Australian
Competition &
Consumer
Commission

# GrainCorp Operations Limited

# Port Terminal Services Access Undertaking

# Further Draft Decision

# 23 September 2009

# Table of contents

# Glossary

| | |
|---|---|
| ABB | ABB Grain Ltd |
| ACCC | Australian Competition and Consumer Commission |
| AGEA | Australian Grain Exporters Association |
| AWE | accredited wheat exporters |
| BHC | bulk handling company |
| CBH | Cooperative Bulk Handling Ltd |
| Draft Decision | ACCC Draft Decision (6 August 2009) |
| ETA | estimated time of arrival |
| GIAV | Grain Industry Association of Victoria |
| GrainCorp | GrainCorp Operations Ltd |
| GTA | Grain Trade Australia |
| Issues Paper | ACCC Issues Paper (29 April 2009) |
| mt | million tonnes |
| NCC | National Competition Council |
| PTSP | Port Terminal Services Protocols |
| TPA | *Trade Practices Act 1974* (Cth) |
| WEA | Wheat Exports Australia |
| WEMA | *Wheat Export Marketing Act 2008* (Cth) |

# 1 Executive summary

This Further Draft Decision is the second of two draft decisions published by the Australian Competition and Consumer Commission (**ACCC**) in relation to its assessment of a proposed undertaking lodged by GrainCorp Operations Limited (**GrainCorp**) on 15 April 2009 (the **proposed Undertaking**) for consideration under Division 6 of Part IIIA of the *Trade Practices Act* 1974 (Cth) (**TPA**). The purpose of publication of this Further Draft Decision is to set out the ACCC's final views – following public consultation – on the type of wheat port access undertakings that would be likely to be accepted by the ACCC pursuant to section 44ZZA(3) of the TPA in order to assist GrainCorp in preparing a revised undertaking for re-lodgement with the ACCC.

The first Draft Decision of 6 August 2009 sought public consultation on:

- the ACCC's draft view that it would not accept GrainCorp's proposed Undertaking in its current form; and

- the ACCC's draft views on the type of wheat port access undertakings that would be likely to be accepted by the ACCC pursuant to section 44ZZA(3) of the TPA.

Following public consultation, this Further Draft Decision confirms the view, consistent with the view set out in the ACCC's Draft Decision on 6 August 2009, that the ACCC would not accept GrainCorp's proposed Undertaking in its current form.

As set out above, this Further Draft Decision also sets out the ACCC's final views on the type of wheat port access undertakings that would be likely to be accepted by the ACCC pursuant to section 44ZZA(3) of the TPA in order to assist GrainCorp in preparing a revised undertaking for re-ldogement with the ACCC.

Given that GrainCorp is obliged to have access arrangements in place by 1 October 2009 in order for its trading operation to retain accreditation to export bulk wheat under the *Wheat Export Marketing Act 2008* (Cth) (**WEMA**), the ACCC will endeavour, where possible, to assess any revised undertaking before 1 October. This will depend on how swiftly GrainCorp is able to lodge any revised undertaking.

Release of this Further Draft Decision follows:

- lodgement of a proposed undertaking by GrainCorp on 15 April 2009 for consideration under Division 6 of Part IIIA of the TPA and consultation on that proposed Undertaking;

- release of a Draft Decision by the ACCC on 6 August 2009 not to accept the proposed Undertaking in its current form and consultation on that Draft Decision; and

- consultation in August/September 2009 on a proposed indicative access agreement and proposed port terminal service protocols (**PTSPs**) submitted by GrainCorp to the ACCC.

The last phase of consultation was carried out because one of the ACCC's views set out in the ACCC's Draft Decision was that GrainCorp should include an indicative access agreement and port loading protocols as part of its undertaking.[1]

Upon request by the ACCC, GrainCorp provided a draft copy of its proposed Wheat Port Terminal Services Agreement on 18 May 2009. This document was published on the ACCC's website. This document was not originally provided to the ACCC as part of GrainCorp's April 15 Undertaking. The ACCC annexed this document to its Draft Decision and sought submissions on whether it would form an appropriate basis for an indicative access agreement. This document is therefore referred to as the "August Indicative Access Agreement".

Accordingly, this Further Draft Decision sets out:

- the ACCC's final views on the proposed Undertaking and detailed suggestions on ways that GrainCorp could address the issues identified (taking into account all of the public submissions received to date);

- the ACCC's final views on whether GrainCorp's proposed indicative access agreement circulated to interested parties for comment in August 2009 would likely form an appropriate Indicative Access Agreement if annexed to a revised undertaking submitted by GrainCorp; and

- the ACCC's final views on whether GrainCorp's proposed PTSPs circulated to interested parties for comment in August 2009 would likely form appropriate PTSPs if annexed to a revised undertaking submitted by GrainCorp.

# GrainCorp's proposed Undertaking

The proposed 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 15 April 2009 proposed Undertaking provides for, amongst other matters:

- a publish/negotiate/arbitrate model in relation to price and non-price terms (rather than including prices or a detailed pricing methodology in the undertaking);

- obligations regarding non-discrimination in the provision of port terminal services;

---

[1] It is noted that GrainCorp did include PTSPs as part of its 15 April 2009 proposed Undertaking, but that these protocols were 'outdated' by the release of the ACCC's Draft Decision on GrainCorp's proposed Undertaking.

- obligations regarding port terminal capacity management, including the shipping stem, and
- ring-fencing obligations providing for restrictions on information flows

Broadly, this Further Draft Decision covers the following issues relevant to the ACCC's assessment of GrainCorp's 15 April 2009 proposed Undertaking:

- Background, Objectives, Structure;
- Term and variation;
- Scope;
- Publish/negotiate/arbitrate;
- Indicative Access Agreement;
- Non-discrimination;
- Ring-fencing;
- Capacity management; and
- Publication of Information

The ACCC reviewed all sections of GrainCorp's 15 April 2009 proposed Undertaking and assessed whether, overall, the proposed Undertaking was likely to be appropriate, having regard to the matters set out in section 44ZZA(3) of the TPA. In making that assessment the ACCC has drawn on:

- GrainCorp's proposed Undertaking, its supporting submission and other submissions it has provided to the ACCC;
- submissions from interested parties on GrainCorp's proposed Undertaking (including submissions in response to the ACCC's Draft Decision dated 6 August 2009); and
- the ACCC's own research as referenced in this Further Draft Decision document.

# ACCC Further Draft Decision

The ACCC has reached a view, consistent with the view set out in its 6 August 2009 Draft Decision, that it would not accept GrainCorp's proposed Undertaking in its current form. The following discussion summarises the key issues considered in this Further Draft Decision and highlights those areas where the ACCC considers that the approach proposed by GrainCorp is not appropriate having regard to the matters in section 44ZZA(3) of the TPA.

Following public consultation, the ACCC has also reached final views on the type of wheat port access undertakings that would be likely to be accepted by the ACCC

pursuant to section 44ZZA(3) of the TPA. In all cases, the ACCC has made detailed suggestions about ways that GrainCorp could address the issues identified.

**Relevance of the context in which the proposed Undertaking has been assessed**

The specific clauses of the 15 April 2009 proposed Undertaking have been assessed having regard to the matters specified under section 44ZZA(3) of the TPA, taking into account the wider context within which GrainCorp has submitted the proposed Undertaking (which, as discussed in the Legislative Framework chapter, fall for consideration within the scope of the matters set out in 44ZZA(3)).

In particular, the ACCC considers the following matters (amongst others) to be relevant to the assessment of the proposed undertakings:

- the objective of Part IIIA of the TPA of promoting the economically **efficient operation of, use of and investment in facilities** by which port terminal services are provided – thereby promoting competition in the wheat export industry and the overall supply chain;

- the objectives of the 'Access Test' embodied in the WEMA, and, in particular, the objective of ensuring that vertically integrated bulk handling companies provide **fair and transparent access** to their facilities to other accredited exporters;

- the transitionary state of the wheat export industry, having moved from a single wheat exporter to 23 accredited wheat exporters in 12 months;

- the legitimate business interests of GrainCorp in being able to run its port terminal facilities with a sufficient degree of flexibility and without unduly prescriptive regulation so as to maintain an efficient supply chain;

- the interests of access seekers that in so running their operations, GrainCorp should do so in a fair and non-discriminatory manner

    - noting also that the pricing principles in section 44ZZCA of the TPA provide that access price structures should not allow a vertically integrated 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;

- whether the proposed undertaking provides for **sufficient certainty and clarity** in its terms, effect and operation so that access seekers are able to understand and enforce their rights;

- the risk and undesirability of imposing regulation that is not appropriate at a time when the industry is newly liberalised and in transition;

- GrainCorp's incentive to run its operations in a fair and transparent manner arising from the threat of more prescriptive regulation in two years time if required; and

- the object of Part IIIA to provide a framework and guiding principles to encourage a consistent approach to access regulation in each industry.

It is noted that the factors listed above are not the actual "matters" listed under section 44ZZA(3) of the TPA,[2] but rather fall for consideration within the scope of the relevant matters under section 44ZZA(3).

In having regard to the objectives of the WEMA, the ACCC specifically acknowledges Parliament's recognition that the promotion of competition 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.

In having regard to the WEMA, the ACCC has not conducted a comprehensive market analysis in relation to each of the ports that will be subject to the proposed Undertaking to assess whether they should be subject to access regulation. Rather, the role of the ACCC in this context is to decide whether the Undertaking proposed by GrainCorp is appropriate. The ACCC considers that Parliament has expressed a clear intention to require port terminal operators to provide access undertakings to mitigate the potential for anti-competitive harm, and it is in that context that the ACCC must consider the appropriateness of those undertakings as provided.

The ACCC recognises that, as GrainCorp has submitted, it is clear that the intention of the WEMA is that the proposed Undertaking should apply only to services offered at port.

In this regard, the ACCC notes that the Explanatory Memorandum to the WEMA dismissed calls to extend the access test to cover up-country services, stating that:

> Up-country facilities do not display natural monopoly characteristics as they have low barriers to entry and there are already a number of competitors in the industry who provide up-country storage services.[3]

The Explanatory Memorandum goes on to note that an extension of the access arrangements to up-country storage facilities would 'impose an excessive regulatory burden'.[4] Further, the Second Reading Speech of the WEMA provides:

> The Senate inquiry also identified concerns in relation to the potential for bulk-handling companies to restrict access to up-country storage facilities in a similar manner to concerns in relation to port facilities.
>
> It is unclear from the evidence presented to the Senate inquiry whether the problem would necessarily arise, and if so, the extent of legislation that would be required to correct it.
>
> If the highest level of regulation were to be imposed on the more than 500 up-country facilities, there is no doubt that this would create increased compliance costs which would almost certainly be directly passed back to growers.
>
> The government will, therefore, continue to monitor the ability of exporters to access up-country storage facilities.

---

2 Other than the first two matters, which the ACCC considers are relevant pursuant to section 44ZZA(3)(e) of the TPA.

3 Explanatory Memorandum, *Wheat Export Marketing Bill 2008*, p. 13.

4 Explanatory Memorandum, *Wheat Export Marketing Bill 2008*, p. 14.

> Let me say here, if any problems are identified then the government will take steps to remedy the situation including, if necessary, the development of a code of conduct.[5]

Nevertheless, the ACCC is cognisant of the submissions made calling for the Undertaking to be extended to include services offered at GrainCorp's up-country storage and handling facilities. Many of these submissions stated that it was artificial to draw a distinction between services offered at port and those offered up-country.

However, the ACCC, in this process, has not formed any views on the competitiveness of the supply of up-country storage and handling services. As set out in the Legislative Framework chapter, the ACCC does not consider that its role in this process was to conduct a thorough assessment of the state of competition in the entire bulk wheat export supply chain. The ACCC notes that the question of whether the access test should be extended up-country is a question of policy for government and notes, as set out above, that the Federal Government has stated that it will monitor developments in the up-country stages of the grain supply chain.

It is the ACCC's view that, given the clear express intention of the WEMA, and having regard to the risk and undesirability of imposing regulation that is not appropriate at a time when the industry is newly liberalised and in transition, the ACCC considers that it is appropriate pursuant to section 44ZZA(3) of the TPA that the scope of the proposed Undertaking be limited to services at port.

The ACCC notes, however, that providing access at the port creates incentives for other parts of the supply chain to be as efficient as possible, as access to the port would facilitate dissatisfied customers taking the option of bypassing GrainCorp's upcountry facilities.

**General approach to pricing and other terms and conditions**

Given the circumstances in which GrainCorp has submitted its proposed Undertaking, the ACCC is of the view that a prescriptive regulatory approach including ex ante price setting is not warranted, and that a less prescriptive publish-negotiate-arbitrate approach is appropriate.

However, in order for the publish-negotiate-arbitrate framework to be appropriate, the ACCC is of the view that it needs to be underpinned by a robust set of mechanisms giving effect to the publication, negotiation and arbitration procedures. Clarity about the terms and conditions for access that are on offer by GrainCorp is an important consideration in this respect. Further, given that GrainCorp is vertically integrated, strong non-discrimination obligations and appropriate transparency measures are also appropriate.

The ACCC is of the view that appropriate non-discrimination measures should prohibit GrainCorp discriminating in favour of itself except to the extent that the cost of providing access to other operators is genuinely and verifiably higher, as per section 44ZZCA of the TPA. As a transparency measure to support this, appropriate measures would require GrainCorp to publish a single set of prices for port terminal services, which may include differentiated prices for different circumstances (i.e. for

[5] House of Representatives, *Votes and Proceedings, Hansard*, Thursday 29 May 2009, p. 76-77.

different processes for testing of grain depending on where it has been stored – but only where these processes are justifiable with regard to hygiene, quality or associated factors), provided those circumstances are transparently stated and the pricing differences are justified on the basis of different costs.

The ACCC is of the view that these underpinning measures would allow access seekers to commercially negotiate with GrainCorp in a framework where both parties know that prices, terms and conditions may be subject to arbitration by the ACCC or a private arbitrator, applying the pricing principles in section 44ZZCA of the TPA and general non-discrimination requirements.

It is also relevant to note that GrainCorp' proposed Undertaking is for a limited duration, and should the publish-negotiate-arbitrate framework prove not to be effective, the ACCC may adopt a more prescriptive method in any future access undertaking assessments.

The ACCC also notes the Port Terminal Services Protocols, which are not terms of access but rather general procedures for operational management of the ports, including how capacity allocation/nomination of shipping slots occurs. The ACCC is of the view that it is in the legitimate business interests of GrainCorp, and indeed in the interests of efficiency in the overall supply chain, that GrainCorp has sufficient flexibility to run its day-to-day operations without unduly prescriptive interference. The ACCC also notes that it is in the interests of the access seekers, and of competition in downstream markets, that these operations are conducted on a non-discriminatory basis, in a manner that is clear and transparent, and with recourse to adequate and swift dispute resolution procedures in the event of dispute between GrainCorp and access seekers. It is therefore the ACCC's view that any changes to the Port Terminal Services Protocols occur with adequate notice and consultation – but not be subject to the variation procedures in section 44ZZA(7) of the TPA. The ACCC notes that should such processes prove unsatisfactory, the port terminal protocols may in future need to be the subject of more prescriptive processes.

In relation to ring-fencing, the ACCC's view is that the weak ring-fencing rules in GrainCorp's proposed Undertaking would not, in their current form, serve as an effective safeguard against anti-competitive discrimination in the provision of port terminal services.

However, ring-fencing is just one tool that can be used to ensure against anti-competitive discrimination.

Were GrainCorp's proposed Undertaking amended to contain robust non-discrimination and no hindering access clauses, fair and transparent port terminal protocols and indicative access agreements (as well as measures to deal with the potential for information about port terminal services to be used to the advantage of GrainCorp's wheat exporting arm), then, in the circumstances, it would not be necessary for ring-fencing measures to be included in GrainCorp's undertaking at this particular point in time.

In forming this view, the ACCC has taken into account the transitional nature of the industry and the possibility that any ring-fencing measures that were implemented at this point in time may need to be revised in the medium term in accordance with any

regulatory changes (either to extend or reduce the regulation to which GrainCorp is subject).

The ACCC considers that this would be an undesirable outcome in that it could impose unnecessary regulatory costs during a time of industry transition.

The ACCC has also taken into account the short duration of GrainCorp's proposed Undertaking (two years) and will closely monitor the effectiveness of its undertaking in ensuring against anti-competitive discrimination during its operation.

The ACCC notes that, once the regulatory framework to which GrainCorp is subject to is more certain, any future undertaking submitted by GrainCorp may need to include robust ring-fencing rules (significantly more robust than the weak ring-fencing measures offered by GrainCorp to the ACCC in its proposed Undertaking).

It is important to note that the ACCC's approach taken to ring-fencing in assessing this particular access undertaking is not indicative of the approach to ring-fencing that the ACCC would be likely to take in relation to other regulated industries. The approach taken on this occasion reflects the factors outlined above, and in particular, that the industry is still transitioning from having a single desk responsible for the export of wheat in mid 2008 to the current situation of having 23 wheat exporters accredited to export wheat from Australia; and that the arrangements can be revisited in two years.

The ACCC therefore notes that, overall, its views and recommendations about the appropriateness of the measures in the proposed Undertaking are less prescriptive than they might otherwise be in relation to longer term undertakings in other industries.

The ACCC has provided its draft views throughout on provisions that would not be appropriate, and alternatives that might be more appropriate.

The ACCC's views on particular sections of the proposed Undertaking are summarised as follows:

## Background, Objectives and Structure sections of the proposed Undertaking

### *Background section*

It is not necessary for the ACCC to form a view on the appropriateness of the background section pursuant to section 44ZZA(3) given that it is merely descriptive and places no obligations on GrainCorp.

### *Objectives*

The objectives section, critical to the operation of the proposed Undertaking, is not appropriate pursuant to section 44ZZA(3) given concerns with the following particular objectives:

- "The recovery of all reasonable costs associated with the granting of access to the Port Terminal Services" (clause 1.2(e)(i)(A)); and

- "GrainCorp's ability to meet its own or its Trading Division's reasonably anticipated requirements for Port Terminal Services" (clause 1.2(e)(i)(D)).

***Structure***

The structure section of the proposed Undertaking is not appropriate pursuant to section 44ZZA(3) given concerns with:

- The reference to a "Schedule" (rather than a "Port Schedule") prevailing over the General Terms (clause 2); and

- The reference to using 'reasonable endeavours' to procure (clause 2.3).

## Commencement, term and variation

***Commencement***

The commencement clause is not appropriate pursuant to section 44ZZA(3) given it does not make it clear the date upon which GrainCorp undertakes to comply with the obligations in the Undertaking, given that for the purposes of the WEMA an undertaking comes into operation at the time when the ACCC publishes its decision to accept the undertaking.[6]

***Term***

The two year term of the proposed Undertaking is appropriate pursuant to section 44ZZA(3) given the transitional state of the wheat export industry.

***Withdrawal and variation***

It is not necessary for the ACCC to form a view on the appropriateness of the withdrawal and variation clauses pursuant to section 44ZZA(3) given that they are merely descriptive.

***Extension***

The extension clause of the proposed Undertaking is not appropriate pursuant to section 44ZZA(3) given that clause 3.6(a) refers to submitting an undertaking 'at least three months' before the expiry of the proposed Undertaking. This is inconsistent with the statutory obligation in section 44ZZBC of the TPA for the ACCC to use reasonable endeavours to make a decision on an access undertaking application within 6 months.

## Scope

In the present circumstances, it is appropriate that GrainCorp's proposed Undertaking applies only to wheat (rather than all grains).

---

6 *Wheat Export Marketing Act 2008*, s 24(3).

In the present circumstances, it is also appropriate that GrainCorp's proposed Undertaking applies only to port terminal services (rather than including up-country services).

It is not appropriate that the services offered to access seekers differ depending on where the grain has been stored.

The drafting of the scope of the proposed Undertaking is not appropriate because it lacks clarity. In relation to the drafting of the scope of the proposed Undertaking:

- it would be appropriate for the definition of Port Terminal Services to be amended to make it clear that the lists of port terminal services in Schedule 2 are not exhaustive;
- it would be appropriate for Schedule 2 to expressly include 'cargo accumulation;
- it would be appropriate for any terms and conditions of access in Schedule 2 to be removed; and
- it would be appropriate for clause 4.4(d) (regarding sharing of efficiency savings) to be removed given its lack of clarity.

The ACCC notes that several submissions called for increased access to ports for employees of superintendence companies. The ACCC accepts that there may be benefits in allowing employees of superintendence companies to access port terminals, particularly in relation to improving the transparency of port operations but notes that the proposed Undertaking is an undertaking focusing on providing access to port terminal services to accredited wheat exporters. It is not an undertaking specifically to provide access to employees of superintendence companies.

## Publish, negotiate, arbitrate mechanism

The ACCC is of the view that, in the present circumstances, it is appropriate that GrainCorp's proposed Undertaking adopts a publish-negotiate-arbitrate approach (rather than providing for ex ante price regulation). In forming this view, the ACCC has had regard to the transitional state of the industry and the relatively short duration of the proposed Undertaking.

The ACCC considers, however, that the drafting of the publish-negotiate-arbitrate component of the proposed Undertaking dated 15 April 2009 is not appropriate.

The ACCC considers it is more likely to be appropriate for the proposed Undertaking to:

- include an indicative access agreement setting standard terms for access to the service;
- require GrainCorp to publish a single set of prices for port terminal services, which may include differentiated prices for different circumstances (i.e., for different processes for testing of grain depending on where it has been stored – but *only* where these processes are justifiable with regard to hygiene, quality or associated factors), provided those circumstances are transparently stated and the pricing differences are justified on the basis of different costs;

- require GrainCorp to publish prices by the beginning of September for the season 2010/2011;
- provide measures to ensure the negotiation, dispute resolution and arbitration mechanisms are applicable to Access Agreements for the 2009/2010 season;
- provide appropriate arrangements to ensure access seekers are not delayed in obtaining access by reason of engaging in a negotiation with GrainCorp on non-standard terms or prices, or by reason of resolving a dispute with GrainCorp pursuant to the processes in the proposed Undertaking;
- address the issues identified by the ACCC in the discussion below regarding the timeframes and lack of clarity and certainty in the drafting of the proposed Undertaking, as well as the disproportionate discretion of the access provider;
- not include a 'pre-condition' to invoking the dispute resolution process, as currently included in clause 6.3(c);
- provide for a Dispute to be mediated by either the IAMA or the GTA;
- provide that when a Dispute is referred to arbitration, it is referred to the ACCC in the first instance;
- provide a mechanism by which the ACCC may consider whether or not it wishes to arbitrate the Dispute;
- provide for the Dispute to be arbitrated by the ACCC if it so chooses, or for the Dispute to be arbitrated by a private arbitrator if the ACCC so chooses;
- permit the ACCC to conduct an arbitration adopting the processes and having regard to the matters set out in Part IIIA of the TPA if it chooses to be the arbitrator;
- require a private arbitrator to keep the ACCC informed of the progress of the arbitration, including timelines and processes for making submissions; and
- allow the ACCC to make submissions in relation to an arbitration conducted by a private arbitrator.

## Indicative Access Agreement

### *Inclusion of an indicative access agreement*

One of the recommendations of the ACCC's Draft Decision dated 6 August 2009 was that GrainCorp should include an indicative access agreement as part of its undertaking.

Including an indicative access agreement in the proposed Undertaking would:

- provide a clear starting point for negotiations between an access seeker and GrainCorp (and is therefore critical to ensuring access seekers can effectively negotiate with GrainCorp); and
- ensure that the costs of negotiation and/or arbitration are not excessive.

The ACCC notes that GrainCorp would be required to offer the indicative access agreement to access seekers who seek to obtain access to GrainCorp's port terminal services on the basis of the standard terms provided under that agreement. For the avoidance of doubt, however, it is important to note that inclusion of an indicative access agreement in the proposed Undertaking does *not* mean that access seekers and GrainCorp are precluded from negotiating around the indicative access agreement (either by commercial agreement or by utilising the negotiation and/or arbitration provisions in the proposed Undertaking).

Upon request by the ACCC, GrainCorp provided a draft copy of its proposed Wheat Port Terminal Services Agreement on 18 May 2009. This document was published on the ACCC's website. This document was not originally provided to the ACCC as part of GrainCorp's April 15 Undertaking. The ACCC annexed this document to its Draft Decision and sought submissions on whether it would form an appropriate basis for an indicative access agreement. This document is therefore referred to as the "**August Indicative Access Agreement**" in this chapter.

***August Indicative Access Agreement not appropriate***

The ACCC does not consider that the August Indicative Access Agreement would form an appropriate basis for an indicative access agreement as it is currently drafted.

The ACCC considers that, in order to be appropriate, improvements would need to be made to ensure that:

- The indicative access agreement includes a robust dispute resolution process that balances the legitimate business interests of GrainCorp with the interests of access seekers;

- Any ability of GrainCorp to unilaterally vary the terms of an executed indicative access agreement can only be exercised in specified circumstances and be subject to the negotiation and arbitration provisions of the undertaking; and

- The terms and conditions of the indicative access agreement provide for sufficient certainty and clarity in their terms, effect and operation.

The ACCC notes submissions from a number of interested parties raising concerns about whether a number of the terms of the indicative access agreement are acceptable, based on the commercial considerations and circumstances of those interested parties. The ACCC notes however, that the standard terms provided under the an indicative access agreement are intended to be the minimum terms and conditions of access to GrainCorp's port terminal services, and that access seekers will have the ability to negotiate (or arbitrate) non-standard terms that vary from any of those standard terms that they consider to be unacceptable, based on their own particular commercial considerations and circumstances. Accordingly, in this Further Draft Decision, the ACCC has not found it necessary to form views about whether the particular terms and conditions of the August Indicative Access Agreement would be acceptable to particular parties (given likely differences between the commercial considerations and circumstances of specific access seekers).

***Variation of the indicative access agreement***

GrainCorp's approach in its proposed Undertaking of 15 April 2009 of retaining discretion to unilaterally vary its "standard terms" (i.e. the price and non-price related terms which are intended to be included in GrainCorp's indicative access agreement) is not appropriate. It results in a lack of certainty and clarity for potential access seekers and undermines the benefits of inclusion of an indicative access agreement in the proposed Undertaking.

It would be more appropriate for the variation provisions in section 44ZZA(7) of the TPA to apply to any variations of the indicative access agreement. This does not preclude parties from negotiating non-standard terms that vary from those in the indicative access agreement.

## Non-discrimination

It is appropriate that GrainCorp's proposed Undertaking dated 15 April 2009 includes non-discrimination and no hindering access clauses.

However, the precise non-discrimination and no hindering access clauses proposed by GrainCorp are not appropriate given the lack of clarity about their interpretation. Further, the drafting of the non-discrimination and no hindering access clauses does not ensure that they will protect against GrainCorp discriminating in favour of its own trading business.

The ACCC has made recommendations about changes that could be made to the non-discrimination and no hindering access clauses to make them sufficiently robust to protect against anti-competitive self-preferential treatment by GrainCorp. For the avoidance of doubt, the non-discrimination clause should protect against (amongst other matters) the ability of GrainCorp to anti-competitively discriminate between wheat exporters on the basis of where grain was stored (i.e. whether it was stored in GrainCorp's up-country storage and handling network, a third party storage network or on-farm).

Further, in order for the ACCC to be able to monitor compliance with the non-discrimination clause, the ACCC considers it would be appropriate for GrainCorp's proposed Undertaking to allow the ACCC to request an audit be undertaken to assess compliance with the non-discrimination clause (but no more than twice in every twelve months).

## Ring-fencing

Ring-fencing is one tool that can be used, in conjunction with robust non-discrimination and no hindering access clauses, fair and transparent port terminal protocols and an indicative access agreement to ensure against anti-competitive discrimination.

The ACCC's view is that the weak ring-fencing rules in GrainCorp's proposed Undertaking would not, in their current form, serve as an effective safeguard against anti-competitive discrimination in the provision of port terminal services.

However, were GrainCorp's proposed Undertaking amended to contain robust non-discrimination and no hindering access clauses, fair and transparent port terminal

protocols and an indicative access agreement (as well as measures to deal with the potential for information about port terminal services to be used to the advantage of GrainCorp's wheat exporting arm), then, in the circumstances, it would not be necessary for ring-fencing measures to be included in GrainCorp's Undertaking at this particular point in time.

In forming this view, the ACCC has taken into account the transitional state of the industry and the possibility that any ring-fencing measures that were implemented at this point in time may need to be revised in the medium term in accordance with any regulatory changes (either to extend or reduce the regulation to which GrainCorp is subject). The ACCC considers that this would be an undesirable outcome in that it could impose unnecessary regulatory costs during a time of industry transition.

The ACCC has also taken into account the short duration of GrainCorp's proposed Undertaking (two years) and will closely monitor the effectiveness of the Undertaking in ensuring against anti-competitive discrimination during its operation.

That said, the ACCC is cognisant of calls by a number of interested parties for robust ring-fencing measures to be included in the Undertaking and notes that, once the regulatory framework to which GrainCorp is subject to is more certain, that any future undertaking submitted by GrainCorp may need to include robust ring-fencing rules (significantly more robust than the weak ring-fencing measures offered by GrainCorp to the ACCC in its proposed Undertaking).

It is important to note that the ACCC's approach taken to ring-fencing in assessing this particular access Undertaking is not indicative of the approach to ring-fencing that the ACCC would be likely to take in relation to other regulated industries. The approach taken on this occasion reflects the factors outlined above, and in particular, that the industry is still transitioning from having a single desk responsible for the export of wheat in mid 2008 to the current situation of having 23 wheat exporters accredited to export wheat from Australia; and that the arrangements can be revisited in two years.

## Capacity Management

### *Port protocols must be part of the Undertaking*

Port Terminal Services Protocols (PTSPs) set out the key process by which GrainCorp will allocate port terminal capacity. For this reason the ACCC notes that the inclusion of the PTSPs in the proposed Undertaking is appropriate.

### *Procedure for variation of port protocols can be flexible*

The variation mechanism set out in GrainCorp's proposed Undertaking of 15 April 2009 is not appropriate because it provides too much discretion to GrainCorp and insufficient certainty for access seekers.

That said, in the interests of retaining flexibility and efficiency, the ACCC would be prepared for the variation mechanism to be based on a robust industry consultation process rather than a formal ACCC consultation process. The ACCC will, however, closely monitor the success of this variation method and will take its findings into account in any future review of access undertakings.

To ensure that the PTSPs that have been varied can be enforced, a provision should be included in the Undertaking that obliges GrainCorp to comply with the PTSPs (as varied from time to time). In addition, a provision should be included in the Undertaking that states that any variations to the PTSPs are subject to the non-discrimination provision in the Undertaking (see further below). Further, any revised PTSPs must contain an expeditious dispute resolution mechanism.

***Substance of the port protocols***

The ACCC considers that the PTSPs attached to GrainCorp's 15 April 2009 proposed Undertaking are not appropriate because they provide too much discretion to GrainCorp and insufficient certainty for access seekers.

The ACCC notes that GrainCorp has revised its PTSPs. The ACCC commenced consultation on the revised PTSPs (dated 3 June 2009) on 6 August 2009 (the August PTSPs).

Even though the August PTSPs were not a part of GrainCorp's 15 April 2009 Undertaking, the ACCC has nevertheless set out the relevant submissions from interested parties on the August PTSPs and the ACCC's views as to whether the proposed amendments to the PTSPs, if included as part of a revised Undertaking, are likely to address the concerns raised in the Draft Decision.

In light of this, the ACCC's view is that while the August PTSPs cover some of the issues raised in the recommendations set out in the Draft Decision on GrainCorp's 15 April 2009 proposed Undertaking, it considers that additional amendments would be necessary in order for them to be considered appropriate. Specifically a number of clauses would need to be amended to provide for greater certainty, transparency and clarity.

The ACCC notes submissions by interested parties suggesting amendments to the August PTSPs in addition to those recommended by the ACCC. The ACCC notes that its approach to the assessment of the PTSPs has given weight to the legitimate business interests of GrainCorp in being able to run its port terminal facilities with a sufficient degree of flexibility and without unduly prescriptive regulation so as to maintain an efficient supply chain. The ACCC further notes that the robust non-discrimination clause and no-hindering access clause that would appropriate in a revised Undertaking (the particulars of which are contained in the Non-Discrimination chapter) are intended to constrain the ability of GrainCorp to exercise discretion under its PTSPs in an anti-competitive manner.

## Publication of Information

***Publication of stocks of grain at port***

It is not appropriate that GrainCorp's proposed Undertaking does not include an obligation to publish stocks of grains at port.

Such an obligation would address concerns raised by interested parties that port operators have the potential to restrict access to port for bulk wheat services by exhausting the port terminal's capacity in favour of other grains.

Specifically, it would be appropriate for this obligation to require publication (on GrainCorp's website) of information on stocks at port of bulk wheat as compared to non-wheat grains, on a monthly basis. The ACCC considers that this would provide a level of transparency over whether GrainCorp are restricting access to port by exhausting the port terminal's capacity in favour of other grains whilst not risking the imposition of onerous reporting requirements that are not appropriate at a time when the industry is newly liberalised and in transition.

For the avoidance of doubt, this obligation would not extend to publication of up-country information. This is because, as set out in the Scope chapter of this further draft decision, it is the ACCC's view that GrainCorp's approach of limiting its proposed Undertaking to port terminal services (and by extension, information about its port operations) is appropriate in the circumstances.

***Publication of key port terminal information***

As set out in the Ring-Fencing chapter, the ACCC considers that it is appropriate that arrangements be provided for in the proposed Undertaking to address the potential for GrainCorp's marketing arm to misuse port terminal information to its advantage.

Specifically, the ACCC considers that the appropriate approach to dealing with this issue would be for the proposed Undertaking to require publication of key port terminal information (such as cargo nomination applications) on the shipping stem a short time after its receipt by GrainCorp (i.e. the next business day). This would increase transparency of nominations that have been made and lessen the opportunity for GrainCorp's marketing arm to misuse key port terminal information whilst not imposing unduly prescriptive regulation on GrainCorp. It is important to note that any such discriminatory conduct would be prohibited by a robust non-discrimination clause, such as that recommended by the ACCC in the Non-Discrimination chapter.

***Publication of key service standards***

It is not appropriate that GrainCorp's proposed Undertaking does not include an obligation to report on a number of key service standards.

Such reporting (on GrainCorp's website) would provide 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. However, the ACCC does not intend this to be an onerous obligation and that, in the context of a newly liberalised industry, the obligation should not (in this particular context) require the collation of data that GrainCorp does not already collect, have on hand or have access to as part of its normal commercial practice.

## Conclusion

In relation to the proposed Undertaking given to the ACCC by GrainCorp on 15 April 2009, the ACCC's further draft view is that, having regard to the matters listed in s.44ZZA(3) of the TPA, it would not be appropriate to accept the proposed Undertaking.

As a result, the ACCC's further draft decision is that it should not accept the proposed Undertaking in its current form.

The ACCC has provided the reasons for its further draft decision throughout this document, including views on provisions that would not be appropriate, and alternatives that would likely be appropriate.

# 2 Procedural overview

**Summary**

Publication of this Further Draft Decision follows:

- Lodgement of GrainCorp's proposed Undertaking on 15 April 2009 for consideration under Division 6 of Part IIIA of the TPA and consultation on the proposed Undertaking (including stakeholder meetings with wheat farmers, exporters and industry bodies around the country);
- Release of a Draft Decision by the ACCC on 6 August 2009 not to accept the proposed Undertaking in its current form and consultation on the ACCC's views set out in its Draft Decision; and
- Consultation on a proposed indicative access agreement and proposed port terminal service protocols submitted by GrainCorp to the ACCC.

This Further Draft Decision now sets out the ACCC's final views on the type of grain port access arrangements that would be likely to be accepted by the ACCC pursuant to section 44ZZA(3) of the TPA. Given the extensive consultation process that the ACCC has engaged in to date, the ACCC is not calling for any further submissions.

Given that GrainCorp is obliged to have access arrangements in place by 1 October 2009 in order for its trading operation to retain accreditation to export bulk wheat under the WEMA, the ACCC will endeavour, wherever possible, to assess any revised undertaking before 1 October. This will depend on how swiftly GrainCorp is able to lodge their revised undertaking.

## 2.1 GrainCorp's proposed undertaking

Under Division 6 of Part IIIA of the *Trade Practices Act 1974 (Cth)* (**the TPA**), 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 Undertaking**) from GrainCorp Operations Limited (**GrainCorp**) on 15 April 2009 for consideration under Division 6 of Part IIIA. The proposed Undertaking relates to the provision of access to services for the export of bulk wheat at grain terminals operated by GrainCorp in Queensland, New South Wales and Victoria.

GrainCorp has submitted the proposed Undertaking in accordance with legislative requirements under the *Wheat Export Marketing Act 2008 (Cth)* (**the WEMA**), further details of which are set out below in the Legislative Framework chapter. Two other parties, ABB Grain Ltd (**ABB**) and Cooperative Bulk Handling Limited (**CBH**)

have also submitted access undertakings to the ACCC, and the ACCC has also published draft decisions in respect of those applications.

## 2.2 Submissions from GrainCorp

During the current process, in addition to the initial supporting submission provided by GrainCorp on 15 April 2009 in conjunction with the proposed Undertaking, the ACCC sought and received further information from GrainCorp as follows:

- On 13 May 2009 the ACCC requested from GrainCorp a public version of its proposed 2009/10 wheat port terminal services agreement.
- On 18 May 2009 GrainCorp responded to the ACCC's request, providing the agreement, fee schedule and protocol for grain received ex-farm.
- On 22 May 2009 GrainCorp made a presentation to ACCC staff members.
- On 2 June 2009 the ACCC requested further information from GrainCorp in relation to various matters raised in its initial submission, and in relation to various clauses of the proposed Undertaking.
- On 15 June 2009 the ACCC received a letter from GrainCorp attaching GrainCorp's revised port terminal protocols.
- On 24 June 2009 GrainCorp provided a response to the ACCC's information request, the ACCC's Issues Paper and to comments made in submissions during the public consultation.
- On 15 July 2009, the ACCC received a letter from GrainCorp confirming matters discussed at a meeting between representatives of GrainCorp and the ACCC that took place on 9 July 2009.
- On 3 September 2009, GrainCorp provided a further submission in response to issues raised in the ACCC's Draft Decision.

## 2.3 Public consultation process to date

The TPA provides that the ACCC may invite public submissions on an access undertaking application.[7]

The ACCC published an Issues Paper on 29 April 2009 inviting submissions on the proposed GrainCorp Undertaking, as well as on the proposed ABB and CBH Undertakings. The ACCC directly advised approximately 80 stakeholders, including accredited wheat exporters, grain growers, farming organisations and state regulatory bodies of the public consultation process.

7 *Trade Practices Act 1974* (Cth) s 44ZZBD(1).

As part of the public consultation process the ACCC also held meetings in several capital cities during May 2009 to allow interested parties the opportunity to discuss relevant matters with the ACCC in person. Meetings were held as follows:

- 7 & 8 May 2009: Brisbane
- 11 & 12 May 2009: Sydney
- 18 & 19 May 2009: Adelaide
- 25 & 26 May 2009: Perth
- 22 & 28 May 2009: Melbourne

### 2.3.1 Submissions received

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

**Australian Grain Exporters Association (AGEA) – submissions received 11, 18 and 29 May and 3 September 2009**

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

Members of the AGEA are active participants in both domestic and export grain markets, with a particular focus on providing efficient access to international markets. Members of AGEA are Bunge Global Markets Australia Pty Ltd, Cargill Australia Limited, Louis Dreyfus Australia Pty Ltd, Glencore Grain Pty Ltd, Noble Grain Australia Pty Ltd and AC Toepfer International (Australia) Pty Ltd.[8]

**SGS Agricultural Services – submission received 27 May and 7 September 2009**

SGS provides inspection, testing, certification and verification services to ensure that products, services and systems across a range of industries meet quality, safety and performance standards and specifications.[9]

**Victorian Farmers Federation – submission received 28 May and 3 September 2009**

The VFF is a federation made up of seven commodity groups representing Victorian farmers in the dairy, grains, livestock, horticulture, chicken meat, eggs and pig industries.[10]

8 http://www.agea.com.au/
9 http://www.au.sgs.com/lob/agricultural_services.htm?lobId=5529
10 http://www.vff.org.au/main/

**AgForce Grains Ltd**

AgForce is the peak body for the grain, beef, sheep and wool industries in Queensland, and provided a submission to the ACCC as a representative of Queensland grain growers.[11]

**Intertek – submission received 29 May 2009**

Intertek is a commodities and products testing company, carrying on a wide range of testing, inspection and certification services across a number of different industries.[12]

**Riverina (Australia) Pty Ltd**

Riverina is an accredited wheat exporter under the WEMA.

**Grain Industry Association of Victoria – submission received 4 June 2009**

The GIAV is the representative body for key participants in the grain industry supply chain in Victoria. Its membership includes grain marketers and traders, grain brokers, end-user processors such as millers, maltsters and stockfeed manufacturers, as well as bulk handling companies, seed specialists, grain transport operators and container packers.[13]

**New South Wales Farmers Association – 10 June 2009**

The NSW Farmers Association represents the interests of the majority of commercial farming operations throughout New South Wales. It states that through its commercial, policy and apolitical lobbying activities it provides a link between farmers, government and the general public.[14]

**Grain Trade Australia (GTA) – submission received 25 August 2009**

Grain Trade Australia is the "post farm-gate" Australian grain industry association. GTA also provides an arbitration service for the resolution of contractual disputes, based on the GTA Trade Rules and the Dispute Resolution Rules.[15]

**Port of Portland (POPL) – submission received 3 September 2009**

POPL owns the Port of Portland (a regional port in South-West Victoria), which is located between the capital city ports of Melbourne and Adelaide.[16]

---

11 AgForce Grains Ltd, *Submission in relation to proposed GrainCorp access undertaking*, 29 May 2009, p. 1.

12 Intertek, *Submission in relation to proposed access undertakings*, 29 May 2009, p. 6.

13 Grain Industry Association of Victoria, *Submission in relation to proposed access undertakings*, 1 June 2009, p. 1.

14 NSW Farmers Association, *Submission in relation to proposed access undertakings*, June 2009, p. 3.

15 Grain Trade Australia, *Memoradum re ACCC Access Undertaking Dispute Resolution Process*, 25 August 2009.

16 Port of Portland, *Submission in relation to Draft Decisions on Port Terminal Services Access Undertakings*, 3 September 2009.

**The Grain and Feed Trade Association (Gafta) – submission received 7 September 2009**

Gafta is an international body representing the trade in grain, pulses and feed materials transacted worldwide. Gafta has around 1200 members in 85 countries.[17]

**Rail Corporation New South Wales (RailCorp)**

RailCorp is a statutory authority of the New South Wales government that owns, operates and maintains the Sydney suburban and interurban rail network. RailCorp is the infrastructure owner that provides access to third party rail operators who in turn provide transport services to the Port Kembla terminal in NSW.[18]

***Submissions alleging anti-competitive conduct***

The ACCC notes that several submissions made allegations that GrainCorp has engaged in conduct that may raise issues under the prohibitions on anti-competitive conduct under Part IV of the TPA. In the context of the current Part IIIA assessment, the ACCC has not formed any views on the legitimacy or otherwise of these allegations. To the extent that claims have raised allegations relating to restrictions on anti-competitive conduct in Part IV of the TPA, these matters are being assessed by the ACCC's Enforcement and Compliance Division.

## 2.4 Confidential submissions

The ACCC notes that it received some confidential submissions as part of its consultation, from both GrainCorp and from third parties. 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.[19] In the current context, however, limited weight was given to confidential submissions made on this process. The ACCC notes that the information provided to it on a confidential basis did not raise any new relevant issues that had not already been raised in public submissions to the ACCC.

## 2.5 Indicative timeline

Under the TPA, the ACCC must use its best endeavours to make a decision on an access undertaking application within 6 months of the day it received the application, or within any further, extended period if the ACCC so decides.[20] The ACCC is therefore obliged to use its best endeavours to make a final decision on the 15 April 2009 proposed Undertaking by 15 October 2009, or such further period as the ACCC decides.

Given that GrainCorp is obliged to have access arrangements in place by 1 October 2009 in order for its trading operation to retain accreditation to export bulk wheat

---

17 Grain and Feed Trade Association, *Submission in relation to Draft Decisions on Port Terminal Services Access Undertakings,* 7 September 2009.

18 RailCorp, *Submission in relation to Draft Decision on GrainCorp Access Undertaking*, 1 September 2009.

19 *Trade Practices Act 1974* (Cth) s 44ZZBD(5).

20 *Trade Practices Act 1974* (Cth) s 44ZZBC(1).

under the WEMA, the ACCC will endeavour, wherever possible, to assess any revised undertaking before 1 October. This will depend on how swiftly GrainCorp is able to lodge any revised undertaking.

## 2.6 Further information

The proposed GrainCorp Undertaking and other relevant materials, including supporting submissions from GrainCorp and public submissions by interested parties, are available on the ACCC's website at www.accc.gov.au by following the links to 'For regulated industries' and 'Wheat Export,' or via the following link: http://www.accc.gov.au/content/index.phtml/itemId/868799

If you have any queries about any matter in relation to the ACCC's process, or to any matters raised in this Further Draft Decision, please contact:

Ms Sarah Sheppard
Director
Transport & General Prices Oversight, Wheat Access Section
Ph: (03) 9290-1992
Email: sarah.sheppard@accc.gov.au
Fax: (03) 9663-3699

# 3 Legislative Framework

**Summary**

In assessing the appropriateness of GrainCorp's proposed Undertaking, the ACCC has had regard to the matters specified under s44ZZA(3) of the TPA. In particular, the ACCC has considered:

- the objectives of the 'access test' embodied in the *Wheat Export Marketing Act 2008* and, in particular, the objective of ensuring that vertically integrated bulk handling companies provide **fair and transparent access** to their facilities to other accredited exporters;
- whether the proposed Undertaking provides **for sufficient certainty and clarity** in its terms, effect and operation;
- the legitimate business interests of the bulk handlers in being able to run their port terminal facilities with a sufficient degree of flexibility and without unduly prescriptive regulation so as to maintain an efficient supply chain;
- the objective of promoting competition in the wheat export industry;
- the desirability of having consistent bulk wheat port access regulation arrangements across Australia;
- the risk and undesirability of imposing regulation that is not appropriate at a time when the industry is newly liberalised and in transition;
- the need to balance the legitimate business interests of GrainCorp with the interests of access seekers; and
- that price discrimination in favour of GrainCorp's trading operations should not occur except to the extent that the cost of providing access by GrainCorp to other users is higher than provision of the service to itself.

It is noted that the factors listed above are not the actual "matters" listed under section 44ZZA(3) of the TPA,[21] but rather fall for consideration within the scope of the relevant matters under section 44ZZA(3) of the TPA.

## 3.1 Part IIIA of the Trade Practices Act

The legislative framework for the ACCC's consideration of the proposed Undertaking is set out in Part IIIA of the TPA.

Part IIIA was inserted into the TPA in 1995 by the *Competition Policy Reform Act 1995* (Cth) and provides three main mechanisms to facilitate access to services provided by means of infrastructure:

[21] Other than the first two matters, which the ACCC considers are relevant pursuant to section 44ZZA(3)(e) of the TPA.

- via declaration of a service (under section 44H) and arbitration (under section 44V);
- through the provision of access undertakings and access codes (under sections 44ZZA and 44ZZAA respectively); and
- via a decision that a State or Territory access regime is effective (under section 44N).

### 3.1.1 Access undertakings

Division 6 of Part IIIA provides that 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 having regard to the matters set out in section 44ZZA(3). If the ACCC accepts the undertaking, the provider is required to offer third party access in accordance with the undertaking. An access undertaking is binding on the access provider and can be enforced in the Federal Court upon application by the ACCC.

## 3.2 Matters in section 44ZZA

Section 44ZZA(3) provides that the ACCC may accept an access undertaking, if it thinks it appropriate to do so, having regard to the following matters:

- the objects of Part IIIA of the TPA;
- the pricing principles specified in section 44ZZCA of the TPA;
- 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.[22]

This part of the document discusses in a general sense how the ACCC proposes to have regard to these matters in making its decision under section 44ZZA(3) in relation to the proposed Undertaking. The discussion in this chapter is general in the sense that it largely does not refer to specific clauses of the proposed Undertaking, but rather constitutes a consideration of the wider context within which the proposed Undertaking exists, and which underpin the more specific analysis of particular proposed clauses. Subsequent chapters consider specific clauses of the proposed

[22] *Trade Practices Act 1974* (Cth) s 44ZZA(3).

Undertaking by reference to this foundational discussion, and refer again to matters in section 44ZZA(3) as relevant.

The discussion in this chapter does not consider each of the matters listed in section 44ZZA(3) in the same order as those matters are listed in that section. Instead, the matters are listed in the following order:

1. any other matters that the ACCC thinks are relevant;
2. the objects of Part IIIA;
3. the public interest, including the interest in having competition in markets (whether or not in Australia);
4. the legitimate business interests of the provider (that is, GrainCorp);
5. the interests of access seekers;
6. the pricing principles in section 44ZZCA; and
7. whether the undertaking is in accordance with an access code that applies to the service.

This re-ordering is simply designed to make the discussion easier to follow; it should not be interpreted as the ACCC placing a particular weight on a matter by virtue of its position in the discussion.

The ACCC notes as a general comment that section 44ZZA(3) describes matters to which the ACCC is required to have regard, not criteria of which the ACCC must be satisfied. The ACCC therefore does not consider that 'satisfaction' of a particular 'criterion' under section 44ZZA(3) leads to a conclusion that a proposed access undertaking should be accepted. The ACCC makes this point in light of the 'satisfying the criteria' language adopted by GrainCorp in its submissions.[23] The test under section 44ZZA(3) is whether the Commission considers it "appropriate" to accept the undertaking, having regarding to the matters in section 44ZZA(3).

[23] See for instance, GrainCorp Operations Limited, *Port Terminal Services Access Undertaking*, 15 April 2009, para 2.11, p. 9.

## 3.3 Any other matters the ACCC thinks are relevant

Section 44ZZA(3)(e) of the TPA provides that, in deciding whether to accept an undertaking, the ACCC may have regard to any other matters it thinks are relevant.

For the reasons outlined below, the ACCC thinks it appropriate for it to have regard to the following matters:

- the *Wheat Export Marketing Act 2008* (Cth) (**the WEMA**), and the intention of Parliament in enacting that legislation; and
- the extent to which the proposed Undertaking is clear and certain.

The ACCC acknowledges that subsection (e) comes at the end of the list of matters to which the ACCC has regard in deciding whether to accept an undertaking. However, the matters arising under subsection (e) are discussed here as it covers the WEMA, which provides context to the ACCC's consideration as a whole.

### 3.3.1 The Wheat Export Marketing Act

The WEMA came into effect on 1 July 2008. Section 24 of that Act relevantly requires that, for the period after 1 October 2009, in order for a person that provides port terminal services to also hold or maintain accreditation to export bulk wheat, there must be in operation, under Division 6 of Part IIIA of the TPA, an access undertaking relating to the provision of access to port terminal services for purposes relating to the export of wheat. It is therefore pursuant to section 24 of the Act that GrainCorp has proffered the proposed Undertaking to the ACCC.

**Regulatory scheme established by the WEMA**

Section 3 of the WEMA states that the objects of the Act are to promote the development of a bulk wheat export marketing industry that is efficient, competitive and advances the needs of wheat growers, and to provide a regulatory framework in relation to participants in the bulk wheat export marketing industry.

In relation to the second objective, the WEMA sets up a system for the regulation of Australian bulk wheat exports, establishing an accreditation scheme for exporters and a regulatory body, Wheat Exports Australia (**WEA**), to administer the scheme. Under the WEMA, parties without WEA accreditation are prohibited from exporting wheat in bulk from Australia, and parties seeking accreditation as bulk wheat exporters must be determined by the WEA to be 'fit and proper' having regard to certain criteria.

The WEMA therefore replaces the previous 'single desk' marketing arrangements for bulk wheat exports with a system that allows multiple accredited firms to export bulk wheat from Australia. As stated in the Explanatory Memorandum:

> 'The [WEMA] will introduce competition into the bulk wheat export industry. Rather than forcing growers to sell their wheat through a single exporter they will be able to choose from a number of accredited exporters as well as domestic outlets.'[24]

[24] Explanatory Memorandum, *Wheat Export Marketing Act 2008* (Cth), p. 3.

**The 'access test' in the WEMA**

The WEMA further provides that parties seeking bulk wheat export accreditation that also provide 'port terminal services' must satisfy an 'access test.'

A 'port terminal service' is defined to mean a service (within the meaning of Part IIIA of the TPA) provided by means of a port terminal facility, and includes the use of a port terminal facility.[25] A 'port terminal facility' is defined as:

> '…a ship loader that is:
>
> (a) at a port; and
> (b) capable of handling wheat in bulk;
>
> and includes any of the following facilities:
>
> (c) an intake/receival facility;
> (d) a grain storage facility;
> (e) a weighing facility;
> (f) a shipping belt;
>
> that is:
>
> (g) at the port; and
> (h) associated with the ship loader; and
> (i) capable of dealing with wheat in bulk.'[26]

The 'access test' is outlined in section 24 of the WEMA and, in summary, provides that:

- *for the period between 1 July 2008 and 30 September 2009*: accredited exporters who operate bulk wheat terminals at ports are required to publish a statement on their website outlining the terms and conditions on which they will allow other accredited exporters access to their port terminal facilities (unless, at the relevant time, 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); and

- *for the period on or after 1 October 2009*: exporters that provide port terminal services will be required to have a formal access undertaking pursuant to Part IIIA of the TPA accepted by the ACCC (or that there be in force a decision under Part IIIA of the TPA 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 provider of port terminal services to publish on their website:

---

25 *Wheat Export Marketing Act 2008* (Cth), s 5.
26 *Wheat Export Marketing Act 2008* (Cth), s 5.

- their policies and procedures for managing demand for port terminal services (commonly termed 'Port Loading Protocols' or 'Shipping Protocols'); and

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

**The rationale for accreditation of bulk wheat exporters and the 'access test'**

The Explanatory Memorandum to the WEMA compares the options of retaining the single desk for bulk wheat exports (option A) and introducing a scheme for accreditation of bulk wheat exporters (option B). It was considered that option B would:

- significantly increase the marketing options for growers;

- mean that more buyers will be competing for wheat, thereby helping growers get a price that reflects market forces;

- force marketers to improve the services they provide to growers to secure supplies of wheat;

- create the opportunity for potential exporters to compete in the export wheat market, which would be likely to drive innovation in marketing, research and development;

- more effectively manage the risk of market lock out; and

- as a result of increased competition, drive supply chain efficiencies in grain marketing.[27]

It was acknowledged, however, that under option B the benefits of the reform may be mitigated if '…bulk handling companies (and potential exporters) deny other potential exporters reasonable access to critical handling and storage infrastructure.'[28] The Report of the Senate Standing Committee on Rural and Regional Affairs and Transport on the exposure draft of the WEMA includes discussion of these concerns:

> 'It was argued that bulk handling and storage facilities throughout Australia are owned and controlled by a limited number of companies. Concerns were raised that, in the event that some or all of these companies became accredited exporters under the proposed legislation, they may be in a position to limit access to these facilities by other exporters.'[29]

The Committee also considered the extent to which such concerns could be dealt with under provisions of the TPA, noting that views from witnesses and submitters on the

---

27 Explanatory Memorandum, *Wheat Export Marketing Act 2008* (Cth), p. 12-13.

28 Explanatory Memorandum, *Wheat Export Marketing Act 2008* (Cth), p. 8.

29 Parliament of Australia, Senate Standing Committee on Rural and Regional Affairs and Transport, *Report on the Wheat Export Marketing Bill 2008 Exposure Draft*, para 3.93.

effectiveness of existing powers under the TPA 'varied greatly.'[30] In providing its view on the issue, the Committee said:

> 'While the committee notes that provisions exist under the TPA to address anti-competitive practices, careful consideration needs to be given to the extent to which these provision offer practical remedies to the concerns raised during this inquiry.'[31]

In the Explanatory Memorandum to the WEMA, it was noted that, under option B, a potential exporter having difficulty gaining access to port terminal services could apply to the National Competition Council (**NCC**) for a declaration that the port terminal facility was essential infrastructure as a means of obtaining access. It was noted, however, that this could involve long timeframes.[32]

It was therefore considered that an 'option C', involving the introduction of a scheme of accreditation for wheat exports, plus a mechanism for allowing access to port terminal facilities, would be appropriate.[33]

The Explanatory Memorandum notes that while the lodgement of an access undertaking will involve costs to the port terminal operator, it will ensure access to port facilities, which will in turn allow marketers to participate effectively in the export of bulk wheat and provide increased choice to growers in their marketing options.[34]

**ACCC's views**

The ACCC therefore 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

---

30 Parliament of Australia, Senate Standing Committee on Rural and Regional Affairs and Transport, *Report on the Wheat Export Marketing Bill 2008 Exposure Draft*, para 3.127

31 Parliament of Australia, Senate Standing Committee on Rural and Regional Affairs and Transport, *Report on the Wheat Export Marketing Bill 2008 Exposure Draft*, para 3.144.

32 Explanatory Memorandum, *Wheat Export Marketing Act 2008* (Cth), p. 8 & 13.

33 Explanatory Memorandum, *Wheat Export Marketing Act 2008* (Cth), p. 8.

34 Explanatory Memorandum, *Wheat Export Marketing Act 2008* (Cth), p. 13.

test demonstrates a clear intention to legislate measures to mitigate the possibility of such conduct undermining the broader intent of the legislation.

The ACCC notes the intention of Parliament in including the access test in the WEMA:

> 'This clause [that is, containing the access test] is intended to ensure that accredited exporters that own, operate or control port terminal facilities provide *fair and transparent access* to their facilities to other accredited exporters. The test aims to avoid regional monopolies unfairly controlling infrastructure necessary to export wheat in bulk quantities, to the detriment of other accredited exporters. All accredited exporters should have access to these facilities while allowing the operators of the facilities to function in a commercial environment.'[35]

The ACCC therefore considers it relevant, and consistent with the intentions of Parliament, to have regard to the extent to which the proposed Undertaking provides for 'fair' access to port terminal services. The ACCC considers that in the current context, 'fair access' ought largely to be equated with non-discriminatory access, reflecting the desirability of ensuring that access to port terminal services is, on the whole, provided on a non-discriminatory basis except where there is a legitimate reason for differential treatment.

The ACCC also considers it relevant, and consistent with the intentions of Parliament, to have regard to the extent to which the proposed Undertaking provides for transparency in relation to the provision of access to port terminal services. That said, the ACCC notes as a general statement that the desirability of transparency ought to be balanced against the desirability of protecting commercially sensitive or otherwise confidential information.

The ACCC notes that GrainCorp has recognised these concepts of fairness and transparency in its supporting submissions:

> '**Non-discriminatory access**: GrainCorp must provide access in accordance with price and non-price terms that include efficiency, fairness and transparency as central elements…'[36]

### 3.3.2 Other matters

The ACCC also considers it relevant that the proposed Undertaking provide for sufficient certainty and clarity in its terms, effect and operation, so as to:

- enable the access provider and access seekers to be sufficiently aware of their respective rights and obligations, and thereby avoid unnecessary costs, monetary or otherwise, when utilising the processes set by the proposed Undertaking;

- enable the mediator and/or arbitrator appointed pursuant to the proposed Undertaking to quickly and effectively resolve any dispute that may arise between an access seeker and the access provider; and

---

35 Explanatory Memorandum, *Wheat Export Marketing Act 2008* (Cth), p. 31, emphasis added.

36 GrainCorp Operations Limited, *Submission to the ACCC*, 15 April 2009, para 2.1(b), p. 3, emphasis in original.

- enable the ACCC to quickly and effectively resolve any potential enforcement concerns that may arise regarding potential non-compliance with the proposed Undertaking by GrainCorp.

## 3.4 The objects of Part IIIA

The objects of Part IIIA 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.[37]

### 3.4.1 GrainCorp submissions

GrainCorp submits that:

> '…the access arrangements (that already exist and expanded and more fully documented in the Access Undertaking) promote the economically efficient use of bulk wheat port terminals, and also promote competition in upstream and downstream markets by giving industry confidence that the transition away from the bulk wheat export monopoly will not be hindered by port access issues arising from anti-competitive behaviour;'[38]

GrainCorp further submits that:

> 'To the extent that port terminal facilities cannot be economically duplicated, an undertaking to provide access to services from those facilities on transparent and non-discriminatory terms would promote the economically efficient use of those facilities and promote competition in vertically related markets, thereby promoting the objects of Part IIIA.
>
> **However, the assumption that Port Terminal Facilities cannot be economically duplicated has not been fully established**.
>
> GrainCorp considers that there is scope for new entry, and there is some potential for intra-port competition. Given that GrainCorp has historically provided access to Port Terminal Services in the absence of a formal access undertaking, the Commission should accept an undertaking that only requires GrainCorp to publish reference prices for a set of standard services without submitting price and non-price terms and conditions to the Commission for prior approval as part of the undertaking. This approach would protect investment incentives and promote economically efficient investments in port terminal facilities.
>
> Accordingly, the Access Undertaking is sufficient to promote the economically efficient operation of, use of and investment in bulk wheat export terminals and thereby promote effective competition in upstream and downstream markets by giving industry confidence that the transition from

---

37 *Trade Practices Act 1974* (Cth) s 44AA.

38 GrainCorp Operations Limited, *Submission to the ACCC*, 15 April 2009, para 3.1, p. 9.

> the bulk wheat export monopoly will not be hindered by port access issues arising from anti-competitive behaviour.'[39]

Further, GrainCorp submits that:

> One of the objects of Part IIIA is to "*provide a framework and guiding principles to encourage a consistent approach to access regulation in each industry*." However, the ACCC should consider each individual Undertaking [offered by each of the bulk handlers] on its merits, having regard to the specific industry environment in which that applicant operates, and matters which relate specifically to the provision of the relevant services by that applicant.'[40]

### 3.4.2 Objects of Part IIIA – promotion of efficiency and competition

The ACCC considers that economic efficiency has three components.

> Productive efficiency refers to the efficient use of resources within each firm such that all goods and services are produced using the least cost combination of inputs.
>
> Allocative efficiency refers to the efficient allocation of resources across the economy such that the goods and services that are produced in the economy are the ones most valued by consumers. It also refers to the distribution of production costs amongst firms within an industry to minimise industry-wide costs.
>
> Dynamic efficiency refers to the efficient deployment of resources between present and future uses such that the welfare of society is maximised over time. Dynamic efficiency incorporates efficiencies flowing from innovation leading to the development of new services, or improvements in production techniques.

The ACCC notes that its present role is to decide whether or not it is appropriate to accept the proposed Undertaking having regard to the matters in section 44ZZA(3) of the TPA.

It is not the ACCC's role in the current context to re-evaluate the policy considerations of government that led to the removal of the single desk, nor to assess the rationale of the access test. As outlined above, the ACCC acknowledges the objects of the WEMA to promote the development of a bulk wheat marketing industry that is efficient, competitive and advances the needs of wheat growers, and the rationale for including the access test as a measure against the potential for port facility operators to frustrate the competitiveness of that industry. The ACCC is therefore not assessing the *need* for an undertaking in the first place but rather the appropriateness of the proposed Undertaking, having regard to the matters in section 44ZZA(3).

There is no requirement in Division 6 of Part IIIA that requires the ACCC to be satisfied, prior to accepting an access undertaking proffered pursuant to that Division, that it is uneconomical to duplicate the facility by means of which the service the

---

39 GrainCorp Operations Limited, *Submission to the ACCC*, 15 April 2009, para 10.2, p. 60, emphasis in original.

40 GrainCorp Operations Limited, *Supplementary submission to the ACCC*, 24 June 2009, p. 3.

subject of the undertaking is provided.[41] In particular, the matters listed in section 44ZZA(3) of Division 6 do not require the ACCC to have regard to whether or not it is uneconomical to duplicate the particular facility. Therefore, even absent the existence of the WEMA, the ACCC considers it is not its role in assessing an undertaking provided under Division 6 of Part IIIA to determine whether the facility to which the undertaking relates is uneconomical to duplicate, nor whether the facility would otherwise meet the requirements for declaration under Division 2.

The ACCC therefore does not consider that its role in the current context is to thoroughly assess the state of competition in the bulk wheat export industry and evaluate whether access undertakings are justified (such as by reason of the port terminal facilities being uneconomical to duplicate). Instead, the ACCC considers that Parliament has expressed a clear intention to require port terminal operators to provide access undertakings to mitigate the potential for anti-competitive harm, and it is in that context that the ACCC must consider the appropriateness of those undertakings as provided.

The ACCC nonetheless considers it appropriate, in having regard to the matters in section 44ZZA(3)(aa) and (b) of Part IIIA, to have some regard to the competitive environment in which the services the subject of the undertaking are provided. That is, section 44ZZA(3)(aa), by referring to the objects of Part IIIA, recognises the promotion of the economically efficient operation of, use of and investment in infrastructure, thereby promoting competition in upstream and downstream markets, while section 44ZZA(3)(b) refers to the public interest, including the public interest in having competition in markets (whether or not in Australia).

### 3.4.3 Objects of Part IIIA – a consistent approach to access regulation

Section 44AA(3)(b) of the TPA states that an object of Part IIIA is to provide a framework and guiding principles to encourage a consistent approach to access regulation in each industry.

In this particular instance, the ACCC notes that the undertaking provided by GrainCorp is one of three undertakings that have been proposed by three bulk handling companies that, taken together, cover services provided by means of facilities at seventeen grain export terminals around Australia. Further, the undertakings have been proffered to the ACCC pursuant to a Commonwealth scheme designed to introduce competition into the bulk wheat export industry.

In this context, the ACCC acknowledges differences in the circumstances of each bulk handler, including differences in the services provided by means of a particular facility, and the extent to which such differences may influence the ACCC's consideration of the appropriateness of the undertaking proposed by that bulk handler.

The ACCC also acknowledges, however, the desirability of encouraging a consistent approach to access regulation, as recognised in section 44AA(3)(b) of the TPA, and

---

[41] This concept is relevant to Division 2 of Part IIIA of the TPA which sets out a mechanism by which parties may seek to have certain services declared. Section 44G(2) of the TPA provides that the NCC cannot recommend to the Minister that a service be declared unless it is satisfied of various matters, including '…that it would be uneconomical for anyone to develop another facility to provide the service.'

considers that, to the extent possible and appropriate, the Undertaking proposed by GrainCorp ought to maintain consistency with the undertakings proposed by the other bulk handlers.

## 3.5 The public interest

Section 44ZZA(3)(b) requires the ACCC to have regard to the public interest, including the public interest in having competition in markets (whether or not in Australia).

### 3.5.1 GrainCorp submissions

GrainCorp submits that:

> '…the public interest and the interests of access seekers is served by GrainCorp continuing to provide access to Port Terminal Services to accredited wheat exporters but under more fully documented arrangements which ensure certainty, transparency and non-discrimination such that the public and access seekers can be confident of a successful transition from a single desk to competition in the export of bulk wheat.' [42]

GrainCorp further submits that:

> 'The public interest would be served if GrainCorp continues to provide access to Port Terminal Services on terms and conditions determined by them subject to a binding process for resolving any dispute about the terms of access. It would protect incentives to make economically efficient investment in Port Terminal Services which would promote the public interest in the long run. It also balances the potentially large cost of regulation with the relatively minimal benefits of access regulation in this case.
>
> The more fully documented arrangements under the Access Undertaking ensure certainty, transparency and non-discrimination such that the public can be confident of a successful transition from a single desk to competition in the export of bulk wheat.'[43]

### 3.5.2 ACCC's views

Section 44ZZA(3)(b) reflects the reference in the Part IIIA objects to the promotion of effective competition in upstream and downstream markets, as discussed above. Therefore, in having regard to this matter, the ACCC again notes the previous discussion regarding the rationales for the WEMA and the access test. However, the public interest also encompasses broader considerations.

Relevantly, the ACCC also considers it appropriate to have regard to the transitional state of the bulk wheat export industry. GrainCorp notes in its submission that:

> 'The bulk wheat export industry is in the early stages of transition following removal of the bulk wheat export monopoly on 1 July 2008.'[44]

The ACCC recognises that the replacement of the single desk for bulk wheat exports with multiple accredited exporters is a significant change to Australia's bulk wheat

---

42 GrainCorp Operations Limited, *Submission to the ACCC*, 15 April 2009, para 3.1, p. 9.
43 GrainCorp Operations Limited, *Submission to the ACCC*, 15 April 2009, para 10.5, p. 60.
44 GrainCorp Operations Limited, *Submission to the ACCC*, 15 April 2009, para 3.1, p. 10

export industry. Experience in dealing with multiple exporters competing in the high volume bulk wheat industry is currently limited to a single season only. To the extent that parties have commented on the problems within the industry in the first season following deregulation, the ACCC recognises that certain of those comments likely derive from teething problems as the industry adapts to the changes.

In this context the ACCC recognises the risk and undesirability of imposing regulation that is not appropriate at a time when the industry is newly deregulated and in transition, and the associated risk of distorting the effective development of competition and efficiency in that industry. The ACCC considers it would not be in the public interest for such an outcome to occur. The ACCC notes, in this regard, that GrainCorp's proposed Undertaking has a short term of two years.

## 3.6 The legitimate business interests of the provider

Section 44ZZA(3)(a) requires the ACCC to have regard to the legitimate business interests of the provider, in this case GrainCorp.

### 3.6.1 GrainCorp submissions

GrainCorp submits that:

> '…the access arrangement will promote GrainCorp's legitimate business interest in providing access on price and non-price terms and conditions that ensure that it receives at least a return on investment that is commensurate with risk…' [45]

### 3.6.2 ACCC 's views

When having regard to the legitimate business interests of the access provider the ACCC considers whether particular terms and conditions in the proposed Undertaking are sufficient and necessary to maintain those interests. The ACCC agrees with GrainCorp's general proposition that it should be able to receive a return on investment that is commensurate with risk.

Potentially relevant to this criterion, is that, if the ACCC does not accept GrainCorp's proposed Undertaking by 1 October 2009, the marketing arm of GrainCorp is likely to lose accreditation under the WEMA to export bulk wheat.

While acknowledging that loss of accreditation is likely to have adverse commercial consequences for GrainCorp, the ACCC does not consider that such an adverse consequence necessarily outweighs other matters to which the ACCC is having regard in deciding whether it is appropriate to accept the proposed Undertaking. For example, the ACCC does not consider that the loss of accreditation is likely to justify the ACCC accepting the proposed Undertaking where the ACCC takes the view that the proposed Undertaking does not appropriately give effect to the objectives of the WEMA.

That said, the ACCC is making every effort to ensure its assessment of GrainCorp's proposed Undertaking is carried out in a timely manner to alleviate the extent to

---

[45] GrainCorp Operations Limited, *Submission to the ACCC*, 15 April 2009, para 3.1, p. 9.

which the consequences of failing to meet the 1 October 2009 deadline may need to be taken into account by the ACCC.

In this regard, the ACCC notes that ACCC staff began engaging with GrainCorp in March 2008 about the need to ensure that sufficient time (i.e. at least 6 months, if not longer) was allowed for the ACCC's assessment of the proposed Undertakings.

Despite this, the ACCC did not receive the proposed Undertaking until 15 April 2009 but are still endeavouring to accommodate the timing set by GrainCorp as much as possible.

## 3.7 The interests of access seekers

Section 44ZZA(3)(c) requires the ACCC to have regard to the interests of persons who might want access to the service.

### 3.7.1 GrainCorp submission

GrainCorp submits that:

> 'Under the Access Undertaking, GrainCorp will continue to provide access to Port Terminal Services to any accredited wheat exporter that meets reasonable prudential requirements.
>
> Such users are adequately protected by the requirement to publish pricing for standard services, the obligations not to discriminate and the detailed negotiate/arbitrate mechanisms.'[46]

### 3.7.2 ACCC's views

This criterion is counterpoised to the 'legitimate business interests of the provider' criterion. While the two criteria may appear to be in conflict with each other, over the long term any conflict is likely to be ameliorated. That is, it is in access seekers' long-term interest that prices and returns are sufficient to provide the incentives needed to induce the access provider to invest in and adequately maintain services.

To assess the interests of access seekers the ACCC has conducted a public consultation process on the proposed Undertaking, during which the ACCC sought and received comments from a range of participants in the bulk wheat export industry. The ACCC considers that submissions made during the public consultation by actual and potential access seekers are relevant in having regard to section 44ZZA(3)(c). Public submissions provided by interested parties are available on the ACCC's website.

In summary, the ACCC notes that a number of common matters raised by third parties in submissions concerned:

- the degree of transparency around allocation of shipping capacity, including the criteria used to determine positions on the shipping stem, and the ability of exporters to obtain a shipping slot;

---

[46] GrainCorp Operations Limited, *Submission to the ACCC*, 15 April 2009, para 10.6, p. 61.

- the acceptance of grain at port that has not come from the port operators' own storage and handling network;
- the possibility of effectively bypassing the port operators' up-country storage and handling facilities;
- the availability of information on grain stocks; and
- the reasonableness of terms and conditions of access to supply chain services.

The ACCC notes that this list is a high level summary only of matters raised during the public consultation and is not indicative of matters that the ACCC considers would need to be addressed by the proposed Undertaking.

## 3.8 The pricing principles in section 44ZZCA

The ACCC is required to have regard to the pricing principles specified in section 44ZZCA of the TPA, which provides as follows:

> 'The pricing principles relating to the price of access to a service are:
>
> (a) that regulated access prices should
>
> (i) be set so as to generate expected revenue for a regulated service or services that is at least sufficient to meet the efficient costs of providing access to the regulated service or services; and
>
> (ii) include a return on investment commensurate with the regulatory and commercial risks involved; and
>
> (b) that the access price structures should:
>
> (i) allow multi-part pricing and price discrimination when it aids efficiency; and
>
> (ii) 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
>
> (c) that access pricing regimes should provide incentives to reduce costs or otherwise improve productivity.'[47]

### 3.8.1 ACCC consideration

The pricing principles are intended to assist in the achievement of the objects of Part IIIA by 'providing effective market signals for the efficient use of existing resources and for future investment in infrastructure'.[48]

---

47 *Trade Practices Act 1974* (Cth) s 44ZZCA.

48 Revised Explanatory Memorandum, *Trade Practices Amendment (National Access Regime) Bill 2006* (Cth), p. 64.

*Pricing principle (a): Recovery of efficient costs*

Part IIIA does not prescribe a particular methodology for setting an access price. Rather, pricing principle (a) aims to address the motive for regulating access prices (monopoly pricing) whilst not deterring investment.[49]

The explanatory memorandum states that the 'starting point to achieving efficient use of infrastructure' is for the price of access to equal the cost of providing an additional unit of the service.

*Pricing principle (b): Pricing structure*

Part IIIA does not prescribe a particular access price structure that must be used in an undertaking. However, pricing principle (b) refers to two specific price structures: multi-part pricing and price discrimination.

Multi-part pricing typically involves an up-front price to access the network, plus a per-unit or usage price. Price discrimination occurs where, for instance, individual access users are charged a different price for the same service.

Pricing principle (b) provides that a price structure should allow multi-part pricing and price discrimination but only when it aids efficiency.

In particular, where an access provider is vertically integrated, price discrimination in favour of the access provider's own operations should not occur (except when the cost of provision by the provider to other users is higher than provision of the service to itself).

*Pricing principle (c): Productivity*

Pricing principle (c) refers to the desirability for access pricing regimes to provide incentives for infrastructure providers to make productivity gains without prescribing the specific mechanisms.[50]

The ACCC notes that the proposed Undertaking submitted by GrainCorp does not propose ex ante pricing regulation, and instead proposes a 'publish-negotiate-arbitrate' approach, under which GrainCorp is obliged to publish prices at a certain time.

Accordingly, the ACCC is not, in this context, assessing the appropriateness of pricing for port terminal services.

However, the ACCC considers that the pricing principles are nonetheless relevant in the sense that they provide guidance on the appropriateness of any pricing discrimination envisaged by the proposed Undertaking. It is the ACCC's view that, in accordance with pricing principle (b), price discrimination in favour of GrainCorp's

---

49 Revised Explanatory Memorandum, *Trade Practices Amendment (National Access Regime) Bill 2006* (Cth), p. 65.

50 Revised Explanatory Memorandum, *Trade Practices Amendment (National Access Regime) Bill 2006* (Cth), p. 67.

own operations should not occur except when the cost of provision by GrainCorp to other users is higher than provision of the service to itself.

## 3.9 Whether the undertaking is in accordance with an access code

Section 44ZZAA of the TPA provides that an industry body may give a written code to the ACCC setting out rules for access to a service.[51] The ACCC may accept the code, if it thinks it appropriate to do so having regard to matters set out in section 44ZZAA(3).[52] An 'industry body' means a body or association (including a body or association established by a law of a State or Territory) prescribed by the regulations for the purposes of section 44ZZAA.[53]

In having regard to this matter in the current context, the ACCC notes that there is currently no access code in place that applies to the service that is the subject of the proposed Undertaking.

[51] *Trade Practices Act 1974* (Cth) s 44ZZAA(1).
[52] *Trade Practices Act 1974* (Cth) s 44ZZAA(3).
[53] *Trade Practices Act 1974* (Cth) s 44ZZAA(8).

# 4 Industry background

**Summary**

This chapter sets out an overview of the grains industry in Victoria, New South Wales and Queensland.

## 4.1 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.[54]

GrainCorp owns and operates 280 receival sites throughout New South Wales, Victoria and Queensland, with a total storage capacity of 20 mt.[55] GrainCorp also owns and operates seven grain export terminals on the eastern seaboard.

