 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.¹²² 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.¹²³

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.¹²⁴

7.2.2 Third party submission to the ACCC Issues Paper

7.2.2.1 Australian Grain Exporters Association (AGEA) dated 10 November 2010

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 4 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.'¹²⁵

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

¹²² GrainCorp Operations Limited, *Submission to the ACCC*, 22 September 2010, p. 9.

¹²³ GrainCorp Operations Limited, *Submission to the ACCC*, 22 September 2010, p. 9.

¹²⁴ GrainCorp Operations Limited, *Submission to the ACCC*, 22 September 2010, p. 9.

¹²⁵ 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.¹²⁶

7.2.2.2 AWB (Australia) Limited (AWB) dated 11 November 2010

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]'.¹²⁷

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.'¹²⁷

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".¹²⁸

7.2.2.3 Mr Timothy Bush dated 4 November 2010

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 longest running, most widespread drought in the eastern Australian states.'¹²⁹ The submission does not comment on the approach to capacity allocation used by GrainCorp.

7.2.3 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.

¹²⁶ Australian Grain Exporters Association, *Submission to ACCC Issues Paper*, 10 November 2010, p. 2.

¹²⁷ AWB (Australia) Limited, *Submission to ACCC Issues Paper*, 12 November 2010, p. 1.

¹²⁸ AWB (Australia) Limited, *Submission to ACCC Issues Paper*, 12 November 2010, p. 2.

¹²⁹ Timothy Bush, *Submission to ACCC Issues Paper*, 12 November 2010, p. 9.

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.'¹³⁰

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.'¹³¹
- 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.¹³²

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 quantum of GrainCorp's bookings on the South Australian shipping stem, is contextually misleading.'¹³³

- 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:

¹³⁰ GrainCorp Operations Limited, *Response to third party submissions*, 13 December 2010, p. 1.

¹³¹ GrainCorp Operations Limited, *Response to third party submissions*, 13 December 2010, p. 2.

¹³² GrainCorp Operations Limited, *Response to third party submissions*, 13 December 2010, p. 2.

¹³³ GrainCorp Operations Limited, *Response to third party submissions*, 13 December 2010, p. 3.

- 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.¹³⁴

7.2.4 GrainCorp submissions on the ACCC Draft decision

GrainCorp provided two submissions in response to the ACCC Draft Decision. The first submission, dated 7 April 2011, dealt only with the invitation in the Draft Decision for stakeholders to provide comments on transferability of shipping slots booked on GrainCorp’s shipping stem. The second submission, dated 18 April 2011, provided further views on transferability and also addressed other matters on which the ACCC provided preliminary views in its Draft Decision.

7.2.4.1 GrainCorp submission dated 7 April 2011

GrainCorp states that it will introduce trading or capacity transfer to have its undertaking accepted but noted its view that there are practical and industry issues arising from such a proposal. In particular GrainCorp is of the view that:

- ‘...there is no identifiable harm to be redressed by the imposition of a capacity based trading system on GrainCorp’s port terminals, as there are actually very limited circumstances where GrainCorp’s elevation services are fully utilised’¹³⁵
- ‘The introduction of elevation capacity transfer and trading will have the following effects
 - reduce export supply chain efficiency, resulting in congestion at GrainCorp’s terminals and reduced total grain exports...
 - increased cost of execution of export sales, particularly at peak times
 - reduced grower net returns as increased costs arising from the secondary trading and related execution costs are passed back to growers by exporters’¹³⁶
- requiring a secondary market risks jeopardising efficient operation of GrainCorp’s port terminal elevators, introduces capacity for gaming of elevation capacity and encourages speculation.¹³⁷
- transfer and trade is experimental and inherently risky and ‘GrainCorp is not aware of any international jurisdiction where grain elevation capacity is traded in the manner proposed by the ACCC.’¹³⁸

¹³⁴ GrainCorp Operations Limited, *Response to third party submissions*, 13 December 2010, p. 4.

¹³⁵ GrainCorp submission to ACCC Draft Decision, 7 April 2011, p.1

¹³⁶ GrainCorp submission to ACCC Draft Decision, 7 April 2011, p.2

¹³⁷ GrainCorp submission to ACCC Draft Decision, 7 April 2011, p.2

- transferability would increase uncertainty of elevation capacity execution
- existing flexibility allows exporters to move capacity between ports and elevation periods and to swap stocks to facilitate cargo accumulation and vessel loading
- existing arrangements are equitable, transparent and fair
- transferability would raise issues for smaller exporters that ‘do not have the financial capacity or risk appetite to make speculative elevation capacity bookings’,¹³⁹

In addition, GrainCorp states its view that there is no need for transferability as:

- there is excess port capacity with utilisation in 2010/11, which is a high demand year, will be between 44 and 47 percent
- constraints on exports are due to shortage of freight to port capacity, not elevation capacity
- there is no data published supporting the contention that the current elevation capacity booking system is either inefficient, or hindering the export of grain through GrainCorp elevators.¹⁴⁰

GrainCorp characterises the ‘transfer and trade market as ‘experimental’’,¹⁴¹ and considers that the use of an auction system by Co-operative Bulk Handling Limited (CBH) as having flaws and inefficiencies and that ‘CBH are now seeking to by-pass their own auction and secondary market with their proposition to introduce Base Load Allocation ...’,¹⁴²

Consequences that of allowing transferability of booked slots that GrainCorp considers likely are:

- entry of participants such as hedge funds that trade grain futures
- traders ‘cornering’ the elevation market at peak times
- monopoly rent premium from sale of capacity to grain exporters
- exporters with significant financial capacity funding large up front capacity bookings to the detriment of smaller exporters
- reduction in export competition in eastern Australia

¹³⁸ GrainCorp submission to ACCC Draft Decision, 7 April 2011, pp.4-5

¹³⁹ GrainCorp submission to ACCC Draft Decision, 7 April 2011, p.5

¹⁴⁰ GrainCorp Operations Limited, *Response to ACCC Draft Decision*, 7 April 2011, pp. 3-4.

¹⁴¹ GrainCorp Operations Limited, *Response to ACCC Draft Decision*, 7 April 2011, p. 4.

¹⁴² GrainCorp Operations Limited, *Response to ACCC Draft Decision*, 7 April 2011, p. 4.

7.2.4.2 GrainCorp submission dated 18 April 2011

In its second submission to the ACCC Draft Decision GrainCorp states its view that speculation in capacity may result in higher levels of bookings going unexecuted and create elevation execution uncertainty. GrainCorp also outlines its view that transfer and trading of elevator capacity will require commoditisation of elevation capacity and that it will not be possible to exclude speculators with no interest in grain trade.

GrainCorp also considers that the proposal will require conduct of some form of auction involving fundamental changes to the current system of elevation booking. In particular GrainCorp states that it will be necessary to tightly define ‘futures’ contract with fixed delivery time period and fixed location for delivery. GrainCorp notes that significant time and resources are required to ensure that failsafe systems can be put in place to prevent significant market disruption.

The second submission also notes GrainCorp’s response to accept the preliminary views in the ACCC Draft Decision on the following issues:

- publication of GrainCorp’s Standard Terms under an accepted undertaking
- the port terminal services protocols (PTSP) must be a comprehensive statement of GrainCorp’s policies and procedures for managing demand for the port terminal service
- the PTSP variation customer consultation process
- the ACCC role in the PTSP variation process.

GrainCorp notes that it has ‘significant concerns with the proposed transfer of booked elevation capacity’.¹⁴³ In particular GrainCorp is of the view that:

- transferability will be a proxy for trading capacity and will lead to the creation of a secondary market and will result in higher costs of export which will be passed back to producers
- GrainCorp’s PTSP allow exporters to ‘move’ capacity temporally and geographically without charge and are, consequently, sufficiently flexible to allow efficient use of elevator capacity
- Transferability will result in ‘commoditisation’ of elevation capacity and require fundamental restructuring of GrainCorp’s complete capacity booking system and PTSP

7.2.5 Third party submissions

Seven submissions for the public record have been received from access seekers and interested parties (including two from AWB):

¹⁴³ GrainCorp Operations Limited, *Response to ACCC Draft Decision*, 18 April 2011, p. 4.

7.2.5.1 Emerald Group Australia dated 6 April 2011

states that under a first come, first served system exporters must make imperfect predictions well ahead of knowing needs and that superficially a secondary market would help matching supply and demand. Emerald identified risks with transferability that it would create an environment that would encourage hoarding by GrainCorp and speculation by others and that it would drive up costs to exporters.

Emerald noted a number of restrictions that it considers necessary to limit what it views as disadvantages of speculative activity that otherwise outweigh the benefits of transferability. The restrictions on trade identified by Emerald are that transfers be limited to accredited exporters, GrainCorp be excluded from trading slots and that slot trades not occur at a value in excess of the booking fee.

7.2.5.2 AWB Limited dated 15 April 2011

AWB provided comments on a number of aspects of the draft decision, including a number where it accepted, or had no objection to, the preliminary view in the Draft Decision. Issues on which AWB put another view are:

- service price differentials based on grain storage ownership which AWB considers to be unjustified monopoly rent
- use of despatch-demurrage to drive supply chain efficiency
- force majeure and payment of fees
- publication on the shipping stem of assigned load dates
- more frequent publication of port information
- capacity allocation should be by auction and trading of slots should occur in line with CBH arrangements which AWB views as providing an effective non-discriminatory mechanism and which is more efficient and equitable by comparison to first come, first served capacity allocation. AWB identifies the following advantages of allowing transfer of slots which provide an opposite view to that of GrainCorp:
 - reduced financial loss from non-utilisation of slots
 - assist in avoiding logistical constraints
 - improve liquidity of the FOB market to buyers
 - reduce risk and increase certainty thereby reducing the incentive on speculators to 'hoard' slots the tendency for overbooking and speculative bookings in advance of sales and harvest
 - reduces the risk of capacity being wasted due to slots being unutilised.

7.2.5.3 Victorian Freight and Logistics Council dated 21 April 2011

informs the ACCC that it is advocating the establishment of a grain supply chain logistics group similar to the Hunter Valley Supply Chain Group.

7.2.5.4 Port of Portland dated 21 April 2011

raises concerns regarding GrainCorp's policy of limiting ship loading at its facility at the Port of Portland to daylight hours. Port of Portland is of the view that this restriction is unnecessary and that it has resulted in a significant restriction of the grain export supply chain and is impacting loading of other cargoes.

7.2.5.5 Goodman Fielder dated 27 April 2011

provided a public submission in addition to a confidential submission that outlined circumstances where it considered that it was prevented from receiving competitive tenders from FOB sellers as only GrainCorp had available capacity. Goodman Fielder is of the view that it should be a requirement for parties seeking access to port terminal services to have a sales contract standing. Alternatives in order of priority are: (i) that trading or on-selling of slots should be allowed subject to limiting speculative activity by capping the sale price at the purchase price; (ii) 12 weeks before the elevation period the slot holder should either trade or relinquish the slot if a sale contract is not in place with an independent body overseeing the process; and (iii) GrainCorp should advise interested parties when port capacity is returned to the stem.

