



## **Australian Grain Exporters Association**

### **Response to the Draft Decision in relation to GrainCorp Operations Limited's proposed Port Terminal Services Access Undertaking**

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#### **Introduction**

AGEA has indicated in previous submissions that while the port access undertakings have provided some assistance to exporters in helping to establish more reasonable terms from the bulk handling companies and developing benchmarks against which bulk handling companies are accountable; there are still improvements that can be made to establish an efficient and competitive marketplace that maximises the opportunity for bulk wheat exports from Australia.

AGEA believes that ACCC approach to the access test for GrainCorp, CBH and Viterra should be to maximise consistency in application to deliver greater efficiency and certainty of performance for all users of port terminal services across Australia.

The objective of port access arrangements must be to promote an efficient supply chain. The undertakings should be a tool to ensure that there are no processes or practices in place that would hinder achievement of this objective. Currently, there are still processes, practices and behaviours in place in the industry that prevent the achievement of this objective.

Specific outcomes that are yet to be realised or require improvement include:

- A transparent shipping stem
- Greater flexibility in ability to transfer shipping slots across ports, time and counterparties
- Consistency in key terms and conditions and flexibility across the various port terminal operators
- Improved information around capacity and stocks at port

#### **Flexibility in shipping slots**

AGEA in its submission to the ACCC Issues Paper in relation to the GrainCorp revised undertakings 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 in the current season and this 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.

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

AGEA does not support tradeable slots via some form of formalised exchange/market. Rather, the AGEA position is about improving the flexibility and efficiency of the allocation and execution of slots.

As such, AGEA supports the ability for market participants to transfer shipping slots to assist in the facilitation of executing the stem. AGEA supports that slots are transferrable across:

- Ports owned by the port terminal operator
- Time/elevation periods
- Approved counterparties

AGEA recognises that business rules need to be put around these transfer options. In the case of time periods and ports, these are already incorporated in port protocols for some BHCs e.g. GrainCorp, however, such rules do not exist for transfer between counter parties at this time.

The mechanism for facilitating the transfer slots would be a commercial agreement between counter parties.

The sort of business rules that might apply include:

- Individual port/time period combination slots are transferrable between counter parties for a maximum number of times
- The party to which the slot is transferred must hold a current agreement with the port terminal operator; not have any outstanding matters with the port terminal operator; and meet the BHC's usual trade terms
- Once transferred, the booking carries all booked arrangements as confirmed with the transferor (e.g. port, elevation period, assigned load date, vessel, etc); and the transferee acquires all obligations, and rights, held in relation to the booking by the transferor at the time of the transfer (all Port Loading Protocol provisions e.g. anti-hoarding etc would apply as they did to the original holder of the slot)
- Timeframes i.e. closer to the date of execution additional rules may be applied (e.g. if the original booking nominated wheat, the commodity would not be able to be changed if the transfer was inside the window of where grain may have begun to be assembled for that shipment
- A nominal administration fee may be required to facilitate the transfer

AGEA believes that with appropriate business rules this is simply another tool to assist in facilitating the execution of the stem and is of the opinion that, had a transfer system been in place for 2010/11, it would have assisted in reducing congestion. The implementation of a transferrable slot system should not result in any additional speculation to that already evident on the stem.

There are also real benefits for the port terminal operator as it would reduce the risk that capacity is lost or unused at peak times.

It has benefits for the exporter as it allows the exporter to seek a commercial outcome in the event that the exporter holds a slot that they cannot use and reduces the loss incurred by the forfeiture of the booking fee.

### **Shipping stem fees**

AGEA is seeking a system that provides exporters with certainty to acquire and execute slots without having to speculate. This can be partly addressed through improving flexibility, however, the issue that booking fees for securing slots that are not refundable if the slot is not used are not incurred as a 'real cost' by all players e.g. the incumbent BHC remains a potential opportunity for speculation by the BHCs.

AGEA believes there is a fundamental weakness under the current conditions whereby all BHC's in relation to the port terminals that they own have the ability to book slots with no real penalty resulting from non-performance. In effect, the result for the incumbent BHC is a journal entry across divisions of the same parent, whereas every other participant in the marketplace wears these non-performance costs as real.

AGEA proposes that agreed slot fees are paid by all participants across all BHC ports into an escrow/trust account (with potential for fees to be paid in instalments with corresponding escalating forfeiture fees as shipping dates draw closer). The charges resulting from non-performance by an exporter result in forfeiture to the local BHC, while charges resulting from non-performance by a BHC result in forfeiture to an agreed charity/industry goodwill.

### **Accountability**

AGEA believe that the BHCs should be accountable for services provided including implementation of commercially based risk sharing of activities, such as demurrage and despatch.

Australian wheat exporters are willing to share the benefits of increased port terminal efficiency, by sharing demurrage/despatch arrangements. To ensure BHCs are accountable for shipping performance and the efficient operation of the facilities, Australian wheat exporters should be compensated for delays caused by BHCs' including vessel demurrage. Conversely, BHCs should be entitled to be rewarded by way of a share in despatch rates if vessels are unloaded at a faster than expected rate.

In relation to demurrage/despatch the AGEA maintains 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.

### **Ring fencing**

ACCC took the view in 2009 that, in the circumstances of that time, ring-fencing was not appropriate, given the 2009 Undertaking contained robust non-discrimination clauses and no hindering access clauses; fair and transparent port terminal protocols and an indicative access agreement; and measures to deal with the potential for information about port terminal services to be used to the advantage of GrainCorp's wheat exporting arm.

AGEA has previously indicated it does not believe that the ring fencing provisions in the Undertakings are adequate. It is AGEA's view that the current undertakings have not deal with the issues relating to information that can be used to the advantage of GrainCorp's wheat exporting arm.

AGEA believes that ACCC should require BHCs to put in place mechanisms that avoid vertically integrated companies from advantaging their trading arms through access to information/services that are not available to other exporters i.e. anything that a BHC trading team sees/receives should be made available to the market.

### **Other establishment provisions of the undertaking**

While AGEA notes the ACCC position in relation to GrainCorp seeking to mitigate regulatory uncertainty, there are a number of new enquiries underway such as the Federal and South Australian parliamentary processes. These, along with the Productivity Commission review, may result in further amendment of Wheat Export Marketing Act and this may lead to the requirement to amend the port access provisions. AGEA believes that there should be provision to amend the undertakings if required.