GrainCorp's principal business activities are aligned into three business units—storage and logistics, trading, and ports and new business. 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—road and rail transport services for certain bulk commodities is managed by the Storage and Logistic business unit
- 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.[56]

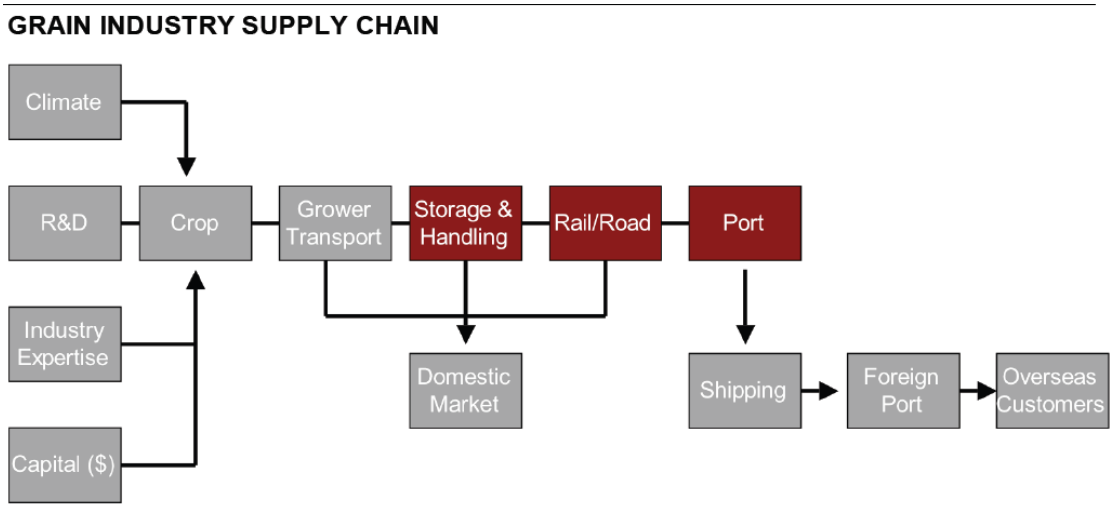
[54] GrainCorp Operations Limited, *Submission to the ACCC*, 15 April 2009, Schedule 1, p. i.
[55] GrainCorp Operations Limited, *Submission to the ACCC*, 15 April 2009, Schedule 1, p. ii.
[56] GrainCorp Operations Limited, *Submission to the ACCC*, 15 April 2009, Schedule 1, p. ii.

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

## 4.2 Structure of the wheat industry in Eastern Australia

Figure 1.2.1 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.[57]

**Figure 1.2.1: Grain industry supply chain**




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

Figure 1.2.2 sets out GrainCorp's storage and handling network.

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

**Figure 1.1.2: Map of GrainCorp's country receival site network**


Source: GrainCorp Operations Limited, (2009).

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.

### 4.2.1 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. Wheat is the dominant grain in New South

Wales, accounting for 65 per cent of total production on average in the five years to 2007-08.[58]

The area planted to wheat in New South Wales in 2008-09 is estimated to have fallen marginally to just less than 4 million hectares. Total wheat production is estimated at around 6.8 mt in 2008-09, which is around 4.3 mt more than what was produced in the previous season.[59]

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

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

**Up-country storage and handling in New South Wales**

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

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

The smallest of the three storage and handling companies in New South Wales is Australian Bulk Alliance (ABA). It owns three receival sites in the state located in the Riverina and the South West, which handled approximately 3 per cent of the state's wheat receivals between 2001-02 and 2005-06.[61]

**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

58 ABARE (2009) *Australian Crop Report*, report no. 150, June 2009.
59 ABARE (2009) *Australian Crop Report*, report no. 150, June 2009.
60 Allen Consulting Group (2008) *Competition in the Export Grain Supply Chain*, March, p. 9.
61 Allen Consulting Group (2008) *Competition in the Export Grain Supply Chain*, March, p. 10.

the industry relies heavily on rail to move at least 90 per cent of exports and about 75 per cent of wheat for milling.[62]

The volume of annual grain exports from New South Wales ranges from less than 1 mt to over 5 mt. 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 700 000 tonnes of grain from the surrounding region. Exports are therefore sourced largely from the northern and south-western regions.

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 Review had regard to:

- grain supply situation in NSW
- market demand situation for NSW-produced grain, including considering the likely impact of the *Wheat Export Marketing Act 2008* on both the domestic and export grain sectors
- capacity of the grain supply chain infrastructure to service the domestic and export markets in terms of the various transport options currently available to growers and service providers.[63]

**Port terminals in New South Wales**

There are two grain terminals at New South Wales ports, both operated by GrainCorp. The terminal located at Carrington in Newcastle has overall storage capacity of 164 000 tonnes. The terminal at Port Kembla (near Wollongong) has 30 storage bins and a storage capacity of 260 000 tonnes. Both port terminals are serviced by both road and rail.

### 4.2.2 Victoria

**Grain production in Victoria**

Victoria produces around 11 per cent of wheat in Australia. Wheat accounted for roughly 54 per cent of total state production on average in the five years to 2007-08.[64] The area planted to wheat in Victoria in 2008-09 is estimated at around 1.6 million hectares. Total wheat production is estimated at about 1.5 mt for 2008-09, which is around 0.5 mt less than what was produced in the previous season.[65]

---

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

63 Department of Infrastructure, Transport, Regional Development and Local Government, *NSW Grain Freight Review Terms of Reference*, October 2008.

64 ABARE (2009) *Australian Crop Report*, report no. 150, June 2009.

65 ABARE (2009) *Australian Crop Report*, report no. 150, June 2009.

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.[66]

**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). The part owner of ABA, ABB Grain, also operates a number of up-country facilities.

Approximately 76 per cent of wheat receivals in Victoria are handled by GrainCorp, with AWB Grainflow handling approximately 16 per cent.[67] An increasing proportion of grain destined for the domestic market is being stored on-farm and transported to market by road.

**Transportation in Victoria**

Approximately 80 to 90 per cent 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.

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.

Until recently, the majority of the Victorian grain rail task was hauled by Pacific National. Following the withdrawal of Pacific National from the management of Victoria's freight lines, El Zorro has 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. ABB has a memorandum of understanding with Genesee and Wyoming to operate one train on Victoria's broad gauge lines to rail grain from ABB Grain 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 ABA is a 50/50 incorporated joint venture of ABB Grain and Sumitomo Corporation.[68]

Geelong is the largest of the terminals in terms of storage, and has 99 concrete silos and 66 inner spaces, and can therefore provide a high degree of segregation between types and grades of grain. Geelong is the largest regional port in Victoria and an

---

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

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

68 The ACCC notes that Wheat Exports Australia has 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.

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. At present, the port is served by road, which bypasses the City of Portland to allow 24-hour access.

Melbourne Port Terminal was commissioned in 2000 and has 20 steel bins. 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.

### 4.2.3 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.[69] Wheat accounted for 39 per cent of Queensland's total grain production on average in the five years to 2007-08.[70] 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.[71]

The area planted to wheat in Queensland in 2008-09 is estimated at around 1 million hectares. Total wheat production is estimated at about 1.9 mt for 2008-09, which is around 0.9 mt more than what was produced in the previous season.[72]

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.[73]

**Up-country storage and handling in Queensland**

Grain storage and handling infrastructure in Queensland is predominately owned and operated mainly by two companies. The largest of these is GrainCorp, which handled approximately 79 per cent of the state's wheat receivals between 2001-02 and 2005-06.[74] It did so through a network of 10 primary sites and 32 storage sites.[75]

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

---

69 Allen Consulting Group (2008) *Competition in the Export Grain Supply Chain*, March, p. 66.
70 ABARE (2009) *Australian Crop Report*, report no. 150, June 2009.
71 Australian Bureau of Statistics (2006) *Value of Agricultural Commodities Produced*, Australia 2004-05, Catalogue No. 7503.0, Canberra.
72 ABARE (2009) *Australian Crop Report*, report no. 150, June 2009.
73 Allen Consulting Group (2008) *Competition in the Export Grain Supply Chain*, March, p. 66.
74 ITS Global (2007) *Grain Marketing Transition Factsheets: Competition in the Domestic Grain Supply Chain*, prepared for AWB, Melbourne.
75 Allen Consulting Group (2008) *Competition in the Export Grain Supply Chain*, March, p. 12.

2005-06.[76] AWB GrainFlow maintains four receival sites in Queensland, all of which are located in the Darling Downs.[77]

**Transportation in Queensland**

Rail services in Queensland are provided by QR, 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.[78] According to consulting firm Strategic Design and Development:

> The rail network is operated by QR (track and trains) under government ownership. Some lines are falling into poor condition and volumes have been weak over the last decade. The current strong harvest has exposed the shortage of trains and resources. Tactical marketing decisions by the trade have further hindered the movement of grain out of storage towards port.
>
> The rail line between Toowoomba and Brisbane is congested with coal traffic from the growing Oakey area. The government has plans for a new corridor through the area, but no development commitment has been made. Grain train paths are severely limited on the existing alignment.[79]

**Port terminals in Queensland**

There are three grain terminals in Queensland, all of which are owned and operated by GrainCorp. The most significant of these is located at Fisherman Island, near Brisbane. It uses a combination of multi-commodity sheds, pads (with capacities of 25 000 tonnes) and bins (with capacities ranging from 50 to 7500 tonnes) to store grain, and has a total capacity of 218 400 tonnes fumigable.[80] The Fisherman Island grain terminal can inload grain from rail and offload grain onto ships at a rate of 2200 tph.[81]

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 86 900 tonnes.[82] The Gladstone grain terminal can inload grain from rail at a rate of 1400 tph, and offload grain onto ships at a rate of 1000 tph.[83]

GrainCorp also has a grain terminal at Mackay. It has eight concrete silos and pads, with a total storage capacity of 82 000 tonnes.[84] The Mackay grain terminal can

---

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

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

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

79 Strategic Design and Development (2008) *Grain Supply Chain Stage One Final Report National Transport Commission*, December, p. 9.

80 GrainCorp Limited (2009) *Fisherman Island Terminal*, accessed 23 July 2009 at http://www.graincorp.com.au/prodserv/Ports/Pages/FishermanIslandTerminal.aspx.

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

82 GrainCorp Limited (2009) *Gladstone Terminal*, accessed 23 July 2009 at http://www.graincorp.com.au/prodserv/Ports/Pages/GladstoneTerminal.aspx.

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

84 GrainCorp Limited (2009) *Mackay Terminal*, accessed 23 July 2009 at http://www.graincorp.com.au/prodserv/Ports/Pages/MackayTerminal.aspx.

inload grain from rail at a rate of 750 tph and offload grain onto ships at a rate of 900 tph.[85]

## 4.3 Industry structure—GrainCorp submissions

GrainCorp submits 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 the 'residual' bulk export volumes are highly variable, where GrainCorp 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, 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 changes 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. 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 proportion is generally wheat.[86]

The ACCC's Issues Paper and information request to GrainCorp included questions on industry structure. GrainCorp's responses to some of these questions are set out below.

> *Question 1: Paragraph 5.5 of GrainCorp's supporting submission to its proposed undertaking dated 15 April 2009 (GrainCorp's submission) states that grain exporters in Victoria and southern NSW are able to ship grain through port terminals owned by three different companies (GrainCorp, ABB and Australian Bulk Alliance (ABA)).*

---

85 Allen Consulting Group (2008) *Competition in the Export Grain Supply Chain*, March, p. 13.
86 GrainCorp Operations Limited, *Submission to the ACCC*, 15 April 2009, para 4.1, p. 14.

*What impact, if any, has this had upon terms and conditions of access to GrainCorp's port terminals that in GrainCorp's opinion compete with ABB and ABA port terminals? Please provide any relevant documents or materials to support your response*

The terms and conditions for most port terminal services are similar across Australia given the role that the previous single desk monopoly provider played in agreeing the framework for wheat. The terms and conditions from a ports perspective also have common conditions that govern the shipping interface that are developed to meet international standards of operation. Competition from other terminals, in normal seasons, has not materially altered the existing non-price terms and conditions nor changed the pricing of services given the already low returns over the cycle that are being made on these assets.

There may be changes to pricing between different terminal facilities for example, where significant underutilisation occurs during drought periods.

*Is there any difference between the price and non-price terms offered to marketers exporting out of different GrainCorp terminals?*

The non-price terms of access are the same across all terminals for all exporters. However, there is a difference in the price for using Queensland terminals based on the lower average utilisation of the ports and the need to obtain an adequate return to continue to support their ongoing viability. This is a structure that has been in place for many years and is applied on the same terms for all exporters.

*Question 2: What factors influence the ability of bulk wheat exporters to switch between terminals (either located in different port zones or owned by different bulk handlers) for the export of bulk wheat? What is the effect of transport costs, infrastructure constraints, availability of transport providers, terminal capacity and terminal availability?*

Grain exporters will take into consideration a large range of factors when making a decision on which port terminal to export through. The general principle is that they will choose the least cost pathway given the requirement to maximise returns on behalf of their owners and customers. The key factors include, but are not limited to, the following:

- commodity grade location
- distance from port and the relative freight differentials between the same
- time taken to transfer from country site to port relative to required load date
- ownership interest in transport capacity
- available export capacity at a point in time
- available port storage capacity
- pricing of supply chain services.

The range of variables that will determine the flow of grain between terminals make it difficult to provide a definitive answer on the decision making process. However, on the basis that the GrainCorp service model is to provide price and non-price terms on the same basis to all exporters and that port terminal capacity, in most years, is underutilised the most significant factor influencing the flow of grain is the transport cost.

The typical differential between road and rail transport is $10–15 per tonne. Rail is, in almost all circumstances on the east coast, the most efficient and cost effective means of moving grain to port. Rail can be contracted by any party directly with rail providers on a take or pay basis or purchased from rail freight providers on a spot or contract basis. Road can be contracted through a multitude of providers with some major exporters purchasing and running their own fleet of trucks for this purpose.

Importantly, evidence given by WEA to the Senate Estimates Hearing on 25 May 2009 included that 'There is grain travelling from Queensland down to Victoria …'[87] This indicates that the market is working and clearly able to allocate resources were required if the appropriate commercial drivers are in place, and clearly indicates that domestic demand in the eastern states is the primary market, with the export market secondary due to the differences in gross returns available.

Our primary observation on exporter behaviour is a general reluctance by all exporters, due to the inherent variability in export volumes, to commit to sufficient forward capacity to give service providers certainty in providing assets to meet the export task.

This is particularly the case with rail which is the major limiting factor on improved export performance. Where an exporter does make a commitment to forward capacity for a scarce resource like rail transport they are able to more effectively manage the choice in pathways and timing of exports from alternative port terminal service providers.

There is a strong element of 'free-riding' by almost all exporters on supply chain asset capacity in Australia with a general reluctance to take on or share risk. This is substantially different to all other markets across the globe where multi-national or local grain traders must build, or forward contract on a take or pay basis, significant supply chain capacity, be it country storage, rail road or port loading services.

AGEA submits that '*in Canada, the USA, South America and Europe including the Black Sea, the level of choice available to wheat exporters and the competition between port operators is extensive (paragraph 3.17, 29 May 2009 submission.*

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.

AGEA advised in their submission that they would be willing to assist the ACCC in reviewing supply chain practice in other countries. We concur that this would be a very useful and informative exercise. As an example of public access to port facilities we would recommend that the ACCC review the public access regime for the third party owned Port of Houston grain elevator

---

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

which is managed by a multinational grain trading company. Details of the facility can be found at the following web address.

http://www.portofhouston.com/maritime/general_cargo/elevator.html

In addition the AGEA members should be invited to provide examples from their global operations specifically stating where they offer port terminal access to other competing exporters on equivalent terms to their own trading division i.e. that another trader can buy port terminal services on an equivalent pricing basis as their trading division without having to buy on a grain only FOB basis.

We reject the assertion by the AGEA members that they are unable to obtain a fair and competitive supply chain service on the east coast. We suggest that the key issue is their reluctance, but not the lack of financial capacity, to commit to forward investments in transport services.[88]

## 4.4 Regulatory regimes

### 4.4.1 New South Wales

No regulatory framework specifically applies to port terminal operators in New South Wales. 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*.

Instead, there has been much discussion over the current 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.

### 4.4.2 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* 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 ensuring 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

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

negotiate-arbitrate access regime.[89] 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
- 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, the ABA and GrainCorp made 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.[90]

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. However, given the significant degree of change in the grain industry and in particular the uncertainty over wheat marketing arrangements, and residual concerns about

---

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

90 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.

competitive access to terminals for minor marketers, the ESC recommended retention of the Act in the short term.[91]

### 4.4.3 Queensland

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

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

At present, no grain port terminals are the subject of an access regime.

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

# 5 Background, Objectives and Structure sections of the proposed Undertaking

**Summary**

***Background section***

It is not necessary for the ACCC to form a view on the appropriateness of the background section pursuant to section 44ZZA(3) given that it is merely descriptive and places no obligations on GrainCorp.

***Objectives***

The objectives section, critical to the operation of the proposed Undertaking, is not appropriate pursuant to section 44ZZA(3) given concerns with the following particular objectives:

- "The recovery of all reasonable costs associated with the granting of access to the Port Terminal Services" (clause 1.2(e)(i)(A)); and
- "GrainCorp's ability to meet its own or its Trading Division's reasonably anticipated requirements for Port Terminal Services" (clause 1.2(e)(i)(D)).

***Structure***

The structure section of the proposed Undertaking is not appropriate pursuant to section 44ZZA(3) given concerns with:

- The reference to a "Schedule" (rather than a "Port Schedule") prevailing over the General Terms (clause 2); and
- The reference to using 'reasonable endeavours' to procure (clause 2.3).

## 5.1 GrainCorp's proposed Undertaking dated 15 April 2009

### 5.1.1 Background section of the proposed Undertaking

GrainCorp's proposed Undertaking includes the following introductory section at clause 1.1:

> 1. Introduction
>
> a. GrainCorp operates the Port Terminal Facilities at the Port Terminals.
>
> b. The Port Terminal Facilities provide services relating to the export of Bulk Wheat and other commodities.

c. GrainCorp has historically provided access to services provided by the Port Terminals to third parties under open access policies.

d. GrainCorp has applied to become an Accredited Wheat Exporter under the *Wheat Export Marketing Act 2008* (Cth).

e. Under section 24 of the WEMA, a person who is also the provider of one or more port terminal services (as defined under that Act) must satisfy the 'access test' to be eligible for accreditation to export bulk wheat.

f. The 'access test' under the WEMA requires:

    i. the person to comply with the continuous disclosure rules in relation to a port terminal service; and

    ii. either there is:

        A. an access undertaking in operation (under Division 6 Part IIIA of the Trade Practices Act 1974) relating to the provision to Accredited Wheat Exporters of access to the port terminal service for purposes relating to export of Bulk Wheat; or

        B. a decision in force that a regime established by a State or Territory for access to the port terminal service is an effective access regime (under Division 2A Part IIIA of the TPA) and under that regime Accredited Wheat Exporters have access to the port terminal service for purposes relating to the export of Bulk Wheat.

g. GrainCorp has submitted this Undertaking to the ACCC for approval under Part IIIA of the TPA for the purpose of satisfying the 'access test'.

### 5.1.2 Objectives of the proposed Undertaking

At clause 1.2 GrainCorp states that the proposed Undertaking has the following objectives:

a. providing a framework to manage negotiations with Applicants for access to services provided by certain facilities at the Port Terminals in relation to export of Bulk Wheat;

b. establishing a workable, open, non-discriminatory and efficient process for lodging and processing Access Applications;

c. providing a non-discriminatory approach to pricing under which GrainCorp publishes reference prices and terms and conditions for the provision of certain standard services annually;

d. operating consistently with the objectives and principles in Part IIIA of the TPA and the Competition Principles Agreement;

e. reaching an appropriate balance between:

   i. the legitimate business interests of GrainCorp, including:

      A. the recovery of all reasonable costs associated with the granting of access to the Port Terminal Services;

      B. a fair and reasonable return on GrainCorp's investment in the Port Terminal Facility commensurate with its commercial risk;

      C. GrainCorp's business interests relating to the export of grain other than Bulk Wheat and to the export of non-grain commodities using the Port Terminal Facilities;

      D. GrainCorp's ability to meet its own or its Trading Divisions' reasonably anticipated requirements for Port Terminal Services; and

   ii. the interest of the public, including:

      A. ensuring efficient use of resources; and

      B. the promotion of economically efficient investment, use and operation of the Port Terminals; and

   iii. the interests of Applicants wanting access to the Port Terminal Services, including providing access to the Port Terminal Services:

      A. on non-discriminatory price and non-price terms; and

      B. in a transparent, open, efficient and non-discriminatory manner;

f. providing an efficient, effective and binding dispute resolution process in the event that GrainCorp and the Applicant are unable to negotiate a mutually acceptable Access Agreement; and

g. in accordance with the objective in s44AA(b) of the TPA, providing for a uniform approach to access to the Port Terminal Services at the different Port Terminals to the extent practicable having regard to the different characteristics of the Port Terminals.

### 5.1.3 Structure of the proposed Undertaking

The structure section of GrainCorp's proposed Undertaking is set out at clause 2 as follows:

**2.1 Components**

This Undertaking applies in relation to access to Port Terminal Services provided by means of Port Terminal Facilities at a number of Port Terminals (listed in Schedule 1). The Port Terminal Facilities are geographically

separate and have different physical and operating characteristics and modes of operation.

**2.2 Priority**

The terms of a Schedule will prevail over the General Terms to the extent of any inconsistency between them.

**2.3 Obligation to procure**

If the performance of an obligation under this Undertaking requires a Related Body Corporate of GrainCorp to take some action or refrain from taking some action, GrainCorp must use reasonable endeavours to procure that Related Body Corporate to take that action or refrain from taking that action.

## 5.2 GrainCorp's submissions in support of its 15 April 2009 proposed Undertaking

In its Issues Paper dated 29 April 2009, the ACCC asked questions in relation to the objectives of the proposed Undertaking. In response to submissions from interested parties, GrainCorp expanded on the intent of the object section in its supplementary submission dated 24 June 2009. In relation to clause 1.2(e)(i)(D), which relates to the ability of GrainCorp to reserve its own or its trading divisions' reasonably anticipated requirements for port terminal services, GrainCorp states:

> The language of this clause is based on section 44W of the TPA, which provides that in making an access determination in an arbitration of an access dispute in relation to a 'declared service' the Commission must not make a determination that would have the effect of preventing an existing user obtaining a sufficient amount of the service to be able to meet the user's reasonably anticipated requirements, measured at the time where the dispute was notified.
>
> In its decision in BHP Billiton Iron Ore Pty Ltd v National Competition Council [2008] HCA 45 the High Court referred to s44W(1) requiring that an existing user be able to obtain a sufficient amount of the service to be able to meet the user's reasonably anticipated requirements, measured at the time when the dispute was notified" and found that BHP would be an "existing user" by virtue of providing the relevant service to itself. The Court held that
>
> > It appears that if either of the services to which Fortescue seeks access are services within the meaning of Pt IIIA, then BHPBIO would properly be regarded as providing that service to itself. Therefore it would be an "existing user" whose interests would be afforded the protection given by par (a) of s 44W(1),
>
> This is consistent with the objectives of Part IIIA to promote the economically efficient operation of, use of **and investment in** the infrastructure by which service are provided, thereby promoting effective competition in upstream and downstream markets.
>
> On this basis clause 1.2(e)(i)(D) is justified and a decision by the ACCC to require the removal of that clause would be inconsistent with the High Court's decision in BHP Billiton Iron Ore Pty Ltd v National Competition Council and the objectives of Part IIIA. We note that submissions by interested parties have not raised any evidence to the contrary.

> However, GrainCorp is willing to remove clause 1.2(e)(i)(D) from the Undertaking if the ACCC considers it necessary.[92]

In relation to the 'obligation to procure' at clause 2.3, following submissions from interested parties, GrainCorp stated in its supplementary submission that it is willing to remove this clause. It stated:

> As the operator of the port terminals, GrainCorp is the appropriate party to the Undertaking. GrainCorp is willing to delete the "reasonable endeavours" obligation. On review, the only related companies who could be the subject of this clause are fully owned subsidiaries.[93]

## 5.3 Submissions from interested parties in response to Issues Paper

### 5.3.1 Australian Grain Exporters Association

AGEA states that the objectives clause is 'a mere statement of intent', highlights the BHCs' 'inevitable conflict of interest' and 'may be used to condone discriminatory behaviours by the BHCs'.[94] AGEA submits that this point is demonstrated at clauses 1.2(e)(i)(A) and (D) which refer to the legitimate business interests of the BHCs, including 'recovery of reasonable costs' and their ability 'to meet its own or its Trading Divisions' reasonably anticipated requirement for Port Terminal Services'.[95]

AGEA submits that the objectives clause defines the objectives of the proposed access undertakings using nebulous concepts like "operating consistently with", "reaching an appropriate balance", "fair and reasonable return ... commensurate with ... commercial risk", "the interest of the public" and so on. AGEA submits that there is no tangible basis upon which to assess actual compliance.[96]

AGEA states that it is impossible to assess the appropriateness of the structure of the proposed Undertaking because it does not contain or refer to the prices or terms and conditions on which access will be provided. On this basis, AGEA states 'it is impossible to say whether specific terms and conditions relating to a particular Port Facility should be permitted to override General Terms'.[97]

AGEA submits that clause 2.3 is unsatisfactory in that it enables GrainCorp, or its related entities to avoid their obligations under the proposed Undertaking. AGEA states:

> If a related entity is required to take or refrain from taking some action under the proposed access undertaking, the related entity should be a party to the undertaking or the BHCs should be obliged to procure the related entity to

---

92 GrainCorp Operations Limited, *Supplementary submission to the ACCC*, 24 June 2009, p. 57.
93 GrainCorp Operations Limited, *Supplementary submission to the ACCC*, 24 June 2009, p. 22.
94 Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, p. 16.
95 Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, p.16.
96 Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, p. 16.
97 Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, p. 17.

> take or refrain from taking action. A 'reasonable endeavours' obligation is not sufficient. There should also be an obligation for the BHCs to indemnify any party that suffers loss or damage as a result of the breach. [98]

### 5.3.2 Riverina

Riverina submits that clause 1.2(e)(i)(D) should be deleted as it encourages:

> (i) the consideration of the Trading Division as something other than another user of Port Terminals and Port Terminal Services; and
>
> (ii) discriminatory treatment between other Users of Port Terminals and Port Terminal Services and GrainCorp's Trading Division.[99]

Riverina also queries the prevalence of the Schedules over the body of the proposed Undertaking, particularly as the Schedules include the Standard Port Terminal Services proposed to the offered. Further, Riverina submits that the body of the proposed Undertaking should prevail over the Schedules and be the primary reference point for understanding the terms of the Undertaking offered which will be binding once finalised.

In relation to clause 2.3, Riverina submits that if a body corporate of GrainCorp is required to do something pursuant to the proposed Undertaking then it should be a party to the proposed Undertaking.[100]

### 5.3.3 AgForce

AgForce notes that the proposed Undertaking allows for GrainCorp to take into account 'recovery of all reasonable costs associated with the granting of access to the Port Terminal'. In this regard AgForce submits that:

> …There is little preventing GrainCorp from setting the compensation for the risk it carries at a level higher for its competitors than its own related entities, thus allowing it to have a competitive advantage across the supply chain. That is, if GrainCorp can operate the port at a cost which is lower than the cost which is lower than the cost imposed on its competitors, the cost of GrainCorp moving grain to port and onto ships is lower, thus allowing GrainCorp to offer higher prices to growers than its competitors and thus gaining more and more market share over time. Again this activity hasn't been evidenced in the past, but there is a possibility of it occurring.[101]

---

98 Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, p. 17.

99 Riverina (Australia) Pty Ltd, *Submission in relation to proposed GrainCorp and CBH access undertakings*, 29 May 2009, p. 13.

100 Riverina (Australia) Pty Ltd, *Submission in relation to proposed GrainCorp and CBH access undertakings*, 29 May 2009, p. 13.

101 AgForce Grains Ltd, *Submission in relation to proposed GrainCorp access undertaking*, 29 May 2009, para 4.1, p. 2.

## 5.4 Submissions in response to Draft Decision

### 5.4.1 GrainCorp

GrainCorp submitted a table outlining the changes it proposes to make to the Objectives and Structures sections of its proposed Undertaking.[102]

### 5.4.2 Interested Parties

#### 5.4.2.1 Australian Grain Exporters Association

The Australian Grain Exporters Association (AGEA) submitted the following in relation to the ACCC's views set out in its Draft Decision on the Objectives section of GrainCorp's Undertaking:

> The Objectives section ties into key clauses and is critical to the working of the proposed Undertakings.
>
> ***BHCs***
>
> The ACCC considers that the reference to 'reasonable costs' at …GrainCorp… clause 1.2(e)(i)(A) is ambiguous with respect to what costs an access provider may recover through charges levied on the access seeker.
>
> The ACCC is of the view that the objective of balancing the legitimate interests of the BHCs with the interests of access seekers is more likely to be appropriate pursuant to section 44ZZA(3) of the TPA if the word 'efficient' is substituted for 'reasonable'. AGEA accepts that a reference to "efficient" costs, instead of "reasonable" costs, would be consistent with the pricing principles at section 44ZZCA of the TPA. However, AGEA is concerned that there will continue to be uncertainty as to the proper application and meaning of this clause as "efficient" costs cannot be objectively determined unless there is proper transparency and non-discrimination.
>
> AGEA agrees with the ACCC's decision that the interpretation of …GrainCorp… clause 1.2(e)(i)(D)] (which refers to the "Port Operator's ability to meet its own or its Trading Division's reasonably anticipated requirements for Port Terminal Services") in the context of an access Undertaking (rather than in relation to a Part IIIA arbitration) is unclear and that it is likely that difficulties would arise in determining the proper application of this clause.
>
> As noted by the ACCC, one interpretation of the clause could be that BHCs intend to reserve and set aside their own or their Trading Division's 'reasonably anticipated requirements' for port capacity and then provide access to third parties for the remaining capacity.
>
> For the reasons given in AGEA's original submission, AGEA remains concerned that BHCs' Objectives clause makes the undertaking circular and biased in favour of BHCs by allowing BHCs to make decisions which are consistent with the objectives of the undertaking, when the objectives of the undertakings provide the opportunity for BHCs to favour their own interests. The problems created by the Objectives clause are exacerbated by weak ring-fencing policies and an overall lack of transparency in relation to BHCs' operational decisions and costs and charges.

[102] GrainCorp Operations Limited, *Submission in relation to Draft Decision on GrainCorp Access Undertaking*, 3 September 2009, p. 27.

> As long as one of BHCs' stated Objectives is biased in favour of their own interests, the ACCC should continue to reject BHCs' Undertakings.

AGEA submitted the following in relation to the ACCC's views as set out in its Draft Decision on the Structure section of GrainCorp's proposed Undertaking:

> Specific terms and conditions in the Port Schedules
>
> AGEA agrees that the structure of the proposed Undertaking is not appropriate given the proposed reference to terms and conditions in the "Port Schedule" (even with the statement that terms in the "Port Schedule" will prevail over the General Terms). All of the proposed terms and conditions of access should be clearly set out in the standard port terminal services agreement offered to accredited wheat exporters. Having other or further terms and conditions in the "Port Schedules" is likely to create confusion and uncertainty.

## 5.5 ACCC's view

### 5.5.1 Background to the proposed Undertaking

Given that the background section of the proposed Undertaking is merely descriptive and does not place any obligations on GrainCorp, it is not necessary for the ACCC to consider whether it is appropriate pursuant to section 44ZZA(3).

### 5.5.2 Objectives of the proposed Undertaking

Unlike the background section, the objectives section is critical to the working of the proposed Undertaking.

The objectives section ties into key clauses of the proposed Undertaking in the following manner:

- the first non-discriminatory access clause (5.4) provides that GrainCorp must not provide access on 'different terms' unless such terms are, inter alia, 'consistent with the objectives of this Undertaking set out in clause 1.2';[103]
- the second non-discriminatory access clause (8.3) provides that GrainCorp undertakes not to discriminate between access seekers or in favour of its trading division in providing Port Terminal Services, 'subject to clause 5.4 and 8.4' (note that, as mentioned above, clause 5.4 refers back to clause 1.2 – the objectives section); and
- it is proposed that any variations to the Port Terminal Services Protocols must be consistent with the objectives section;[104]

The ACCC considers that the objectives section, as a whole, is not appropriate having regard to matters in section 44ZZA(3) given its concerns with the following particular objectives:

---

[103] GrainCorp Operations Limited, *Port Terminal Services Access Undertaking*, 15 April 2009, clause 5.4(a)(ii)(C).

[104] GrainCorp Operations Limited, *Port Terminal Services Access Undertaking*, 15 April 2009, clause 8.2(b)(i)(A).

**"The recovery of all reasonable costs associated with the granting of access to the Port Terminal Services"** (clause 1.2(e)(i)(A))

The ACCC considers that the reference to 'reasonable costs' at clause 1.2(e)(i)(A) is ambiguous with respect to what costs an access provider may recover through charges levied on the access seeker. Further, it is not clear whether allowing for recovery of 'all reasonable costs' would be in accordance with the pricing principles at 44ZZCA (which make reference to 'efficient costs' rather than 'reasonable costs'). It is noted that the use of the term 'reasonably anticipated requirements' in section 44W of the TPA is referring to "an existing user" (i.e. any existing user, not just the access provider).

The ACCC considers that this clause does not appropriately balance the legitimate business interests of GrainCorp with the interests of access seekers, and the ambiguity of this clause raises concerns about the certainty and clarity of the terms of the proposed Undertaking.

The ACCC is of the view that this objective is more likely to be appropriate pursuant to section 44ZZA(3) of the TPA if the word 'efficient' is substituted for 'reasonable'.

.The ACCC notes AGEA's concern that even with this change, the meaning of 'efficient costs' may remain uncertain. The ACCC considers, however, that the term 'efficient costs' is appropriate in a regulatory setting having regard to the matters at section 44ZZA(3). The term 'efficient costs' is commonly used in regulated industries.

**"GrainCorp's ability to meet its own or its Trading Division's reasonably anticipated requirements for Port Terminal Services"** (clause 1.2(e)(i)(D))

The ACCC considers that the interpretation of clause 1.2(e)(i)(D) in the context of an access undertaking (rather than in relation to a Part IIIA arbitration) is unclear and that it is likely that difficulties would arise in determining the proper application of this clause.

One interpretation of the clause could be that GrainCorp intends to reserve and set aside its own or its Trading Division's 'reasonably anticipated requirements' for port capacity and then provide access to third parties for the remaining capacity. This could allow GrainCorp to significantly promote the interests of GrainCorp above those of potential access seekers in a manner that is neither in the interests of potential access seekers, or in the broader public interest, including the public interest in having competition in markets. This interpretation of the clause runs counter to the objectives of the WEMA and particularly the objective of ensuring 'fair' access to port terminal services.

This ambiguity raises concerns about the certainty and clarity of the terms of the proposed Undertaking.

### 5.5.3 Structure of the proposed Undertaking

The ACCC considers that the structure section is not appropriate having regard to matters at section 44ZZA(3) given its concerns with the following particular clauses:

**The reference to a "Schedule" (rather than a "Port Schedule") prevailing over the General Terms** (clause 2.2)

Clause 2.2 of the proposed Undertaking states that the terms of the Schedules to the proposed Undertaking will prevail over the general terms to the extent of any inconsistency between them. The ACCC considers the scope of this clause to be inappropriately broad given that the Schedules cover a large range of areas (including port protocols - which are proposed to be able to be changed without the consent of the ACCC). The ACCC considers that this creates insufficient certainty and clarity in relation to the terms of the Undertaking.

The ACCC therefore considers that restricting the coverage of clause 2.2 to the Schedules relating to the description of the port terminals and the port terminal services definition, namely Schedules 1 and 2, is more likely to be appropriate pursuant to section 44ZZA(3).

**Using 'reasonable endeavours' to procure** (clause 2.3)

The ACCC considers that if another body was required to act (or not act) in a certain manner by the proposed Undertaking, then that party should be a party to the proposed Undertaking.

However, the ACCC considers that inclusion of the obligation to procure clause is nonetheless appropriate in the unlikely case that it is required.

However, an obligation to use 'reasonable endeavours' does not appropriately balance the legitimate business interests of GrainCorp with the interests of access seekers, who require more certainty that the terms of the proposed Undertaking will be carried out.

It is the ACCC's view that the words 'use reasonable endeavours to' should be removed from this clause to strengthen the obligation to procure.

# 6 Term of, and variation to, the proposed Undertaking

**Summary**

***Commencement***

The commencement clause is not appropriate pursuant to section 44ZZA(3) given it does not make it clear the date upon which GrainCorp undertakes to comply with the obligations in the Undertaking, given that for the purposes of the WEMA an undertaking comes into operation at the time when the ACCC publishes its decision to accept the undertaking.[105]

***Term***

The two year term of the proposed Undertaking is appropriate pursuant to section 44ZZA(3) given the transitional state of the wheat export industry.

***Withdrawal and variation***

It is not necessary for the ACCC to form a view on the appropriateness of the withdrawal and variation clauses pursuant to section 44ZZA(3) given that they are merely descriptive.

***Extension***

The extension clause of the proposed Undertaking is not appropriate pursuant to section 44ZZA(3) given that clause 3.6(a) refers to submitting an undertaking 'at least three months' before the expiry of the proposed Undertaking. This is inconsistent with the statutory obligation in section 44ZZBC of the TPA for the ACCC to use reasonable endeavours to make a decision on an access undertaking application within 6 months.

## 6.1 GrainCorp's proposed Undertaking dated 15 April 2009

### 6.1.1 Commencement and Term

The proposed Undertaking is expressed to commence on 1 October 2009.[106]

The proposed Undertaking provides for expiration on the earlier of 30 September 2011, or when the ACCC consents to GrainCorp withdrawing the Undertaking in

[105] *Wheat Export Marketing Act 2008*, s 24(3).

[106] GrainCorp Operations Limited, *Port Terminal Services Access Undertaking*, 15 April 2009, clause 3.1.

accordance with Part IIIA of the TPA, including under clause 3.3 of the Undertaking (which provides for 'early withdrawal,' as described below).[107]

### 6.1.2 Withdrawal & variation of the proposed Undertaking

The proposed Undertaking provides that GrainCorp may seek the approval of the ACCC to the withdrawal of the Undertaking if:

a. GrainCorp or a Related Body Corporate ceases to be an Accredited Wheat Exporter under the WEMA; or

b. the WEMA is amended such that an Accredited Wheat Exporter is no longer required to have in place an access undertaking under Part IIIA of the TPA in relation to access to any of the Port Terminal Services for the purposes of obtaining or maintaining accreditation under that Act.[108]

In terms of variation, the proposed Undertaking provides that GrainCorp may seek the approval of the ACCC for variation via the removal of the Port Terminal Services provided at a particular Port Terminal on the occurrence of:

a. the disposal of the Port Terminal to a person who is not a Related Body Corporate of GrainCorp and GrainCorp ceases to operate or control the Port Terminal Facilities at that Port Terminal; or

b. if there is in force under Division 2A Part IIIA of the TPA a regime established by a State or Territory for access to services provided at the Port Terminal, and under that regime Accredited Wheat Exporters have access to Port Terminal Services (or services substantially similar to the Port Terminal Services) for purposes relating to the export of Bulk Wheat.[109]

The proposed Undertaking also provides, in relation to variation, that GrainCorp may seek the approval of the ACCC to vary the Undertaking if GrainCorp is of the opinion that circumstances have changed such that the Undertaking:

a. is no longer commercially viable for GrainCorp or becomes inconsistent with the objectives set out in clause 1.2; or

b. is no longer consistent with the Continuous Disclosure Rules as a result of changes to the WEMA.[110]

The proposed Undertaking also provides that, prior to seeking the approval of the ACCC for a variation of this kind,[111] GrainCorp will first consult with counterparties to Access Agreements and Applicants regarding the proposed variation.[112]

---

[107] GrainCorp Operations Limited, *Port Terminal Services Access Undertaking*, 15 April 2009, clause 3.2.

[108] GrainCorp Operations Limited, *Port Terminal Services Access Undertaking*, 15 April 2009, clause 3.3.

[109] GrainCorp Operations Limited, *Port Terminal Services Access Undertaking*, 15 April 2009, clause 3.4.

[110] GrainCorp Operations Limited, *Port Terminal Services Access Undertaking*, 15 April 2009, clause 3.5.

[111] That is, per clause 3.5(a), where GrainCorp is of the opinion that circumstances have changed such that the undertaking is no longer commercially viable or becomes inconsistent with the objectives; or that the undertaking is no longer consistent with the Continuous Disclosure Rules as a result of changes to the WEMA.

### 6.1.3 Extension of the proposed Undertaking

Clause 3.6 proposes a mechanism for extension of the proposed Undertaking in certain circumstances. In summary, this clause provides:

a. At least three months before the expiry of the Undertaking, GrainCorp will submit to the ACCC a written statement outlining whether or not it intends to submit a new undertaking to the ACCC for its consideration.

b. If GrainCorp intends to submit a new undertaking to the ACCC, GrainCorp will also apply to the ACCC for an extension of the expiring Undertaking.

c. The application for extension would include a proposed extension period which, in GrainCorp's view, 'reasonably estimates the time it would take for GrainCorp to formulate a new undertaking and have that undertaking take effect following approval by the ACCC.'[113]

It is proposed that if GrainCorp does not propose to submit to the ACCC a new undertaking, then the steps at paragraphs (b) and (c) are not applicable.[114] It is also proposed that nothing in clause 3.6 (regarding the extension of the Undertaking) prevents GrainCorp from submitting a new undertaking to the ACCC at any time during the term of current Undertaking.[115]

## 6.2 GrainCorp's supporting submissions to the proposed Undertaking dated 15 April 2009

In its initial submission, GrainCorp notes that the proposed term of the Undertaking is 2 years, '…to align with the forthcoming Productivity Commission review of the WEMA.'[116] GrainCorp also submits that the proposed Undertaking is provided to satisfy the access test in the WEMA, and as result proposes that GrainCorp may seek its withdrawal in the circumstances described above.[117]

In its supplementary submission, GrainCorp states that the 2 year term strikes an appropriate balance between the current requirements of the WEMA and the need for the access regime framework to remain flexible.[118]

In its supplementary submission, GrainCorp clarified, in response to a question from the ACCC, that the obligation in clause 3.5(b) on GrainCorp to '…first consult with counterparties to Access Agreements and Applicants…' prior to seeking the ACCC's approval for a variation to the proposed Undertaking would involve GrainCorp:

---

112 GrainCorp Operations Limited, *Port Terminal Services Access Undertaking*, 15 April 2009, clause 3.5(b).

113 GrainCorp Operations Limited, *Port Terminal Services Access Undertaking*, 15 April 2009, clause 3.6(c).

114 GrainCorp Operations Limited, *Port Terminal Services Access Undertaking*, 15 April 2009, clause 3.6(d).

115 GrainCorp Operations Limited, *Port Terminal Services Access Undertaking*, 15 April 2009, clause 3.6(e).

116 GrainCorp Operations Limited, *Submission to the ACCC*, 15 April 2009, para 9.3, p. 53.

117 GrainCorp Operations Limited, *Submission to the ACCC*, 15 April 2009, para 9.3, p. 53.

118 GrainCorp Operations Limited, *Supplementary submission to the ACCC*, 24 June 2009, para 2.2, p. 10.

- preparing proposed changes and circulating those proposals to interested parties, giving all interested parties sufficient time to review and respond to the proposals;

- discussing the proposals, collating, reviewing and actively considering the responses from interested parties;

- depending on the level and nature of the responses, changing the initial proposals in order to ensure that any proposed amendment to the Undertaking is appropriate.[119]

GrainCorp also makes the following comments:

- 'As the ACCC is aware, under the TPA the Undertaking can only be varied with the consent of the ACCC, having regard to the factors set out in section 44ZZA(3).'[120]

- 'GrainCorp is not seeking to expand the legislative process set out in the TPA... Nor will the inclusion of clause 3.4 and 3.5 fetter the ACCC's statutory discretion.'[121]

- 'Further, if the WEMA access test remains unaltered, it is clearly in GrainCorp's interest to ensure that it has an undertaking in place if it wishes to continue to be accredited as a bulk wheat exporter and so ensure that it deals with the expiry of the Undertaking in a timely manner.'[122]

## 6.3 Submissions from interested parties in response to ACCC Issues Paper

### 6.3.1 AgForce Grains Ltd

AgForce Grains Ltd (AgForce) submits that the proposed two year term of the Undertaking '…is probably sufficient and allows some recognition of changes which may occur in the industry in coming years, allowing for review of the document.'[123] However AgForce considers that a one year term should be instigated, having regard to the possibility of a poorly executed undertaking adversely affecting the industry for longer than necessary.[124]

---

119 GrainCorp Operations Limited, *Supplementary submission to the ACCC*, 24 June 2009, para 3.2, p. 12.

120 GrainCorp Operations Limited, *Supplementary submission to the ACCC*, 24 June 2009, para 3.4, p. 13.

121 GrainCorp Operations Limited, *Supplementary submission to the ACCC*, 24 June 2009, para 3.4, p. 13.

122 GrainCorp Operations Limited, *Supplementary submission to the ACCC*, 24 June 2009, para 3.4, p. 13.

123 AgForce Grains Ltd, *Submission in relation to proposed GrainCorp access undertaking*, 29 May 2009, para 4.4, p. 3.

124 AgForce Grains Ltd, *Submission in relation to proposed GrainCorp access undertaking*, 29 May 2009, para 4.4, p. 3.

AgForce submits that different expiry dates for the CBH undertaking and the GrainCorp and ABB undertakings should not create issues, as the operators work in 'mostly different states and different markets.'[125]

In relation to variation of the undertaking AgForce submits that '…any changes to an Undertaking should be enacted at a time which allows the market to plan for those changes i.e. not in September when harvest has already begun in QLD.'[126]

### 6.3.2 Australian Grain Exporters Association[127]

**Term**

The Australian Grain Exporters Association (AGEA), in its submission of 29 May 2009, suggested that the proposed two year term of GrainCorp's undertaking is unacceptable to wheat exporters and unlikely to promote efficient investment. AGEA submits that wheat exporters 'need the comfort of knowing that their investment is protected by guaranteed access to port terminal services for at least five years.'[128]

AGEA submits that the GrainCorp undertaking should operate for a minimum of five years and have a common expiry date with the undertakings of the other bulk handlers.[129]

**Early withdrawal and variation**

In relation to the variation of the proposed Undertaking, AGEA submits that:

a. the circumstances in which GrainCorp may seek to vary the access undertaking are broader than the TPA;[130]

b. the provider of an access undertaking is adequately protected by section 44ZZA(7) of the TPA,[131] and it is unnecessary for the undertaking to specify the circumstances in which GrainCorp may seek the ACCC's approval to withdraw or vary the undertaking, as this is covered by that section;[132]

---

125 AgForce Grains Ltd, *Submission in relation to proposed GrainCorp access undertaking*, 29 May 2009, para 4.4, p. 4.

126 AgForce Grains Ltd, *Submission in relation to proposed GrainCorp access undertaking*, 29 May 2009, para 4.10, p. 7.

127 The ACCC notes that AGEA's submission of 29 May 2009 was made in relation to all three bulk handlers. In summarising AGEA's submission, the ACCC interprets references to 'the bulk handlers,' 'the BHCs' and 'the Port Operators' as references to GrainCorp in circumstances where the AGEA submission is commenting on aspects common to all three of the undertakings.

128 Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 7.1, p. 18.

129 Australian Grain Exporters Association, (29 May 2009) Schedule 1, D2(i); para 7.2, p. 18.

130 Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 7.2, p. 18.

131 Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 7.2, p. 18.

132 Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, Schedule 1, para D2(iii), p. 40.

c. ‘it is not appropriate for the undertaking to specify the circumstances in which the ACCC may (or may not) consent to a variation of an access undertaking as this may fetter the ACCC’s statutory discretion;’[133]

d. If the undertaking is to contain a term regarding variation, that term should be consistent with section 44ZZA(7) of the TPA.[134]

AGEA also notes that the undertaking proposes that GrainCorp may seek variation of the undertaking if the Port Terminal is disposed to a person who is not a Related Body Corporate of GrainCorp, and GrainCorp ceases to operate or control the Port Terminal Facilities at that Port Terminal. AGEA submits that ‘[a]ny disposal of a port terminal service that is the subject of an access undertaking should be strictly on terms that access to those services continues.’[135]

**Extension**

AGEA submits that there is a ‘mismatch’ between what is proposed in the GrainCorp undertaking in relation to extension of the undertaking and what is specified in section 44ZZBC(1) of the TPA in terms of extension to an access undertaking. AGEA submits that the bulk handlers should be required to submit a statement outlining their intention to provide a new undertaking at least six months prior to the expiry of the existing undertaking, and to submit a new undertaking not less than six months before the expiry of the undertaking.[136]

AGEA also submits that it is appropriate that the undertaking applies only to new Access Agreements.[137]

### 6.3.3 Riverina (Australia) Pty Ltd

Riverina (Australia) Pty Ltd (**Riverina**) submits that the GrainCorp Undertaking be ‘fixed’ until the expiry of its term, being two years, and that any discretion to change the term of the Undertaking during the period of operation be removed, unless such change is approved by the ACCC ‘through an identical process to the current one.’[138]

Riverina also submits that clause 3.5(a)(i) of the GrainCorp Undertaking be amended to remove the phrase ‘…it is no longer commercially viable for GrainCorp or…’. Riverina submits that:

> ‘For the short period for which the Undertaking will be in operation prior to review it is submitted that GrainCorp’ should be bound to the terms of the Undertaking, Protocols and fees set to permit certainty, transparency and non-

---

133 Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 7.2, p. 18.

134 Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, Schedule 1, para D2(iv), p. 40.

135 Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 7.3, p. 18.

136 Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 7.4, p. 18.

137 Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, Schedule 1, para D2(v), p. 40.

138 Riverina (Australia) Pty Ltd, *Submission in relation to proposed GrainCorp and CBH access undertakings*, 29 May 2009, para 2(b)(ii) & (iii), p. 2.

> discriminatory access amongst competitors in the grain trading market in Australia.'[139]

## 6.4 Submissions in response to ACCC Draft Decision

### 6.4.1 GrainCorp

GrainCorp submits that:.

- It will amend clause 3.1 to specify that the 1 October 2009 commencement date applies only for the purposes of the WEMA[140]
- In light of the ACCC's view in its Draft Decision that clauses 3.3-3.5 are merely descriptive and in no way fetter the discretion of the ACCC in relation to circumstances in which GrainCorp may seek approval to vary the Undertaking, GrainCorp will retain those clauses.[141]
- It will delete clause 3.6(a) in light of the ACCC's view that the clause is inappropriate.[142]

### 6.4.2 Australian Grain Exporters Association

AGEA agrees with the ACCC's Draft Decision that the proposed Undertaking should be for a term of two years.[143]

## 6.5 ACCC's views

### 6.5.1 Term

Section 44ZZBA(1) of the TPA provides:

> (1) If the Commission accepts an access undertaking or an access code, it comes into operation at:
>
> (a) If, within 21 days after the Commission publishes its decision, no person has applied to the [Australian Competition] Tribunal for review of the decision – the end of that period; or
>
> (b) If a person applies to the Tribunal within that period for review of the decision and the Tribunal affirms the decision – the time of the Tribunal's decision.

However, section 24(3) of the WEMA provides:

---

139 Riverina (Australia) Pty Ltd, *Submission in relation to proposed GrainCorp and CBH access undertakings*, 29 May 2009, Schedule A, para 11(d), p. 13.

140 GrainCorp Operations Limited, *GrainCorp Operations Limited, Submission in relation to Draft Decision on GrainCorp Access Undertaking, 3 September 2009*, p. 28.

141 GrainCorp Operations Limited, *GrainCorp Operations Limited, Submission in relation to Draft Decision on GrainCorp Access Undertaking, 3 September 2009*, p. 28.

142 GrainCorp Operations Limited, *GrainCorp Operations Limited, Submission in relation to Draft Decision on GrainCorp Access Undertaking, 3 September 2009*, p. 28-29.

143 Australian Grain Exporters Association, *Submission in relation to Draft Decisions on Port Terminal Services Access Undertakings*, 3 September 2009, 6.1.

> (2) For the purposes of paragraph (2)(c) [regarding whether a person passes the access test at a particular time]:
>
> (a) assume that subsection 44ZZBA(1) of the *Trade Practices Act 1974* had never been enacted; and
>
> (b) assume that an access undertaking comes into operation at the time when the ACCC publishes its decision to accept the undertaking.

The Explanatory Memorandum to the WEMA explains that this clause was included to clarify that the ACCC's decision to accept an access undertaking is sufficient to pass the access test. The Explanatory Memorandum goes on to state that:

> …This contrasts with section 44ZZBA of the *Trade Practices Act 1974* which provides for appeal processes before an undertaking comes into force. Subclause 24(3) of the Bill does not prevent appeals against the ACCC's decisions from taking place, but means that the access test is passed once the ACCC approves an undertaking. This has been done to eliminate the possibility of a third party delaying the accreditation of a port terminal service provider through vexatious use of the legal process. A port terminal service provider should not be disadvantaged by such appeals if it has acted in good faith and provided an access undertaking that is satisfactory to the ACCC…

Given the interaction between section 44ZZBA(1) of the TPA and section 24(3) of the WEMA, the ACCC considers it is not appropriate for the proposed Undertaking to simply specify that it commences on 1 October 2009.

It would be more likely to be appropriate if the clause specified that this was the commencement date for the purposes of section 24 of the WEMA.

The ACCC considers it is appropriate for the proposed Undertaking to have a term of two years. In taking this view the ACCC notes the transitional state of the bulk wheat export industry and the desirability of avoiding the imposition of regulation that is not appropriate on a newly deregulated industry, which would not be in the public interest. The ACCC notes that, given the transitional state of the industry, access arrangements that are appropriate now may not be appropriate in several years time. The ACCC considers that a short term undertaking (of two years) mitigates these risks.

### 6.5.2 Withdrawal and variation

Section 44ZZA(7) of the TPA states that an access provider may withdraw or vary an undertaking at any time, but only with the consent of the ACCC. Further, the ACCC may consent to a variation of the undertaking if it thinks appropriate, having regard to the matters in section 44ZZA(3).[144]

The ACCC considers that, in light of section 44ZZA(7), it is unnecessary for the proposed Undertaking to specify the particular circumstances in which GrainCorp may seek the withdrawal or variation of the proposed Undertaking. The ACCC considers that the clauses GrainCorp has proposed are merely indicative of the circumstances in which variation or withdrawal may be sought, and in no way fetter the discretion of the ACCC in relation to those matters as provided under the TPA.

---

144 *Trade Practices Act 1974* (Cth) s 44ZZA(7).

Therefore, it is not necessary for the ACCC to form a view on the appropriateness of the withdrawal and variation clauses pursuant to section 44ZZA(3) given that they are merely descriptive.

### 6.5.3 Extension

Section 44ZZBB of the TPA provides, in relation to the extension of access undertakings:

> (1) If an access undertaking is in operation under section 44ZZBA (including as a result of an extension under this section), the provider of the service may apply in writing to the Commission for an extension of the period for which it is in operation.
>
> (2) The provider of the service must specify in the application a proposed extension period.
>
> (3) The Commission may, by notice in writing, extend the period for which the undertaking is in operation if it thinks it appropriate to do so having regard to the matters mentioned in subsection 44ZZA(3). The notice must specify the extension period.[145]

The ACCC considers that, in light of section 44ZZBB, it is unnecessary for the proposed Undertaking to specify the particular circumstances in which GrainCorp may seek the extension of the proposed Undertaking. The ACCC considers that the clauses GrainCorp has proposed are merely indicative of what GrainCorp may do in seeking an extension, and in no way fetter the discretion of the ACCC in relation to those matters as provided under the TPA.

Furthermore, it is the ACCC's view that clause 3.6(a) of the proposed Undertaking is not appropriate pursuant to section 44ZZA(3). This clause refers to GrainCorp submitting a statement regarding whether or not it intends to submit a new undertaking at least three months before the expiry of the proposed Undertaking. The ACCC considers that, in light of the statutory obligation in section 44ZZBC of the TPA for the ACCC to use reasonable endeavours to make a decision on an access undertaking application within 6 months of receiving the application, or such longer period, the reference to 3 months in clause 3.6(a) creates confusion and is not appropriate. The ACCC also notes that it is not possible to foresee whether GrainCorp will wish to submit a different undertaking in the future, or the length of time it would take for the ACCC to consider such undertaking, and it is therefore not appropriate to attempt to anticipate such time frames in the current proposed Undertaking.

[145] *Trade Practices Act 1974* (Cth) s 44ZZBB(1) – (3), note omitted.

# 7 Scope

**Summary**

In the present circumstances, it is appropriate that GrainCorp's proposed Undertaking applies only to wheat (rather than all grains).

In the present circumstances, it is also appropriate that GrainCorp's proposed Undertaking applies only to port terminal services (rather than including up-country services).

It is not appropriate that the services offered to access seekers differ depending on where the grain has been stored.

The drafting of the scope of the proposed Undertaking is not appropriate because it lacks clarity. In relation to the drafting of the scope of the proposed Undertaking:

- it would be appropriate for the definition of Port Terminal Services to be amended to make it clear that the lists of port terminal services in Schedule 2 are not exhaustive;
- it would be appropriate for Schedule 2 to expressly include 'cargo accumulation;
- it would be appropriate for any terms and conditions of access in Schedule 2 to be removed; and
- it would be appropriate for clause 4.4(d) (regarding sharing of efficiency savings) to be removed given its lack of clarity.

The ACCC notes that several submissions called for increased access to ports for employees of superintendence companies. The ACCC accepts that there may be benefits in allowing employees of superintendence companies to access port terminals, particularly in relation to improving the transparency of port operations but notes that the proposed Undertaking is an undertaking focusing on providing access to port terminal services to accredited wheat exporters. It is not an undertaking specifically to provide access to employees of superintendence companies.

## 7.1 GrainCorp's proposed Undertaking dated 15 April 2009

GrainCorp's proposed Undertaking applies to access to Port Terminal Services provided by means of GrainCorp's Port Terminal Facilities located at Fisherman Island, Gladstone Port, Mackay Port, Port Kembla, Carrington Port, Geelong Port and Portland Port. Port Terminal Services are defined in the Undertaking as:

> "Port Terminal Services" means the services described in Schedule 2 in relation to Bulk Wheat provided by means of a Port Terminal Facility, and includes the use of a Port Terminal Facility.[146]

GrainCorp further outlines the nature of Port Terminal Services stating that subject to Schedule 2, they may include:

> a. intake and receival services;
>
> b. storage and handling services;
>
> c. ship nomination, acceptance, booking, cancellation and cargo accumulation; and
>
> d. ship loading.[147]

The proposed Undertaking also sets out the meaning of Port Terminal Facilities:

> "Port Terminal Facility" means a ship loader that is:
>
> (a) at a Port Terminal; and
>
> (b) capable of handling Bulk Wheat;
>
> and includes any of the following facilities:
>
> (c) an intake/receival facility;
>
> (d) a grain storage facility;
>
> (e) a weighing facility;
>
> (f) a shipping belt;
>
> that is:
>
> (g) at the Port Terminal; and
>
> (h) associated with the ship loader; and
>
> (i) capable of dealing with Bulk Wheat.
>
> The Port Terminal Facilities at each Port Terminal are described in Schedule 1. [148]

The proposed Undertaking also seeks to clarify what is not covered by the Undertaking, stating:

> …
>
> (b) To avoid doubt, this Undertaking does not apply:

---

146 GrainCorp Operations Limited, *Port Terminal Services Access Undertaking,* 15 April 2009, clause 4.1.

147 GrainCorp Operations Limited, *Port Terminal Services Access Undertaking,* 15 April 2009, clause 4.3.

148 GrainCorp Operations Limited, *Port Terminal Services Access Undertaking,* 15 April 2009, clause 4.2.

(i) to access to services not being Port Terminal Services provided by GrainCorp in relation to Bulk Wheat; or

(ii) in relation to other facilities owned by GrainCorp which are part of the grain supply chain such as up-country receival and accumulation facilities; or

(iii) to the transportation of Bulk Wheat to port; or

(iv) to grains which are not wheat; or

(v) to wheat which is not Bulk Wheat. [149]

Schedule 2 of GrainCorp's proposed Undertaking provides detail on the specific services included and excluded from the Undertaking. Under the headings 1, 2 and 3 (all related to the 'intake of wheat') GrainCorp states that it will provide the following services 'in accordance with the relevant published price and non-price terms and in accordance with the relevant Port Terminal Protocols':

a. unloading of rail and road trucks into the Terminal during the hours and days as specified by GrainCorp;

b. sampling and classification on delivery;

c. weighing on delivery;

d. transfer of wheat to storage cells;

e. recording and provision of delivery information;

f. wheat hygiene and quality management;

g. elevation to outloading paths;

h. shipping stem maintenance;

i. insurance for all general physical risk (i.e. fire, flood, storm, etc). [150]

GrainCorp proposes to exclude the following services from the proposed Undertaking:

a. all Port Terminals - stevedoring costs; and

b. Geelong Terminal - wharfage. [151]

Structurally, the above elements of the services that GrainCorp will offer under the proposed Undertaking (relating to the 'intake of wheat' are separated the following categories:

- "Intake of wheat at Port Terminals ex GrainCorp country sites";

---

[149] GrainCorp Operations Limited, *Port Terminal Services Access Undertaking,* 15 April 2009, clause 4.4(b).

[150] GrainCorp Operations Limited, *Port Terminal Services Access Undertaking,* 15 April 2009, Schedule 2, clause 1.1, 2.2 and 3.2.

[151] GrainCorp Operations Limited, *Port Terminal Services Access Undertaking,* 15 April 2009, Schedule 2, clause 1.2, 2.3 and 3.3.

- "Intake of wheat at Port Terminals ex other Approved Bulk Handling Company Sites"

- "Intake of wheat at Port Terminals from Unapproved Sources/ untreated wheat"

The term 'other Approved Bulk Handling Company Site' is defined at clause 2.1 of Schedule 2 as:

> those sites, not operated by GrainCorp, that, in GrainCorp's absolute opinion, have relevant grain quality procedures and consistently meet export quality standards on outloading.

It definition of the term 'Unapproved Source' can be derived from clause 3.1 of Schedule 2, which provides:

> Unapproved Sources
>
> If:
>
> (a) the wheat to be delivered to the Port Terminal:
>
> (i) has not been treated to a level acceptable to GrainCorp within the last three months; or
>
> (ii) is outloaded from sites not operated by GrainCorp and those sites cannot demonstrate relevant grain quality procedures and consistently meet export quality standards on outloading; or
>
> (iii) the wheat is received directly ex farm; or
>
> (each an "**Unapproved Source**")
>
> (b) a User is unable to provide proof of treatment of the wheat,
>
> then GrainCorp will provide the services in clause 3.2 if the User and the wheat to be delivered complies with the Testing and Sampling procedures in the Access Agreement. [152]

The 'intake of wheat' services offered by GrainCorp are the same regardless of whether the wheat is delivered to port via a 'GrainCorp country site', an 'other Approved Bulk Handling Company Site' or an 'Unapproved Source'. However, what GrainCorp terms 'conditions' on which access is offered differ depending on the origin of the wheat.

Clause 2.4 of Schedule 2 of GrainCorp's proposed Undertaking sets out the conditions of access that are specific to bulk wheat received at port from 'Other Approved Bulk Handling Company Sites'. It states:

> (a) These services are provided as per the shift hours listed in the Port Terminal Protocols and relevant Access Agreement. Overtime fees and other conditions will apply for intake and unloading outside of those shift hours.

---

[152] GrainCorp Operations Limited, *Port Terminal Services Access Undertaking*, 15 April 2009, Schedule 2, clause 3.1.

(b) GrainCorp will only provide the direct to port intake service under section 2.2:

(i) where the deliveries of wheat by the User, when added to existing commitments for nominated shipments, do not exceed GrainCorp's capacity to store the required cargoes in vertical Port Terminal storage;

(ii) for deliveries of wheat by customers who meet the following terms:

(A) a minimum of 500 tonnes per day delivery by road or 1,000 tonnes by rail during normal Port Terminal receival hours, on normal business days as advised by the Port Terminal from time to time;

(B) deliveries are to be in accordance with a delivery program agreed to between the parties;

(C) a minimum parcel of 5,000 tonnes for a specific nominated vessel;

(D) all cargo to be delivered within an agreed period prior to the nominated date of arrival of the vessel. Such period will be a maximum of 21 business days and will be dependent on the storage capacity allocated for that accumulation;

(E) deliveries not to commence prior to nomination of a vessel to GrainCorp, where such nomination is to include as a minimum the name of vessel, estimated date of arrival of the vessel and grades and quantities of grain to be loaded;

(F) the customer will provide proof of prior treatment before rail is directed to the Port Terminal;

(G) no wheat protection (pesticide or fumigation) to be provided by GrainCorp;

(H) the customer allows GrainCorp to inspect the wheat in store before outloading to the Port Terminal;

(I) delivery inspection to consist of check for infestation (infested loads will be rejected), obvious contamination and moisture content (loads exceeding maximum tolerances will be rejected) only; and

(J) other terms and conditions included in the Access Agreement or Port Terminal Services Protocols.

(c) Requests for services which do not meet the criteria above do not constitute a request for Standard Port Terminal Services and will be quoted and applied on a case by case basis depending on the services required. This includes a failure by a User to meet any of the above criteria during the delivery period or after delivery.

Schedule 2 also includes conditions on when GrainCorp will accept delivery to port from an 'Unapproved Source'. Clause 3.1 of Schedule 2 states that GrainCorp will

accept delivery from an 'Unapproved Source' subject to compliance with the 'Testing and Sampling procedures in the Access Agreement'.[153]

Schedule 2 also includes services GrainCorp will provide for 'Infested wheat loads delivered by rail'. These services relate only to wheat delivered from an 'Other Approved Bulk Handling Company Sites or an 'Unapproved Source'. Clauses 2.5 and 3.4 each provide:

> GrainCorp will provide, and the User is deemed to have requested, the following port intake services in relation to intake at the Port Terminal by rail from Other Approved Bulk Handling Company Sites of infested loads in accordance with the relevant published price and non-price terms and in accordance with the relevant Port Terminal Services Protocols:
>
> (a) rail receival path cleaning;
>
> (a) fumigation for the infested grain (where available) or removal of the grain from the terminal to a "hospital" facility for disinfestation.
>
> These services will be provided in accordance with relevant AQIS biosecurity conditions. [154]

Schedule 2 also provides that GrainCorp will provide other services 'in accordance with the relevant published price and non-price terms and in accordance with the relevant Port Terminal Services Protocols', namely:

- 'Ship Loading';
- 'Storage';
- 'Blending';
- 'Grain Quality';
- 'Miscellaneous'; and
- 'Additional services'.

## 7.2 GrainCorp's submissions in support of the April undertaking

GrainCorp submits that its service definition is in line with the WEMA requirements and that its proposed Undertaking is not required to relate to any other part of the grain supply chain, nor to other grains.[155] GrainCorp notes:

> There is simply no basis for extending the Undertaking to upcountry facilities or provision of logistics. GrainCorp's upcountry facilities are not

[153] It is unclear from the Wheat Port Terminal Services Agreement provided to the ACCC on 18 May 2009 what these 'Testing and Sampling procedures in the Access Agreement' are.

[154] There appears to be a drafting error at clause 3.4 of GrainCorp's proposed Undertaking as it refers to 'Other Approved Bulk Handling Company Silos' when it appears as if it should refer to 'Unapproved Sources'.

[155] GrainCorp Operations Limited, *Submission to the ACCC, Port Terminal Service Access Undertaking*, 15 April 2009, p. 1.

> natural monopolies and can be easily replicated by other grain participants (as has occurred). GrainCorp competes with the bulk handling networks of other wheat exporters including AWB and ABA. They also compete against on farm storage which has increased significantly.
>
> The same issues were raised when the WEMA access test was being developed and the Government made a conscious policy decision to limit the access test to port terminal services.
>
> Similarly, there is no basis for extending it to other grains, many of which have been exported in deregulated markets for some time. In any case, the practicalities of open ports means that there will need to be consistency in the application of port protocols and shipping stems to other grains as already occurs at GrainCorp ports without any regulatory compulsion to do so.[156]

In relation to upcountry storage and handling services, GrainCorp also submits:

> To impose regulation on these services in the absence of evidence that they are a natural monopoly is manifestly inconsistent with competition policy and, in GrainCorp's view, an overreach of the ACCC's powers.
>
> Rather than alleging monopoly behaviour in submissions, or seeking to have the logistics chain regulated through "regulatory creep", interested parties have had, and continue to have, the opportunity to apply to the National Competition Council (**"NCC"**) to commence the process of having grain receival and handling infrastructure declared 'essential'. That no party has sought to do this indicates very strongly that no evidence is available to support such a declaration.[157]

GrainCorp also makes the following further submissions about why the proposed Undertaking should apply only to bulk wheat (rather than all grains):

> The WEMA only requires the Access Test to be satisfied in relation to the export of bulk wheat. This was a policy decision made at the time the WEMA was introduced and is reflected in the legislation today.
>
> Members of AGEA, (largely international companies with little or no infrastructure investment in the Australian grain sector) supported passage of the WEMA as it removed the regulatory burden of the bulk wheat export monopoly granted to AWB International Ltd., regulation that was counter to the commercial interests of these companies (a point of common interest with GrainCorp).
>
> The same organisations within the AGEA are now seeking the imposition of new regulation to disadvantage their competitors (the bulk handling companies).
>
> There is no evidence that an Undertaking is needed to regulate access to port terminal services for non-regulated grains… [158]

In response to the question in the ACCC's Issues Paper about how the proposed Undertaking would interact with other grains exported via GrainCorp's port terminals, GrainCorp states:

---

156 GrainCorp Operations Limited, *Supplementary submission to the ACCC,* 24 June 2009, p. 4.
157 GrainCorp Operations Limited, *Supplementary submission to the ACCC*, 24 June 2009, p. 20.
158 GrainCorp Operations Limited, *Supplementary submission to the ACCC*, 24 June 2009, p. 21.

The Undertaking is not intended to impact [on] other grains. However if the ACCC imposes conditions within the proposed Undertaking that reduce operational flexibility to the point where terminal efficiency is affected, the overall impact of this will flow through to both regulated and non-regulated grains.

This would be due to the fact that the majority of grain shipped through GrainCorp terminals is regulated (bulk wheat) and thus any measures that affect terminal operations for the majority of the grain handled will naturally affect the efficiency of handling and shipping non-regulated grains.

Following approval of the Undertaking, GrainCorp intends, where feasible and subject to the conditions imposed upon the Undertaking by the ACCC, to have consistent Protocols for all grains and to continue to include non-regulated grain vessels on the shipping stem. This is explained below.

(a) The Undertaking applies to the provision of port terminal services in relation to the export of bulk wheat only. Therefore the Undertaking and the attached Protocols will refer and apply only in relation to the export of bulk wheat. Similarly, GrainCorp has prepared a specific set of terms and conditions which apply to the provision of port terminal services for bulk wheat and which incorporate those Protocols.

(b) Practically, however, there should be consistency between the Protocols and terms and conditions applying for non-regulated grains. There may be minor differences necessary to accommodate specific issues relating to a particular grain type. For example, the physical characteristics of differing grains, such as variations in volumetric density, and seasonality and frequency of exports, does play a determining role in the way in which some non-regulated grains are stored, handled and shipped. This will impact on the manner in which terminal storage is managed, how elevator equipment is cleaned, the application of fumigants and so on.

(c) In light of this, GrainCorp considered whether it should retain the same approach of having one set of terms and conditions for all grains and all services and one set of protocols. After consideration, it was decided that a clear demarcation in the documentation between the bulk wheat services regulated by the Undertaking and other services was a better approach.

    - First, it avoids confusion as to the scope of the Undertaking and when arbitration applies and to whom the regulated access seekers are (i.e. those parties accredited by WEA as bulk wheat exporters).

    - Secondly, GrainCorp is concerned about the inflexibilities introduced in the Undertaking in dealing with its customers and new circumstances.

For example, if GrainCorp wished to amend the port protocols for a specific matter relating to the shipping of barley and no such changes are required for regulated grain exports, it is much clearer if there is a set of bulk wheat specific protocols subject to the Undertaking, and another set of protocols applying to non-regulated grains.

In the Protocols included in the Undertaking, at clause 3.1.5(c) GrainCorp included a right to reserve capacity for servicing its non-grain activities. GrainCorp has been concerned, among other things, that by introducing an Undertaking and specific Protocols for bulk wheat that bulk wheat could in fact have priority over other grains.

> Following consultation with customers, GrainCorp has deleted this clause from its current Protocols as it was perceived as giving GrainCorp a right to prioritise other grains over bulk wheat, or to prioritise GrainCorp Trading over other port terminal service customers. This was never the intention, despite claims to the contrary to the ACCC in submissions and via consultation.
>
> The intention is that they should be treated equally, with scheduling done under a common basis through consistent Protocols. [159]

In response to submissions from interested parties that the port terminal services are inadequately defined, GrainCorp submits:

> GrainCorp considers that the port terminal services are adequately defined to achieve the objects of the WEMA and an exhaustive list as that proposed by AGEA is not appropriate. [160]

In response to submissions from interested parties that the Undertaking should apply to upcountry storage, GrainCorp submits:

> Interested party submissions have not justified that upcountry storage facilities are natural monopolies and should be regulated by Part IIIA of the TPA. [161]

In response to submissions from interested parties that the Undertaking should apply to all grains, GrainCorp submits:

> Exporters have had adequate access to port terminal services for shipping non-regulated grains for many years. No justification has been provided for the Undertaking to be extended to non-wheat grains.[162]

In response to submissions from interested parties that the scope of the proposed Undertaking should be expanded to ensure personnel from superintendence companies can access the ports, GrainCorp states:

> SGS and Intertek (and other cargo superintendents) have historically been granted access to GrainCorp port terminal facilities to conduct their operations, following appropriate notification of GrainCorp management. Any limitations placed on access to operational sections of terminals are necessary having regard to employee and visitor safety.[163]

## 7.3 Submissions received in response to Issues Paper

### 7.3.1 AgForce Grains Ltd

AgForce notes that it was a strong proponent of the requirement for Part IIIA access undertakings as part of the formation of the *Wheat Export Marketing Act 2008* and

---

159 GrainCorp Operations Limited, *Supplementary submission to the ACCC*, 24 June 2009, p. 15.
160 GrainCorp Operations Limited, *Supplementary submission to the ACCC*, 24 June 2009, p. 18.
161 GrainCorp Operations Limited, *Supplementary submission to the ACCC*, 24 June 2009, p. 18.
162 GrainCorp Operations Limited, *Supplementary submission to the ACCC*, 24 June 2009, p. 18.
163 GrainCorp Operations Limited, *Supplementary submission to the ACCC*, 24 June 2009, p. 104.

still believes the access undertakings are needed for the future prosperity of the industry.[164]

AgForce states that it lobbied for the inclusion of other grains in the WEMA and hopes that the procedures put in place through the Undertaking are reflected in the export of all grain from Queensland.[165]

Other than that, AgForce submits that:

> Despite the comments by others in the industry, the scope of the Undertaking seems to be very clear and includes all activities taking place at the port. The definitions of what activities, services and assets are included seem clear and those not included are also clear.[166]

### 7.3.2 Australian Grain Exporters Association

AGEA submits that the scope of the proposed Undertaking should not be limited to services at port, and not limited to only bulk wheat. AGEA states that upstream facilities cannot feasibly be separated from port terminal services and notes that currently the port operator provides both port services and upstream services under a single contract.[167] AGEA states:

> It is artificial to try to compartmentalise port terminal services from the upstream services when such services are all provided by the same company and under the same contract. [168]

AGEA submits that as the proposed Undertaking only covers bulk wheat, port operators have the potential to restrict access to port by exhausting the port terminal's capacity in favour of other grains.[169]

AGEA submits that the service definition must include 'all services provided by means of the port terminal facilities to which the undertaking applies, as well as the use of the port terminal facilities'.[170] Further, AGEA states that the service definition must identify the geographical parameters of the port terminal facilities and include all service provided within that area. It states that the geographical boundaries should at least begin at the point where the wheat arrives and include every other point until the wheat is loaded into the ship's hold.[171] However, AGEA points out the limitations of defining the service on geographical lines, providing an example of where storage

---

164 AgForce Grains Ltd, *Submission in relation to proposed GrainCorp access undertaking*, 29 May 2009, covering letter.

165 AgForce Grains Ltd, *Submission in relation to proposed GrainCorp access undertaking*, 29 May 2009, para 2.0, p. 1.

166 AgForce Grains Ltd, *Submission in relation to proposed GrainCorp access undertaking*, 29 May 2009, para 4.5, p. 4.

167 Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 3.7, p. 4.

168 Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 4.6, p. 9.

169 Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 4.9, p. 10.

170 Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 8.3, p. 19.

171 Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 8.4, p. 19.

facilities at some ports in Western Australian and South Australia ports are located outside the geographical confines of the port.[172]

AGEA sets outsets out in detail what it considers must be included in the service definition:

i) daily intake to port by grade;

ii) information of stock on hand at port;

iii) port capacity;

iv) stock movements back out of port (prior consultation with marketer in question);

v) managing port-related stock swaps;

vi) weighing of wheat upon receival by BHCs and again upon outturn onboard vessel;

vii) unloading;

viii) storage;

ix) fumigation and management—quality of grain is to be maintained at the same level as when it was delivered to the BHCs "quality in = quality out" over the rail;

x) segregating/blending as directed by AWE;

xi) accumulating;

xii) elevating to ship;

xiii) sampling of wheat upon receival by BHCs and again upon outturn onboard vessel;

xiv) loading, stowing and trimming;

xv) access by independent superintendent/surveyor;

xvi) documentation evidencing the process;

A. weight

B. quality

C. AQIS compliance

xvii) managing vessel nominations and shipping stem on a timely basis;

xviii) notifying problems and respond to request from marketers on a timely basis e.g. daily report on quality loaded. [173]

[172] Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 8.5, p. 20.