In addition confidential submissions were received from two parties that wished to maintain anonymity. A summary of these submissions has been provided by the companies and published on the ACCC website. The submissions put views:

- regarding capacity management that an independent body to manage the allocation of slot bookings and receipt and management of fees and the need for anti-hoarding provisions
- that an appropriate method of transferring slot bookings is essential to achieve greater efficiency and competitiveness
- arrangements whereby GrainCorp can book slots with no real financial penalty for non performance are flawed; all participants should pay a booking fee into an escrow account and be forfeited for non-performance; forfeited fees to be given to charity or industry goodwill recipient
- under current demurrage and despatch arrangements there is a misalignment of risk and control in relation to FOB sales as the FOB seller bears the risk while GrainCorp is paid to control loading
- GrainCorp's marketing arm has unfair access to commercial information not available to the rest of the industry. In the absence of ring fencing arrangements GrainCorp should be required to publish harvest receipts and qualities and information on grades and quality of key stock at port
- more timely publication of relevant port performance information is required.

7.2.5.6 Australian Grain Exporters Association (AGEA) dated 21 April 2011

AGEA' submission identifies the following:

- AGEA seeks greater flexibility to transfer shipping slots across counterparties as well as across ports and time but 'does not support tradeable slots via some form of formalised exchange/market'. Rather it supports 'flexibility and efficiency of

the allocation of slots. AGEA provides suggested transfer rules including a cap on the number of transfers between counterparties and timeframes. AGEA considers that ‘had a transfer system been in place for 2010/11 it would have assisted in reducing congestion and that such transfers would not result in additional speculation to that already evident.

- AGEA believes that current booking arrangements favour the incumbent port operator for whom the fee is simply a journal entry across divisions while other participants ‘wears these non-performance costs as real’. AGEA proposes all booking fees be placed in an escrow/trust account with fees paid to GrainCorp on non-performance by third parties and to charity/goodwill on non-performance by GrainCorp.
- AGEA seeks greater accountability for services provided by port operators through commercially based risk sharing demurrage/despatch arrangements.
 - Mechanisms should be put in place that avoid vertically integrated port operators from advantaging their trading arms through access to information/services that are not available to other exporters.

7.2.6 GrainCorp submission in response to submissions on the ACCC Draft Decision by third parties

GrainCorp submits that no change to its current approach to capacity management be required and reiterates its view that transferability will lead to speculation and trading and should not be required. GrainCorp also submits that there are wide ranging views in submissions which indicate no clear views as to how to implement a workable capacity transfer or trading system. GrainCorp’s response to the specific issues raised in each submission are outlined below.

7.2.6.1 Response to submission by Emerald Group Australia

GrainCorp notes Emerald’s concerns regarding transferability but while it agrees that other traders may acquire capacity for speculative purposes it repudiates a suggestion that GrainCorp itself would be encouraged to hoard capacity. GrainCorp rejects measures suggested by Emerald to ‘regulate’ elevation capacity trading.¹⁴⁴

7.2.6.2 Response to submission by AWB Limited

GrainCorp responds to issues raised by AWB in relation to capacity management, including specific comments on the PTSP and transparency of port information in the following terms:

- GrainCorp submits that the information on its shipping stem contains all of information required to make the allocation of assigned load dates as transparent as it can be and rejects AWB's call for it to be audited.¹⁴⁵
- GrainCorp considers current reporting requirements and continuous disclosure requirements provides adequate information to meet objectives of Part IIIA of the

¹⁴⁴ GrainCorp Operations Limited, *submission to ACCC in response to submissions by third parties*, 6 May 2011, p. 5.

¹⁴⁵ GrainCorp Operations Limited, *submission to ACCC in response to submissions by third parties*, 6 May 2011, p. 7.

Act; further, it submits that additional reporting would increase the administrative burden and compliance costs without assisting exporters, increasing port elevator efficiency or adding value for customers¹⁴⁶

- GrainCorp submits that the significant number of changes to its proposed PTSP between 2009 and 2011 are the result of a PTSP variation process¹⁴⁷
- GrainCorp reiterates its position in previous submissions that a system of transfer or trading of elevator capacity bookings will have ‘significant unintended consequences and will increase costs for growers’¹⁴⁸
- GrainCorp submits that there is no evidence of current inefficiencies in the allocation of elevator capacity on the East Coast that would support the introduction of an auction system, and that no bookings have gone unexecuted in the year to date, indicating that the current system is efficient¹⁴⁹
- GrainCorp submits that an auction system would add administrative costs and significantly inflate the cost of execution at peak times and that, as in Western Australia, an auction would add significant uncertainty for users¹⁵⁰
- GrainCorp submits that the \$5 per tonne booking fee is currently an effective discipline against speculation, but that introducing transferable and tradeable slots would result in speculation.¹⁵¹
- GrainCorp notes that AWB does not provide evidence to support its claim that GrainCorp has not applied the protocols correctly¹⁵²
- GrainCorp notes that the ESC did not consider grain export elevators were essential infrastructure¹⁵³
- GrainCorp submits that there are fundamental market differences between eastern Australia, South Australia, and Western Australia, and that uniformity of regulation across the four port elevator service providers would discourage investment and stifle innovation.¹⁵⁴

¹⁴⁶ GrainCorp Operations Limited, *submission to ACCC in response to submissions by third parties*, 6 May 2011, p. 8.

¹⁴⁷ GrainCorp Operations Limited, *submission to ACCC in response to submissions by third parties*, 6 May 2011, p. 9.

¹⁴⁸ GrainCorp Operations Limited, *submission to ACCC in response to submissions by third parties*, 6 May 2011, p. 9.

¹⁴⁹ GrainCorp Operations Limited, *submission to ACCC in response to submissions by third parties*, 6 May 2011, p. 10.

¹⁵⁰ GrainCorp Operations Limited, *submission to ACCC in response to submissions by third parties*, 6 May 2011, p. 11.

¹⁵¹ GrainCorp Operations Limited, *submission to ACCC in response to submissions by third parties*, 6 May 2011, pp. 11-12.

¹⁵² GrainCorp Operations Limited, *submission to ACCC in response to submissions by third parties*, 6 May 2011, p. 12.

¹⁵³ GrainCorp Operations Limited, *submission to ACCC in response to submissions by third parties*, 6 May 2011, p. 12.

¹⁵⁴ GrainCorp Operations Limited, *submission to ACCC in response to submissions by third parties*, 6 May 2011, p. 12.

7.2.6.3 Response to submission by Port of Portland Proprietary Limited

GrainCorp submits that the matters raised by Port of Portland Pty Ltd are operational matters and should not be considered by the ACCC in its assessment of the Proposed 2011 Undertaking as they are not linked to the provision of access. GrainCorp considers that its decision to operate the Portland elevator on a day shift only is efficient, and notes that customers are able to request additional shifts.¹⁵⁵

7.2.6.4 Response to submission by Victorian Freight Logistics Council

GrainCorp submits that a trading, auctioning or transfer between parties of elevation capacity will not address the problems raised by Victorian Freight Logistics Council (VFLC) relating to the upcountry supply chain constraints.¹⁵⁶

Regarding formation of a Grain Supply Logistics Group, GrainCorp submits that VFLC has not directly approached GrainCorp to discuss its proposal and that it would involve agreement between competing grain exporters and transport service providers. GrainCorp notes that any arrangement would require an authorisation from the ACCC under the Act. GrainCorp considers that the risks raised by VFLC are outside the scope of the ACCC's assessment of the Proposed 2011 Undertaking.¹⁵⁷

7.2.6.5 Response to submission by Goodman Fielder Limited

GrainCorp notes that much of what GFL has suggested is outside the scope of the provisions of the Act in relation to the Proposed 2011 Undertaking. GrainCorp does not consider the decision by exporters to book elevation capacity in advance of having firm export sales is unreasonably speculative, as exporters need certainty of elevation capacity in order to make related forward decisions in their grain business.¹⁵⁸

GrainCorp submits that the \$5 per tonne booking fee mitigates unreasonable speculation, and that the current booking system is fair and transparent, and that in the year to date no capacity has gone unexecuted.¹⁵⁹

GrainCorp notes that GFL has not provide detail or supporting data around its claim that there are barriers to fair and open access to vessel slots.¹⁶⁰

In relation to GFL's suggestion that an independent body require evidence of a sales contract in order for exporters to obtain elevation capacity, GrainCorp submits that:

- it is unclear how the contracts would be verified and dispute resolution mechanisms would function

¹⁵⁵ GrainCorp Operations Limited, *submission to ACCC in response to submissions by third parties*, 6 May 2011, p. 13.

¹⁵⁶ GrainCorp Operations Limited, *submission to ACCC in response to submissions by third parties*, 6 May 2011, p. 13.

¹⁵⁷ GrainCorp Operations Limited, *submission to ACCC in response to submissions by third parties*, 6 May 2011, pp. 13-4.

¹⁵⁸ GrainCorp Operations Limited, *submission to ACCC in response to submissions by third parties*, 6 May 2011, pp. 14-15.

¹⁵⁹ GrainCorp Operations Limited, *submission to ACCC in response to submissions by third parties*, 6 May 2011, p. 15.

¹⁶⁰ GrainCorp Operations Limited, *submission to ACCC in response to submissions by third parties*, 6 May 2011, p. 15.

- a sale contract may not represent an obligation to export grain, as sale contracts can be changed
- a sale contract represents only one component of the commitments, which also include grain and transport ‘ownership’.¹⁶¹

GrainCorp submits that GFL’s proposal would result in a significant increase in regulatory intervention which is counter to the deregulation of the sector. GrainCorp also submits that giving an independent body operational control of GrainCorp’s assets would be intrusive and beyond what is necessary to ensure fair and reasonable access.¹⁶²

In relation to a secondary market, GrainCorp reiterates its position that this will increase the incentive for exporters to act in a speculative manner.¹⁶³

In response to GFL’s proposal that a sales contract be required 12 weeks prior to the vessel slot spread, GrainCorp submits that this would affect the efficient operation of the grain market, as it would reduce certainty for participants to forward buy and sell grain and contract transport, and reduce flexibility in the grain chain, countering others’ calls for greater flexibility.¹⁶⁴

In relation to GFL’s submission that GrainCorp should simultaneously notify all interested parties where excess port terminal capacity becomes available, GrainCorp submits that this is accomplished by the daily update on available elevation capacity that is currently provided to customers.¹⁶⁵

7.2.6.6 Response to submission by Australian Grain Exporters Association (AGEA)

GrainCorp considers that grain supply chains in eastern Australia are operating efficiently, and that there is no statutory basis for AGEA’s statement that the “objective” of the port access arrangements is to promote an efficient supply chain¹⁶⁶.

GrainCorp responds to specific concerns raised by AGEA as follows:

- GrainCorp submits that the shipping stem is already sufficiently transparent.¹⁶⁷
- GrainCorp considers that significant flexibility is already provided in the ability to move elevation capacity between ports and across elevation periods. However, allowing the transfer of slots between exporters would encourage speculative

¹⁶¹ GrainCorp Operations Limited, *submission to ACCC in response to submissions by third parties*, 6 May 2011, pp. 15-6

¹⁶² GrainCorp Operations Limited, *submission to ACCC in response to submissions by third parties*, 6 May 2011, p. 16.

¹⁶³ GrainCorp Operations Limited, *submission to ACCC in response to submissions by third parties*, 6 May 2011, p. 16.

¹⁶⁴ GrainCorp Operations Limited, *submission to ACCC in response to submissions by third parties*, 6 May 2011, p. 17.

¹⁶⁵ GrainCorp Operations Limited, *submission to ACCC in response to submissions by third parties*, 6 May 2011, p. 17.

¹⁶⁶ GrainCorp Operations Limited, *submission to ACCC in response to submissions by third parties*, 6 May 2011, p. 18.