AGEA also provides detailed submissions on specific clauses of Schedule 2 of GrainCorp's Undertaking which sets out the standard Port Terminal Services being offered described above at 1.1, as set out below:[174]

(a) Clause 2.1—it is not appropriate that GrainCorp has an absolute discretion as to whether to provide services in relation to the intake of wheat from non-GrainCorp sites. The services should be provided to all exporters that receive accreditation from WEA;

(b) Clause 2.4(b)(i)—there is no transparency in relation to GrainCorp's vertical storage capacity and this clause could be used to refuse access to services;

(c) clause 2.4(b)(ii)(A)—GrainCorp is entitled to refuse to provide services for deliveries that do not exceed 500 tonnes per day. This unfairly discriminates and does not take into account unforeseen delays, or delays caused by the BHC itself, such as trucks being delayed in queues;

(d) clause 2.4(b)(ii)(C)—there is no justification for refusing to provide services where the parcel of wheat to be loaded does not exceed 5,000 tonnes;

(e) clause 2.4(b)(ii)(D) and (E)—AWEs will be restricted if they cannot commence deliveries prior to 21 days. GrainCorp is paid for the service and the use of its facilities, and is therefore compensated for the longer accumulation times. The requirement to provide a vessel name is a detail that is not relevant to the provision of the BHCs' port terminal facilities. To require this level of detail imposes a burden on AWEs to book vessels further ahead of time than is usual practice. This results in AWEs incurring greater costs as result of having to charter vessels with longer lead time and reduced flexibility in marketing strategies;

(f) clause 2.4(b)(ii)(F)—proof of prior treatment is unreasonable and an AWE might not be able to provide such proof in respect of harvest shipping where they do not treat;

(g) clause 2.4(b)(ii)(G)—wheat protection by GrainCorp should be an option; and

(h) clause 2.4(b)(ii)(H)—it is not clear how delivery inspection would work, who would pay for the service and whether this clause could be used by GrainCorp to prevent accumulation.

### 7.3.3 Grain Industry Association of Victoria

The Grain Industry Association of Victoria (GIAV) submits that the scope of the proposed Undertaking should not be limited to services at the port terminal, but should also cover rail and road access.[175] GIAV states that it is often 'upstream

---

[173] Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 8.4(b), pp. 19-20.

[174] Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 8.10, pp. 21-22.

[175] Grain Industry Association of Victoria, *Submission in relation to proposed access undertakings*, 1 June 2009, p. 1.

access' issues—for instance transport to port, and the capacity of the bulk handler to load transport at its up-country facilities—that are the constraining factors on export capacity.[176]

GIAV states that GrainCorp charges a higher fee for handling grain from third parties 'to cover the risk of an adverse outcome from handling grain from third parties',[177] and submits that this should not be allowed to occur pursuant to the Undertaking. GIAV also submits that the undertaking should apply equally to parties who use the port operators' up-country services and those that do not.[178]

### 7.3.4 New South Wales Farmers Association

The NSW Famers Association notes that the proposed Undertaking does not cover up-country storage and handling facilities and is concerned that 'a lack of regulation has possibly led to the deterioration of competition, and therefore higher fees and charges which are inevitably passed on to the industry'.[179]

### 7.3.5 Riverina

Riverina submits that the proposed Undertaking should apply to all grains and not be limited to wheat.[180] In this regard Riverina refers to access problems it experienced when attempting to export sorghum through GrainCorp's Fisherman Island terminal in February/ March 2009. Riverina notes:

> The interchange ability of all grains and the systematisations of the processes adopted demonstrate the applicability to all grain exports from respective Ports.
>
> GrainCorp has provided its draft sorghum protocol to Riverina for the coming year which contains some significant differences to that proposed for wheat, which can be detailed further if required.[181]

Riverina also makes a submission on the treatment of 'ex-farm' delivered grain and provides an example of where GrainCorp has required 'ex-farm' delivered grain to be delivered to an approved up-country storage facility before reaching the Fisherman Island port. Riverina also states that there were requirements imposed on it concerning the amount of grain that could be transported to port by road.[182]

---

176 Grain Industry Association of Victoria, *Submission in relation to proposed access undertakings*, 1 June 2009, p. 1.

177 Grain Industry Association of Victoria, *Submission in relation to proposed access undertakings*, 1 June 2009, p. 2.

178 Grain Industry Association of Victoria, *Submission in relation to proposed access undertakings*, 1 June 2009, p. 2.

179 NSW Farmers Association, *Submission in relation to proposed access undertakings*, June 2009, p. 5.

180 Riverina (Australia) Pty Ltd, *Submission in relation to proposed GrainCorp and CBH access undertakings*, 29 May 2009, p. 4.

181 Riverina (Australia) Pty Ltd, *Submission in relation to proposed GrainCorp and CBH access undertakings*, 29 May 2009, p. 4.

182 Riverina (Australia) Pty Ltd, *Submission in relation to proposed GrainCorp and CBH access undertakings*, 29 May 2009, p. 9.

### 7.3.6 Victorian Farmers Federation Grains Group

The Victorian Farmers Federation (VFF) considers that the current wheat export marketing legislation is flawed due to its limited scope.[183]

### 7.3.7 SGS Australia

SGS states that superintendence and inspection companies 'play a vital role in facilitating trade by assisting their clients to mitigate the substantial risk taken on by parties buying and selling large quantities of grain'.[184] SGS submits that Australian port operators are generally very restrictive in granting access to superintendence companies, and is concerned that the 'continuation of such policies will jeopardise Australia's place in the international market in the future'.[185]

### 7.3.8 Intertek

Intertek submits that some port operators unnecessarily restrict the rights of exporters and customers to appoint an independent superintendent to supervise the loading of a vessel, and collect samples and monitor quality. Intertek submits that superintendent companies need access to maintain a chain of custody on samples, conduct testing and monitor the quality of cargo during loading.[186] Intertek states that there appears to be a disparity among the port operators in the grain industry and those in other industries, such as oil and chemical plants, the later are said to permit greater access to their ports.[187]

## 7.4 Submissions in response to Draft Decision

### 7.4.1 GrainCorp

GrainCorp submits the following in response to the ACCC's views set out in its Draft Decision in relation to the scope of GrainCorp's proposed Undertaking:

> **Reference prices - justification of differential grain receipt charges**
>
> **Risk Charging Regime for Grain Receival**
>
> In the Draft Determination, the ACCC noted that *'Given the pricing principles, and in particular pricing principle b(ii), the ACCC considers it would be appropriate if, as a transparency measure, appropriate measures would required prices to be transparently specified for a standard set of port terminal service to all parties, including GrainCorp, with any special requirements due to different origin being separately enumerated and priced.'*
>
> GrainCorp will amend Annexure A - Bulk Wheat Port Terminal Services and Fee Schedule to separately enumerate and price special requirements due to grain being sourced from a non-approved source.

---

183 Victorian Farmers Federation Grains Group, *Submission in relation to proposed access undertakings*, 28 May 2009, p. 1.
184 SGS Australia, *Submission in relation to proposed access undertakings*, 26 May 2009, p. 1.
185 SGS Australia, *Submission in relation to proposed access undertakings*, 26 May 2009, p. 2.
186 Intertek, *Submission in relation to proposed access undertakings*, 29 May 2009, p. 5.
187 Intertek, *Submission in relation to proposed access undertakings*, 29 May 2009, p. 5.

> Part of the service provided by GrainCorp can be viewed as a 'guarantee' that grain dispatched to a domestic or export customer from a GrainCorp site will meet customer requirements. This is a component of the service provision agreement GrainCorp has with all customers. If GrainCorp fails to deliver grain that complies with specification, and the fault is that of GrainCorp, the cost of any such failure is the liability of GrainCorp.
>
> Where grain is received into a GrainCorp port terminal from third party storages, GrainCorp is exposed to the potential losses caused by failures on the part of those storing grain prior to delivery to a port terminal to classify, treat, or handle grain correctly. GrainCorp is exposed to increased risk levels due to -
>
> - The risk of receiving grain which has been inappropriately treated with pesticides or chemicals which GrainCorp is unable to test for at the point of receival, and
> - The risk that GrainCorp's testing and sampling procedures may not identify wrongly graded or contaminated grain.
>
> To account for the increased level of risk, some measure of additional surety is required. While GrainCorp does have some contractual protections in the BWPTS Agreement, this is by no means fully protects GrainCorp from the consequences of contaminated or incorrectly classified wheat coming from unapproved sources. For example, GrainCorp has never sought to recover the full costs from an exporter of a port 'blockout' caused by such an occurrence. GrainCorp will restructure the Port Terminal Fee Schedule to provide more transparency about the fee differentials that apply to grain received from different storages at GrainCorp port terminals.[188]

GrainCorp also submitted a table specifying the changes that it proposes to make to the scope of its undertaking.[189]

### 7.4.2 Interested Parties

#### 7.4.2.1 AGEA

The Australian Grain Exporters Association (AGEA) submitted the following in relation to the ACCC's views as set out in its Draft Decision on the scope of GrainCorp's proposed Undertaking:

> AGEA does not agree with the ACCC's draft decision to limit the scope of the proposed Undertaking to wheat and to port terminal services (rather than including up-country services)…
>
> AGEA agrees that the drafting of the definition of "Port Terminal Services" in the proposed Undertakings lack clarity and is therefore not appropriate pursuant to section 44ZZA(3).
>
> AGEA agrees with the ACCC that the BHCs' definition should be substituted with the following definition proposed by the ACCC :
>
> "***Port Terminal Services*** *means the services described in [the Port Schedules] in relation to Bulk Wheat provided by means of a Port Terminal*

[188] GrainCorp Operations Limited, *Submission in relation to Draft Decision on GrainCorp Access Undertaking*, 3 September 2009, p. 19.

[189] GrainCorp Operations Limited, *Submission in relation to Draft Decision on GrainCorp Access Undertaking*, 3 September 2009, p. 27.

*Facility, and includes the use of a Port Terminal Facility and the use of all other associated infrastructure necessary to allow an Accredited Wheat Exporter to export Bulk Wheat through that Port Terminal*."

AGEA also agrees with the ACCC that the BHCs' definition of "port terminal services" must be amended to make it clear that the lists of port terminal services in the Port Schedules or definitions are not exhaustive. The definition of "port terminal services" must include all services provided by means of the port terminal facilities to which the proposed Undertaking applies, as well as the use of the port terminal facilities…

AGEA further submits that the definition of "Port Terminal Services" should be the same across the proposed Undertaking, the port terminal services agreement and the port loading protocol…

***BHCs - Not necessary for proposed Undertaking to expressly provide for access to employees of superintendence companies***

The ACCC is of the view that it is not necessary for the BHCs' proposed Undertaking to expressly provide for access to port terminals by employees of superintendence companies submissions. AGEA believes that there must be an obligation on the BHCs to allow an AWEs' superintendent (or independent third person nominated by the AWEs) access to the port to sample AWEs' wheat and inspect the loading of AWEs' stock onto vessels. This is essential to protect the AWEs' interests as regards any issues with the condition of the ship, that of the cargo being loaded on board the vessel and relevant sales terms.

It is a common term under international sales contracts for both buyers and sellers to be entitled to have a representative present during the loading of the vessel. Certain markets require this, if the weight and quality is to be final at loadport.[190]

#### 7.4.2.2 Port of Portland

The Port of Portland submits that it agrees with the ACCC's position to include cargo accumulation service in the undertaking, 'as it is a critical planning and operational tool for any potential exporter'.[191]

#### 7.4.2.3 Late submissions

The ACCC notes that it also received two late submissions from SGS Australia and The Grain and Feed Trade Association (GAFTA) which largely reiterate the earlier SGS submission of 26 May 2009.

## 7.5 ACCC's views

This section sets out the ACCC's views as to whether the services definition in the proposed Undertaking is appropriate having regard to the matters in section 44ZZA(3) of the TPA.

---

190 GrainCorp Operations Limited, *Submission in relation to Draft Decision on GrainCorp Access Undertaking*, 3 September 2009, p. 5.

191 Port of Portland, *Submission in relation to Draft Decisions on Port Terminal Services Access Undertakings*, 3 September 2009, p. 2.

### 7.5.1 Scope of the proposed service definition

#### 7.5.1.1 Appropriate that the proposed Undertaking relates only to wheat

The ACCC accepts GrainCorp's submissions that it is appropriate that the proposed Undertaking applies only to wheat.

The ACCC notes AGEA's submission that GrainCorp's undertaking should not be limited to wheat. In this regard, the ACCC maintains its view that it is appropriate that the undertaking applies only to wheat. The ACCC recognises that, as GrainCorp has submitted, it is clear that the intention of the WEMA is that the proposed Undertakings should apply only to wheat.

This is because section 24 of the WEMA requires that, for the period after 1 October 2009, in order for a person that provides port terminal services to also hold or maintain accreditation *to export bulk wheat*, there must be in operation, under Division 6 of Part IIIA of the TPA, an access undertaking relating to the provision of access to port terminal services for *purposes relating to the export of wheat* (our emphasis).

The ACCC also considers that limiting the scope of the Undertaking to wheat reduces the risk and undesirability of imposing regulation that is not appropriate at a time when the industry is newly liberalised and in transition.

However, the ACCC recognises that limiting the proposed Undertaking to wheat has the potential to create a number of issues in the industry.

First, limiting the proposed Undertaking to wheat leaves open the possibility that different port terminal protocols could apply for wheat than apply for other grains.

The ACCC notes the submissions made by GrainCorp on this point, and considers that the position it has taken is reasonable given the potential for there to be minor differences necessary to accommodate specific issues relating to a particular grain type.[192]

It is encouraging that GrainCorp has submitted that it intends, where feasible, to have consistent protocols for all grains and to continue to include non-regulated grain vessels on the shipping stem. The ACCC considers that this approach will assist in alleviating the possibility of inconsistency between protocols that apply to wheat and those applying to other grains.

The second issue is one raised by AGEA, that given the proposed Undertaking relates only to wheat, port operators have the potential to restrict access to port by exhausting the port terminal's capacity in favour of other grains.[193]

While the ACCC has no evidence to suggest that such behaviour would be likely to occur, the ACCC recognises that providing a greater level of transparency over stocks

---

[192] For example, the physical characteristics of differing grains, such as variations in volumetric density, and seasonality and frequency of exports – which GrainCorp submits can play a determining role in the way in which some non-regulated grains are stored, handled and shipped.

[193] Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 4.9, p. 10.

at port would assist access seekers and would alleviate the potential for port operators to engage in this behaviour. Accordingly, in the Publication of Information chapter the ACCC sets out its view that publication of stocks at port (all grains) would be an appropriate part of any revised proposed Undertaking.

The ACCC also notes that if an access seeker experiences access issues in relation to access the port terminal services for the export of wheat, that have been influenced in some way by decisions made about other grains, that the access seeker could seek to arbitrate on that access issue or enforce the non-discrimination clause in the proposed Undertaking.

#### 7.5.1.2 Appropriate that proposed Undertaking relates only to services offered at port

The ACCC also accepts GrainCorp's submissions that it is appropriate that the proposed Undertaking applies only to services offered at port (not upcountry).

The ACCC notes AGEA's submission that GrainCorp's undertaking should not be limited to services at port. In this regard, the ACCC maintains its view that it is appropriate that the undertaking applies only to port terminal services. The ACCC recognises that, as GrainCorp has submitted, it is clear that the intention of the WEMA is that the proposed Undertakings should apply only to services offered at port.

In this regard, the ACCC notes that the Explanatory Memorandum to the WEMA dismissed calls to extend the access test to cover up-country services, stating that:

> Up-country facilities do not display natural monopoly characteristics as they have low barriers to entry and there are already a number of competitors in the industry who provide up-country storage services. [194]

The Explanatory Memorandum goes on to note that an extension of the access arrangements to up-country storage facilities would 'impose an excessive regulatory burden'.[195] Further, the Second Reading Speech of the WEMA provides:

> The Senate inquiry also identified concerns in relation to the potential for bulk-handling companies to restrict access to up-country storage facilities in a similar manner to concerns in relation to port facilities.
>
> It is unclear from the evidence presented to the Senate inquiry whether the problem would necessarily arise, and if so, the extent of legislation that would be required to correct it.
>
> If the highest level of regulation were to be imposed on the more than 500 up-country facilities, there is no doubt that this would create increased compliance costs which would almost certainly be directly passed back to growers.
>
> The government will, therefore, continue to monitor the ability of exporters to access up-country storage facilities.

[194] Explanatory Memorandum, *Wheat Export Marketing Bill 2008* (Cth), p. 13.
[195] Explanatory Memorandum, *Wheat Export Marketing Bill 2008* (Cth), p. 14.

> Let me say here, if any problems are identified then the government will take steps to remedy the situation including, if necessary, the development of a code of conduct.[196]

Nevertheless, the ACCC is cognisant of submissions to both the Issues Paper and Draft Decision calling for the Undertaking to be extended to include services offered at GrainCorp's up-country storage and handling facilities. Many of these submissions stated that it was artificial to draw a distinction between services offered at port and those offered up-country.

However, the ACCC, in this process, has not formed any views on the competitiveness of the supply of up-country storage and handling services. As set out in the Legislative Framework chapter, the ACCC does not consider that its role in this process was to conduct a thorough assessment of the state of competition in the bulk wheat export supply chain.

It is the ACCC's view that, given the clear express intention of the WEMA and having regard to the risk and undesirability of imposing regulation that is not appropriate at a time when the industry is newly liberalised and in transition, the ACCC considers that it is appropriate pursuant to section 44ZZA(3) of the TPA that the scope of the proposed Undertaking be limited to services at port. The ACCC notes that the question of whether the 'access test' under the WEMA should be extended up-country is a question of policy for government.

The ACCC notes, however, that providing access at the port creates incentives for other parts of the supply chain to be as efficient as possible, as access to the port would facilitate dissatisfied customers taking the option of bypassing GrainCorp's upcountry facilities.

#### 7.5.1.3 It is not appropriate that the services offered differ according to where the grain was stored

Schedule 2 of GrainCorp's proposed Undertaking establishes different services - offered on different conditions - depending on where the access seeker's wheat was stored – i.e. whether it was stored in GrainCorp's up-country storage and handling facilities, in what GrainCorp terms an "Other Approved Bulk Handling Company Site" or in what it terms an "Unapproved Source".

The three differentiated services set out in Schedule 2 are priced separately in the Fees Schedule at Annexure A of GrainCorp's proposed 2009–10 Wheat Port Terminal Services Agreement.

GrainCorp states that this differentiation is motivated by operational, quality, safety and commercial factors.[197] Elsewhere, GrainCorp states that the delineation is to also guard against logistical risks[198] and has provided examples of where it states this increased risk in receiving bulk wheat from sites other than those it owns has materialised into shipping delays.

---

196 House of Representatives, *Votes and Proceedings, Hansard*, Thursday 29 May 2009, pp. 76-77.
197 GrainCorp Operations Limited, *Supplementary submission to the ACCC*, 24 June 2009, p. 61.
198 GrainCorp Operations Limited, *Supplementary submission to the ACCC*, 24 June 2009, p. 93.

The ACCC notes GrainCorp's argument that there is a different risk associated with receiving bulk wheat ex-farm as opposed to via its own up-country storage facility.

This may very well be the case. However, GrainCorp has not provided quantitative information supporting any cost differential that arises from the relative risks of receiving grain from different sources. Neither has the ACCC sought to either verify or quantify any risk differential that may arise from the different sources of bulk wheat.

In assessing whether to accept the proposed Undertaking, the ACCC is, however, required to take into account the pricing principles at section 44ZZCA, which state at section 44ZZCA(b):

> The pricing principles relating to the price of access to a service are:
>
> (a) that regulated access prices should
>
> (i) be set so as to generate expected revenue for a regulated service or services that is at least sufficient to meet the efficient costs of providing access to the regulated service or services; and
>
> (ii) include a return on investment commensurate with the regulatory and commercial risks involved; and
>
> (b) that the access price structures should:
>
> (i) allow multi-part pricing and price discrimination when it aids efficiency; and
>
> (ii) 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
>
> (c) that access pricing regimes should provide incentives to reduce costs or otherwise improve productivity.'[199]

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

An example of an additional service may be the rail receival path cleaning service that currently only applies to bulk wheat from an "Other Approved Bulk Handling Company Site" or an "Unapproved Source".

The adoption of this approach would remedy other concerns that the ACCC has about the scope of GrainCorp's proposed Undertaking – namely, the discretion GrainCorp allows itself in determining whether an up-country storage facility is an "Other Approved Bulk Handling Company Site" or an "Unapproved Source". Such a high level of discretion does not provide sufficient certainty and transparency for access seekers.

---

[199] *Trade Practices Act 1974* (Cth) s 44ZZCA.

### 7.5.1.4 Drafting of the scope lacks clarity

While the ACCC recognises that the GrainCorp has attempted to draft the scope of its proposed Undertaking to be consistent with the service definition in the WEMA, the ACCC nevertheless considers that the drafting of the scope of GrainCorp's proposed Undertaking lacks clarity and is therefore not appropriate pursuant to section 44ZZA(3).

The definition of Port Terminal Service in the WEMA is:

> *Port terminal service* means a service (within the meaning of Part IIIA of the *Trade Practices Act 1974*) provided by means of a port terminal facility, and includes the use of a port terminal facility. [200]

A Port Terminal Facility is defined in the WEMA in the following manner:

> "Port Terminal Facility" means a ship loader that is:
>
> (a) at a Port Terminal; and
>
> (b) capable of handling Bulk Wheat;
>
> and includes any of the following facilities:
>
> (c) an intake/receival facility;
>
> (d) a grain storage facility;
>
> (e) a weighing facility;
>
> (f) a shipping belt;
>
> that is:
>
> (g) at the Port Terminal; and
>
> (h) associated with the ship loader; and
>
> (i) capable of dealing with Bulk Wheat. [201]

#### *Clause 4.1(b) – amendments to make it clear that the lists of port terminal services in Schedule 2 are not exhaustive*

GrainCorp states that it has structured its service definition to strike a balance between defining the services with an 'exhaustive list', which it states has the risk of inadvertently excluding a service, and a high level 'principle' approach which may be too broad.[202]

The ACCC considers that the current drafting of the scope of GrainCorp's proposed Undertaking does risk inadvertently excluding relevant services.

---

200 *Wheat Export Marketing Act 2008* (Cth) s 5.
201 *Wheat Export Marketing Act 2008* (Cth) s 5.
202 GrainCorp Operations Limited, *Supplementary submission to the ACCC*, 24 June 2009, p. 19.

It is not clear whether the elements of the service described at Schedule 2 are intended to be exhaustive. That is, clause 4.1(b) provides that port terminal services '*means* the services described in Schedule 2' (emphasis added). This drafting leaves the services definition open to an interpretation that the specified elements of the service in Schedule 2 may be an exhaustive list.

Therefore, for the avoidance of doubt, the ACCC is of the view that the service description should include drafting such that any services necessarily required by access seekers to port terminal services are captured. This could be achieved by the substitution of clause 4.1(b) with the following:

> **Port Terminal Services** means the services described in Schedule 2 in relation to Bulk Wheat provided by means of a Port Terminal Facility, and includes the use of a Port Terminal Facility and the use of all other associated infrastructure necessary to allow an Accredited Wheat Exporter to export Bulk Wheat through that Port Terminal.

***Schedule 2 – inclusion of 'cargo accumulation'***

The ACCC is of the view that it would be appropriate for cargo accumulation services to be explicitly included within the scope of the Undertaking.

The ACCC accepts arguments made by AGEA that cargo accumulation is an essential part of port terminal services. The ACCC considers that a transparent cargo accumulation procedure is an important element of the port terminal service, as the potential costs to the industry could be significant if the cargo accumulation process is poorly managed.

The ACCC notes that the exclusion of 'cargo accumulation' from Schedule 2 may have been inadvertent given that clause 4.3(c) of the proposed Undertaking includes a reference to 'cargo accumulation' (although the ACCC understands that clause 4.3 is merely illustrative in nature).

***Schedule 2 – removal of terms and conditions***

The ACCC is of the view that it is not appropriate for Schedule 2 of GrainCorp's proposed Undertaking to include any terms or conditions of access on which access will be offered.

The terms and conditions on which access is offered are set out in the standard terms offered to accredited wheat exporters. Having other terms and conditions in the Port Schedules is likely to create confusion and uncertainty about the terms of access (even with the operation of clause 2.2 – setting out that the terms of a Schedule will prevail over the General Terms to the extent of any inconsistency).

It is the ACCC's view that, instead, the terms and conditions of access should *all* be clearly set out in the standard terms offered to accredited wheat exporters.

In this regard, it would be appropriate for clause 2.4(b) to be removed from the proposed Undertaking given it includes a list of conditions of access that only apply to bulk wheat originating from 'Other Approved Bulk Handling Company Sites'. These

conditions include a minimum receival tonnage and that no 'wheat protection' will be provided by GrainCorp.

Without commenting on appropriateness of these conditions of access, it is not appropriate for *any* such conditions to be included in Schedule 2.

***Removal of clause 4.4(d) – irrelevant to scope***

The ACCC notes that under the heading "What this Undertaking does not cover", clause 4.4(d) provides:

> Nothing in this Undertaking requires GrainCorp or Related Body Corporate to share efficiency savings or benefits from the operation of a separate integrated supply chain service whether or not the integrated supply chain service utilises the Port Terminal Facilities.

The ACCC considers that the rationale for, and implications of, clause 4.4(d) are not clear.

The ACCC is of the view that inclusion of this clause in the context of defining the scope of the Undertaking introduces an unnecessary degree of uncertainty for access seekers and is therefore not appropriate.

#### 7.5.1.5 Not necessary for GrainCorp's proposed Undertaking to expressly provide for access to employees of superintendence companies

The ACCC notes that several submissions called for increased access to ports for employees of superintendence companies.

The ACCC accepts that there may be benefits in allowing employees of superintendence companies to access port terminals, particularly in relation to improving the transparency of port operations.

However, the proposed Undertaking is an undertaking focusing on providing access to port terminal services to *accredited wheat exporters*. It is not an undertaking specifically to provide access to employees of superintendence companies. That said, the ACCC notes that a failure of GrainCorp to allow an accredited wheat exporter to bring an employee of a superintendence company into the port terminal area could be an issue dealt with by negotiation or arbitration under the undertaking (see the Publish, Negotiate, Arbitrate chapter).

The ACCC further notes that failure to allow a wheat exporter to bring an employee of a superintendence company into the port may, in some circumstances, have the potential to breach the non-discrimination obligations that the ACCC considers are appropriate for inclusion in a revised undertaking.

# 8 Publish, Negotiate, Arbitrate

**Summary**

The ACCC is of the view that, in the present circumstances, it is appropriate that GrainCorp's proposed Undertaking adopts a publish-negotiate-arbitrate approach (rather than providing for ex ante price regulation). In forming this view, the ACCC has had regard to the transitional state of the industry and the relatively short duration of the proposed Undertaking.

The ACCC considers, however, that the drafting of the publish-negotiate-arbitrate component of the proposed Undertaking dated 15 April 2009 is not appropriate.

The ACCC considers it is more likely to be appropriate for the proposed Undertaking to:

- include an indicative access agreement setting standard terms for access to the service;
- require GrainCorp to publish a single set of prices for port terminal services, which may include differentiated prices for different circumstances (i.e., for different processes for testing of grain depending on where it has been stored – but *only* where these processes are justifiable with regard to hygiene, quality or associated factors), provided those circumstances are transparently stated and the pricing differences are justified on the basis of different costs;
- require GrainCorp to publish prices by the beginning of September for the season 2010/2011;
- provide measures to ensure the negotiation, dispute resolution and arbitration mechanisms are applicable to Access Agreements for the 2009/2010 season;
- provide appropriate arrangements to ensure access seekers are not delayed in obtaining access by reason of engaging in a negotiation with GrainCorp on non-standard terms or prices, or by reason of resolving a dispute with GrainCorp pursuant to the processes in the proposed Undertaking;
- address the issues identified by the ACCC in the discussion below regarding the timeframes and lack of clarity and certainty in the drafting of the proposed Undertaking, as well as the disproportionate discretion of the access provider;
- not include a 'pre-condition' to invoking the dispute resolution process, as currently included in clause 6.3(c);
- provide for a Dispute to be mediated by either the IAMA or the GTA;
- provide that when a Dispute is referred to arbitration, it is referred to the ACCC in the first instance;
- provide a mechanism by which the ACCC may consider whether or not it wishes to arbitrate the Dispute;
- provide for the Dispute to be arbitrated by the ACCC if it so chooses, or for the Dispute to be arbitrated by a private arbitrator if the ACCC so chooses;

- permit the ACCC to conduct an arbitration adopting the processes and having regard to the matters set out in Part IIIA of the TPA if it chooses to be the arbitrator;
- require a private arbitrator to keep the ACCC informed of the progress of the arbitration, including timelines and processes for making submissions; and
- allow the ACCC to make submissions in relation to an arbitration conducted by a private arbitrator.

## 8.1 GrainCorp's proposed Undertaking dated 15 April 2009

The GrainCorp Undertaking dated 15 April 2009 proposes a 'publish-negotiate-arbitrate' model for dealing with the publication of prices and terms, negotiating for access and resolving disputes. The key relevant clauses are 5, 6 and 7 of the proposed Undertaking, though other clauses are also relevant.

### 8.1.1 Obligation to publish price and non-price terms

Clause 5.1 obliges GrainCorp, by no later than 30 September each year, for access to each of its Standard Port Terminal Services, to publish 'Reference Prices' and 'Standard Terms.' If GrainCorp has not published by that time at the commencement of the proposed Undertaking, it must publish within 15 Business Days of commencement. Unless varied, the Reference Prices and Standard Terms must apply at least until 30 September of the next year.

### 8.1.2 Access, Standard Terms and Standard Services

Clause 5.2 provides that the 'Standard Port Terminal Services' for each Port are set out in Schedule 2. Further, clause 5.2(b) provides that, unless otherwise specified in a Port Schedule, access to a Standard Port Terminal Service (and GrainCorp's obligation to enter into an Access Agreement for them) will only be offered for a term expiring no later than 30 September of the year following the year in which the Standard Terms were first published, subject to appropriate 'holding over' provisions.

Clause 5.1(e) provides that if an Applicant seeks access to non-standard Port Terminal Services, GrainCorp and the Applicant may negotiate different prices and non-price terms.

Clause 5.3 provides that parties may agree to include terms in an agreement applying to services other than Port Terminal Services, but that the Undertaking only applies to the terms relating to the provision of access to Port Terminal Services. Clause 5.3(a) of the Undertaking also provides that the Standard Terms must include the Port Terminal Services Protocols. Clause 6.7(b) reiterates that a negotiated Access Agreement will, unless otherwise agreed between GrainCorp and the Applicant, at least address the essential elements set out in Schedule 3 (being the Port Terminal Protocols).

Clause 5.4 provides that if an Applicant requests a Standard Port Terminal Service, GrainCorp must *offer*, in accordance with clause 6, that Service at the Reference Prices for that Service applicable at that time. Clause 6 sets out the negotiation process (see below). Clause 6.7(b)(i) reiterates that GrainCorp must offer the Standard Terms to the Applicant where the Applicant requests access to a Port Terminal Service, subject to the Applicant satisfying the Prudential Requirements (see below).

Clause 5.4 goes on to provide that GrainCorp must not *provide access* on terms[203] which are different from the Standard Terms and Reference Prices, or which differ between Applicants/Users, except in certain circumstances. Per clause 5.4, GrainCorp may provide access on different terms where those terms are:

- consistent with the objects of the proposed Undertaking;
- offered on an arm's length commercial basis; and
- commercially justifiable, taking into account the 21 matters listed in clause 5.5.

Clause 5.4(b) contains an obligation regarding non-discrimination. Please refer to the Non-Discrimination chapter for further discussion of this obligation. Clause 6.7 reiterates that, subject to clauses 5.4 and 5.5, GrainCorp may offer amended Standard Terms to reflect terms which GrainCorp considers reasonably necessary or desirable to accommodate a request for access to a non-standard Port Terminal Service. Further, clause 6.7 states that GrainCorp may agree changes to the Standard Terms requested by the Applicant.

Clause 6.7(a) provides that the granting of access is finalised by the execution of an Access Agreement. Clause 6.7(c) provides that once the Applicant has notified GrainCorp that it is satisfied with the terms and conditions of the Access Agreement as drafted, GrainCorp will, as soon as reasonably practicable, provide a final Access Agreement (or if applicable, an amendment to an existing Access Agreement) to the Applicant for execution. Clause 6.7(d) provides that if GrainCorp offers an Access Agreement and the Applicant accepts the terms and conditions offered in that Access Agreement, GrainCorp and the Applicant will execute the Access Agreement. The clause states that the parties will use reasonable endeavours to comply with this clause as soon as practicable.[204]

### 8.1.3 Negotiating for access

**Good faith negotiations**

Clause 6.1 of the Undertaking provides that GrainCorp will negotiate in good faith for the provision of access to Port Terminal Services.

**Confidentiality**

Clause 6.2 relates to confidentiality during the negotiation process. It provides that if a party provides 'Confidential Information' to the other party as part of the negotiation process, the party receiving that information will treat it as secret and

[203] The ACCC interprets clause 5.4(a)(ii) to include the words 'on terms' after the word 'Division' and before the words 'which are.'

[204] GrainCorp Operations Limited, *Port Terminal Services Access Undertaking*, 15 April 2009, clause 6.7.

confidential, as the property of the provider, and will not use the information for any purpose outside the provisions of the Undertaking. A party may disclose the Confidential Information to the extent necessary for the provision of advice from legal advisors, financiers, accountants or other consultants, provided those persons are under a legal obligation not to disclose the information. The confidentiality obligation is reiterated in clause 6.3(b).

**Provision of information by GrainCorp to Applicant**

Clause 6.4(a) provides that, if requested by the Applicant, GrainCorp will provide the Applicant with information related to access to the Port Terminal Services that may be reasonably required by the Applicant in relation to the Access Application. GrainCorp will provide this information subject to:

- GrainCorp not disclosing any information which would breach a confidentiality obligation or which it considers is commercially sensitive in relation to its own operations; or

- the Applicant paying the reasonable costs incurred by GrainCorp in obtaining information that is not ordinarily and freely available to GrainCorp.

Under clause 6.4(a)(ii)(B), GrainCorp may also refuse an information request if it is unduly onerous, or the expense and resources required to provide the information is disproportionate to the benefit to be obtained from the information.

**Access application, acknowledgement and commencement of negotiations**

Clause 6.5(a)(i) provides that requests for access to Port Terminal Services are to be submitted in the form of an Access Application, which is set out at Schedule 4. The form requires the Applicant to provide 'request details,' being season; customer application type and business category; and 'applicant details', being company name; ACN/ABN; website; address; contact details; details of authorised company representative, including authorisation; and duration of the agreement sought. An Applicant may seek initial meetings with GrainCorp to discuss the application and seek clarification on the process as outlined in the Undertaking, or the information requirements of the form.

Parties will commence negotiation to progress towards an Access Agreement as soon as reasonably possible following GrainCorp's acknowledgement of receipt of an Access Application.[205] Clause 6.5(b) requires GrainCorp to acknowledge receipt of the Application within five Business Days of receipt, or such longer period as required if GrainCorp requires additional information regarding, or clarification of, the Application. If GrainCorp seeks further information or clarification, it must advise the Applicant of the additional information or the clarification within five Business Days of receipt of the Application. Upon receiving the required information or clarification, GrainCorp will provide written acknowledgement of the receipt of the

[205] GrainCorp Operations Limited, *Port Terminal Services Access Undertaking*, 15 April 2009, clause 6.6(a).

completed Access Application within five Business Days. The 'Negotiation Period' commences upon GrainCorp's acknowledgement of receipt.[206]

**Negotiation, 'pre-conditions' to negotiation and ceasing negotiation**

Clause 6.4(b) provides that:

- GrainCorp reserves the right to negotiate only with Applicants who comply with the requirements and processes set out in the Undertaking, and that if an Applicant does not comply and GrainCorp considers that such non-compliance is material, GrainCorp is not obliged to continue negotiations with the Applicant;
- the Applicant must be an Accredited Wheat Exporter;
- GrainCorp may require, at any time, the Applicant to demonstrate that it can meet the Prudential Requirements (see further below), and GrainCorp may refuse to commence negotiations, or may cease negotiations, with an Applicant if they cannot meet the Prudential Requirements;
- GrainCorp may at any time refer a request for access to the arbitrator if GrainCorp is of the view that the Applicant's request is frivolous in nature, or that the Applicant is not negotiating in good faith. If the arbitrator determines that the request is frivolous, then GrainCorp will be entitled to cease negotiations, and will not be obliged to comply with the proposed Undertaking in respect of the request.

If GrainCorp refuses to negotiate for the reasons described at points 1 or 3 above, then within 10 Business Days of the decision to refuse to negotiate, GrainCorp must explain in writing to the Applicant the reasons for the refusal.

Clause 6.6 provides that GrainCorp will be entitled to cease negotiations upon the cessation of the 'Negotiation Period,' which will occur upon:

- GrainCorp believing that the negotiations are not progressing in good faith towards the development of an access agreement within a reasonable time period;
- GrainCorp receiving evidence confirming that the Applicant no longer satisfies the Prudential Requirements;
- the execution of an Access Agreement;
- written notification from the Applicant that it no longer wishes to proceed with its Access Application; or
- the expiration of three months, or if an extension is agreed upon, at the end of that extended period.

Clause 6.4(b)(vi) states that if the Applicant considers that GrainCorp has unreasonably refused to commence or unreasonably ceased negotiations under clause 6.4(b) or clause 6.6(c), then the Applicant may refer the matter to the arbitrator.

Clause 6.6(b)(v) states that if GrainCorp receives evidence confirming that the Applicant no longer satisfies the Prudential Requirements, it will advise the Applicant of the evidence and issue a notice of intent to end the Negotiation Period, to become

[206] GrainCorp Operations Limited, *Port Terminal Services Access Undertaking*, 15 April 2009, clause 6.6(b).

effective ten Business Days after the issue of the notice. GrainCorp will be required to provide the Applicant with written reasons for its decision to end the Negotiation Period.

**Prudential requirements**

Clause 6.4(b)(iv) stipulates that to meet the Prudential Requirements, the Applicant must:

- be solvent; and
- the Applicant, or a Related Body Corporate, must not be currently, or have been in the previous two years, in 'Material Default' of any agreement with GrainCorp; and
- be able to demonstrate to GrainCorp that it has a legal ownership structure with a sufficient capital base and assets of value to meet the actual or potential liabilities under an Access Agreement, including timely payment of access charges and payment of insurance premiums and deductibles under the required policies of insurance, or otherwise provides Credit Support acceptable to GrainCorp (acting reasonably).

### 8.1.4 Pre-arbitration dispute resolution

Clause 6.3(c) provides that, if at any time during the negotiation process a dispute arises between the parties which, after reasonable negotiation, the parties are unable to resolute, then either party may seek to resolve the dispute in accordance with the process in clause 7.

Clause 7.1(a) of the Undertaking provides for 'Disputes' to be resolved in accordance with clause 7, unless expressly agreed otherwise. 'Dispute' in this sense is defined as a bona fide dispute between GrainCorp and an Applicant/User arising under the proposed Undertaking, but excludes any disputes in relation to an executed Access Agreement. Clause 7.1(b) reiterates that Disputes in relation to an executed Access Agreement will be dealt with under the provisions of that Access Agreement.

Clause 7.1(c) states that by 31 July of each year, GrainCorp will report to the ACCC on any material disputes in relation to an Access Agreement and any Disputes raised by Applicants, Users or GrainCorp in the last 12 months, which will include the details of any resolution and the status of unresolved matters.

Clause 7.1(a) goes on to provide that either party to a Dispute may give the other party a 'Dispute Notice' specifying the Dispute and requiring it to be dealt with under clause 7. The parties are required to use 'reasonable endeavours acting in good faith' to settle the Dispute as soon as practicable.

Clause 7.2 states that within five Business Days of a party giving the other party a Dispute Notice, senior representatives from each party are to meet and use reasonable endeavours acting in good faith in order to resolve the Dispute by joint discussions.

Clause 7.3(a) provides that if a Dispute is not resolved via discussion between senior representatives, then within 10 Business Days after the date of the Dispute Notice and

if the parties agree, they can attempt to resolve the Dispute by mediation. Clause 7.3(b) states if the parties agree to attempt to resolve the dispute by mediation, the Dispute will be referred to the Chief Executive Officers of the parties involved who will attempt to resolve the Dispute, including by informal mediation. Clause 7.3(c) states if the dispute is not resolved within 10 Business Days of being referred to CEOs, the Dispute will be referred to formal mediation. If the parties are unable to agree upon a mediator within 10 Business Days, on the request of either party the Dispute will be referred to a mediator appointed by the President of the New South Wales Chapter of the Institute of Arbitrators and Mediators of Australia (IAMA). Clause 7.3(d) sets out matters in relation to the conduct and costs of the mediation.

### 8.1.5 Arbitration

**Referral to arbitration**

Clause 7.3(a)(ii) provides that, if after senior representatives have discussed the Dispute, the parties do not wish to resolve the Dispute by mediation, either party may, by notice in writing to the other and the arbitrator, refer the Dispute to arbitration. A Dispute may also be referred to arbitration:

- if the Dispute is not resolved by joint discussion under clause 7.2;
- at any time after the appointment of the mediator under clause 7.3(c).[207]

Under clause 7.4(b), GrainCorp must notify the ACCC of the details of any Dispute which has been referred to arbitration, the progress of the arbitration and also provide the ACCC with the arbitrator's final determination. Clause 7.4(d) requires GrainCorp to indemnify the arbitrator from any claims made against it arising out of the performance of its duties under clause 7, except for certain conduct, and to pay costs.

Clause 7.4(c) provides that if the Applicant serves notice of a Dispute on the arbitrator,[208] the notice will also include an agreement by that Applicant to:

- pay any of the costs of the arbitration as determined by the arbitrator under clause 7.10; and
- indemnify the arbitrator from any claims made against the arbitrator arising from the performance of its duties under clause 7, except for certain conduct.

**Selection of arbitrator**

Clause 7.5(a) provides that the arbitration must be conducted by an arbitrator appointed by agreement of the parties.

Under clause 7.5(b), if the parties fail to agree an arbitrator within 10 Business Days of the referral under clause 7.4(a), either party may request the ACCC to appoint an arbitrator.

---

[207] GrainCorp Operations Limited, *Port Terminal Services Access Undertaking*, 15 April 2009, clause 7.4(a).

[208] There is an ambiguity in the proposed Undertaking at this point. It is not clear whether the reference here to the arbitrator should actually be to 'the mediator' or to 'the other party.'

**Termination of arbitration**

Clause 7.6(d) provides that the arbitrator may at any time terminate the arbitration without making an award if it thinks that:

- the notification of the Dispute is vexatious;
- the subject matter of the Dispute is trivial, misconceived or lacking in substance; or
- the party who notified the Dispute has not engaged in negotiations in good faith.

**Conduct of the arbitration**

Clause 7.6 outlines the arbitration procedures, though clause 7.5(c) provides that the arbitration will not proceed unless and until the Applicant has agreed to pay the arbitrator's costs as determined under clause 7.10. Clause 7.6 provides:

- the arbitration must be conducted in private, unless the parties agree otherwise, and subject to the involvement of and disclosures to the ACCC;
- parties may appoint representatives, including those with legal qualifications, to represent or assist in the arbitration;
- the arbitrator will:[209]
  - observe the rules of natural justice, but is not required to observe the rules of evidence;
  - proceed as quickly as is possible and consistent with a fair and proper assessment;
  - encourage written presentations by the parties with rebuttal opportunities and questioning by the arbitrator;
  - call on any party the arbitrator believes necessary to give evidence;
  - permit the ACCC, on request, to make submissions to the arbitrator on matters relevant to the Dispute;
  - decide how to receive evidence and submissions and consider confidentiality issues;
  - present a draft determination and hear argument from the parties before making a final determination; and
  - hand down a written final determination including reasons, findings of law and fact, and references to evidence on which findings of fact were based.

[209] GrainCorp Operations Limited, *Port Terminal Services Access Undertaking*, 15 April 2009, clause 7.6(c).

**Matters the arbitrator must take into account**

Clause 7.7(a) provides that, in deciding a Dispute, the arbitrator will take into account:

- 'the principles, methodologies and provisions set out in this Undertaking, in particular clauses 5.4 and 5.5';[210]
- the objectives and principles in Part IIIA of the TPA and the Competition Principles Agreement;
- the benefit to the public from having competitive markets;
- any guidance published, or submissions provided, by the ACCC; and
- any other matter the arbitrator thinks appropriate.

Clause 7.7(b) provides that, in making its determination, the arbitrator:

- may deal with any matters referred to in section 44V of the TPA;
- will not make a decision which would have any of the effects described in section 44W of the TPA; and
- will take into account the matters referred to in section 44X of the TPA.

**Other matters – confidentiality, costs and effect of decision**

Clause 7.8 requires the arbitrator to take all reasonable steps to protect the confidentiality of information that a party has identified is confidential or commercially sensitive. The clause goes on to permit the arbitrator to require the parties to comply with confidentiality regimes, and to make confidential and public versions of its determinations, and limit access to the confidential version. Clause 7.8(d) states that the entire dispute resolution process remains subject to the confidentiality clause at clause 6.2.

Clause 7.10 provides that the arbitrator's costs and the costs of the parties to the arbitration will be borne by the parties in such proportions as the arbitrator determines, and the parties may make submissions on the issue of costs prior to that determination.

Clause 7.9 states that the arbitrator's determination is final and binding subject to any rights of review by a court of law. If an Applicant does not comply with the arbitrator's determination or direction, GrainCorp is no longer obliged to continue negotiations regarding the provision of access for that Applicant.[211] GrainCorp will

[210] GrainCorp Operations Limited, *Port Terminal Services Access Undertaking*, 15 April 2009, clause 7.7(a)(i).

[211] GrainCorp Operations Limited, *Port Terminal Services Access Undertaking*, 15 April 2009, clause 7.9(b).

comply with the lawful directions or determinations of the arbitrator except where the determination or direction is subject to a review by a court of law.[212]

## 8.2 GrainCorp submissions received in support of its 15 April 2009 Undertaking

### 8.2.1 Initial submission of 15 April 2009

GrainCorp's initial submission focuses largely on why a negotiate-arbitrate model is appropriate rather than an ex ante pricing approach, and GrainCorp makes few comments regarding the appropriateness of particular publish-negotiate-arbitrate clauses.

GrainCorp notes that the negotiation arrangements in the proposed Undertaking are similar to those found in the ARTC access undertaking, except for the removal of the step involving the Indicative Access Proposal.[213] GrainCorp reiterates this point in its further submission.[214] GrainCorp notes also that the proposed Undertaking provides for an independent arbitrator rather than arbitration by the ACCC.[215]

**GrainCorp submits that publication of pricing is appropriate**

GrainCorp submits that annual publication of pricing for Standard Port Terminal Services is appropriate because:

- it provides transparency in the provision of Port Terminal Services; which facilitates *ex post* monitoring to ensure GrainCorp does not engage in discriminatory pricing;
- it promotes efficient negotiation and timely agreement on the terms of access;
- access seekers are well resourced and are able to assess and negotiate terms of access;
- it is not practicable to undertake a uniform price determination exercise for each port; and
- the proposed Undertaking provides for arbitration.[216]

GrainCorp submits that, in the context of the way that it '…has and continues to provide access to Port Terminal Services for the export of bulk wheat,'[217] the regulatory costs of undertaking ex ante price regulation outweigh the benefits, given that:[218]

- the legislative framework of the WEMA leans towards light-handed regulation;

---

212 GrainCorp Operations Limited, *Port Terminal Services Access Undertaking*, 15 April 2009, clause 7.9(c).
213 GrainCorp Operations Limited, *Submission to the ACCC*, 15 April 2009, para 9.6, p. 55.
214 GrainCorp Operations Limited, *Supplementary submission to the ACCC*, 24 June 2009, p. 73.
215 GrainCorp Operations Limited, *Submission to the ACCC*, 15 April 2009, para 9.6, p. 55.
216 GrainCorp Operations Limited, *Submission to the ACCC*, 15 April 2009, pp. 53-54.
217 GrainCorp Operations Limited, *Submission to the ACCC*, 15 April 2009, para 9.4, p. 54.
218 GrainCorp Operations Limited, *Submission to the ACCC*, 15 April 2009, para 9.4, p. 54.

- ‘there is a history of open access on reasonable terms and conditions’;

- GrainCorp’s business is volume-driven and ‘there is no incentive to turn away customers with volume, but rather an incentive to encourage increased throughput volumes’;

- GrainCorp has historically faced wheat exporters with considerable constraining power and will continue to do so;

- the proposed Undertaking contains a non-discrimination obligation;

- Australian wheat exporters may substitute overseas supply chains with Australia in response to any attempt by GrainCorp to charge a monopoly price for Port Terminal Services, leading to a reduction in wheat exports; and

- ‘the threat of arbitration and/or heavier-handed regulation is a powerful disincentive against monopoly pricing (to the extent that is possible in the first place).’

GrainCorp elaborates on these arguments throughout its submission.

**(1) Throughput business**

GrainCorp submits that its revenue from bulk handling services depends on throughput, therefore it has a clear incentive to maximise throughput at its export grain terminals. GrainCorp submits that this is particularly the case given that, except in short periods of peak demand, its grain port terminals have substantial excess capacity.[219] GrainCorp reiterates this point in its further submission.[220]

**(2) Constraining power of access seekers**

GrainCorp submits that a number of the current and likely access seekers are substantial multi-national corporations and grain marketers who exert ‘a significant constraining influence on GrainCorp’s conduct.’ GrainCorp submits that these companies are ‘sophisticated grain traders and in many cases vertically integrated owners of port facilities in other countries,’ with resources and skills to assess the behaviour of GrainCorp and whether access terms are reasonable. GrainCorp submits these companies are therefore in a good position to negotiate access terms, and are able to ship grain from other ports globally if dissatisfied with services provided in Australia, or to develop their own export supply chain infrastructure.[221]

In its further submission GrainCorp submits that a customer who believed it was the victim of discrimination could:

- bring a claim for a breach of the Storage and Handling Agreement;

- complain to the ACCC or commence legal action under the misuse of market power provisions in section 46 of the TPA;

---

[219] GrainCorp Operations Limited, *Submission to the ACCC*, 15 April 2009, para 2.4, p. 5.
[220] GrainCorp Operations Limited, *Supplementary submission to the ACCC*, 24 June 2009, p. 2.
[221] GrainCorp Operations Limited, *Submission to the ACCC*, 15 April 2009, para 2.5, pp. 5-6.

- complain to other regulators, such as the WEA, or invoke other regulatory regimes, such as in Victoria.[222]

**(3) Competition from other port terminals and containerisation**

GrainCorp submits that it is constrained by:

- the ability of growers and marketers to divert wheat to domestic customers or containerised exports, though GrainCorp states '…it is correct to assume that containerisation would not fully substitute for all bulk wheat exports…';[223]

- competition between existing export terminals in Victoria and South Australia for export wheat from Victoria and Southern New South Wales; and

- the possibility of new entry by a competing port terminal.[224]

GrainCorp submits that grain exporters in Victoria and southern NSW are able to ship grain through five port terminals owned by three companies, namely:

- GrainCorp's port terminals at Port Kembla, Geelong and Portland;

- The Melbourne Port Terminal, which is owned by AWB and the Australian Bulk Alliance (ABB and Sumitomo); and

- Adelaide, including ABB's new port terminal at Port Adelaide Outer Harbor.[225]

In its further submission to the ACCC, GrainCorp submits that

> 'Competition from other terminals, in normal seasons, has not materially altered the existing non-price terms and conditions nor changed the pricing of services given the already low returns over the cycle that are being made on these assets.'[226]

In relation to the possibility of new entry, GrainCorp submits that the Melbourne Port Terminal and the Outer Harbor Terminal in South Australia are examples of recent entry. GrainCorp also submits that, subject to a reasonable offer to shareholders, '…all of the [GrainCorp] port and country assets could be taken over by a consortium of exporters for significantly less than replacement value if they determined that this could improve export supply chain access and efficiency.'[227]

**(4) History of access**

GrainCorp submits it already provides access to its Port Terminal Services for third party grain exporters, in relation to wheat and other grains,[228] and that its past practices in providing access to third parties have not given rise to any concerns in

---

222 GrainCorp Operations Limited, *Supplementary submission to the ACCC*, 24 June 2009, p. 32.
223 GrainCorp Operations Limited, *Submission to the ACCC*, 15 April 2009, para 5.6, p. 29.
224 GrainCorp Operations Limited, *Submission to the ACCC*, 15 April 2009, para 2.6, p. 6.
225 GrainCorp Operations Limited, *Submission to the ACCC*, 15 April 2009, para 5.5, p. 27.
226 GrainCorp Operations Limited, *Supplementary submission to the ACCC*, 24 June 2009, p. 23.
227 GrainCorp Operations Limited, *Supplementary submission to the ACCC*, 24 June 2009, p. 28.
228 GrainCorp Operations Limited, *Submission to the ACCC*, 15 April 2009, para 2.8, pp. 6-7.

relation to the terms on which access is provided.[229] GrainCorp reiterates this point in its further submission.[230]

**(5) Competition in the global market**

GrainCorp submits that Australian wheat and export grain terminals compete with wheat produced in, and export grain terminals located in, other countries. GrainCorp submits that customers in downstream markets are able to choose between supply chains.[231]

In its further submission, GrainCorp submits that its exports from Australia, particularly wheat, are counter cyclical to northern hemisphere production, and there is a 'strong price driver to execute Australian export sales by July, the time at which the global cereal market generally softens in anticipation of the northern hemisphere harvest.'[232]

**(6) Domestic demand**

GrainCorp submits that in eastern Australia, demand from the domestic market is a competitive constraint on GrainCorp. GrainCorp submits that only around 30% of wheat produced in the eastern states is exported in bulk via GrainCorp terminals.[233]

**(7) Threat of regulation**

GrainCorp submits that it is constrained by the threat of heavier handed regulation if it is found to have acted inappropriately. It submits that it is subject to scrutiny though the continuous disclosure requirements of the WEMA and monitoring by the WEA.[234] GrainCorp also notes the Productivity Commission review of the Access Test requirement due in 2010.[235]

### 8.2.2 Further submission of 24 June 2009

In response to an information request from the ACCC, as well the ACCC's Issues Paper and comments arising from the public consultation, GrainCorp provided further submissions on the appropriateness of the proposed publish-negotiate-arbitrate clauses.

**(1) Timing for publication of terms and prices**

In response to concerns raised during the public consultation, GrainCorp notes that it is prepared to:

- include the 'Wheat Port Terminal Services Agreement' (other than the fee schedule and port protocols) in the proposed Undertaking to comprise the Standard Terms, which may only be varied with the consent of the ACCC, on the assumption that the term of the proposed Undertaking is 2 years; and

---

229 GrainCorp Operations Limited, *Submission to the ACCC*, 15 April 2009, para 4.6, p. 22.
230 GrainCorp Operations Limited, *Supplementary submission to the ACCC*, 24 June 2009, p. 2.
231 GrainCorp Operations Limited, *Submission to the ACCC*, 15 April 2009, para 2.9, p. 7.
232 GrainCorp Operations Limited, *Supplementary submission to the ACCC*, 24 June 2009, p. 26.
233 GrainCorp Operations Limited, *Submission to the ACCC*, 15 April 2009, para 5.8, p. 30.
234 GrainCorp Operations Limited, *Submission to the ACCC*, 15 April 2009, para 5.9, p. 30.
235 GrainCorp Operations Limited, *Submission to the ACCC*, 15 April 2009, para 9.4, p. 54.

- publish Standard Terms and Reference Prices by 31 August each year.[236]

GrainCorp submits that given the commencement date of the prices and terms would continue to be 1 October, this would allow customers one full month to factor in any changes to their proposed export schedule.[237] GrainCorp notes its intention is also to publish Reference Prices for 2009/10 by early August 2009.[238]

**(2) Negotiation process**

GrainCorp submits that the majority of exporters will seek Standard Services on Standard Terms and published Reference Prices, which should address concerns about a cumbersome or overly long negotiation process.[239]

GrainCorp anticipates that differentiated contract terms will only apply to atypical or novel access requests.[240] GrainCorp submits, though, that the negotiation process is still available in relation to a request for non-standard services or special or varied terms.[241] GrainCorp submits that that where an exporter requests non-standard access, negotiation over the non-standard terms will commence as soon as possible after the receipt of such a request.[242] GrainCorp submits that it has a strong incentive to commence negotiations in order to secure throughput as soon as possible.[243]

GrainCorp submits that the reference in the proposed Undertaking to 'amended Standard Terms' is to varied terms which are offered in relation to non-standard Port Terminal Services.[244]

**(3) Timeframes for the negotiate-arbitrate process**

GrainCorp submits that the proposed timeframes in clauses 5, 6 and 7 strike a balance between encouraging quick and efficient dealings between GrainCorp and access seekers, and the need for GrainCorp and access seekers to have adequate opportunity to complete their internal processes, particularly for non-standard or atypical access applications.[245]

In relation to the timeframes for the negotiation process in clause 6, GrainCorp submits that:

- historically, negotiating for access has involved recontracting standard terms and conditions that have not significantly changed in 5 years;

- applicants will now have be able to negotiate for non-standard terms, something of which GrainCorp has no experience; and

---

236 GrainCorp Operations Limited, *Supplementary submission to the ACCC*, 24 June 2009, pp. 4-5.
237 GrainCorp Operations Limited, *Supplementary submission to the ACCC*, 24 June 2009, p. 68.
238 GrainCorp Operations Limited, *Supplementary submission to the ACCC*, 24 June 2009, p. 5.
239 GrainCorp Operations Limited, *Supplementary submission to the ACCC*, 24 June 2009, p. 5.
240 GrainCorp Operations Limited, *Supplementary submission to the ACCC*, 24 June 2009, p. 6.
241 GrainCorp Operations Limited, *Supplementary submission to the ACCC*, 24 June 2009, p. 5.
242 GrainCorp Operations Limited, *Supplementary submission to the ACCC*, 24 June 2009, p. 66.
243 GrainCorp Operations Limited, *Supplementary submission to the ACCC*, 24 June 2009, p. 66.
244 GrainCorp Operations Limited, *Supplementary submission to the ACCC*, 24 June 2009, p. 71
245 GrainCorp Operations Limited, *Supplementary submission to the ACCC*, 24 June 2009, p. 65.

- it anticipates few access seekers wishing to negotiate novel terms and conditions.[246]

GrainCorp submit that the timeframes and procedures in clause 7 are appropriate and provide for disputes to be resolved quickly and with certainty.[247] GrainCorp submits that:

- in relation to meeting of senior representatives within five Business Days of the Dispute Notice, GrainCorp submits that it would be unrealistic to require a shorter timeframe;

- in relation to the referral to mediation or arbitration within 10 Business Days of Dispute Notice, GrainCorp submits it would be unreasonable to impose a shorter timeframe for setting the outermost time limit. GrainCorp submits that the access seeker can also refer a matter directly to arbitration without mediation within 10 Business Days after issuing a Dispute Notice.

- in relation to arbitration, GrainCorp submits that the proposed Undertaking sets out the principles with which an arbitrator must comply, including to proceed as quickly as is possible and consistent with a fair and proper assessment of the matter. GrainCorp submits it cannot predict the nature of matters which may be referred to arbitration and therefore this clause is appropriate.[248]

**(4) Access application**

GrainCorp submits that Schedule 4 to the proposed Undertaking sets out the information to be included in an Access Application, and that the requirements are not onerous and allow for information gathering and review.[249] GrainCorp submits that:

- 'Customer Type' requires the customer to indicate if they are accredited by WEA under the bulk wheat export accreditation scheme and if any conditions have been applied by WEA to that accreditation; and

- 'Business Category' requires the customer to indicate if they are a grain trader, agent, broker, buyer, processor, etc.[250]

GrainCorp submits that it is not necessary for the Applicant to have a website to seek access to the port terminal services, and GrainCorp will not refuse access purely because an Applicant does not have a website. GrainCorp submits that the existence of a website is of some value in establishing the bona fides of the Applicant.[251]

In relation to the timeframe of 5 Business Days for GrainCorp to acknowledge an access application, GrainCorp submits that this timeframe is fair and reasonable, and that the proposed Undertaking sets an outer limit on the time GrainCorp may take.[252]

---

246 GrainCorp Operations Limited, *Supplementary submission to the ACCC*, 24 June 2009, p. 65.
247 GrainCorp Operations Limited, *Supplementary submission to the ACCC*, 24 June 2009, p. 67.
248 GrainCorp Operations Limited, *Supplementary submission to the ACCC*, 24 June 2009, p. 67.
249 GrainCorp Operations Limited, *Supplementary submission to the ACCC*, 24 June 2009, pp. 65-66.
250 GrainCorp Operations Limited, *Supplementary submission to the ACCC*, 24 June 2009, p. 70.
251 GrainCorp Operations Limited, *Supplementary submission to the ACCC*, 24 June 2009, p. 70.
252 GrainCorp Operations Limited, *Supplementary submission to the ACCC*, 24 June 2009, pp. 65-66.

GrainCorp submits that the applicant will be entitled to make another application for access after the negotiation period ceases, and that the further applications would be dealt with as per clause 6. GrainCorp submits that the application would need to have addressed the issues (if any) which lead to the end of negotiations or the rejection of negotiations on the original application.[253]

**(5) Information requests**

In relation to clause 6.4(a)(ii)(B), GrainCorp submits that it is unable to say with precision what information requests would be 'onerous' or 'disproportionate.' It submits, however, that factors it may take into account in deciding if a request is onerous or disproportionate could include:

- GrainCorp's capability to gather and present the information requested;
- the volume of and timeframe within which information is required and whether it is readily at hand or requires collation or analysis;
- the demands placed upon GrainCorp's resources to provide the requested information in comparison to the benefit to be obtained by an access seeker;
- the ability of the access seeker to obtain the information elsewhere; and
- the purpose for which the access seeker seeks the information.[254]

GrainCorp submits that clause 6.4(a)(ii) is a protection for atypical or novel access applications, and for situations where information requests are unreasonable, and GrainCorp would not expect any material information requests in relation to recontracting with existing exporters.[255]

**(6) Confidential information**

GrainCorp submits that the obligation for the parties to maintain confidentiality of information acquired during the negotiation process continues once the negotiation process ends, as neither clause 6.2 nor clause 6.3(b) provide that the confidentiality obligations terminate at the end of the negotiation process.[256]

GrainCorp also submits that given it expects few of the bulk wheat exporters currently using its terminals will seek non-standard access, GrainCorp finds it difficult to see what information of a confidential nature could be released during the access agreement application process.[257]

**(7) Discretion to cease negotiations**

GrainCorp submits that deciding whether negotiations were progressing in good faith or not would be determined on a case by case basis, with consideration of the generally understood and commonly used meaning of the term in Undertakings and contracts, as well as the case law interpreting the meaning of good faith. GrainCorp

---

253 GrainCorp Operations Limited, *Supplementary submission to the ACCC*, 24 June 2009, p. 71.
254 GrainCorp Operations Limited, *Supplementary submission to the ACCC*, 24 June 2009, p. 69.
255 GrainCorp Operations Limited, *Supplementary submission to the ACCC*, 24 June 2009, p. 69.
256 GrainCorp Operations Limited, *Supplementary submission to the ACCC*, 24 June 2009, p. 74.
257 GrainCorp Operations Limited, *Supplementary submission to the ACCC*, 24 June 2009, p. 74.

submits that demonstrating a lack of good faith by another party would involve a relatively high threshold, which it is be willing to accept. GrainCorp notes that an applicant can seek an arbitrator's determination that GrainCorp has unreasonably ceased to negotiate or notify the ACCC of a potential breach of the Undertaking.[258]

In relation to the ability of GrainCorp to cease negotiations if it believes an applicant is materially non-compliant with the processes in the proposed Undertaking, GrainCorp emphasises the materiality component of the discretion. GrainCorp submits that this should be considered in the context that:

- for general recontracting, there are very few requirements before entering the negotiation process;
- for atypical access applications, there are some further rights and protections for both parties;
- GrainCorp must provide reasons why it is not obliged to negotiate; and
- if the applicant thinks GrainCorp is being unreasonable, it can seek arbitration or complain to the ACCC as this would also be a potential breach of the Undertaking.[259]

GrainCorp submits that it is difficult to say in advance what material non-compliance might be, but factors which GrainCorp might consider as a basis for ceasing negotiations could include:

- where the Applicant entity does not have export accreditation as a bulk wheat exporter (and it is not clear that such accreditation is being sought by that entity);
- whether, if requested, the Applicant provides information on the prudential requirements or insurance set out in the proposed Undertaking (clause 6.4(b)(ii)); or
- whether the Applicant has complied with the confidentiality obligations under clause 6.2; or
- whether an Applicant's demands are frivolous, unreasonable or vexatious noting that GrainCorp may go to the arbitrator for a determination to this effect and therefore be entitled to break off negotiations (clause 6.4(b)(vii)).[260]

**(8) Prudential Requirements**

GrainCorp submits that it is reasonable that it maintains the discretion as to whether to negotiate with any access seeker that is currently, or has within a reasonable timeframe, been in Material Default of an agreement with GrainCorp. GrainCorp adds

[258] GrainCorp Operations Limited, *Supplementary submission to the ACCC*, 24 June 2009, pp. 70-71.
[259] GrainCorp Operations Limited, *Supplementary submission to the ACCC*, 24 June 2009, p. 69.
[260] GrainCorp Operations Limited, *Supplementary submission to the ACCC*, 24 June 2009, p. 70.

that the ACCC approved this condition in the ARTC Interstate Undertaking and as a result felt it was appropriate in this case.[261]

GrainCorp submits that accreditation under the WEMA provides no guarantee of the financial or prudential security of an accredited bulk wheat exporter and that WEA has made it clear that no industry participant should consider the prudential or financial assessment processes undertaken by WEA to be a basis upon which financial or other risk can be calculated.[262] GrainCorp submits that it is GrainCorp, and not the WEA, that ultimately is responsible for the financial position of GrainCorp's port terminal operations.[263]

**(9) Disputes**

GrainCorp submits that a 'bona fide dispute' is one that it genuine, real, of substance and not created by an access seeker as an abuse of process, in bad faith with a vexatious or frivolous purpose, or in relation to trivial matters.[264]

In relation to the interaction of the dispute resolution mechanism in the proposed Undertaking and under an access agreement, GrainCorp submits that a claim of discrimination in relation to the terms of the access agreement would be dealt with in accordance with the dispute resolution process the proposed Undertaking, and if the dispute relates to claims of discriminatory conduct in relation to services provided under an executed access agreement, then the terms of that agreement and the protocols contained within would apply.[265]GrainCorp further submits that discriminatory conduct would be a breach of the proposed Undertaking enabling the ACCC to take action.[266]

**(10) Obligation to report material disputes to the ACCC**

GrainCorp submits that the following would constitute a material dispute:

- where an Applicant lodges a Dispute Notice under the proposed Undertaking; and
- any formal dispute raised under clause 10 of the port protocols.[267]

GrainCorp submits that materiality is different to the 'bona fide' nature of a dispute, in that materiality refers to the importance of potential consequences or impacts of the dispute in the context of the port's general operations, whereas 'bona fide' refers to whether a dispute is genuine, or whether the dispute resolution process is being used to achieve a different purpose not related to the reasons alleged on the face of the complaint, or is otherwise frivolous, vexatious or without merit. GrainCorp submits that a material dispute would be bona fide, but that it is possible that some bona fide disputes would be raised in relation to immaterial matters.[268]

GrainCorp submits that it is likely a dispute will be material if:

---

261 GrainCorp Operations Limited, *Supplementary submission to the ACCC*, 24 June 2009, p. 69.
262 GrainCorp Operations Limited, *Supplementary submission to the ACCC*, 24 June 2009, p. 74.
263 GrainCorp Operations Limited, *Supplementary submission to the ACCC*, 24 June 2009, p. 74.
264 GrainCorp Operations Limited, *Supplementary submission to the ACCC*, 24 June 2009, p. 76.
265 GrainCorp Operations Limited, *Supplementary submission to the ACCC*, 24 June 2009, p. 76.
266 GrainCorp Operations Limited, *Supplementary submission to the ACCC*, 24 June 2009, p. 77.
267 GrainCorp Operations Limited, *Supplementary submission to the ACCC*, 24 June 2009, p. 77.
268 GrainCorp Operations Limited, *Supplementary submission to the ACCC*, 24 June 2009, pp. 77-78.

- it cannot be resolved between the parties' operational personnel and needs to be escalated internally or referred to an external mediator or arbitrator;

- it raises issues directly relevant to a parties' ability to obtain access to the Port Terminal Services; or

- the matter in dispute is likely to have a material impact on the business of operations of either GrainCorp or the access seeker.

GrainCorp submits that a dispute is unlikely to be material if:

- it is resolved quickly by the parties operational and commercial personnel by and with no need for escalation or external involvement;

- it relates to grain quality standards, biosecurity, quarantine or chemical residue matters (unless and to the extent this may impact adversely on GrainCorp's operations);

- it does not raise any issues relevant to a party's ability to obtain access to the Port Terminal Services; or

- the matter in dispute would not have any real or significant impact on the business or operations of either GrainCorp or the access seeker.[269]

**(11) Involvement of IAMA**

GrainCorp submits that its legal representatives have confirmed with IAMA that it would be prepared to appoint a mediator if requested by GrainCorp or an Applicant. GrainCorp notes that several customers have commented that they would prefer to use the existing Grain Trades Australia (GTA) arbitration process for dispute resolution rather than IAMA as it is a known process, accepted across the industry as being fair and effective, and the arbitrators possess a high level of industry expertise and knowledge. GrainCorp submits that if required by the ACCC, it would be prepared to amend the proposed Undertaking to provide that a mediator is to be appointed by either IAMA or GTA.[270]

**(12) Arbitration**

GrainCorp submits that the proposed Undertaking does not specify how soon after the referral to arbitration GrainCorp must notify the ACCC of the dispute, but submits that it will notify the ACCC as soon as is practicable.[271]

GrainCorp submits that the likely cost and duration of an arbitration process are impossible to estimate in advance, and will vary on a case by case basis.[272]

GrainCorp submits that in light of resource constraints upon the ACCC and the likelihood of the need for specialist industry knowledge related to the provision of grain handling services, it was not reasonable or appropriate to expect the ACCC to

---

269 GrainCorp Operations Limited, *Supplementary submission to the ACCC*, 24 June 2009, p. 78.
270 GrainCorp Operations Limited, *Supplementary submission to the ACCC*, 24 June 2009, p. 78.
271 GrainCorp Operations Limited, *Supplementary submission to the ACCC*, 24 June 2009, p. 80.
272 GrainCorp Operations Limited, *Supplementary submission to the ACCC*, 24 June 2009, p. 80.

arbitrate a dispute. GrainCorp submitted that an independent arbitrator would be more appropriate.[273] GrainCorp further submits that it is prepared to consider suitable alternative solutions for the appointment of a mediator or arbitrator (failing their agreement) including appointment by IAMA or the ACCC. Alternatively, GrainCorp submits that it would be prepared to have the dispute dealt with in accordance with the established GTA arbitration process.[274]

GrainCorp submits in relation to the question of who determines whether an Applicant has complied with a determination or direction of an arbitrator, typically an arbitrator's determination and orders can be expected to be clear and easily interpreted. GrainCorp notes that if either party considers there has been a breach of the arbitrator's determination, they are able to seek a court order to enforce the determination, or report the non-compliance to the ACCC. [275]

**(13) Holding over provisions**

GrainCorp submits that, in relation to an access seeker that has not exported through GrainCorp port terminals, for commercial reasons GrainCorp will require execution of an Access Agreement before it provides port terminal services to that new access seeker. GrainCorp submits that, unless such an agreement is in place, it will not provide access under the proposed Undertaking. GrainCorp submits that for the next season, there are holding over provisions in the access agreement.[276]

GrainCorp also submits that it is in its interests to have maximum terminal throughput, so depending on the nature of a dispute, it may be possible to enter into interim arrangements for the provision of services pending dispute where practical, and provided it does not affect or alter parties' rights in connection with the dispute.[277]

## 8.3 Submissions received from interested parties in response to ACCC Issues Paper

### 8.3.1 Australian Grain Exporters Association (AGEA)[278]

**Price and non-price terms**

AGEA submits that price and non-price terms should be a part of the proposed Undertaking and must be published in advance of the commencement of the proposed Undertaking (or the expiry of the current terms), and that port protocols should also be part of the undertakings.[279]

---

273 GrainCorp Operations Limited, *Supplementary submission to the ACCC*, 24 June 2009, p. 81.
274 GrainCorp Operations Limited, *Supplementary submission to the ACCC*, 24 June 2009, p. 81.
275 GrainCorp Operations Limited, *Supplementary submission to the ACCC*, 24 June 2009, p. 80.
276 GrainCorp Operations Limited, *Supplementary submission to the ACCC*, 24 June 2009, pp. 68-69.
277 GrainCorp Operations Limited, *Supplementary submission to the ACCC*, 24 June 2009, p. 79.
278 AGEA provided three submissions to the ACCC: 11, 18 and 29 May 2009. This section largely draws upon the submission of 29 May 2009, which was the most substantial.
279 Australian Grain Exporters Association, *Submission in relation to proposed access undertakings,* 29 May 2009, para 9.6, p. 24 & Schedule 1, para F2, p. 42.

**Timing for publication**

AGEA submits that requirement to publish standard terms and reference prices does not provide certainty and transparency unless publication occurs well in advance of the commencement of the proposed Undertaking. AGEA also submits that users need to know the terms and conditions on which the services will be provided in order to assess the reliability of the service, plan, budget and generally compete in the market.[280]

AGEA submits that the proposed Undertaking contemplates that price and non-price terms can be unilaterally imposed by the bulk handler as late as 15 business days after commencement of the proposed Undertaking, when the bulk handler's storage and handling agreements are also scheduled to commence.[281] AGEA notes that Australian wheat exporters (**AWEs**) enter into forward sale contracts well before 1 October, with the export season beginning in earnest about the time that both the new storage and handling contracts and the proposed Undertaking are proposed to commence. AGEA submits that the consequence of providing the price and non-price terms 15 business days after they are due to commence would be that:

a. AWEs would feel compelled to enter into contracts with the bulk handler without a proper opportunity to negotiate;

b. AWEs will have to wait until they have negotiated access to the port terminal services before starting to look for export sales;

c. grain marketers would be prevented from entering into wheat export sales contracts until the terms and conditions and pricing of port terminal services are provided, thus reducing the level of competition and the overall efficiency of the bulk wheat export market;

d. alternatively to (b), AWEs must decide whether to take the commercial risk of entering into export sales contracts before knowing whether they will be able to perform the contracts, as the bulk handler may block access to port terminal services;

e. further to (d), grain marketers could be forced to enter into export wheat sales contracts without knowing the price or level of service available at port (such as when vessels will be called to berth and the wheat load rate, exposing AWEs to extensive demurrage claims and possibly rendering them in default of wheat sales contracts) and the associated key bulk handling services which need to be priced into those contracts.[282]

AGEA also submits that standard terms and references prices must be published by least 1 September.[283]

---

280 Australian Grain Exporters Association, Submission in relation to proposed access undertakings, 29 May 2009, para 9.6, p. 24.

281 Australian Grain Exporters Association, Submission in relation to proposed access undertakings, 29 May 2009, para 9.2, p. 23.

282 Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 9.5, pp. 23-24.

283 Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 12.1, p. 29.