¹⁶⁷ GrainCorp Operations Limited, *submission to ACCC in response to submissions by third parties*, 6 May 2011, p. 18.

activity. GrainCorp considers it is not the purpose of the Proposed 2011 Undertaking to prescribe operational aspects where they do not relate to the provision of access in a non-discriminatory manner.¹⁶⁸

- GrainCorp submits that AGEA's desire for one consistent set of terms across Australia goes beyond the terms of the legislation and is inconsistent with the principle of competition between parties, and that it would also create inflexibility and is not within the ambit of the Proposed 2011 Undertaking.¹⁶⁹
- GrainCorp submits that the provision of a daily shipping stem, a daily email to customers about available elevation capacity, and a weekly summary of stocks at port provide sufficient transparency.¹⁷⁰
- GrainCorp notes that AGEA has not provided evidence that the allocation of capacity is inefficient, or that allowing 'transfer' between parties would make allocation more efficient. GrainCorp submits that allowing transfer of capacity would result in an informal market place for capacity, which would encourage speculation.¹⁷¹
- In response to AGEA's reference to the need for business rules, GrainCorp submits that AGEA does not provide substantive guidance on how the transfer of slots would be managed which highlights the problematic nature of such a task.
- GrainCorp states that it derives 90 per cent of its earnings from non-grain trading activities, including the provision of port elevation services. In order to highlight the incentive GrainCorp has to maximise the use of port elevators, so as not to deny the company significant revenue, GrainCorp states that:
 - the annual cost of maintaining and operating the company's port elevators is in excess of \$50 million, and
 - if GrainCorp handles 2.5 million tonnes of its own export bookings, the fixed allocated cost of these bookings is more than \$20 per tonne, which is more than four times the \$5 per tonne charged to other customers.¹⁷²
- GrainCorp submits that AGEA's proposition to create a national escrow account for all port elevator booking fees lacks sound economic basis and is not realistic for a publicly listed company such as GrainCorp.¹⁷³

¹⁶⁸ GrainCorp Operations Limited, *submission to ACCC in response to submissions by third parties*, 6 May 2011, p. 18.

¹⁶⁹ GrainCorp Operations Limited, *submission to ACCC in response to submissions by third parties*, 6 May 2011, p. 19.

¹⁷⁰ GrainCorp Operations Limited, *submission to ACCC in response to submissions by third parties*, 6 May 2011, p. 19.

¹⁷¹ GrainCorp Operations Limited, *submission to ACCC in response to submissions by third parties*, 6 May 2011, pp. 19-20

¹⁷² GrainCorp Operations Limited, *submission to ACCC in response to submissions by third parties*, 6 May 2011, p. 20.

¹⁷³ GrainCorp Operations Limited, *submission to ACCC in response to submissions by third parties*, 6 May 2011, p. 20.

- GrainCorp considers that the request for dispatch demurrage provisions in the Proposed 2011 Undertaking is inappropriate given that GrainCorp does not manage the whole supply chain.¹⁷⁴
- GrainCorp submits that AGEA's views on ring-fencing are dealt with by the ACCC in the draft decision and in relation to the 2009 Undertaking.¹⁷⁵
- GrainCorp does not consider that additional amendment provisions are required.¹⁷⁶

7.2.6.7 Response to confidential submissions

GrainCorp considers that the ACCC should require a redacted version of the confidential submissions to be published on the ACCC website or supply GrainCorp with a copy of the confidential submissions subject to confidentiality restrictions. GrainCorp submits that it is not procedurally fair for GrainCorp to be required to respond to an amendment notice issued by the ACCC where the ACCC has made a decision to issue such a notice based on material that GrainCorp has not seen.¹⁷⁷

GrainCorp has responded to the issues outlined in the summary provided by the ACCC as follows:

- GrainCorp does not consider that an independent body would be more suitable to manage the allocation of capacity, and submits that this is outside the scope of the Act. GrainCorp submits that this proposal would increase the regulatory intervention, be inappropriately intrusive, and drive up costs which would be passed back to growers.¹⁷⁸
- GrainCorp submits that defined terms and conditions of the allocation of slots are set out in GrainCorp's current indicative access agreement and protocols.¹⁷⁹
- GrainCorp notes that it updates its shipping stem daily on the company website, which includes a significant amount of detail.¹⁸⁰
- GrainCorp submits that the current terms and conditions for allocation and execution of shipping slot bookings effectively deal with perceived risk that exporters will try to hoard capacity.¹⁸¹

¹⁷⁴ GrainCorp Operations Limited, *submission to ACCC in response to submissions by third parties*, 6 May 2011, p. 20.

¹⁷⁵ GrainCorp Operations Limited, *submission to ACCC in response to submissions by third parties*, 6 May 2011, p. 20.

¹⁷⁶ GrainCorp Operations Limited, *submission to ACCC in response to submissions by third parties*, 6 May 2011, p. 21.

¹⁷⁷ GrainCorp Operations Limited, *submission to ACCC in response to submissions by third parties*, 6 May 2011, p. 21.

¹⁷⁸ GrainCorp Operations Limited, *submission to ACCC in response to submissions by third parties*, 6 May 2011, p. 21.

¹⁷⁹ GrainCorp Operations Limited, *submission to ACCC in response to submissions by third parties*, 6 May 2011, p. 22.

¹⁸⁰ GrainCorp Operations Limited, *submission to ACCC in response to submissions by third parties*, 6 May 2011, p. 22.

GrainCorp does not agree with the view expressed in confidential submissions that exporters are currently required to make forward commitments for slots well before grain is sold, quality is known or even purchased from farmer. GrainCorp submits that exporters can book available elevation capacity at any time and have flexibility to roll forward booked capacity or change ports.

GrainCorp submits that, due to speculation, transfer of capacity will most likely reduce available elevation capacity for exporters.¹⁸²

GrainCorp also submits that the proposed transfer mechanisms for elevation capacity would create the following practical and logistical problems:

- new practices of indemnification and contractual arrangements would be required
- create a value for relevant loading slot at a particular time and place, which would quickly become a secondary market and result in speculation
- speculation would lead to the most desirable shipping times being blocked out, necessitating an auction system.¹⁸³

GrainCorp reiterates its position that the transfer / trading of elevation capacity will lead to the bidding up of all elevation capacity, and the consequent increased costs will be passed back to all grain growers.¹⁸⁴

In response to concerns in the confidential submissions regarding the treatment of booking fees and penalties for non performance, GrainCorp submits that it has no commercial incentive to block other exporters from utilising the port terminals and incurs significant costs in maintaining and operating the port terminals. GrainCorp also submits that the proposition to create a national escrow account lacks sound or rational economic or legal basis under the Act.¹⁸⁵

GrainCorp reiterates its position that the inclusion of demurrage and dispatch clauses would not be appropriate given that GrainCorp does not manage the whole supply chain, in contrast to other jurisdictions such as the USA. GrainCorp submits that it is not in a position to manage demurrage or dispatch risk.¹⁸⁶

In response to concerns in the confidential submissions regarding access to information and requests for ring fencing, GrainCorp states that the matter has been dealt with by the ACCC in its draft decision. GrainCorp also submits that sufficient

¹⁸¹ GrainCorp Operations Limited, *submission to ACCC in response to submissions by third parties*, 6 May 2011, p. 22.

¹⁸² GrainCorp Operations Limited, *submission to ACCC in response to submissions by third parties*, 6 May 2011, p. 22.

¹⁸³ GrainCorp Operations Limited, *submission to ACCC in response to submissions by third parties*, 6 May 2011, pp. 22-3.

¹⁸⁴ GrainCorp Operations Limited, *submission to ACCC in response to submissions by third parties*, 6 May 2011, p. 23.

¹⁸⁵ GrainCorp Operations Limited, *submission to ACCC in response to submissions by third parties*, 6 May 2011, p. 23.

¹⁸⁶ GrainCorp Operations Limited, *submission to ACCC in response to submissions by third parties*, 6 May 2011, p. 24.

information is available on the shipping stem, and that GrainCorp's trading division does not have the ability to gain a competitive benefit from any information it receives which is not available on the shipping stem, published elsewhere on the GrainCorp website or private information sources.¹⁸⁷

In response to requests for publication of relevant performance measures and key stock at port information, GrainCorp submits that it currently publishes weekly stocks at port, monthly port performance statistics, and the shipping stem. GrainCorp considers that this information is adequate and notes that it is also in daily contact with customers in the act of or preparing to accumulate cargos.¹⁸⁸

7.3 Submissions relating to variation of the PTSP

7.3.1 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.¹⁸⁹ 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.¹⁹⁰

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.¹⁹¹

¹⁸⁷ GrainCorp Operations Limited, *submission to ACCC in response to submissions by third parties*, 6 May 2011, p. 24.

¹⁸⁸ GrainCorp Operations Limited, *submission to ACCC in response to submissions by third parties*, 6 May 2011, p. 25.

¹⁸⁹ GrainCorp Operations Limited, *Submission to the ACCC*, 22 September 2010, p. 9.

¹⁹⁰ GrainCorp Operations Limited, *Submission to the ACCC*, 22 September 2010, p. 9.

¹⁹¹ GrainCorp Operations Limited, *Submission to the ACCC*, 22 September 2010, p. 9.

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

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.’¹⁹²

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

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.’¹⁹³

7.3.4 AWB Submission in response to Draft Decision (15 April 2011)

AWB agrees with the ACCC’s recommendations intended to ensure the PTSP is comprehensive and yet able to be varied by GrainCorp without unfairly impacting market participants.¹⁹⁴

7.3.5 GrainCorp response to Draft Decision (18 April 2011)

GrainCorp accepted a number of the preliminary views in the ACCC’s Draft Decision. GrainCorp will make the required change to clause 9.1(a) of the 2011 Proposed Undertaking to ensure the PTSPs are a comprehensive statement of GrainCorp’s policies and procedures for managing demand for the port terminal service.

GrainCorp has also proposed revisions to the port protocol variation process to address the recommended changes considered necessary by the ACCC. GrainCorp submits that the express requirement that it will consider stakeholders’ responses “in good faith” is unnecessary, as there is a general obligation to act in good faith as a matter of law. However, GrainCorp notes that it will make the requested change in any event.

Regarding a role for the ACCC in issuing an objection notice, GrainCorp submits that as a matter of principle:

...there are dangers in regulators imposing themselves in commercial variation processes between commercial parties, as this increases the cost and complexity of what should be the provision of a commercial service at an economically efficient price.¹⁹⁵

GrainCorp has nonetheless proposed a draft clause dealing with an objection notice.

¹⁹² Australian Grain Exporters Association, *Submission to ACCC Issues Paper*, 10 November 2010, p. 1.

¹⁹³ GrainCorp Operations Limited, *Response to third party submissions*, 13 December 2010, p. 1.

¹⁹⁴ AWB, *Submission*, 15 April 2011, s. 5.3.4.

¹⁹⁵ GrainCorp Operations Limited, *Submission*, 18 April 2011, p. 7.

8 Appendix B: Analysis of bulk wheat export markets

The ACCC has assessed the differences across BHCs and the markets in which they operate so that its views are made on a consistent basis across undertakings. The analysis is of particular relevance in the ACCC's consideration of the capacity allocation and management arrangements proposed in the undertakings it is considering.

Capacity allocation arrangements include two main components:

- Primary allocation arrangements by which capacity is rationed between competing users and which are broadly categorised as either price or non-price rationing. Primary allocation arrangements currently operated by the BHCs include both non-price administered allocation (as in the case of the first come, first served arrangements of GrainCorp, Viterra and ABA) and price rationing (as under the CBH auction system). Primary allocation systems of both types typically require exporters to make at least some capacity commitments before production outcomes, and hence export shipping requirements, are fully known.
- In-season arrangements that facilitate exporters adjusting to any divergence between actual outcomes and ex ante planning regarding demand for export capacity. These adjustment mechanisms include flexibility for shippers to move booked capacity between geographic and/or temporal locations (such as exists under GrainCorp's PTSP) and the ability for shippers to transfer bookings in a secondary market (as occurs under CBH's arrangements in WA). In-season response to changed, unforeseen or unplanned needs may also occur through grain trading or swapping along the supply chain, including by use of the FOB purchases or sales.

Two key market characteristics relevant to the view formed on the appropriateness of particular capacity management arrangements in specific market circumstances are:

- the relationship between total port elevation capacity and average annual and seasonal demand for it
- the extent to which the incentive exists for vertically integrated BHCs to pursue self preferential treatment—including blocking other exporters from accessing port services—as opposed to seeking to maximise returns from their terminals.

The following sections discuss the relevance of these factors to a decision regarding the appropriateness of capacity management arrangements proposed by a port operator. An assessment in particular cases will be informed also by the current arrangements the operator has in place and the effectiveness of those arrangements in achieving fair and efficient outcomes.

8.1 Extent of capacity constraint

As the PC stated in its Inquiry Report on Wheat Export Marketing Arrangements, auctions can play a significant role in efficiently allocating limited port capacity.¹⁹⁶ This general economic principle, that allocative efficiency is best achieved through a price mechanism, has greatest application when supply is limited relative to demand. When no binding capacity constraint exists the demands of all users can be met and the means by which allocation occurs is not critical to achieving efficiency.

In all Australian states from which wheat is exported there are periods when port capacity is more highly valued. These periods occur when new season grain is available to be shipped and differ depending on harvest times in the production zones. In all years, even those of poor harvest, demand for shipping slots during these peak periods exceeds capacity to some extent. However the frequency and extent to which demand exceeds capacity varies between the ports operated by the BHCs.

On this basis, it might be considered appropriate for all port operators to use auction systems to allocate port capacity as all (with the possible exception of ABA) have limited capacity at least at some ports for some periods. This was the view of the PC which noted that port operators other than CBH might also consider adopting a similar [auction] system where there is a likelihood of excess demand for port capacity at certain points in time (effectively, a shifting peak demand problem driven by movements in the supply and demand for wheat).¹⁹⁷

However, the ACCC considers that the mere likelihood of excess demand at some points during the wheat export year is not sufficient to warrant the ACCC taking the view that access arrangements employing a non-price system of allocating capacity are inappropriate. on the ACCC's view will take into account the degree of the capacity constraint evident and a judgement as to whether resultant inefficiencies warrant requiring the operator to employ an auction system for primary allocation arrangements. Also relevant is the extent to which allocative inefficiencies arising under the first come, first served arrangements are mitigated by other measures such as transferability or greater flexibility to move capacity bookings.

Table 8.1 sets out information on capacity available in each region and on demand for that capacity by grain exporters. Capacity measures are based on information published or provided by port operators and demand for port services is based on estimates of the grain export task derived from ABS data on grain production, domestic demand and accumulation and run down of grain stocks.

The ACCC notes that measures of capacity are not always directly comparable as port capacity depends on cargo accumulation capacity (in turn determined by road and rail receivals and storage) as well as by ship loading capacity. Operators that provide bundled up-country and at-port services (Viterra's Export Select and CBH's Grain Express) provide port capacity measures that reflect capacity to provide the integrated service. The information in Table 8.1 is based on estimates of capacity to receive and store grain for cargo accumulation and to load ships and abstracts from the impact of freight capacity limits and other up-country bottlenecks on the grain

¹⁹⁶ Productivity Commission, *Wheat Export Marketing Arrangements*, 1 July 2010, p. 205.

¹⁹⁷ Productivity Commission, *Wheat Export Marketing Arrangements*, 1 July 2010, p. 205.

supply chain and exports. The ACCC recognises the significance of up-country bottlenecks in the grain supply chain but its concern in forming a view on wheat access undertakings is access to port terminal services. For this, the capacity of the port to in-load is relevant but the capacity of the upcountry supply chain to deliver is not.

Average monthly ‘capacity utilisation’ is calculated from the estimates of supply and demand for port capacity. These capacity utilisation measures are used to obtain an indication of the intensity with which capacity is used within regions and to compare that across regions. Two capacity utilisation measures are of particular relevance—measures for years of high production and export demand and an average across a number of years to even out the impact of production variation. The latter is necessary for a comparison across regions as weather impacts on crop production can differ markedly in any year between regions. This has been the case in the 2011 year when the east coast has had a large harvest.

Table 8.1: Port terminal capacity and demand

Region	Characteristics
East Coast (Queensland, NSW and Victoria)	<p><u>Capacity</u></p> <p>GrainCorp monthly capacity across 7 ports: 1.26mt (reduced to 1.09mt in January and February peak months when storage at Geelong is diverted for harvest receipt).</p> <p>ABA monthly capacity (approx): 90,000 tonnes</p> <p>Average monthly east coast capacity: 1.32mt</p> <p><u>Demand for port services</u></p> <p>Domestic demand accounts for a high proportion of production on the east coast the year to year variability of exports is greater than either SA or WA where domestic demand is much lower.</p> <p>Average monthly export task:</p> <p>High demand year (2010/11) all grains:- 0.72mt</p> <p>High demand year (2010/11) wheat:- 0.51mt</p> <p>Three year average (2008/09-2010/11) wheat:- 0.45mt</p> <p><u>Capacity utilisation</u></p> <p>High demand year (2010/11) all grains:- 54%</p> <p>Three year average (2008/09-2010/11) wheat:- 34%</p> <p>Three year average (2008/09-2010/11) all grains:- 48%¹⁹⁸</p>

Also, note that grain exports are highly seasonal and the monthly averages used to obtain an indication of capacity constraint masks the extent of capacity utilisation in the peak period.

¹⁹⁸ All grains utilisation rate is based on the same ration of wheat to non wheat exports as in 2010/11

The ability to compare the extent to which capacity is constrained on the east coast and in South Australia and Western Australia is made difficult because both Viterra and CBH do not report capacity on the same basis as GrainCorp.

8.2 Incentive for self-preferential treatment

A vertically integrated operator may have an incentive to utilise bottleneck infrastructure it controls to block competitors in upstream or downstream markets in order to gain market share at the expense of access seekers. The strength of such an incentive will be influenced by the existence or threat of competition to the integrated monopolist's position. Where actual or potential competition exists, the incentive to block competitors is moderated by the threat that the blocking stream markets but instead result in loss of throughput to an alternative supply chain or use.

However, where competition to the integrated monopolist is weak and the incentive to hoard capacity and so block others from accessing export capacity is strong, this will inform an assessment as to the appropriateness of proposed capacity allocation arrangements. Where the incentive to block out access seekers is strong, so too is the argument that allocation arrangements should incorporate measures to prevent such behaviour. Auctions can provide such a mechanism as they are a fair, transparent and efficient means of allocating capacity under which the incumbent faces the same limits on its ability to acquire capacity as other users.

It is also possible to design non-price allocation systems in such a way as to prevent or reduce anti-competitive behaviours by the operator. Such measures include use of an independent body to manage the shipping stem and requiring that the access provider faces the same financial disincentive to hoard as do access seekers.

In the context of the Australian wheat export industry competition to the bulk shipment of wheat through an operator's ports comes from a number of sources:

- extent of vertical integration and alternative up-country supply chains
- domestic uses for wheat
- competition from ports in other regions
- threat of bypass by customers
- containerised exports.

The extent of competition varies significantly across the markets in which the BHCs operate. A high level summary of the key features of each region (including the differences that exist) in terms of their existing supply chain characteristics and competitive dynamics is outlined below.

8.3 Up-country supply chains

The key up-country supply chain characteristics (and differences) that exist in each of the three regions is summarised in Table 8.2 below:

Table 8.2: up-country supply chain characteristics by region

Region	Characteristics
East Coast	<p>The provision of wheat storage and handling services is dominated by GrainCorp (in New South Wales, Victoria and QLD) and Viterra (in South Australia).</p> <p>There is significant competition for the provision of such services from:</p> <ul style="list-style-type: none"> ▪ on-farm storage (which makes up a relatively greater proportion of total storage capacity than in other regions)¹⁹⁹; ▪ a significant number of independent bulk handlers. There is a wider choice of independent storage and transport providers compared to other regions; and ▪ limited overlap of GrainCorp's and Viterra's up-country storage networks.
South Australia	<p>The provision of wheat storage and handling services is dominated by Viterra.</p> <p>There is some competition from:</p> <ul style="list-style-type: none"> ▪ on-farm storage; and ▪ independent bulk handlers, and. ▪ to a limited competition from GrainCorp's up-country storage networks in western Victoria
Western Australia	<p>The provision of bulk wheat storage and handling services is dominated by CBH which has significant market power.</p> <p>There is some very limited competition from on-farm storage but none from independent bulk handlers. There is no overlap in the storage network of CBH and any other vertically integrated bulk handler.</p>

Source: Productivity Commission *Inquiry Report No. 51: Wheat Export Marketing Arrangements*, 1 July 2010, pp. 67-68.

As Table 8.2 illustrates, there appears to be a significantly higher level of competition in the up-country wheat supply chain (i.e. the provision of wheat storage and transport services) in the east coast as compared to both South Australia and Western Australia.

¹⁹⁹ The PC report observed that the larger stock of on-farm storage in the East Coast may be attributable to the relative importance of the domestic market and longer history of choice in domestic marketing: Productivity Commission *Inquiry Report No. 51: Wheat Export Marketing Arrangements*, 1 July 2010, p. 68.

8.4 Domestic and non-bulk export wheat

The proportion of wheat that is supplied into the Australian domestic market relative to the proportion that is exported overseas varies significantly between the three regions, as illustrated in Table 8.3 below:

Table 8.3: domestic and export wheat supply characteristics by region

Region	Characteristics
East Coast	<p>Annual domestic demand for wheat on the east coast is close to 5mt which is approximately 60% of average annual production with the remainder exported. The bulk wheat export supply chain therefore faces significant competition from the storage and transport of wheat to be sold into the domestic market.</p> <p>The bulk wheat supply chain also faces competition from export wheat in containers and bags. Containerised export grain volumes on the east coast are significant and have expanded in recent years. The Essential Services Commission (ESC) found that containerised grain exports in Victoria and southern New South Wales expanded to represent all grain exports in Victoria and southern NSW.²⁰⁰</p>
South Australia	<p>70% of wheat production in South Australia is exported, with only a relatively small proportion supplied into the domestic market.²⁰¹ The bulk wheat supply chain therefore does not face significant competition from the storage and transport of wheat to be sold into the domestic market.</p> <p>Almost all wheat exports from South Australia is exported in bulk with only limited competition from wheat exported in containers and bags.</p>
Western Australia	<p>90% of wheat production in Western Australia is exported, with only a small amount required to supply the domestic market. The bulk wheat supply chain therefore does not face significant competition from the storage and transport of wheat to be sold into the domestic market.</p> <p>Almost all wheat in Western Australia is exported in bulk with only limited competition from wheat exported in containers and bags.</p>

Source: Source: Productivity Commission *Inquiry Report No. 51: Wheat Export Marketing Arrangements*, 1 July 2010, pp. 56 and 68.