**Negotiating for access**

AGEA submits that AWEs do not have a realistic alternative supplier of port terminal services and have little, if any bargaining power. AGEA submits that the imbalance in market power has resulted in bulk handlers refusing to negotiate, imposing unfair terms and prices and discriminating against AWEs who do not accept the bulk handlers' standard terms and conditions.[284]

AGEA submits that the proposed Undertaking does not provide a genuine framework for negotiations and exacerbate the imbalance in bargaining power because:

a. the bulk handler not required to negotiate in good faith and reach agreement on the terms of access;
b. the effect of offering terms and conditions immediately before 1 October is that AWEs know that if they do not execute the agreements, they will be denied access to bulk handling services;
c. the application process and timeframes for conducting negotiations are slow and unwieldy;
d. the dispute resolution mechanism does not provide for the speedy resolution of disputes; and
e. the bulk handler is allowed to 'reserve the right to negotiate', 'refuse to negotiate' and to 'cease' negotiations in various circumstances.[285]

AGEA further submits that it is not appropriate that the proposed Undertaking includes such a number of grounds on which the bulk handler may cease negotiations with the Applicant because the dispute resolution process is lengthy and the right to cease negotiations could lead to AWEs incurring substantial losses over non-performance of sales contracts. AGEA submits that the bulk handler should be required to negotiate on reasonable terms with any person that is an accredited wheat exporter.[286]

AGEA suggests that with the ability for the bulk handler to publish terms and conditions as little as one day before or up to 15 business days after the proposed Undertaking takes effect, and no limitation on the additional information that can be requested in relation to receiving an access application, it would likely be mid-October before negotiations regarding terms of access would begin.[287] AGEA also submits that the timeframe for acknowledgements was not appropriate and would slow the negotiation process.[288]

AGEA submits that the wheat season traditionally runs from 1 October to 30 September of each year and that negotiations for forward sales contracts begin well

---

284 Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 11.1, p. 27.
285 Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 11.2, p. 27.
286 Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, Schedule 1, para H2 (iv), p. 44.
287 Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 11.3, pp. 27-28.
288 Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, Schedule 1, para H2(ix), p. 45.

before this period. AGEA submits that AWEs must therefore decide whether to take the commercial risk of entering into export sales contracts before knowing whether they will be able to perform the contracts, as the bulk handler may otherwise block access to port terminal services. Alternatively, an AWE would have to wait until it has negotiated access to the port terminal services, before starting to look for export sales.[289]

AGEA submits that the definition of Prudential Requirements in the proposed Undertakings is neither appropriate nor necessary. AGEA submits that it is unnecessary for the bulk handler to require AWEs to satisfy additional 'Prudential Requirements' in the context of the requirements for accreditation as a wheat exporter under the WEMA.[290] AGEA submits that once an AWE obtains accreditation under the WEMA, it should not be necessary for the bulk handler to enquire into the AWE's financial standing.[291]

**Dispute Resolution**

AGEA submits that the dispute resolution mechanism in the proposed Undertaking is inadequate as an effective mechanism for the speedy resolution of disputes.[292] AGEA submits that for general disputes, the dispute resolution procedure must provide that:

a. either party may notify the other party of a dispute;
b. representatives of the parties must meet within 48 hours and endeavour to resolve the dispute;
c. if the dispute cannot be resolved, either party may give notice to the ACCC that a dispute exists under the proposed Undertaking and may refer the dispute to arbitration, which is to be conducted by the ACCC;
d. the arbitration must be conducted in accordance with arbitration rules to be specified in the proposed Undertaking, which must include an obligation to keep confidential any information disclosed during the arbitration;
e. the arbitration must be heard and concluded within 14 days of the notice of referral to the ACCC and the ACCC must endeavour to make a determination within 14 days; and
f. the bulk handler must take reasonable steps to mitigate loss, including continuing to provide port terminal services during, and pending the determination of, any dispute.[293]

AGEA also submits that the confidentiality provisions relating to dispute resolution do not sufficiently protect commercially sensitive information and that there should be an obligation on the parties and the arbitrator that the entire arbitration process is

---

289 Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, Schedule 1, para H2(ix), p. 45.
290 Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 11.5, p. 28.
291 Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, Schedule 1, para H2(v), p. 45.
292 Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 13.1, p. 30 & Schedule 1, para J2(i), p. 46.
293 Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 13.2, p. 30.

confidential, unless and only to the extent that both parties agree in writing otherwise.[294]

### 8.3.2 AgForce Grains Ltd

AgForce submits that in negotiations for transport assets, GrainCorp tries to enter into long standing agreements (a minimum of three years) to provide themselves with certainty. AgForce submits that the 1 year length of access agreements does not provide others in the market the security they need to plan their business equivalent to what GrainCorp believes it needs in the market, and that terms should be offered for longer if both parties agree.[295]

AgForce raises concerns with the potential for GrainCorp to use clause 6.4(a)(ii)(A) and (B) to avoid releasing necessary information. AgForce submits that history has shown that operators of monopolies in the grains industry have used such clauses to prevent the release of information vital to the industry and regulators, citing the Wheat Export Authority's inability to acquire information from AWB, despite the Wheat Export Authority having the power to access the information.[296]

AgForce submits that the timeframe of 5 days for the GrainCorp to acknowledge receipt of an Access Application seemed excessive in a digital world, and that acknowledgement should be instantaneous.[297]

AgForce submits that the negotiation process in the proposed Undertaking does not achieve an appropriate balance between the interests of GrainCorp and access seekers. AgForce suggests that while GrainCorp requires access seekers to act in good faith and can cease negotiations on the basis that good faith was not expressed by the access seeker, there is no counter-obligation or ability for the access seeker to require the same. Additionally, AgForce suggests that the 10 days' notice to end the negotiation period required under clause 6.6(b)(v) should be applied at all stages of the negotiation and for all reasons for ceasing negotiations.[298]

### 8.3.3 Riverina (Australia) Pty Ltd

Riverina submits that the dispute resolution/arbitration process should be expanded to explicitly include access contract negotiations for price and non-price terms and for more definition to be given to what good faith is for the purpose of the proposed Undertaking.[299] Riverina submits that certainty could be added to the dispute resolution process through the establishment of an independent review board with authority to resolve all disputes pertaining to port terminal access, or through the

---

294 Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, Schedule 1, para J2, p. 47.

295 AgForce Grains Ltd, *Submission in relation to proposed GrainCorp access undertaking*, 29 May 2009, para 4.7, p. 5.

296 AgForce Grains Ltd, *Submission in relation to proposed GrainCorp access undertaking*, 29 May 2009, para 4.11, p. 7.

297 AgForce Grains Ltd, *Submission in relation to proposed GrainCorp access undertaking*, 29 May 2009, para 4.12, p. 7.

298 AgForce Grains Ltd, *Submission in relation to proposed GrainCorp access undertaking*, 29 May 2009, para 4.13, pp. 7-8.

299 Riverina (Australia) Pty Ltd, *Submission in relation proposed GrainCorp and CBH access undertakings*, 29 May 2009, para 2(b)(i) and (vi), pp. 1-2.

specific identification of types of conduct to demonstrate GrainCorp's understanding of good faith in this context.[300]

Riverina submits that under the proposed Undertaking GrainCorp has the discretion to change price and non-price items without consultation, with minimal notice to users of the facility and with no compensation for any losses that may be caused due to forward contract and export contract positions set for any time greater than 30 days after the notification of the change.[301] Riverina further submits that any discretion by a party to a contract to unilaterally alter the terms of a contract, especially for essential infrastructure services, places the party with that discretion in a position of substantial market advantage to the other.[302]

Riverina further submits that the grain industry is particularly sensitive to alteration of terms as grain traders make considerable use of forward contracts as a mechanism for conducting their business, with contracts for periods as short as a couple of days to as long as six months in advance of the crop harvest.[303]

## 8.4 Submissions received on GrainCorp's publish-negotiate-arbitrate model in the 15 April 2009 Undertaking in response to ACCC Draft Decision

The following submissions on the publish-negotiate-arbitrate model were received in response to the ACCC's Draft Decision.

### 8.4.1 GrainCorp

In response to the ACCC's Draft Decision, GrainCorp has made submissions on various aspects of the publish-negotiate-arbitrate component. In particular, GrainCorp has made submissions in relation to:

- the application of the proposed Undertaking to negotiations for the 2009/2010 season, and arrangements for access seekers to obtain access during the negotiation of an access agreement, including where the dispute resolution or arbitration processes are invoked;
- the scope of the dispute resolution mechanism in the proposed Undertaking; and
- various amendments GrainCorp proposes to make in light of the ACCC's Draft Decision.

**'Holding over' and 'reopening' arrangements**

GrainCorp submits that:

300 Riverina (Australia) Pty Ltd, *Submission in relation proposed GrainCorp and CBH access undertakings*, 29 May 2009, para 4.2, p. 5.

301 Riverina (Australia) Pty Ltd, *Submission in relation proposed GrainCorp and CBH access undertakings*, 29 May 2009, para 3.1(b), pp. 2-3.

302 Riverina (Australia) Pty Ltd, *Submission in relation proposed GrainCorp and CBH access undertakings*, 29 May 2009, para 3.1(c), p. 3.

303 Riverina (Australia) Pty Ltd, *Submission in relation proposed GrainCorp and CBH access undertakings*, 29 May 2009, para 3.1(d) and (e), p. 3.

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

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

(b) while an access seeker is engaging in the negotiation process before an Access Agreement has been entered into - the ACCC considers that it is *not appropriate for an access seeker to be delayed in obtaining access because they are engaging in the negotiation process in the proposed Undertaking, including where the dispute resolution and arbitration processes are invoked*.

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

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

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

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

- Between 1 August 2009 and 30 September 2009 - Customers negotiate and sign BWPTS Agreements.

- 1 October 2009 - the signed BWPTS Agreements come into effect and GrainCorp provides Port Terminal Services subject to the prices and conditions in those agreements.

- If the ACCC requires GrainCorp to amend the Standard Terms after a Customer has entered into a BWPTS Agreement, GrainCorp proposes to offer to vary a signed BWPTS Agreement to reflect the Standard Terms. The Customer has 14 days in which to accept this offer.

- GrainCorp will provide a one month window in which exporters who have signed BWPTS Agreements can "reopen" the signed agreements and have the protection of the negotiate/arbitrate provisions under the Undertaking. To take advantage of this, the exporter would have to lodge an Access Application within that one month window with GrainCorp seeking to vary their BWPTS Agreements.

- Any variations to the BWPTS Agreement arising from an arbitration in relation to a dispute raised before 1 November 2009 will apply from 1 October 2009.

Allowing customers a one month window to lodge an access application in relation to a variation of a BWPTS Agreement signed before the Undertaking becomes effective balances the parties' interests by giving GrainCorp sufficient contractual certainty while enabling the Undertaking to apply for

the 2009/2010 season. The one month window takes into account that the Standard Terms and Reference Prices have been publicly available since mid-August (and in fact, the Standard Terms were initially made publicly available on 15 June, albeit with a small number of amendments made in August 2009). GrainCorp considers that to allow any longer or an unlimited period would result in uncertainty for a significant proportion of the grain season.

…

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

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

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

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

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

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

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

This is necessary or otherwise it is conceivable that it will be the end of, or even after, a season expires before the parties know the terms on which services were being provided. This is not commercially acceptable for GrainCorp or exporters.[304]

---

[304] GrainCorp Operations Limited, *Submission in relation to Draft Decision on GrainCorp Access Undertaking*, 3 September 2009, pp. 12-14.

**The scope of the dispute resolution mechanism in the proposed Undertaking**

GrainCorp submits:

> We understand that the ACCC *considers it is appropriate that [the Undertaking] limit[s] the scope of the dispute resolution mechanism to 'Disputes' that arise during the negotiation of an Access Agreement. Once the parties have an access agreement, they have direct rights of enforcement in contract and need not revert to the proposed Undertaking*.
>
> However, the ACCC has requested GrainCorp to specify the circumstances in which the dispute resolution mechanism will apply.
>
> GrainCorp will make it clear that a Dispute that is subject to the dispute resolution procedures in the Undertaking are as follows:
>
> ***At any time before an access agreement is executed***
>
> Any dispute arising in relation to the negotiation of –
>
> - access to standard or non standard port terminal services,
> - access on non standard terms (for port terminal services or standard port terminal services),
> - prices, including reference prices for standard port terminal services or prices for non-standard port terminal services, or
> - any combination of the above.
>
> ***At any time after an access agreement is executed***
>
> - A dispute arising in relation to a decision by GrainCorp to unilaterally vary the prices under the BWPTS Agreement,
> - A dispute in relation to the negotiation of access to Port Terminal Services in addition to Port Terminal Services already the subject of an executed BWPTS Agreement, i.e. this is essentially a new Access Application,
>
> ***One month "reopening period"***
>
> - A dispute in relation to the negotiation of a variation to a BWPTS Agreement that was entered into prior to 1 October 2009 (see comments on the re-opening provisions above),
>
> The following are not subject to the dispute resolution procedures in the Undertaking:
>
> - A decision by GrainCorp to vary the Port Terminal Services Protocols - this is a contractual dispute in that GrainCorp has not complied with its contractual obligation to follow the process in the Undertaking (i.e. it can be disputed but it is not subject to ACCC arbitration) or it is a breach of the Undertaking which can be regulated by the ACCC.
> - Disputes that arise under a BWPTS Agreement. These disputes would be resolved under the dispute resolution procedure in the BWPTS Agreement….

- Disputes that arise in relation to the application of the Port Terminal Services Protocols. These disputes would be resolved under the dispute resolution procedure in the BWPTS Agreement and the Port Terminal Services Protocols….

- Disputes about the terms of the initial Port Terminal Services Protocols (i.e. the protocols attached to the Undertaking at the date of its approval) or the Protocols applying at the time of the Access Application.[305]

**Proposed amendments to the proposed Undertaking**

GrainCorp has proposed a number of amendments to its proposed Undertaking in light of the ACCC's Draft Decision. In relation to the publish/negotiate/arbitrate clauses, GrainCorp submits that it will substantially amend clauses 5, 6 and 7 to:

- remove uncertainty and ambiguity;
- clearly identify the circumstances in which a Dispute arises and in which an access seeker may refer a matter to arbitration;
- include specific timeframes to ensure GrainCorp cannot delay or frustrate the negotiation process;
- remove GrainCorp's discretion in areas which the ACCC identified as inappropriate;
- include a provision for the ACCC to arbitrate disputes where appropriate.[306]

Further specific amendments GrainCorp proposes to make are summarised in the following tables.

**Table 8.1 – Summary of further amendments proposed by GrainCorp in relation to publish-negotiate-arbitrate clauses**

| Issue | GrainCorp proposed amendment |
|---|---|
| *Absence of an Indicative Access Agreement* | GrainCorp has agreed to include an Indicative Access Agreement (IAA) in the proposed Undertaking. GrainCorp also proposes to amend the proposed Undertaking to provide that any variation to the IAA should take place in accordance with the process in section 44ZZA(7) of the TPA.[307] |
| *Publication of Reference Prices* | GrainCorp notes the ACCC 's views that any time for publication of prices must allow sufficient opportunity for access seekers to negotiate access agreements before those prices become |

[305] GrainCorp Operations Limited, *Submission in relation to Draft Decision on GrainCorp Access Undertaking*, 3 September 2009, pp. 14-15.
[306] GrainCorp Operations Limited, *Submission in relation to Draft Decision on GrainCorp Access Undertaking*, 3 September 2009, p. 31.
[307] GrainCorp Operations Limited, *Submission in relation to Draft Decision on GrainCorp Access Undertaking*, 3 September 2009, pp. 45-6.

effective.[308]

GrainCorp agrees that it will be required to publish Reference Prices by no later that 31 August each year. GrainCorp also proposes that if it varies either the Reference Prices or the Standard Terms (in accordance with the proposed Undertaking), it must publish the variation at least 30 days prior to the date on which it is to become effective in the same locations as it publishes its Reference Prices and Standard terms.[309]

GrainCorp also proposes to amend clause 5.2(c) to provide that if Reference Prices are not published at the commencement of the Undertaking, GrainCorp will publish the prices within 3 Business Days of commencement, rather than 15.[310]

*Prudential Requirements (6.4(b)(iii)-(iv) and 6.6(b)(v)).*

GrainCorp proposes to amend these provisions to provide more detail about the information GrainCorp requires to determine whether the Prudential Requirements are met and to include timeframes in relation to that assessment.[311]

GrainCorp considers it appropriate that the proposed Undertaking allows GrainCorp to require an Applicant to demonstrate it can satisfy the Prudential Requirements and that GrainCorp can revisit the issue of creditworthiness during the negotiation period if there is a material change. GrainCorp submits that this achieves an appropriate balance between the legitimate interests of GrainCorp in ensuring that its customers have appropriate financial resources to meet their obligations to GrainCorp upon entering into an Access Agreement, and the legitimate interests of Applicants in understanding the information required and the process involved.[312]

GrainCorp also submits that clauses relating to Prudential Requirements will be grouped together.[313]

*Access Application*

GrainCorp proposes to amend Schedule 4 to provide that a website be specified on an Access Application form only where available.[314]

GrainCorp also proposes to amend clause 6.6 so that if, for any

---

[308] GrainCorp Operations Limited, *Submission in relation to Draft Decision on GrainCorp Access Undertaking*, 3 September 2009, p. 32-3.

[309] GrainCorp Operations Limited, *Submission in relation to Draft Decision on GrainCorp Access Undertaking*, 3 September 2009, p. 32.

[310] GrainCorp Operations Limited, *Submission in relation to Draft Decision on GrainCorp Access Undertaking*, 3 September 2009, p. 33.

[311] GrainCorp Operations Limited, *Submission in relation to Draft Decision on GrainCorp Access Undertaking*, 3 September 2009, p. 34-5.

[312] GrainCorp Operations Limited, *Submission in relation to Draft Decision on GrainCorp Access Undertaking*, 3 September 2009, p. 34-5.

[313] GrainCorp Operations Limited, *Submission in relation to Draft Decision on GrainCorp Access Undertaking*, 3 September 2009, p. 38.

| | |
|---|---|
| | reasons, the Negotiation Period ceases and an Access Agreement has not been executed, the Applicant may restart the negotiation process.[315] |
| *Pre-condition to dispute resolution (clause 6.3(c))* | GrainCorp considers it reasonable, and reflective of a commercial situation, to require the parties to engage in 'reasonable negotiation' prior to referring a Dispute to arbitration. GrainCorp submits that it did not intend to rely clause 6.3(c) as a precondition' to invoking the dispute resolution provisions, but will amend the clause to remove the requirement that the parties first engage in 'reasonable negotiation' before referring a matter to arbitration.[316] |
| *Involvement of GTA* | GrainCorp proposes amendments such that a mediator may be appointed by either IAMA or GTA, at GrainCorp's election. GrainCorp submits that this amendment is in response to submissions by interested parties, and considers it appropriate for a mediation to be conducted by a mediator appointed by either IAMA or GTA, depending on the circumstances.[317] |
| *Selection of the arbitrator* | GrainCorp proposes to amend the arbitration clause to provide separate processes for an arbitration by either the ACCC or a private arbitrator.[318]<br><br>GrainCorp also proposes to amend clause 7.3(a)(ii) and 7.4(c) to clarify their operation. GrainCorp proposes to delete the words 'and the arbitrator' in clause 7.3(a)(ii) and insert the words 'on appointment of an arbitrator' in clause 7.4(c).[319] |
| *Conduct of the arbitration* | GrainCorp proposes to include a new clause to provide that a private arbitrator may conclusively resolve all disputes in a matter referred to it, rather than requiring re-commencement of negotiations. GrainCorp considers that enabling an arbitrator to conclusively resolve all disputes in a matter referred to it balances the interests of GrainCorp and the interests of Applicants.[320] |

[314] GrainCorp Operations Limited, *Submission in relation to Draft Decision on GrainCorp Access Undertaking*, 3 September 2009, p. 44.
[315] GrainCorp Operations Limited, *Submission in relation to Draft Decision on GrainCorp Access Undertaking*, 3 September 2009, p. 38.
[316] GrainCorp Operations Limited, *Submission in relation to Draft Decision on GrainCorp Access Undertaking*, 3 September 2009, p. 33.
[317] GrainCorp Operations Limited, *Submission in relation to Draft Decision on GrainCorp Access Undertaking*, 3 September 2009, p. 41.
[318] GrainCorp Operations Limited, *Submission in relation to Draft Decision on GrainCorp Access Undertaking*, 3 September 2009, p. 42.
[319] GrainCorp Operations Limited, *Submission in relation to Draft Decision on GrainCorp Access Undertaking*, 3 September 2009, p. 41.
[320] GrainCorp Operations Limited, *Submission in relation to Draft Decision on GrainCorp Access Undertaking*, 3 September 2009, p. 42.

| | |
|---|---|
| | GrainCorp proposes amendments so that it must notify the ACCC within two Business Days of a Dispute being referred to arbitration.[321] |
| *Confidentiality* | GrainCorp proposes amendments such that provisions relating to confidentiality will be grouped together.[322] |
| *Other* | GrainCorp proposes to delete clause 6.8 as it essentially repeats clause 5.4.[323] |

**Table 8.2 – Summary of proposed amendments to timeframes**

| **Clause** | **GrainCorp's proposed amendment** |
|---|---|
| 6.4(a) | GrainCorp proposes to amend this clause so that information will be provided within a defined timeframe or that GrainCorp advises the Applicant that clarification of the request is required within a defined time of receiving the request.[324] |
| 6.4(b)(v) | GrainCorp proposes to amend this clause to provide that it must provide reasons for its decision not to negotiate at the time the decision is communicated to the Applicant, rather than within 10 Business Days.[325] |
| 6.5(a)(ii) | GrainCorp proposes to amend this clause so that GrainCorp will, if requested, conduct initial meetings with the Applicant within three Business Days of the Applicant's request for a meeting.[326] |
| 6.5(b)(i) | GrainCorp proposes to change the timeframe referred to in this clause from 5 Business Days to 3 Business Days.[327] |
| 6.5(b)(iii)-(iv) | GrainCorp proposes to amend these clauses to provide that it must respond within 3 Business Days.[328] |

---

321 GrainCorp Operations Limited, *Submission in relation to Draft Decision on GrainCorp Access Undertaking*, 3 September 2009, p. 42.

322 GrainCorp Operations Limited, *Submission in relation to Draft Decision on GrainCorp Access Undertaking*, 3 September 2009, p. 44.

323 GrainCorp Operations Limited, *Submission in relation to Draft Decision on GrainCorp Access Undertaking*, 3 September 2009, p. 39. The ACCC assumes GrainCorp is referring to clause 6.8(b) rather than the entirety of clause 6.8.

324 GrainCorp Operations Limited, *Submission in relation to Draft Decision on GrainCorp Access Undertaking*, 3 September 2009, p. 33.

325 GrainCorp Operations Limited, *Submission in relation to Draft Decision on GrainCorp Access Undertaking*, 3 September 2009, p. 35.

326 GrainCorp Operations Limited, *Submission in relation to Draft Decision on GrainCorp Access Undertaking*, 3 September 2009,p. 36.

327 GrainCorp Operations Limited, *Submission in relation to Draft Decision on GrainCorp Access Undertaking*, 3 September 2009, p. 36.

328 GrainCorp Operations Limited, *Submission in relation to Draft Decision on GrainCorp Access Undertaking*, 3 September 2009, p. 37.

| | |
|---|---|
| 6.6(a) | GrainCorp proposes to amend this clause so that GrainCorp must offer to commence negotiations within 10 Business Days (or such longer period as agreed between the parties). GrainCorp submits that by removing the reference to 'as soon as reasonably possible' clause 6.6(a) provides the Applicant with certainty that GrainCorp will offer to commence negotiations within 10 Business Days (unless the Applicant agrees to a longer period).[329] |
| 6.7(c)-(d) | GrainCorp proposes to amend these clauses to specify timeframes of 10 Business Days in relation to the execution of an Access Agreement. GrainCorp considers that the ACCC's concern that the clause as originally drafted created the potential for delay once the parties essentially reached agreement but prior to execution of an Access Agreement was unwarranted. However, GrainCorp submits that its proposed timeframes eliminate any risk of delay on GrainCorp's behalf prior to execution of an Access Agreement GrainCorp also notes that it has a strong incentive to execute an Access Agreement as quickly as possible following the conclusion of negotiations to achieve certainty.[330] |
| 7.1(a) | GrainCorp considers that the Applicant's right to refer a dispute to arbitration at any time provides sufficient protection to the Applicant in the event it is not satisfied with the terms of access which GrainCorp offers. However, GrainCorp proposes to amend clause 7.1(a) to remove the reference to reasonable endeavours. Under the amended clause, GrainCorp submits that both parties must act in good faith to settle the Dispute 'in accordance with this clause 7.'[331] |
| 7.3(c) | GrainCorp proposes to amend this clause to change the timeframe from 10 Business Days to 5 Business Days. |
| 7.3(d) | GrainCorp does not proposes to change this clause. GrainCorp notes that the clause will provide for formal mediation by a mediator elected by the parties. GrainCorp submits that if the parties cannot agree on a mediator GrainCorp will elect for a mediator to be appointed by either IAMA or GTA. GrainCorp submits that as either party can refer the matter to arbitration at any time, a specified timeframe would not achieve a different result.[332] |

[329] GrainCorp Operations Limited, *Submission in relation to Draft Decision on GrainCorp Access Undertaking*, 3 September 2009, p. 37.

[330] GrainCorp Operations Limited, *Submission in relation to Draft Decision on GrainCorp Access Undertaking*, 3 September 2009, pp. 38-9.

[331] GrainCorp Operations Limited, *Submission in relation to Draft Decision on GrainCorp Access Undertaking*, 3 September 2009, pp. 40-1.

[332] GrainCorp Operations Limited, *Submission in relation to Draft Decision on GrainCorp Access Undertaking*, 3 September 2009, p. 41.

**Table 8.3 – Summary of proposed amendments to discretions of GrainCorp during negotiation process**

| Clause | GrainCorp proposed amendment |
|---|---|
| 6.4(a)(ii)(B) and (C) | GrainCorp proposes to amend these provisions so that GrainCorp may only refuse to comply with an information request where that request is unduly onerous, having regard to GrainCorp's capability to gather and present the information requested, the volume of and timeframe within which information is requested and whether it is readily at hand or required collation or analysis, the ability of the Applicant to obtain the information elsewhere and the purpose for which the Applicant seeks the information.[333]<br><br>GrainCorp considers that this amendment adequately balances the interests of Applicants in obtaining access to the information they require to negotiate on an informed basis, with GrainCorp's interests in protecting itself from vexatious information requests. GrainCorp notes that an Applicant may also seek arbitration if it believes GrainCorp is refusing to respond to an information request as required by the Undertaking.[334]<br><br>GrainCorp also proposes to delete clause 6.4(a)(ii)(C).[335] |
| 6.4(b)(i) | GrainCorp proposes to amend this clause so that there is no reliance on GrainCorp's subjective view of what constitutes 'material non-compliance.' GrainCorp also notes that if an Applicant considers that GrainCorp has inappropriately ceased negotiations, it can seek arbitration in relation to GrainCorp's decision.[336] |
| 6.4(b)(vii) | GrainCorp proposes to remove the reference to 'frivolous' in this clause. GrainCorp submits that it is reasonable to allow GrainCorp to cease negotiations if a request for access is not in good faith or the Applicant is not negotiating in good faith. GrainCorp also proposes to insert the following wording: *'The arbitrator may consider whether or not an Applicant is negotiating in good faith as a preliminary or threshold question in any arbitration.'*[337] |
| 6.6(b)(iv) | GrainCorp proposes to amend this clause to provide that the Negotiation Period may end if GrainCorp believes that the negotiations are not progressing in good faith towards the |

[333] GrainCorp Operations Limited, *Submission in relation to Draft Decision on GrainCorp Access Undertaking*, 3 September 2009, pp. 33-4.
[334] GrainCorp Operations Limited, *Submission in relation to Draft Decision on GrainCorp Access Undertaking*, 3 September 2009, pp. 33-4.
[335] GrainCorp Operations Limited, *Submission in relation to Draft Decision on GrainCorp Access Undertaking*, 3 September 2009, p. 34.
[336] GrainCorp Operations Limited, *Submission in relation to Draft Decision on GrainCorp Access Undertaking*, 3 September 2009, p. 34.
[337] GrainCorp Operations Limited, *Submission in relation to Draft Decision on GrainCorp Access Undertaking*, 3 September 2009, p. 36.

development of an Access Agreement within a reasonable time period, *but no less than 8 weeks*. GrainCorp submits that 8 weeks is an appropriate time after which GrainCorp may cease negotiating if an Applicant is not negotiating in good faith towards the development of an Access Agreement. GrainCorp considers that this amendment, together with the Applicant's ability to seek arbitration if it thinks GrainCorp has inappropriately ceased negotiations, balances GrainCorp's interests with those of the Applicant.[338]

### 8.4.2 Interested Parties

#### 8.4.2.1 Australian Grain Exporters Association (AGEA)

AGEA provided a submission in relation to all bulk handling companies (**BHCs**).

**(1) General comments on the publish negotiate arbitrate approach**

AGEA agrees that the proposed publish-negotiate-arbitrate framework needs to be underpinned by a robust set of mechanisms giving effect to the publication, negotiation and arbitration procedures.[339]

**(2) Timing for publication of standard terms and reference prices**

AGEA notes that the ACCC did not require prices to be part of the proposed Undertaking. AGEA submits that, in light of this position, it agrees with the ACCC that proposed prices must be published within a sufficient time for access seekers to negotiate access agreements before those prices come into force.[340] AGEA submits that BHCs have historically published prices as late as mid-October, 'which is not acceptable.'[341]

AGEA submits that:

> The BHCs have provided proposed port terminal services agreement (which may be revised), but have not published prices. AGEA is concerned that the BHCs will delay publishing prices until after 1 October 2009, as they have done in the past.
>
> AGEA submits that:
>
> (a) BHCs should also be required to publish the prices of those port terminal services before the ACCC decides whether to accept the Undertaking and, subsequently, by no later than 31 August of the relevant year;

---

338 GrainCorp Operations Limited, *Submission in relation to Draft Decision on GrainCorp Access Undertaking*, 3 September 2009, pp. 37-8.

339 Australian Grain Exporters Association, *Submission in relation to Draft Decisions on Port Terminal Services Access Undertakings*, 3 September 2009, 1.1

340 Australian Grain Exporters Association, *Submission in relation to Draft Decisions on Port Terminal Services Access Undertakings*, 3 September 2009, 8.2-8.3.

341 Australian Grain Exporters Association, *Submission in relation to Draft Decisions on Port Terminal Services Access Undertakings*, 3 September 2009, 8.2.

(b) the published prices should include standard and non-standard services offered by the BHCs;

(c) the published prices should provide transparency in relation to BHCs' costs of providing the service to ensure prices are based on actual costs and are not discriminatory;

(d) prices should be sufficiently transparent so that it can be determined whether services are being provided in return for the prices paid;

(e) the published prices should not be subject to change during the term of the port terminal services agreement;

(f) alternatively to sub-paragraph (e), the opportunity to amend published prices should be limited to the same circumstances in which a variation of the Undertaking is permitted.[342]

AGEA also submits that:

> BHCs should be required to publish price and non-price terms *before* the Undertakings commence to ensure there is transparency in relation to price and non-price terms, that prices reflect the BHCs' cost of providing the service and there is no opportunity to discriminate. The requirement to publish prices before the Undertakings commence will also provide a benchmark against which to measure any proposed change in price to again ensure there is transparency and that any increase in price reflects an increase in BHCs' cost of providing the service.[343]

AGEA submits that unless prices are published before the ACCC accepts the proposed Undertakings, there will be no real opportunity to ensure that BHCs do not hinder access to port terminal services or discriminate through the charges imposed.[344] AGEA submits that it is very concerned that the BHCs have not published prices and there will not be a proper opportunity to negotiate before the proposed Undertakings are due to take effect on 1 October 2009.[345]

**(3) Timeframes**

AGEA agrees with the ACCC's Draft Decision that, in general, the timeframes proposed by GrainCorp in clauses 6 and 7 are not appropriate.[346] Specifically, AGEA submits that:

(i) In relation to … [clause 6.4(a)], the lack of any timeframes for the performance of obligations creates uncertainty and is not appropriate.

(ii) In relation to … [clause 6.4(b)(iii)], it is not appropriate that [GrainCorp] may, at *any time, before or during the negotiation*

---

342 Australian Grain Exporters Association, *Submission in relation to Draft Decisions on Port Terminal Services Access Undertakings*, 3 September 2009, 8.4-8.5.

343 Australian Grain Exporters Association, *Submission in relation to Draft Decisions on Port Terminal Services Access Undertakings*, 3 September 2009, 1.4-1.5.

344 Australian Grain Exporters Association, *Submission in relation to Draft Decisions on Port Terminal Services Access Undertakings*, 3 September 2009, 8.6.

345 Australian Grain Exporters Association, *Submission in relation to Draft Decisions on Port Terminal Services Access Undertakings*, 3 September 2009, 8.7.

346 Australian Grain Exporters Association, *Submission in relation to Draft Decisions on Port Terminal Services Access Undertakings*, 3 September 2009, 8.17.

*process*, require the Applicant to demonstrate that it can meet the Prudential Requirements.

If the ACCC accepts that the BHCs can impose Prudential Requirements, it is more appropriate that the proposed Undertaking specifies a particular point in time at which the AWEs must demonstrate that it can meet the Prudential Requirements, and a particular timeframe within which [BHCs] must confirm that those requirements have or have not been met. [BHCs] should be required to respond within 3 business days.

(iii) In relation to …[clause 6.4(b)(v)], it is not appropriate for the BHCs to have 10 Business Days to provide reasons for refusing to negotiate with AWEs in the circumstances described.

The BHCs should provide reasons to the AWEs at the time the BHCs refuse to negotiate, i.e. within 2 business days.

(iv) In relation to … [clause 6.5(b)(i)], it is not appropriate that the BHCs be permitted to take 5 Business Days to acknowledge receipt of an access application. This should only take 2 business days.

(v) The timings in …[clause 6.5(b)(iii) and (iv)] are also not appropriate. Five business day should suffice, particularly for [clause 6.5(b)(iv)].

(vi) [In relation to clause 6.6(a), GrainCorp] should be required to be ready to negotiate within 1 business day.

(vii) [Clause 6.6(b)(iv)] is inappropriate. It has the effect of entitling the BHC to cease negotiations at their discretion.

(viii) …[GrainCorp clause 6.7(c)]…should require the BHC to provide a final access agreement within 1 business day of the terms being agreed.

(ix) [GrainCorp] must be required to comply with clause …[ 6.7(d)] as all times, not just …"*as soon as reasonably practicable*"….

(x) [GrainCorp clause 7.3]… does not acknowledge the serious nature of access disputes and the urgency with which they must be dealt.

(xi) For general disputes, the dispute resolution procedure must provide for authorised representatives to meet immediately, with the senior representatives of the parties to otherwise meet within 48 hours of notification of a dispute and endeavour to resolve the dispute;

(xii) If the above negotiation is not successful and mediation is to take place, AGEA believes that the dispute should be referred to Grain Trade Australia ("**GTA**") within 72 hours of the dispute notice. It is possible for GTA to agree to perform the mediation within defined terms and time limits to be set out in a predetermined dispute resolution agreement. As such, it is possible to specify that each party is to provide each other and the mediator with their summary of the dispute within 7 business days of the reference to GTA with the mediation to take place within a further 7 business days.[347]

[347] Australian Grain Exporters Association, *Submission in relation to Draft Decisions on Port Terminal Services Access Undertakings*, 3 September 2009, 8.17. Please note that this section of

**(4) Clarity and certainty**

AGEA agrees with the ACCC's Draft Decision that clauses 5 to 7 of the proposed Undertaking lack clarity and certainty.[348] In particular, AGEA submits that:

> (i) In relation to …[GrainCorp clauses 6.4(a)(ii)(B)-(C)], where the applicant agrees to pay the reasonable costs, the BHC must be required to provide the information.
>
> (ii) …[GrainCorp clause 6.4(b)(i)] is not appropriate as it entitles the BHCs to cease negotiations as its discretion. The clause should be deleted.
>
> (iii) AGEA agrees that the BHCs must provide reasons for ceasing or refusing to negotiate under any circumstances …[GrainCorp clause 6.4(b)(v)]. Reasons should be provided within 1 business days.
>
> (iv) …[GrainCorp clause 6.4(a)(i)] should be amended to require the BHCs to attend any meeting requested within 1 business day.
>
> (v) AGEA agrees that …[GrainCorp clause 6.4(b)(v)] is not appropriate, as it essentially repeats the Prudential Requirements matter referred to in …[clause 6.4(b)(iii)].[349]

**(5) Discretion of bulk handlers**

AGEA agrees with the ACCC's Draft Decision that the negotiation component of the proposed Undertaking does not achieve 'an appropriate balance between the interests of the access provider and access seekers in that there is disproportionate discretion on the part of the access provider to refuse to negotiate, which undermines the possibility of a robust negotiate-arbitrate mechanism.'[350] Specifically, AGEA submits that:

> (i) In relation to … [GrainCorp clause 6.4(a)(ii)], the discretion that the BHCs have to refuse a request for information from an Applicant, including where the Applicant does not agree to pay 'reasonable costs' incurred by the BHCs (which, as noted above, is itself not appropriate).
>
> (ii) In relation to … [GrainCorp clause 6.4(b)(i)], the discretion that BHCs have not to negotiate with an Applicant if the BHC considers the Applicant does not materially comply with the requirements and processes set out in the proposed Undertaking.
>
> (iii) In relation to … [GrainCorp clauses 6.4(b)(iii) & (iv) and clause 6.6(b)(v)], the discretion that the BHCs have to at any time, before or during the negotiation process, to require the AWEs to demonstrate that it meets the Prudential Requirements, and to cease or refuse to

---

AGEA's submission referred to the relevant clauses of the ABB, CBH and GrainCorp proposed Undertakings. The extract here has been edited to refer only to the GrainCorp clauses.

348 Australian Grain Exporters Association, *Submission in relation to Draft Decisions on Port Terminal Services Access Undertakings*, 3 September 2009, 8.21.

349 Australian Grain Exporters Association, *Submission in relation to Draft Decisions on Port Terminal Services Access Undertakings*, 3 September 2009, 8.21. Please note that this section of AGEA's submission referred to the relevant clauses of the ABB, CBH and GrainCorp proposed Undertakings. The extract here has been edited to refer only to the GrainCorp clauses.

350 Australian Grain Exporters Association, *Submission in relation to Draft Decisions on Port Terminal Services Access Undertakings*, 3 September 2009, 8.22.

commence negotiations if the Applicant does not meet those requirements ….

(iv) In relation to …[GrainCorp clause 6.4(b)(vii)], the discretion that the BHCs have to refer an application to the arbitrator if the BHC is of the view that the application is frivolous in nature or that the Applicant is not negotiating in good faith, and for BHCs to seek reasonable costs.

(v) In relation to … [GrainCorp clause 6.5(b)], the discretion that the BHCs have in relation to the acknowledgement of an Access Application, and to request further information or clarification from AWEs.

(vi) In relation to … [GrainCorp clause 6.6(b)(iv)], the discretion that the BHCs have to cease negotiations if the BHCs believe that the negotiations are not progressing in good faith towards the development of an Access Agreement within a reasonable time period;

(vii) The discretions effectively created by the uncertain time periods in … [GrainCorp clauses 6.6(a) and 6.7(c) and (d)].[351]

**(6) Prudential Requirements**

In relation to the requirement in the proposed Undertaking that an access seeker must satisfy 'Prudential Requirements', AGEA submits that:

> An accredited AWE must comply with WEA's stringent accreditation scheme, which includes having regard to the "*financial resources available to the company*" (s.13(1)(c)(i) of the WEM Act). It is unacceptable that after AWEs obtain accreditation, BHCs can still seek to impose Prudential Requirements upon AWEs that are not reasonable….
>
> If the ACCC accepts that the BHCs are entitled to impose reasonable Prudential Requirements, it is essential that there be a dispute resolution mechanism in place to deal with disputes arising out of the BHCs' application and decisions based on their Prudential Requirements.[352]

**(7) Timeliness of dispute resolution process**

AGEA submits that:

> Disputes can arise at various times on a number of issues, such as:
>
> (a) securing capacity or determining load position, which is allocated by BHCs in advance of the vessel's estimated time of arrival ("**ETA**") at their discretion with reference to "operational efficiencies" that are not transparent to access seekers;
>
> (b) at the time of loading, in relation to insect infestation, late changes in load order, operational changes at port and so on.
>
> It is critical that dispute resolution and arbitration is efficient and timely. Certain disputes such as the substitution of vessels in shipping stems or any

---

[351] Australian Grain Exporters Association, *Submission in relation to Draft Decisions on Port Terminal Services Access Undertakings*, 3 September 2009, 8.22. Please note that this section of AGEA's submission referred to the relevant clauses of the ABB, CBH and GrainCorp proposed Undertakings. The extract here has been edited to refer only to the GrainCorp clauses.

[352] Australian Grain Exporters Association, *Submission in relation to Draft Decisions on Port Terminal Services Access Undertakings*, 3 September 2009, 8.13-8.14.

> dispute affecting the timing of a vessel's loading require a resolution by an umpire within 24 hours and the umpire's decision must be binding. Longer issues should be resolved by "fast track" mediation or arbitration. The referring must party to act reasonably when determining whether to invoke this dispute resolution process. The umpire could be chosen from a panel that is either agreed each year between the BHCs and AWEs, or in the alternative appointed by the ACCC. [353]

**(8) Involvement of Grain Trade Australia (GTA) in dispute resolution**

In relation to the conduct of the mediation and arbitration processes under the proposed Undertaking, AGEA submits that:

> It is AGEA's preference for there to be only one body to whom mediations are referred. AGEA would prefer mediations (and arbitrations) to be referred to GTA as it has the requisite industry experience to conduct mediations (and arbitrations).
>
> GTA must be required to enforce a strict policy to ensure that any mediator, arbitrator or umpire does not have a conflict of interest in the matter. That would include any nominated person that is also employed or retained as an agent advisor or legal representative of parties that could have an interest in the outcome.
>
> The local State laws must apply to the dispute resolution process and the right to appeal on an error of law must be preserved.[354]

**(9) Selection of the arbitrator and arbitration process**

In relation to the involvement of the ACCC in the arbitration of certain disputes under the proposed Undertaking, AGEA submits:

> AGEA note that the ACCC considers that … [GrainCorp clause 7.5] is not appropriate having regard to the public interest and that the ACCC considers it is more likely to be appropriate for the ACCC to have a role.
>
> If the dispute cannot be resolved by expedited negotiation or mediation, AGEA agrees that the ACCC should have some involvement in any arbitration process.….[355]

AGEA also submits, in relation to the process for an arbitration:

> To be effective, any arbitration must be conducted in accordance with arbitration rules to be specified in the proposed Undertakings, which must include an obligation to keep confidential any information disclosed during the arbitration.
>
> The arbitration rules must require both parties to serve relevant materials including evidence within 7 days and the dispute be heard and concluded within 14 days of the notice of referral to the ACCC. The ACCC must endeavour to make a determination within 14 days.

---

353 Australian Grain Exporters Association, *Submission in relation to Draft Decisions on Port Terminal Services Access Undertakings*, 3 September 2009, 8.15-8.16.

354 Australian Grain Exporters Association, *Submission in relation to Draft Decisions on Port Terminal Services Access Undertakings*, 3 September 2009, 8.23-8.25.

355 Australian Grain Exporters Association, *Submission in relation to Draft Decisions on Port Terminal Services Access Undertakings*, 3 September 2009, 8.26-8.27.

> Where arbitration is to be conducted by private arbitration, the dispute should be referred to GTA, with a copy of all materials, including the award, to be provided to the ACCC.…
>
> At all times during any dispute resolution process, BHCs must continue to negotiate access agreements and provide full access to port terminal services.[356]

**(10) 'Holding over' arrangements**

In relation to 'holding over' arrangements – by which an access seeker may obtain access pending the conclusion of negotiation of an access agreement or pending the resolution of a dispute – AGEA submits that:

> It is essential that AWEs are able to access to port terminal services during the period that they are negotiating access and also during any periods of dispute.
>
> The BHCs proposed Undertakings apply where AWEs are negotiating access to the port terminals.
>
> As such, holding over arrangements are an important aspect of the negotiate-arbitrate approach and it is not appropriate for an access seeker to be delayed in obtaining access because they are engaging in the negotiation process in the proposed Undertaking, including where the dispute resolution and arbitration processes are invoked.
>
> This must apply to all port access negotiations, whether they be under the standard terms offered by the BHCs or any variations.[357]

**(11) Indicative Access Agreement**

AGEA agrees that the non-inclusion of an Indicative Access Agreement in the proposed Undertaking results in a lack of certainty and clarity for potential access seekers and is, therefore, not appropriate having regard to the matters set out in section 44ZZA(3) of the TPA.[358]

**(12) Appropriate clauses**

AGEA acknowledges that certain clauses in the proposed Undertaking are appropriate:

> AGEA agrees either party must be able to unilaterally refer a dispute to arbitration. AGEA also considers that throughout the dispute resolution process, all parties must be obliged to act in good faith.
>
> The proposed undertaking should require that all information relevant for the negotiate-arbitrate processes should be protected by robust confidentiality requirements that protect both the BHC and the AWEs.[359]

---

356 Australian Grain Exporters Association, *Submission in relation to Draft Decisions on Port Terminal Services Access Undertakings*, 3 September 2009, 8.28-8.33.

357 Australian Grain Exporters Association, *Submission in relation to Draft Decisions on Port Terminal Services Access Undertakings*, 3 September 2009, 8.37 – 8.40.

358 Australian Grain Exporters Association, *Submission in relation to Draft Decisions on Port Terminal Services Access Undertakings*, 3 September 2009, 9.1.

359 Australian Grain Exporters Association, *Submission in relation to Draft Decisions on Port Terminal Services Access Undertakings*, 3 September 2009, 8.35-8.36.

#### 8.4.2.2 Grain Trade Australia

Grain Trade Australia (GTA) provided a submission explaining its role in arbitrating contractual disputes in the grain industry:

> As part of its role, GTA provides an arbitration service for the resolution of contractual disputes, based on the GTA Trade Rules and the Dispute Resolution Rules (which include a set of "Fast Track" Rules for the expeditious resolution of disputes).
>
> GTA has conducted approximately 150 arbitrations over the last 20 years. GTA relies on volunteers from within the industry to act as arbitrators. Currently GTA has 100 arbitrators on its list. GTA arbitrations are conducted in accordance with the *Commercial Arbitration Acts* in place in the various States. Any challenges to GTA arbitration to date have been dismissed by the Courts who have up-held the GTA process.[360]

GTA also submits that it is able to offer its expertise in administration of dispute resolution in relation to the proposed Undertakings of the bulk handlers:

> It is envisaged that disputes would broadly concern
>
> 1. the Access Application process, and
>
> 2. the Access Agreement (inc Standard Terms and Shipping Protocols).
>
> While the terms of the process are open to negotiation, GTA would propose;
>
> 1. An expedited process producing a legally binding award within 3-5 days of commencement of the process, or sooner (i.e. hours) if the parties require;
>
> 2. Specialist trained arbitrators drawn from the current GTA list to deal with Access Application and Access Agreement disputes.
>
> The parties would be encouraged to agree on an arbitrator from the GTA list. If the parties cannot agree, the GTA CEO would be empowered to make an appointment (which would be subject to a parties right to object on the grounds of apprehended or actual bias).
>
> It is anticipated that an "unreasoned" award could be produced within 3-5 days with a fully reasoned award to be produced shortly thereafter.
>
> It is not anticipated that the process would provide for appeals (other than to the Courts) unless the parties so desire. Similarly enforcement of awards would ultimately be a matter for the Courts, or perhaps the ACCC if appropriate.
>
> Fees would be in-line with current GTA arbitration fees, estimated at $7,000 each party, perhaps subject to the time taken and complexity of the dispute.[361]

---

[360] Grain Trade Australia, *Memorandum re ACCC Access Undertaking Dispute Resolution Process*, 25 August 2009, p. 1.

[361] Grain Trade Australia, *Memorandum re ACCC Access Undertaking Dispute Resolution Process*, 25 August 2009, pp. 1-2.

## 8.5 ACCC's views

### 8.5.1 Introduction

The ACCC has identified the following issues as arising for consideration in relation to the proposed publish-negotiate-arbitrate component of the proposed Undertaking:

- the appropriateness of the publish-negotiate-arbitrate approach without ex ante price regulation, and the form in which prices are published;
- the absence of an indicative access agreement as part of the proposed Undertaking;
- the appropriateness of the timing for the publication of standard terms and reference prices;
- generally, the appropriateness of the timeframes proposed in various clauses and the degree of certainty and clarity provided in the drafting of various clauses;
- the appropriateness of the discretion afforded to GrainCorp in the negotiation process;
- the appropriateness of the dispute resolution and arbitration processes, including for the selection of the arbitrator and conduct of the arbitration; and
- the absence of appropriate 'holding over' arrangements.

The ACCC notes that AGEA's submission in relation to the Draft Decision broadly supported the ACCC's view on these issues.

**Lack of consultation on rationale for various provisions**

As a preliminary point, the ACCC notes that GrainCorp did not provide comments in support of many of the clauses in the publish-negotiate-arbitrate component of the proposed Undertaking in its initial submission, and it was only in response to the ACCC's Issues Paper and a request for information from the ACCC that GrainCorp elaborated on why it considered its particular approach appropriate. GrainCorp provided its public response to the ACCC's information request on 30 June 2009, and consequently GrainCorp's further submissions have not yet been subject to public consultation.

The ACCC acknowledges that GrainCorp's further submission in some instances provides further explanation, and therefore clarity, as to how many of the proposed clauses are intended to operate. While this is beneficial, the ACCC considers it also highlights deficiencies in the drafting of many clauses as they currently appear in the proposed Undertaking..

### 8.5.2 Appropriateness of publish-negotiate-arbitrate approach

GrainCorp has proposed a 'publish-negotiate-arbitrate' approach in its proposed Undertaking, under which it would be obliged to publish price and non-price terms for access to the service, provide those terms to access seekers on a non-discriminatory

basis, and then be subject to dispute resolution and arbitration procedures in the event of a dispute with an access seeker during negotiations for access. This model is different to an 'ex ante pricing' model that has previously been put forward in an access undertaking to the ACCC for assessment,[362] where the undertaking sets a price or price methodology for the service to which it relates.

An issue for the ACCC is therefore whether the less prescriptive publish-negotiate-arbitrate approach put forward by the proposed Undertaking is by itself appropriate, or whether it is appropriate for the proposed Undertaking to include ex ante pricing regulation.

The ACCC notes that there is no requirement in Division 6 of Part IIIA that an access undertaking include price, and reiterates that the ACCC's role is to decide whether or not a proposed undertaking is appropriate, having regard to the matters in section 44ZZA(3).

In this particular case, there are some specific features of this industry at this time.

First, the ACCC reiterates its comments regarding the transitional state of the bulk wheat export industry. The ACCC acknowledges that in regulating an industry during a transitional phase there is a risk that regulation that is not appropriate may distort the effective development of that industry, and the ACCC considers that this risk is particularly pertinent to the regulation of prices. That is, the ACCC is mindful of the possibility that, despite best intentions, setting regulated prices for port terminal services at the current time may unnecessarily constrain the ability of the industry to develop and effectively respond to changing circumstances that are not foreseeable at the present, and that such an outcome would not be in the public interest. The ACCC also notes the planned Productivity Commission review of the WEMA, and statements by the government that it will monitor up-country developments.

Second, before the ACCC would consider a publish-negotiate-arbitrate framework appropriate, it would expect it to be underpinned by a robust set of mechanisms giving effect to the publication, negotiation and arbitration procedures. Given that GrainCorp is vertically integrated, strong non-discrimination obligations and appropriate transparency measures would also be appropriate (see the Non-Discrimination chapter).

It should be noted that the ACCC has expressed the view elsewhere in this draft decision that appropriate non-discrimination measures should prohibit GrainCorp discriminating in favour of itself except to the extent that the cost of providing access to other operators is higher, as per s.44ZZCA of the TPA. As a transparency measure to support this, appropriate measures would require prices to be transparently specified for a standard set of port terminal services to all parties, including GrainCorp, with any special requirements due to different origin being separately enumerated and priced.

These underpinning measures would allow access seekers to commercially negotiate with GrainCorp in a framework where both parties know that prices, terms and

---

[362] See for example the *ARTC 2002 Interstate Access Undertaking*, and the *ARTC 2008 Interstate Access Undertaking*.

conditions may be subject to arbitration by the ACCC or a private arbitrator, applying the pricing principles in s.44ZZCA of the TPA and general non-discrimination requirements.

Third, the proposed Undertaking is for a limited duration. GrainCorp is subject to the threat of more prescriptive regulatory requirements in any future Undertaking should the publish-negotiate-arbitrate framework not be effective. GrainCorp will have a strong incentive to ensure that prices are commercially reasonable and non-discriminatory to avoid more costly and intrusive regulation in future (such as cost modelling for all its port terminals, ex ante pricing and prescriptive ring-fencing).

Finally, the proposed Undertaking covers six port terminals, and the proposed Undertakings of all three bulk handlers cover 17 port terminals altogether. Given the transitional state of the industry, it would be a significant cost burden on the industry to require ex ante cost modelling of 17 port terminals if only a few may prove the subject of an arbitration that would warrant cost modelling.

Therefore the ACCC considers it is likely to be appropriate for the proposed Undertaking to adopt a publish-negotiate-arbitrate approach rather than an ex ante regulated price approach, provided that the mechanisms giving effect to the publish-negotiate-arbitrate approach are robust. In this regard the ACCC reiterates its previous comments regarding the need for the proposed Undertaking to be certain and clear, and to provide for 'fair and transparent access' to access seekers. The ACCC considers that it is in the interests of access seekers, and consistent with the WEMA, for the publish-negotiate-arbitrate mechanism to be robust.

The ACCC wishes to emphasise that in reaching this view it is not suggesting that the absence of ex ante regulation of prices for port terminal services is likely to be appropriate in all circumstances. The ACCC is instead acknowledging that it is appropriate for the proposed Undertaking not to provide for ex ante pricing regulation given the circumstances at this particular time. The ACCC wishes to expressly recognise the possibility that ex ante price regulation may be appropriate for port terminal services in certain circumstances, and takes no view on what may be appropriate in relation to any subsequent undertaking proposed by GrainCorp following the expiry of the current proposed Undertaking.

The ACCC notes as a general comment that the publish-negotiate-arbitrate clauses in the proposed Undertaking are to a large extent modelled on clauses contained in the access undertaking submitted by the Australian Rail Track Corporation (**ARTC**), and accepted by the ACCC on 30 July 2008. The ACCC considers the fact that it accepted as appropriate particular clauses in the ARTC access undertaking provides little support for a conclusion that similar clauses in the current context are appropriate, as the circumstances of the current proposed Undertaking and the ARTC access undertaking are clearly distinguishable. Significantly, the ACCC notes that the ARTC access undertaking included a regulated access price. The ACCC therefore considers that, as a general matter, it is appropriate for the publish-negotiate-arbitrate mechanism in the current context to be, in a sense, more 'prescriptive' than that in the ARTC access undertaking.

### 8.5.3 Absence of an indicative access agreement

Please refer to the discussion of this issue below in the Standard Terms and Conditions chapter. In summary, the ACCC considers it is not appropriate that the proposed Undertaking does not include an indicative access agreement. The ACCC notes GrainCorp's further submission that it is prepared to include an indicative agreement in the proposed Undertaking, and considers that such an approach is more likely to be appropriate.

### 8.5.4 Timing for publication of standard terms and reference prices

The proposed Undertaking states that GrainCorp may publish Standard Terms and Reference Prices for the season by no later than 30 September of each year,[363] or within 15 Business Days of the commencement of the proposed Undertaking if not already published.[364]

In light of the ACCC's view that the proposed Undertaking should include an indicative access agreement setting out non-price terms, the ACCC considers it likely to be appropriate that the obligation to publish be limited to an obligation only to publish prices.

The ACCC considers that any time for publication of prices must allow sufficient opportunity for access seekers to negotiate access agreements before those prices become effective, and in this regard also refers to the discussion below in relation to holding over arrangements. The ACCC considers that publication by no later than 30 September is not appropriate in this regard.

The ACCC notes that GrainCorp has, in its further submission to the ACCC, proposed a revision whereby it would publish by no later 31 August in the relevant year, with prices to become effective on 1 October. The ACCC considers that this approach is more likely to be appropriate.

The ACCC also considers it is not appropriate for GrainCorp to publish prices within 15 Business Days of the commencement of the proposed Undertaking if it has not already published, particularly if non-price terms are to be already included in an indicative access agreement. The ACCC considers that publication three weeks after commencement of the proposed Undertaking creates uncertainty as to the prices that are to apply, and the ACCC considers that a period of three Business Days is more likely to be appropriate. The ACCC notes GrainCorp's submission that it intends to publish prices for the 2009/10 season by early August 2009. [365]

### 8.5.5 General issues – negotiation, dispute resolution, arbitration

After the obligation to publish, the mechanism in the proposed Undertaking essentially contains three components, set out in clauses 6 and 7:

- a process for the negotiation of access agreement ('negotiation component');

---

[363] GrainCorp Operations Limited, *Port Terminal Services Access Undertaking*, 15 April 2009, clause 5.1(a).

[364] GrainCorp Operations Limited, *Port Terminal Services Access Undertaking*, 15 April 2009 clause 5.1(c).

[365] GrainCorp Operations Limited, *Supplementary submission to the ACCC*, 24 June 2009, p. 5.

- a dispute resolution procedure in the event of dispute between the access seeker and access provider during negotiations ('dispute resolution component'); and

- the ability for resolution of the dispute to be escalated to arbitration ('arbitration component').

The ACCC considers that two general issues arise in relation to these components:

8. the specified timeframes are in some instances unnecessarily long, while in other instances are vague or non-existent, thereby providing scope for the negotiation, dispute resolution and arbitration processes to be frustrated or delayed; and
9. the drafting of numerous clauses lacks clarity and certainty.

**(1) Timeframes**

The ACCC considers that many of the timings proposed by GrainCorp in clauses 6 and 7 are not appropriate. The ACCC considers that the timeframes are in some instances unnecessarily long, in others defined without sufficient clarity, while in other instances timeframes are absent altogether. The ACCC considers that this creates uncertainty, ambiguity and is not in the interests of access seekers or GrainCorp.

In particular, the ACCC considers that:

- In relation to clause 6.4(a), the lack of any timeframes for the performance of obligations creates uncertainty and is not appropriate.

- In relation to clause 6.4(b)(iii), it is not appropriate that GrainCorp may, at *any time, before or during the negotiation process*, require the Applicant to demonstrate that it can meet the Prudential Requirements. It is more likely to be appropriate that the proposed Undertaking specifies a particular point in time at which the Applicant must demonstrate that it can meet the Prudential Requirements, and a particular timeframe within which GrainCorp must confirm that those requirements have or have not been met.

- In relation to clause 6.4(b)(v), it is not appropriate for GrainCorp to have 10 Business Days to provide reasons for refusing to negotiate with an access seeker in the circumstances described. It is more likely to be appropriate for GrainCorp to provide reasons to the access seeker at the time that GrainCorp refuses to negotiate.

- In relation to clause 6.5(b)(i), it is not appropriate that GrainCorp be permitted to take 5 Business Days to acknowledge receipt of an access application. The information contained in an application is specified in Schedule 4 to the proposed Undertaking and includes matters such as company name, address, contact details etc. The ACCC questions that GrainCorp would need 5 Business Days to assess such information. The timings in clause 6.5(b)(iii) and (iv) are also not appropriate, although the ACCC acknowledges that GrainCorp may in some circumstances require additional information from an access seeker (or clarification of information) in relation to the provision of access, particularly

where access is sought on non-standard terms. The ACCC considers the timings in clause 6.5(b) are of particular concern as clause 6.6(b) provides that the 'Negotiation Period' under the proposed Undertaking – the 'official' period for negotiations – commences upon GrainCorp acknowledging receipt of the Access Application. The discretion conferred pursuant to clause 6.5(b)(ii)-(iv) to seek further information/clarification therefore provides the access provider with the ability to delay the commencement of 'official' negotiation.

- In relation to clause 6.6(a), the reference to both parties commencing negotiations 'as soon as reasonably possible to progress towards an Access Agreement' lacks certainty and is therefore not appropriate. It is more likely to be appropriate for the reference to be to a specified period of time.

- In relation to clause 6.6(b)(iv), the reference to 'a reasonable time period' lacks certainty and is therefore not appropriate.

- In relation to clause 6.7(c) and (d), the references to 'as soon as reasonably practicable' and 'reasonable endeavours to comply with this clause as soon as practicable' respectively are not appropriate. The ACCC considers it is not appropriate that the potential for delay be created once the parties have essentially reached agreement on terms of access but prior to execution of the access agreement. It is more likely to be appropriate for these clauses to include short, specified timeframes.

- In relation to clause 7.3(c), the reference to '10 Business Days' is not appropriate. It is more likely to be appropriate for this clause to refer to 5 Business Days, to reduce unnecessary delay and to create incentives for parties to resolve disputes quickly. Further, as it is difficult to determine how long it may take the IAMA to appoint a mediator, and for that mediation to commence, it is more likely to be appropriate for timeframes leading up to that stage to be shorter.

- In relation to clause 7.3(d), it is not appropriate that there is no specified timeframe for the conduct of the mediation, as this creates uncertainty.

- In relation to clause 7.4(b), it is not appropriate that there is no specified timeframe within which GrainCorp must notify the ACCC, as this creates uncertainty. Please refer, however, to the discussion below: **Arbitration component – further issues**.

**(2) Lack of clarity and certainty**

The ACCC considers that the drafting of numerous provisions in clauses 5-7 lack clarity and certainty, making those clauses not appropriate. The ACCC acknowledges that in some instances GrainCorp may have intended certain provisions to recognise or address legitimate considerations, but considers that the drafting of those provisions does not appropriately give expression to those considerations, and instead results in ambiguity and uncertainty.

The ACCC considers that clauses 5.1(e), 5.2(a), 5.4, 5.5 and 6.7 create significant ambiguity and uncertainty as to how one of the most fundamental obligations in the proposed Undertaking – to offer access – is intended to operate. The ACCC considers

that the drafting of these clauses is repetitious (particularly 6.7) and convoluted – for example clause 5.4 is expressed as subject to clause 5.5, then clause 5.4(a)(ii)(D) refers to 'taking into account the matters set out in clause 5.5,' then clause 6.7 – which on one interpretation appears merely to repeat matters in clause 5.4 – is expressed also to be subject to clauses 5.4 *and* 5.5. The ACCC considers that in other instances the drafting lacks clarity – for example, clause 5.4(a)(i) refers to an obligation to 'offer' the Standard Port Terminal Service, whereas clause 5.4(a)(ii) refers to an obligation to 'not *provide access,*' without any sense of what the difference (if any) entails. Further, the ACCC considers that various provisions in clause 5.5 are vague – for instance, 'geographic and seasonal variations' – as is the reference in clause 6.7 that the Access Agreement will '…at least address the essential elements set out in Schedule 3'. Further still, certain clauses appear to contain typographical errors that create further ambiguity and uncertainty – clause 5.4(a)(ii) is presumably missing the words 'on terms' before the words 'which are different from.'

The ACCC therefore considers it is more likely to be appropriate for the proposed Undertaking to provide greater certainty and clarity in relation to this key obligation.

The ACCC also considers:

- In relation to clause 6.4 (a)(ii)(B) and (C), the references to 'unduly onerous,' 'disproportionate to the benefit to be obtain from the information,' 'reasonable costs incurred' and 'information that is not ordinarily and freely available to the GrainCorp' are not appropriate. The ACCC notes the attempted further explanation of the terms 'unduly onerous' and 'disproportionate' provided by GrainCorp in response to the ACCC's information request, and considers that these explanations provide some further clarity and certainty on the operation of the provision. The ACCC considers it is more likely to be appropriate if the drafting of those terms reflects what was suggested by GrainCorp in its further submission, and if the other terms in this clause are also drafted with greater clarity and certainty. However the ACCC also notes GrainCorp's comments that it is unable to say with precision what information requests would be onerous or disproportionate.[366] In light of this statement the ACCC considers it is also likely to be appropriate if GrainCorp removes the provision entirely, given that GrainCorp itself is unable precisely to explain its operation.

- In relation to clause 6.4(b)(i), the reference to non-compliance that the Port Operator believes is material is not appropriate because it appears to depend on GrainCorp's subjective view at its absolute discretion.

- In relation to clause 6.4(b)(v), it is not appropriate that GrainCorp provide reasons for refusing to negotiate only in certain circumstances, and it is more likely to be appropriate that GrainCorp provides reasons for ceasing or refusing to negotiate in all circumstances, at the same time as it ceases or refuses to negotiate.

- In relation to clause 6.5(a)(ii), it is not appropriate that the clause merely recognises the ability of the Applicant to *seek* a meeting with GrainCorp, as there is no obligation on GrainCorp actually to have the meeting sought.

366 GrainCorp Operations Limited, *Supplementary submission to the ACCC*, 24 June 2009, p. 69.

- In relation to clause 6.6(b)(v), it is not appropriate that this clause essentially repeats the Prudential Requirements matter referred to in clause 6.4(b)(iii).

- In relation to clause 7.1(a), it is not appropriate that the clause refers to parties using reasonable endeavours to settle the Dispute as soon as is practicable, in light of the specified timeframes in clause 7.

- In relation to clauses 7.3(a)(ii) and 7.4(c), it is not appropriate that those clauses refer to providing a notice to the arbitrator, as it appears that in the circumstances contemplated by those clauses an arbitrator has not yet been appointed. Please refer, however, to the discussion below: **Arbitration component – further issues**.

- It is more likely to be appropriate that it is clearly specified that clause 7.3(d) applies to formal mediation conducted either by a mediator appointed by agreement between the parties, or as appointed by the President of the New South Wales chapter of the IAMA.

- It is more likely to be appropriate for the Access Application form in Schedule 4 to be amended in light of GrainCorp's further submission (see above).

### 8.5.6 Negotiation component – further issues

**Disproportionate discretion on GrainCorp**

The ACCC considers that the negotiation component does not achieve an appropriate balance between the interests of the access provider and access seekers in that there is disproportionate discretion on the part of the access provider to refuse to negotiate, or to cease negotiations, with the access seeker. The ACCC considers that this discretion creates the potential for the negotiation process to be delayed or frustrated, and therefore creates uncertainty. The ACCC also considers that this discretion undermines the robustness of the negotiate-arbitrate mechanism as a whole.

The ACCC in particular notes:

- In relation to clause 6.4(a)(ii), the discretion that GrainCorp has to refuse a request for information from an Applicant, including where the Applicant does not agree to pay 'reasonable costs' incurred by GrainCorp (which, as noted above, is itself not appropriate).

- In relation to clause 6.4(b)(i), the discretion that GrainCorp has not to negotiate with an Applicant if GrainCorp considers the Applicant does not materially comply with the requirements and processes set out in the proposed Undertaking.

- In relation to clause 6.4(b)(iii) & (iv), and clause 6.6(b)(v), the discretion that GrainCorp has to at any time, before or during the negotiation process, to require the Applicant to demonstrate that it meets the Prudential Requirements, and to cease or refuse to commence negotiations if the Applicant does not meet those requirements (see further below).

- In relation to clause 6.4(b)(vii), the discretion that GrainCorp has to refer an application to the arbitrator if GrainCorp is of the view that the application is frivolous in nature or that the Applicant is not negotiating in good faith.

- In relation to clause 6.5(b), the discretion that GrainCorp has in relation to the acknowledgement of an Access Application, and to request further information or clarification from an Applicant (see also above).

- In relation to clause 6.6(b)(iv), the discretion that GrainCorp has to cease negotiations if GrainCorp believes that the negotiations are not progressing in good faith towards the development of an Access Agreement within a reasonable time period;

- The discretions effectively created by the uncertain time periods in clauses 6.6(a), and 6.7(c) and (d) (see above).

The ACCC considers that timeframes that are not appropriate and a lack of sufficient clarity and certainty, as described above, in some instances compound the problematic nature of certain of the areas of discretion set out above.

The ACCC notes that in some circumstances the proposed Undertaking permits the Applicant to refer a matter to the arbitrator if it believes GrainCorp has exercised its discretion improperly, and allows for negotiations to recommence if the arbitrator finds GrainCorp has acted improperly. The ACCC notes, however, that this avenue is expressly recognised in only some situations, not all, and even where it is provided, provides the access seeker only with the ability to continue negotiations at a future time if the arbitrator so orders. The ACCC considers it is more likely to be appropriate for the arbitrator to conclusively resolve the dispute if a matter is referred in this way, as requiring recommencement of negotiations creates opportunities for unnecessary delay.

Similarly, the proposed Undertaking provides few opportunities for the Applicant to refer a matter to the arbitrator if the Applicant is dissatisfied with the conduct of GrainCorp.

The ACCC considers that the proposed Undertaking does not appropriately recognise the ability of an access seeker to re-apply for access in circumstances where negotiations may cease and an Access Agreement has not been executed (for example, at the expiry of the 'Negotiation Period'). The ACCC notes GrainCorp's submission that an Applicant would be able to submit a new application for access in the event that the Negotiation Period ceases,[367] and the ACCC considers that it is more likely to be appropriate for the proposed Undertaking to reflect this so as to provide greater clarity and certainty for access seekers.

The ACCC considers as a general matter that where the proposed Undertaking provides GrainCorp with a discretion to refuse to negotiate, or cease or potentially otherwise delay or hinder negotiations, such discretion should be drafted with sufficient clarity and certainty to minimise the possibility of that discretion being misused. The ACCC also considers that any such discretion is more likely to be

[367] GrainCorp Operations Limited, *Supplementary submission to the ACCC*, 24 June 2009, p. 71.

appropriate where it balances the interests of GrainCorp with the interests of access seekers.

The ACCC considers that the clauses are not appropriate for the reasons stated, but acknowledges that GrainCorp may have intended the discretions to recognise or address legitimate considerations. In particular, in relation to the Prudential Requirements, the ACCC acknowledges that it is likely to be appropriate for the proposed Undertaking to include some form of recognition that an access seeker must meet prudential requirements in order to obtain access, but that such a requirement should be drafted with greater certainty, and to better balance the interests of the access provider and access seekers. The ACCC considers in particular that clauses 6.4(b)(iv)(B) and (C) as currently drafted are not appropriate, as they create too wide a discretion for GrainCorp, lack clarity and create uncertainty.

The ACCC notes GrainCorp's submission that the dispute resolution mechanism in the proposed Undertaking would apply to any dispute arising in relation to the negotiation of access to Port Terminal Services.[368] The ACCC therefore considers that a Dispute in relation to Prudential Requirements arising from negotiations for access could be dealt with via the dispute resolution mechanism in the proposed Undertaking.

**Appropriate clauses**

The ACCC considers that it is appropriate for the proposed Undertaking to include an obligation on GrainCorp to negotiate in good faith, as recognised in clause 6.1. The ACCC would also expect that access seekers utilising the process in the proposed Undertaking would also act in good faith.

The ACCC also considers it appropriate that the proposed Undertaking provides a mechanism for dealing with confidential information that may be relevant to the negotiation, dispute resolution and arbitration process, as somewhat recognised by clauses 6.2, 6.3(b) and 7.8(d). The ACCC considers however that reiterating the obligation in clause 6.2 at clause 6.3(b) and then 7.8(d) creates unnecessary confusion and it is more likely to be appropriate that the proposed Undertaking contains a single clause dealing with confidentiality during the negotiation, dispute resolution and arbitration process. The ACCC considers it is also likely to be appropriate for the proposed Undertaking to provide for disclosure of confidential information to the mediator and arbitrator as relevant, and to the ACCC.

The ACCC notes GrainCorp's submission that the obligation for the parties to maintain the confidentiality of information acquired during the negotiation process continues once the negotiation process ends, as neither clause 6.2 nor clause 6.3(b) provide that the confidentiality obligations terminate at the end of the negotiation process.[369] The ACCC considers that this construction is not apparent on the face of the proposed Undertaking, and it is more likely to be appropriate for the proposed Undertaking to expressly recognise this point.

---

[368] GrainCorp Operations Limited, *Submission in relation to Draft Decision on GrainCorp Access Undertaking*, 3 September 2009, p. 14.

[369] GrainCorp Operations Limited, *Supplementary submission to the ACCC*, 24 June 2009, p. 74.

The ACCC considers it is appropriate for the proposed Undertaking to include clause 6.3(a), or something similar, to provide guidance on how the negotiation, dispute resolution and arbitration processes are intended to operate, as this provides clarity.

### 8.5.7 Dispute resolution component – further issues

**Pre-condition to invoking dispute resolution mechanism**

The ACCC notes that clause 6.3(c) of the proposed Undertaking provides that if, at any time during the negotiation process, a dispute arises between the parties which, after reasonable negotiation, the parties are unable to resolve to their mutual satisfaction, then either party may seek to resolve the dispute in accordance with the Dispute resolution process in clause 7.

The ACCC considers that clause 6.3(c) is not appropriate, as it effectively imposes a 'pre-condition' on the invocation of the dispute resolution mechanism by requiring the parties to engage in 'reasonable negotiation' prior to invoking clause 7. The ACCC considers that the term 'reasonable negotiation' lacks certainty and that clause 6.3(c) could potentially allow either the access seeker or the access provider to unnecessarily delay the timely resolution of the dispute.

**Definition of dispute**

The ACCC notes that the definition of 'Dispute' in clause 11.1 refers to a 'bona fide' dispute. The ACCC also notes that in its supplementary submission GrainCorp submits that a 'bona fide dispute' is one that it genuine, real, of substance and not created by an access seeker as an abuse of process, in bad faith with a vexatious or frivolous purpose, or in relation to trivial matters.[370]

The ACCC considers that it is likely to be appropriate for 'Dispute' to be defined to mean a 'bona fide' dispute, as this is a widely-known term, the use of which here is intended to prevent either the access seeker or the access provider invoking the dispute resolution process in relation to a frivolous or vexatious disputes.

The ACCC considers it is not appropriate, however, for GrainCorp to have discretion to decide what is and what is not a bona fide dispute, as this does not adequately balance the legitimate business interests of GrainCorp and the interests of access seekers.

**Involvement of GTA**

The ACCC notes GrainCorp's submission that several customers have commented that they would prefer to use the existing Grain Trades Australia (GTA) arbitration process for dispute resolution rather than IAMA, as it is a known process, accepted across the industry as being fair and effective, and the arbitrators possess a high level of industry expertise and knowledge. GrainCorp submits that if required by the ACCC, it would be prepared to amend the proposed Undertaking to provide that a mediator is to be appointed by either IAMA or GTA.[371] The ACCC also notes AGEA's submission in response to the Draft Decision that it may be appropriate for

[370] GrainCorp Operations Limited, *Supplementary submission to the ACCC*, 24 June 2009, p. 76.
[371] GrainCorp Operations Limited, *Supplementary submission to the ACCC*, 24 June 2009, p. 78.

Grain Trade Australia (GTA) to have a role in relation to the dispute resolution processes in the proposed Undertaking.

The ACCC considers that involvement of the IAMA in the mediation process is appropriate, but considers that the ability for a dispute to be mediated by an appointee of either the IAMA or the GTA, depending on the circumstances, is also likely to be appropriate. The ACCC acknowledges that circumstances may arise in which the industry expertise of a GTA appointed mediator may facilitate the timely resolution of a dispute more effectively than a mediator without such expertise.

**Dispute resolution mechanism in the access agreement**

The ACCC notes that clause 7.1(b) of the proposed Undertaking provides that any disputes in relation to an executed access agreement will be dealt with pursuant to the provisions of that agreement; similarly, the definition of 'Dispute' in clause 11.1 excludes any disputes in relation to an executed Access Agreement. The ACCC considers it is appropriate that these clauses limit the scope of the dispute resolution mechanism to 'Disputes' that arise during the negotiation of an Access Agreement. Once the parties have an access agreement, they have direct rights of enforcement in contract and need not revert to the proposed Undertaking.

On this point the ACCC understands GrainCorp's further submission to be that a claim of discrimination in relation to the terms of the access agreement would be dealt with in accordance with the dispute resolution process in the proposed Undertaking, but if the dispute relates to claims of discriminatory conduct in relation to services provided under an executed access agreement, then the terms of that agreement and the protocols contained within would apply.[372] The ACCC has difficulty with the distinction GrainCorp appears to be making, and considers it is more likely to be appropriate for the proposed Undertaking to clearly specify the circumstances in which the dispute resolution mechanism will apply.

Subject to GrainCorp addressing the matters referred to in the Indicative Access Agreement chapter, the ACCC considers it is likely to be appropriate for:

- disputes in relation to an executed Access Agreement to be dealt with pursuant to that Agreement; and

- for GrainCorp by 31 July each year to provide a report to the ACCC on any material disputes in relation to an Access Agreement.

### 8.5.8 Arbitration component – further issues

**Selection of the arbitrator**

The ACCC considers that clause 7.5 is not appropriate having regard to the public interest.

The ACCC considers it is more likely to be appropriate for the ACCC to have a role as arbitrator. The ACCC considers that clear public interest considerations arise in relation to the proposed Undertaking, and which may also arise in relation to certain Disputes between an access seeker and an access provider. In this regard the ACCC

[372] GrainCorp Operations Limited, *Supplementary submission to the ACCC*, 24 June 2009, p. 76.

notes again the effect of the WEMA in reforming the arrangements for the export of bulk wheat from Australia via the introduction of competition, as well as the transitional state of the industry at present. The ACCC considers it would be better placed than a private arbitrator to have regard to these matters in arbitrating a dispute which raises such matters, particularly due to its experience in economic regulation and in arbitrating matters with public interest considerations.

The ACCC also considers that if the ACCC had a role as arbitrator in the proposed Undertaking, then that consideration would support the appropriateness of the overall publish-negotiate-arbitrate approach proposed by GrainCorp. That is, if it were possible for the ACCC to arbitrate certain Disputes, the ACCC would thereby maintain an additional degree of oversight in relation to the proposed Undertaking, thereby enhancing the robustness of the dispute resolution mechanism.

The ACCC notes, however, the likelihood that not every Dispute that may arise in relation to the proposed Undertaking will warrant arbitration by the ACCC. While it is not possible for the ACCC predict, at this stage, the particular Disputes upon which it may or may not choose to arbitrate, it is possible that purely commercial or technical disputes with no public interest considerations may more appropriately be arbitrated by a private arbitrator.

The ACCC therefore considers it more likely to be appropriate for the proposed Undertaking to provide:

- that when a Dispute is referred to arbitration, it is referred to the ACCC in the first instance;

- at the time a Dispute is referred to the arbitration and notified to the ACCC, for the parties to inform the ACCC whether they have agreed upon, or are likely to agree upon, a private arbitrator to arbitrate the Dispute;

- a mechanism by which the ACCC may consider whether or not it wishes to arbitrate the Dispute; and

- for the Dispute to be arbitrated by the ACCC if it so chooses, or for the Dispute to be arbitrated by a private arbitrator if the ACCC so chooses.

The ACCC notes, of course, that the proposed Undertaking does not remove the ability of parties to resolve disputes to their mutual satisfaction by mediation or arbitration without recourse to the mechanism in the proposed Undertaking, if they agree to take that course.

**Conduct of the arbitration**

The ACCC considers that clause 7.7(a) is not appropriate as it lacks clarity and certainty, and to some extent replicates matters in clause 7.7(b). The ACCC considers it is nonetheless likely to be appropriate for the arbitration component to include the matters acknowledged in clause 7.7(a)(iv) and (v).