As Table 8.3 illustrates, the bulk wheat export supply chain faces greater competition from the storage and transport of wheat to be sold into the domestic market on the east

²⁰⁰ Essential Services Commission, *Review of Victorian Grain Handling and Storage Access Regime Final Report*, May 2009, pp 39-40.

²⁰¹ Productivity Commission *Inquiry Report No. 51: Wheat Export Marketing Arrangements*, 1 July 2010, p. 56.

coast than in Western Australia and South Australia. Also, there is a somewhat higher level of competition to bulk wheat export from containerised and bagged exports on the east coast than in either South Australia or Western Australia.

8.5 Port terminal facilities

The relative proximity of port terminals operated by different bulk handlers in particular regions is a key determinant of the extent to which those ports terminals compete for the throughput of wheat. Table 8.4 below provides an overview of the level of competition that exists between ports operated by different bulk handlers in each region.

Table 8.4: competition between port terminals by region

Region	Characteristics
East Coast	GrainCorp does not currently face competition from alternative grain port terminal operators in New South Wales or Queensland. However, as the ESC, noted in its review of grain handling and storage arrangements in Victoria, there is a “significant degree of competitive substitutability” between the port terminals operated by ABA and GrainCorp. ²⁰² Also, some very limited competition to Port of Portland in western Victoria may come from ports in South Australia.
South Australia	Viterra operates all wheat port terminals in South Australia and is not likely to face competition from any alternative port terminal operator for wheat throughput, with the possible exception of weak competition from Port of Portland.
Western Australia	CBH operates all wheat port terminals in Western Australia and is not likely to face competition from any alternative port terminal operator for wheat throughput.

Source: Productivity Commission *Inquiry Report No. 51: Wheat Export Marketing Arrangements*, 1 July 2010, p 68.

As Table 8.4 illustrates, the vertically integrated BHCs face very limited competition from other ports for their port terminal services although there is a higher level of competition between wheat port terminals in the southern part of the east coast region as compared to port terminals in both South Australia and Western Australia.

Competition at Newcastle in New South Wales may also soon be provided by the use of existing port elevation capacity for grain. The ACCC is aware of a storage facility under construction in Newcastle which will be used for cargo accumulation in order to utilise port loading facilities operated by POAGS at the K2 berth on Kooragang Island. The ACCC considers this preparedness on the part of wheat exporters to seek

²⁰² Essential Services Commission, *Review of Victorian Grain Handling and Storage Access Regime, Final Report*, May 2009, p. 48.

a means to bypass GrainCorp facilities will introduce increased competition in the east coast for the supply of port terminal services.

8.6 Conclusion

The ACCC considers that each of the different regions can be distinguished on the basis of the different characteristics that relate to each (as outlined above). In particular, the ACCC considers that:

Capacity constraint

Grain port terminal capacity on the east coast appears to be approximately double the average annual demand. Given the seasonality of grain exports, this results in peak periods of excess demand each year which can be quite significant in high demand years, such as 2010/11.

Incentive for self preferential treatment

- there is a significantly higher level of competition in the east coast for up-country supply chain services than in South Australia and Western Australia;
- there is a significantly higher level of competition in the east coast between wheat supplied into the domestic market and export wheat compared to South Australia and Western Australia and from the development of the non-bulk export market;
- there is a higher level of competition between port terminals located in sections of the east coast (New South Wales, Victoria and the easternmost parts of South Australia) compared to port terminals in South Australia (where there is some small degree of competition from Victorian ports) and Western Australia where there are no competing ports; and
- there is evidence of possible competition from access seekers prepared to bypass port terminals on the east coast

Accordingly, the ACCC considers that there is less incentive for GrainCorp to discriminate in favour of its own operations in the allocation of capacity at port terminal facilities given the competitive constraints that exist in the east coast along various key elements of the supply chain. However, the ACCC notes that these competitive pressures are less evident in Queensland, particularly for GrainCorp's facilities at Mackay. The reduced incentive across other regions on the east coast suggests arrangements to preclude the port operator from anti-competitive behaviours in the management of its capacity allocation arrangements (either by auction or measures to make administration of first come, first served allocation system competitively neutral) are not likely to be required in an access undertaking relating to operations for much of the east coast, as compared to South Australia and Western Australia where very different competitive conditions exist.

9 Appendix C: Industry overview

9.1 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 1992.²⁰³

GrainCorp owns and operates 270 receival sites throughout New South Wales, Victoria and Queensland, with a total storage capacity of 20 mt.²⁰⁴ 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.²⁰⁵
- 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.²⁰⁶

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

²⁰³ GrainCorp Operations Limited, *Submission to the ACCC*, 15 April 2009, Schedule 1, p. i.

²⁰⁴ Productivity Commission (2010) *Wheat Export Marketing Arrangements*, Report no. 51, Canberra, p. 254.

²⁰⁵ GrainCorp Operations Limited (2010), *GrainCorp Shareholder Review*, p. 6.

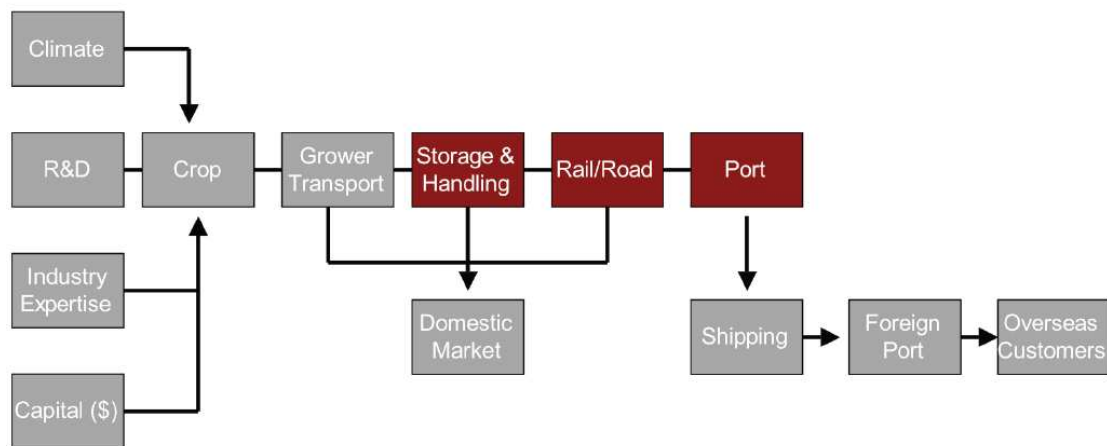
²⁰⁶ GrainCorp Operations Limited, *Submission to the ACCC*, 15 April 2009, Schedule 1, p. ii; GrainCorp Operations Limited, *GrainCorp at a Glance*, accessed on 9 February 2011 at <http://www.graincorp.com.au>.

9.2 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.²⁰⁷

Figure 1

GRAIN INDUSTRY SUPPLY CHAIN



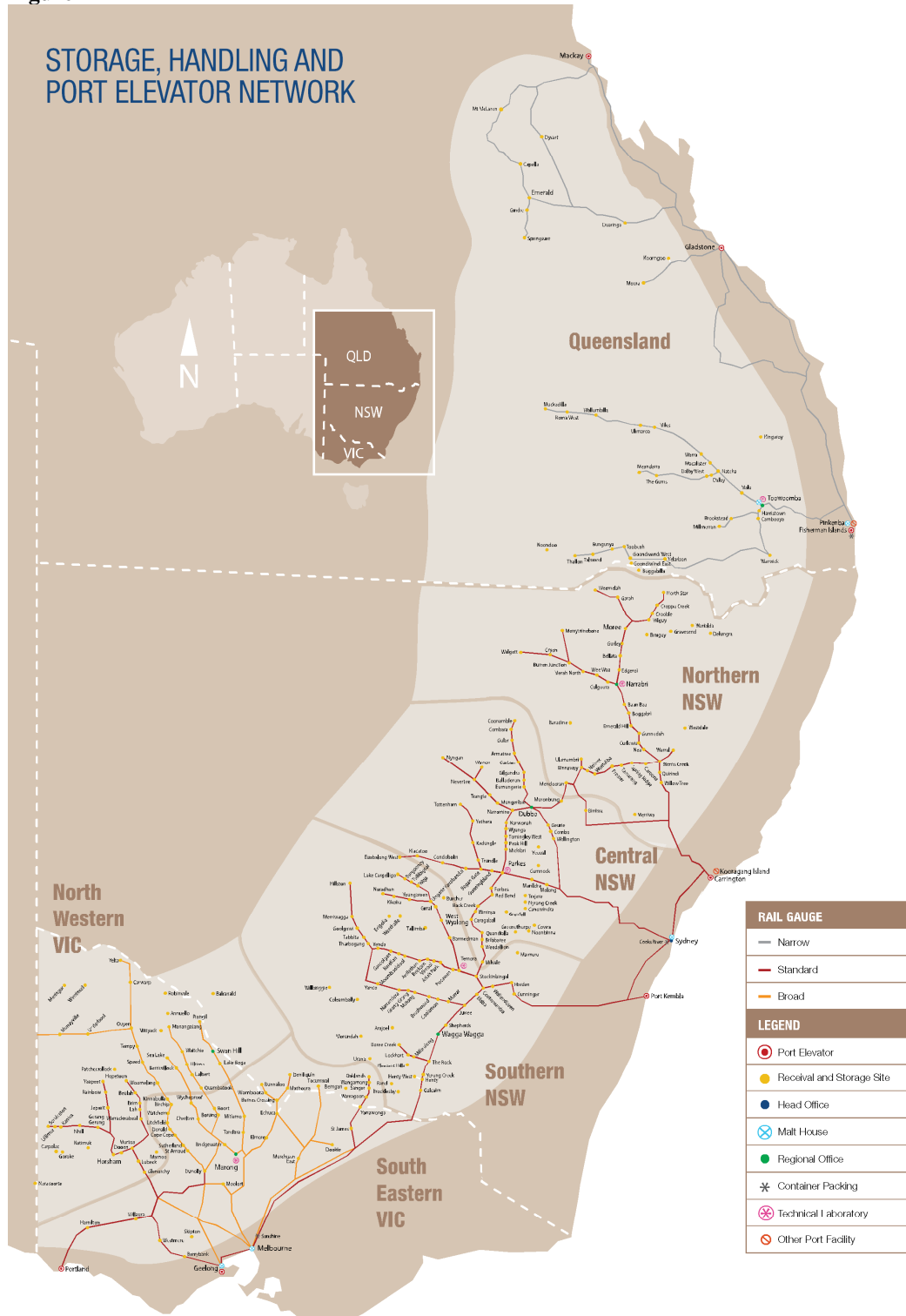
Source: Ernst & Young (2008)

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

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

²⁰⁷ 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 receipts for the 2010 grain harvest were complete at a

total volume of 13.3 mt.²⁰⁸ 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.

9.2.1 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.²⁰⁹ 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.²¹⁰

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 receipts 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).²¹¹

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 receipts 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 receipt sites in the state located in the

²⁰⁸ 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>.

²⁰⁹ ABARES (2010) Australian Crop Report, report no. 156, December 2010.

²¹⁰ ABARES (2010) Australian Crop Report, report no. 156, December 2010.

²¹¹ 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 2005-06.²¹²

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.²¹³ The volume of annual grain exports from New South Wales ranges from less than 1 mt to over 5 mt.²¹⁴ 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.²¹⁵

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.²¹⁶

Port terminals in New South Wales

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

²¹² Allen Consulting Group (2008) *Competition in the Export Grain Supply Chain*, March, p. 10.

²¹³ Single Vision Grains Australia (2007) *Transport Infrastructure Issues paper One – Network Review for the Australian Grains Industry*, January, pp. 17-19.

²¹⁴ Department of Infrastructure, Transport, Regional Development and Local Government, *NSW Grain Freight Review – Final Report*, September 2009, p. 25.

²¹⁵ Single Vision Grains Australia (2007) *Transport Infrastructure Issues paper Two – Commercial Aspects for the Australian Grains Industry*, January, pp. 7-8.

²¹⁶ Department of Infrastructure, Transport, Regional Development and Local Government, *NSW Grain Freight Review – Final Report*, September 2009, pp. 8-14

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.²¹⁷

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.²¹⁸

9.2.2 Victoria

Grain production in Victoria

Victoria produces around 11 per cent of wheat in Australia.²¹⁹ 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.²²⁰

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.²²¹

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.²²² The remainder was handled by ABA at its four receival sites, and Viterra 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.

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.

²¹⁷ GrainCorp Operations (2010), *Port Operations*, pp. 10-11

²¹⁸ GrainCorp Operations (2010), *Port Operations*, pp. 10-11

²¹⁹ ABARES (2010) Australian Crop Report, report no. 156, December 2010.

²²⁰ ABARES (2010) Australian Crop Report, report no. 156, December 2010.

²²¹ Victoria Department of Primary Industries (2005) *Priorities for Action: Victoria's Grain Industry*, p. 2.

²²² Allen Consulting Group (2008) *Competition in the Export Grain Supply Chain*, March, p. 11.

However, transport to port by road has been increasing since the deregulation of the wheat industry.²²³

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.²²⁴

Geelong is the largest of the terminals in terms of storage, with a total vertical storage capacity of 225 000 tonnes (wheat equivalent).²²⁵ 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 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.²²⁶

²²³ Productivity Commission (2010) *Wheat Export Marketing Arrangements*, Report no. 51, Canberra, p. 257.

²²⁴ 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.

²²⁵ GrainCorp Operations, *Port Operations*, pp. 10-11

²²⁶ Wheat Exports Australia (2010), *2009/10 Marketing Year: Report for Growers*, December, p. 13.

Melbourne Port Terminal was commissioned in 2000 and has 20 steel bins of various sizes holding a total of 48 000 mt storage.²²⁷ 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.²²⁸

9.2.3 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.²²⁹ 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.²³⁰ 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.²³¹

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.²³²

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 receipts between 2001-02 and 2005-06.²³³ It did so through a network of 10 primary sites and 32 storage sites.²³⁴

The second storage and handling company in Queensland is AWB GrainFlow, which handled approximately 21 per cent of the State's wheat receipts for the five years to 2005-06.²³⁵ AWB GrainFlow maintains four receipt sites in Queensland, all of which are located in the Darling Downs.²³⁶

²²⁷ 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>

²²⁸ Wheat Exports Australia (2010), *2009/10 Marketing Year: Report for Growers*, December, p. 13.

²²⁹ Allen Consulting Group (2008) *Competition in the Export Grain Supply Chain*, March, p. 66; ABARES (2010) Australian Crop Report, report no. 156, December 2010.

²³⁰ Australian Bureau of Statistics (2006) *Value of Agricultural Commodities Produced*, Australia 2004-05, Catalogue No. 7503.0, Canberra.

²³¹ ABARES (2010) Australian Crop Report, report no. 156, December 2010.

²³² Allen Consulting Group (2008) *Competition in the Export Grain Supply Chain*, March, p. 66.

²³³ ITS Global (2007) *Grain Marketing Transition Factsheets: Competition in the Domestic Grain Supply Chain*, prepared for AWB, Melbourne.

²³⁴ Allen Consulting Group (2008) *Competition in the Export Grain Supply Chain*, March, p. 12.

²³⁵ ITS Global (2007) *Grain Marketing Transition Factsheets: Competition in the Domestic Grain Supply Chain*, prepared for AWB, Melbourne.

²³⁶ Allen Consulting Group (2008) *Competition in the Export Grain Supply Chain*, March, p. 12.

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.²³⁷

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.²³⁸

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 magnesia.²³⁹

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.²⁴⁰

9.3 Industry structure – GrainCorp submissions

9.3.1 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:

- 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

²³⁷ Allen Consulting Group (2008) *Competition in the Export Grain Supply Chain*, March, p. 13.

²³⁸ GrainCorp Operations (2010), *Port Operations*, accessed 9 February 2011 at <http://www.graincorp.com.au/Documents/Port%20Operations.PDF>.

²³⁹ GrainCorp Operations (2010), *Port Operations*, accessed 9 February 2011 at <http://www.graincorp.com.au/Documents/Port%20Operations.PDF>

²⁴⁰ GrainCorp Operations (2010), *Port Operations*, accessed 9 February 2011 at <http://www.graincorp.com.au/Documents/Port%20Operations.PDF>

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.²⁴¹

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...’²⁴²
- 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 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.²⁴³

²⁴¹ GrainCorp Operations Limited, *Submission to the ACCC*, 15 April 2009, para. 4.1, p. 14.

²⁴² Parliament of Australia, Hansard, *Senate Standing Committee on Rural and Regional Affairs and Transport*, 25 May 2009, p. 54.

9.3.2 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.²⁴⁴

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.²⁴⁵

9.4 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.

²⁴³ GrainCorp Operations Limited, *Supplementary submission to the ACCC*, 24 June 2009, pp. 23-25

²⁴⁴ GrainCorp Operations Limited, *Submission to the ACCC*, 22 September 2010, pp. 3-4.

²⁴⁵ GrainCorp Operations Limited, *Submission to the ACCC*, 22 September 2010, pp. 3-4, 9.

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

9.4.1 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.

9.4.2 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.²⁴⁶ 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.

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

²⁴⁶ Regulation of prices for prescribed services was discontinued on 9 October 2003.

- 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.²⁴⁷

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 determination is that the Grain Handling and Storage Act regulatory framework ceased to apply to those ports from 1 October 2009.²⁴⁸

9.4.3 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

²⁴⁷ 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.

²⁴⁸ Essential Services Commission (2009) *Review of the Victorian Grain Handling and Storage Access Regime*, Final Report, May, pp. 11-12.

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.

9.5 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.²⁴⁹

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.²⁵⁰
- *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.²⁵¹ There is also a wider choice of storage service providers in the eastern states as the major bulk handlers storage networks overlap to some extent, and compete with independent storage providers.²⁵²
- *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.²⁵³ Major

²⁴⁹ Productivity Commission (2010) *Wheat Export Marketing Arrangements*, Report no. 51, Canberra, p. 173.

²⁵⁰ Productivity Commission (2010) *Wheat Export Marketing Arrangements*, Report no. 51, Canberra, p. 255.

²⁵¹ Productivity Commission (2010) *Wheat Export Marketing Arrangements*, Report no. 51, Canberra, p. 68.

²⁵² Productivity Commission (2010) *Wheat Export Marketing Arrangements*, Report no. 51, Canberra, p. 67.

²⁵³ Productivity Commission (2010) *Wheat Export Marketing Arrangements*, Report no. 51, Canberra, p. 251.

bulk handler storage capacity is approximately 20 mt and on farm storage is 12 mt.²⁵⁴ 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.²⁵⁵ Since deregulation, uneconomic bulk storage facilities have been closed down due to the increase in site-based costing.²⁵⁶

- *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.²⁵⁷
- *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.²⁵⁸ 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.²⁵⁹
- *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.²⁶⁰

9.6 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

²⁵⁴ Productivity Commission (2010) *Wheat Export Marketing Arrangements*, Report no. 51, Canberra, p. 69.

²⁵⁵ Productivity Commission (2010) *Wheat Export Marketing Arrangements*, Report no. 51, Canberra, p. 259.

²⁵⁶ Productivity Commission (2010) *Wheat Export Marketing Arrangements*, Report no. 51, Canberra, pp. 261-2.

²⁵⁷ Productivity Commission (2010) *Wheat Export Marketing Arrangements*, Report no. 51, Canberra, p. 68.

²⁵⁸ Productivity Commission (2010) *Wheat Export Marketing Arrangements*, Report no. 51, Canberra, p. 257.

²⁵⁹ Productivity Commission (2010) *Wheat Export Marketing Arrangements*, Report no. 51, Canberra, pp. 263-5.

²⁶⁰ Productivity Commission (2010) *Wheat Export Marketing Arrangements*, Report no. 51, Canberra, p. 251.

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.²⁶¹ Heavy rainfall during November and December 2010 has had broader effects on the quality of production and delays to the winter grain harvest.²⁶²

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 rain 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.²⁶³
- *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.²⁶⁴

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.²⁶⁵ 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.²⁶⁶

²⁶¹ ABARES (2011), *The impact of recent flood events on commodities*, ABARES Special Report, Canberra, January 2011, p. 1.

²⁶² ABARES (2011), *The impact of recent flood events on commodities*, ABARES Special Report, Canberra, January 2011, p. 3

²⁶³ ABARES (2011), *The impact of recent flood events on commodities*, ABARES Special Report, Canberra, January 2011, p. 10.

²⁶⁴ ABARES (2011), *The impact of recent flood events on commodities*, ABARES Special Report, Canberra, January 2011, p. 11.

²⁶⁵ ABARES (2011), *The impact of recent flood events on commodities*, ABARES Special Report, Canberra, January 2011, p. 3.

²⁶⁶ ABARES (2011), *The impact of recent flood events on commodities*, ABARES Special Report, Canberra, January 2011, p. 10.

10 Appendix D: Legislative framework and outlook

10.1 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.²⁶⁷

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* (Cth) (**the Act**), (previously the *Trade Practices Act 1974* (Cth)). 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 nominated

²⁶⁷ The relevant transitional legislation is the *Wheat Export Marketing (Repeal and Consequential Amendments) Act 2008* (Cth).

and the date on which the nomination was accepted (this statement is commonly termed the Shipping Stem).²⁶⁸

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.

10.2 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 WEA 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.

10.3 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);
- 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).

²⁶⁸ See subsection 24(4) of the WEMA for detail about the continuous disclosure rules.

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.

10.4 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.

10.5 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.

10.5.1 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.

10.5.2 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)).

10.5.3 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).

Attachment A: Draft Amendment Notice for consultation

Section 44ZZAAA(1) Amendment Notice

The Australian Competition and Consumer Commission (ACCC) gives this amendment notice to GrainCorp Operations Limited (GrainCorp) under section 44ZZAAA(1) of the *Competition and Consumer Act 2010* (Cth) (Act).

The ACCC may issue an amendment notice setting out proposed amendments to an undertaking given to the ACCC under section 44ZZA(1) of the Act. On 22 September 2010, GrainCorp gave the ACCC an undertaking under section 44ZZA(1) of the Act [with a minor amendment made on 31 January 2011] (Proposed 2011 Undertaking).

The ACCC's proposed amendments to the Proposed 2011 Undertaking, including the reason for each proposed amendment, are set out in this notice. Part 1 of this notice sets out the proposed amendments to the General Terms, Part 2 sets out the proposed amendments to the Standard Port Terminal Services in Schedule 2 and Part 3 sets out the proposed amendments to the Port Terminal Services Protocols in Schedule 3 of the Proposed 2011 Undertaking.

Any minor amendments that are necessary in order to implement the proposed amendments set out in this notice, such as cross references to other clauses, should also be made.