The ACCC considers that, in light of its view that it is more likely to be appropriate for the ACCC to have a role as arbitrator, it is also more likely to be appropriate for the arbitration component to provide for differences in the circumstances depending

on whether the arbitrator is the ACCC or a private arbitrator. In particular, the ACCC considers that it is more likely to be appropriate for the proposed Undertaking:

- to require a private arbitrator to keep the ACCC informed of the progress of the arbitration, including timelines and processes for making submissions;
- to allow the ACCC to make submissions in its absolute discretion in relation to an arbitration conducted by a private arbitrator (the current drafting of the proposed Undertaking is unclear as to upon whose request the ACCC may make submissions); and
- to permit the ACCC to conduct an arbitration in accordance with the provisions of Part IIIA of the TPA if it chooses to be the arbitrator.

The ACCC also considers that these matters would also support the appropriateness of the overall publish-negotiate-arbitrate approach proposed by GrainCorp.

**Appropriate clauses**

The ACCC considers it is appropriate to allow either party unilaterally to refer the dispute to arbitration, as this provides a 'check' on the ability of either party to delay or frustrate the dispute resolution process. The ACCC also considers it appropriate for the arbitrator to take into account the matters listed in clause 7.6(d) as a check on the ability of either party improperly to refer a matter to arbitration.

### 8.5.9 Holding over arrangements

Clause 5.2(b) provides that access to a Standard Port Terminal Service[373] will be offered for a period expiring no later than 30 September of the year following the year in which the Standard Terms were first published, subject to appropriate 'holding over' provisions.

The ACCC considers that the publish-negotiate-arbitrate mechanism is not appropriate as it does not adequately provide 'holding over' arrangements, being arrangements whereby an access seeker may obtain access to the service without an executed access agreement while they are negotiating for an access agreement pursuant to the proposed Undertaking. The ACCC considers that holding over arrangements are an important aspect of the negotiate-arbitrate approach and that it is not appropriate for an access seeker to be delayed in obtaining access because they are engaging in the negotiation process in the proposed Undertaking, including where the dispute resolution and arbitration processes are invoked. The ACCC considers that such an outcome creates uncertainty, is not in the interests of access seekers, and is unlikely to ensure that the proposed Undertaking provides fair and transparent access.

The ACCC notes GrainCorp's submission that it will not provide access to an access seeker that has not previously used a GrainCorp terminal in the absence of that access seeker executing an agreement.[374] The ACCC also notes GrainCorp's submission that it is in its interests to have maximum terminal throughput, therefore depending on the nature of a dispute, it may be possible to enter into interim arrangements for the

[373] And GrainCorp's obligation to enter into an Access Agreement for that/those service/s.
[374] GrainCorp Operations Limited, *Supplementary submission to the ACCC*, 24 June 2009, pp. 68-69.

provision of services pending dispute where practical.[375] The ACCC considers it is more likely to be appropriate for the proposed Undertaking to provide holding over arrangements for the reasons outlined above.

The ACCC also considers it not appropriate for the proposed Undertaking to contain clause 3.7 as currently drafted. Clause 3.7 provides that the proposed Undertaking applies only to the negotiation of new Access Agreements (and the negotiation of access in addition to that already the subject of an Access Agreement), and that nothing in the proposed Undertaking can require a party to an existing Access Agreement to vary a term or provision of that agreement.

The ACCC considers that, on its face, this clause potentially prevents the application of the proposed Undertaking to Access Agreements for the 2009/10 season, on the basis that access seekers could sign agreements prior to the commencement of the proposed Undertaking, and then, by virtue of clause 3.7, be precluded from negotiating non-standard terms or prices. The ACCC considers that this would be an unacceptable outcome, as it would essentially render the negotiate-arbitrate mechanism redundant for the first season.

The ACCC considers it is more likely to be appropriate for the proposed Undertaking to include a mechanism that ensures that the negotiate-arbitrate process is available to access seekers who wish to negotiate non-standard terms or prices for the 2009/10 season. The ACCC considers that an option in this regard could be the inclusion of a clause that obliges GrainCorp to negotiate, as per the negotiate-arbitrate mechanism, variations to Access Agreements entered into prior to the commencement of the proposed Undertaking. Such a clause would not be intended to create commercial uncertainty for GrainCorp through the potential variation of multiple contracts, but rather to create an incentive for GrainCorp to negotiate access agreements as if the proposed Undertaking were in effect, and thereby avoid the problem of the potential circumvention of the negotiate-arbitrate mechanism.

**GrainCorp's proposed 'holding over' and 're-opening' arrangements**

The ACCC considers that the 'holding over' and 're-opening' arrangements proposed by GrainCorp address the concerns stated by the ACCC above and are likely to be appropriate if included in a revised undertaking.

The ACCC considers that the proposed 're-opening' arrangements recognise the interests of access seekers by ensuring that they may take advantage of the negotiation (and, if applicable, dispute resolution and arbitration) procedures in the proposed Undertaking in relation to the 2009/2010 season. The ACCC considers it is also appropriate for the ability of access seekers to reopen agreements executed prior to the commencement of the proposed Undertaking to be limited to a defined period, as this recognises the interests of GrainCorp by providing certainty for its commercial operations.

Similarly, the ACCC considers that GrainCorp's proposal of an 'interim agreement' recognises the interests of access seekers by ensuring that they are not precluded from obtaining access to Port Terminal Services by reason of engaging in the negotiation

[375] GrainCorp Operations Limited, *Supplementary submission to the ACCC*, 24 June 2009, p. 79.

(or dispute resolution or arbitration) process, while also providing certainty for GrainCorp.

### 8.5.10 Conclusion in relation to publish-negotiate-arbitrate component

The ACCC considers it is appropriate for the proposed Undertaking to adopt a publish-negotiate-arbitrate approach, and not provide ex ante price regulation, if the publish-negotiate-arbitrate component is robust. The ACCC considers, however, that the publish-negotiate-arbitrate component of the proposed Undertaking is not appropriate for the following reasons:

- The proposed publish-negotiate-arbitrate component lacks clarity and certainty. The ACCC considers that the drafting of numerous clauses is either vague, ambiguous, confusing or unnecessarily broad or restrictive, which is of itself not appropriate and which also creates uncertainty as to how the mechanism will operate in practice.

- The proposed publish-negotiate-arbitrate component does not appropriately address the interests of access seekers. The ACCC considers that many clauses of the proposed mechanism provide too great a discretion on the access provider to refuse to negotiate, or to cease negotiations once commenced, which has the potential to delay or frustrate the overall access application process. The opportunity for delay and frustration creates further uncertainty as to how the mechanism will operate in practice. The lack of certainty and clarity described above, and the absence of appropriate holding over arrangements are also not in the interests of access seekers.

- The proposed publish-negotiate-arbitrate component is not in the public interest. The ACCC considers it is not in the public interest to accept an access undertaking that lacks certainty and clarity, and that does not appropriately address the interests of access seekers. Further, the ACCC considers that the arbitration component in particular does not appropriately recognise public interest considerations, as outlined above.

- The proposed publish-negotiate-arbitrate component is not appropriate in the context established by the WEMA. The ACCC considers that the lack of clarity and certainty and failure to address the interests of access seekers are unlikely to ensure fair and transparent access to port terminal services.

The ACCC considers it is more likely to be appropriate for the proposed Undertaking to:

- include an indicative access agreement setting standard terms for access to the service;

- require GrainCorp to publish a single set of prices for port terminal services, which may include differentiated prices for particular circumstances (i.e., for different processes for testing of grain depending on where it has been stored – but *only* where these processes are justifiable with regard to hygiene, quality or associated factors), provided those circumstances are transparently stated and the pricing differences are justified on the basis of different costs;

- require GrainCorp to publish prices by the beginning of September;
- provide measures to ensure that the negotiation, dispute resolution and arbitration mechanisms are applicable to Access Agreements for the 2009/2010 season;
- provide appropriate arrangements to ensure access seekers are not delayed in obtaining access by reason of engaging in a negotiation with GrainCorp on non-standard terms or prices, or by reason of resolving a dispute with GrainCorp pursuant to the processes in the proposed Undertaking;
- address the issues identified by the ACCC in the discussion above regarding the timeframes and lack of clarity and certainty in the drafting of the proposed Undertaking, as well as the disproportionate discretion of the access provider;
- not include a 'pre-condition' to invoking the dispute resolution process, as currently included in clause 6.3(c);
- provide for a Dispute to be mediated by either the IAMA or the GTA;
- provide that when a Dispute is referred to arbitration, it is referred to the ACCC in the first instance;
- provide a mechanism by which the ACCC may consider whether or not it wishes to arbitrate the Dispute;
- provide for the Dispute to be arbitrated by the ACCC if it so chooses, or for the Dispute to be arbitrated by a private arbitrator if the ACCC so chooses;
- permit the ACCC to conduct an arbitration adopting the processes and having regard to the matters set out in Part IIIA of the TPA if it chooses to be the arbitrator;
- require a private arbitrator to keep the ACCC informed of the progress of the arbitration, including timelines and processes for making submissions; and
- allow the ACCC to make submissions in its absolute discretion in relation to an arbitration conducted by a private arbitrator.

# 9 Indicative Access Agreement

**Summary**

***Inclusion of an indicative access agreement***

One of the recommendations of the ACCC's Draft Decision dated 6 August 2009 was that GrainCorp should include an indicative access agreement as part of its undertaking.

Including an indicative access agreement in the proposed Undertaking would:

- provide a clear starting point for negotiations between an access seeker and GrainCorp (and is therefore critical to ensuring access seekers can effectively negotiate with GrainCorp); and
- ensure that the costs of negotiation and/or arbitration are not excessive.

The ACCC notes that GrainCorp would be required to offer the indicative access agreement to access seekers who seek to obtain access to GrainCorp's port terminal services on the basis of the standard terms provided under that agreement. For the avoidance of doubt, however, it is important to note that inclusion of an indicative access agreement in the proposed Undertaking does *not* mean that access seekers and GrainCorp are precluded from negotiating around the indicative access agreement (either by commercial agreement or by utilising the negotiation and/or arbitration provisions in the proposed Undertaking).

Upon request by the ACCC, GrainCorp provided a draft copy of its proposed Wheat Port Terminal Services Agreement on 18 May 2009. This document was published on the ACCC's website. This document was not originally provided to the ACCC as part of GrainCorp's April 15 Undertaking. The ACCC annexed this document to its Draft Decision and sought submissions on whether it would form an appropriate basis for an indicative access agreement. This document is therefore referred to as the "**August Indicative Access Agreement**" in this chapter.

***August Indicative Access Agreement not appropriate***

The ACCC does not consider that the August Indicative Access Agreement would form an appropriate basis for an indicative access agreement as it is currently drafted.

The ACCC considers that, in order to be appropriate, improvements would need to be made to ensure that:

- The indicative access agreement includes a robust dispute resolution process that balances the legitimate business interests of GrainCorp with the interests of access seekers;
- Any ability of GrainCorp to unilaterally vary the terms of an executed indicative access agreement can only be exercised in specified circumstances and be subject to the negotiation and arbitration provisions of the undertaking; and

- The terms and conditions of the indicative access agreement provide for sufficient certainty and clarity in their terms, effect and operation.

The ACCC notes submissions from a number of interested parties raising concerns about whether a number of the terms of the indicative access agreement are acceptable, based on the commercial considerations and circumstances of those interested parties. The ACCC notes however, that the standard terms provided under the an indicative access agreement are intended to be the minimum terms and conditions of access to GrainCorp's port terminal services, and that access seekers will have the ability to negotiate (or arbitrate) non-standard terms that vary from any of those standard terms that they consider to be unacceptable, based on their own particular commercial considerations and circumstances. Accordingly, in this Further Draft Decision, the ACCC has not found it necessary to form views about whether the particular terms and conditions of the August Indicative Access Agreement would be acceptable to particular parties (given likely differences between the commercial considerations and circumstances of specific access seekers).

***Variation of the indicative access agreement***

GrainCorp's approach in its proposed Undertaking of 15 April 2009 of retaining discretion to unilaterally vary its "standard terms" (i.e. the price and non-price related terms which are intended to be included in GrainCorp's indicative access agreement) is not appropriate. It results in a lack of certainty and clarity for potential access seekers and undermines the benefits of inclusion of an indicative access agreement in the proposed Undertaking.

It would be more appropriate for the variation provisions in section 44ZZA(7) of the TPA to apply to any variations of the indicative access agreement. This does not preclude parties from negotiating non-standard terms that vary from those in the indicative access agreement.

## 9.1 GrainCorp's proposed Undertaking dated 15 April 2009

In its proposed Undertaking dated 15 April 2009, GrainCorp did not include an indicative access agreement setting out the standard terms and conditions of access to port terminal services as part of its Undertaking. Instead, it provided for an obligation to simply publish its standard terms and reference prices. Further details about the mechanism it proposed in its 15 April 2009 undertaking are set out in the Publish, Negotiate, Arbitrate chapter.

GrainCorp's proposed Undertaking dated 15 April 2009 allowed GrainCorp to vary its standard terms in accordance with the following procedure:

> **Variation to Reference Prices and Standard Terms**
>
> (a) GrainCorp may vary the References Prices or the Standard Terms;
>
> (b) Any variation under clause 5.6(a) 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 References Prices and Standard Terms;

(c) GrainCorp must provide the ACCC with copies of variations to the Reference Prices and Standard Terms promptly following publication[;]

(d) To avoid doubt, any variations to the Reference Prices or Standard Terms does not automatically override the terms of existing access agreements.[376]

## 9.2 GrainCorp's supporting submissions in relation to its 15 April 2009 Undertaking

The arguments submitted by GrainCorp in support of the approach in its 15 April 2009 proposed Undertaking have not been set out in this further draft decision.

This is because GrainCorp has now informed the ACCC that in its revised proposed Undertaking to be provided to the ACCC it will include a Wheat Port Terminal Services Agreement (i.e. an indicative access agreement) in its proposed Undertaking which can only be varied with the consent of the ACCC.

GrainCorp submits that these would comprise the 'standard terms', on the assumption that the Undertaking would run for only two years.[377]

## 9.3 Submissions received from interested parties on GrainCorp's 15 April 2009 Undertaking in response to ACCC Issues Paper

### 9.3.1 Australian Grain Exporters Association (AGEA)

AGEA submitted that the proposed access undertaking contemplates that the price and non-price terms can be unilaterally varied by GrainCorp without negotiation with its customers. AGEA argued that the terms and conditions of access to port terminal facilities must comply with and, if not incorporated in the undertaking, be subordinate to the proposed access undertaking where necessary.[378] AGEA also argued for the inclusion of a list of particular terms to be included as part of the undertaking.[379]

AGEA argued that GrainCorp should not be able to vary price and non-price terms except in clearly defined circumstances (such as a material adverse change) and provided both parties agree to the proposed changes. AGEA submitted that the implementation of the amended terms should only take effect after six months' notice, in order to give wheat exporters time to adjust.[380]

---

376 Clause 5.6 of GrainCorp's August Indicative Access Agreement.

377 It should be noted at this point that because the standard terms were not originally included as part of the Undertaking, the ACCC has not been limited in its ability to consult on their appropriateness as standard terms prior to the release of this Draft Decision.

378 Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 9.3, p. 23.

379 Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 4.17, pp. 12-13.

380 Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 9.8, p. 24.

### 9.3.2 AgForce

AgForce submitted that a specific timeframe of 3 months should be allowed for notice of proposed changes to agreements or standard terms.[381] Additionally, AgForce submitted that where changes to standard access terms or pricing affects a current holder of an agreement or an application, they should be informed of these changes at least 30 days prior to them coming into effect.[382]

### 9.3.3 Riverina

Riverina submitted that any discretion by a party to unilaterally alter terms of a contract, especially for essential infrastructure services, places the party with that discretion in a position of substantial market advantage to the other.[383]

Riverina also submitted that GrainCorp has discretion to change price and non-price terms without consultation, with minimal notice to users of the facility and with no compensation for any losses.[384]

## 9.4 The ACCC's Draft Decision and consultation on the August Indicative Access Agreement

Upon request by the ACCC, GrainCorp provided a copy of its proposed standard terms on 18 May 2009 (i.e. the August Indicative Access Agreement). The August Indicative Access Agreement was published on the ACCC's website, but was not originally provided to the ACCC as part of GrainCorp's April 15 Undertaking. The ACCC annexed this document to its Draft Decision and sought submissions on whether it would form an appropriate basis for an indicative access agreement.

The ACCC does not intend to provide a detailed description of the provisions of the August Indicative Access Agreement in this further draft decision. However, in summary, GrainCorp's August Indicative Access Agreement includes provisions relating to the following matters concerning the supply of port terminal services by GrainCorp to access seekers:

- commencement and termination of the agreement;[385]
- scope, including provisions in relation to the specific services to which the agreement applies;[386]

- services provided, including provisions in relation to receival of wheat, quality testing services, pest control, outloading of wheat, and preconditions of any outturning or outloading services;[387]

---

381 AgForce Grains Ltd, *Submission in relation to proposed GrainCorp access undertaking*, 29 May 2009, p. 4.

382 AgForce Grains Ltd, *Submission in relation to proposed GrainCorp access undertaking*, 29 May 2009, p. 8.

383 Riverina (Australia) Pty Ltd, *Submission in relation to proposed GrainCorp and CBH access undertakings*, 29 May 2009, p. 3.

384 Riverina (Australia) Pty Ltd, *Submission in relation to proposed GrainCorp and CBH access undertakings*, 29 May 2009, p. 2.

385 August Indicative Access Agreement, Clause 1.

386 August Indicative Access Agreement, Clause 2.

- conditions of services provided, including provisions in relation to new season agreements and 'holding over' provisions, hours of operation, rail transport providers, and road transport providers;[388]

- obligations of clients (i.e. access seekers), including provisions in relation to shipping information, and port charges;[389]

- title to grain and grain accounting obligations, including provisions in relation to co-ownership, transfer of title, stock swaps, shrinkage, documentation and weights, record-keeping, and provision of stock information;[390]

- payment of fees, charges and other moneys, including provisions in relation to invoices, goods and services tax, information, payment, interest on overdue accounts, credit facilities and requirements, costs, set-off, and amounts owing;[391]

- damages, including provisions relating to GrainCorp's liability to customers under specific circumstances, and discretion in mitigating or settling customer claims;[392]

- exclusions of GrainCorp liability, including provisions in relation to the circumstances in relation to which GrainCorp's liability is excluded or limited, insurance, and force majeure events;[393]

- termination of the agreement;[394]

- disputes resolution process for disputes arising under the executed access agreement, including provisions in relation to independent testing, an obligation to mediate prior to court proceedings, and maintenance of the status quo during disputes;[395]

- miscellaneous other matters, including provisions in relation to legal operation, notices, exercise of rights, remedies cumulative, governing law, assignment and privacy, site access, confidentiality and endorsement, legal advice and costs, amendment of the agreement, counterparts, entire understanding, and interaction with the proposed GrainCorp Access Undertaking dated 15 April 2009;[396]

- interpretation of the agreement and definitions of terms used;[397]

- Annexure A, attaching the relevant reference prices for port terminal services under the executed agreement;[398] and

---

387 August Indicative Access Agreement, Clause 3.
388 August Indicative Access Agreement, Clause 4.
389 August Indicative Access Agreement, Clause 5.
390 August Indicative Access Agreement, Clause 6.
391 August Indicative Access Agreement, Clause 7.
392 August Indicative Access Agreement, Clause 8.
393 August Indicative Access Agreement, Clause 9.
394 August Indicative Access Agreement, Clause 10.
395 August Indicative Access Agreement, Clause 11.
396 August Indicative Access Agreement, Clause 12.
397 August Indicative Access Agreement, Clause 13.

- Annexure B, attaching the GrainCorp Port Terminal Services Protocols.[399]

In their submissions to the ACCC in response to the Draft Decision, interested parties made submissions about the appropriateness of the August Indicative Access Agreement. These submissions are set out below.

## 9.5 Submissions from GrainCorp in response to Draft Decision

GrainCorp, in its submission on the ACCC's Draft Decision, does not make any submissions in support of its August Indicative Access Agreement.

It does, however, provide the following submissions on the issue of the appropriate dispute resolution mechanism to be included under the indicative access agreement (attached to the undertaking). GrainCorp submits that its August Indicative Access Agreement provides a "robust and appropriate" dispute resolution mechanism, based on the following reasons:

- The dispute resolution mechanism provides for disputes concerning the grade, quality, sampling, testing, or classification of Wheat to be referred to an independent testing facility. Users have an ability to seek adjudication of a dispute in a timely manner by an independent party with the technical expertise necessary to determine such a dispute. Historically, this procedure has been appropriate for dealing with the type of technical disputes relating to sampling, testing or classifying Wheat.

- The Port Terminal Services Protocols which form part of the BWPTS Agreement include a very specific dispute resolution mechanism for rejection of CNAs by GrainCorp. Note that given the minimisation of almost all GrainCorp's discretion in regard to the acceptance or rejection of CNAs under the revised Protocols …GrainCorp considers rejections can be tested against objective grounds and such disputes to be very unlikely.

- For all other disputes, the dispute resolution mechanism mandates the escalation of a dispute to chief executive level, prior to the commencement of court proceedings

- It would not be appropriate for the dispute resolution provisions to mandate that the parties to refer a dispute to private arbitration, irrespective of the circumstances of the dispute. Private arbitration has the potential to be costly and drawn out, imposing an additional and unnecessary burden on both GrainCorp and exporters. The courts are appropriate for such disputes.

- Historically, Users have raised very few, if any, disputes in relation to the terms of the previous storage and handling agreements. Exporters have had

---

398 August Indicative Access Agreement, Annexure A (though the ACCC notes that Annexure A of the August Indicative Access Agreement was blank).

399 August Indicative Access Agreement, Annexure B (though the ACCC notes that Annexure B of the August Indicative Access Agreement was blank, though please see further the Capacity Management chapter).

> access to binding dispute resolution under the Victorian Essential Services Commission regime for many years and have not resorted to it."[400]

GrainCorp also submits that it intends to provide a revised indicative access agreement to address the concerns raised by the ACCC in relation to the dispute resolution mechanism provided under the August Indicative Access Agreement, which will include:

- a clear statement of the stages of the dispute resolution process, and
- clear timeframes in which the parties must seek to resolve the dispute.[401]

## 9.6 Submissions received from interested parties in response to the Draft Decision

### 9.6.1 Australian Grain Exporters Association

**Inclusion of an indicative access agreement in the proposed Undertaking**

AGEA submits that the non-inclusion of an indicative access agreement in the proposed Undertaking would results in a lack of certainty and clarity for potential access seekers and is, therefore, not appropriate having regard to the matters set out in section 44ZZA(3) of the TPA.[402]

**Standard terms that should be included in the indicative access agreement**

AGEA also submits that the indicative access agreements should ensure:

> (a) transparency in relation to port stocks (for wheat and other grains), accumulation plans (including incoming rail/road slots) and ship load order; and
>
> (b) accountability of BHCs, for example, in relation to demurrage/despatch and port inload spots.[403]

AGEA further submits that the indicative access agreements should include prices (for standard and non-standard services) and be binding, or require bulk handlers to publish prices (for standard and non-standard services) by 31 August at the latest.[404]

---

400 Australian Grain Exporters Association, *Submission in relation to the ACCC's Draft Decision*, 3 September 2009, para 2.4.

401 Australian Grain Exporters Association, *Submission in relation to the ACCC's Draft Decision*, 3 September 2009, para 2.4.

402 Australian Grain Exporters Association, *Submission in relation to the ACCC's Draft Decision*, 3 September 2009, para 9.1.

403 Australian Grain Exporters Association, *Submission in relation to the ACCC's Draft Decision*, 3 September 2009, para 9.2.

404 Australian Grain Exporters Association, *Submission in relation to the ACCC's Draft Decision*, 3 September 2009, para 9.3. For AGEA's further submissions on the 'timing for publication of standard terms and reference prices', refer to the Publish Negotiate Arbitrate chapter of this document.

In relation to the proposed standard terms of the indicative access agreement, AGEA submits that the following elements should be included:

(a) the prices for the services;

(b) clearly specified circumstances in which higher charges (e.g., overtime) may apply, subject to AWEs being given an option to unload in peak times and BHCs providing documentary proof that overtime charges were incurred and why they were necessary;

(c) certainty of term, so that the price and non-price terms are binding for the duration of the contract; it is inappropriate for the BHCs to be in a position to unilaterally alter the contractual terms;

(d) limited opportunity to vary price and non-price terms (for example, only in the event of a material adverse change with reference to the Council of Australian Government's Competition and Infrastructure Reform Agreement pricing principles, i.e. that pricing must be based on the cost to the BHCs of providing the service, plus a reasonable commercial margin), and only if both parties agree to the changes, provided also that the varied price or non-price terms will only take effect after a minimum 6 months' notice to AWEs;

(e) provisions which require the terms and conditions to be applied to wheat of specific grades or quality specifications which require segregation from other parcels throughout the port terminal facility;

(f) the specification of minimum performance criteria which BHCs are required to meet including:

    i. acceptance of vessel nominations regardless of stock entitlements within 24 hours;

    ii. changes to vessel slots and cargo accumulation;

    iii. unloading of trains/road transport within six hours;

    iv. load rates and time to count as per Austwheat 2008 charter party (as amended from time to time);

    v. benchmark criteria for grading, fumigation, weighing, compliance with AQIS requirements, loading to receival standards. The grain loaded to the ship should be of a standard not less than that delivered to the port terminal by or on behalf of the exporter. The terminal should provide running samples and/or analysis during loading so that any deviation from the required quality is known by the exporter prior to the completion of loading.

    vi. settling despatch demurrage at the applicable vessel rate.

(g) an effective right for AWEs to recover their loss and damage against BHCs if BHCs breach the terms and conditions of the port terminal services;

(h) a shipping protocol which provides:

    i. that if AWEs pay the vessel nomination fee and are allocated an estimated load date, BHCs must provide the necessary services to allow AWEs to load the vessel (within a three day spread), failing which BHCs will be liable for any loss or damage AWEs may suffer;

ii. transparency as to how the BHCs accept vessel nominations and provided vessel slots;

iii. mutual rights to terminate on the grounds of force majeure;

iv. a dispute resolution mechanism whereby disputes may be referred to an independent 'umpire' for a binding and timely decision; in order to be effective, this will require decisions to be made within 24 hours of one party notifying the other of a dispute;

(i) an obligation on BHCs to provide AWEs with information relating to weight, quality and AQIS compliance and all other necessary information to assess whether BHCs have met the performance criteria within 24 hours of the information being available;

(j) an obligation on BHCs to allow AWEs' superintendent (or independent third person nominated by AWEs) access to the port to sample AWEs' wheat and inspect the loading of AWEs' stock onto vessels;

(k) an obligation on BHCs to provide AWEs with daily updates on:

i. stock on hand at port;

ii. daily receivals by grade into port;

iii. the port's capacity;

iv. wheat accumulation;

v. unloading from upcountry transporters into port;

vi. stock movements;

(l) an obligation on BHCs to take running samples (for testing in relation to quality and specifications) as the grain is loaded onboard vessels;

(m) an obligation on BHCs to notify AWEs promptly if there is a problem or BHCs expect that they might not be able to perform their obligations;

(n) a complaints procedure to an independent body;

(o) a requirement that BHCs engage an independent auditor to undertake an audit of BHCs' compliance with the undertaking at such times as the ACCC may reasonably direct, but at least once in any 12 month period;

(p) an entitlement on the part of the ACCC to investigate any matters arising out of or relating to any complaints or the audit;

(q) a dispute resolution mechanism which allows for the speedy resolution of disputes, including a mechanism to refer any disputes under the undertaking to arbitration by the ACCC.[405]

## Specific comments on the standard terms of the August Indicative Access Agreement

In relation to the standard terms to be included in an indicative access agreement, AGEA submits the following in relation to specific provisions of GrainCorp's August Indicative Access Agreement:

### 1. Clause 1 Consideration and Term of Agreement

[405] Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 4.17.

The definition of "Services" is too narrow. "Services" is defined as:

"*services [provided] to the Client at a nominated Port Terminal owned by GrainCorp for the storage, handling, sampling, testing, weighing and loading to vessel, rail wagon (where available) or road truck of the Client's Wheat*".

The definition of "Services" under the port terminal services agreement must encompass all services provided by GrainCorp within the port terminal facility. The GrainCorp definition does not do that. By way of example, GrainCorp does not include fumigation and accumulation in its terms of reference. These services are provided at GrainCorp's port terminals and must be within the scope of the definition.

AGEA agrees with the definition of "port terminal services" proposed by the ACCC (see p. 87 of the ACCC's draft decision on GrainCorp's proposed Undertaking). That definition should apply to the proposed Undertaking, the port terminal services agreement and the port loading protocol.

**2. Clause 1.3 (see also clause 4.1) Consideration and Term of Agreement**

"*This Agreement shall be deemed to have been accepted by the Client and the Client and GrainCorp will be bound by the terms and conditions of this Agreement from the earlier of:*

*(i) …; or*

*(ii) the date that GrainCorp provides any Services at a Port Terminal for or on behalf of the Client during the Term."*

The above is contrary to a "publish/negotiate/arbitrate model".

**3. Clause 2.5 Scope of Agreement**

"*This Agreement is not an open offer or a representation that GrainCorp will provide the Services to the Client for any minimum or maximum quantity or quality of Wheat, nor is it a representation that GrainCorp will provide the Services for all of the Client's requirements. Where GrainCorp does provide the Services.*."

Clause 2.5 provides GrainCorp with the unfettered discretion whether or not to provide port terminal services to AWEs. Clause 2.5 is unnecessary and inconsistent with the obligation to provide access to port terminal services. If there are events which justifiably excuse a BHC from providing access to port terminal services, those events can be clearly specified in the agreement and protocols and the [bulk handler]s will be protected.

**4. Clause 2.6 Scope of Agreement**

"*…The Client acknowledges that Annexure A [pricing schedule] which forms part of this Agreement may be amended by GrainCorp providing at least 30 days prior written notice to the Client… Following this notice period, the revised Annexure A will form part of the Agreement and shall apply retrospectively unless*"

GrainCorp has not included an indicative prices schedule upon which AGEA is able to comment.

However, that GrainCorp is able to unilaterally amend its fees with only 30 days notice and charge the new prices retrospectively, is not consistent with a "publish/negotiate/arbitrate model".

For the reasons discussed in paragraphs 8.4 of AGEA's further submission, GrainCorp should be required to publish prices for standard and non-standard services before the ACCC accepts the proposed Undertaking.

**5. Clause 3.1 Receival of Wheat**

"*During the Term of this Agreement GrainCorp* ***will use its reasonable endeavours*** *to receive Wheat into the Port Terminal in accordance with the Client's request and subject to any restrictions, limitations or other conditions in this Agreement.* ***At all times GrainCorp retains the final discretion as to what specifications and quantities of Wheat it will receive into the Port Terminal.***" [emphasis added]

Clause 3.1 is entirely unacceptable. It provides GrainCorp with the absolute and final discretion as to whether to allow AWEs' grain into its port terminal facilities and is inconsistent with the obligation to provide access to port terminal services. Any discretions must be kept to a minimum and must be exercisable based on criteria that is objectively ascertainable. Further, there is no transparency in relation to GrainCorp's decision making process and GrainCorp is not obliged to provide reasons for its decision.

**6. Clause 3.2 Receival of Wheat**

"*GrainCorp will only receive Wheat at Port Terminals from sources other than Country Sites where the Client and the Wheat it seeks to deliver, satisfy the terms and conditions specified in Annexure A:* Wheat Port Terminal Services and Fees Schedule *and Annexure B:* Port Terminal Services Protocol."

GrainCorp has not included Annexure A. As a result, AGEA is not able to comment as to, and the ACCC is unable to determine, whether it ensures fair and transparent port terminal access.

**7. Clause 3.3 (b) Receival of Wheat**

"*Wheat received and stored by GrainCorp of Feed Grade for stock feed consumption may be commingled with Wheat of the same type and grade but of a different growing season;*"

Sales contracts often contain warranties that the grain being sold is of a particular season. Before blending grain from different seasons, GrainCorp must first obtain the AWEs' written permission. Otherwise, GrainCorp must be solely responsibly for the resulting losses.

**8. Clause 3.9 Pest Control**

"*If the Client requests and GrainCorp agrees to a different chemical or treatment strategy for a specific Port Terminal,* ***an additional fee may be charged*** *by GrainCorp and payable by the Client for the agreed treatment.*" [emphasis added]

GrainCorp should not have the discretion whether or not to charge an additional fee.

The above discretion is not transparent and fairness cannot be shown.

**9. Clause 3.10 Pest Control**

"*Where fumigation or other certificates are required by the Client,* ***GrainCorp will apply a charge*** *for the administration of these certificates. Any certification requirements must be lodged as part of a Cargo Nomination Application.*" [emphasis added]

There is no reference as to how that charge will be determined.

Again, there is no transparency provided by GrainCorp. GrainCorp should be required to publish all costs and charges which GrainCorp proposes to charge for standard and non-standard services.

**10. Clause 3.12 Outloading of Wheat**

"*The Client must ensure that its road transport provider advises GrainCorp of vehicle registration details in writing,* ***by 5pm*** *on the business day prior to the date when the outloading services are to be performed. If the* ***Client uses the GrainCorp web truck booking program*** *(available at www.graincorp.com.au) this notice period will be* ***extended to 6:00am*** *on the day of outloading…*

*The* ***outloading notification requirement may change from time to*** *time and if so, it will be advised by GrainCorp. The loading out of* ***Wheat is subject to local operating arrangements, availability of rail and road transport, fumigation requirements and periods of non access and prevailing weather conditions.***" [emphasis added]

Preferential treatment is provided by GrainCorp in the event that the AWEs use other GrainCorp services. Discrimination of this kind is contrary to the proposed Undertaking (for the reasons explained in the ACCC's draft decision).

The clause also provides that the terms may change. GrainCorp has the discretion to amend at any time and without notice. This is not representative of a "publish/negotiate/arbitrate model".

The loading of the wheat is subject to variables that are vague. The clause does not specify how the loading out will change. Further, there is no obligation for GrainCorp to consult the AWEs about the failure to perform.

**11. Clause 3.14(b) Outloading of Wheat**

"*the GrainCorp Stock Management System will be updated either manually or automatically to reflect the remaining Interest (if any) of the Client.*" [emphasis added].

All stock levels must be updated automatically, at least every 24 hours.

In view of GrainCorp's failure to implement a proper ring-fencing system, information such as stock levels must be made publicly available and not just GrainCorp's trading arm.

**12. Clause 3.16 Precondition to Any Outturning or Outloading Services**

"*GrainCorp determines that the Client's selected mode of transportation is not clean, fit for loading or carriage then it may suspend or refuse to provide and outturning or outloading Services and in no circumstances will GrainCorp be liable for any Loss or Claim and the Client shall meet all of GrainCorp's costs, expenses or losses associated with the rejection or cancellation of the scheduled outturning or outloading services*".

It is not appropriate that GrainCorp is able to reject a vessel as being unfit. AMSA and AQIS inspect the vessels and are responsible for determining cleanliness. It is unnecessary for GrainCorp to take on this role if the vessel has already passed the customary surveys. Clause 3.16 might be intended to provide further justification for rejecting or delaying vessels to change the vessel line-up to suit GrainCorp. If GrainCorp wishes to take on that role, it must be fully responsible for the consequences. It certainly should not be entitled to exercise the discretion and have the AWEs indemnify GrainCorp for its action.

**13. Clause 3.17 Precondition to Any Outturning or Outloading Services**

"*Prior to physically outturning or outloading any Wheat, GrainCorp reserves the right to invoice the Client and receive payment in full for any related outturning or outloading services, failing which GrainCorp is not required to commence any such outturning or outloading services*."

[Accredited wheat exporter]s must comply with WEA's stringent accreditation scheme. Among other things, WEA must have regard to the "*financial resources available to the company*" (s.13(1)(c)(i) of the WEM Act). It is unnecessary for [bulk handler]s to require AWEs to pay for services up front.

Additionally, GrainCorp has not provided any benchmark against which it will exercise its discretion to require pre-payment, and at what point pre-payment will be required.

**14. Clause 4.2 Hours of Operation**

"*GrainCorp and the Client may agree that additional (overtime) shifts will be provided for the handling of the Client's Wheat. This applies to both shipping services and the unloading of road and rail transport. If GrainCorp provides additional overtime…*"

GrainCorp has the discretion whether or not to provide overtime. There is no transparency as to when overtime will be charged and whether it is required. For example, if a client is required to pay for overtime, how can they be satisfied that another client is not unloading at the same time? GrainCorp may charge twice for one shift. Under the proposed Undertaking, [bulk handler]s should be obliged to report on overtime charges and other key service standards.

**15. Clause 4.4 Hours of Operation**

"*Notification of a request to load a vessel requiring overtime or weekend shifts must be provided to GrainCorp prior to cut off times* ***as specified from time to time*** *by the Port Terminal.* ***GrainCorp cannot guarantee and does not represent that it will accept any such requests.***" [Emphasis added]

GrainCorp does not provide any transparency as to whether cut off times will be changed.

Additionally, GrainCorp retains the discretion to refuse to accept these requests. There is no transparency as to how GrainCorp will determine whether or not to accept such request.

**16. Clause 4.5(a)(4) Rail Transport Providers**

"*…provides an acceptable audit system for the notification of defects in rail wagons….*"

GrainCorp does not specify what will be an "*acceptable audit system*".

**17. Clause 4.7(4) Road Transport Providers**

"*Notwithstanding this minimum notice period,* ***GrainCorp does not guarantee the availability of outloading operations regardless of the period of notice.*** *GrainCorp* ***may levy additional charges*** *as described in Annexure A where this minimum notice period is not observed…*"[emphasis added]

GrainCorp does not provide any transparency as to availability of the outloading operations, despite compliance with requirements by the AWEs.

Additionally, GrainCorp retains the discretion whether or not to levy additional charges.

**18. Clause 6.7 -6.9 Co-ownership**

"*GrainCorp may become a Co-owner by adding Wheat to the Stored Wheat. In accordance with Clause 6.1, full ownership in any Wheat added to the Stored Wheat by GrainCorp is transferred to the Co-owners. In return, the Co-owners transfer to GrainCorp an Interest..."*

GrainCorp as the provider of port terminal services, is entitled to receive, store and outturn its own bulk wheat.

There is no attempt to separate GrainCorp as provider of port terminal services and GrainCorp as trader of Australian bulk wheat.

**19. Clause 6.10 Transfer of Title**

*"6.10. If a Client (as seller) wishes to transfer a tonnage of Wheat…to another GrainCorp client… the Client must either:*

*(a) complete and execute a Buyer to Buyer Title Transfer Form (or Stock Swap Form)… Wheat is not transferred until the Buyer to Buyer Title Transfer Form.. is also* ***executed*** *by both the GrainCorp client receiving the transfer and* ***GrainCorp.*** *The GrainCorp* ***Stock Management System will be updated manually*** *to reflect the revised Interests of the Client and the transferee. The transfer (swap) is effective, after execution by all parties, on the date on which the seller (initiator) signs the Buyer to Buyer Title Transfer Form…; or*

*(b) complete and execute the Buyer to Buyer Title Transfer Form on the GrainCorp web page* ***using the GrainCorp Buyer to Buyer Software*** *as per* ***Clauses 6.11*** *to* ***6.23*** *and follow the procedures as agreed to between the Client and GrainCorp from time to time. Title will transfer in the GrainCorp Stock Management System upon the Client clicking on the 'Confirm' button. The transfer (swap) is effective on the date on which the seller (initiator) processes the transfer of title on the GrainCorp web page*". [emphasis added]

GrainCorp retains the control as to if and when stock swaps can occur and there is no transparency in relation to its conduct.

Further, if option (a) above is used, GrainCorp will update the Stock Management System manually. There is no benchmark as to when the update will occur.

Further, AWEs that use GrainCorp's Buyer to Buyer Software obtain a higher level of service.

**20. Clause 6.19 Transfer of Title**

"*GrainCorp may reverse any transfer if:*

*(a) the user is in default of payment of* ***any Fees*** *to GrainCorp; or…*

*(c) in* ***GrainCorp's opinion****, the security of the Client has been breached; or*

*(d) the user is in* ***breach of any term of this Agreement****; or*

*in which case GrainCorp has no liability to the Client in connection with the reversal*". [Emphasis added]

GrainCorp's discretion is unfettered. Regardless of GrainCorp's obligation to provide access or how minor the amount claimed by GrainCorp (the amount may be disputed), GrainCorp is entitled to reverse the transfer of grain, without being liable.

The transfer could cause significant losses to the AWEs.

GrainCorp is not required to advise the AWEs of the reversal of title.

**21. Clause 6.20 Transfer of Title**

"*GrainCorp may at any time add, remove, change or impose restrictions on the functionality of the service without limitation and without recourse by the Client.*"

GrainCorp's discretion is unfettered. GrainCorp is not required to provide any notice before unilaterally removing the service from the AWEs. The basis upon which GrainCorp makes its decision is not objectively ascertainable and there is no transparency.

**22. Clause 6.23 and 6.24 Stock Swaps**

"*The Client acknowledges that for Operational Reasons, GrainCorp can swap a grade of Wheat with the same grade of Wheat between Country Sites in the Natural Port Zone, and by entering into this Agreement the Client consents to any such stock swap occurring.*"

Operational reasons is defined as meaning *" delays or Wheat unavailability due to weather problems, grain infestation or fumigation, grain quality problems, inaccessible Wheat, mechanical failure, rail availability or rail delays and last of grain in storage being outloaded.*"

GrainCorp has the discretion to move the AWEs' wheat that is held at port awaiting loading onto a vessel back up-country.

GrainCorp is not required to provide any notice, nor compensation for the damages that flow from the AWEs not being able to access their grain.

**23. Clause 6.27 Shrinkage**

"*…Where a shrinkage allowance is deducted under **Clause 6.25** and **6.26** title in the shrinkage residue (being a volume of Wheat representing the amount deducted) will transfer to GrainCorp (and not the Co-Owners pursuant to **Clause 6.1**)….*"

The above is an example where GrainCorp obtains a benefit over and above its co-owners of a co-commingled stack.

**24. Clause 6.41 Provision of Stock Information**

AGEA refers to paragraphs 1.27 and 1.28 above.

**25. Clause 7.2 Invoices**

"*…GrainCorp may amend these credit terms at any time if the Client does not strictly adhere to these payment terms, and may reject Wheat from any party where they have outstanding accounts under this Agreement or any other agreement the Client has with GrainCorp or its Related Bodies Corporate which breach the terms of credit of the relevant agreement.*

*GrainCorp reserves the right to make adjustments for any error in the calculation of Fees in one invoice in any subsequently issued claim for payment.*"

GrainCorp is entitled to refuse to provide port terminal services, despite the AWEs disputing an invoice from GrainCorp or GrainCorp's Related Bodies Corporate, for example, from GrainCorp's trading arm. If GrainCorp had a proper ring-fencing policy in place, it is unclear how it and its related bodies corporate would be aware of the various transactions that provide for the opportunity to exercise a lien.

**26. Clause 7.12 Set-off**

"*At its sole discretion, GrainCorp may apply any amounts whatsoever then due and payable by it to the Client in satisfaction of any amounts whatsoever then due and payable by the Client to GrainCorp under this or any other agreement between the Client and GrainCorp or its Related Bodies Corporate.*"

It is not appropriate that GrainCorp has the discretion to set-off any amounts owing by it or any of its related bodies corporate to the AWEs whether under this or other agreements. It is neither necessary nor appropriate that a "set off" clause be contained in the minimum terms and conditions in an access agreement. It is open to GrainCorp to negotiate a clause of this kind with access seekers.

Further, it is unacceptable that the right is unilateral.

If GrainCorp had a robust ring-fencing policy in place, it is unclear how it and its related bodies corporate would be aware of the various transactions that provide for the set-off opportunity.

**27. Clause 8.3 Damages**

"*Where a Claim is recognised by GrainCorp to be valid and GrainCorp agrees to compensate the Client or, in any other event where GrainCorp is liable to compensate or indemnify the Client, then GrainCorp's maximum liability in respect of any Claim shall not exceed $500,000 for Wheat outloaded on any shipping vessel and $10,000 for Wheat outloaded on to rail or road trucks on any one day for the Port Terminal.*"

Liability terms and limits must reflect commercial reality and contain realistic limits on liability. Given the volume of stock [bulk handler]s handle, [bulk handler]s should not be able to exclude or limit liability (including consequential loss, see clause 8.6). Requiring [bulk handler]s to be responsible for loss or damage caused would improve efficiency.

**28. Clause 8.4.**

"*GrainCorp's liability for a Claim under this Clause 8 is subject to the Client:*

*(a) advising GrainCorp immediately of suspecting downgraded Wheat, cease discharging suspected loads, and allow GrainCorp to inspect suspected downgraded Wheat.*"

This may not be possible. Often the damage is not discovered until it is being discharged, at which time the AWEs are unlikely to have title and control over the wheat.

"*(b) allowing GrainCorp every possible opportunity to mitigate all actual or potential losses.*"

AGEA refers to (a) above.

"*(c) informing GrainCorp of any potential Claim which it has against GrainCorp in respect of downgraded Wheat received by the Client within 2 business days of receiving the Wheat; and*"

This may not be possible. Often the damage is not discovered until it is being discharged, which will be more than two days of the wheat being received into the vessel. Further, GrainCorp has the discretion to exclude any representative of the AWEs from being present during the loading into the vessel (clause 12.10).

*"(d) providing GrainCorp with a sample of the downgraded Wheat subject to the Claim; and*"

AGEA refers to sub-paragraph (a) above.

"*(e) allowing GrainCorp to test this sample and compare this sample with sample of Wheat retained by GrainCorp on the outloading of Wheat from the Country Site or the Port Terminal.*"

AGEA refers to sub-paragraph (a) above.

**29. Clause 91 – 9.4 Exclusion of Liability**

"*9.1. Unless specifically provided otherwise in this Agreement, GrainCorp is not liable for any Loss or Claim including damage, destruction, contamination or loss of Wheat unless and then only to the extent such is caused directly by the negligence of GrainCorp or its employees.*"

Liability terms and limits must reflect commercial reality and contain realistic limits on liability. Given the volume of stock [bulk handler]s handle, [bulk handler]s should not be able to exclude liability unless caused by negligence and where negligence is shown, set a cap on damages that can be claimed.

*9.2. The Client acknowledges that GrainCorp is unable to test Wheat on receival (whether received from the Client or from another person) for toxic or other chemical residues, genetically modified seed or other contamination. GrainCorp is not liable for any direct or Consequential Loss suffered or incurred by the Client caused by or otherwise relating to the storage or handling of contaminated Wheat at the Port Terminal.*

*9.3. The Client acknowledges that any transportation of Wheat is at the Client's risk, including transportation of Wheat arranged by or on behalf of or at the request of either the Client or GrainCorp. To the fullest extent permitted by law, GrainCorp is not liable for any direct or Consequential Loss incurred by the Client caused by or otherwise relating to the transportation of Wheat.*

It is not appropriate that GrainCorp is entitled to contract out of responsibility for transporting the wheat when it is under its control.

**30. Clause 10.1 Termination**

"*10.1. Further to Clause 1, GrainCorp may terminate this Agreement:*

*(a) immediately upon written notice to the Client if the Client:*

*(i)* ***fails to pay any amount*** *that is due and payable under this Agreement* ***or any other agreement*** *between the Client and GrainCorp or its* ***Related Bodies Corporate****;*

*(ii) breaches a warranty as set out in this Agreement or any other agreement between the Client and GrainCorp or its* ***Related Bodies Corporate****;*

*(iii)* ***fails to follow a direction of GrainCorp*** *made reasonably and lawfully;*

*(iv) commits an act or omission which compromises the safety of any person or brings GrainCorp in to* ***disrepute****; or*

*(v) fails to have in place or accurately declare the status of an Accreditation Requirements as set out in this Agreement*

*(b) upon 14 days written notice to the Client if the Client breaches any other provision of this Agreement or any other agreement between the Client and GrainCorp or its* ***Related Bodies Corporate****, and does not remedy the breach* ***to GrainCorp's satisfaction within GrainCorp's stipulated time frame****.*" [emphasis added]

The above entitles GrainCorp to cease providing services without any consideration as to the significance of the monies owing or breaches in contracts in relation to it or its Related Bodies Corporate.

GrainCorp is entitled to make any direction, whether or not related to the provision of port terminal services.

If GrainCorp had a robust ring-fencing policy in place, it is unclear how it and its related bodies corporate would be aware of a breach of any other agreement between GrainCorp or its Related Bodies Corporate .

**31. [Clause] 11.1 – 11.2 Disputes**

"*11.1 Any dispute concerning the grade, quality, sampling, testing or classification of Wheat which GrainCorp and the Client cannot resolve themselves after using reasonable endeavours to do so may be referred to a mutually agreed independent testing facility for resolution in accordance with the provisions of this Agreement. GrainCorp and the Client agree to be bound by the decision of the mutually agreed independent testing facility. GrainCorp and the Client shall bear their own costs in determining the resolution to the dispute.*"

*11.2. If any dispute between the parties however relates to access to the Port Terminal and arises in connection with the protocols and procedures set out in Annexure B, then the parties shall resolve such disputes in accordance with the dispute resolution provisions contained in Annexure B.*"

GrainCorp's dispute resolution process is vague and slow. The dispute resolution clause must contain a clear and well defined process.

AGEA refers to paragraphs 8.16, 8.17(xi)-(xii), 8.23 – 8.39 above.

**32. Clause 12.10 Site Access**

"*GrainCorp may, in its absolute discretion, refuse or reject a visitation request or propose alternative times and/or places for the visit and the Client shall not attend at any GrainCorp site without receiving the prior consent of GrainCorp for each visit and shall not enter or stay on any GrainCorp site without appropriate GrainCorp supervision.*"

As noted in paragraph **Error! Reference source not found.** of AGEA's further submission, it is a common term under international sales contracts for both buyers and sellers to be entitled to have a representative present during the loading of the vessel. Certain markets require this if the weight and quality is to be final at loadport.

That GrainCorp retains the discretion whether or not to grant access, without any benchmarks against which it is to exercise its discretion, does not provide transparent access to port terminal services.

The problems created by a lack of transparency in relation to access are magnified by reason

of the lack of a robust ring-fencing policy.[406]

In relation to liability clauses generally, AGEA submits that bulk handlers should not be allowed to cap their liability, exclude consequential loss claims or exclude liability unless caused by negligence (gross or otherwise) or wilful default.[407]

AGEA also submits that liability terms and limits must reflect commercial reality and contain realistic limits on liability. AGEA submits that, given the volume of stock bulk handlers deal with, they should not be able to exclude or limit liability. Further, AGEA submits that requiring bulk handlers to be responsible for loss or damage caused would improve efficiency.[408]

In relation to the issue of bulk handler liability under an indicative access agreement, AGEA submits that:

> "Bulk handlers should provide fair compensation if they fail to provide the services that they are paid to provide. The terms and conditions of most bulk handlers who control port facilities cap their liability to access seekers at extraordinarily low levels. The grain cargoes involved in bulk shipments are worth large sums of money and if bulk handlers fail to properly provide port-related services, they can cause exporters to suffer losses well above these caps.
>
> For example, if a bulk handler negligently fails to load uncontaminated cargo within an allocated shipment time, a wheat exporter is exposed to potentially enormous losses including costs such as replacing a contaminated cargo and paying for sea freight to transport the replacement cargo to an export customer. Wheat exporters have to pay all these costs even if they arise solely due to bulk handler negligence. These liability caps should be removed so that bulk handlers are fully accountable if they fail to provide services."[409]

### Variations of the indicative access agreement

AGEA submits that the bulk handlers' approach to variation of the standard terms is not appropriate. AGEA submits that the ability for the BHCs to unilaterally change the indicative access agreement would result in a lack of certainty and clarity for potential access seekers and undermine the benefits of inclusion of the indicative access agreement in the undertaking. AGEA notes that the proposed Undertakings are for a short period and submits that any variation of the indicative access agreement (and the port loading protocols, which should both form part of the proposed Undertakings) should be in accordance with the process under section 44ZZA(7) of the TPA. AGEA submits that the same should apply in relation to the bulk handlers' published prices.[410]

---

406 Australian Grain Exporters Association, *Submission in relation to the ACCC's Draft Decision*, 3 September 2009, Schedule 4.

407 Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, AGEA, 29 May 2009, para 12.2.

408 Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, AGEA, 29 May 2009, Schedule 1, para I2.

409 Australian Grain Exporters Association, *Submission on wheat export marketing access undertakings*, 18 May 2009, pp. 2-3.

410 Australian Grain Exporters Association, *Submission in relation to the ACCC's Draft Decision*, 3 September 2009, para 9.5-9.9.

In relation to unilateral variations prices under an indicative access agreement, AGEA submits:

> "Bulk handling fee structures are also convoluted and contain elements that are subject to change without notice. If fee structures cannot be relied on because the bulk handler changes them without notice after exporters price their wheat export program, this causes wheat exporters to incur costs which cannot be recovered from customers. The lack of available alternative port facilities, combined with bulk handlers' refusal to negotiate, mean that exporters have little choice but to pay these increased fees. Noting that these contracts are only 12 months in duration, bulk handlers should be required to negotiate reasonable terms and conditions with grain marketers, then stick to them during the contract period. This would allow marketers to price their grain sales with certainty about bulk handlers' costs and level of service, without the risk that they will be exposed to unexpected financial losses or denial of port facilities, thereby reducing their competitiveness."[411]

### 9.6.2 New South Wales Farmers' Association

In relation to the issue of bulk handler liability under an indicative access agreement, the NSW Farmers' Association submits that:

> "Another example of substantial market power relates to the storage and handling terms and conditions of a port operator which limits their liability in relation to a claim, which is recognised by 'the bulk handler' to be valid and 'the bulk handler' agrees to compensate the Client or, in other event, where 'the bulk handler' is liable to compensate or indemnify the Client, then 'the bulk handler's' maximum liability in respect of a claim shall not exceed $500,000 for grain out loaded onto any shipping vessel, and $10,000 for grain out loaded onto rail or road truck on any one day for a site. In the situation where a ship haul can be worth in excess of $25 million and the entire value of its contents can be placed in jeopardy if the ship fails to leave the port, it would seem to the Association that 'the bulk handler's' liability is unusually conservative."[412]

In relation to specific provisions of the standard terms of an indicative access agreement, the NSW Farmers' Association submits that:

> "There are concerns that many of the fees and charges set by bulk handlers who are port operators, at their port facilities are not a fair representation of the usual commercial rates. For example interest on overdue accounts is outlined as follows in 'the bulk handler's' Storage and Handling Agreement Clause 3.9. *"the interest rate applicable under this Clause 3.9 is the rate which is 6% above the bank bill buying rate for bills with a tender of 90 days quoted from time to time by National Australia Bank."* The Association understands that in most industries the commercially accepted rate is 2% above the 90 day bank bill. The Association feels that many of the fees set by the port operators and for that matter the upcountry grain storage and handling facilitators (as they often represent an extension of the port facilities business model), are not representative of a truly competitive market place nor is the environment conducive to the introduction of competition. For competitor to survive it would seem necessary to closely monitor the fees set by port operators until such time as adequate competition is available to regulate this situation in the market place. Furthermore policy makers should

---

411 Australian Grain Exporters Association, *Submission on wheat export marketing access undertakings*, AGEA, 18 May 2009, p. 4.

412 NSW Farmers' Association, *Submission on port terminal services access undertakings,* 10 June 2009, p. 4.

> give serious consideration toward how the industry is to achieve improved competition within regional areas of the nation in particular within the natural geographic and infrastructure created monopolies surrounding ports and port zones."[413]

## 9.7 ACCC's views

### 9.7.1 Necessary for undertaking to include an indicative access agreement

The ACCC considers that the approach taken by GrainCorp in its proposed Undertaking of 15 April 2009 of not including an indicative access agreement results in a lack of certainty and clarity for potential access seekers and is therefore not appropriate having regard to the matters set out in section 44ZZA(3) of the TPA.

Indicative access agreements are a common inclusion in access undertakings.[414] They assist access seekers (through the negotiation and arbitration framework discussed in the Publish, Negotiate, Arbitrate chapter of this draft decision) to conclude a set of agreed access terms and conditions with the access provider. These terms and conditions are then embodied in a contractual relationship between the access provider and an access seeker (i.e. an Access Agreement).

Including an indicative access agreement in the proposed Undertaking would provide a clear starting point for negotiations and is therefore crucial to ensure access seekers can effectively negotiate with GrainCorp. Another key benefit of inclusion of the indicative access agreement is to ensure that the costs of negotiation and/or arbitration are not excessive.

The ACCC notes that GrainCorp would be required to offer the indicative access agreement to access seekers who seek to obtain access to GrainCorp's port terminal services on the basis of the standard terms provided under that agreement. For the avoidance of doubt, however, it is important to note that inclusion of an indicative access agreement in the proposed Undertaking does *not* mean that access seekers and GrainCorp are precluded from negotiating around the indicative access agreement. There is nothing to stop GrainCorp agreeing to different terms and conditions with access seekers, either by commercial agreement or via the negotiation/ arbitration framework in the proposed Undertaking. Nevertheless, an indicative access agreement serves the function of operating as a 'minimum offer' by the access provider.

### 9.7.2 Revisions required to August Indicative Access Agreement

The ACCC does not consider that the August Indicative Access Agreement would form an appropriate basis for an indicative access agreement as it is currently drafted.

The ACCC considers that, in order to be acceptable to the ACCC, improvements would need to be made to ensure that:

---

413 NSW Farmers' Association, *Submission on port terminal services access undertakings,* 10 June 2009, p. 4.

414 See, for example, the access undertaking submitted by the Australian Rail Track Corporation (**ARTC**), and accepted by the ACCC on 30 July 2008.

- The indicative access agreement includes a robust dispute resolution process that balances the legitimate business interests of GrainCorp with the interests of access seekers;

- Any ability of GrainCorp to unilaterally vary the terms of an executed indicative access agreement can only be exercised in appropriate circumstances; and

- The terms and conditions of the indicative access agreement provide for sufficient certainty and clarity in their terms, effect and operation.

These three areas are discussed in detail below.

The ACCC notes submissions from a number of interested parties raising concerns about whether a number of the terms of the indicative access agreement are acceptable, based on the commercial considerations and circumstances of those interested parties. The ACCC notes however, that the standard terms provided under the an indicative access agreement are intended to be the minimum terms and conditions of access to GrainCorp's port terminal services, and that access seekers will have the ability to negotiate (or arbitrate) non-standard terms that vary from any of those standard terms that they consider to be unacceptable, based on their own particular commercial considerations and circumstances. Accordingly, in this Further Draft Decision, the ACCC has not found it necessary to form views about whether the particular terms and conditions of the August Indicative Access Agreement would be acceptable to particular parties (given likely differences between the commercial considerations and circumstances of specific access seekers).

***Dispute Resolution***

A key feature of an effective indicative access agreement is a robust dispute resolution process. The ACCC is concerned with ensuring fair and transparent access to port terminal services and that includes ensuring that the dispute resolution process fairly balances the legitimate business interests of GrainCorp with the interests of access seekers.

The dispute resolution process provided under clause 11 of GrainCorp's August Indicative Access Agreement is set out below:

> **11 DISPUTES**
>
> 11.1 Any dispute concerning the grade, quality, sampling, testing or classification of Wheat which GrainCorp and the Client cannot resolve themselves after using reasonable endeavours to do so may be referred to a mutually agreed independent testing facility for resolution in accordance with the provisions of this Agreement. GrainCorp and the Client agree to be bound by the decision of the mutually agreed independent testing facility. GrainCorp and the Client shall bear their own costs in determining the resolution to the dispute.

> 11.2 If any dispute between the parties however relates to access to the Port Terminal and arises in connection with the protocols and procedures set out in Annexure B, then the parties shall resolve such disputes in accordance with the dispute resolution provisions contained in Annexure B.

The ACCC considers that the dispute resolution provisions at clause 11 of GrainCorp's August Indicative Access Agreement (set out above) would require a number of revisions in order to be considered appropriate for inclusion in the undertaking. This is because the relevant processes and timeframes that must be followed for the resolution of disputes have not been drafted with a sufficient level of clarity and detail.

***Unilateral variation of terms of an executed indicative access agreement***

The ACCC is of the view that GrainCorp's approach to the variation of agreed non-price related terms under an executed access agreement is appropriate. This is because, under the August Indicative Access Agreement, variations to agreed non-price related terms is only allowed to occur with the written agreement of both parties to that agreement under clause 12.13 which states that "this document may only be varied or replaced by a document executed by the parties".

In relation to variation of price terms under the August Indicative Access Agreement, prices can be unilaterally varied by GrainCorp under an executed indicative access agreement (under clause 2.6). In this regard, the ACCC notes that clause 2.6 states that:

> *The Client acknowledges that Annexure A which forms part of this Agreement may be amended by GrainCorp providing at least 30 days prior written notice to the Client. Following this notice period, the revised Annexure A will form part of the Agreement and shall apply retrospectively unless and to the extent that the amendments relate to pricing for services.*

The ACCC notes that Annexure A was blank as at the time of consultation on the August Indicative Access Agreement.

The ACCC notes that it would not be appropriate for GrainCorp to have an unrestricted ability to unilaterally vary either the agreed price or non-price related terms under an executed access agreement (which may include agreed standard terms or non-standard terms), since this would result in a lack of certainty and clarity for access seekers with such an executed access agreement in place.

The ACCC considers that the ability to vary the agreed price and non-price terms under an executed access agreement should only be permitted in the following circumstances:

- for non-price related agreed terms, variations should only be permitted to occur with the written agreement of all relevant parties to the executed access agreement; and

- for price related agreed terms, variations should only be permitted to occur with the written agreement of all relevant parties to the executed access agreement, or by GrainCorp (on a unilateral basis) under a limited range of clearly defined circumstances (for example, where there is a new law, or change to an existing law, which results in an increase in the cost to GrainCorp of providing a particular port terminal service).

The ACCC notes that it would be appropriate for any unilateral price rises under the second scenario set out above to still be subject to the negotiation and arbitration provisions in the undertaking in the event that an access seeker did not accept GrainCorp's decision to vary prices.

***Certainty and clarity***

The ACCC is concerned that a number of the clauses in GrainCorp's August Indicative Access Agreement do not provide for sufficient certainty and clarity in its terms, effect and operation. It is important that an indicative access agreement is sufficiently clear and certain given that the intention of an indicative access agreement is to provide a clear starting point for negotiations between an access seeker and GrainCorp (and clarity is therefore critical to ensuring access seekers can effectively negotiate with GrainCorp) and to ensure that the costs of negotiation and/or arbitration are not excessive.

In particular, the ACCC's views on particular clauses are as follows:

- in relation to clause 3.2, which states that:

> *GrainCorp will only receive Wheat at Port Terminals from sources other than Country Sites where the Client and the Wheat it seeks to deliver, satisfy the terms and conditions specified in Annexure A: Wheat Port Terminal Services and Fees Schedule and Annexure B: Port Terminal Services Protocol.*

  It is not appropriate that this provision refers to the "*terms and conditions specified in Annexure A: Wheat Port Terminal Services and Fees Schedule…*", as the relevant terms and conditions referred to here are more appropriately to be contained in Annexure B: Port Terminal Services Protocols. The ACCC considers it appropriate that this clause refers to "*Annexure B: Port Terminal Services Protocols*".

- in relation to clause 3.17, which states that:

> *Prior to physically outturning or outloading any Wheat, GrainCorp reserves the right to invoice the Client and receive payment in full for any related outturning or outloading services, failing which GrainCorp is not required to commence any such outturning or outloading services. On completion of any outturning or outloading services, the Client must within 30 days pay for any additional costs, services and Fees for Wheat outturned or loaded additional to the quantity invoiced. If the quantity outturned or outloaded is less, then GrainCorp will within 30 days refund to the Client the difference.*

  It is not appropriate that no timeframe is provided for GrainCorp to advise access seekers of any unilateral variation to the "*outloading notification requirement*" by

GrainCorp. The ACCC considers it would be appropriate for a clear timeframe to be provided, or for the discretion to vary the notification period to be removed altogether.

- in relation to clause 4.6, which states that:

> *GrainCorp does not warrant that the tonnage loaded into rail transport provided by or on behalf of the Client to a Port Terminal will be loaded to the Nominated Capacity.*

It is not appropriate that this provision relates to the loading of bulk wheat "*from*" and not "*to*" a port terminal. The ACCC considers it would be appropriate that GrainCorp replace the words "*to a port terminal*" to "*from a port terminal*".

- in relation to clause 5.2, which states that:

> *The Client acknowledges that AQIS may disallow the loading of some portion of the Client's Wheat at the Port Terminal for reasons of non conformance to AQIS export conditions as outlined in the Export Control Act 1982 (such as, but not limited to, detection of live insects , rodents and rattlepod). GrainCorp is not liable for any Loss incurred by the Client in relation to the failure to load that portion of the Wheat or the replacement of that stock for the completion of loading, including vessel discharge or other post loading mitigation.*

It is not appropriate that this provision does not clearly express the relevant limitation on GrainCorp's liability. In particular, it is not clear whether the reference to GrainCorp not being liable for the losses referred to is directly linked to the AQIS determination also referred to in this provision. The ACCC considers it would be appropriate for this provision to be redrafted to provide greater clarity as to the specific limitations on GrainCorp liability.

- in relation to clause 5.3, which states that:

> *GrainCorp is not liable for any quality issues derived from Wheat rejected from shipping at the Port Terminal that has been delivered from any site, not being a Country Site. The Client remains the owner of this Wheat at all times until the Wheat is sold or removed from the Port Terminal. Applicable fees to apply to this Wheat are detailed in Annexure A.*

references to "*quality issues*" are not appropriate. The ACCC considers it would be appropriate that further clarification or specific listed examples as to what any such "quality issues" are likely to consist of are included in the provision.

- in relation to clause 5.4, which states that:

> *Where contaminated Wheat is received from any site, not being a Country Site, and this Wheat contaminates other stock at the Port Terminal, the owner of the contaminated Wheat assumes responsibility forand is liable for all costs associated with the contaminated stock.*

References to "*all costs associated with the contaminated stock*" are not appropriate. The ACCC considers it would be appropriate that further clarification

or specific listed examples as to what any such costs are likely to consist of are included in the provision.

- in relation to clause 6.25, which states that:

> *GrainCorp will reduce the recorded tonnage of Wheat by a shrinkage allowance of 0.5% from each load of Wheat delivered into the Client's name into the Port Terminal. This includes Grower deliveries, Receival Docket transfers from Grower Warehousing and road and rail receivals from any site, not being a Country Site. This excludes Wheat which has been delivered to the Client by Title Transfer from another client in the Port Terminal and Wheat delivered to the Port Terminal from Country Sites*

it is not appropriate that a higher shrinkage rate (i.e 0.5%) is applied to wheat sourced from non-GrainCorp upcountry supply chain storage facilities than wheat sourced from GrainCorp upcountry supply chain storage facilities (i.e. 0.25%). The ACCC considers it would be appropriate that the same wheat shrinkage rate be applied irrespective of the source of the access seeker's wheat.

### 9.7.3 Variation of the indicative access agreement

GrainCorp's approach in its proposed Undertaking of 15 April 2009 of retaining discretion to unilaterally vary its "standard terms" (i.e. the price and non-price related terms which are intended to be included in GrainCorp's indicative access agreement) is not appropriate. It results in a lack of certainty and clarity for potential access seekers and undermines the benefits of inclusion of an indicative access agreement in the proposed Undertaking.

As set out in the ACCC's Draft Decision, it would be appropriate for the variation provisions in section 44ZZA(7) of the TPA to apply to any variations of the indicative access agreement. This does not preclude parties from negotiating non-standard terms that vary from those in the indicative access agreement.

The ACCC understands that the standard terms upon which GrainCorp offers grain exporters do not vary greatly from year to year. The ACCC also understands that, in relation to standard terms of access, there is not as great a need for flexibility as is the case in relation to the port loading protocols (see the Capacity Management chapter). Further, the ACCC notes that the parties are able to negotiate non-standard terms that vary from those in the indicative access agreement.

For these reasons, and given the short term of the proposed Undertaking, the ACCC considers that it would be more appropriate for any variation of the indicative access agreement to take place in accordance with the process under section 44ZZA(7) of the TPA.

# 10 Non-discrimination

**Summary**

It is appropriate that GrainCorp's proposed Undertaking dated 15 April 2009 includes non-discrimination and no hindering access clauses.

However, the precise non-discrimination and no hindering access clauses proposed by GrainCorp are not appropriate given the lack of clarity about their interpretation. Further, the drafting of the non-discrimination and no hindering access clauses does not ensure that they will protect against GrainCorp discriminating in favour of its own trading business.

The ACCC has made recommendations in this chapter about changes that could be made to the non-discrimination and no hindering access clauses to make them sufficiently robust to protect against anti-competitive self-preferential treatment by GrainCorp. For the avoidance of doubt, the non-discrimination clause should protect against (amongst other matters) the ability of GrainCorp to anti-competitively discriminate between wheat exporters on the basis of where grain was stored (i.e. whether it was stored in GrainCorp's up-country storage and handling network, a third party storage network or on-farm).

Further, in order for the ACCC to be able to monitor compliance with the non-discrimination clause, the ACCC considers it would be appropriate for GrainCorp's proposed Undertaking to allow the ACCC to request an audit be undertaken to assess compliance with the non-discrimination clause (but no more than twice in every twelve months).

## 10.1 GrainCorp's proposed Undertaking dated 15 April 2009

The following are GrainCorp's non-discrimination provisions within its proposed Undertaking, dated 15 April 2009:

**Clause 5.4 – Non-discriminatory access**

(a) Subject to clause 5.5:

(i) if an Applicant requests a Standard Port Terminal Service at a Port Terminal, GrainCorp must offer the Standard Port Terminal Service at the Reference Prices applicable from time to time for that Standard Port Terminal Service for that Port Terminal in accordance with clause 6; and

(ii) GrainCorp must not provide access to Applicants or Users (including its own Trading Division) which are different from:

(A) in the case of Standard Port Terminal Services, the Reference Prices or Standard Terms; or

(B) in all cases, the price and non-price terms offered to another Applicant or User,

unless such different terms are:

(C) consistent with the objectives of this Undertaking set out in clause 1.2;

(D) commercially justifiable taking into account the matters set out in clause 5.5; and

(E) offered on an arms length commercial basis.[415]

(b) GrainCorp must not discriminate against an Applicant in breach of this Undertaking where the terms and conditions are different to those offered to another User or the Trading Division for providing like Port Terminal Services and the differentiation is for the purpose of substantially damaging a competitor or conferring upon GrainCorp or its Trading Division any unfair competitive advantage over a competitor in the marketing of Bulk Wheat.

The non-discriminatory access clause set out above is expressed to be subject to the price and non-price terms provisions outlined in clause 5.5. Clause 5.5 sets out the basis upon which the price and non-price terms for the provision of access to Port Terminal Services might differ between different access seekers. Clause 5.5 states:

For the purposes of this Undertaking, the price and non-price terms for the provision of access to Port Terminal Services to different Applicants or Users will be determined by having regard to:

**5.5 Price and non-price terms**

For the purposes of this Undertaking, the price and non-price terms for the provision of access to Port Terminal Services to different Applicants or Users will be determined having regard to:

(a) GrainCorp's legitimate business interests and investment in the Port Terminal Services, Port Terminal Facilities and the Port Terminal;

(b) all costs that GrainCorp incurs or may incur in providing access, including any costs of extending the Port Terminal Services, but not costs associated with losses arising from increased competition in upstream or downstream markets;

(c) the economic value to GrainCorp of any additional investment that the Applicant or GrainCorp has agreed to undertake;

(d) the interests of all persons who have rights to use the Port Terminal;

(e) the operational and technical requirements necessary for the safe and reliable operation of the Port Terminal Services, the Port Terminal Facilities and the Port Terminal;

(f) the economically efficient operation of the Port Terminal Services, the Port Terminal Facilities and the Port Terminal;

(g) any differences in the costs of providing access to Port Terminal Services to different Applicants or Users;

(h) the opportunity cost of accommodating the requirements of one Applicant or User compared to the requirements of one or more other Applicants or Users;

---

[415] GrainCorp Operations Limited, *Port Terminal Services Access Undertaking*, 15 April 2009, clause 5.4.

(i) the provision of quality related services reasonably required by GrainCorp in respect of some Applicants or Users, but not others including security of Bulk Wheat integrity, testing of Bulk Wheat or Bulk Wheat classification, fumigation and protection requirements for Bulk Wheat;

(j) the relative risk related to storing and handling different Bulk Wheat segregations for Applicants and Users;

(k) available Port Terminal capacity, including receival, handling, storage and cargo accumulation capacity;

(l) differences in types and grades of Applicants' or Users' Bulk Wheat;

(m) differences in Applicants' or Users' Bulk Wheat volumes;

(n) differences in periods of time during which access to Port Terminal Services is required by Applicants or Users;

(o) differences in levels of Applicants' or Users' usage of Port Terminal Services;

(p) differences in modes of receival, storage or outturn including different transport modes to receive Bulk Wheat and different ship configurations;

(q) geographic and seasonal variations;

(r) minimisation of demurrage at the port over a given period;

(s) maximisation of throughput of Bulk Wheat and other commodities at the port over a given period;

(t) unless GrainCorp is offering segregated services at a Port Terminal, the ability to mix the same grade of Bulk Wheat owned by different owners and / or mix different grades of Bulk Wheat owned by the same or different owners; and

(u) the credit risk of an Applicant or User.[416]

The non-discrimination clause in GrainCorp's proposed Undertaking is also linked to the 'Objectives' provisions set in clause 1.2. For instance, GrainCorp can provide access to Applicants or Users (including its own Trading Division) on terms which differ from the Reference Prices or Standard Terms if those different terms are consistent with the objectives of the undertaking set out in clause 1.2 (as well as commercially justifiable taking into account the matters set out in clause 5.5 and offered on an arms length basis), which are as follows:

**1.2 Objectives**

The Undertaking has the following objectives:

(a) providing a framework to manage negotiations with Applicants for access to services provided by certain facilities at the Port Terminals in relation to export of Bulk Wheat;

(b) establishing a workable, open, non-discriminatory and efficient process for lodging and processing Access Applications;

[416] GrainCorp Operations Limited, *Port Terminal Services Access Undertaking*, 15 April 2009, clause 5.5.

(c) providing a non-discriminatory approach to pricing under which GrainCorp publishes reference prices and terms and conditions for the provision of certain standard services annually;

(d) operating consistently with the objectives and principles in Part IIIA of the TPA and the Competition Principles Agreement;

(e) reaching an appropriate balance between:

(i) the legitimate business interests of GrainCorp, including:

(A) the recovery of all reasonable costs associated with the granting of access to the Port Terminal Services;

(B) a fair and reasonable return on GrainCorp's investment in the Port Terminal Facility commensurate with its commercial risk;

(C) GrainCorp's business interests relating to the export of grain other than Bulk Wheat and to the export of non-grain commodities using the Port Terminal Facilities;

(D) GrainCorp's ability to meet its own or its Trading Divisions' reasonably anticipated requirements for Port Terminal Services; and

(ii) the interest of the public, including:

(A) ensuring efficient use of resources; and

(B) the promotion of economically efficient investment, use and operation of the Port Terminals; and

(iii) the interests of Applicants wanting access to the Port Terminal Services, including providing access to the Port Terminal Services:

(A) on non-discriminatory price and non-price terms; and

(B) in a transparent, open, efficient and non-discriminatory manner;

(f) providing an efficient, effective and binding dispute resolution process in the event that GrainCorp and the Applicant are unable to negotiate a mutually acceptable Access Agreement; and

(g) in accordance with the objective in s44AA(b) of the TPA, providing for a uniform approach to access to the Port Terminal Services at the different Port Terminals to the extent practicable having regard to the different characteristics of the Port Terminals.[417]

GrainCorp also includes a non-discrimination clause at 8.3, in the 'Capacity Management' section of its proposed Undertaking and deals with discrimination in the context of 'Operational Decisions'. GrainCorp's proposed Undertaking states that 'Operational Decisions' has the following meaning:

> ...decisions made in the course of providing the Port Terminal Services including day to day decisions concerning scheduling, cargo accumulation decisions and ship loading.[418]

[417] GrainCorp Operations Limited, *Port Terminal Services Access Undertaking*, 15 April 2009, clause 1.2.