GrainCorp has until 5pm on XXJune 2011 ("due date") to respond to this notice. GrainCorp may give the ACCC a revised undertaking incorporating the proposed amendments in response to this notice. If GrainCorp does not respond by the due date, the proposed amendments are taken to not be accepted by GrainCorp and the ACCC will proceed to make its decision on whether to accept the Proposed 2011 Undertaking.

1 General Terms

The following proposed amendments relate to various general provisions of the Proposed 2011 Undertaking.

1.1 Proposed amendment

Clause 1.1, subsection (f), insert the following —

At the date of this Undertaking, the ‘access test’ under the WEMA requires:

AND

Clause 6.3, subsection (b), insert the following —

- (ii) At the date of this Undertaking, an Applicant is required to be an Accredited Wheat Exporter. However, if the requirement to obtain accreditation under the WEMA, or any other applicable legislation, is removed at any time during the term of this Undertaking, an Applicant must otherwise be entitled to export Bulk Wheat. It is the responsibility of the Applicant to ensure that they are in compliance with the relevant legal requirements for the purposes of exporting Bulk Wheat.

Reasons

In each of the above clauses, the words ‘at the date of this undertaking’ should replace the word ‘currently’, to allow for the possibility that the government may accept the Productivity Commission’s (PC) recommendation to abolish the access test from 2014. The PC recommendations and “establishment provisions” of the Proposed 2011 Undertaking are discussed in further detail in section 3.3.2 of the Explanatory Statement, pages 21-2.

1.2 Proposed amendment

Clause 1.1, insert the following —

- (h) The ACCC monitors compliance of undertakings accepted under Part IIIA of the CCA.
- (i) The ACCC may authorise the Regulated Access, Pricing and 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.

Reasons

The ACCC notes that the Proposed 2011 Undertaking includes provisions for the ACCC to authorise ACCC Commissioners to exercise the powers conferred on it

regarding the non-discrimination and arbitration provisions. The authorisation provisions should be extended to cover all the ACCC's functions and powers under the Proposed 2011 Undertaking. Extending the authorisation provisions will allow the ACCC to respond and act in a timely manner, thereby facilitating the efficient operation of the undertaking. This will assist GrainCorp in running its operations efficiently for the benefit of the supply chain.

The ACCC notes that the Regulated Access, Pricing and Monitoring Committee is comprised of several ACCC Commissioners.

Clause 1.1(i) must state the correct the name of the Regulated Access, Pricing and Monitoring Committee.

This is considered further in section 5.3.1.4 of the Explanatory Statement, page 59.

1.3 Proposed amendment

Clause 4.1, subsection (a), insert the following —

- (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;

Reasons

The ACCC notes that certain provisions in GrainCorp's Proposed 2011 Undertaking take effect on different dates. The publish-negotiate-arbitrate provisions take effect on 1 August 2011 and relate to the negotiation of Access Agreements that do not commence until, or after, 1 October 2011.

The ACCC notes that for a two-month period, certain provisions of the Proposed 2011 Undertaking will operate alongside the 2009 Undertaking.

To prevent potential confusion due to the operation of two concurrent undertakings, it is appropriate to amend clause 4.1, thereby expressly limiting the scope of the Proposed 2011 Undertaking to Access Agreements that will operate during the term of the Proposed 2011 Undertaking.

This is discussed in further detail in section 3.3.1 of the Explanatory Statement, pages 20-1.

1.4 Proposed amendment

Clause 5.5, insert the following subsection (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.

Reasons

It is appropriate for GrainCorp to provide the ACCC with a copy of an Access Agreement executed with GrainCorp's own Trading Division to enable the ACCC to assess GrainCorp's compliance with the non-discriminatory access provisions in clause 5.5 of the Proposed 2011 Undertaking.

This is discussed further in section 3.3.3.2 of the Explanatory Statement, pages 24-5

The ACCC notes that if this proposed amendment is adopted in the undertaking, the numbering of the existing clause 5.5 in the Proposed 2011 Undertaking will be renumbered clause 5.5(a)-(d).

1.5 Proposed amendment

Insert the following clause —

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 or 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.

Reasons

The ACCC notes that under the current drafting of GrainCorp's Proposed 2011 Undertaking, it may obtain information from GrainCorp through an ACCC directed audit. Further, the ACCC may obtain information at any time on a voluntary basis. These methods of information gathering may not be appropriate in every instance. Specifically, an audit may not lead to the timely provision of information to the ACCC and is limited to information related to the non-discrimination provisions of the Proposed 2011 Undertaking. Broader information gathering powers should be

included in GrainCorp’s undertaking to allow the ACCC to exercise its powers and functions.

This is discussed further in section 5.3.2 of the Explanatory Statement, pages 59-60

1.6 Proposed amendment

Clause 7.1, subsection (b), insert the following —

- (i) the terms of the Initial Port Terminal Services Protocols or the Port Terminal Services Protocols applying at the time of the Access Application; or
- (ii) a decision by GrainCorp to vary the fees at which Port Terminal Services are provided to reflect changes to the Consumer Price Index.

Reasons

The ACCC notes that the Indicative Access Agreement attached to the Proposed 2011 Undertaking exempts disputes based on a change to Fees due solely to a change in the Consumer Price Index. The ACCC notes that the dispute resolution provisions of the Proposed 2011 Undertaking do not explicitly exempt disputes based on price increases in Fees to reflect changes in the Consumer Price Index.

The inconsistency between the Proposed 2011 Undertaking and the Indicative Access Agreement should be rectified. Specifically, it is appropriate to narrow the circumstances under which Disputes can be raised under the Proposed 2011 Undertaking, to prevent price disputes where prices are varied solely to reflect changes in the Consumer Price Index. The ACCC considers that the proposed amendment appropriately balances the legitimate business interests of GrainCorp with the interests of access seekers.

This is discussed further in section 3.3.3.5 of the Explanatory Statement, pages 26-7.

1.7 Proposed amendment

Clause 13.1, insert the following definition —

“Consumer Price Index” means the Eight Capital Cities Weighted Average All Groups Consumer Price Index number published by the Australian Bureau of Statistics.

Reasons

The proposed amended clause 7.1(b)(ii) refers to the Consumer Price Index (see proposed amendment 1.6 above), and therefore it is in the interests of clarity to include a definition of Consumer Price Index in the Proposed 2011 Undertaking.

1.8 Proposed amendment

Clause 7.5, subsection (d), insert the following —

Within two Business Days of the parties agreeing an arbitrator, GrainCorp must notify the ACCC of the name of the arbitrator.

Reasons

GrainCorp should provide the ACCC with details of the arbitrator appointed by the parties. Clause 7.7 of the Proposed 2011 Undertaking sets out the arbitration process where the ACCC is not the arbitrator. The process allows for ACCC involvement and actually requires the arbitrator to keep the ACCC informed about the progress of the arbitrator. Considering the ACCC's involvement in the arbitration process even when not acting as arbitrator, it is a clear step to provide the ACCC with the name of the arbitrator once appointed.

This is discussed further in section 3.3.3.5 of the Explanatory Statement, page 27.

Port Terminal Services Protocols variation process

The following discussion relates to proposed amendments 1.9-1.14.

The Port Terminal Services Protocols (PTSP) prescribes how GrainCorp will operate its ports regarding bulk wheat export. GrainCorp may vary the PTSP in accordance with the process set out in its Proposed 2011 Undertaking. The PTSP variation process requires the following amendments to ensure the process is fair and transparent.

1.9 Proposed amendment

Clause 9.2, insert the following —

(b) the Port Terminal Services Protocols must be, and continue to be, a comprehensive statement of GrainCorp's policies and procedures for managing demand for Port Terminal Services;

Reasons

In order to provide sufficient certainty to access seekers, the PTSP should be a comprehensive document that encompasses all of GrainCorp's policies and procedures for managing demand for Port Terminal Services. The ACCC is concerned that this has not been the case at all times under the 2009 Undertaking. To ensure clarity and certainty, the Proposed 2011 Undertaking should expressly provide that the PTSP must be, and continue to be, a comprehensive document.

This is discussed further in section 3.3.1.1 of the Explanatory Statement, pages 52-3.

1.10 Proposed amendment

Clause 9.3, subsection (a)(iii), insert the following —

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

Reasons

GrainCorp should consider responses received as part of consultation during the variation process in good faith. The extension of the ‘actively consider’ requirement in the Proposed 2011 Undertaking to a ‘good faith’ requirement would put GrainCorp in line with other port operators and result in consistent regulation. The introduction of a good faith requirement will encourage meaningful consultation.

This is discussed further in the Explanatory Statement at section 5.3.1.2, pages 55.

1.11 Proposed amendment

Clause 9.3, subsection (a)(iii), insert the following —

(D) subject to clause 9.3(a)(iv), GrainCorp publishing on its website any written submissions received from interested parties under this clause 9.3(a)(iii) within 5 Business Days of receiving that submission.

AND

Clause 9.3, subsection (a), insert the following —

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 submission to the ACCC within 5 Business Days of receiving the submission

Reasons

In the interests of transparency, GrainCorp should be required to publish all written submissions received during the PTSP variation process. Transparent consultation will facilitate dialogue between GrainCorp and access seekers in the variation process.

Publishing all submissions may not appropriately balance the interests of access seekers with the legitimate business interests of GrainCorp. The requirement to provide those submissions that are not published on GrainCorp’s website to the ACCC, therefore, will allow the ACCC to monitor the variation process.

This is discussed further in the Explanatory Statement in section 5.3.1.2, pages 55.

The ACCC notes that if this proposed amendment is adopted in the undertaking, the numbering of the existing clause 9.3(a)(iv) in the Proposed 2011 Undertaking will be renumbered clause 9.3(a)(v).

Proposed amendment

Clause 9.3, subsection (a)(iii), insert the following —

(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).

Reasons

If the Proposed 2011 Undertaking is amended to expressly allow GrainCorp to amend a proposed variation based on consultation, the variation process will benefit from increased efficiency and a greater ability for GrainCorp to respond to consultation.

Taking the operational nature of the PTSP into account and the importance of certainty in port operations, it is not necessary to recommence the consultation process if a proposed variation is amended based on engagement between GrainCorp and access seekers.

This is discussed further in the Explanatory Statement in section 5.3.1.2, pages 55-6.

1.12 Proposed amendment

Clause 9.3, subsection (a), insert the following —

(v) any variation must be published at least 20 business days prior to the date on which it is to become effective in the same locations as GrainCorp publishes its Port Terminal Services Protocols.

Reasons

A proposed variation to the PTSP should be published within a reasonable timeframe before becoming effective. A 20 business day period is appropriate as it provides GrainCorp and access seekers with sufficient time to prepare for the implementation of the varied PTSP.

The ACCC notes that the 20 business day notice period follows a 10 business day consultation period, making the total time to conduct a variation no less than 30 business days. This appropriately balances the need for operational certainty for both GrainCorp and access seekers, with an appropriate level of transparency in the variation process.

The ACCC notes that this proposed amendment amends the existing clause 9.3(a)(iv) of the Proposed 2011 Undertaking, but if accepted, will appear in the undertaking as clause 9.3(a)(v). This is discussed further in the Explanatory Statement in section 5.3.1.2, page 56.

1.13 Proposed amendment

Insert new clause 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(a), 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 and/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 and place 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.

Reasons

Considering the scope of matters GrainCorp could amend through a PTSP variation process, it is necessary to introduce a mechanism for the ACCC to object to a proposed variation.