The following is the non-discrimination clause at 8.3:

> **8.3 Non-discrimination**
>
> Subject to clause 5.4 and 8.4, GrainCorp undertakes not to discriminate between Users or in favour of its Trading Division in providing Port Terminal Services.[419]

Clause 8.4 of GrainCorp's proposed Undertaking sets out a list of factors it will consider in making Operational Decisions. At clause 8.4(c) of its proposed Undertaking, GrainCorp states that 'it will make such decisions based on objective commercial criteria and will adopt practices and policies to promote fair, reasonable and non-discriminatory Operational Decision making'.[420]

GrainCorp states that it may in making Operational Decisions:

(i) give priority to vessels based on the lead time given between nomination and vessel ETA and likely availability of sufficient Bulk Wheat at the Port Terminal prior to vessel ETA necessary to make a nominated vessel's nominated cargo tonnage;

(ii) take into account in particular, the objectives of:

minimising demurrage at the Port Terminal over a given period;

maximising throughput of Bulk Wheat and other commodities at the Port Terminal over a given period;

(iii) vary a cargo assembly plan or queuing order for vessels as a result of:

- insufficient Bulk Wheat at the Port Terminal accumulated by the User necessary to make a User's nominated vessel's nominated cargo tonnage;
- variations in vessel arrival times;
- failure of vessels to pass surveys;
- stability and ship worthiness inspections;
- vessel congestion;
- variation in cargo requirements;
- lack of performance of freight providers;
- equipment failure;
- maintenance outages;
- contamination of accumulated cargoes or contamination of loads;

---

418 GrainCorp Operations Limited, *Port Terminal Services Access Undertaking*, 15 April 2009, clause 8.4(a).

419 GrainCorp Operations Limited, *Port Terminal Services Access Undertaking*, 15 April 2009, clause 1.2.

420 GrainCorp Operations Limited, *Port Terminal Services Access Undertaking*, 15 April 2009, clause 8.4(c).

- a User not working a vessel or accumulating a cargo on a 24 hour/7 day basis where another User is able to do so.[421]

GrainCorp's proposed Undertaking, at clause 8.5, also includes a 'No hindering access' provision, which states:

> **8.5 No hindering access**
>
> GrainCorp must not engage in conduct having a purpose of hindering access to the Port Terminal Services by any other User in the exercise of a reasonable right of access.[422]

## 10.2 GrainCorp's submissions in support of its April Undertaking

GrainCorp submits that access seekers face a 'low burden of proof to show there has been prohibited discriminatory conduct'[423], and '[a]ll that is required is that the arbitrator forms the view that access is not in accordance with any one of the three preconditions for legitimate differentiation of terms and conditions outlined in clause 5.4(a)(ii)(C) / (D) / (E)'.[424]

GrainCorp submits that 'the commitment in the Access Undertaking not to discriminate between wheat exporters ensures that the Port Terminal Operator cannot charge other wheat exporters monopoly prices to subsidise its own wheat export business'.[425]

GrainCorp submits that:

> […] access and services will be offered and provided to GrainCorp Trading on the same terms as offered to other bulk wheat exporters.
>
> GrainCorp Trading will be required to enter into a WPTS Agreement and comply with the following obligations;
>
> - pay to GrainCorp Operations Limited the standard fees payable under each agreement; and
> - be subject to the Undertaking and the Protocols; and
> - comply with all other terms and conditions contained within that Agreement.[426]

GrainCorp submits that it has no incentive to discriminate between users of port terminal services or engage in monopoly pricing. GrainCorp states:

---

421 GrainCorp Operations Limited, *Port Terminal Services Access Undertaking*, 15 April 2009, clause 8.4(d).

422 GrainCorp Operations Limited, *Port Terminal Services Access Undertaking*, 15 April 2009, clause 8.4(d).

423 GrainCorp Operations Limited, *Supplementary submission to the ACCC*, 24 June 2009, para 13.7, p. 59.

424 GrainCorp Operations Limited, *Supplementary submission to the ACCC*, 24 June 2009, para 13.7, p. 59

425 GrainCorp Operations Limited, *Submission to the ACCC*, 15 April 2009, para 9.4, p. 53.

426 GrainCorp Operations Limited, *Supplementary submission to the ACCC*, 24 June 2009, para 17.2, p. 82.

> […] revenue from bulk handling services depends on throughput. Accordingly, GrainCorp has a clear incentive to maximise throughput through its export grain terminals in order to defray costs and recover its costs in providing Port Terminal Services. This is particularly the case given that, except in short periods of peak demand, the grain port terminals operated by GrainCorp generally have substantial excess capacity.[427]

GrainCorp further submits that:

> The set of standard Port Terminal Services for which GrainCorp will publish price and non-price terms are the same as the set of standard Port Terminal Services that GrainCorp would supply to all access applicants and users, including their own bulk wheat export business should they choose to export bulk wheat using the standard Port Terminal Services regulated by the proposed Undertaking.
>
> To the extent that additional costs have to be incurred, the Access Undertaking provides that these cost variations are to be reflected in the published prices available to applicants and users. This approach is consistent with the pricing principles set out in section 44ZZCA of the TPA.
>
> The Access Undertaking also recognises that it can be appropriate for Port Terminal Services to be provided to different users on differentiated terms, reflecting the particular requirements of each user. Again, this approach is consistent with the pricing principles set out in section 44ZZCA of the TPA and promotes efficiency in the use of Port Terminal Services.[428]

In relation to clause 5.4(b) of its proposed Undertaking and the intended meaning of 'substantially damaging a competitor' and 'conferring any unfair competitive advantage', GrainCorp submits that these are common terms in competition regulation. In addition, GrainCorp submits that clause 5.4(b) 'was meant to reinforce the restrictions on differentiation rather than derogating from it'.[429] However, GrainCorp submits that it is willing to remove this clause.

GrainCorp submits that the range of differentiation factors under clause 5.5 are appropriate and the 'limits of GrainCorp's ability to discriminate are robust'.[430] GrainCorp submits that there are legitimate reasons for providing access to port terminal services on different terms on the basis of the factors addressed below.

> **5.5(a) legitimate business interests and investment**
>
> This clause is intended to enable GrainCorp to apply a higher fee to Users for services which are more costly for GrainCorp to provide. This is consistent with the pricing principles in section 44ZZCA(b)(ii) *"that access price structures should 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.**"* GrainCorp does not agree with Riverina's proposal to delete this clause.
>
> **5.5(d) interests of all persons who have a right to use the port terminal**
>
> GrainCorp should be required to provide access on differentiated terms to customers to take into account the interests of other persons who have rights to use the Port Terminal, including exporters of other grains, containerised wheat and other non-grain commodities GrainCorp

---

427 GrainCorp Operations Limited, *Submission to the ACCC*, 15 April 2009, para 2.4, p. 5.
428 GrainCorp Operations Limited, *Submission to the ACCC*, 15 April 2009, para 2.4, p. 55.
429 GrainCorp Operations Limited, *Supplementary submission to the ACCC*, 24 June 2009, para 13.2, p. 53.
430 GrainCorp Operations Limited, *Supplementary submission to the ACCC*, 24 June 2009, para 13.7, p. 59.

disagrees with AGEA's submission that *"there is no obligation for all rights to be afforded equal weight*." In fact, this paragraph was included to ensure other grains got equal priority.

**5.5(f) economically efficient operation of the services and facilities**

GrainCorp should be able to determine varying terms of access for each user depending upon whether the manner in which that party uses the Port terminal services either increases or decreases the efficiency of the operation of Port Terminal Facilities. This is consistent with the pricing principles in section 44ZZCA(b)(i) of the TPA *that the access price structures should allow multi-part pricing and price discrimination when it aids efficiency.*

**5.5(h) opportunity cost of providing access**

This is consistent with the *Grain Handling Act 1995 (Vic)* and reflects the language in section 17(4) of that Act, *that the terms and conditions of access may vary according to the actual and opportunity costs to the provider having regard to…"* For example, it would be reasonable for a user requesting a non-standard service which will result in a slower load rate to be charged a premium for decreasing the overall throughput at the terminal. GrainCorp does not agree with Riverina's proposal to delete this clause.

**5.5(i) provision of quality related services**

Differentiating between users level of quality related services will provide an incentive to improve the quality of the Bulk Wheat delivered to the port terminal, thereby reducing costs and improving productivity. GrainCorp has provided significant information on the requirement to differentiate between Users on the basis of quality related services in the context of grain received ex-farm to avoid terminal blockages and the risk of contamination. These measures seek to protect the exporters of grain.

**5.5(k) available Port Terminal capacity and 5.5(p) differences in modes of receival, storage or outturn**

GrainCorp should be able to differentiate between Users on the basis of their use of port terminal storage and on the rate at which they can move wheat through the terminal facilities based on the objective of achieving maximum utilisation of each part of the Port Terminal. Delays and blockages are more often than not attributable to GrainCorp's export customers, their changing requirements and the quality of grain brought to the port terminals – all factors within the user's control. GrainCorp disagrees with AGEA's submission that *"in most cases, BHC's control all of these elements and BHC's should not be entitled to discriminate on the occurrence of elements that it controls"*. This is not the case.

**5.5(r) minimisation of demurrage**

This clause does not, as AGEA suggests at paragraph 10.4 of its submission, mean that GrainCorp will call vessels to berth out of order according to which vessel has the highest demurrage rate. The clause is intended to enable GrainCorp to differentiate between users on the basis of minimising the detriment suffered by all Users overall, should the services requested by one user be likely to significantly increase the level of demurrage faced by all users. This is based on the age old concept of mitigation of loss.

**5.5(u) credit risk**

GrainCorp should be able to adjust the terms and conditions on which it offers access to a particular user or applicant, and to base its behaviour depending on the creditworthiness or credit history of that applicant or user. To differentiate between Users or Applicants on the basis of

> their creditworthiness is standard commercial practice, even for our export customers in their assessment of clients and risks.[431]

In response to claims made by interested parties that it discriminates in the provision of port terminal services depending on whether wheat enters the port via its up-country facilities or through services provided by third parties, GrainCorp submits that it 'charges differential fees for grain received from non-approved storages as the quality and logistical risks associated with handling and shipping this grain are much higher to both GrainCorp and the customers using port terminal services'.[432]

## 10.3 Submissions received from interested parties in response to ACCC Issues Paper, dated 29 April 2009

### 10.3.1 Australian Grain Exporters Association (AGEA)

AGEA states that the provisions within GrainCorp's non-discriminatory access clause at clause 5.4 have the effect of providing a justification for discrimination (rather than ensuring against discrimination).[433]

AGEA notes the link between GrainCorp's non-discriminatory access clause and the 'objectives' clause of the proposed Undertaking. In this regard, AGEA submits that:

> GrainCorp clause 5.4 gives BHCs complete discretion to decide whether discrimination is consistent with the objectives of the undertaking and therefore justified. The objectives of the undertaking include reaching an appropriate balance between factors including BHCs' own *"legitimate business interests", "recovery of all [of their] reasonable costs"* and their "*ability to meet [their] own or [their] Trading Divisions' reasonably anticipated requirements for Port Terminal Services*". BHCs' conflict of interest would inevitably result in BHCs deciding to discriminate in its price and non-price terms in favour of its own interests or its Trading Divisions.[434]

AGEA submits that clause 5.4(b) of GrainCorp's proposed Undertaking has the effect of removing protection from port users in that 'it would be impossible to prove a subjective requirement that the discrimination was "*for the purpose of substantially damaging a competitor or conferring upon the Port Operator or its Trading Division any unfair competitive advantage*"'.[435]

In relation to the way in which GrainCorp has linked the non-discriminatory access clause at 5.4 to clause 5.5, AGEA submits that clause 5.5 provides a 'non-exhaustive list of factors justifying discrimination on the price and non-price terms on which

---

431 GrainCorp Operations Limited, *Supplementary submission to the ACCC*, 24 June 2009, para 13.7, pp. 60-61.

432 GrainCorp Operations Limited, *Supplementary submission to the ACCC*, 24 June 2009, para 18.2, p. 95.

433 Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 10.1, p. 25.

434 Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 10.2, p. 25.

435 Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 10.3, p. 25.

access to port terminal services will be provided. The factors set out in clause 5.5 […] lack certainty and allow BHCs to favour their own interests'.[436]

The following paragraphs are AGEA's views on the list of considerations found at clause 5.5 of GrainCorp's proposed Undertaking:

(a) GrainCorp at clause 5.5(a) refer to BHCs' "*legitimate business interests and investment*" and provides a self-serving justification to adjust price and non-price terms in favour of its own interests;

(b) GrainCorp at clause 5.5(d) refer to "*the interests of all person which have rights to use the Port Terminal*", but there is no obligation for all rights to be afforded equal weight;

(c) GrainCorp at clause 5.5(f) refer to "*the economically efficient operation of the Port Terminal Services, the Port Terminal Facilities and the Port Terminal*", but it is unclear what this means: it may be impossible to show that an act of discrimination made a difference to the "*economically efficient operation of the Port Terminal Services"*;

(d) GrainCorp at clause 5.5(k) refer to "*available Port Terminal capacity, including receival, handling, storage and cargo accumulation capacity*": in most cases, BHCs control all of these elements and BHCs should not be entitled to discriminate on the occurrence of elements that it controls;

(e) GrainCorp at clause 5.5(p) refer to "*differences in modes of receival, storage or outturn including different transport modes to receive Bulk Wheat and different ship configuration*", which suggests that discrimination may occur in the event that non-BHC services are used;

(f) GrainCorp at clause 5.5(r) refer to "*minimisation of demurrage at the port over a given period*": this clause suggests that discrimination and the calling of vessels to berth out of order might be permitted according to which vessel has the highest demurrage rate. It is unclear how this clause would operate because demurrage rates ordinarily are confidential between the parties to the vessel charterparty and BHCs should not be privy to vessel demurrage rates. In any event, a AWE's ability to negotiate a low demurrage should not result in that AWE being penalised by having another vessel being given priority at berthing, because it has a higher demurrage rate.[437]

AGEA submits that GrainCorp's proposed Undertaking must contain a complaints and audit procedure which:

(a) allows complaints in relation to actual or suspected breaches of the undertaking to be made to an independent person who must investigate the complaint and report to the ACCC on the outcome of the investigation;

(b) requires BHCs to engage an independent auditor to undertake an audit of BHCs compliance with the undertaking at such times as the ACCC may reasonably direct, but at least once in any 12 month period;

(c) allows the ACCC to investigate any matters arising out of or relating to complaints or the audit.[438]

---

436 Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 10.4, pp. 25-26.

437 Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 10.4, pp. 26.

438 Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 10.5, p. 26.

AGEA submits that GrainCorp discriminates in the provision of port terminal services depending on whether the wheat is received from GrainCorp's up-country facilities or via services provided by third parties.[439] AGEA states that GrainCorp charges wheat exporters a fee of $1.50 per tonne for any wheat that is received into port from non-GrainCorp up-country services and that these fees are not based on additional costs incurred by GrainCorp, but 'merely act as a penalty (or disincentive) in the event that…[access seekers]…do not use certain BHCs' services'.[440]

Regarding GrainCorp's non-discrimination clause at 8.3 of its proposed Undertaking – which relates to discrimination in the making of Operational Decisions – AGEA states:

> The BHCs' discretion to make Operational Decisions is too wide and subjective. AWEs need the certainty of knowing shipping slots will be available. The Port Protocols should clearly define the obligations to accept vessel nominations. If AWEs fail to get wheat to port by the load date, AWEs forfeit the booking fee and BHCs' interests are protected.
>
> GrainCorp clause 8.4(d)(i) entitles BHCs to make Operational Decisions to give priority to vessels based on the "*lead time given between nomination and vessel ETA and likely availability of sufficient Bulk Wheat at the Port Terminal prior to vessel ETA*". BHCs control the movement and accumulation of wheat at port.
>
> GrainCorp clause 8.4(d)(ii) provides opportunities for BHCs to restrict access to port terminal services and is vague and uncertain.
>
> > (a) In relation to GrainCorp clause 8.4(d)(ii)(A), in the normal course of events, BHCs are not aware of the AWE's vessel demurrage rate. In any event, a AWE's ability to negotiate a low demurrage should not result in that AWE being penalised by having another vessel being given priority at berthing, because it has a higher demurrage rate.
> >
> > (b) In relation to GrainCorp clause 8.4(d)(ii)(B), as BHCs controls the movement and accumulation of wheat at port, it is within its means to show that the throughput of bulk wheat is maximised by loading its vessels in priority to other AWEs.
>
> GrainCorp clause 8.4(d)(iii) provides BHCs with very broad entitlements to vary a cargo assembly plan or queuing order of a vessel. BHCs control the movement and accumulation of wheat at port facility (GrainCorp clause 8.4(d)(iii)(A)). BHCs should not be entitled to vary a cargo assembly plan or queuing order as a result of vessel congestion (GrainCorp clause 8.4(d)(iii)(A)).[441]

### 10.3.2 Agforce

Agforce submits that the provision in GrainCorp's proposed Undertaking which allows it to take into account 'recovery of all reasonable costs associated with the granting of access to the Port Terminal' contains little constraint on GrainCorp setting the 'compensation for the risk it carries at a higher level for its competitors than its

---

439 Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 3.13, p. 5.

440 Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 3.24, p. 8.

441 Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 15.1-15.2, 15.4-15.6, pp. 33-34.

own related entities, thus allowing it to have a competitive advantage across the supply chain'.[442] Agforce continues:

> That is, if GrainCorp can operate the port at a cost which is at all lower than the cost imposed on its competitors, the cost of GrainCorp moving grain to port and onto ships is lower, thus allowing GrainCorp to offer higher prices to growers than its competitors and thus gaining more and more market share over time. Again this activity hasn't been evidenced in the past, but there is a possibility of it occurring.[443]

In relation to the 'objectives' clause of the proposed Undertaking (which is tied to the non-discriminatory access clause) Agforce submits that there would be no need for such a clause if the proposed Undertaking was 'truly fair and competitive'.[444]

In relation to GrainCorp's price and non-price terms (which are also tied to the non-discriminatory access clause), Agforce submits the following:

> As the owner of a monopoly asset it is completely acceptable for reference prices and standard terms to be published. These prices are obviously unlikely to be offered to any customer given the long list of 'Price and non price terms' listed in section 5.5 of the Undertaking and GrainCorp's own arm are obviously going to meet these terms very well.[445]

In relation to GrainCorp's non-discriminatory access clause at 5.4, Agforce submits:

> The clauses are clear in stating that GrainCorp must not discriminate, but clause 5.5 allows them to avoid (through commercial incentives/penalties) clause 5.4 in almost all cases.[446]

Agforce submits that the factors GrainCorp may take into account in deciding to offer different terms to different access seekers 'allow GrainCorp to be flexible in almost all aspects of determining price and terms'. Agforce states that '[I]t appears that each Applicant will have to negotiate on all aspects of their access agreements to gain maximum advantage'.[447]

### 10.3.3 Riverina

Riverina submits that clause 5.4(b) should be deleted from GrainCorp's proposed Undertaking. Similarly, Riverina submits that clauses 5.5(a), 5.5(h), 5.5(i), 5.5(p) and 5.5(u) should all be deleted.[448]

In relation to GrainCorp's considerations in making 'Operational Decisions' set out in clause 8.4, Riverina submits that clauses 8.4(d)(iii)(A) and 8.4(d)(iii)(K) should be deleted.[449]

---

442 AgForce Grains Ltd, *Submission in relation to proposed GrainCorp access undertaking*, 29 May 2009, para 4.1, p. 2.

443 AgForce Grains Ltd, *Submission in relation to proposed GrainCorp access undertaking*, 29 May 2009, para 4.1, p. 2.

444 AgForce Grains Ltd, *Submission in relation to proposed GrainCorp access undertaking*, 29 May 2009, para 4.2, p. 3.

445 AgForce Grains Ltd, Submission in relation to proposed GrainCorp access undertaking, 29 May 2009, para 4.6, p. 5.

446 AgForce Grains Ltd, Submission in relation to proposed GrainCorp access undertaking, 29 May 2009, para 4.6, p. 8.

447 AgForce Grains Ltd, Submission in relation to proposed GrainCorp access undertaking, 29 May 2009, para 4.9, p. 6.

448 Riverina (Australia) Pty Ltd, *Submission in relation to proposed GrainCorp and CBH access undertakings*, 29 May 2009, para 11(k)-(p), p. 14.

### 10.3.4 Victorian Farmers Federation (VFF)

The VFF states that, in receiving grain, there is 'much anecdotal evidence' that GrainCorp favours grain which is received from its up-country storage facilities. On this issue, the VFF states:

> The VFF acknowledge there are some practical reasons for these restrictions in terms of grain hygiene. However, the VFF is concerned it is also a way of forcing growers to deliver to particular up-country storage facilities and of forcing non-port operating marketers to use specific up-country facilities.[450]

### 10.3.5 Grain Industry Association of Victoria (GIAV)

The GIAV submits that wheat exporters are currently discriminated against when delivering grain to GrainCorp's ports from 'private/third party upcountry facilities'.[451]

On this issue, GIAV submits:

> While recognising that section 24 of the Wheat Export Marketing Act is only directed at port terminal services, this should not be deflect the underlying commercial reality that both upstream and port terminal services are provided by the same entity or related entities.
>
> The BHCs' have demonstrated in their agreements, pricing and discussion that they intend to leverage their position at the ports to protect their upcountry system. This is evidenced by the fact that both ABB and GNC tariffs for handling grain from their own up-country network is different to that coming from 3rd party storages. ABB and GNC charge a higher fee for handling grain from third parties, shippers must obtain ABB approval in advance, and they must adhere to a separate and additional set of terms and conditions.
>
> GNC goes further in that they not only charge a higher fee to cover the risk of an adverse outcome from handling grain from 3rd parties, but should that risk be realized they then charge again to correct the risk.[452]

### 10.3.6 NSW Farmers Association

The NSW Farmers Association submits that GrainCorp charges more at its ports if 'the grain has not come from a related upcountry storage facility'.[453] On this issue the NSW Farmers Association states:

> There appears to be a growing potential for dominant vertically integrated business models to create a lack of incentive for investment in alternative bulk storage and logistic paths to port for both themselves or others who are forced to use 'their loading facilities and therefore 'voluntar[il]y' meet ' their access conditions.[454]

---

449 Riverina (Australia) Pty Ltd, *Submission in relation to proposed GrainCorp and CBH access undertakings*, 29 May 2009, para 11(aa),(bb), p. 15.

450 Victorian Farmers Federation, *Submission in relation to proposed access undertakings*, 28 May 2009, p. 3.

451 Grain Industry Association of Victoria, *Submission in relation to proposed access undertakings*, 1 June 2009, p. 2.

452 Grain Industry Association of Victoria, *Submission in relation to proposed access undertakings*, 1 June 2009, pp. 1-2.

453 NSW Farmers Association, *Submission in relation to proposed access undertakings*, June 2009, p. 5.

454 NSW Farmers Association, *Submission in relation to proposed access undertakings*, June 2009, p. 5.

### 10.3.7 GrainCorp submissions in response to ACCC Draft Decision

In response to the views set out in the ACCC's Draft Decision regarding non-discrimination, GrainCorp submits:

> **Non discriminatory access**
>
> In its Draft Determination, the ACCC proposed the following non-discrimination clause:
>
> *In providing access to Port Terminal Services, GrainCorp must not discriminate between different Applicants or Users (including its own Trading Division) in favour of its own trading Division, except to the extent that the cost of providing access to other Applicants or Users is higher.*
>
> GrainCorp understands the proposed non-discrimination clause is intended to apply only to preferential treatment of GrainCorp's Trading Division. Further, GrainCorp understands that the reference to cost in the clause is intended to include efficiency considerations.
>
> GrainCorp has grave concerns about the narrowness of this provision and whether it enables GrainCorp to price differentially its services at the port to take into account efficiency, quality, safety, hygiene and other risk factors which are not always easily quantifiable. In this regard, GrainCorp strongly supports the position of CBH, expressed in its letter to the ACCC dated 24 August 2009, available on the ACCC's public register.
>
> While GrainCorp intends to amend the Undertaking to reflect the ACCC's proposed non-discrimination provision, subject to the removal of the bracketed words (including its own Trading Division), GrainCorp would appreciate the ACCC's further explanation of its proposed clause in its Final Determination on how this wording addresses the issues discussed above and raised in the CBH letter.[455]

In relation to an audit provision being included in any revised Undertaking, GrainCorp submits:

> **Annual Audit of Capacity Management Processes**
>
> In its Draft Determination, the ACCC supported the submission by the Australian Grain Exporters Association (AGEA) for the inclusion of a requirement for an annual audit of GrainCorp's compliance with the non-discrimination obligations under the Undertaking. Such an audit is not warranted for the following reasons –
>
> - Submissions from interested parties have not demonstrated a need for the inclusion of an audit obligation. The cost of such an audit will be considerable, possibly up to $100,000, and would place an additional and unwarranted regulatory burden unfairly upon GrainCorp, a burden not carried by other exporters.
> - There are inherent difficulties in auditing GrainCorp's compliance with an obligation not to engage in discriminatory behaviour. Such an audit would be seeking to prove a negative and it is not clear that the audit would provide any meaningful insight into GrainCorp's conduct.
> - The new cargo nomination processes provide a high level of transparency, such that there is little additional information which an audit of GrainCorp's internal processes will reveal.

[455] GrainCorp Operations Limited, *Submission in relation to Draft Decision on GrainCorp Access Undertaking*, 3 September 2009, p. 18-19.

- GrainCorp is subject to audit by Wheat Exports Australia of matters relating conditions of its accreditation, including compliance with the Access Test. The consequences of a finding that GrainCorp did not satisfy the Access Test would expose GrainCorp to serious sanctions under the WEMA, including loss of its bulk wheat export accreditation.

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

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

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

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

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

If, despite the above, the ACCC still requires an external audit, GrainCorp is willing to accept that the ACCC can reserve the right to direct the conduct of an audit should it not be satisfied with the conduct or scope of an internal audit or one directed by Wheat Exports Australia.[456]

### 10.3.8 Submissions from interested parties in response to ACCC Draft Decision

#### 10.3.8.1 Australian Grain Exporters Association (AGEA)

In response to the views set out in the ACCC's Draft Decision regarding non-discrimination, AGEA submits:

> It is imperative that the BHCs proposed Undertakings include robust and enforceable non-discrimination and no hindering access clauses. BHCs' compliance with these clauses should be subject to an annual audit by an independent third party.
>
> The non-discrimination and no hindering access clauses proposed by the BHCs are not appropriate given the lack of clarity about their interpretation. The BHCs' non-discrimination clauses do not ensure the BHCs will be prohibited from discriminating in favour of their own marketing arm.
>
> Specifically, the BHCs must not be able to discriminate between AWEs on any basis, including where grain was stored (i.e. whether it was stored in the BHCs' up-country storage and handling network, a third party storage network or on-farm) or how it was transported to the BHCs' facilities.

[456] GrainCorp Operations Limited, *Submission in relation to Draft Decision on GrainCorp Access Undertaking*, 3 September 2009, 3 September 2009, p. 21-22.

The non-discrimination no hindering access clauses must be wide enough to encompass all forms discrimination and hindrance, such as but not limited to, the prices charged and delays in obtaining access to the port terminal facilities.[457]

AGEA further submits:

**Appropriate to include a non-discrimination clause in the proposed Undertaking**

AGEA agrees that it is appropriate for the BHCs proposed Undertakings to include a non-discriminatory access clause obliging it to not discriminate against access seekers in favour of its affiliated trading business.

The anti-discrimination clause must be robust in order to avoid regional monopolies unfairly controlling infrastructure necessary to export wheat in bulk quantities, to the detriment of other accredited exporters.

AGEA agrees with the ACCC's proposed non-discrimination clause, which is straightforward and clear. As the ACCC suggests, price discrimination should only be permitted where it aids efficiency and therefore should be limited to circumstances where the cost of providing access to other access seekers is higher. If price discrimination is permitted in circumstances where the cost or providing access is higher, there must also be transparency in relation to such costs so that access seekers know the differential in price is justified.

[…]

The ACCC has stated that price discrimination in favour of BHCs' trading operations should not occur except to the extent that the cost of provision of services to other users is higher than provision of the service to itself.

However, unless there is transparency in relation to BHCs' operational decisions and costs and charges and binding terms and conditions of access, including binding indicative pricings for their standard and non-standard services which are published in advance of the commencement of the Undertakings, it will not be possible to determine whether discrimination has taken place. To ensure fair and transparent access to port terminal services, BHCs' compliance with the non-discrimination clause, ring-fencing policies and the proposed Undertaking generally must be the subject of an annual audit by an independent third party.

***Non-discrimination in making Operational Decisions***

Although there should be a general umbrella obligation of non-discrimination in the negotiation and provision of port terminal services, AGEA accepts the ACCC's position that it is appropriate for BHCs to include a non-discrimination clause in relation to its operational decisions. However, AGEA agrees with the ACCC's reasons for rejecting proposed CBH clause 9.2(b)(ii) and 9.2(d) (GrainCorp/ABB clause 8.3 and 8.4) which makes the ability to discriminate in relation to operational decisions 'subject to' other clauses, the combined effect of which would not achieve the objective of prohibiting BHCs from discriminating in favour of its own business.

***A more appropriate non-discrimination clause***

AGEA agrees with the ACCC's proposed non-discrimination clause, save that the requirement to not discriminate must also extend to the negotiation process of the provision of port terminal services and the dispute resolution process.[458]

---

[457] Australian Grain Exporters Association, *Submission in relation to Draft Decisions on Port Terminal Services Access Undertakings*, 3 September 2009, p. 6.

#### 10.3.8.2 Victorian Farmers Federation (VFF)

In response to the views set out in the ACCC's Draft Decision regarding non-discrimination, the VFF submits:

> Regarding GrainCorp Limited's undertaking the VFF agree with ACCC that it is not appropriate that the services it offers to access-seekers differ depending on whether the grain has been stored on-farm or otherwise. In the current form of its undertaking GrainCorp appears to be discriminating against grain that is delivered ex-farm without clear quantification and evidentiary justification.[459]

## 10.4 ACCC's view

**Appropriate to include a non-discrimination clause in the proposed Undertaking**

The ACCC is of the view that it is appropriate that GrainCorp's proposed Undertaking includes a non-discriminatory access clause obligating it to not discriminate against access seekers in favour of its affiliated trading business.

A robust non-discriminatory access clause is an important regulatory tool that can be used to constrain the behaviour of a vertically integrated owner of a key infrastructure facility. This is because many of the benefits of access to infrastructure can be lost if measures are not put into place to control potential anti-competitive leverage into related markets.

While a number of interested parties providing submissions on this process have raised allegations of current or past discriminatory conduct by GrainCorp in favour of its trading arm, it is important to note that the ACCC, in its assessment of GrainCorp's proposed Undertaking, has not formed any views on the legitimacy or otherwise of these claims. To the extent that claims have raised allegations relating to under restrictions on anti-competitive conduct in Part IV of the TPA, these matters are being assessed by the ACCC's Enforcement and Compliance Division.

In the current process assessing the appropriateness of the proposed Undertaking pursuant to s44ZZA(3) of the TPA, the need for a robust non-discriminatory access clause is highlighted by examining the intent of the WEMA. Clause 24 of the WEMA states:

> This clause is intended to ensure that accredited exporters that own, operate or control port terminal facilities provide fair and transparent access to their facilities to other accredited exporters. The test aims to avoid regional monopolies unfairly controlling infrastructure necessary to export wheat in bulk quantities, to the detriment of other accredited exporters. All accredited exporters should have access to these facilities while allowing the operators of the facility to function in a commercial environment.[460]

As set out in the Legislative Framework chapter of this Further Draft Decision, the ACCC is of the view that, in the current context, 'fair' access ought largely to be

---

458 Australian Grain Exporters Association, *Submission in relation to Draft Decisions on Port Terminal Services Access Undertakings*, 3 September 2009, p. 22-23.

459 Victorian Farmers Federation, *Submission in relation to Draft Decisions on Port Terminal Services Access Undertakings*, 3 September 2009, p. 1.

460 Explanatory Memorandum, *Wheat Export Marketing Act 2008* (Cth), p. 31.

equated with non-discriminatory access, reflecting the desirability of ensuring that access to port terminal services is, on the whole, provided on a non-discriminatory basis except where there is a legitimate reason for differential treatment.

In this regard, the ACCC recognises that a service provider may engage in price discrimination where it aids efficiency.[461] In fact, price discrimination may be an essential tool to enable a network owner to recover the legitimate costs of its investment. It is likely to promote the following objectives:

- ensuring efficient use of the network;
- reducing the average price on the network; and
- minimising the risk-adjusted cost of capital.

This is recognised in the pricing principles specified in s44ZZCA of the TPA, which provides as follows:

> The pricing principles relating to the price of access to a service are:
>
> (a) that regulated access prices should
>
> (i) be set so as to generate expected revenue for a regulated service or services that is at least sufficient to meet the efficient costs of providing access to the regulated service or services; and
>
> (ii) include a return on investment commensurate with the regulatory and commercial risks involved; and
>
> (b) that the access price structures should:
>
> (i) allow multi-part pricing and price discrimination when it aids efficiency; and
>
> (ii) 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
>
> (c) that access pricing regimes should provide incentives to reduce costs or otherwise improve productivity.[462]

However, as set out in the Legislative Framework chapter of this Further Draft Decision, the ACCC is of the view that, while there is a place for price discrimination, this should only occur in specified circumstances, that is, where the cost of providing access to other operators is higher. Therefore, price discrimination in favour of GrainCorp's trading operations should not occur except to the extent that the cost of provision of services to other users is higher than provision of the service to itself.

---

461 *Trade Practices Act 1974* (Cth) s 44ZZCA(b)(i).
462 *Trade Practices Act 1974* (Cth) s 44ZZCA.

**The particular non-discrimination clauses proposed by GrainCorp are not appropriate**

***Clauses 5.4 (and 5.5)***

As the ACCC explains in the Indicative Access Agreement chapter, the ACCC considers that it is not appropriate that GrainCorp's proposed Undertaking does not include in its proposed Undertaking the minimum standard terms and conditions upon which it undertakes to offer access to its port terminal services.

As set out in the Indicative Access Agreement chapter, the ACCC considers that it would be appropriate for these standard terms and conditions to form a part of GrainCorp's proposed Undertaking.

With minimum standard terms in the Undertaking, the scope for discrimination in offering port terminal services via access agreement negotiations will be significantly reduced.

Nevertheless, the ACCC considers that it is still appropriate that GrainCorp has included a non-discrimination clause that applies in relation to 'non-standard' terms and conditions of access, to ensure that such terms and conditions comply with the principles of non-discriminatory access.

However, the ACCC considers that the particular non-discrimination clause put forward by GrainCorp at clause 5.4 is not appropriate having regard to the matters in s44ZZCA(3). A simpler non-discrimination clause (as set out later in this chapter) is likely to be more appropriate.

Clause 5.4 is to be read subject to clause 5.5, which provides a wide range of caveats on the non-discrimination obligation. Read together, the ACCC is of the view that this non-discrimination clause will not achieve the objective of prohibiting GrainCorp from discriminating in favour of its own business.

In particular, the ACCC is of the view that the following provisions at clause 5.5 are not appropriate and do not constitute legitimate grounds for discrimination:

> *(b) all costs that GrainCorp incurs or may incur in providing access, including any costs of extending the Port Terminal Services, but not costs associated with losses arising from increased competition in upstream or downstream markets;*

The ACCC considers that the reference to 'all costs' is not appropriate given that the pricing principles at s44ZZCA make reference to 'efficient costs' rather than 'all costs'.

> *(c) the economic value to the GrainCorp of any additional investment that the Applicant or GrainCorp has agreed to undertake;*

The ACCC is of the view that this clause lacks clarity and is therefore not appropriate. For instance, it is not clear what type of investment this clause relates to. In addition, it is not clear what type of investment an 'Applicant' would agree to undertake.

*(h) the opportunity cost of accommodating the requirements of one Applicant or User compared to the requirements of one or more other Applicants or Users;*

The ACCC does not agree that opportunity cost (what is foregone by employing resources in their current use rather than the most valuable alternative use) is a relevant commercial justification for GrainCorp to discriminate.

It is possible that 'opportunity cost' considerations by GrainCorp might allow it to charge for the opportunity cost of wheat received via an alternative up-country storage and handling facility. This would clearly constitute an unreasonable justification for discrimination and is contrary to the objective of the WEMA of promoting competition in the wheat export industry.

The ACCC notes GrainCorp's submission regarding the intended interpretation of the clause, but does not consider that this interpretation is clear from the clause's drafting.

*(j) the relative risk related to storing and handling different Bulk Wheat segregations for Applicants and Users;*

The ACCC believes that it would be standard commercial practice to include the cost of risk in the standard terms and conditions of access.

Non-discrimination clauses should be designed to proscribe anti-competitive conduct which favours an affiliated entity of the service provider. This type of clause is not appropriate to be included in a non-discrimination clause.

*(n) differences in periods of time during which access to Port Terminal Services is required by Applicants or Users;*

The ACCC considers that this clause is not appropriate because it is likely that GrainCorp would have significant discretion over the 'periods of time' during which access seekers can access port terminal services. As a result, it is difficult to see how this clause could form legitimate grounds for discrimination. The ACCC is of the view that this clause does not appropriately balance the legitimate business interests of the provider with the interests of persons who might want access to the service.

*(p) differences in modes of receival, storage or outturn including different transport modes to receive Bulk Wheat and different ship configurations;*

The ACCC is of the view that this clause is not appropriate. This clause, as currently drafted, lacks clarity and provides GrainCorp with scope to discriminate based on subjective determinations on why different modes of receival, storage and outturn would necessitate discrimination.

*(q) geographic and seasonal variations;*

The ACCC considers that this clause is not appropriate as it lacks clarity. For instance, it is unclear what criteria GrainCorp would use in applying this clause.

*(r) minimisation of demurrage at the port over a given period*

The ACCC is of this view that this clause is also not appropriate as it lacks clarity. For instance, it is unclear who this clause refers to, and why, as AGEA notes in its submission, a wheat exporter who negotiates a lower demurrage rate should be penalised for this. The ACCC notes GrainCorp's submission regarding the intended interpretation of the clause, but does not consider that this interpretation is clear from the clause's drafting.

*(s) maximisation of throughput of Bulk Wheat and other commodities at the port over a given period;*

The ACCC considers that this clause is not appropriate as it lacks sufficient clarity and provides GrainCorp's with a level of discretion that is not appropriate. For instance, it is unclear how GrainCorp would determine that discriminating against access seekers would in effect maximise throughput. Further, there is a lack of clarity around what the term 'over a given period' refers to.

*(u) the credit risk of an Applicant or User;*

The ACCC is of the view that clauses relating to 'the credit risk of an Applicant or User' are more appropriately included in section 6 of GrainCorp's proposed Undertaking – 'Negotiating for Access'. Credit risk matters are an ex ante consideration and generally would be dealt with in relation to negotiation for access. It is unclear why it would need to be used as a justification for discriminating against particular Applicants or Users.

In relation to the other matters within 5.5:

(a) GrainCorp's legitimate business interests and investment in the Port Terminal Services, Port Terminal Facilities and the Port Terminal;

(d) the interests of all persons who have rights to use the Port Terminal;

(e) the operational and technical requirements necessary for the safe and reliable operation of the Port Terminal Services, the Port Terminal Facilities and the Port Terminal;

(f) the economically efficient operation of the Port Terminal Services, the Port Terminal Facilities and the Port Terminal;

(g) any differences in the costs of providing access to Port Terminal Services to different Applicants or Users;

(i) the provision of quality related services reasonably required by GrainCorp in respect of some Applicants or Users, but not others including security of Bulk Wheat integrity, testing of Bulk Wheat or Bulk Wheat classification, fumigation and protection requirements for Bulk Wheat;

(k) available Port Terminal capacity, including receival, handling, storage and cargo accumulation capacity;

(l) differences in types and grades of Applicants' or Users' Bulk Wheat;

(m) differences in Applicants' or Users' Bulk Wheat volumes;

(o) differences in levels of Applicants' or Users' usage of Port Terminal Services; and

(t) unless GrainCorp is offering segregated services at a Port Terminal, the ability to mix the same grade of Bulk Wheat owned by different owners and / or mix different grades of Bulk Wheat owned by the same or different owners;

it is unclear why GrainCorp considers it necessary for these to be expressly mentioned as caveats to the non-discrimination clause. These factors appear to relate to normal commercial reasons for differentiating between services provided to different access seekers (although the precise meaning of some of the factors is unclear).

As noted above, a robust non-discrimination clause aims to prevent discrimination by the bulk handler against access seekers *in favour* of its affiliated businesses (except to the extent that the cost of provision of services by GrainCorp to other access seekers is higher than provision of the service to itself).

Treating access seekers differently purely because of legitimate commercial factors will *not* be caught by a properly drafted non-discrimination clause.

***Clauses 8.3 (and 8.4) – Non-discrimination in making Operational Decisions***

The ACCC is of the view that it is appropriate for GrainCorp to include a non-discrimination clause in relation to its operational decisions.

However, this obligation against non-discrimination is said to be "subject to" clauses 5.4 and 8.4.

Clause 5.4 (explained above) is the clause that provides a list of caveats upon the obligation not to discrimination.

Similar to clause 5.4, clause 8.4 provides a range of justifications for prioritising vessels and varying cargo assembly plans.

The ACCC is of the view that, read together with clauses 5.4 and 8.4, the non-discrimination clause in 8.3 would not achieve the objective of prohibiting GrainCorp from discriminating in favour of its own business.

This is because, as explained above, clause 5.4 sets out an inappropriately broad and unclear list of caveats to the non-discrimination clause. Further, clause 8.3 also sets out a number of other justifications for prioritising vessels.

As a general point (without commenting on the appropriateness of the factors in clause 8.3), the ACCC considers that it is not appropriate that clause 8.3 contains provisions relating to prioritising vessels and varying cargo assembly plans. Similar provisions are set out in GrainCorp's Port Loading Protocols. For the sake of clarity, all provisions regarding capacity management should be set out in the Port Loading

Protocols (which the ACCC, as noted in the Capacity Management chapter, considers should be attached to the proposed Undertaking).

Clauses 8.3 and 8.4 of GrainCorp's proposed Undertaking are discussed further in the Capacity Management chapter.

### A more appropriate non-discrimination clause

The ACCC notes that non-discrimination clauses applicable in other regulated industries tend to be significantly less complex than the non-discrimination clauses set out in GrainCorp's proposed Undertaking.

For instance, in relation to regulated gas pipelines, the National Gas Law states that a covered service provider providing light regulation services must not engage in price discrimination other than price discrimination 'that is conducive to efficient service provision'.[463]

The ACCC considers that non-discrimination obligations would be better addressed via a single clause. That is, the ACCC takes the view that it would be more appropriate that clauses 5.4 and 8.3 be combined to create a single non-discriminatory access clause.

In addition, the ACCC is of the view that a clearer and more concise non-discriminatory access clause is more likely to be appropriate. For example, for the reasons set out above, the ACCC is more likely to consider appropriate the following type of non-discrimination clause:

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

For the avoidance of doubt, the non-discrimination clause should protect against (amongst other matters) the ability of GrainCorp to anti-competitively discriminate between wheat exporters on the basis of where grain was stored (i.e. whether it was stored in GrainCorp's up-country storage and handling network, a third party storage network or on-farm).

The ACCC notes the submissions from AGEA that the non-discrimination clause should extend beyond the act of provision of access to the negotiation and dispute resolution process. In this regard, the ACCC is of the view that AGEA has adopted an unduly narrow interpretation of the meaning of the words 'in providing access to Port Terminal Services'. The non discrimination clause will extend to all matters relating to, and necessary for, the provision of access including setting the terms and conditions of access. In relation to dispute resolution, the April undertaking provided that an arbitrator must take into account the non-discrimination clause. Therefore, the operation of the clause will extend to the negotiation and dispute resolution processes, where relevant.

---

[463] *National Gas (South Australia) Act 2008* (SA), Schedule 1, National Gas Law, clause 136.

The ACCC notes GrainCorp's submission in which it states that it 'has grave concerns about the narrowness of …[the ACCC's proposed non-discrimination clause]… and whether it enables GrainCorp to price differentially its services at the port to take into account efficiency, quality, safety, hygiene and other risk factors which are not always easily quantifiable'.[464]

In response to this submission, the ACCC notes:

- The ACCC's proposed non-discrimination clause is based on the pricing principles set out in s44ZZCA of the TPA. These principles provide that access price structures should 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.[465]

- Given GrainCorp's vertically integrated structure, discrimination by GrainCorp in favour of its own trading business by way of different price and/or non-price terms and conditions of access, is only appropriate where these different terms and conditions reflect differences in the underlying costs of providing access to different access seekers.

- The ACCC's view is that 'the cost of providing access' in respect of this Undertaking would be viewed relatively broadly in the sense that 'costs' would be viewed as all genuine and verifiable costs of providing a particular service to different access seekers. 'Costs' in this context should not be limited to (although they would include) explicit cash costs. 'Costs' would likely include, amongst other things, all verifiable accounting costs, operating and capital, of providing the service in question.

- Further, the ACCC is mindful that investments in improved production processes that generate genuine productive efficiencies should be encouraged, not discouraged. As a general principle, where GrainCorp has generated improved efficiencies in a production process that give rise to verifiable lower costs (e.g. per-unit costs) in respect of a certain service provided by that process, GrainCorp should be permitted to pass through the cost differences generated by those efficiencies in the form of lower access charges to those access seekers using that service, provided that all access seekers reasonably have the non-discriminatory ability to use that service if they choose, whether or not they in fact choose to use it.

### 'No hindering access clause' on its current terms is not appropriate

In relation to the 'No hindering access' clause at 8.5, the ACCC considers that it is appropriate that such a clause be included in GrainCorp's proposed Undertaking. Such a clause is consistent with the objective of the WEMA of ensuring that vertically

---

[464] GrainCorp Operations Limited, *Submission in relation to Draft Decision on GrainCorp Access Undertaking*, 3 September 2009, p. 18.

[465] See *Trade Practices Act* s 44ZZCA(b)(ii), (emphasis added).

integrated bulk handling companies provide fair and transparent access to their facilities to other accredited exporters.

However, the ACCC is of the view that the drafting of clause 8.5 is not appropriate as the terms of the clause would likely prove difficult to interpret. In particular, the ACCC considers that the phrase 'in the exercise of a reasonable right of access' is ambiguous and the implications of the phrase for the operation of the clause are unclear.

The ACCC notes that clause 8.5 of GrainCorp's proposed Undertaking partially reflects s44ZZ of the TPA – 'Prohibition on hindering access to declared services' – which states:

> **Prohibition on hindering access to declared services**
>
> (1) The provider or a user of a service to which a third party has access under a determination, or a body corporate related to the provider or a user of the service, must not engage in conduct for the purpose of preventing or hindering the third party's access to the service under the determination.
>
> (2) A person may be taken to have engaged in conduct for the purpose referred to in subsection (1) even though, after all the evidence has been considered, the existence of that purpose is ascertainable only by inference from the conduct of the person or from other relevant circumstances. This subsection does not limit the manner in which the purpose of a person may be established for the purposes of subsection (1).
>
> (3) In this section, a user of a service includes a person who has a right to use the service.[466]

The ACCC notes that s44ZZ(2) explains the concept of 'for the purpose of preventing or hindering the third party's access'. In order to promote certainty and clarity for access seekers, the ACCC considers that clause 8.5 of GrainCorp's proposed Undertaking would be more appropriate if it reflected the terms of s44ZZ of the Act.

### Enforcement of non-discrimination commitments

The ACCC notes that, under s44ZZJ of the TPA, if the ACCC thinks that the provider of an access undertaking has breached any of its terms, the ACCC may apply to the Federal Court to enforce the access undertaking. The Court may make orders directing the provider to comply with the undertaking, directing the provider to compensate any other person who has suffered loss or damage as a result of the breach or any other order that the Court thinks appropriate. The enforcement of the terms of the access undertaking would include the non-discrimination clause.

In order to assist the ACCC to monitor compliance with the non-discrimination clause and assist in ensuring access to port terminal services is fair and transparent, the ACCC considers that it would be appropriate for GrainCorp's revised Undertaking to provide for an annual audit of compliance with the non-discrimination clause.

However, the ACCC is cognisant of GrainCorp's view that the introduction of an audit provision is not required. In relation to GrainCorp's submission that '[s]uch an audit would be seeking to prove a negative and it is not clear that the audit would

---

466 *Trade Practices Act 1974* (Cth), s44ZZ.

provide any meaningful insight into GrainCorp's conduct',[467] the ACCC notes that the notice of request of an audit will specify what material the ACCC requires the audit to cover.

The ACCC notes GrainCorp's submission that '[t]he new cargo nomination processes provide a high level of transparency, such that there is little additional information which an audit of GrainCorp's internal processes will reveal'.[468] The ACCC does not accept this submission, noting that the cargo nomination processes are not intended to expose all possible ways in which a port operator could engage in discriminatory, self-preferential treatment.

The ACCC considers that in order to avoid the undesirability of imposing regulation that is not appropriate at a time when the industry is newly liberalised and in transition, it would be appropriate that:

- rather than prescribing a mandatory audit, the audit would only need to be carried out at the direction of the ACCC (which may occur, for example, in response to allegations of discrimination); and
- the audit not be carried out more than twice in every twelve months (to keep down costs on GrainCorp of conducting the audit).

Further, the ACCC recognises that it may be the case that a WEA-directed audit report may satisfy GrainCorp's compliance with its obligations to provide the ACCC with an audit of compliance with its non-discrimination clause. In this regard, the ACCC notes that if the WEA's audit processes cover areas in which the ACCC also seeks an audit report, then it is likely that the WEA-directed audit report, if provided to the ACCC by GrainCorp, would provide sufficient information for the ACCC's purposes. The ACCC notes, however, that this would only be appropriate if the WEA-directed audit was conducted within 3 months of the request made by the ACCC.

The ACCC further notes, however, that it would require the discretion to determine whether the WEA-directed audit did indeed satisfy the ACCC's request for an audit of compliance with the non-discrimination clause.

---

[467] GrainCorp Operations Limited, *Submission in relation to Draft Decision on GrainCorp Access Undertaking*, 3 September 2009, p. 21.

[468] GrainCorp Operations Limited, *Submission in relation to Draft Decision on GrainCorp Access Undertaking*, 3 September 2009, 3 September 2009, p. 21.

# 11 Ring-fencing

**Summary**

Ring-fencing is one tool that can be used, in conjunction with robust non-discrimination and no hindering access clauses, fair and transparent port terminal protocols and an indicative access agreement to ensure against anti-competitive discrimination.

The ACCC's view is that the weak ring-fencing rules in GrainCorp's proposed Undertaking would not, in their current form, serve as an effective safeguard against anti-competitive discrimination in the provision of port terminal services.

However, were GrainCorp's proposed Undertaking amended to contain robust non-discrimination and no hindering access clauses, fair and transparent port terminal protocols and an indicative access agreement (as well as measures to deal with the potential for information about port terminal services to be used to the advantage of GrainCorp's wheat exporting arm), then, in the circumstances, it would not be necessary for ring-fencing measures to be included in GrainCorp's Undertaking at this particular point in time.

In forming this view, the ACCC has taken into account the transitional state of the industry and the possibility that any ring-fencing measures that were implemented at this point in time may need to be revised in the medium term in accordance with any regulatory changes (either to extend or reduce the regulation to which GrainCorp is subject). The ACCC considers that this would be an undesirable outcome in that it could impose unnecessary regulatory costs during a time of industry transition.

The ACCC has also taken into account the short duration of GrainCorp's proposed Undertaking (two years) and will closely monitor the effectiveness of the Undertaking in ensuring against anti-competitive discrimination during its operation.

That said, the ACCC is cognisant of calls by a number of interested parties for robust ring-fencing measures to be included in the Undertaking and notes that, once the regulatory framework to which GrainCorp is subject to is more certain, that any future undertaking submitted by GrainCorp may need to include robust ring-fencing rules (significantly more robust than the weak ring-fencing measures offered by GrainCorp to the ACCC in its proposed Undertaking).

It is important to note that the ACCC's approach taken to ring-fencing in assessing this particular access Undertaking is not indicative of the approach to ring-fencing that the ACCC would be likely to take in relation to other regulated industries. The approach taken on this occasion reflects the factors outlined above, and in particular, that the industry is still transitioning from having a single desk responsible for the export of wheat in mid 2008 to the current situation of having 23 wheat exporters accredited to export wheat from Australia; and that the arrangements can be revisited in two years.

## 11.1 GrainCorp's proposed Undertaking dated 15 April 2009

GrainCorp's proposed Undertaking includes a set of Ring Fencing Rules at Schedule 5, which cover the following areas:[469]

*Financial Records*

Clause 1 states:

> GrainCorp must make the financial records relating to its provision of access to and the provision of the Port Terminal Services available to the independent auditor appointed by the ACCC when requested to do so by notice in writing given by the ACCC.

*Restricted Information*

Clause 2 states:

> (a) GrainCorp must not use or disclose Restricted Information other than for the purpose of providing access to Port Terminal Services in compliance with the terms of this Undertaking.
>
> (b) "**Restricted Information**" means Confidential Information received from a User in respect of:
>
> > (i) an Intention Notice or a Cargo Nomination Application until the date on which it is accepted by GrainCorp, including information on:
> >
> > > (A) the expected date of arrival of the ship at the nominated Port;
> > > (B) a Cargo Assembly Plan; and
> > > (C) the destination of nominated ships;
> >
> > (ii) an order to load a ship including any amendments to the loading order.

*Prohibited Information*

Clause 3 states:

> Subject to clause 5 of this Schedule, GrainCorp shall not:
>
> (a) disclose Restricted Information to:
>
> > (i) its Trading Divisions; or
> >
> > (ii) other entities, including its own Related Bodies Corporate, their agents or employees who are involved in trading Bulk Wheat;
>
> (b) access or use Restricted Information for the purpose of substantially damaging a competitor or conferring upon it or its Related Bodies Corporate any unfair competitive advantage over a competitor in the marketing of Bulk Wheat; or
>
> (c) allow its Trading Divisions or other entities, including its own Related Bodies Corporate, their agents or employees who are involved in trading Bulk Wheat to have access to Restricted Information in GrainCorp's possession or control.

*Permitted Information Flows*

Clause 4 states:

---

469 GrainCorp Operations Limited, *Submission to the ACCC*, 15 April 2009, Schedule 5, pp. 49-51.

GrainCorp may disclose:

(a) to an Applicant or User any Restricted Information that solely relates to the Bulk Wheat owned by that Applicant or User; and

(b) to any person, information concerning the grade, quality, quantity, location or attributes of Bulk Wheat received by GrainCorp ("**Receival Specific Information**"), provided that the Receival Specific Information is aggregated to such an extent that a third party recipient of that aggregated information without access to the Receival Specific Information would not be capable of identifying information specific to any particular User.

*Compliance*

Clause 5 states:

(a) GrainCorp's employees will be made aware:

(i) that a failure to comply with the obligations under this Schedule may constitute a disciplinary offence and expose both the individual and GrainCorp to penalties for a breach of the TPA or WEMA;

(ii) they should contact the legal department if they have any concerns in relation to this policy, adherence to its objects by officers, employees or agents or its application to any particular conduct.

(b) GrainCorp will provide information and guidance to its officers, employees and agents to ensure so far as is practicable that they are made aware of their obligations under this Undertaking.

(c) If any GrainCorp officer, employee or agent is responsible for, or knowingly involved in conduct in breach of this clause, or any specific process created to implement this clause then, without prejudice to any other action that GrainCorp may be required by law to take or shall otherwise think appropriate:

(i) the conduct of that employee will be taken into account in relation to that person's performance appraisal and remuneration review; and

(ii) the relevant person shall receive training as determined by GrainCorp's compliance manager.

(d) GrainCorp will make employees aware that engaging in deliberate conduct in repeated or serious breach of this Schedule may be grounds for dismissal.

*Audit*

Clause 6 states:

(a) GrainCorp's compliance with this clause (and its related processes and procedures) must be independently audited by an independent auditor at such times as the ACCC may direct but in event not more than once in any 12 month period.

(b) The auditor ("Compliance Auditor") will be selected by GrainCorp but must be approved by the ACCC.

(c) The Compliance Auditor shall review:

(i) records of any complaints;

(ii) GrainCorp's compliance with this clause;

(iii) records held by the compliance officer;

(iv) any relevant policies or procedures that implement or otherwise relate to this clause; and

(v) any other issues relevant to GrainCorp's compliance with the principles and obligations stated in this clause.

(d) The Compliance Auditor's report, which shall include:

(i) recommendations for any improvements in GrainCorp's policies or processes; and

(ii) a report on GrainCorp's past compliance with any recommendations previously made by a Compliance Auditor.

must be provided to the ACCC

## 11.2 GrainCorp's submissions in response to ACCC's Issues Paper

GrainCorp submits that ring-fencing arrangements are unnecessary given that:

> Much of the information which may be available to GrainCorp in relation to grain held at, or shipped from, their ports, is not confidential in the industry and therefore will not deliver any unique informational advantage to GrainCorp. Customers or competitors (or any other person) can obtain much of that information from government agencies (e.g. ABARE, ABS), from field observations or from their day to day trading activities.[470]

GrainCorp further submits that information on grain production, grade / quality, surplus export tonnages, rail movements, port prices and shipping stem information is publicly available and states that ABARE publishes monthly reports which provide information on:

- opening stocks held by bulk grain handlers, milling operators and feed and other wheat users;
- the current year's production, supplies and wheat available;
- the volume of wheat used for export and domestically;
- the volume of wheat committed for export and domestically; and
- the wheat balance as at the end of each month.[471]

GrainCorp submits that vessel nomination information is 'only after the fact information'.[472] GrainCorp submits that while a Cargo Nomination Application is being assessed, GrainCorp has only 'a partial picture of the sales arrangements of a grain exporter's activity (up to 7 days)'.[473]

Further, while GrainCorp states that there may be a perception that the information GrainCorp obtains via Cargo Nomination Applications could be used to provide its trading arm with a competitive advantage, it also states that:

---

470 GrainCorp Operations Limited, *Submission to the ACCC*, 15 April 2009, para 8.2, p. 45.
471 GrainCorp Operations Limited, *Submission to the ACCC*, 15 April 2009, para 8.2, p. 45.
472 GrainCorp Operations Limited, *Submission to the ACCC*, 15 April 2009, para 8.8, p. 49.
473 GrainCorp Operations Limited, *Submission to the ACCC*, 15 April 2009, para 8.8, p. 49.

- 'The information provided in the Cargo Nomination Application is limited in nature and does not require the grain exporter to disclose commercially sensitive information, including prices paid and location of grain.

- Given the involvement of multiple grain exporters in major overseas grain sales (often involving grain being supplied from competing origins) export sale information is usually known by all grain traders before the grain exporter has to organise the grain logistics for a vessel.

- GrainCorp's Trading business has no ability to take advantage of this information in securing export sales. When a vessel is nominated by a grain exporter the export sale is generally completed. It is not possible for GrainCorp to complete and execute a competing export sale within working 7 days, as the usual time to negotiate an export contract is two to three months prior to shipment'.[474]

GrainCorp submits that it 'is about to commence the practice of placing all cargo nomination applications received onto the shipping stem as they are received, prior to commencement of the timely cargo accumulation risk assessment process'.[475] GrainCorp submits that this process has been developed following the recent WEA audit and involves a process whereby, 'if a cargo is accepted, the shipping stem will be updated to reflect this outcome. If a nomination is rejected, the nomination will be removed from the stem'.[476]

Although GrainCorp considers ring-fencing rules to be unnecessary for the reasons set out above, GrainCorp has proposed a set of ring-fencing rules which it states 'will ensure separation between port / logistics operations and trading operations', stating that it will 'restrict information flows between these two sections of the Company' and 'address any residual concerns the Commission may have in relation to information held by GrainCorp on a Cargo Nomination Application in the 7 working day assessment period'.[477] In relation to this 7 working day assessment period, the ACCC notes that in GrainCorp's revised Port Terminal Services Protocol, provided to the ACCC on 15 July 2009, GrainCorp commits to complete a Risk Assessment of a Cargo Nomination Application (CNA) within a maximum of 5 business days following receipt of a completed CNA form.[478]

In relation to the 'Financial Records' provided under GrainCorp's ring fencing rules, GrainCorp submits that Financial Records has the meaning in the Corporations Act 2001 (Cth). GrainCorp submits that:

> the types of records and accounts that will be made available to the independent auditor under …[the Financial Records clause]… of the ring fencing rules will include relevant sections of the management accounts that relate to internal charging of the Ports Business Unit to GrainCorp Trading for services provided.[479]

GrainCorp considers that it already reports on the separate accounts of its individual business units. Further, GrainCorp submits that as of 1 January 2008, it has been required to comply with Accounting Standard AASB8 – Operating Segments.[480]

---

474 GrainCorp Operations Limited, *Submission to the ACCC*, 15 April 2009, para 8.9, p. 50.
475 GrainCorp Operations Limited, *Supplementary submission to the ACCC*, 24 June 2009, p. 90.
476 GrainCorp Operations Limited, *Supplementary submission to the ACCC*, 24 June 2009, p. 90.
477 GrainCorp Operations Limited, *Submission to the ACCC*, 15 April 2009, para 8.9, p. 50.
478 GrainCorp Operations Limited, *Port Terminal Services Protocol* (revised), para 2.1, p. 3.
479 GrainCorp Operations Limited, *Supplementary submission to the ACCC*, 24 June 2009, p. 86.
480 GrainCorp Operations Limited, *Supplementary submission to the ACCC*, 24 June 2009, p. 87.

GrainCorp submits that its reporting obligations under this accounting standard, which GrainCorp submits are independently audited, 'are adequate to achieve the "accounting separation" sought by the ACCC'.[481]

In addition, GrainCorp submits that 'it would be unduly onerous for the ACCC to demand any higher level of reporting on accounting separation than that required by the Accounting Standards and GrainCorp's reporting requirements as a listed entity'.[482]

GrainCorp submits that the ring fencing rules in its Undertaking are adequate and rejects AGEA's submission that the definition of 'Restricted Information' is too narrow. GrainCorp submits that the 'information set out in the definition of Restricted Information adequately covers the type of information provided to a Port Terminal Operator in order to obtain Port Terminal Services. GrainCorp submits that the restrictions apply to this confidential information for the period before the information becomes public through the shipping stem'.[483]

## 11.3 Submissions received from third parties in response to ACCC Issues Paper

### 11.3.1 Australian Grain Exporters Association (AGEA)

AGEA submits that ring fencing arrangements are 'critical to a fair and transparent access regime' but submits that GrainCorp's proposed ring fencing rules are inadequate.[484] AGEA makes the following comments about GrainCorp's ring fencing rules:

> GrainCorp undertake to not use or disclose "*Restricted Information*" other than for the purposes of "*providing access to Port Terminal Services in compliance with the terms of this Undertaking"*. The definition of "*Restricted Information*" is extremely narrow, falls well below the usual standards applied to such levels of commercially sensitive information and arguably protects only the information provided by a User in respect of an Intention Notice or Vessel Nomination Application until the date on which it is accepted by GrainCorp.
>
> GrainCorp clause 3 prohibits GrainCorp from disclosing "*Restricted Information"* to its Trading Divisions or other entities involved in trading Bulk Wheat. The prohibition should apply to *any* disclosure to *any* entity.
>
> GrainCorp clause 3(b) is inadequate as it arguably limits GrainCorp's obligation under clause 2(a) by incorporating a subjective element that entitles GrainCorp to access or use Restricted Information so long as it is not "*for the purpose of substantially damaging a competitor or conferring upon it or its related bodies corporate any unfair competitive advantage over a competitor in the market in bulk wheat*". Such purpose would be very difficult to prove.
>
> Under GrainCorp clause 4(b), GrainCorp retain[s] the sole discretion to pass on to "*any person*" information concerning grade, quality, quantity, location or attributes of bulk wheat received by ABB/GrainCorp, provided that the information is aggregated. That the information is aggregated does not render it useless and, in fact, providing that information may confer an unfair advantage on the BHC to the detriment of the applicant or user. AWEs must give forward nomination of a

---

481 GrainCorp Operations Limited, *Supplementary submission to the ACCC*, 24 June 2009, p. 88.
482 GrainCorp Operations Limited, *Supplementary submission to the ACCC*, 24 June 2009, p. 88.
483 GrainCorp Operations Limited, *Supplementary submission to the ACCC*, 24 June 2009, p. 90.
484 Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 16.1, p. 34.

> vessel in order to load wheat. AWEs have a limited amount of time to transport wheat to port for accumulation. If BHCs' Trading Division is aware of this, they will immediately start to buy stock knowing the AWE might need it to load the vessel which is on its way. On occasions, BHCs have delayed or refused to supply freight to move stock that is owned by an AWE to port, so as to apply additional pressure on the AWE to buy stock from the BHC's Trading Division on unfavourable terms.
>
> Additionally information concerning warehouse stocks provide[s] a lot of value to the BHCs' Trading Divisions as it entitles them to assess the risks associated with additional sales programs.
>
> GrainCorp's ring-fencing rules do not include an obligation to provide training to its officers, employees and agents who are involved in the provision of access to port terminal services (compare ABB clause 5(c)).[485]

AGEA disputes GrainCorp's assertion that information about who is holding what grain in the BHC's system is available through ABARE. Further, contrary to GrainCorp's claim, AGEA submits that this information is valuable to the trading divisions of BHCs.[486]

AGEA also submits that accounting separation should be implemented 'to ascertain whether BHCs' trading divisions are required to make the very substantial payments which AWEs are required to make for port terminal services, or whether there are merely book entries between the trading and operating divisions'.[487]

### 11.3.2 Agforce

Agforce submits that separating business units is difficult, submitting that:

> In any division of departments of a large company like GrainCorp it is difficult to truly partition the activities of one department from another. No matter how good that separation is, the holder of assets from one end of the supply chain to the other will be able to advantage all its departments involved in the trade and transport of grain from those assets and services. Without regulation of the whole supply chain this is impossible to prevent.[488]

While submitting that accounting separation has its limitations, Agforce submits that 'separation of accounts will make assessment of activities and profits more streamlined for the regulator or auditor'.[489]

In furthering its arguments in favour of including an accounting separation regime to be part of GrainCorp's ring fencing rules, Agforce submits that:

> The three bulk handlers who are required to submit Port Access Undertaking are recognised in the industry as having a great deal of market information not available to others in the industry in their region.

---

485 Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 16.2-16.6, pp. 34-35.

486 Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 4.15, p. 12.

487 Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, Schedule 1, para L2, p. 49.

488 AgForce Grains Ltd, *Submission in relation to proposed GrainCorp access undertaking*, 29 May 2009, para 4.14, p. 8.

489 AgForce Grains Ltd, *Submission in relation to proposed GrainCorp access undertaking*, 29 May 2009, para 4.14, p. 8.

By holding such a large amount of the total storage, and a great deal of the grain which will be exported these bulk handlers know:

- How much grain is in storage
- Where that grain is
- The type and grade of that grain
- How much has been sold to the trade and how much is still warehoused by growers
- Essentially who owns what tonnage of grain, marketer by marketer and grower by grower
- The tonnage moving to domestic markets (roughly)
- The tonnage moving to export markets (accurately) from each region

There is no other player in the QLD grain market who has any where near the amount of information that GrainCorp does and whilst there is a significant amount of grain in on-farm storage the percentage of that grain which moves into GrainCorp storage, at some stage, is high. It is clear that there is a risk that this information could be used to manipulate the market to the advantage of the bulk handler and it is difficult to prevent this happening through a Port Access Undertaking alone.

It is clear that there is a risk that this information could be used to manipulate the market to the advantage of the bulk handler and it is difficult to prevent this happening through a Port Access Undertaking alone. [490]

### 11.3.3 Riverina

Riverina states that GrainCorp's ability to source 'uncommitted grain' – which it describes as '[g]rain put into storage by Growers for storage and later sale or use which is not contracted to any party'[491] – has the potential to 'provide GrainCorp with a competitive advantage in securing exporting sales and thus use of Port Terminal and Port Terminal Services'.[492]

To overcome this information advantage, Riverina proposes that the Undertakings be amended to provide for one of the two following approaches:

(i) GrainCorp disclose to all Licence Holders of its new STORM IT network details of the uncommitted grain stored in its upcountry facilities on a geographical manner (as opposed to an individual Grower basis) similar to the shipping stem, to avoid potential or perceived advantaging GrainCorp's Trading Division, at the expense of competition grain traders; or

(ii) Upcountry information on grain warehoused at GrainCorp sites listed as 'uncommitted' for shipping purposes, be defined as 'restricted information' and subject to stronger protections than are currently set out in the GrainCorp Undertaking.[493]

### 11.3.4 GrainCorp submissions in response to ACCC's Draft Decision

In response to the ACCC's Draft Decision, and the ACCC's conclusion that ring-fencing measures are not required at this time, GrainCorp submits that it 'strongly agrees with this finding for the reasons set out in its previous submissions'.[494]

---

490 AgForce Grains Ltd, *Submission in relation to proposed GrainCorp access undertaking*, 29 May 2009, para 4.14, p. 8.

491 Riverina (Australia) Pty Ltd, *Submission in relation to proposed GrainCorp and CBH access undertakings*, 29 May 2009, n 9, p. 8.

492 Riverina (Australia) Pty Ltd, *Submission in relation to proposed GrainCorp and CBH access undertakings*, 29 May 2009, para 6.3(c), p. 8.

493 Riverina (Australia) Pty Ltd, *Submission in relation to proposed GrainCorp and CBH access undertakings*, 29 May 2009, para 6.4(a), p. 9.

### 11.3.5 Submissions from interested parties in response to Draft Decision

#### 11.3.5.1 Australian Grain Exporters Association (AGEA)

In response to the views set out in the ACCC's Draft Decision regarding ring-fencing, AGEA submits:

> **Ring-fencing**
>
> AGEA believes that the ACCC should not discard the need for robust and enforced ring-fencing policies (with a requirement for an annual audit as to compliance with the ring-fencing provisions) even if the BHCs' Undertakings contain a robust non-discrimination and no hindering access clause. The respective histories of the BHCs suggest that without ACCC intervention, the BHCs will not provide ring-fencing policies that are adequate and they will in any event, be discarded when convenient to that BHC. Removing ring-fencing policies will take away any protection against the BHCs providing confidential information to their marketing arm. The result will be a complete failure of operators being required to provide *"fair and transparent access"* to their port terminal services to AWEs (see paragraphs 11.1 – 11.11 below).[495]

AGEA further submits:

> The ACCC considers, and AGEA agrees, that the BHCs' current ring-fencing rules are not an effective safeguard against anti-competitive discrimination in the provision of port terminal services.
>
> However, AGEA does not agree with the ACCC's view that if the BHCs' proposed Undertakings are amended to contain "*robust non-discrimination and no hindering access clauses, fair and transparent port terminal protocols and an indicative access agreement (as well as measures to deal with the potential for information about port terminal services to be used to the advantage of [the BHCs'] wheat exporting arm), then, in the circumstances, it would not be necessary for ring-fencing measures to be included in [the BHCs'] undertaking at this particular point in time*."
>
> As is clear from the above, the BHCs are not offering to provide access to terminal services in accordance with the above principles. As such, and for the further reasons set out immediately below, a robust ring-fencing policy is essential to ensure BHCs provide fair and transparent access to port terminal services to all AWEs.
>
> The ACCC has taken the above view due to transitional nature of the industry and the short duration of the proposed Undertaking.
>
> AGEA recognises that the duration of the Undertaking may be considered to be short. However, in an industry that is in transition and now involves 23 companies that are accredited to AWEs, it is essential that robust ring-fencing rules are out in place.
>
> The substantial number of failings identified by the ACCC in the BHCs proposed Undertakings which require wholesale rectification is telling.

---

494 GrainCorp Operations Limited, *Submission in relation to Draft Decision on GrainCorp Access Undertaking*, 3 September 2009, p. 49.

495 Australian Grain Exporters Association, *Submission in relation to Draft Decisions on Port Terminal Services Access Undertakings*, 3 September 2009, p. 7.

The BHCs have shown that they will not provide fair and transparent access to port terminal facilities to AWEs, unless required to do so under the risk that their trading arm losing export accreditation.

As noted by the ACCC, some BHCs have drawn out this proposed Undertaking process. They have not been open and frank. Each revised submission has in reality, been an attempt to have the ACCC accept their proposed Undertakings with as little as possible monopolistic advantages surrendered.

The majority of the BHCs' submissions to the ACCC have been timed so as to exclude the possibility of those submissions being subjected to proper public scrutiny and consultation before the ACCC provided its draft decisions.

Twenty three newly accredited companies have been identified by WEA as being worthy of exporting bulk wheat from Australia. At the same time that these newly accredited AWEs are trying to gain a foothold in the Australian bulk wheat market, the BHCs should not be allowed the opportunity to provide port terminal services without robust ring-fencing rules being part of their proposed Undertakings.

History has shown that the information exchange between BHCs and their respective trading arms is impossible to deter. To avoid the opportunity for discrimination, quality and quantity data on receivals and other stock information should be publicly available information and should be updated daily.[496]

## 11.4 ACCC's views

Ring-fencing is one tool that can be used, in conjunction with robust non-discrimination and no hindering access clauses, fair and transparent port terminal protocols and an indicative access agreement to ensure against anti-competitive discrimination.

The ACCC's view is that the weak ring-fencing rules in GrainCorp's proposed Undertaking would not, in their current form, serve as an effective safeguard against anti-competitive discrimination in the provision of port terminal services. However, it may be more appropriate at this point in time to rely on other safeguards against non-discrimination.

The ACCC's view is that, were GrainCorp's proposed Undertaking amended to contain robust non-discrimination and no hindering access clauses, fair and transparent port terminal protocols and indicative access agreements, then, in the circumstances, it would not be necessary for ring-fencing measures to be included in GrainCorp's Undertaking at this particular point in time.

In addition, it would be necessary for GrainCorp's revised Undertaking to include measures to deal with the potential for information about port terminal services to be used to the advantage of GrainCorp's wheat exporting arm. Such appropriate measures are discussed in the Publication of Information chapter. These measures require publication of key port terminal information (such as vessel nomination applications) on the shipping stem a short time after its receipt by GrainCorp (i.e. the

[496] Australian Grain Exporters Association, *Submission in relation to Draft Decisions on Port Terminal Services Access Undertakings*, 3 September 2009, p. 24.

next business day). This would increase transparency of nominations that have been made and lessen the opportunity for GrainCorp's marketing arm to anti-competitively misuse key port terminal information relating to other wheat exporters whilst not imposing unduly prescriptive regulation on GrainCorp. It is important to note that any such discriminatory conduct would be prohibited by a robust non-discrimination clause, such as that recommended by the ACCC in the Non-Discrimination chapter.

In forming the view that ring-fencing measures are not required at this time, the ACCC has taken into account the transitional state of the industry and the possibility that any ring-fencing measures that were implemented at this point in time may need to be revised in the medium term in accordance with any regulatory changes (either to extend or reduce the regulation to which GrainCorp is subject).[497] The ACCC considers that this would be an undesirable outcome in that it could impose unnecessary regulatory costs during a time of industry transition, particularly given the short duration of GrainCorp's proposed Undertaking (two years).

That said, the ACCC is cognisant of calls by a number of interested parties for robust ring-fencing measures, and notes that it will closely monitor the effectiveness of GrainCorp's Undertaking in ensuring against anti-competitive discrimination during its operation. Should the Undertaking not prove effective, the ACCC may impose ring-fencing in future regulatory arrangements.

It is important to note that the ACCC's approach to ring-fencing in assessing this particular access Undertaking is not indicative of the approach to ring-fencing that the ACCC would be likely to take in relation to other regulated industries. The approach taken on this occasion reflects the factors outlined above, and in particular, that the industry is still transitioning from having a single desk responsible for the export of wheat in mid 2008 to the current situation of having 23 wheat exporters accredited to export wheat from Australia; and that the arrangements can be revisited in two years.

The ACCC notes that, once the regulatory framework to which GrainCorp is subject is more certain, any future undertaking submitted by GrainCorp may need to include robust ring-fencing rules (significantly more robust than the weak ring-fencing measures offered by GrainCorp to the ACCC in its proposed Undertaking).

Such ring-fencing rules may include the following (noting that this is not an exhaustive list):

**Accounting Separation**

A robust accounting separation framework would include:

1. Identification of the costs and revenue of port terminal services;

2. Identification of the direct and common costs of port terminal services. (Direct costs are those that can be solely attributed to a particular service. These are incremental costs that would be avoided if the service was not provided. By

[497] For example, the ACCC notes the planned Productivity Commission review of the WEMA and statements by the Federal Government that it will monitor developments in the up-country stages of the grain supply chain.

contrast, common costs are costs shared between regulated and unregulated services);

3. Allocation of common costs between port terminal services and other services in accordance with predefined cost allocation rules; and

4. An explanation of the basis or methodology used in measuring cost elements (including the valuation of assets) and allocating costs.

**Creation or designation of discrete organisational divisions**

This would require GrainCorp's ports operations, and the information obtained in the provision of port terminal services, to be logistically ring-fenced from its trading arm.

This would require GrainCorp's port operations, and the information obtained in the provision of port terminal services, to have separate business systems which assign control over necessary infrastructure, operational support systems and information systems (eg accounting systems) to its trading arm.

In addition, line of sight business restrictions would need to be imposed to prevent other affiliates replicating the functions that have been ring-fenced.

**Governance arrangements**

This would require GrainCorp's ports business to employ separate staff from its trading arm.

That is, there would be no sharing of staff between GrainCorp's trading arm and its other business units.

Each business unit would be required to occupy separate premises with direct reporting lines to senior management for ring-fenced divisions. In addition, remuneration and incentives (including short-term incentive schemes such as annual bonuses as well as long-term incentive and remuneration schemes) for all staff in ring-fenced divisions would be on unit performance and independently of whole-of-business performance.

Strong governance arrangements would include oversight by a body internal to the firm to report on GrainCorp's compliance with its ring-fencing obligations.

**Compliance**

Robust compliance measures would include, at a minimum, an obligation to provide training to its officers, employees and agents who are involved in the provision of access to port terminal services.

## Independent audits

Independent audits to be conducted twice in any 12-month period. Further, an audit clause would contain an option for a third party to lodge a complaint, and then for the ACCC to direct a 'spot' audit if it considers it is warranted taking in to consideration

the nature of that complaint. The auditor's reports would be made available to the ACCC.

# 12 Capacity Management

**Summary**

***Port protocols must be part of the Undertaking***

Port Terminal Services Protocols (PTSPs) set out the key process by which GrainCorp will allocate port terminal capacity. For this reason the ACCC notes that the inclusion of the PTSPs in the proposed Undertaking is appropriate.

***Procedure for variation of port protocols can be flexible***

The variation mechanism set out in GrainCorp's proposed Undertaking of 15 April 2009 is not appropriate because it provides too much discretion to GrainCorp and insufficient certainty for access seekers.

That said, in the interests of retaining flexibility and efficiency, the ACCC would be prepared for the variation mechanism to be based on a robust industry consultation process rather than a formal ACCC consultation process. The ACCC will, however, closely monitor the success of this variation method and will take its findings into account in any future review of access undertakings.

To ensure that the PTSPs that have been varied can be enforced, a provision should be included in the Undertaking that obliges GrainCorp to comply with the PTSPs (as varied from time to time). In addition, a provision should be included in the Undertaking that states that any variations to the PTSPs are subject to the non-discrimination provision in the Undertaking (see further below). Further, any revised PTSPs must contain an expeditious dispute resolution mechanism.

***Substance of the port protocols***

The ACCC considers that the PTSPs attached to GrainCorp's 15 April 2009 proposed Undertaking are not appropriate because they provide too much discretion to GrainCorp and insufficient certainty for access seekers.

The ACCC notes that GrainCorp has revised its PTSPs. The ACCC commenced consultation on the revised PTSPs (dated 3 June 2009) on 6 August 2009 (the August PTSPs).

Even though the August PTSPs were not a part of GrainCorp's 15 April 2009 Undertaking, the ACCC has nevertheless set out the relevant submissions from interested parties on the August PTSPs and the ACCC's views as to whether the proposed amendments to the PTSPs, if included as part of a revised Undertaking, are likely to address the concerns raised in the Draft Decision.

In light of this, the ACCC's view is that while the August PTSPs cover some of the issues raised in the recommendations set out in the Draft Decision on GrainCorp's 15 April 2009 proposed Undertaking, it considers that additional amendments would be necessary in order for them to be considered appropriate. Specifically a number of

clauses would need to be amended to provide for greater certainty, transparency and clarity.

The ACCC notes submissions by interested parties suggesting amendments to the August PTSPs in addition to those recommended by the ACCC. The ACCC notes that its approach to the assessment of the PTSPs has given weight to the legitimate business interests of GrainCorp in being able to run its port terminal facilities with a sufficient degree of flexibility and without unduly prescriptive regulation so as to maintain an efficient supply chain. The ACCC further notes that the robust non-discrimination clause and no-hindering access clause that would appropriate in a revised Undertaking (the particulars of which are contained in the Non-Discrimination chapter) are intended to constrain the ability of GrainCorp to exercise discretion under its PTSPs in an anti-competitive manner.

## 12.1 GrainCorp's proposed Undertaking dated 15 April 2009

### 12.1.1 Obligation to publish Port Terminal Services Protocols

GrainCorp's proposed Undertaking dated 15 April 2009 states that GrainCorp must, as a condition of the Undertaking, comply with the Continuous Disclosure Rules set out in section 24(4) of the Wheat Export Marketing Act (the WEMA)[498]:

> *24(4) For the purposes of this Act, a person complies with the **continuous disclosure rules** in relation to a port terminal service at a particular time if:*
>
> *(a) at that time, there is available on the person's Internet site a current statement setting out the person's policies and procedures for managing demand for the port terminal service (including the person's policies and procedures relating to the nomination and acceptance of ships to be loaded using the port terminal service); and*
>
> *(b) at that time, there is available on the person's Internet site a current statement setting out:*
>
> *(i) the name of each ship scheduled to load grain using the port terminal service; and*
>
> *(ii) for each ship referred to in subparagraph (i)—the time when the ship was nominated to load grain using the port terminal service; and*
>
> *(iii) for each ship referred to in subparagraph (i)—the time when the ship was accepted as a ship scheduled to load grain using the port terminal service; and*
>
> *(iv) for each ship referred to in subparagraph (i)—the quantity of grain to be loaded by the ship using the port terminal service; and*

[498] GrainCorp Operations Limited, *Port Terminal Services Access Undertaking*, 15 April 2009, clause 8.1, 11.1.

> *(v) for each ship referred to in subparagraph (i)—the estimated date on which grain is to be loaded by the ship using the port terminal service …*

These provisions are paraphrased in the Undertaking at clauses 8.1(a) to 8.1(a)(ii)(E).

Clause 8.1(a) provides that GrainCorp's 'Shipping Stem'[499] (which will be updated each business day) is available on its website at www.graincorp.com.au.

Clause 8.2(d) provides that GrainCorp's 'Port Terminal Rules' are available at www.graincorp.com.au.[500] 'Port Terminal Rules' is not a defined term in the Undertaking. It is assumed that the reference to the 'Port Terminal Rules' in clause 8.2(d) is an error and means the 'Port Terminal Services Protocols'[501] are available at www.graincorp.com.au.

### 12.1.2 The substance of the Port Terminal Services Protocols

The 15 April 2009 Undertaking refers to GrainCorp's policies and procedures for managing demand for the port terminal service as Port Terminal Services Protocols (PTSP).[502] These PTSPs are set out in Schedule 3 to the Undertaking and are referred to as the 'Initial Port Terminal Services Protocols'.[503] As the PTSPs are included in a Schedule to the Undertaking, given the wording used in the Undertaking, the ACCC is of the view that the PTSPs form part of the Undertaking.[504]

#### 12.1.2.1 Outline of the substance of the initial PTSPs

The PTSPs refer to a party seeking to export grain through GrainCorp's ports as an 'exporter'. An exporter is not a defined term in the Undertaking. It is assumed for the purposes of this discussion that an 'exporter' is an 'Applicant', as defined in the Undertaking, who has entered into an 'Access Agreement' with GrainCorp.[505]

#### 12.1.2.2 Intention to Nominate

An exporter 'may provide GrainCorp with their forward shipping plan by submitting an intention to nominate a cargo(s)'. This process is optional and is used by GrainCorp 'to develop a forward shipping program'.[506]

---

499 GrainCorp Operations Limited, *Port Terminal Services Access Undertaking*, 15 April 2009, clause 8.1(a)(ii), 11.1.

500 GrainCorp Operations Limited, *Port Terminal Services Access Undertaking*, 15 April 2009, clause 8.2(d).

501 GrainCorp Operations Limited, *Port Terminal Services Access Undertaking*, 15 April 2009, clause 8.1(a)(i), 11.1 and Schedule 3.

502 GrainCorp Operations Limited, *Port Terminal Services Access Undertaking*, 15 April 2009, clause 8.1(a) and 11.1 and Schedule 3.

503 GrainCorp Operations Limited, *Port Terminal Services Access Undertaking*, 15 April 2009, clause 8.2(a).

504 GrainCorp Operations Limited, *Port Terminal Services Access Undertaking*, 15 April 2009, clause 2.2 and 11.2(e) - 'a reference to a, clause, Part or a Schedule is a reference to a clause, Part or Schedule of this Undertaking'.

505 GrainCorp Operations Limited, *Port Terminal Services Access Undertaking*, 15 April 2009, clause 11.1.

506 GrainCorp Operations Limited, *Port Terminal Services Access Undertaking*, 15 April 2009, Schedule 3, clause 1.

### 12.1.2.3 Cargo Nomination Application Procedure

In order to request that GrainCorp load grain on a vessel at a particular port, an exporter must:

(i) submit a Cargo Nomination Application (CNA) form (or equivalent) to GrainCorp at least '28 days prior to arrival laycan of the vessel'. GrainCorp retains the discretion to accept a CNA of less than 28 days;[507]

The CNA must include:

(i) the load port terminal(s), grain, grade and tonnage of the cargo, 14 day arrival laycan period and the proposed transport arrangement into the Port Terminal;[508]

(ii) '[t]he name of the vessel (if known)';[509]

(iii) '[a] Cargo Assembly Plan (CAP)[510] that outlines the grain and grade for the nominated cargo, the location of the grain and grade (GrainCorp, approved and non-approved storage facilities), blending requirements and other grain services required at the Port Terminal';[511]

(iv) '[c]onfirmation that the exporter will, if it is accumulating grain from a non-approved storage(s), operate under the applicable protocols and procedures, as advised by GrainCorp from time to time for the relevant Port Terminal';[512]

(v) '[c]onfirmation that the vessel is expected to be ready to load on arrival at the Port Terminal';[513]

(vi) '[t]he destination of nominated cargo, including all details of all phytosanitary requirements of the destination country';[514]

(vii) '[d]etails of any special or unusual features of the nominated vessel that may impact in any way on vessel loading performance';[515] and

---

507 GrainCorp Operations Limited, *Port Terminal Services Access Undertaking*, 15 April 2009, Schedule 3, clause 2.1.

508 GrainCorp Operations Limited, *Port Terminal Services Access Undertaking*, 15 April 2009, Schedule 3, clause 2.2.1 and 1.2.

509 GrainCorp Operations Limited, *Port Terminal Services Access Undertaking*, 15 April 2009, Schedule 3, clause 1.2 and 2.2.1.

510 Cargo Assembly Plan is also defined in clause 11.1 of the Undertaking as 'a document or documents recording, among other things, the agreed approximate tonnage of Bulk Wheat to be delivered and accumulated by the User at each loading Port Terminal submitted by the User and accepted, subject to GrainCorp's final determination, by GrainCorp'.

511 GrainCorp Operations Limited, *Port Terminal Services Access Undertaking*, 15 April 2009, Schedule 3, clause 2.2.2.

512 GrainCorp Operations Limited, *Port Terminal Services Access Undertaking*, 15 April 2009, Schedule 3, clause 2.2.3.

513 GrainCorp Operations Limited, *Port Terminal Services Access Undertaking*, 15 April 2009, Schedule 3, clause 2.2.4.

514 GrainCorp Operations Limited, *Port Terminal Services Access Undertaking*, 15 April 2009, Schedule 3, clause 2.2.5.

(viii) '[d]etails of the holders of any encumbrances over the commodities and the proposed release of any encumbrances.'[516]

#### 12.1.2.4 Cargo Nomination Application review and acceptance procedure

Once a CNA is received, GrainCorp will undertake a 'risk assessment' within seven business days.[517] GrainCorp will assess the CNA's in the chronological order they are received 'using the information supplied by the exporter' in a CNA and CAP.[518]

GrainCorp will accept or decline a CNA based on 'a risk assessment that takes into account the criteria outlined in clause 3.1.' [519]

GrainCorp's 'risk assessment will take into account all particulars of the exporter's request including':

(i) the information provided under the Cargo Nomination Application Procedure provision is 'complete and correct';[520]

(ii) 'the exporter provides confirmation to GrainCorp that it will have sufficient grain tonnage of the relevant grade (at GrainCorp, approved, or non-approved storage facilities)' against the CAP for the nominated cargo';[521]

(iii) 'the exporter provides confirmation to GrainCorp that it has contracted sufficient rail and/or road transport to accumulate the grain tonnage against the CAP to the Port Terminal for the nominated cargo prior to arrival laycan';[522]

(iv) '[p]hytosanitary and market access risks, including the presence of insects in stored grain and the application of grain protectants and fumigants for grain from approved or non-approved including on-farm, storage facilities as per the Storage and Handling Agreement';[523]

(v) '[w]hether GrainCorp has available and sufficient intake, grain segregation, storage and shipping capacity at the Port Terminal that will

---

515 GrainCorp Operations Limited, *Port Terminal Services Access Undertaking*, 15 April 2009, Schedule 3, clause 2.2.6.

516 GrainCorp Operations Limited, *Port Terminal Services Access Undertaking*, 15 April 2009, Schedule 3, clause 2.2.7.

517 GrainCorp Operations Limited, *Port Terminal Services Access Undertaking*, 15 April 2009, Schedule 3, clause 3.1.

518 GrainCorp Operations Limited, *Port Terminal Services Access Undertaking*, 15 April 2009, Schedule 3, clause 3.1

519 GrainCorp Operations Limited, *Port Terminal Services Access Undertaking*, 15 April 2009, Schedule 3, clause 3.2.

520 GrainCorp Operations Limited, *Port Terminal Services Access Undertaking*, 15 April 2009, Schedule 3, clause 3.1.1.

521 GrainCorp Operations Limited, *Port Terminal Services Access Undertaking*, 15 April 2009, Schedule 3, clause 3.1.2.

522 GrainCorp Operations Limited, *Port Terminal Services Access Undertaking*, 15 April 2009, Schedule 3, clause 3.1.3.

523 GrainCorp Operations Limited, *Port Terminal Services Access Undertaking*, 15 April 2009, Schedule 3, clause 3.1.4.

allow loading of the grain onto the nominated cargo, taking into account:'[524]

a. '[o]ther cargo(s) previously accepted by GrainCorp that appear as accepted cargo nominations on the GrainCorp Shipping Stem (see clause 3.5';[525]

b. '[s]ufficient capacity to receive and handle grain under the applicable protocol for accumulation by road of grain into GrainCorp Port Terminals from ex-farm and non-approved storage facilities as advised by GrainCorp from time to time';[526]

c. 'GrainCorp's right to reserve capacity at the Port Terminal to service its non-grain, domestic bound grain, containerised grain and export non-wheat bulk grain activities; and'[527]

(vi) '[a]ny other supporting information or documents in the event that issues arise which may cause any legal, regulatory, reputational or practical concerns, including the compliance with port of destination requirements and any potential event that may be a notifiable matter by GrainCorp to Wheat Exports Australia'.[528]

If GrainCorp accepts a CNA, GrainCorp:

(i) 'will assign a load laycan … and queuing order. The exporter must then pay a booking fee (in accordance with clause 6) … to confirm the accepted' CNA;[529]

(ii) may impose 'reasonable conditions' in accepting a CNA including: 'the mode of transport, port operating arrangements, requirement for overtime, source of grain and if applicable, the application of the relevant protocols and procedures, as advised by GrainCorp from time to time for the relevant Port Terminals from non-approved storage facilities.'[530]

If GrainCorp declines a CNA, 'GrainCorp must provide to the exporter(s) reasons for this decision.'[531]

---

524 GrainCorp Operations Limited, *Port Terminal Services Access Undertaking*, 15 April 2009, Schedule 3, clause 3.1.5.

525 GrainCorp Operations Limited, *Port Terminal Services Access Undertaking*, 15 April 2009, Schedule 3, clause 3.1.5(a).

526 GrainCorp Operations Limited, *Port Terminal Services Access Undertaking*, 15 April 2009, Schedule 3, clause 3.1.5(b).

527 GrainCorp Operations Limited, *Port Terminal Services Access Undertaking*, 15 April 2009, Schedule 3, clause 3.1.5(c).

528 GrainCorp Operations Limited, *Port Terminal Services Access Undertaking*, 15 April 2009, Schedule 3, clause 3.1.6.

529 GrainCorp Operations Limited, *Port Terminal Services Access Undertaking*, 15 April 2009, Schedule 3, clause 3.3.1.

530 GrainCorp Operations Limited, *Port Terminal Services Access Undertaking*, 15 April 2009, Schedule 3, clause 3.3.2.

531 GrainCorp Operations Limited, *Port Terminal Services Access Undertaking*, 15 April 2009, Schedule 3, clause 3.4.

'In the event that two or more nominations for port access with identical or similar Load Laycans (i.e. within 5 business days), and providing that all prior conditions as identified in this Protocol have been met, GrainCorp will assign a Load Date [an estimated time of loading[532]] in accordance with clause 4, in the order in which the Cargo Nomination Applications are received.'[533]

#### 12.1.2.5 Load Dates

'No later than 21 days before the nominated Load Laycan, the exporter will inform GrainCorp of:'[534]

(i) the ETA 'of the vessel, which must be within the Load Laycan';[535] and

(ii) 'the name of the vessel, its location, and the captains details or the ship agent's contact details'.[536]

'GrainCorp will then assign an estimated time of loading … and new Queuing Order for the vessel, which will be within the Load Laycan, but on or after the estimated time of arrival of the vessel provided by the exporter.'[537] 'If the exporter fails to comply … the exporter forfeits its vessel nomination and the Booking Fee.'[538]

#### 12.1.2.6 Site accumulation

'No later than 21 days before the assigned Load Date, the exporter will provide stock information that will allow GrainCorp to develop a Site Assembly Plan (SAP) for the accumulation of the grain for delivery to the Port Terminal base[d] on details provided in the CAP.'[539]

The 'SAP will detail the location of the grain and grade to be accumulated for the nominated vessel from GrainCorp, approved or non-approved or ex-farm storage facilities'.[540]

'GrainCorp is under no obligation to receive grain at any of its port terminals against an accepted cargo nomination more than 21 days in advance of the assigned Load Date.'[541]

---

532 GrainCorp Operations Limited, *Port Terminal Services Access Undertaking*, 15 April 2009, Schedule 3, clause 4.1.

533 GrainCorp Operations Limited, *Port Terminal Services Access Undertaking*, 15 April 2009, Schedule 3, clause 3.6.

534 GrainCorp Operations Limited, *Port Terminal Services Access Undertaking*, 15 April 2009, Schedule 3, clause 4.1.

535 GrainCorp Operations Limited, *Port Terminal Services Access Undertaking*, 15 April 2009, Schedule 3, clause 4.1.1.

536 GrainCorp Operations Limited, *Port Terminal Services Access Undertaking*, 15 April 2009, Schedule 3, clause 4.1.2.

537 GrainCorp Operations Limited, *Port Terminal Services Access Undertaking*, 15 April 2009, Schedule 3, clause 4.2.

538 GrainCorp Operations Limited, *Port Terminal Services Access Undertaking*, 15 April 2009, Schedule 3, clause 4.2.

539 GrainCorp Operations Limited, *Port Terminal Services Access Undertaking*, 15 April 2009, Schedule 3, clause 5.1.

540 GrainCorp Operations Limited, *Port Terminal Services Access Undertaking*, 15 April 2009, Schedule 3, clause 5.1.

Without limitation 'GrainCorp is not liable to the exporter or any third party, or any person claiming through or on behalf of the exporter, for any losses or delays, whether direct or indirect, that may arise if grain is not accumulated at the Port Terminal before the assigned Load Date for any reason'.[542]

#### 12.1.2.7 Booking Fee

'The exporter must pay to GrainCorp a non-refundable booking fee as per the Pricing Schedule of the GrainCorp Port Terminal Services and / or Storage and Handling Agreement of the season relating to the cargo nomination to confirm a Cargo Nomination Application within 24 hours (Monday to Friday) of GrainCorp notifying an export that a Load Laycan and Queuing Order has been assigned to an accepted Cargo Nomination Application. This fee is in addition to any other fees that may be applicable to the accumulation of grain and shipping of grain for the nominated cargo. Failure to make payment in cleared funds within 24 hours of such notification will cause the export to lose any allocated Load Laycan and Queuing Order.'[543]

'In the circumstances where an exporter nominates a cargo and pays the Booking Fee but it is subsequently found that the exporter has failed to comply with the requirements of clauses 2.2, 3.1.1-3.1.4, 3.3.2, 4.1, 5.1 or 6.1', GrainCorp can cancel the assigned Load Laycan, Load Date and Queuing Order and require the exporter to renominate another cargo or provide a substitute vessel.[544]

#### 12.1.2.8 Substituting Nominated Vessels

An exporter can substitute a nominated vessel for another vessel 'that is materially similar to the original nomination without the exporter having to pay a new booking fee or having to re-nominate a new vessel under the procedures outlined in clauses 2 and 3, provided that the Load Date is within 5 days of the original Load Date assigned in clause 4.1. this is subject to GrainCorp having the right to alter the Load Date and Queuing Order when a vessel is substituted by the exporter.'[545]

'The exporter can substitute another vessel at the nominated Port Terminal that is materially similar to the original nomination without the exporter being required to pay a new booking fee or having to renominate a new vessel under the procedures outlined in clause 3, provided that the Load Date is the same at the original Load Date assigned in clause 4.1.'[546]

---

541 GrainCorp Operations Limited, *Port Terminal Services Access Undertaking*, 15 April 2009, Schedule 3, clause 5.2.

542 GrainCorp Operations Limited, *Port Terminal Services Access Undertaking*, 15 April 2009, Schedule 3, clause 5.3.

543 GrainCorp Operations Limited, *Port Terminal Services Access Undertaking*, 15 April 2009, Schedule 3, clause 6.1.

544 GrainCorp Operations Limited, *Port Terminal Services Access Undertaking*, 15 April 2009, Schedule 3, clause 6.2.

545 GrainCorp Operations Limited, *Port Terminal Services Access Undertaking*, 15 April 2009, Schedule 3, clause 7.1.

546 GrainCorp Operations Limited, *Port Terminal Services Access Undertaking*, 15 April 2009, Schedule 3, clause 7.2.

### 12.1.2.9 Late or Cancelled Vessels

As soon as the vessel 'is able to proceed to survey', the exporter must provide GrainCorp with a 'Notice of Readiness'.[547]

GrainCorp state:

> '8.2 If a vessel's Notice of Readiness is later than 5 days after the assigned Load Date then:
>
> 8.2.1 The exporter forfeits any Booking Fee previously paid;
>
> 8.2.2 The exporter must re-nominate to secure a new Load Laycan or Load Date and Queuing Order as per clauses 2 and 3 and must pay a new Booking Fee; and
>
> 8.2.3 All grain in the Port Terminal accumulated for that nominated vessel will accrue additional storage charges (in addition to the standard storage charges). These fees are specified in the Pricing Schedule attached to the GrainCorp Port Terminal Services and / or Storage and Handling Agreement of the season relating to the cargo nomination, from the sixth day after the assigned Load Date, until such time as the grain is either loaded to a vessel or removed from the Port Terminal. Any additional fees accrued are payable prior to the outloading of the grain to a vessel or other transport'.[548]

### 12.1.2.10 Vessels Failing Regulatory Survey

GrainCorp state that:

> '9.1 The exporter is responsible for the condition and state of readiness of vessels presented to GrainCorp for loading as per relevant Marine, AQIS and any other survey required by regulation relating to the export of grain from Australia.
>
> 9.2 In the event of an exporter's vessel failing an AQIS or other survey that may be required by regulation, GrainCorp reserves the right to give priority to other vessels on its Shipping Stem and to place the represented vessel in a loading period that can accommodate the vessel at the sole discretion of the GrainCorp.
>
> 9.3 All other items shall be treated in accordance with clause 5 (as amended or relevant in dealing with Port Terminal Operation) of the Storage and Handling Agreement and/ or Port Terminal Services of the season relating to the vessel nomination and clause 8 of this Protocol for late or cancelled vessels.
>
> 9.4 In the event of an exporter's vessel failing an AQIS or other survey that may be recommended by GrainCorp in connection with clause 3.1.6 or required by regulation and the vessel is not, or cannot, be removed from the berth to allow the presentation of another vessel on the Shipping Stem, all grain in the Port Terminal accumulated for that nominated vessel will immediately accrue additional storage charges (in addition to the

---

547 GrainCorp Operations Limited, *Port Terminal Services Access Undertaking*, 15 April 2009, Schedule 3, clause 8.1.

548 GrainCorp Operations Limited, *Port Terminal Services Access Undertaking*, 15 April 2009, Schedule 3, clause 8.2.

standard storage charges).[549] These fees are specified in the Pricing Schedule attached to the GrainCorp Port Terminal Services and / or Storage and Handling Agreement of the season relating to the cargo nomination until such time as the grain is either loaded to a vessel or removed from the Port Terminal. Any additional fees accrued are payable prior to the outloading of the grain to vessel or other transport.'

#### 12.1.2.11 Dispute Resolution

If an exporter disputes GrainCorp's rejection of a CNA for bulk wheat exports, the following procedures apply:

(i) the exporter must notify GrainCorp of the dispute and the requested resolution (Dispute Notice) by 5pm the next business day after receiving the rejection notice;[550]

(ii) GrainCorp must 'use best endeavours' to respond within two business days of receiving the Dispute Notice setting out whether the decision will be reversed and, if not, providing reasons for the decision;[551]

(iii) if not satisfied, or if GrainCorp has not responded to the Dispute Notice within two business days, the exporter may serve an escalation notice on GrainCorp within two business days;[552]

(iv) on receipt of the notice, GrainCorp 'must use all reasonable endeavours' to arrange a meeting within five business days between GrainCorp's 'Executive General Manager, Ports and New Business and the exporter to provide an opportunity for the exporter to air its grievances';[553]

(v) this dispute resolution process does not apply to a dispute concerning 'the grade, quality, sampling, testing or classification of grain', which will be referred to BRI Australia Ltd in accordance with the dispute resolution clause in the Access Agreement.[554]

There are no further stages in the dispute resolution process.

### 12.1.3 Varying the Port Terminal Services Protocols

In accordance with the Undertaking, GrainCorp may vary the PTSPs subject to any variation being consistent with: (i) the objectives set out in clause 1.2 of the Undertaking; and (ii) GrainCorp's obligation to provide non-discriminatory access

---

549 These 'additional storage charges' are set out in the relevant Access Agreement and/or the Storage and Handling Agreement - GrainCorp Operations Limited, *Port Terminal Services Access Undertaking*, 15 April 2009, Schedule 3, clause 9.4.

550 GrainCorp Operations Limited, *Port Terminal Services Access Undertaking*, 15 April 2009, Schedule 3, clause 10.1.1.

551 GrainCorp Operations Limited, *Port Terminal Services Access Undertaking*, 15 April 2009, Schedule 3, clause 10.1.2.

552 GrainCorp Operations Limited, *Port Terminal Services Access Undertaking*, 15 April 2009, Schedule 3, clause 10.1.3.

553 GrainCorp Operations Limited, *Port Terminal Services Access Undertaking*, 15 April 2009, Schedule 3, clause 10.1.4.

554 GrainCorp Operations Limited, *Port Terminal Services Access Undertaking*, 15 April 2009, Schedule 3, clause 10.1.5.

under clause 5.4. The obligation to provide non-discriminatory access in clause 5.4 is subject to the exceptions contained in clause 5.5.[555]

GrainCorp must also comply with the following obligations when varying the PTSPs:[556]

(i) the PTSPs must contain an 'expeditious' dispute resolution mechanism for dealing with disputes relating to GrainCorp's rejection of Cargo Nomination Applications;[557]

(ii) '30 days prior to the date on which' a variation to a PTSP 'is to become effective' the variation must be published by GrainCorp on its website;[558]

(iii) GrainCorp must give the ACCC a copy of the varied PTSPs 'promptly' after they are published on GrainCorp's website.[559]

Clause 8.2(e) states that the varied PTSPs do not automatically override the terms of any existing access agreements that parties have previously entered into.[560]

### 12.1.4 Operational Decisions

In making decisions relating to the provision of access to the Port Terminal Services, the Undertaking notes that GrainCorp is likely to make 'Operational Decisions'.[561]

Operational Decisions are defined in the Undertaking as 'decisions made in the course of providing the Port Terminal Services'.[562]

The Undertaking provides a list of the kinds of areas Operational Decisions will cover, such as: 'scheduling, cargo accumulation decisions and ship loading'.[563] This list is not exhaustive.

In arriving at an Operational Decision relating to the provision of access to the Port Terminal Services, the Undertaking requires that GrainCorp 'must balance conflicts of interests of users of the Port'.[564]

---

555 GrainCorp Operations Limited, *Port Terminal Services Access Undertaking*, 15 April 2009, clause 8.2(b).

556 GrainCorp Operations Limited, *Port Terminal Services Access Undertaking*, 15 April 2009, clause 8.2(b).

557 GrainCorp Operations Limited, *Port Terminal Services Access Undertaking*, 15 April 2009, clause 8.2(b)(ii).

558 GrainCorp Operations Limited, *Port Terminal Services Access Undertaking*, 15 April 2009, clause 8.2(b)(iii).

559 GrainCorp Operations Limited, *Port Terminal Services Access Undertaking*, 15 April 2009, clause 8.2(c).

560 GrainCorp Operations Limited, *Port Terminal Services Access Undertaking*, 15 April 2009, clause 8.2(e).

561 GrainCorp Operations Limited, *Port Terminal Services Access Undertaking*, 15 April 2009, clause 8.4, 11.1.

562 GrainCorp Operations Limited, *Port Terminal Services Access Undertaking*, 15 April 2009, clause 8.4(a).

563 GrainCorp Operations Limited, *Port Terminal Services Access Undertaking*, 15 April 2009, clause 8.4(a).

This 'obligation' is subject to the qualification in 8.4(c) that some Operational Decisions will 'necessarily confer a relative disadvantage on one user of the Port Terminal and an advantage on others'.

The Undertaking obliges GrainCorp to make Operational Decisions 'based on objective commercial criteria'.[565] GrainCorp will also 'adopt practices and policies to promote fair, reasonable and non-discriminatory Operational Decision making.'[566] No further information is given in relation to the 'objective commercial criteria' or the 'practices and policies' referred to.

Without limiting the qualifications in clause 8.4(c) (set out above) or the matters that GrainCorp can have regard to in determining the price and non-price terms for the provision of access to Port Terminal Services for different 'Applicants or Users' (as set out in clause 5.5),[567] GrainCorp may, in making Operational Decisions:

(i) give priority to vessels based on 'lead time given between nomination and vessel ETA and likely availability of sufficient Bulk Wheat at the Port Terminal prior to vessel ETA necessary to make a nominated vessel's nominated cargo tonnage'[568];

(ii) take into account, in particular, the objectives of:

   a. 'minimising demurrage at the Port Terminal over a given period'[569];

   b. 'maximising throughput … at the Port Terminal over a given period'[570];

(iii) 'vary a cargo assembly plan or 'queuing order for vessels' as a result of:[571],

   a. 'insufficient Bulk Wheat at the Port Terminal accumulated by the User necessary to make a User's nominated vessel's nominated cargo tonnage';

   b. 'variations in vessel arrival times';

   c. 'failure of vessels to pass surveys';

---

564 GrainCorp Operations Limited, *Port Terminal Services Access Undertaking*, 15 April 2009, clause 8.4(b).

565 GrainCorp Operations Limited, *Port Terminal Services Access Undertaking*, 15 April 2009, clause 8.4(c).

566 GrainCorp Operations Limited, *Port Terminal Services Access Undertaking*, 15 April 2009, clause 8.4(c).

567 GrainCorp Operations Limited, *Port Terminal Services Access Undertaking*, 15 April 2009, clause 8.4(d).

568 GrainCorp Operations Limited, *Port Terminal Services Access Undertaking*, 15 April 2009, clause 8.4(d)(i).

569 GrainCorp Operations Limited, *Port Terminal Services Access Undertaking*, 15 April 2009, clause 8.4(d)(ii)(A).

570 GrainCorp Operations Limited, *Port Terminal Services Access Undertaking*, 15 April 2009, clause 8.4(d)(ii)(B).

571 GrainCorp Operations Limited, *Port Terminal Services Access Undertaking*, 15 April 2009, clause 8.4(d)(iii).

d. ‘stability and ship worthiness inspections’;

e. ‘vessel congestion’;

f. ‘variation in cargo requirements’;

g. ‘lack of performance of freight providers’;

h. ‘equipment failure’;

i. ‘maintenance outages’;

j. ‘contamination of accumulated cargoes or contamination of loads’;

k. ‘a User not working a vessel or accumulating a cargo on a 24 hour / 7 day basis where another User is able to do so’.

### 12.1.5 Other matters

GrainCorp will offer to include the PTSPs in the Access Agreements but is not obliged to.[572]

GrainCorp ‘undertakes not to discriminate between Users or in favour of its Trading Division in providing Port Terminal Services’ subject to GrainCorp’s obligation to provide non-discriminatory access under clause 5.4 – which is subject to the exceptions contained in clause 5.5, and clause 8.4, which sets out GrainCorp’s obligations when making ‘Operational Decisions’. [573]

GrainCorp must not engage in conduct ‘having a purpose of hindering access to the Port Terminal Services by any other User in the exercise of a reasonable right of access’.[574]

## 12.2 GrainCorp’s supporting submission to the proposed 15 April 2009 Undertaking

This section summarises the arguments in GrainCorp’s supporting submission to its 15 April 2009 Undertaking that expand on or otherwise explain the approach taken in relation to Capacity Management (Clause 8) and the Initial Port Terminal Services Protocols (Schedule 3) in the proposed Undertaking as submitted on 15 April 2009.

---

572 GrainCorp Operations Limited, *Port Terminal Services Access Undertaking*, 15 April 2009, clause 8.2(a).

573 GrainCorp Operations Limited, *Port Terminal Services Access Undertaking*, 15 April 2009, clause 8.3.

574 GrainCorp Operations Limited, *Port Terminal Services Access Undertaking*, 15 April 2009, clause 8.5.

### 12.2.1 General comments on the proposed PTSPs

#### 12.2.1.1 GrainCorp submit that the provisions in the proposed Undertaking that relate to publication of the PTSP, the Shipping Stem and the requirements of the WEMA address any concerns about the way port terminal capacity is managed

GrainCorp submits that 'there is generally excess capacity at each export grain terminal' and that the terminals 'operate through allocations being given in accordance with published non-discriminatory protocols.'[575]

GrainCorp submits that the PTSP and the Shipping Stem (which are both in the public domain), when read in conjunction with the ring fencing provisions in the proposed Undertaking 'address any concerns about the way port terminal capacity … is managed.'[576]

GrainCorp also submits that due to the requirement on GrainCorp to publish the PTSP and the Shipping Stem (in the proposed Undertaking), GrainCorp is subject to oversight by 'the WEA under the WEMA and the Commission under the Access Undertaking',[577] which also 'enables bulk wheat exporters to ensure GrainCorp is complying with its obligations under the WEMA, export accreditation and the Port Rules.'[578]

#### 12.2.1.2 GrainCorp submits that the Undertaking provides it with the flexibility it requires, within an appropriate framework, to amend the PTSPs to take into account 'evolving industry forces' to ensure the efficient operation of its ports

GrainCorp submit that the 'continuation of an efficient supply chain depends on port operators retaining some flexibility to respond to dynamic, evolving industry forces' and that as a result it is necessary to have 'sufficient flexibility to vary the Port Terminal Service Protocols to ensure … [its] efficient operation.'[579]

In light of this, GrainCorp has attached the Initial Port Terminal Services Protocols to the proposed Undertaking, but they are subject to alteration. GrainCorp submits that it 'does not consider it is necessary or that it would aid in the efficient operation of the port terminals, to require ACCC approval to vary the Port Terminal Service Protocols from time to time.'[580] GrainCorp submits however that it may not vary the PTSPs under the proposed Undertaking except in accordance with the objectives of the undertaking and the non-discriminatory principles in clause 5.4.[581]

GrainCorp submits that prescriptive PTSPs that are 'effectively locked in for the life of the Undertaking may prevent the efficient operation of port terminals and preclude

---

[575] GrainCorp Operations Limited, *Submission to the ACCC*, 15 April 2009, para 9.7, p. 56.
[576] GrainCorp Operations Limited, *Submission to the ACCC*, 15 April 2009, para 9.7, p. 56.
[577] GrainCorp Operations Limited, *Submission to the ACCC*, 15 April 2009, para 9.7, p. 56.
[578] GrainCorp Operations Limited, *Submission to the ACCC*, 15 April 2009, para 9.7, p. 57.
[579] GrainCorp Operations Limited, *Submission to the ACCC*, 15 April 2009, para 2.1, p. 8.
[580] GrainCorp Operations Limited, *Submission to the ACCC*, 15 April 2009, para 9.7, p. 56.
[581] GrainCorp Operations Limited, *Submission to the ACCC*, 15 April 2009, p. 8, 38 and 56.

the adoption of measures mitigating port congestion, particularly during peak periods.'[582]

#### 12.2.1.3 GrainCorp submits that the Access Agreement will include the PTSPs as part of the contractual terms

GrainCorp submits that 'the Undertaking requires' the Access Agreement to contain the PTSPs and that the PTSPs are 'the primary terms which apply to the provision of Port Terminal Services.'[583]

In light of this, GrainCorp submit that the proposed Undertaking 'effectively regulates the primary contract terms through having the initial protocols annexed to the Undertaking and thus subject to a change mechanism'.[584]

GrainCorp also notes that given the PTSP 'are an element of the contractual service agreement in place between GrainCorp and the terminal service customers, the Protocols cannot be unilaterally varied during a season as any variation has to be done with the agreement of both contracted parties.'[585]

### 12.2.2 Port Terminal Services Protocols

#### 12.2.2.1 GrainCorp's outline and rationale for the elements in the PTSP vessel nomination and allocation process

GrainCorp submits that the PTSPs are 'applied uniformly to all grain exporters' (including its own trading arm) and they are voluntarily applied to 'the export of all grains'.[586]

GrainCorp submit that the key steps in the PTSP and the supporting rationale include:

1. ***Published Price and Non-Price Terms / Intention to Nominate***

GrainCorp notes that it 'publishes details of the terms and conditions on which … Port Terminal Services … are provided each year'. The terms of the PTSP 'will comprise the key provisions of the Port Terminal Storage and Handling Agreement.'[587] The initial PTSPs in the proposed Undertaking also allow wheat exporters to voluntarily provide an Intention to Nominate.[588] The ACCC notes that the Intention to Nominate has been removed from the revised PTSPs.[589]

GrainCorp submits that its rationale for this approach is that the 'provision of this information allows GrainCorp to forward plan future demand for its country silo and port terminal facilities.'[590]

---

582 GrainCorp Operations Limited, *Submission to the ACCC*, 15 April 2009, para 2.10, p. 8.
583 GrainCorp Operations Limited, *Submission to the ACCC*, 15 April 2009, para 9.4, p. 54.
584 GrainCorp Operations Limited, *Submission to the ACCC*, 15 April 2009, para 9.4, p. 54.
585 GrainCorp Operations Limited, *Submission to the ACCC*, 15 April 2009, para 9.7, p. 56.
586 GrainCorp Operations Limited, *Submission to the ACCC*, 15 April 2009, para 7.2, p. 39.
587 GrainCorp Operations Limited, *Submission to the ACCC*, 15 April 2009, p. 40.
588 GrainCorp Operations Limited, *Submission to the ACCC*, 15 April 2009, p. 40.
589 GrainCorp, Letter to Anthony Wing, 'Port Terminal Services Protocols', 15 June 2009.
590 GrainCorp Operations Limited, *Submission to the ACCC*, 15 April 2009, p. 40.

2. ***Cargo Nomination Application***

GrainCorp note that under the PTSPs, access seekers 'must in writing nominate their vessel no later than 28 days before the required shipment date by submitted a Cargo Nomination Application and Cargo Assembly Plan (CNA/CAP). The CNA/CAP contains relevant grain and vessel loading information. The nomination does not require vessel details and the nominee can specify 14 laycan date range for the arrival of the ship rather than a firm Estimated Time of Arrival (ETA). The receipt of each CNA/CAP is date and time stamped and assessed in chronological order'.[591]

GrainCorp submits that its rationale for this approach is the 'flexibility of not providing vessel details and laycan date range in a vessel nomination, enables a grain exporter to nominate the vessel as early as possible to maximise the time to manage port terminal capacity and inbound transport logistics.'[592]

3. ***Assessment***

GrainCorp notes that it assesses 'each CNA/CAP based on a number of criteria including:'

(i) the access seeker 'demonstrating it has access to sufficient grain … to accumulate for the vessel in a manner that minimises the risk of disruption to the shipping stem;'

(ii) the access seeker 'demonstrating it has access to sufficient rail or road grain transport to accumulate for the vessel in a manner that minimises the risk of disruption to the shipping stem;'

(iii) the access seeker 'can meet phytosanitary requirements for the port terminal and the nominated market as determined by AQIS; and'

(iv) 'GrainCorp has sufficient port terminal capacity taking into account other accepted vessels and its requirements for non-grain and non-wheat commodities'.[593]

GrainCorp submits that its rationale for this approach is the 'assessment provides a level of assurance' that the access seeker 'can accumulate the wheat to meet the nominated vessel. It also ensures that port terminal capacity is not over allocated creating delays and demurrage for other grain exporters.'[594]

4. ***Load Laycan and Queuing Order***

GrainCorp notes that it 'will accept or decline a vessel nomination within 7 working days or receipt of a Vessel Nomination Advice, where:'

(i) 'if the vessel nomination is declined' reasons will be provided and the access seeker can 'renominate the vessel;'

---

591 GrainCorp Operations Limited, *Submission to the ACCC*, 15 April 2009, p. 41.
592 GrainCorp Operations Limited, *Submission to the ACCC*, 15 April 2009, p. 41.

593 GrainCorp Operations Limited, *Submission to the ACCC*, 15 April 2009, p. 41.
594 GrainCorp Operations Limited, *Submission to the ACCC*, 15 April 2009, p. 41.

(ii) if the vessel nomination is accepted … a 14 day Laycan Date and Queuing Order number' will be assigned and a 'non-refundable booking fee' must be paid to confirm the acceptance'; [595]

(iii) once accepted, the relevant vessel information will be published on the Shipping Stem in accordance with the WEMA continuous disclosure provisions.[596]

GrainCorp submits that its rationale for this approach is the 'payment of a non-refundable booking fee … provides a financial incentive … to nominate a bona fide vessel and comply with the Site Assembly Plan and vessel timeliness requirements' in the PTSP.'[597]

The ACCC notes that the 7 business day risk assessment process has been reduced to 5 business days in the revised PTSPs.[598]

5. ***Confirm Vessel Load Dates***

GrainCorp notes that the access seeker 'must provide vessel details and vessel estimated time of arrival (ETA) within 21 days of the ships ETA, where:'

(i) 'GrainCorp will confirm a Load Date to the grain exporter within the Laycan Date range based on the provided ETA;'

(ii) if the wheat exporter 'fails to provide this information within 21 days or fails to provide an ETA within the assigned Laycan Load date, it will lose its Cargo Nomination Application and Booking Fee.'

(iii) once an ETA is assigned, the relevant vessel information on the Shipping Stem will be updated.[599]

GrainCorp submits that its rationale for this approach is that it 'requires a firm ETA … at least 21 days out to plan the order of vessels arrival[s] … to plan grain accumulation.'[600]

6. ***Site Assembly Plan***

GrainCorp notes that the access seeker 'must provide a Site Assembly Plan (SAP) within 21 days of the ETA for the accumulation of grain against a vessel. Grain accumulated from … [non approved third party] storage will be required to comply with the procedures … set out under 'Receival of Grain from non-approved storage' in the Port Terminal Grain Handling Storage and Handling Agreement. If the [access seeker] … fails to provide these details within 21 days of an ETA, it will lose its vessel nomination and Booking Fee.'[601]

---

595 GrainCorp Operations Limited, *Submission to the ACCC*, 15 April 2009, p. 41.
596 GrainCorp Operations Limited, *Submission to the ACCC*, 15 April 2009, p. 42.
597 GrainCorp Operations Limited, *Submission to the ACCC*, 15 April 2009, p. 42.
598 GrainCorp, Letter to the Anthony Wing, 'Port Terminal Services Protocols', 15 June 2009.
599 GrainCorp Operations Limited, *Submission to the ACCC*, 15 April 2009, p. 42.
600 GrainCorp Operations Limited, *Submission to the ACCC*, 15 April 2009, p. 42.
601 GrainCorp Operations Limited, *Submission to the ACCC*, 15 April 2009, p. 42.

GrainCorp submits that its rationale for this approach is that it 'requires at least 21 days to accumulate grain for the nominated vessel. Conversely, GrainCorp cannot accumulate grain over a longer period given limited port terminal storage capacity to pre-accumulate grain for a vessel.'[602]

7. ***Vessel Late or Fails Survey***

GrainCorp notes that 'if the vessel is more than 5 days late than the assigned ETA or fails survey … GrainCorp will apply a storage fee surcharge for any grain in the port terminal accumulated for that ship and cannot be loaded.' The access seeker can also 'lose its vessel nomination and Booking Fee.'[603]

GrainCorp submits that its rationale for this approach is that the 'application of storage fee surcharge (at a level in line with vessel demurrage costs) will provide the financial incentive for the grain exporter to swap its grain and / or vessel with another grain exporter on the shipping stem to load the accumulated grain'.[604]

#### 12.2.2.2 The PTSPs contain a dispute resolution mechanism that is limited to review of decisions to reject cargo nomination applications

GrainCorp notes that the dispute resolution mechanism deals with 'disputes arising from GrainCorp's decision to reject a Cargo Nomination Application.'[605]

GrainCorp submits the mechanism has been included because:[606]

(i) 'the acceptance / rejection of a Cargo Nomination Application is the critical decision under the protocols';

(ii) 'it is difficult to itemise this decision making process as it requires a complex set of "real time" decisions … where an element of judgement based on experience is required';

(iii) 'the alternative would be to move to very rigid rules in an attempt to remove all discretion … [which] will remove flexibility and may act as a disincentive to export;'

(iv) the mechanism provides a balance where 'decisions to reject Cargo Nomination Applications can be subject to review' and provides an 'incentive on GrainCorp to make justifiable decisions'.

GrainCorp submit that the PTSP dispute resolution mechanism 'is limited to rejections of Cargo Nomination Applications because the other decisions under the protocols are objective in nature.'[607] GrainCorp also notes that it must provide a report to the ACCC on any material disputes.[608]

---

602 GrainCorp Operations Limited, *Submission to the ACCC*, 15 April 2009, p. 42.
603 GrainCorp Operations Limited, *Submission to the ACCC*, 15 April 2009, p. 42.
604 GrainCorp Operations Limited, *Submission to the ACCC*, 15 April 2009, p. 43.
605 GrainCorp Operations Limited, *Submission to the ACCC*, 15 April 2009, para 7.1, p. 38.
606 GrainCorp Operations Limited, *Submission to the ACCC*, 15 April 2009, para 7.1, pp. 38-39.
607 GrainCorp Operations Limited, *Submission to the ACCC*, 15 April 2009, para 7.1, p. 39.
608 GrainCorp Operations Limited, *Submission to the ACCC*, 15 April 2009, para 7.1, p. 39.

## 12.3 GrainCorp's supplementary submission to the 15 April 2009 proposed Undertaking

This section summarises the arguments in GrainCorp's supplementary submission, dated 24 June 2009, that expands on or otherwise explains the approach taken in relation to Capacity Management (Clause 8) and the Initial Port Terminal Services Protocols (Schedule 3) in the proposed Undertaking as submitted on 15 April 2009.

GrainCorp's supplementary submission responds to matters raised in the ACCC's Issues Paper, Information Request and the public submissions received from interested parties.

### 12.3.1 Responses to general comments on GrainCorp's proposed Undertaking

#### 12.3.1.1 GrainCorp agrees to include the Access Agreement in the Undertaking such that the Access Agreement can only be varied with consent of the ACCC

GrainCorp notes that it 'agrees to include the Wheat Port Terminal Services Agreement [Access Agreement] in the Undertaking (other than the Annexures being the fee schedule or the Protocols) such that it can only be varied with consent of the ACCC' … on the 'assumption that the Undertaking term is only two years.'[609]

#### 12.3.1.2 GrainCorp has revised the PTSPs that are to be included in the Undertaking, which can be varied in accordance with the mechanism in the proposed Undertaking without requiring a variation to the Undertaking under the Trade Practices Act

GrainCorp notes that it has 'recently updated its Protocols' which 'will be used for bulk wheat for 2009/2010 and GrainCorp will update the Initial Port Terminal Services Protocols in the Undertaking to reflect these updates.'[610]

GrainCorp submits that these revised PTSPs 'will be included in the Undertaking to give certainty for the first season but it is necessary that GrainCorp be able to vary [the PTSPs] … without consent of exporters before the start of a season but subject to the limitations in the Undertaking' in accordance with clause 8.2(b).[611]

GrainCorp submits that it does not accept that the PTSPs 'should be locked in for the term and only be capable of variation through an inflexible TPA variation process'.[612]

GrainCorp notes that under the proposed approach it can update the PTSPs 'during the season but … can only implement changes mid-season if it gets the exporters … to agree … as the Protocols form part of the contract.' '[T]his will only be possible if

---

609 GrainCorp Operations Limited, *Supplementary submission to the ACCC*, 24 June 2009, p. 4.
610 GrainCorp Operations Limited, *Supplementary submission to the ACCC*, 24 June 2009, p. 5.
611 GrainCorp Operations Limited, *Supplementary submission to the ACCC*, 24 June 2009, p. 5, 16 and 40.
612 GrainCorp Operations Limited, *Supplementary submission to the ACCC*, 24 June 2009, p. 98.

exporters see that the changes are provided for necessary operational issues or benefit them.'[613]

#### 12.3.1.3 Proposed withdrawal and re-lodgement of the Undertaking

GrainCorp submits that its 'intention is to re-lodge the Undertaking with these changes, following the ACCC's draft determination' and 'requests the ACCC to take into account these changes in making its draft determination.'[614] GrainCorp submit that 'the changes … respond directly to issues … raised and interested parties will get a further opportunity to comment on the changes during consultation on the draft determination.'[615]

### 12.3.2 Responses to general comments on GrainCorp's proposed PTSPs

#### 12.3.2.1 GrainCorp intends to have consistent PTSPs for all grains

GrainCorp submits that it 'intends, where feasible and subject to the conditions imposed upon the Undertaking … to have consistent Protocols for all grains and to continue to include non-regulated grain vessels on the shipping stem' with 'minor differences necessary to accommodate specific issues relating to a particular grain type'.[616]

In light of this, GrainCorp submits that it will have a 'set of bulk wheat specific protocols subject to the Undertaking, and another set of protocols applying to non-regulated grains'.[617]

#### 12.3.2.2 GrainCorp submits that prescriptive PTSPs would hinder efficient infrastructure management as many variables are outside its control

GrainCorp submits that '[o]perations at grain port terminals are influenced by a large range of external variables at the port terminal and … along the grain logistics chain, most of which GrainCorp has no control over' including 'grain infestation, grain chemical treatments, grain quality variations, rail delays, track shutdowns, port blockages, mechanical breakdowns, weather delays'.[618]

GrainCorp submits that to manage these variables to 'minimise cost to both GrainCorp and its customers, particularly vessel demurrage costs, the Company requires a level of flexibility' within the PTSPs 'to facilitate efficient infrastructure management.' '[P]rescriptive protocols would have a significant negative impact on port terminal efficiency and service standards', 'driving up costs and reducing the competitiveness of Australian grain exports.'[619]

---

613 GrainCorp Operations Limited, *Supplementary submission to the ACCC*, 24 June 2009, p. 5.
614 GrainCorp Operations Limited, *Supplementary submission to the ACCC*, 24 June 2009, p. 7.
615 GrainCorp Operations Limited, *Supplementary submission to the ACCC*, 24 June 2009, p. 7.
616 GrainCorp Operations Limited, *Supplementary submission to the ACCC*, 24 June 2009, p. 15.
617 GrainCorp Operations Limited, *Supplementary submission to the ACCC*, 24 June 2009, p. 16.
618 GrainCorp Operations Limited, *Supplementary submission to the ACCC*, 24 June 2009, p. 2.
619 GrainCorp Operations Limited, *Supplementary submission to the ACCC*, 24 June 2009, p. 2.

#### 12.3.2.3 GrainCorp submits that any ability to manipulate the shipping stem to its advantage is addressed by evidence of its past behaviour, the requirement to publish the shipping stem, the terms of the PTSPs, and GrainCorp's compliance with the WEMA.

GrainCorp submits that its ability 'to manipulate the shipping stem and provide any advantage to its trading arm by giving its vessels priority … is suitably addressed by GrainCorp's history of not having acted in this manner previously, and further prevented by … the requirement to publish the shipping stem, the terms of the Protocols and the compliance with the WEMA as confirmed by the WEA directed audits'.[620]

Further, GrainCorp submit that it is 'about to commence … placing all cargo nomination applications received onto the shipping stem as they are received, prior to commencement of the timely cargo accumulation risk assessment process' and that 'if a cargo is accepted, the shipping stem will be updated to reflect this outcome. If a nomination is rejected, the nomination will be removed from the stem.'[621]

### 12.3.3 Responses to specific comments on GrainCorp's proposed PTSPs

#### 12.3.3.1 GrainCorp submits that the requirement to prove 'grain ownership' as a critical component of its risk assessment has been reduced

GrainCorp submits that as the revised PTSPs 'allow exporters to nominate cargos between 1 October and 30 September of the following year, the requirement for proving 'grain ownership' as a critical component of cargo accumulation risk management assessment has been reduced, eliminating a degree of subjectivity from the assessment of cargo nomination applications.'[622]

However, GrainCorp also submit that access seekers 'will still be required to provide detailed stock information to GrainCorp for the development of a site assembly plan a minimum of 21 days prior to the assigned load date, to ensure that cargos are assembled in a timely manner and that other exporters are not inconvenienced.'[623]

#### 12.3.3.2 GrainCorp's explanation as to the justification and process for assessing the information required from access seekers for GrainCorp to be satisfied that an access seeker has sufficient grain tonnage

1. ***The assessment process is necessarily subjective***

GrainCorp submits that the 'process of evaluating the risk of timely accumulation of a grain cargo is necessarily subjective, as a number of the factors of relevance cannot be adequately expressed or quantified at the time in which a cargo nomination application is made.'[624]

GrainCorp submits that this judgement is 'informed by the following considerations:'

---

620 GrainCorp Operations Limited, *Supplementary submission to the ACCC*, 24 June 2009, p. 62, 98-99.
621 GrainCorp Operations Limited, *Supplementary submission to the ACCC*, 24 June 2009, p. 90.
622 GrainCorp Operations Limited, *Supplementary submission to the ACCC*, 24 June 2009, p. 77.
623 GrainCorp Operations Limited, *Supplementary submission to the ACCC*, 24 June 2009, p. 77.
624 GrainCorp Operations Limited, *Supplementary submission to the ACCC*, 24 June 2009, p. 95.

(i) '[t]he experience of the exporter, how long they have been exporting and the tonnage they ship;'

(ii) '[t]he reputation of the exporter and their record of successful 'on time' accumulation of cargos;'

(iii) '[t]he provision of evidence that the exporter has the capability of accumulating the cargo on time using road and / or rail transport in a manner that would minimise potential disruption to other port terminal customers;'

(iv) [i]f a cargo is to be accumulated from approved or non approved storages and the risk associated with delays caused by the latter;'

(v) '[d]emand for port terminal services at or around the time of a cargo nomination and any relevant terminal operational arrangements (including use of the berth by other vessels as directed by the relevant Port Authority), and the likely requirement for overtime.'[625]

GrainCorp submits that it does not 'set empirical ownership 'limits' on risk assessments [and does not] … require proof of ownership of a whole cargo.'[626] However:

> 'An exporter with a large presence in the market has a lower risk of failing to accumulate a cargo on time than an exporter with a smaller market share. Thus a large and active exporter may be judged a low timely accumulation risk and thus no evidence of stock ownership may be required prior to the acceptance of a nomination.
>
> On the other hand, a smaller exporter with a history of grain accumulation problems, or a history of timely cargo accumulation failure, may have to supply proof of ownership of the majority of a cargo prior to the acceptance of a nomination, as they may present a high risk of causing delays at port that would then impact on other exporters in the form of vessel delays and demurrage.'[627]

2. ***Due to the ability to make a forward booking, the significance of 'grain ownership' as a decision making criteria is reduced***

GrainCorp submits that 'the risk assessment process for forward bookings will not rely on grain ownership as a decision making criteria, as it is not possible to require an exporter to provide proof of ownership for cargos nominated 2, 6 or 11 months ahead' therefore 'concerns over the "sufficient grain tonnage" question have been largely addressed.'[628]

GrainCorp submit that the critical point 'relating to ownership of sufficient tonnage … to accumulate a cargo in a timely manner is now not at the time of acceptance of cargo nomination, it is at a point no later than 21 days from the assigned load where the nominee has to advise GrainCorp of stock information that will allow the

---

625 GrainCorp Operations Limited, *Supplementary submission to the ACCC*, 24 June 2009, p. 95.
626 GrainCorp Operations Limited, *Supplementary submission to the ACCC*, 24 June 2009, p. 95.
627 GrainCorp Operations Limited, *Supplementary submission to the ACCC*, 24 June 2009, pp. 95-96.
628 GrainCorp Operations Limited, *Supplementary submission to the ACCC*, 24 June 2009, p. 96.

Company to develop a site assembly plan in conjunction with the exporter' – under clause 4.1 of the revised PTSPs.[629]

GrainCorp submit that at this point 'if the exporter is not able to prove that they have sufficient grain ownership that will minimise the risk of a failure to accumulate the cargo by the assigned load date, GrainCorp may be forced to compel the exporter to renominate and secure a new assigned load date, when not doing so risks disruption and delays to other customers' – under clause 8 of the revised PTSPs.[630]

3. ***If a more prescriptive approach in accepting vessel nominations is required, full ownership will need to be demonstrated***

GrainCorp also submits that if it is 'forced to move to become more 'prescriptive' with respect to how it accepts vessel nominations the only way in which this can be achieved [is by an exporter being required to] … demonstrate full ownership of the quantity of grain … at the time a cargo is nominated … [which] would be counterproductive … and will make the new Protocols unworkable'.[631]

#### 12.3.3.3 GrainCorp submits that the PTSPs provide clearly defined rules

GrainCorp submits that the PTSPs 'provide clear rules for the nomination of cargos, advising vessel ETA's, assigning load dates, advising GrainCorp of a vessels laycan, processes for nominating multi port loads or changing ports, information requirements about a vessel's readiness to load, the development of a site accumulation plan, [and] deadlines for when information has to be lodged' and that AGEA's assertion that the PTSPs 'don't contain clearly defined rules is patently incorrect.'[632]

GrainCorp also submits that clause 1.3 of the PTSPs 'clearly describes the information required in a Cargo Nomination Application', clause 2 'describes the Application Review and Acceptance procedure' and that section 2.1 states that it 'will accept or decline a CNA based on a Risk Assessment that takes into account the criteria outlined in clause 2.1'.[633] GrainCorp submits that 'this is a very transparent set of requirements that are not difficult to understand.'[634]

Further, GrainCorp submit that it is the access seekers' 'obligation to ensure that sufficient cargo is available at the Port Terminal by the estimated load date. GrainCorp has minimal control over cargo availability and no control over vessel delays, regulatory survey failures and weather. In addition … GrainCorp has no visibility of charter party costs and demurrage rates and it is unreasonable to expect GrainCorp to accept any liability on that basis.'[635]

---

629 GrainCorp Operations Limited, *Supplementary submission to the ACCC*, 24 June 2009, p. 96.
630 GrainCorp Operations Limited, *Supplementary submission to the ACCC*, 24 June 2009, p. 96.
631 GrainCorp Operations Limited, *Supplementary submission to the ACCC*, 24 June 2009, p. 96, 100.
632 GrainCorp Operations Limited, *Supplementary submission to the ACCC*, 24 June 2009, p. 99.
633 GrainCorp Operations Limited, *Supplementary submission to the ACCC*, 24 June 2009, p. 100.
634 GrainCorp Operations Limited, *Supplementary submission to the ACCC*, 24 June 2009, p. 100.
635 GrainCorp Operations Limited, *Supplementary submission to the ACCC*, 24 June 2009, Attachment 4, p. 7.

#### 12.3.3.4 GrainCorp submits that re-ordering of vessels is undertaken on a transparent basis in line with clearly defined rules

GrainCorp submit that most 'modifications to loading order … are directly related to':

(i) '[r]equests by exporters for variations in load date or loading port';[636]

(ii) '[r]eordering caused by vessel survey failure or insufficient stock at port requiring the shipping stem to be rearranged to avoid terminals 'blocking out', or other exporters incurring demurrage'; or[637]

(iii) 'the availability of stock at port to load' as GrainCorp cannot 'partially load vessels and allow the vessel to sit on the berth whilst further stock is delivered.'[638]

GrainCorp submit that the PTSPs and Access Agreement 'provide clear direction to customers on the process of removing failed vessels and the consequential effect on queuing.' GrainCorp also submit that '[i]t is erroneous of AGEA to suggest that reordering of vessels is undertaken on a non-transparent basis and in the absence of clearly defined rules.'[639]

GrainCorp submit that if AGEA are 'proposing that the shipping stem become a rigidly enforced order of loading … they concede to proof of grain ownership and site assembly will be prerequisites to access and bookings.'[640]

GrainCorp further submit that the removal of 'the ability of exporters to make modifications to their own cargo nominations' or the requirement that 'a request to change a cargo nomination be subject to public input from other exporters' would a be 'very transparent, but ultimately unworkable process, as it would be cumbersome and may mean that other exporters would object to the proposed modification(s).'[641]

#### 12.3.3.5 GrainCorp submits that the existing arbitration process offered by Grain Trade Australia (GTA) has been agreed to be an appropriate mechanism for the settlement of disputes under the PTSP and the proposed Undertaking

GrainCorp submits that section 10 of the PTSPs 'contains an expedited dispute resolution process' where it 'is required to give reasons for any decision to reject a cargo nomination application and there is a rapid escalation process should the exporter be dissatisfied' providing 'accountability for GrainCorp's decision making at the port.'[642]

GrainCorp also submits however that 'following recent consultation with customers' it has agreed 'that use of the existing arbitration process offered by GTA would be an

---

636 GrainCorp Operations Limited, *Supplementary submission to the ACCC*, 24 June 2009, p. 100.
637 GrainCorp Operations Limited, *Supplementary submission to the ACCC*, 24 June 2009, p. 101.
638 GrainCorp Operations Limited, *Supplementary submission to the ACCC*, 24 June 2009, p. 101.
639 GrainCorp Operations Limited, *Supplementary submission to the ACCC*, 24 June 2009, p. 101.
640 GrainCorp Operations Limited, *Supplementary submission to the ACCC*, 24 June 2009, p. 102.
641 GrainCorp Operations Limited, *Supplementary submission to the ACCC*, 24 June 2009, p. 102.
642 GrainCorp Operations Limited, *Supplementary submission to the ACCC*, 24 June 2009, p. 102.

appropriate mechanism for the settlement of disputes relating to the provision of port terminal services and those relating to the provision of access via the Undertaking.'[643]

#### 12.3.3.6 GrainCorp submits its revised PTSPs have been changed in consultation with its customers to improve their effectiveness and transparency

GrainCorp submits that it 'engaged customers in a process of reviewing the previous protocols to improve their effectiveness' and 'believes that the process of consultation was effective and [the] … subsequent introduction of revised protocols reflects an active and flexible approach to improving transparency and compliance with Protocol requirements on behalf of both parties.'[644]

GrainCorp submits that 'some requests by customers for shorter notification periods from customers were received during consultation and the Company believes, based on operational experience that the time frames adopted reflect good practice.'[645]

#### 12.3.3.7 GrainCorp submits that the PTSPs are applied equally to all access seekers

GrainCorp submits that under the PTSPs, its trading arm is 'subject to the same requirements as other port terminal service customers', 'will be required to enter into an WPTS Agreement [Access Agreement] and will be subject to the terms and conditions for provision of access and services described within the Undertaking.'[646]

#### 12.3.3.8 GrainCorp submits that removing its ability to impose reasonable conditions in accepting a CNA (clause 3.3.2 of the PTSPs) would reduce its ability to manage risk associated with receiving wheat from third parties

GrainCorp submits that clause 3.3.2 of the PTSPs 'does not discriminate "non-approved" storage' but allows GrainCorp 'to manage risk associated with receiving wheat from sources that have neither the appropriate quality accreditation in place nor a transparent grain treatment regime … [protecting] both GrainCorp risk and export markets'. GrainCorp also submit that the 'planning of capacity and resource allocation requires thorough knowledge of grain to be delivered and mode of transport. GrainCorp's experience to date of unsolicited deliveries direct to port further support the need for this clause.'[647]

#### 12.3.3.9 GrainCorp submits it will remove the reference to 'reasonably anticipated requirements' from the PTSPs

GrainCorp submits that the 'reference to "reasonably anticipated requirements" will be removed' from the PTSPs.[648]

---

643 GrainCorp Operations Limited, *Supplementary submission to the ACCC*, 24 June 2009, p. 102.
644 GrainCorp Operations Limited, *Supplementary submission to the ACCC*, 24 June 2009, p. 99.
645 GrainCorp Operations Limited, *Supplementary submission to the ACCC*, 24 June 2009, p. 99.
646 GrainCorp Operations Limited, *Supplementary submission to the ACCC*, 24 June 2009, p. 99.
647 GrainCorp Operations Limited, *Supplementary submission to the ACCC*, 24 June 2009, Attachment 4, p. 5.
648 GrainCorp Operations Limited, *Supplementary submission to the ACCC*, 24 June 2009, p. 96.

### 12.3.4 Responses to general comments on proposed clause 8.4 – 'Operational Decisions'

#### 12.3.4.1 GrainCorp submits that its operational procedures are sufficiently transparent to allow it to provide port terminal services effectively

GrainCorp note that AGEA has stated 'that Port Terminal Operators "have an obvious conflict of interest … and real incentive to … inhibit competition by discriminating in favour of their Trading Divisions"' and that 'the existing Undertaking does not provide transparency in relation to management of shipping slots and accumulation at port.'[649]

GrainCorp submit that these claims 'fail to recognise':

(i) 'the requirement for GrainCorp to publish the shipping stem and update it every business day;'

(ii) 'the provisions of the Protocols which specify the manner in which and the factors relevant to GrainCorp accepting a cargo nomination application;'

(iii) 'the recent finding of the WEA directed audit that, while the process of rationing port terminal capacity where limited was not 'transparent', GrainCorp had not given preferential treatment to GrainCorp Trading.'[650]

GrainCorp submits that the PTSPs 'prevents manipulation of logistics, substitution of vessels or variation of the shipping stem … as it lists the factors which GrainCorp may take into account in accepting a cargo nomination application and its customers can take action under the WPTS Agreement if they consider GrainCorp refused to grant them a shipping slot without legitimate grounds.'[651]

GrainCorp rejects AGEA's submission that 'the requirement that "the Client must confirm it will/has contracted sufficient rail and/or road transport to accumulate the wheat tonnage to the Port Terminal for the nominated cargo prior to the nominated Load Laycan" means that GrainCorp would be likely to discriminate in favour of applicants who use GrainCorp's rail service' as it is submitted to be 'inconsistent with GrainCorp's incentive to maximise throughput at the terminal and … failure to obtain such confirmation could cause … inefficiencies at the ports.'[652]

GrainCorp also rejects AGEA's submission that 'exporters are constantly charged for overtime' as any 'penalties or overtime are .. applied equally in like circumstances to all access seekers.'[653]

Further, GrainCorp submits that its ability to give priority to vessels based on the 'lead time given between nomination and vessel ETA and likely availability of sufficient Bulk Wheat at the Port Terminal prior to vessel ETA' is 'reasonable for the

---

649 GrainCorp Operations Limited, *Supplementary submission to the ACCC*, 24 June 2009, p. 55.
650 GrainCorp Operations Limited, *Supplementary submission to the ACCC*, 24 June 2009, p. 55.
651 GrainCorp Operations Limited, *Supplementary submission to the ACCC*, 24 June 2009, p. 55.
652 GrainCorp Operations Limited, *Supplementary submission to the ACCC*, 24 June 2009, p. 55.
653 GrainCorp Operations Limited, *Supplementary submission to the ACCC*, 24 June 2009, p. 55.

efficient operation of the port terminal facilities' and regardless, 'GrainCorp must still comply with the requirements of the port terminal service protocols.'[654]

#### 12.3.4.2 GrainCorp submits that efficient terminal management requires flexibility in the making of operational decisions

GrainCorp submits that 'efficient terminal management requires flexibility, and that the imposition of rigid operational rules will impact on the efficient management of port terminal infrastructure'.[655]

GrainCorp also submit that the 'accumulation of grain cargos and loading of vessels is a complex … task, where many components have to work in concert. A single element in the supply chain, or the inability to flexibly react to changed circumstances, can lead to a coordination failure, and thus a break down of efficiency.'[656]

GrainCorp submit that 'other factors that require port terminal management to adjust flexibly daily' include: '[v]ariations in rail service frequency', '[t]rain derailments, accidents and breakdowns', '[r]oad works and traffic delaying the arrival of trucks', '[r]oad transport availability','[i]ndustrial action','[c]hanges to transport regulation such as those relating to fatigue management', '[t]erminal disruptions and machinery failures', '[r]ain, wind, flooding, etc, hindering, delaying or stopping vessel loading', '[q]uarantine related matters such as the presence of insects in grain on receival', '[t]he rejection of grain in the shipping path by AQIS due to insects, weed seeds or other material delaying or preventing vessel loading', '[v]essels failing marine or AQIS survey', '[v]essels arriving late and terminal capacity becoming 'blocked out', '[v]essel mechanical failure', '[t]he capacity of vessels to ballast and trim at rates equal to ship loader rates', [v]essel air draft and tides' and '[d]elays related to cargo ownership – insufficient grain to load vessels.'[657]

GrainCorp submit that during 'the current shipping year, more than 95% of variations to cargo nominations post acceptance were requested by exporters' and that a rigid Undertaking 'that preclude[s] flexibility … may lead to a situation where … variations' cannot be accommodated, 'causing significant inefficiencies that would materially harm … individual exporters [and] … the overall competitiveness of Australian grain exports.'[658]

GrainCorp also submit that the 'recent [WEA directed] audit of GrainCorp's operations for the period 15 December 2008 to 20 May 2009 concluded that 'despite the confusion between the noted times of Notice of Intention to Nominate and the Vessel Nomination, our audit did not find any evidence of unfair or inappropriate priority setting.'[659]

---

654 GrainCorp Operations Limited, *Supplementary submission to the ACCC*, 24 June 2009, Attachment 4, p. 13.
655 GrainCorp Operations Limited, *Supplementary submission to the ACCC*, 24 June 2009, p. 55.
656 GrainCorp Operations Limited, *Supplementary submission to the ACCC*, 24 June 2009, p. 56.
657 GrainCorp Operations Limited, *Supplementary submission to the ACCC*, 24 June 2009, pp. 56-57.
658 GrainCorp Operations Limited, *Supplementary submission to the ACCC*, 24 June 2009, p. 57.
659 GrainCorp Operations Limited, *Supplementary submission to the ACCC*, 24 June 2009, p. 57.

### 12.3.5 Responses to specific comments on proposed clause 8.4 – 'Operational Decisions'

#### 12.3.5.1 GrainCorp submits that the 'objective commercial criteria' referred to focus on how it can deliver services to customers in the most efficient and commercially viable manner

GrainCorp submit that the '"objective commercial criteria" referred to … focus … on how terminal management can deliver services to customers in the most efficient and commercially viable manner'. GrainCorp submit that '[f]lexibility is required to efficiently manage complex infrastructure that services multiple customers.'[660]

GrainCorp submits that scheduled operations can be disrupted by: '[r]ain or high winds preventing vessels from being loaded or berthing', '[t]ransport delays leaving cargo accumulation incomplete, forcing vessels to stand off to await the accumulation of the remainder of a cargo', '[v]essels failing survey and their assigned load date being missed can cause terminals to 'block out' (fill to storage capacity)', '[g]rain presented to AQIS failing inspection slowing ship loading or causing vessels to stand off while replacement grain is sourced or grain is fumigated (for between 2 and 9 days)', and '[m]achinery failures delaying ship loading.'[661]

GrainCorp submit that in such circumstances it 'has to be able to respond to the circumstances … and make decisions, such as changing the order of vessel loading, in order to minimise disruption to all customers' however, if 'rigid prescriptive rules are placed on the management of shipping at terminals efficiency will be reduced and the cost of exporting will increase.'[662]

### 12.3.6 GrainCorp's proposed withdrawal and re-lodgement of the Undertaking – Revised PTSPs

As noted above, GrainCorp has submitted that it intends to re-lodge the Undertaking with changes (amongst other amendments) to the PTSPs following the ACCC's draft decision. GrainCorp also requested that the ACCC to take into account these changes in making its draft decision.

As the revised PTSPs have neither been submitted as part of the proposed Undertaking (lodged on 15 April 2009) nor have the amendments to the PTSP been subject to public consultation, the ACCC considered that it would be not appropriate to comment on the terms of the revised PTSPs as part of the draft decision. However, in the interests of expediency, the ACCC annexed the most recent version of the revised protocols received by the ACCC prior to the Draft Decision for comment during the consultation period on the draft decision.

---

660 GrainCorp Operations Limited, *Supplementary submission to the ACCC*, 24 June 2009, p. 97.
661 GrainCorp Operations Limited, *Supplementary submission to the ACCC*, 24 June 2009, p. 97.
662 GrainCorp Operations Limited, *Supplementary submission to the ACCC*, 24 June 2009, p. 97.

## 12.4 Submissions received from interested parties in response to ACCC Issues Paper dated 29 April 2009 on the 15 April 2009 proposed Undertaking

This chapter summarises the arguments put forward in public submissions by interested parties in response to GrainCorp's proposed undertaking and supporting submission in relation to Capacity Management (Clause 8) and the Initial Port Terminal Services Protocols (Schedule 3) in the proposed Undertaking as submitted on 15 April 2009.

### 12.4.1 Australian Grain Exporters Association (AGEA)

#### 12.4.1.1 AGEA's general comments on GrainCorp's proposed Undertaking

AGEA submits that '[f]air and transparent access requires … an … undertaking which has clarity, certainty and transparency. The rules must be detailed and clear … [and] be capable of objective application. Discretionary or subjective decisions must be kept to the absolute minimum. Decisions and the reasons for them must be disclosed in a timely way and open to effective and timely review.'[663]

AGEA also submits that unless the proposed access undertakings provide transparency in relation to BHC's decisions[664], 'BHCs will be able to manipulate logistics, substitute vessels and/or vary the shipping stem to confer preferential treatment on themselves'.[665]

#### 12.4.1.2 AGEA's general comments on GrainCorp's proposed PTSPs

1. ***Transparency and certainty required in the application of the PTSPs and shipping stem***

AGEA submits that the proposed PTSPs do not provide transparency 'in relation to the management and operation of BHCs' port terminals and shipping stem. The Port Protocols provide the BHCs with wide discretions and lack objective criteria for the allocation of shipping slots'.[666] AGEA further submit that the PTSPs 'do not contain clearly defined rules which are capable of objective application.'[667]

---

663 Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 2.6, p. 2.

664 It should be noted that AGEA's submissions on the proposed Undertakings (including the proposed port protocols) are, unless otherwise specified, comments relating to the proposed Undertaking and proposed port protocols of all three bulk handling companies (ABB, GrainCorp and CBH).

665 Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 4.12, p. 10.

666 Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 14.1, p. 31.

667 Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para K2(iii), p. 48.

AGEA also submits that 'there is no transparency in relation to the shipping stems', bringing into question 'the ability of the BHCs to manipulate the shipping stem to their commercial advantage'.[668]

AGEA also submits that '[t]ransparency should ensure that port protocols are applied to BHCs … and AWEs on a 'no less favourable' basis. This does not occur at present.'[669]

In addition, AGEA submits that the access provider's need for flexibility and the access seeker's need for transparency and certainty can be balanced by 'clearly specifying the obligations of the BHCs.'[670]

2. ***Conflict of interest means BHC will discriminate against other users***

AGEA submits that 'BHCs' conflict of interest make it inevitable that BHCs will give preferential treatment to their Trading Divisions and make operational decisions that allow them to maximise profits [for example, in the allocation of overtime and other expenses], to the detriment of other users of the port and competition in the bulk wheat export market.'[671]

To mitigate against these risks AGEA states that 'a clearly defined shipping protocol and transparency in relation to BHCs' decision-making is required.'[672]

3. ***Certainty of reserved shipping slots and limited re-ordering of shipping slots***

AGEA submits that access seekers must have 'the certainty of knowing that if they book a spot for a vessel on a particular day, the service will be delivered or they will be adequately compensated.'[673] 'At present … BHCs have the discretion to change booking slots and do not incur any liability if they fail to deliver.'[674]

AGEA also submits that '[r]eordering of the load order of vessels in the shipping stem should only be allowed in certain … circumstances and with full transparency in the decision-making process.' The reason proposed for this is that '[o]therwise, BHCs may assert that delays were encountered in getting stock to port or insufficient stock was accumulated, but AWEs would never know if that was the case.'[675]

---

668 Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 14.6, p. 32.

669 Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 14.7, p. 32.

670 Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, Schedule 1, para K2(ii), p. 48.

671 Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 14.2, p. 31.

672 Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009,para 14.2, p. 31.

673 Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 14.3, p. 31.

674 Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 14.3, p. 31.

675 Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 14.5, p. 31.

4. ***Entitlement should not be a basis on which an ability to export is determined***

AGEA submits that the 'ability to export stock should not be subject to BHC being satisfied that AWEs have stock available because':

(i) 'BHCs control the ability of AWEs to get stock to port and accumulation.'

(ii) 'BHCs can allow their stock to sit in port, taking up accumulation space … [and] therefore have the ability to manipulate the logistics of getting stock to port to serve their own interests'; and

(iii) 'AWEs enter into forward sale contracts' under which they have legal title to wheat 'but this would not be apparent from BHCs' system'.[676]

5. ***The capacity allocation process should be completely transparent***

AGEA submits that there 'must be complete transparency in relation to capacity allocation or an independent person should be appointed to make decisions about capacity allocation.'[677]

AGEA submit that capacity could be allocated by way of an auction process whereby:

> *'AWEs can bid for capacity by port, for any month at … the export out-loading charge … The initial tender should take place as early as possible, with the full annual capacity put up for tender. In each tender, AWEs can bid for a maximum of 25% capacity in each port. The tender should be operated by an independent third party … Tenders for under-subscribed capacity could then be held at intervals to be determined. Where a tender is oversubscribed, the capacity should be issued on a pro-rated basis …*
>
> *Where storage capacity at port is limited … capacity should be allocated on the basis that a port user has access to storage facilities for [an appropriate] … period … to allow the user to accumulate and ship their vessel.'*[678]

6. ***Dispute resolution process for operational matters***

AGEA submits that the PTSPs must 'contain a clear dispute resolution mechanism whereby disputes [in relation to the PTSPs] may be referred to an independent umpire for a binding decision to be made within 24 hours'. The reason proposed for this is that '[i]f a dispute is not resolved within 24 hours, the opportunity to export stock may be lost because a slot may have been allocated to another party.'[679]

7. ***Varying the PTSPs***

AGEA submits that the access provider's right to unilaterally vary the PTSPs 'is inconsistent with the requirement of clarity and certainty' and notes that BHCs 'are

---

676 Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 14.4, p. 31.

677 Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 14.8, p. 32.

678 Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 14.8, 14.10, pp. 32-33.