The ACCC's power to issue an objection notice would be discretionary and be limited to variations that are:

1. material in nature; and
2. amount to a breach of the anti-discrimination clause 5.5 and / or the no hindering access clause (which would be renumbered as clause 9.5).

The ACCC notes that certainty, flexibility and timeliness regarding the operation of the PTSP are of critical importance, given that the PTSP is the document by which the port operates. However, the objection notice is necessary to ensure that the PTSP are not used as a mechanism to discriminate or hinder access.

The objection notice is not onerous, particularly as the process requires that a draft objection notice be given to GrainCorp, allowing GrainCorp the ability to address the ACCC's concerns before reaching the stage of the formal objection notice.

The power to issue an objection notice will not interfere with port operations when proposed variations do not give rise to concerns within the limited criteria above.

The ACCC notes that if this proposed amendment is adopted in the undertaking, the existing no hindering access clause 9.4 in the Proposed 2011 Undertaking will become clause 9.5

This is discussed further in the Explanatory Statement, section 5.3.1.3, pages 56-59.

1.14 Proposed amendment

Clause 10.1, replace subsection 10.1 (a) with—

- (a) In order to expressly satisfy ACCC’s requirements GrainCorp will publish and update weekly in a prominent position on its website the following:
 - (i) total stocks of Bulk Wheat held at each Port Terminal;
 - (ii) The three (3) grades of Bulk Wheat contributing the largest tonnage at each Port Terminal;
 - (iii) total stocks of barley, sorghum, canola, and aggregate of all other grains held at each Port Terminal;

AND

Clause 10.1 renumber existing 10.1(b) as 10.1(c)

AND

Clause 10.1, replace existing subsections 10.1(a)(iii) and (iv) with new subsection 10.1(b) —

- (b) In order to expressly satisfy ACCC’s requirements GrainCorp will publish and update monthly in a prominent position on its website the following:
 - (i) cargo nominations; and
 - (ii) Nominated Elevation Capacity of each Port Terminal.

Reasons

GrainCorp should publish more detailed information on stocks of Bulk Wheat at port to promote effective competition in the wheat export market. Publication of such data would allow all bulk wheat exporters access to market information relevant to sourcing swap wheat and to assess potential congestion at port. This is discussed further in the Explanatory Statement at section 4.3.4.2, pages 44-5.

1.15 Proposed amendment

Clause 13.1, insert the following definitions —

“Elevation Period” is a period of one month, commencing on either the first or the fifteenth day of a calendar month, or a 15 day period as defined in a CNA.

“Nominated Elevation Capacity” is the tonnage of Elevation Capacity published on the GrainCorp web site that is available during any one Elevation Period at a particular port.

Reasons

The proposed amended clause 10.1(b)(ii) refers to Nominated Elevation Capacity (see proposed amendment 1.15 above), and therefore it is in the interests of clarity to include a definition of Nominated Elevation Capacity in the Proposed 2011 Undertaking. The proposed definition refers to the Elevation Period, and therefore it is similarly in the interests of clarity to include a definition of Elevation Period.

1.16 Proposed amendment

Clause 11, subsection (a), insert the following —

GrainCorp will publish the following key service performance indicators in a prominent position on its website:

Reasons

It is appropriate to extend the requirement on GrainCorp to publish a report on its performance against the Key Performance Indicators, to ensure that the report is published in a prominent place on the GrainCorp website. This extended requirement will assist in providing greater transparency and accountability.

This is discussed further in section 3.3.3.6 of the Explanatory Statement, pages 28-9.

1.17 Proposed amendment

Clause 11, subsection (b), insert the following —

GrainCorp will notify the ACCC within five Business Days of publication, that it has published a report on the GrainCorp website under clause 11(a).

Reasons

It is appropriate to include a requirement on GrainCorp to notify the ACCC when it publishes a performance report on its website. Such a requirement will allow the

ACCC to more easily monitor GrainCorp's compliance with reporting requirements under the Proposed 2011 Undertaking. A notice requirement is a simple measure to increase transparency and not onerous on GrainCorp.

This is discussed further in section 3.3.3.6 of the Explanatory Statement, pages 28-9.

2 Standard Port Terminal Services, Schedule 2 of the Proposed 2011 Undertaking

The following proposed amendments relate to Schedule 2 of the Proposed 2011 Undertaking.

2.1 Proposed amendment

Schedule 2, clause 1.1, subsection (a), insert the following —

Site Assembly Plan co-ordination;

And

Schedule 2, clause 2.2 subsection (a), insert the following —

Site Assembly Plan co-ordination;

Reasons

Amending Schedule 2 to state that GrainCorp will provide Site Assembly Plan co-ordination is an appropriate amendment, as it broadly expresses the role GrainCorp has at port.

3 Port Terminal Services Protocols – schedule 3 of the Proposed 2011 Undertaking

The following proposed amendments relate to the Port Terminal Services Protocols, which govern the operation of the ports under the Proposed 2011 Undertaking.

3.1 Proposed amendment

Schedule 3, clause 1, insert the following –

Nominated Elevation Capacity. This is the tonnage of Elevation Capacity published on the GrainCorp web site that is available during any one Elevation Period at a particular port.

Non-Peak period. A ‘non-peak’ period occurs when the total of Booked Elevation Capacity shown as ‘accepted’ CNA’s on the GrainCorp Shipping Stem is less than an amount 10,000 tonnes less than the Nominated Elevation Capacity of a port during a relevant Elevation Period.

Peak period. A ‘peak’ period occurs when the total of Booked Elevation Capacity shown as ‘accepted’ CNA’s on the GrainCorp Shipping Stem is at least equal to an amount 10,000 tonnes less than the Nominated Elevation Capacity of a port during a relevant Elevation Period.

Shipping Stem. This has the meaning given in clause 2.

Workflow Online Platform or Workflow. This means the platform for booking elevator capacity on GrainCorp’s website.

AND

Amend the definition of **Vessel Nomination** in clause 1 to reference clause 18.

Reasons

The ACCC notes that the PTSP submitted as part of the Proposed 2011 Undertaking incorrectly reference clause 20 in the definition of Vessel Nomination. This typographical error should be corrected to remove ambiguity and avoid confusion for access seekers. Due to Proposed Amendments 3.2 discussed below, it is necessary for the PTSP to include definitions of Nominated Elevation Capacity, Non Peak period, and Peak period. The ACCC considers that the inclusion of definitions for Shipping stem and Workflow Online Platform or Workflow is appropriate as it provides additional clarity and transparency for access seekers.

The substance of the PTSP is discussed further in the Explanatory Statement, section 4.3.6, page 48.

3.2 Proposed amendment

Schedule 3, insert new clause 11, Conditional Refund on Surrender of Bookings at Peak Periods –

11 Conditional Refund on Surrender of Bookings at Peak Periods

Should a customer wish to surrender BEC during a Peak period, the following will apply.

11.1 A customer may surrender BEC by amending the relevant CNA(s) using Workflow **no later than 35 days prior** to the first day of the CEP in which the surrendered BEC is to be executed. As soon as GrainCorp receives a notification to surrender BEC in this manner it will be deemed final and cannot be reversed. Hereinafter such BEC will be referred to as ‘Surrendered BEC’.

11.1.1 The total tonnage of Surrendered BEC will be placed back on the Shipping Stem the next business day following receipt by GrainCorp of notice in accordance with Clause 0. Customers will be notified that BEC has been returned to the Shipping Stem and is available for booking via the daily ‘Available Elevation Capacity’ email.

11.2 Refund of any booking fee(s) related to Surrendered BEC will be managed in the following manner.

11.2.1 If no later than 28 days prior to the first day of the Confirmed Elevation Period in which the Surrendered BEC was to be executed no new booking is made by a customer:

- (a) for an amount of tonnes equivalent to or greater than the quantity of tonnes surrendered, and
- (b) at the same port and for the same Elevation Period in which the Surrendered BEC was to be executed,

The customer shall not be entitled to any refund of the Booking Fee in whole or part.

11.2.2 If no later than 28 days prior to the first day of the CEP in which the Surrendered BEC was to be executed and a new booking is made by a customer (other than the customer that Surrendered BEC under Clause 0);

- (a) for an amount of tonnes equivalent to or greater than the quantity of tonnes surrendered; and
- (b) at the same port and for the same Elevation Period in which the Surrendered BEC was to be executed that

would replace as the Surrendered BEC,

GrainCorp will refund 50% of the original Booking Fee to the customer that Surrendered BEC under Clause 11.1

11.2.3 For the avoidance of doubt;

- (a) A new booking is defined as the lodgement of a new CNA under Clause 3; and
- (b) BEC transferred from another elevator, or from another Elevation Period at the same elevator, is not considered a 'new' booking for the purposes of this Clause 0.

Reasons

To promote efficient use of its port terminal services, GrainCorp should encourage customers to return unwanted capacity booked for peak periods to the stem for use by other wheat exporters. GrainCorp should also ensure that capacity at peak periods that is returned to its shipping stem is made available for new bookings.

This is discussed further in the Explanatory Statement at section 4.3.4.1, page 44.

3.3 Proposed amendment

Schedule 3, clause 2, insert the following –

2 Shipping Stem

Pursuant to the obligations of wheat export Port Terminal service providers under the Wheat Export Accreditation Scheme 2008 established under the Wheat Export Marketing Act 2008 (Cth) ("Act"), GrainCorp will publish Shipping Stem information on its website in accordance with s. 24(4) of the Act (Shipping Stem).

2.1 Opening of the Shipping Stem

GrainCorp will open the Shipping Stem by the end of June each year for the following Shipping Year.

2.2 Provision of Announcement of Stem Opening

At least two (2) weeks prior to the day on which the Shipping Stem will be opened, GrainCorp will provide all customers with current Bulk Wheat or Bulk Grain Port Terminal Services Agreements with a notice in writing of the date and time upon which the stem will open, and will place a copy of the announcement on the Shipping Stem web page.

2.3 The Elevation Capacity of GrainCorp port infrastructure will be determined from time to time, and the Elevation Capacity of each facility will be published on the GrainCorp web site.

2.3.1 GrainCorp will inform customers in writing of any changes to elevator capacity two (2) weeks prior to any capacity change being implemented.

Reasons

To promote efficient use of its port terminal services, GrainCorp should ensure that customers have clarity and certainty regarding the operation of its shipping stem and sufficient notice to plan their export requirements and assess likely booking needs in advance of the shipping stem opening.

This is discussed further in the Explanatory Statement at section 4.3.4.3, pages 45-6.

3.4 Proposed amendment

Schedule 3, clause 5, insert the following –

5.3 All matters related to the management of CNAs will be recorded in an individual ‘shipping file’, which will include a copy of the original CNA upon which the date and time of receipt of the CNA will be recorded.

AND

Clause 6, insert the following –

6.1 CNAs will be assessed in chronological order of receipt, where the chronology will be determined by the time and date allocated to a CNA by the Online Workflow system.

AND

Clause 7, amend subclause 7.5 as follows –

7.5 Whether GrainCorp has available sufficient intake, grain segregation, storage and Elevation Capacity at the Port Terminal that will allow accumulation of the cargo at the Port Terminal, taking into account, other Booked Elevation Capacity previously accepted by GrainCorp that appears as ‘accepted’ on the GrainCorp Shipping Stem.

To promote efficient use of its port terminal services, GrainCorp should ensure that customers have clarity and certainty regarding the systems used to allocate and manage capacity bookings on its shipping stem.

This is discussed further in the Explanatory Statement at section 4.3.4.3, pages 45-6.