679 Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 14.11, p. 32.

only required to "consult" with AWEs before implementation of the varied terms and conditions.'[680]

#### 12.4.1.3 Specific comments on GrainCorp's proposed PTSPs

1. ***PTSPs must contain certain provisions***

AGEA submits that the PTSPs must provide:[681]

(i) that if the access seekers 'pay the vessel nomination fee and are allocated an estimated load date, BHCs must provide the necessary services to allow … load[ing of] the vessel (within a three day spread), failing which BHCs will be liable for any loss or damage' suffered;

(ii) 'transparency as to how the BHCs accept vessel nominations and provide vessel slots';

(iii) 'mutual rights to terminate on the grounds of force majeure';

(iv) 'a dispute resolution mechanism whereby disputes may be referred to an independent 'umpire' for a binding and timely decision' within 24 hours.

2. ***The 'risk assessment' process in the PTSPs is not transparent and is based on factors that are largely within GrainCorp's knowledge or control.***[682]

AGEA note that under the PTSPs, GrainCorp 'has 7 business days of receipt of a Cargo Nomination Application to undertake a risk assessment and GrainCorp will accept or decline a Cargo Nomination Application based on a risk assessment that takes into account the criteria in clause 3.1.'

AGEA submits that the 'factors listed in clause 3.1 include factors that are largely within GrainCorp's knowledge or control (see clauses 3.1.2 to 3.1.5)' and that the 'process for undertaking risk assessments is not transparent and does not show how the process will work in practice.'[683]

Examples AGEA give to support this argument is that:

(i) 'under clause 3.1.2 GrainCorp may take into account "confirmation to GrainCorp that [the exporter] will have sufficient grain tonnage of the relevant grade (at GrainCorp, approved or non-approved storage facilities) against the CAP for the nominated cargo."' AGEA submit that in 'the vast

---

680 Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para K2(vii), p. 48.

681 Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 4.17(h), p. 14.

682 AGEA's comments in headings 2 and 3 are specific to GrainCorp and do not apply to other bulk handling companies.

683 Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, Schedule 3, p. 54.

majority of circumstances, GrainCorp will have access to this information';[684]

(ii) '[i]n relation to clauses 3.1.3 and 3.1.4, it is likely that GrainCorp or its contractors will accumulate the grain as the wheat will most likely be under the control of GrainCorp, as per its Storage & Handling Agreement.'[685]

(iii) AGEA also notes in relation to clause 3.1.3 that 'GrainCorp may accept or decline a Cargo Nomination Application based on confirmation that the exporter has "contracted sufficient rail and/or transport to accumulate the grain tonnage."' AGEA submits that this 'suggests that GrainCorp would be likely to discriminate in favour of applicants who use GrainCorp's rail services.'[686]

(iv) '[c]lause 3.1.5 provides that GrainCorp may take into account whether "GrainCorp has available and sufficient intake, grain segregation, storage and shipping capacity at the Port Terminal that will allow loading of the grain onto the nominated cargo."' AGEA submit that 'GrainCorp controls Port Terminal intake, grain segregation, storage and shipping capacity.'[687]

3. ***The dispute resolution process in the PTSPs are too slow and do not protect the access seeker's interests.***

AGEA submits that by the time a client has the opportunity to 'serve an escalation process' under the dispute resolution process in the PTSPs, the 'client will most likely have lost its spot'. Therefore, the 'dispute mechanism does not protect the interests of clients by providing a speedy mechanism for resolving disputes.'[688]

#### 12.4.1.4 General comments on proposed clause 8.4 – 'Operational Decisions'

1. ***The arguments raised in relation to the PTSPs are also relevant to the clauses on Operational Decisions***

AGEA submits that its arguments in relation to the PTSPs (as set out above) are also relevant to the clauses in the proposed Undertaking dealing with 'Operational Decisions'.[689]

---

684 Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, Schedule 3, p. 54.

685 Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, Schedule 3, p. 54.

686 Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, p.11.

687 Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, Schedule 3, p. 54.

688 Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, Schedule 3, p. 54.

689 Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 15.1, p. 33.

2. ***The criteria GrainCorp can take into account when making Operational Decisions are largely subjective and create uncertainty***

AGEA submits that GrainCorp's discretion in making Operational Decisions 'is too wide and subjective' and that access seekers 'need the certainty of knowing shipping slots will be available.'[690]

AGEA propose that this could be achieved by having PTSPs that 'clearly define the obligations to accept vessel nominations', whereby if the access seeker 'fails to get wheat to port by the load date' they 'forfeit the booking fee', which would protect GrainCorp's interests.[691]

#### 12.4.1.5 Specific comments on proposed clause 8.4 – 'Operational Decisions'

1. ***GrainCorp can determine priority of a particular vessel based on factors within its control***

AGEA note that clause 8.4(d)(i) 'entitles BHCs to make Operational Decisions to give priority to vessels based on the "lead time given between nomination and vessel ETA and likely availability of sufficient Bulk Wheat at the Port Terminal prior to vessel ETA"'.[692]

AGEA submits that GrainCorp controls 'the movement and accumulation of wheat at port.'[693]

2. ***The objectives GrainCorp can take into account when making Operational Decisions are vague and provide opportunities for GrainCorp to restrict access***

AGEA submits that clause 8.4(d)(ii) 'provides opportunities for BHCs to restrict access to port terminal services' and are uncertain.[694] In particular, AGEA submits that:

(i) under clause 8.4(d)(ii)(A), GrainCorp would not normally be 'aware of the AWE's vessel demurrage rate' and regardless, an access seeker's 'ability to negotiate a low demurrage should not result in … another vessel being given priority … because it has a higher demurrage rate.';[695] and

(ii) under clause 8.4(d)(ii)(B), as GrainCorp 'controls the movement and accumulation of wheat at port, it is within its means to show that the

---

690 Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 15.2, p. 33.

691 Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 15.2, p. 33.

692 Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 15.4, p. 33.

693 Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 15.4, p. 33.

694 Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 15.5, p. 33.

695 Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 15.5(a), p. 34.

throughput of bulk wheat is maximised by loading its vessels in priority' to other access seeker's vessels.[696]

3. ***The factors on which GrainCorp can vary a cargo assembly or queuing order are broad and some are within GrainCorp's control***

AGEA submits that clause 8.4(d)(iii) provides GrainCorp with 'very broad entitlements to vary a cargo assembly plan or queuing order of a vessel.'[697] In particular, AGEA submits that:

(i) with regard to the criterion in clause 8.4(d)(iii)(A), GrainCorp 'control[s] the movement and accumulation of wheat at port facility';[698] and

(ii) with regard to the criterion in clause 8.4(d)(iii)(A), 'vessel congestion' is not an appropriate ground.[699]

### 12.4.2 Riverina (Australia) Pty Ltd

#### 12.4.2.1 Riverina submits that the proposed Undertaking engenders uncertainty and discriminatory conduct

Riverina submits that aspects of GrainCorp's proposed Undertaking 'engender uncertainty, lack of transparency and may possibly lead to discriminatory conduct in the treatment of users of Port Terminals and Port Terminal Services.'[700]

Riverina also submits that in 'order to provide certainty, transparency and non-discriminatory conduct':

(i) the 'Protocols be incorporated as part of the Undertaking';[701]

(ii) 'any discretion to change the terms of the … Protocols … during their respective operative periods is removed unless approved by the ACCC through an identical process to the current one occurs';[702] and

(iii) 'the Protocols are extended to include all grains exported through the Port Facilities using Port Terminal Services'.[703]

---

696 Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 15.5(b), p. 34.

697 Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 15.6, p. 34.

698 Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 15.6, p. 34.

699 Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 15.6, p. 34.

700 Riverina (Australia) Pty Ltd, Submission in relation to proposed GrainCorp and CBH access undertakings, 29 May 2009, p. 1.

701 Riverina (Australia) Pty Ltd, Submission in relation to proposed GrainCorp and CBH access undertakings, 29 May 2009, p. 1.

702 Riverina (Australia) Pty Ltd, Submission in relation to proposed GrainCorp and CBH access undertakings, 29 May 2009, p. 2.

703 Riverina (Australia) Pty Ltd, Submission in relation to proposed GrainCorp and CBH access undertakings, 29 May 2009, p. 2.

Riverina submits that these changes (amongst others) would provide 'certainty for all users to enable forward budgeting, contracting and business development and ties in … with the setting of budgets, plans and estimation of expenses and revenues for … normal 12 month forward planning processes.'[704]

#### 12.4.2.2 Riverina submits that GrainCorp retains the discretion to change non-price terms without consultation, with minimal notice to users and no requirement to compensate losses caused as a result of the exercise of this discretion.

Riverina submits that the drafting of the proposed Undertaking gives GrainCorp 'the discretion to change … non-price items without consultation, with minimal notice to users of the facility and with no compensation for losses that may be caused due to forward contract and export contract positions set for any time greater than 30 days after notification of the intended change.' Riverina submit that this 'discretion reduces certainty for Users of the Port Terminal Services.'[705]

#### 12.4.2.3 Riverina submits that information provided by publication of the shipping stem is 'laudable' and promotes competition

Riverina submits that '[s]hipping stem information is publicly accessible under the continuous disclosure requirements of the WEMA and Riverina considers that this is a laudable transparent process for detailing information to the public in general' as '[t]imely access by all market participants to relevant information promotes competition and utilisation of facilities.'[706]

#### 12.4.2.4 Riverina proposes certain amendments to the proposed Undertaking and PTSPs

Riverina proposes that clause 8.2(b) and (c) be deleted from the proposed Undertaking in their entirety.[707] These clauses related to the variation mechanism for the PTSPs.

Riverina also propose that clause 3.3.2 of the PTSPs be deleted as it is submitted that 'this discriminates against Users utilising non-approved storage facilities. Where other measures relating to grain grade, testing and other issues are met through the proscribed measures in the standard terms this is not required and introduces discriminatory treatment.'[708]

## 12.5 Revised PTSPs dated 3 June 2009

At the same time as releasing its draft decision on GrainCorp's 15 April 2009 Undertaking the ACCC commenced consultation on GrainCorp's revised PTSPs,

---

704 Riverina (Australia) Pty Ltd, Submission in relation to proposed GrainCorp and CBH access undertakings, 29 May 2009, p. 5.

705 Riverina (Australia) Pty Ltd, Submission in relation to proposed GrainCorp and CBH access undertakings, 29 May 2009, pp. 2-3.

706 Riverina (Australia) Pty Ltd, Submission in relation to proposed GrainCorp and CBH access undertakings, 29 May 2009, p. 7.

707 Riverina (Australia) Pty Ltd, Submission in relation to proposed GrainCorp and CBH access undertakings, 29 May 2009, p. 14.

708 Riverina (Australia) Pty Ltd, Submission in relation to proposed GrainCorp and CBH access undertakings, 29 May 2009, p. 16.

dated 3 June 2009 and consulted on these revised PTSPs during August 2009 as part of the draft decision consultation process (and are, therefore, referred to as the August PTSPs).

### 12.5.1 GrainCorp's proposed Port Terminal Service Protocol dated 3 June 2009 (August PTSPs)

The August PTSPs refer to a party seeking to export grain through GrainCorp's ports as a 'client'.

#### 12.5.1.1 Cargo Nomination Application Procedure

If the Client makes a request that GrainCorp load grain on a vessel at a Port Terminal operated by GrainCorp, the Client must submit a Cargo Nomination Application (CNA) form not less than 28 days prior to the commencement date of the Load Laycan (Laycan).[709]

The Client may nominate a cargo with an initial Expected Time of Arrival of less than 28 days; however acceptance of the nomination is at the sole discretion of GrainCorp, acting reasonably.[710]

A CNA must include:[711]

- the Port or Ports at which the cargo is to be loaded;
- the name of the vessel (if known);
- a 14 day Load Laycan;
- a cargo specification that outlines the grain and grade for the nominated cargo, the location of the grain and grade (at GrainCorp, approved Bulk Handling Company or non-approved storage facilities), blending requirements and other services required by the Client at the Port Terminal;
- confirmation that the Client will, if it is accumulating grain from a non-approved storage(s), operate under the applicable protocols and procedures, as advised by GrainCorp from time to time for the relevant Port Terminal;
- confirmation that the Client will/has contracted sufficient rail and/or road transport to accumulate the grain tonnage to the Port Terminal for the nominated cargo prior to the nominated Load Laycan;
- confirmation that the vessel is expected to be ready to load on arrival at the Port Terminal;
- the destination of the nominated cargo, including details of all phytosanitary and other certification requirements of the destination country;

[709] GrainCorp Operations Limited, *Revised Port Terminal Services Protocol,* 15 June 2009, clause 1.1.
[710] GrainCorp Operations Limited, *Revised Port Terminal Services Protocol,* 15 June 2009, clause 1.2.
[711] GrainCorp Operations Limited, *Revised Port Terminal Services Protocol,* 15 June 2009, clause 1.3.

- details of any special or unusual features of the nominated vessel that may impact in any way vessel loading performance (For the avoidance of doubt, Tween Decker vessels will not be accepted for loading at GrainCorp Port Terminals);

- details of the holders of any encumbrances over the commodities and the proposed release of any encumbrances.

GrainCorp requires that when receiving treated or fumigated grain by other Approved Bulk Handling Company, the Client must advise GrainCorp on submitting the CNA (and prior to delivery), the details of any chemical treatment used or planned to be used, and not deliver the grain until advised that such treatments are acceptable to GrainCorp. GrainCorp states that its Port Terminals have a nil tolerance for fumigant residues above accepted Maximum Residue Levels. Where the grain has been fumigated, the Client must provide a 'clearance certificate' stating that the commodity is free from all fumigant residues, issued by a licensed fumigator.[712]

GrainCorp will not accept a CNA outside business hours (8:00am to 4:00pm) Monday to Friday. If a Cargo Nomination is submitted outside these times, the nomination is taken to have been received at the commencement of the next business day.[713]

#### 12.5.1.2 Cargo Nomination Application Review and Acceptance Procedure

GrainCorp will complete a Risk Assessment of a CNA within 5 business days of receiving a completed CNA form. The 5 business day Risk Assessment period will commence from 8.00 AM on the first business day following receipt of a CNA. CNAs will be assessed in the chronological order they are received, using the information supplied by the Client in the CNA.[714]

The Risk Assessment will take into account all particulars of the Client's request, including the following:

- whether the information provided by the client required under clause 1 is complete and correct;[715]

- the client providing written confirmation to GrainCorp that it will have sufficient grain tonnage of the relevant grade (at GrainCorp, approved or non-approved storage facilities) for the nominated cargo;[716]

- the Client providing written confirmation to GrainCorp that it has contracted sufficient rail and/or road transport to accumulate the grain tonnage to the Port Terminal for the nominated cargo prior to the nominated Load Laycan;[717]

---

[712] GrainCorp Operations Limited, *Revised Port Terminal Services Protocol,* 15 June 2009, clause 1.4.
[713] GrainCorp Operations Limited, *Revised Port Terminal Services Protocol,* 15 June 2009, clause 1.5.
[714] GrainCorp Operations Limited, *Revised Port Terminal Services Protocol,* 15 June 2009, clause 2.1.
[715] GrainCorp Operations Limited, *Revised Port Terminal Services Protocol,* 15 June 2009, clause 2.1.1.
[716] GrainCorp Operations Limited, *Revised Port Terminal Services Protocol,* 15 June 2009, clause 2.1.2.
[717] GrainCorp Operations Limited, *Revised Port Terminal Services Protocol,* 15 June 2009, clause 2.1.3.

- Phytosanitary and market access risks, including the presence of insects in stored grain and the application of grain protectants and fumigants for grain from Approved Bulk Handling Companies or non-approved, including on-farm, storage facilities as per the GrainCorp Storage and Handling Agreement for the relevant season and/or the Wheat Port Terminal Services Agreement (Applicable post 1 October 2009);[718]

- Whether GrainCorp has available and sufficient intake, grain segregation, storage and shipping capacity at the Port Terminal that will allow loading of the grain onto the nominated vessel, taking into account:[719]

    - Other cargo(s) previously accepted by GrainCorp that appear as accepted cargo nominations on the GrainCorp Shipping Stem (see clause 2.5)

    - Sufficient capacity to receive and handle grain under the applicable protocol for accumulation by road of grain into GrainCorp Port Terminals from ex-farm and non-approved storage facilities as advised by GrainCorp from time to time;

- any other supporting information or documents in the event that issues arise which may cause any legal, regulatory, reputational or practical concerns, including the compliance with port of destination requirements and any potential event that may be a notifiable matter by GrainCorp to Wheat Exports Australia.[720]

GrainCorp will accept or decline a CNA based on a Risk Assessment that takes into account the criteria outlined in Clause 2.1.[721]

If GrainCorp accepts a Cargo Nomination Application, GrainCorp:[722]

- will assign a load date (Assigned Load Date). The Client must then pay a booking fee (in accordance with Clause 5) (Booking Fee), to confirm the accepted Cargo Nomination; and

- may impose reasonable conditions in accepting a Cargo Nomination including, the mode of transport, port operating arrangements, requirement for overtime, source of grain and if applicable, the application of the relevant protocols and procedures, as advised by GrainCorp from time to time for the relevant Port Terminals from non-approved storage facilities; and

- will notify the Client in writing of the acceptance of a Cargo Nomination and of the related Assigned Load Date, and any reasonable conditions imposed.

---

[718] GrainCorp Operations Limited, *Revised Port Terminal Services Protocol,* 15 June 2009, clause 2.1.4.
[719] GrainCorp Operations Limited, *Revised Port Terminal Services Protocol,* 15 June 2009, clause 2.1.5.
[720] GrainCorp Operations Limited, *Revised Port Terminal Services Protocol,* 15 June 2009, clause 2.1.6.
[721] GrainCorp Operations Limited, *Revised Port Terminal Services Protocol,* 15 June 2009, clause 2.2.
[722] GrainCorp Operations Limited, *Revised Port Terminal Services Protocol,* 15 June 2009, clause 2.3.

If GrainCorp declines a Cargo Nomination, GrainCorp must provide to the Client reason(s) for this decision, and will provide the reasons in writing.[723]

GrainCorp will publish 'Shipping Stem' information on its website www.graincorp.com.au in accordance with section 24(4) of the Act for all accepted CNA's (Shipping Stem) and pursuant to the obligations of wheat export port terminal service providers under the Bulk Wheat Accreditation Scheme established under the Wheat Export Marketing Act 2008 (Cth).[724]

In the event that two or more Cargo Nominations are received with identical or similar Laycans (i.e. within 5 business days of each other), and providing that all prior conditions as identified in this Protocol have been met, GrainCorp will assign an Assigned Load Date in accordance with Clause 3, in the order in which the CNAs were received.[725]

Where a Cargo Nomination requires loading from two Port Terminals, an Assigned Load Date will be allocated at both Port Terminals. In the event that a vessel is delayed during loading at the first port terminal due to:[726]

- a late or substituted vessel, the Client's failure to present sufficient cargo to the first Port Terminal or failure to pass relevant Marine, AQIS and any other survey required by regulation, the Assigned Load Date at the second load port will lose priority and be subject to a review of the Risk Assessment as detailed in Clause 2.1 and allocated a new Assigned Load Date at the second load port accordingly.

- no fault of the Client (including but not limited to weather effected loading delays, mechanical breakdown of port terminal equipment, AQIS rejection of infested grain), and providing cargo has been accumulated at the second load port by the Assigned Load Date, that vessel will retain its priority on the shipping stem at the second Port Terminal.

#### 12.5.1.3 Vessel nomination – 21 Day Notice

The Client is required to provide GrainCorp the following information no later than 21 days before the first date of the Laycan. The information will constitute a Vessel Nomination:[727]

- The name of the vessel,

- The Estimated Time of Arrival (ETA) of the nominated vessel (which must be within the Load Laycan),

- Details of the vessel length, depth and maximum air draft, or any other vessel characteristic that may inhibit or affect loading performance,

- Contact details of Ship's Agent (24 hour basis),

[723] GrainCorp Operations Limited, *Revised Port Terminal Services Protocol,* 15 June 2009, clause 2.4.
[724] GrainCorp Operations Limited, *Revised Port Terminal Services Protocol,* 15 June 2009, clause 2.5.
[725] GrainCorp Operations Limited, *Revised Port Terminal Services Protocol,* 15 June 2009, clause 2.6.
[726] GrainCorp Operations Limited, *Revised Port Terminal Services Protocol,* 15 June 2009, clause 2.7.
[727] GrainCorp Operations Limited, *Revised Port Terminal Services Protocol,* 15 June 2009, clause 3.1.

- Contact details of Cargo Agent if one employed by customer (24 hour basis),
- Contact details of ship's Captain,
- Any variations that may have been applied and accepted to the original CNA
- Details of the last three (3) cargoes carried the last three (3) ports of call and information relating to any preparations made to the vessel to ensure it passes the regulatory Marine and AQIS pre-loading surveys.

GrainCorp will then update the Cargo Nomination and Assigned Load Date for the vessel, which will be within the Laycan.

If the Client fails to comply with Clause 3.1, including an ETA later than the Laycan, the Client forfeits their Cargo Nomination and the Booking Fee.

GrainCorp will not accept a Vessel Nomination outside business hours (8:00am to 4:00pm) Monday to Friday. If a Vessel Nomination is submitted outside these times, GrainCorp will take the Confirmation to have been received at the commencement of the next business day.[728]

GrainCorp may request that the customer provide assurances of the fitness of a vessel in the form of an 'in-transit' marine surveyor report if GrainCorp (acting reasonably) assesses that the readiness of a vessel to load (Vessel Readiness to Load) presents a higher than acceptable risk of failing a Marine, AQIS or related survey. If the request is not complied with, GrainCorp may refuse to accept a vessel 'alongside' to present for the Marine, AQIS or related survey required under Regulation.[729]

The Client shall be responsible for any costs associated with an 'in-transit' marine survey, or a refusal to accept a vessel 'alongside'.[730]

GrainCorp may record any and all information relating to the Vessel Readiness to Load performance of the Client, its shipping agents and shipping lines, and may incorporate this information into relevant cargo Risk Assessment procedures.[731]

#### 12.5.1.4 Site accumulation

The Client must provide stock information no later than 21 days before the Assigned Load Date that will allow GrainCorp to develop a Site Assembly Plan (SAP) for the accumulation of the grain for delivery to the Port Terminal based on details provided in the CNA. The SAP will detail the location of the grain and grade to be accumulated for the nominated vessel from GrainCorp, Approved Bulk Handling Company or non-approved or ex-farm storage facilities.[732]

---

[728] GrainCorp Operations Limited, *Revised Port Terminal Services Protocol,* 15 June 2009, clause 3.1.
[729] GrainCorp Operations Limited, *Revised Port Terminal Services Protocol,* 15 June 2009, clause 3.2.
[730] GrainCorp Operations Limited, *Revised Port Terminal Services Protocol,* 15 June 2009, clause 3.3.
[731] GrainCorp Operations Limited, *Revised Port Terminal Services Protocol,* 15 June 2009, clause 3.4.
[732] GrainCorp Operations Limited, *Revised Port Terminal Services Protocol,* 15 June 2009, clause 4.1.

The Client and GrainCorp will be required to compile and agree the SAP prior to accumulation to the Port Terminal commencing.[733]

GrainCorp is under no obligation to receive grain at any of its port terminals against an accepted cargo nomination more than 21 days in advance of the Assigned Load Date.[734]

Without limitation, GrainCorp is not liable to the Client or any third party, or any person claiming through or on behalf of the Client, for any costs, losses or delays, whether direct or indirect, that may arise if grain is not accumulated at the Port Terminal before the Assigned Load Date for any reason.[735]

#### 12.5.1.5 Booking Fee

To confirm a Cargo Nomination, the Client must pay a non-refundable booking fee (as per the relevant Port Terminal Services and Fees Schedule for the relevant season) to GrainCorp within 3 days (Monday to Friday) of GrainCorp notifying a Client that an Assigned Load Date has been assigned to an accepted CNA. Once a CNA is accepted, GrainCorp will provide a tax invoice against which this fee is to be paid. This fee is in addition to any other fees that may be applicable to the accumulation of grain and shipping of grain for the nominated cargo. Failure to make payment in cleared funds within 3 days of such notification will cause the Client to lose any allocated Assigned Load Date.[736]

Where the Client nominates a cargo and pays the Booking Fee but it is subsequently found that the Client has failed to comply with the requirements of Clauses 1.2, 2.1.1-2.1.4, 2.3.2, 3.1, or 4.1, GrainCorp can cancel the Assigned Load Date. The Client forfeits any Booking Fee previously paid and will be required to renominate another cargo, or provide a substitute vessel in accordance with clauses 2 and 3.[737]

#### 12.5.1.6 Substituting Nominated Vessels

*Substituting vessels outside the 21 day period*[738]

Subject to Clause 5.2, no later than 21 days before the first date of the Laycan, a Client may substitute a nominated vessel for another vessel at the nominated Port Terminal for the same cargo (with a +/- 5% tolerance on cargo tonnes) without the Client being required to pay a new Booking Fee or having to re-nominate a new cargo, provided that the vessel is scheduled to arrive within 5 days of the originally Assigned Load Date. This is subject to GrainCorp having the right to alter the Assigned Load Date when a vessel is substituted by the Client.

*Substituting vessels within the 21 day period*[739]

A Client may apply to substitute a vessel at the nominated Port Terminal for the same cargo (with a +/- 5% tolerance on cargo tonnes) within the 21 day period, provided

[733] GrainCorp Operations Limited, *Revised Port Terminal Services Protocol,* 15 June 2009, clause 4.2.
[734] GrainCorp Operations Limited, *Revised Port Terminal Services Protocol,* 15 June 2009, clause 4.3.
[735] GrainCorp Operations Limited, *Revised Port Terminal Services Protocol,* 15 June 2009, clause 4.4.
[736] GrainCorp Operations Limited, *Revised Port Terminal Services Protocol,* 15 June 2009, clause 5.1.
[737] GrainCorp Operations Limited, *Revised Port Terminal Services Protocol,* 15 June 2009, clause 5.2.
[738] GrainCorp Operations Limited, *Revised Port Terminal Services Protocol,* 15 June 2009, clause 6.1.
[739] GrainCorp Operations Limited, *Revised Port Terminal Services Protocol,* 15 June 2009, clause 6.2.

that the ETA is the same as the original ETA. It is at GrainCorp's sole discretion, acting reasonably, to approve the substituted vessel. If GrainCorp approves the substitution, the Client may be required to pay a new Booking Fee and may be required to re-nominate under the procedures outlined in Clause 1.

GrainCorp will not accept notification of a request for a Substitution of a Nominated Vessel outside business hours (8:00am to 4:00pm) Monday to Friday. If a vessel substitution is submitted outside these times, the Substitution is taken to have been received at the commencement of the next business day.

#### 12.5.1.7 Loading of Vessels

Prior to loading the vessel, GrainCorp will provide the Client with an authority to load (Authority to Load) for the Client's approval. The Authority to Load will include all quality information relating to the Client's cargo.[740]

The Client must approve the Authority to Load and return to GrainCorp prior to the commencement of loading.[741]

The Client acknowledges that GrainCorp has the right to mitigate dust emissions at the Port Terminal. Such mitigation may include moisture conditioning of grain paths.[742]

Notwithstanding any other provision in this Protocol, the Client understands and accepts that matters and events beyond GrainCorp's control may occur, including, but not limited to:[743]

- changes in vessel scheduling and arrival or departure times;
- failure of vessels to pass any quarantine requirements or other inspections;
- grain quality related matters;
- vessel congestion;
- lack of performance;
- delays due to freight or other service providers; and
- rain or high winds that prevent vessel loading

which means GrainCorp cannot guarantee that all cargoes will be ready for loading, or that they can or will be loaded as scheduled. GrainCorp will try to avoid any changes or delays where possible and will keep the Client informed.[744]

[740] GrainCorp Operations Limited, *Revised Port Terminal Services Protocol,* 15 June 2009, clause 7.1.
[741] GrainCorp Operations Limited, *Revised Port Terminal Services Protocol,* 15 June 2009, clause 7.2.
[742] GrainCorp Operations Limited, *Revised Port Terminal Services Protocol,* 15 June 2009, clause 7.3.
[743] GrainCorp Operations Limited, *Revised Port Terminal Services Protocol,* 15 June 2009, clause 7.4.
[744] GrainCorp Operations Limited, *Revised Port Terminal Services Protocol,* 15 June 2009, clause 7.4.

#### 12.5.1.8 Late or Cancelled Vessels

If a vessel's Authority to Load or ETA advised under Clause 3.1 is later than 5 days after the Assigned Load Date, or the vessel has been cancelled by the Client (or related parties to the vessel) then:

- the Client forfeits any Booking Fee previously paid;[745]

- the Client must re-nominate to secure a new Assigned Load Date as per Clauses 1 and 2 and must pay a new Booking Fee;[746] and

- all grain in the Port Terminal accumulated for that nominated vessel will accrue additional storage charges (in addition to the standard storage charges). These fees are specified in the relevant Port Terminal Services and Fees Schedule for the season relating to the CAN, and apply from the sixth day after the Assigned Load Date, until such time as the grain is either loaded to a vessel or removed from the Port Terminal. Any additional fees accrued are payable prior to the outloading of the grain to a vessel or other transport.[747]

On becoming aware that the vessel will be late or that the vessel is to be cancelled, the Client must notify GrainCorp by updating the CNA form as soon as practicable. Any update to a CNA must be received by GrainCorp during normal business hours or will be deemed to have been received at the commencement of the next business day.[748]

#### 12.5.1.9 Changing Load Port

If the Client wishes to change the Load Port, they must inform GrainCorp as soon as is reasonably practicable, doing so in writing using the CNA form. Any notification of a change in Load Port must be submitted to GrainCorp during business hours. Any notification received outside business hours will be deemed to have been received at the commencement of the next business day.[749]

If the Client changes the Load Port:

- the Client forfeits any Booking Fee previously paid;[750]

- the Client must re-nominate to secure a new Assigned Load Date as per clauses 1 and 2 and must pay a new Booking Fee;[751] and

---

[745] GrainCorp Operations Limited, *Revised Port Terminal Services Protocol,* 15 June 2009, clause 8.1.1.
[746] GrainCorp Operations Limited, *Revised Port Terminal Services Protocol,* 15 June 2009, clause 8.1.2.
[747] GrainCorp Operations Limited, *Revised Port Terminal Services Protocol,* 15 June 2009, clause 8.1.3.
[748] GrainCorp Operations Limited, *Revised Port Terminal Services Protocol,* 15 June 2009, clause 8.1.4.
[749] GrainCorp Operations Limited, *Revised Port Terminal Services Protocol,* 15 June 2009, clause 9.1.
[750] GrainCorp Operations Limited, *Revised Port Terminal Services Protocol,* 15 June 2009, clause 9.2.1.
[751] GrainCorp Operations Limited, *Revised Port Terminal Services Protocol,* 15 June 2009, clause 9.2.2.

all grain in the Port Terminal accumulated for that nominated vessel will accrue additional storage charges (in addition to the standard storage charges). These fees are specified in the relevant Port Terminal Services and Fees Schedule for the season relating to the CAN, and apply from the sixth day after the Assigned Load Date, until such time as the grain is either loaded to a vessel or removed from the Port Terminal. Any additional fees accrued are payable prior to the outloading of the grain to a vessel or other transport.[752]

However, if the change in Load Port creates operational efficiencies for GrainCorp, GrainCorp, acting reasonably, may elect to waive some of (or all) Clauses 9.2.1 to 9.2.3, and assign a new Assigned Load Date with the agreement of the Client.[753]

#### 12.5.1.10 Vessels Failing Regulatory Survey

The Client is responsible for the condition and state of readiness of vessels presented to GrainCorp for loading as per relevant Marine, AQIS and any other surveys required by regulation relating to the export of grain from Australia.[754]

In the event of the Client's vessel failing an AQIS or other survey that may be required by regulation, GrainCorp reserves the right to give priority to other vessels on its Shipping Stem and to assign, at its sole discretion acting reasonably, the re-presented vessel an Assigned Load Date that can accommodate the vessel.[755]

All other items shall be treated in accordance with clause 3 of the GrainCorp Storage and Handling Agreement for the relevant season and/or the Wheat Port Terminal Services for the season relating to the CNA and clauses 5 and 6 of the Port Terminal Services Protocol shall apply.[756]

#### 12.5.1.11 Insufficient Grain Accumulated to Load Vessel

GrainCorp states that it is not liable for, and does not guarantee, cargo availability at a Port Terminal by the Assigned Load Date, regardless of the period of notification provided by the Client. The Client accepts full responsibility for the accumulation of any and all cargos.[757]

If the Client has not accumulated sufficient grain at a Port Terminal by the Assigned Load Date, and the vessel has berthed and passed all required Marine, AQIS or other relevant surveys, GrainCorp may commence to load the vessel with the available grain in such a manner as to comply with the directions of the Captain of the vessel, or the stevedore, to ensure the stability of the vessel.[758]

GrainCorp may request the movement of a part loaded vessel off the berth at the Client's expense if the next vessel on the Shipping Stem at the Port Terminal is ready

---

[752] GrainCorp Operations Limited, *Revised Port Terminal Services Protocol,* 15 June 2009, clause 9.2.3.
[753] GrainCorp Operations Limited, *Revised Port Terminal Services Protocol,* 15 June 2009, clause 9.2.4.
[754] GrainCorp Operations Limited, *Revised Port Terminal Services Protocol,* 15 June 2009, clause 10.1.
[755] GrainCorp Operations Limited, *Revised Port Terminal Services Protocol,* 15 June 2009, clause 10.2.
[756] GrainCorp Operations Limited, *Revised Port Terminal Services Protocol,* 15 June 2009, clause 10.3.
[757] GrainCorp Operations Limited, *Revised Port Terminal Services Protocol,* 15 June 2009, clause 11.1.
[758] GrainCorp Operations Limited, *Revised Port Terminal Services Protocol,* 15 June 2009, clause 11.2.

to berth and has sufficient cargo assembled to commence and complete loading.[759] A relocated vessel may be allowed back on the berth for the recommencement of loading when the balance of the cargo has been accumulated at the Port Terminal.[760]

If grain arriving at the Port Terminal from a GrainCorp Country Site cannot be loaded onto the nominated vessel due to quality reasons through no fault of the Client (excluding infestation or where the Client's cargo quality/grade specifications vary from the relevant GTA receival standards) GrainCorp will:[761]

- replace that grain with grain of the nominated grade and at GrainCorp's cost;
- deem the Client's Grain Accounting Stock Tonnes for that component of stock outside of the quality requirements referred to in Clause 11.5 to have remained at the originating GrainCorp Country Site; and
- 'stock swap' the rejected grain at a port terminal with grain of an equivalent quality profile to that specified in the CNA, and GrainCorp will assume ownership of the rejected grain at the Port Terminal.

GrainCorp will not be liable for any grain that does not meet the CNA requirement that has been sent to the Port Terminal from an Approved Bulk Handling Company or non-approved storage facilities. The Client remains the owner of this grain until it is out loaded in its entirety, and until this time, the grain will be subject to any applicable storage and related fees and charges.[762]

#### 12.5.1.12 Residual Grain at the Port Terminal

Any residual grain in the Port Terminal after completion of vessel loading or as a result of vessel cancellation will accrue an occupancy charge and fees detailed in the relevant Port Terminal Services and Fees Schedule. Under the PTSP, the Client acknowledges that GrainCorp may reposition or relocate the grain into outside storage or other off-wharf storage at the Client's cost, including storage, freight and weighing.[763]

GrainCorp will not be liable for any loss relating to the degradation of the quality of grain that has been delivered to a Port Terminal from any approved Bulk Handling Company or non-approved storages and rejected as being unfit for loading onto a vessel. The Client remains the owner of this grain at all times and until the grain is sold or removed from the Port Terminal.[764]

The limitation of GrainCorp's liability will not apply if:

[759] GrainCorp Operations Limited, *Revised Port Terminal Services Protocol,* 15 June 2009, clause 11.3.
[760] GrainCorp Operations Limited, *Revised Port Terminal Services Protocol,* 15 June 2009, clause 11.4.
[761] GrainCorp Operations Limited, *Revised Port Terminal Services Protocol,* 15 June 2009, clause 11.5.
[762] GrainCorp Operations Limited, *Revised Port Terminal Services Protocol,* 15 June 2009, clause 11.6.
[763] GrainCorp Operations Limited, *Revised Port Terminal Services Protocol,* 15 June 2009, clause 12.1.
[764] GrainCorp Operations Limited, *Revised Port Terminal Services Protocol,* 15 June 2009, clause 12.2.

- residual stock remaining in the port terminal as a result of a rejection to load to vessel by AQIS was moved to the Port Terminal from a GrainCorp Country Site;[765] or

- the Client has a cargo nomination with an Assigned Load Date commencing within 14 days of the previous vessel's completion of loading, where previously rejected grain may be included as part of that cargo;[766] or

- the Client sells residual grain to another client or agrees that the grain can be included as a component of the cargo of a vessel of another client, where cargo accumulation for that client commences within 14 days of the completion of the loading of the vessel upon which the rejected grain was originally to be loaded.[767]

#### 12.5.1.13 Dispute Resolution

If the Client wishes to dispute GrainCorp's rejection of a CNA for bulk grain export, the following procedures will apply:

1. the Client must notify GrainCorp in writing of the dispute, the reasons for the dispute and the requested resolution by 4pm the next business day after receiving the rejection notice;[768]
2. GrainCorp must use 'best endeavours' to respond to the Client within two Business Days of receiving the Dispute Notice, setting out whether GrainCorp intends to reverse its decision, and if not, must provide an explanation or basis for the decision;[769]
3. If not satisfied with the response, or if GrainCorp fails to respond within two Business Days, then the Client may serve an escalation notice on GrainCorp within the later of two Business Days of receipt of the Response or when the Response was due;[770]
4. On receipt of an Escalation Notice, GrainCorp must use all reasonable endeavours to arrange a meeting within 5 business days of the receipt between GrainCorp's Executive General Manager, Ports and New Business, and the Client to provide an opportunity for the Client to air its grievances.
5. The dispute resolution process under clause 13 does not apply to a dispute concerning the grade, quality, sampling, testing or classification of grain, which will be referred to a mutually agreed independent testing company in accordance with the relevant dispute resolution clause in the Wheat Port Terminal Services Agreement.

---

[765] GrainCorp Operations Limited, *Revised Port Terminal Services Protocol,* 15 June 2009, clause 12.3.1.
[766] GrainCorp Operations Limited, *Revised Port Terminal Services Protocol,* 15 June 2009, clause 12.3.2.
[767] GrainCorp Operations Limited, *Revised Port Terminal Services Protocol,* 15 June 2009, clause 12.3.3.
[768] GrainCorp Operations Limited, *Revised Port Terminal Services Protocol,* 15 June 2009, clause 13.1.1.
[769] GrainCorp Operations Limited, *Revised Port Terminal Services Protocol,* 15 June 2009, clause 13.1.2.
[770] GrainCorp Operations Limited, *Revised Port Terminal Services Protocol,* 15 June 2009, clause 13.1.3.

There are no further stages in the dispute resolution process.

### 12.5.2 GrainCorp's submissions in response to the Draft Decision and the August PTSPs

GrainCorp made the following submissions in response to the ACCC's draft decision and in relation to its August Port Terminal Service Protocol:

> **Section 1 - Part Terminal Services Protocols**
>
> **1.1 Introduction Port Terminal Elevation Capacity Allocation Transparency**
>
> In its Draft Determination, the ACCC requested submissions on whether GrainCorp's revised Port Terminal Services Protocols would be appropriate (if attached to a revised undertaking submitted by GrainCorp).
>
> The purpose of this section is to provide the ACCC with information on the changes GrainCorp is proposing to make to its Port Terminal Services Protocols and to demonstrate that these changes address the issues raised by the ACCC in its draft determination and the concerns raised by interested parties in their responses to the ACCC's Issues Paper dated 2 June 2009.
>
> During the process of developing the draft Undertaking, GrainCorp sought to work cooperatively with all stakeholders to ensure that the introduction of the new regulated access regime presents as few disruptions as possible to the business of providing port terminal elevation services.
>
> Following submission of the draft Undertaking on 15th April 2009, subsequent discussions with the ACCC, and on-going consultation with clients, GrainCorp took a number of steps including –
>
> 1) Introduction of a revised set of Port Terminal Protocols on 3rd June 2009, including the revision of a number of cargo nomination application criteria.
>
> 2) Allowing exporters to nominate cargos for a full shipping year (1st October to 30th September) and the publication on the web of shipping stem containing a full 'shipping year'.
>
> 3) The publication on 29th August 2009 of monthly estimated port terminal elevation capacities for all GrainCorp port terminals.
>
> 4) The development of a further revised set of Port Terminal Services Protocols for 1st October 2009.
>
> The revised Port Terminal Services Protocols balance the interests of:
>
> - The public, by ensuring that:
>
>  - GrainCorp can comply with all laws, regulations and marine and other safety requirements;
>  - the quality of export grain is not compromised; and
>  - the safe operation of GrainCorp's port terminals continues.
>
> - Exporters, by providing certainty, clarity and transparency in relation to GrainCorp's decision making under the Port Terminal Services Protocols; and

- GrainCorp, by enabling it to operate its Port Terminals efficiently and safely.

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

**1.2 Revised Port Terminal Protocols**

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

(a) Removal of the '49 day' rule.

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

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

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

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

These changes reflect both:

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

- feedback from exporters.

Of particular note is the removal of the '49 day' rule that effectively placed a cap on the maximum length of time before the proposed commencement of vessel loading that an exporter could nominate a cargo (previously exporters could not nominate a cargo more than 49 days out from the proposed commencement of vessel loading).

This rule proved to be unworkable. It was replaced with a requirement that exporters could nominate a cargo for elevation at any time between the 30th September 2009 and the date 28 days before the proposed date of elevation. (See point 1.3 below).

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

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

**1.3 Extended Cargo Nomination Period**

Submissions to the ACCC from exporters, and feedback from exporters to GrainCorp, indicated that offering the ability for exporters to nominate

'longer term' shipping programs would offer greater certainty for their export activities.

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

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

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

### 1.4 October 2009 'Interim' CNA assessment process

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

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

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

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

### 1.5 Publication of Estimated Port Terminal Elevation Capacities

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

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

GrainCorp expects that exporters will refer to both the shipping stem, and the estimated port terminal elevation capacity table, *prior* to submitting a

CNA, as a method for ensuring that there is sufficient elevation capacity available at the time they wish to ship grain.

### 1.6 Development of Revised Port Terminal Protocols

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

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

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

### 1.7 Sufficient Grain

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

This requirement has been removed. Accordingly, GrainCorp has:

a) removed any ambiguity over the concept of 'sufficient grain'; and
b) removed any perceived lack of transparency or arbitrariness associated with the nature of judgements made about what 'sufficient grain' was.

Under the Port Terminal Services Protocols, it is the responsibility of an exporter to ensure that they can accumulate a cargo in a timely manner [timely manner is defined as having sufficient grain accumulated at a terminal by the assigned load date that will allow elevation of grain to a vessel and the completion of loading in the time allocated],and that GrainCorp accepts no liability related to the failure of an exporter to do so.

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

**1.8 Initial Determination of Vessel Order**

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

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

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

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

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

**1.9 Laycan Nomination**

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

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

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

**1.10 Conclusion - Transparency of Capacity Management Processes**

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

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

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

The new regulatory regime is, in this context, an experiment that may, or may not, affect the efficiency and thus the competitiveness of Australian grain exports.[771]

GrainCorp also commented on dispute resolution under the Bulk Wheat Port Terminal Services Agreement:

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

It is appropriate that disputes arising under an executed BWPTS Agreement be treated as contractual disputes and be subject to the dispute resolution procedure in the BWPTS Agreement. The Dispute Resolution provisions in the BWPTS Agreement are robust and appropriate for the following reasons:

• The dispute resolution mechanism provides for disputes concerning the grade, quality, sampling, testing, or classification of Wheat to be referred to an independent testing facility. Users have an ability to seek adjudication of a dispute in a timely manner by an independent party with the technical expertise necessary to determine such a dispute. Historically, this procedure

[771] GrainCorp Operations Limited, *Submission in relation to Draft Decision on GrainCorp Access Undertaking*, 3 September 2009, para 1.1-1.10, p. 6-11.

has been appropriate for dealing with the type of technical disputes relating to sampling, testing or classifying Wheat;

• The Port Terminal Services Protocols which form part of the BWPTS Agreement include a very specific dispute resolution mechanism for rejection of CNAs by GrainCorp. Note that given the minimisation of almost all GrainCorp's discretion in regard to the acceptance or rejection of CNAs under the revised Protocols discussed above, GrainCorp considers rejections can be tested against objective grounds and such disputes to be very unlikely;

• For all other disputes, the dispute resolution mechanism mandates the escalation of a dispute to chief executive level, prior to the commencement of court proceedings. The ACCC has indicated that the Dispute Resolution provisions in the BWPTS Agreement as currently drafted are not sufficient.

In response to the ACCC's requirements, GrainCorp intends to amend the Dispute Resolution procedure to include:

• a clear statement of the stages of the dispute resolution process; and

• clear timeframes in which the parties must seek to resolve the dispute.

• it would not be appropriate for the dispute resolution provisions to mandate that the parties to refer a dispute to private arbitration, irrespective of the circumstances of the dispute. Private arbitration has the potential to be costly and drawn out, imposing an additional and unnecessary burden on both GrainCorp and exporters. The courts are appropriate for such disputes.

• Historically, Users have raised very few, if any, disputes in relation to the terms of the previous storage and handling agreements. Exporters have had access to binding dispute resolution under the Victorian Essential Services Commission regime for many years and have not resorted to it.

### 2.5 Operational disputes under the Port Terminal Services Protocols

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

#### *Referral of operational disputes to GTA is not appropriate*

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

GrainCorp is firmly of the view that an independent arbitrator:

• could not be fully cognisant of all relevant factors necessary to make an informed decision in the required timeframe about a complex common user port terminal operation;

• could make decisions which adversely impact on the operation of the port terminal and other users not party to the dispute.

In response to the submission made by GTA on 25 August 2009 (placed on the public register on 2 September 2009), it would not be appropriate for

operational disputes under the Port Terminal Services Protocols to be arbitrated by a GTA member because:

• GTA arbitration typically deals with disputes in relation to grain trade and commodity standards. GrainCorp does not consider that GTA members have appropriate experience in logistical matters involving the assembly of cargos and the loading of vessels at port;

• Requiring GrainCorp to comply with the determination of an independent arbitrator which overrides GrainCorp's risk assessment and other decisions, exposes GrainCorp to an unreasonable liability resulting from increased operational, environmental and safety risks; and

• GTA members may well have a conflict of interest in that decisions could directly or indirectly benefit their own operations or adversely impact their competitors.

To address the concerns of exporters, GrainCorp proposes that the dispute resolution procedures in the Port Terminal Services Protocols should apply only to a decision by GrainCorp to refuse a Cargo Nomination Application as discussed above. All other disputes should be dealt with by the robust dispute resolution procedures in the BWPTS Agreement.

This dispute resolution procedure is appropriate for the following reasons:

• GrainCorp has amended its Port Terminal Services Protocols significantly since the Draft Determination. It has responded to the ACCC's guidance by limiting GrainCorp's ability to exercise discretion. The result is that there are now very few areas which will give rise to disputes under the Port Terminal Services Protocols.

• The CNA rejection dispute resolution procedure provides for a rapid escalation process to GrainCorp senior management should an exporter be dissatisfied with GrainCorp's decision making.

• The requirement that GrainCorp provides reasons for a decision to reject a cargo nomination at the time the decision is communicated to the exporter, together with the obligation to publish the shipping stem on a daily basis, provide sufficient transparency for Users. In the event that GrainCorp did not comply with its obligations under the Port Terminal Services Protocols, Users have access to adequate information to identify these circumstances. This is in addition to the oversight already occurring by Wheat Exports Australia.

• GrainCorp will amend the Undertaking so that a breach of the Port Terminal Services Protocols is a breach of the Undertaking. A User who considers GrainCorp has breached the Port Terminal Services Protocols has the additional avenue of seeking that the ACCC enforce compliance with the Undertaking, including by commencing proceedings in the Federal Court of Australia.

Accordingly, there are extremely serious consequences for GrainCorp should it breach the Port Terminal Services Protocols. These provide a strong incentive for GrainCorp to comply with the Port Terminal Services Protocols; and

• Any other breach of the Port Terminal Services Protocols is a breach of GrainCorp's contractual obligations. A User can seek to enforce its contractual rights by pursuing the dispute resolution procedures including the ultimate right to Court proceedings.

…[772]

GrainCorp also submitted on the issue of an annual audit of capacity management processes:

> **2.9 Annual Audit of Capacity Management Processes**
>
> In its Draft Determination, the ACCC supported the submission by the Australian Grain Exporters Association (AGEA) for the inclusion of a requirement for an annual audit of GrainCorp's compliance with the non-discrimination obligations under the Undertaking. Such an audit is not warranted for the following reasons:
>
> • Submissions from interested parties have not demonstrated a need for the inclusion of an audit obligation. The cost of such an audit will be considerable, possibly up to $100,000, and would place an additional and unwarranted regulatory burden unfairly upon GrainCorp, a burden not carried by other exporters.
>
> • There are inherent difficulties in auditing GrainCorp's compliance with an obligation not to engage in discriminatory behaviour. Such an audit would be seeking to prove a negative and it is not clear that the audit would provide any meaningful insight into GrainCorp's conduct.
>
> The new cargo nomination processes provide a high level of transparency, such that there is little additional information which an audit of GrainCorp's internal processes will reveal.
>
> •GrainCorp is subject to audit by Wheat Exports Australia of matters relating conditions of its accreditation, including compliance with the Access Test. The consequences of a finding that GrainCorp did not satisfy the Access Test would expose GrainCorp to serious sanctions under the WEMA, including loss of its bulk wheat export accreditation.
>
> GrainCorp's internal independent auditor, KPMG conducts an annual audit of all GrainCorp internal processes. All company processes that relate to port terminal capacity management will be subject to annual audit by KPMG.
>
> The additional burden of an audit requirement places GrainCorp at an unfair disadvantage when compared to the operators of the Melbourne Port Terminal who are not required to meet the Access Test under the WEMA.
>
> Any discrimination in favour of GrainCorp Trading through the allocation of elevation capacity will become apparent in either the Wheat Exports Australia directed audit or the KPMG internal audits. The requirement for an audit of the type suggested by the AGEA, and supported by the ACCC, should it be enforced, would lead to a situation where the same processes would be audited three times, by three separate auditors. This represents a potentially onerous direct and indirect cost burden on GrainCorp, and a needless triplication of regulation. If such an audit is imposed, it would be reasonable for GrainCorp to seek to recover from exporters relevant direct and indirect costs.
>
> GrainCorp has offered to undertake to provide the ACCC with the results of any relevant audit conducted at the direction of the industry regulator (Wheat Exports Australia), or by the internal independent audit conducted

[772] GrainCorp Operations Limited, *Submission in relation to Draft Decision on GrainCorp Access Undertaking*, 3 September 2009, para 2.4-2.5, p. 15-18.

by KPMG. Accordingly, GrainCorp believes that no additional audit requirement is warranted.

If, despite the above, the ACCC still requires an external audit, GrainCorp is willing to accept that the ACCC can reserve the right to direct the conduct of an audit should it not be satisfied with the conduct or scope of an internal audit or one directed by Wheat Exports Australia.[773]

### 12.5.3 Submissions received from interested parties in response to the August PTSPs

#### 12.5.3.1 AGEA

AGEA made the following submissions on capacity management generally:

**Capacity Management**

1.22 It is not appropriate that the BHCs proposed Undertakings do not include binding indicative policies and procedures for managing demand for the port terminal services (ie port loading protocols), as these documents set out the key processes by which the BHCs will allocate and manage port terminal capacity. AGEA understands from the materials provided by the BHCs that ABB's port terminal services protocols will be part of its proposed Undertaking and GrainCorp's port terminal services protocols will be part of its access agreement. However, CBH's port terminal services protocols will not be part of the proposed Undertaking or the access agreement. This needs to be addressed and consistency across the BHCs requires that the protocols be part of the proposed.

1.23 AGEA notes that the ACCC considers it desirable that the BHCs have flexibility to run their operations in an efficient manner.

1.24 The BHCs have been operating their business for a significant period of time. CBH was incorporated on 4 April 1933. There are likely to be very few, if any, events that will be unforeseen or of a material adverse nature, when the contract period only runs for 12 months.

1.25 The standard terms and conditions run for 12 months. The BHCs should not be permitted to vary prices or standard terms or the Port Loading Protocols during that 12 month period. If an amendment is required, the BHCs can rely upon section 44ZZA(7).

1.26 If the ACCC accepts that BHCs should be able to amend the port loading protocols during the 12 month term and that the circumstances in which amendment should be allowed should not be limited to section 44ZZA(7), then any variation must be strictly in accordance with a mechanism to be specified in the port loading protocols whereby:

(a) A robust industry consultation process must take place.

(b) The BHC must provide the AWEs at least 3 months notice of the proposed change, in order for the AWEs to consider the proposal and enter into meaningful negotiations with the BHC and if necessary, to give AWEs time to adjust.

(c) Any dispute in relation to variations may be referred to mediation or arbitration;

---

[773] GrainCorp Operations Limited, *Submission in relation to Draft Decision on GrainCorp Access Undertaking*, 3 September 2009, para 2.9, p. 21-22.

(d) Any variations must also be subject to the non-discrimination clauses in the proposed Undertaking.[774]

AGEA made the following further submissions on capacity management:

**Capacity Management**

12.1 The port loading protocols are not appropriate for the reason that they lack sufficient clarity, certainty and transparency in relation to decision making about capacity management. Intake capacity at all ports is known. BHCs should be accountable for intake delays, which it is within their capacity to manage and control. GrainCorp accept intake from third party shippers. For GrainCorp, the intake needs to be carefully controlled to ensure efficient utilisation of port capacity. This could be achieved by GrainCorp being held accountable at the time accumulation starts.

12.2 The port loading protocols do not make BHCs accountable. Transport is pre-booked and confirmed with BHCs to meet their schedule. Late arrivals or transport delays are penalised, thereby minimising the risk of delays. BHCs should be held accountable for stocks, which are within their control at port, and delays.

12.3 Any adjustment in the shipping stem has the potential to expose AWEs to demurrage. Accordingly, the shipping stem must not be subject to change except in certain, specified circumstances and with full transparency in the decision-making process. To ensure BHCs are accountable for shipping performance and the efficient operation of the facilities, AWEs 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. The BHCs' exposure to demurrage, (and conversely right to despatch), should be calculated by reference to the vessel loading window which is provided by the BHCs and the demurrage rate linked to the Baltic Exchange.

***Nature of the inclusion of the PLPs in the proposed Undertaking and Access Agreements***

12.4 As the port terminal protocols set out the key process by which the BHCs will allocate port terminal capacity, they must be included in the proposed Undertakings and in a form that is binding. Certainty and clarity in the provision of access to port terminal services cannot be achieved without this as the minimum requirement. For similar reasons, the port terminal services agreement must also be included in and form part of the proposed Undertakings.

***Varying the Port Terminal Protocols***

12.5 As the port terminal protocols must form part of the key processes by which the BHCs will allocate port terminal capacity and form part of the proposed Undertakings, the opportunity to amend the protocols must be limited to the circumstances in which amendment of the proposed Undertakings is permitted (ie. in accordance with section 44ZZA(7).

12.6 Alternatively, any variation of the port loading protocols must only take place after consultation with the port users and within strict binding confines of terms that form part of the proposed Undertaking.

12.7 The ACCC refers to p 12 of GrainCorp's supplementary submissions, at which GrainCorp stated:

---

[774] Australian Grain Exporters Association, *Submission in relation to Draft Decisions on Port Terminal Services Access Undertakings*, 3 September 2009, para 1.22-1.26, p. 7.

"*GrainCorp envisages that it will prepare proposed changes and circulate those proposals to interested parties, along with an explanation for the amendments. The consultation process will give all interested parties sufficient time to review and respond to the proposals submitted. GrainCorp will discuss the proposals, collate, review and actively consider the responses from interested parties.*

*Depending on the level and nature of the responses, the initial proposals may be changed in order to ensure that any proposed amendments to the Undertaking are appropriate.*"

12.8 The above is a vague, non-binding description as to what GrainCorp may or may not do.

…

12.10 The discretion is such that the proposed Undertaking does not in any way ensure fair and transparent access to port terminal services.

12.11 AGEA agrees that any proposed Undertaking should include a provision allowing the ACCC to treat a breach of the amended port terminal protocols as a breach of the Undertaking

***Interaction of the Operational Decisions clause and the PLPs***

12.12 As 'Operational Decisions' are stated to constitute all decisions made in the course of providing the Port Terminal Services, they must form part of the proposed Undertaking.

**Whether the Operational Decisions clause provides an appropriate balance between providing access seekers with sufficient certainty and clarity as to their terms, effect and operation and the BHCs with sufficient flexibility in their management of the Port Terminal Services**

12.13 AGEA agrees with the ACCC's position.

12.14 Additionally, AGEA makes the following comments:

(i) GrainCorp/ABB clauses 8.4(b) and (c): do not provide any transparency or benchmarks to show that the Operational Decisions are made to ensure that fair access is provided to all AWEs.

(ii) GrainCorp/ABB clause 8.4(d)(i): it is the BHCs that control the movement and accumulation of wheat at port.[775]

In relation to GrainCorp's revised Port Terminal Services Protocol itself, AGEA made the following comments:

By way of general comment, GrainCorp's protocols do not provide transparency in relation to the exercise of GrainCorp's discretion(s) or to demonstrate how the protocol will be applied to all exporters equally. The latter comment applies to every clause in GrainCorp's protocols and is emphasised, although not repeated below to avoid repetition.

Further, it will enable the ACCC to monitor how GrainCorp allocates vessel slots to its own trading arm. For example, when GrainCorp released vessel

[775] Australian Grain Exporters Association, *Submission in relation to Draft Decisions on Port Terminal Services Access Undertakings*, 3 September 2009, para 12.1-12.14, p. 25-26.

slots, indicatively its trading arm was successful in securing 59 from 101 slots from October 2009 to September 2010.

1. **Clause 1 Cargo Nomination Application Procedure**

The above time frame is too long a lead time. GrainCorp should only need between 14 and 21 days' notice. Acceptance of the nomination should not be at GrainCorp's discretion. Acceptance of nomination must be in accordance with strict rules and regulations that are objectively ascertainable, so that it can be determined whether fair and transparent access is being provided to AWEs.

2. **Clause 1.3 Cargo Nomination Application Procedure**

The onerous requirements imposed on the access seeker cannot be satisfied at the time of completing the cargo nomination application because the information required to be provided may not be available when booking port capacity.

3. **Clause 2.1 Cargo Nomination Application Review and Acceptance Procedure**

Five days to complete a Risk Assessment is too long. In this five day period, GrainCorp will have sensitive market information and AWEs face significant risk if the information is misused due to inadequate ring fencing policies. GrainCorp should be able to advise AWEs whether it has accepted the nomination within 1 business day.

The concept of Risk Assessment has not been properly defined. GrainCorp has merely set out a number of elements that it will take into account as part of the process.

The matters which GrainCorp may take into account in making the Risk Assessment give GrainCorp the discretion to reject a nomination application on a technicality.

The elements which GrainCorp will take into account are not all consistent with the requirements that must be satisfied when the AWEs submits the nomination. For example:

**Clause 2.1.3** requires:

"*The Client provides written confirmation to GrainCorp that it **has contracted*** [emphasis added] *sufficient rail and/or road transport to accumulate the grain tonnage to the Port Terminal for the nominated cargo prior to the nominated **Load Laycan**…".*

However, under clause 1.3.6, to submit the Cargo Nomination Application, the AWEs need only provide:

"*Confirmation that the Client **will/has** contract(ed) sufficient rail and/or road transport to accumulate the grain tonnage to the Port Terminal for the nominated cargo prior to the nominated Load Laycan*" [Emphasis added]. Further to the above, it may not be possible for AWEs to actually comply, as GrainCorp retains the discretion to move grain to other GrainCorp sites, (see clause 6.23 -6.24 of the PTSA).

**Clause 2.1.5(b)** requires:

GrainCorp can discriminate when determining whether to accept a nomination if the grain enters the port from a non-GrainCorp source.

4. **Clause 2.3 Cargo Nomination Application Review and Acceptance Procedure**

If GrainCorp accepts a cargo nomination, it still may impose further conditions at any time and at its discretion. There is no defined date by which GrainCorp will advise of the Assigned Load Date, nor when it will provide reasons for declining a cargo nomination (clause 2.3.3).

5. **Clause 2.7 Cargo Nomination Application**

Clause 2.7 may result in AWEs incurring penalties at both ports, even though it is required to pay for the service at both ports.

6. **Clause 3.1 Vessel nomination**

Clause 3.1 imposes onerous requirements on AWEs. Failure to comply with the requirements may result in forfeiture of the nomination and booking fee. The requirement to confirm a booking no later than 21 days severely restricts the exporter's ability to secure the most effective chartering option and could result in additional costs of US $5 – 7 per tonne.

The requirement to have chartered a vessel is a detail that is not relevant to the provision of GrainCorp's port terminal facilities. To require this level of detail imposes a burden on AWEs to book vessels further ahead of time than is usual practice. This results in the AWEs incurring greater costs as a result of having to charter vessels with longer lead time and reduced flexibility in marketing strategies. It is not commercially viable.

The stipulation that nominations must be provided within the hours of 8.00am to 4.00pm is not consistent with business practice and is onerous given the five day time frame.

7. **Clause 3.2 Vessel Nomination – 21 Day Notice**

It is not appropriate that GrainCorp is able to exercise discretion a reject a vessel as being unfit. If it wishes to take on that role, it must be fully responsible for the consequences. No transparency is provided as how GrainCorp will exercise its discretion.

8. **Clause 3.4 Vessel nomination – record of information**

AWEs may have numerous clients who may charter a vessel on a range of different terms. AWEs should not be penalised for a FOB vessel it had no role in chartering.

9. **Clause 4.1 Site accumulation**

There is no rigour placed on GrainCorp to perform this function within an effective time period.

10. **Clause 4.4 Site accumulation**

GrainCorp is entitled to charge a fee for a service that it does not complete within the agreed times.

11. **Clause 5.1 Booking Fee**

3 days to provide cleared funds is harsh and unreasonable. Clause 5.1 would require exporters to pay without invoice or face losing a shipping position.

12. **Clause 5.2 Booking Fee**

GrainCorp has the discretion whether or not to cancel a load date, without any benchmark against which the discretion is exercised and no transparency in relation to the decision making process.

13. **Clause 6.1 Substituting Vessels Outside the 21 Day Period**

The 21 day notice period effectively denies the client the ability to perform this task.

14. **Clause 6.2 Substituting Vessels Within the 21 Day Period**

GrainCorp has the discretion whether or not to accept a substitute vessel and whether or not to apply a fee. GrainCorp's discretion can be exercised on subjective grounds, without reference to clearly ascertainable factors, and no transparency is provided as to how these discretions are to be exercised.

The requirement that the Client pay a new Booking Fee is a penalty. If a substituted vessel arrives and performs a service, GrainCorp does not incur any cost due to vessel substitution. GrainCorp may incur some administration cost (effectively the cost of updating a spreadsheet), however, a charge of $5 per tonne is excessive. A 25,000 tonne vessel could incur a charge of AU$125,000, even though it has performed its intended service. Any proposed fee should be proportionate to the cost incurred.

15. **Clause 7.3 Loading of Vessels**

GrainCorp's emission mitigation should be tightly regulated, which it is not. Adding moisture directly affects grain performance functionality. Water added to a load should be reimbursed to an exporter's grain entitlement.

16. **Clause 7.4 Loading of Vessels**

GrainCorp has an obligation to provide access to port terminal services. To promote efficiency, GrainCorp should only be excused for non-performance for failure to accumulate cargo where there is a breach by the bulk handler that is not causative of the failure to accumulate. The client should be entitled to compensation for GrainCorp's non-performance.

17. **Clause 8 Late or Cancelled Vessels**

A five day performance restriction is unreasonable and does not take into account real world conditions of vessel chartering, weather conditions and market. Further, the imposition of charges does not correlate with costs incurred by BHCs. BHCs may commingle stock, yet AWEs may be charged until a performing vessel is reinserted into the queue.

18. **Clause 9.2 Changing Load Port**

The client may decide to mitigate costs due to GrainCorp's poor performance by moving a vessel to a different port. In that event, the client should not forfeit the booking fee and GrainCorp should be required to re-pay the booking fee.

19. **Clause 10 Vessels Failing Regulatory Survey**

In many cases, the client does not directly engage the vessel and should not be responsible for the condition and state of readiness of the vessel.

20. **Clause 11.1 Insufficient Grain Accumulated to Load Vessel**

Notwithstanding the obligation to provide access to port terminal services, GrainCorp purports to exclude any responsibility for complying with its contractual obligations. GrainCorp formulates site assembly plans and

controls port access. GrainCorp also controls significant upcountry resources for accumulation. GrainCorp should not be excused from performance or be able to exclude liability for failing to perform its contractual obligations or charge additional fees for a task it controls. Further, the AWEs are required to accept responsibility for services that it has paid GrainCorp to perform.

**21. Clause 13 Dispute Resolution**

AGEA refers to its comments at item 32 in Schedule 4.[776]

## 12.6 ACCC's views

### 12.6.1 Introduction

The ACCC has identified the following issues as arising for consideration in relation to the proposed 'Capacity Management'.

- the nature of the inclusion of the PTSPs in the proposed Undertaking and Access Agreements;
- the process to be applied in varying the PTSPs;
- whether the substance of the PTSPs provide an appropriate balance between providing access seekers with sufficient certainty and clarity as to their terms, effect and operation; and GrainCorp with sufficient flexibility in their management of the Port Terminal Services;[777]
- whether the Operational Decisions clause provides an appropriate balance between providing access seekers with sufficient certainty and clarity as to their terms, effect and operation; and GrainCorp with sufficient flexibility in their management of the Port Terminal Services.

The ACCC considers it important that the proposed Undertaking provides for sufficient certainty and clarity in its terms, effect and operation in order to enable the access provider and access seekers to be adequately aware of their respective rights and obligations, and thereby avoid unnecessary costs, monetary or otherwise, when utilising the processes set by the proposed Undertaking.

The ACCC considers that an undertaking that achieves these aims is in the public interest, would promote the interests of persons who might want access to the service, while also protecting the legitimate business interests of the provider, and would allow for an enforceable undertaking.

---

776 Australian Grain Exporters Association, *Submission in relation to Draft Decisions on Port Terminal Services Access Undertakings*, 3 September 2009, Schedule 1, p. 47-52.

777 The ACCC has provided draft views on both the 15 April 2009 PTSPs and the August PTSPs.

### 12.6.2 Nature of the inclusion of the PTSPs in the proposed Undertaking and Access Agreements

#### 12.6.2.1 PTSPs form part of the proposed Undertaking

Given the PTSPs set out the key process by which GrainCorp will allocate port terminal capacity (or in GrainCorp's words 'the protocols are the primary terms which apply to the provision of Port Terminal Services'[778]), it is the ACCC's view that the inclusion of the PTSPs in the proposed Undertaking is appropriate.

#### 12.6.2.2 PTSPs may be offered as part of the Access Agreements

In April 2009, GrainCorp undertook to offer to include the initial PTSPs set out in Schedule 3 in the Access Agreements but the wording of clause 8.2(a) of the proposed Undertaking does not **oblige** GrainCorp to include the PTSPs in the Access Agreements.[779]

It appears however that GrainCorp is of the view that the wording of clause 8.2(a) does impose an obligation as they have also submitted that 'the Undertaking **requires** the access agreement to contain the Port Terminal Services Protocols' (emphasis added).[780]

As the ACCC understood this proposal (assuming GrainCorp is obliged to include the PTSPs in the Access Agreement), the initial PTSPs would form part of the contractual terms and conditions that GrainCorp agrees to provide to access seekers for the term of the Access Agreement. However, under the 15 April 2009 proposed Undertaking, GrainCorp could also vary the PTSPs subject to the terms in the Undertaking during the term of the Access Agreement.

In the ACCC's view, the practical result of this provision does not provide for sufficient certainty and clarity in its terms, effect and operation of the proposed Undertaking because:

(i) the PTSPs set out GrainCorp's policies and procedures for managing demand for the Port Terminal Services and as a result, there should only be one version of the PTSPs that applies to bulk wheat;

(ii) for example, if GrainCorp enters into an Access Agreement with an access seeker with the initial PTSPs in the form they exist in the proposed Undertaking in January – then in March GrainCorp varies the PTSPs, and then in May enters into an Access Agreement with a second access seeker offering a different version of the PTSPs – unless the first access seeker agrees to a contractual change, GrainCorp will be contractually obliged to comply with two, possibly competing, versions of the PTSPs.

In light of this, the ACCC's view is that clause 8.2(a) of GrainCorp's 15 April 2009 Undertaking is not appropriate in its current form.

---

778 GrainCorp Operations Limited, *Submission to the ACCC*, 15 April 2009, para 9.4, p. 54.

779 GrainCorp Operations Limited, *Port Terminal Services Access Undertaking*, 15 April 2009, clause 8.2(a).

780 GrainCorp Operations Limited, *Submission to the ACCC*, 15 April 2009, para 9.4, p. 54.

The ACCC recommends that while the PTSPs should be part of the Undertaking (as appears to be offered), a provision should be included in the Undertaking that obliges GrainCorp to comply with the PTSPs when providing the Port Terminal Services on the terms contained in the PTSPs that are in existence at the date the access undertaking came into operation or, if relevant, as varied from time to time in accordance with the variation methodology in the Undertaking (discussed further below).

When combined with the recommendation in relation to the variation methodology (set out below), it is the ACCC's view that this approach is more appropriate as it would maintain a flexible and pragmatic approach to variations of the PTSPs – allowing GrainCorp to respond to operational concerns – while providing access seekers with sufficient certainty and clarity in relation to the terms, effect and operation of the proposed PTSPs.

### 12.6.3 Varying the Port Terminal Services Protocols

It is the ACCC's view that the process to be applied in the proposed Undertaking when seeking a variation of the PTSPs provides too much discretion to GrainCorp and insufficient certainty for access seekers. Given the PTSPs form part of the key processes by which GrainCorp will allocate port terminal capacity, their variation should, in most circumstances, take place after consultation with the port users.

As discussed above, the ACCC has recommended that the initial PTSPs should be part of the Undertaking (as appears to be currently offered by GrainCorp).

In order to vary the PTSPs under the proposed Undertaking, a provision should be included in the Undertaking that obliges GrainCorp to comply with the terms in the PTSPs when providing the Port Terminal Services as the PTSPs existed on the date the access undertaking came into operation or, if relevant, as varied from time to time in accordance with the variation methodology in the Undertaking. In addition, a provision should be included in the undertaking that states that any variations to the PTSPs must be made in accordance with, and are subject to the non-discrimination provisions in the Undertaking.

The variation methodology for the PTSPs in the Undertaking would require:

(i) an adequate consultation process (the proposed methodology set out at page 12 of GrainCorp's supplementary submission could be used as a base) where access seekers are given a sufficient degree of notice about amendments, with the PTSPs as varied from time to time being required to be published on its website and provided to the ACCC within 5 days.
(ii) in recognition of the fact that parties may not respond to GrainCorp's communications regarding proposed changes, in certain specifically defined circumstances (i.e. force majeure situations) that are set out clearly in the Undertaking, the amendments may be implemented unilaterally.
(iii) and a clause would be included in the Undertaking obligating GrainCorp to comply with the PTSPs (as amended from time to time).

The ACCC notes that this proposal leaves GrainCorp with the flexibility to vary the PTSPs and lies somewhere in the middle of the spectrum of possible PTSP variation

mechanisms that could be included in the Undertaking. On one end would be the mechanism to allow GrainCorp the flexibility to amend the PTSPs at will, and at the other, the mechanism of only allowing amendments to the PTSPs in accordance with the formal undertaking variation mechanism in section 44ZZA(7) of the Act.

The ACCC notes AGEA's submission that, as an alternative to variation of the PTSPs solely under section 44ZZA(7) of the TPA, variations to the PTSPs must take place in accordance with a strict mechanism set out in the Undertaking, and that a provision should be included in the Undertaking that allows the ACCC to treat a breach of the amended port terminal protocols as a breach of the Undertaking.

While the ACCC recognises that the recommended 'model' has some risks (given that the ACCC will not review all proposed amendments to determine their appropriateness) it is the ACCC's view that this risk is mitigated by:

- the inclusion of a robust consultation mechanism;
- the inclusion of a provision allowing the ACCC to treat a breach of the amended PTSPs as a breach of the Undertaking (that is, clarifying that GrainCorp will comply with the PTSPs, as amended from time to time);
- the recommendation for a robust non-discrimination provision and the inclusion of a provision that any variation to the PTSPs must be made in accordance with and are subject to the non-discrimination provisions in the undertaking; and (iv) the fact that if there are issues with this particular model, the term of the Undertaking is relatively short and the variation mechanism could be strengthened in any future Undertaking, if necessary.

It is the ACCC's view that this approach is appropriate as it would maintain a flexible and pragmatic approach to variations of the PTSPs – allowing GrainCorp to respond to operational concerns without having to formally vary the Undertaking itself – while providing access seekers with sufficient certainty and clarity in its terms, effect and operation of the key processes by which GrainCorp will allocate port terminal capacity as provided by the PTSPs.

To ensure that the ACCC can enforce PTSPs that have been varied, a provision should be included in the Undertaking that obliges GrainCorp to comply with the Port Terminal Services Protocols (as varied from time to time).

The ACCC considers that a detailed consultation mechanism such as one similar to that outlined in GrainCorp's supplementary submission[781], an obligation on GrainCorp to comply with the terms of a varied PTSP and any variations being subject to the non-discrimination provisions in the Undertaking would likely be considered appropriate in the circumstances.

### 12.6.4 The substance of the proposed April PTSPs

The ACCC has considered two issues. Firstly, whether the provisions in the Undertaking and the transparency provisions in the WEMA are sufficient to adequately deal with capacity management issues, and if not, whether or not the PTSPs provide for sufficient certainty and clarity in its terms, effect and operation in

[781] GrainCorp Operations Limited, *Supplementary submission to the ACCC*, 24 June 2009, p. 12.

order to enable the access provider and access seekers to be adequately aware of their respective rights and obligations, and thereby avoid unnecessary costs, monetary or otherwise, when utilising the processes set by the proposed PTSPs and Undertaking.

#### 12.6.4.1 Transparency provisions in the WEMA

With regard to the first consideration, the ACCC notes that the very premise behind the requirements under the WEMA for Bulk Handlers to provide an access undertaking to the ACCC is that these bulk handlers are vertically integrated and an access undertaking is required to provide a level of constraint against the potential for discrimination in the provision of port terminal services. Further, the transparency provided by publication of certain information in relation to the shipping stem does not, in the ACCC's view, by itself, provide satisfactory protection against the ability for GrainCorp to discriminate in favour of its own trading arm.

#### 12.6.4.2 Whether the PTSPs dated 15 April 2009 provide an appropriate balance between providing access seekers with sufficient certainty and clarity as to their terms, effect and operation and GrainCorp with sufficient flexibility in their management of the Port Terminal Services.

With regard to the second consideration, on the one hand, given the ACCC considers it important that the proposed Undertaking provides for sufficient certainty and clarity in its terms, effect and operation in order to enable GrainCorp and access seekers to be adequately aware of their respective rights and obligations.

In light of this, the ACCC also recognises that the process of vessel nomination, acceptance and rejection and overall capacity management is an evolving process. This is (at least in part) due to the existence of a range of possible exogenous developments which can precipitate a change to any previously stated plan. As a result, the ACCC recognises that the maintenance of a flexible and pragmatic approach is required to maintain the overall efficiency of the system.

On balance, the ACCC's view is that the proposed PTSPs dated 15 April 2009 are, on the whole, unlikely to be appropriate because they are unclear and outdated. The following comments on the particular provisions of the PTSPs dated 15 April 2009 are however made in recognition of the challenge of balancing access seekers' interests and GrainCorp's legitimate business interests, and are made under the headings used in the PTSPs. The ACCC notes that some of these concerns are addressed in the revised PTSPs that were annexed at **Annexure B** of the Draft Decision.

1. ***Cargo Nomination Application Procedure***

The ACCC's view is that the provision as currently drafted is not appropriate for the following reasons:

(i) in relation to clause 2.2.4, the criteria and the process to be applied in assessing whether or not an access seeker has provided 'confirmation' that it will comply with 'applicable protocols and procedures' is unclear and requires further explanation (this is relevant as it is a factor in GrainCorp's 'risk assessment' under clause 3.1.1). In addition, the reference to the 'applicable protocols and procedures, as advised by GrainCorp from time

to time for the relevant Port Terminal' is also unclear as it is uncertain to what protocols and procedures an access seeker is providing confirmation they will operate under.

(ii) in relation to clause 2.2.5, the criteria and the process to be applied in assessing whether or not an access seeker has provided 'confirmation' that a 'vessel is expected to be ready to load on arrival' is unclear and requires further explanation (this is relevant as it is a factor in GrainCorp's 'risk assessment' under clause 3.1.1).

2. ***Cargo Nomination Application Review and Acceptance Procedure***

The ACCC's view is that the provision as currently drafted is not appropriate for the following reasons:

(i) in relation to clause 3.1, the criteria to be used and the process to be applied by GrainCorp in its 'risk assessment' is unclear and requires further explanation. While a series of factors that will be taken into account are listed, the list is non-exhaustive, and GrainCorp has noted at page 95 of its supplementary submission a range of other considerations it will take into account when considering timely accumulation of a grain cargo that it considers as relevant to this assessment process.

(ii) in relation to clause 3.1.2, the requirement to demonstrate 'sufficient grain tonnage of the relevant grade' is unclear and is unlikely to be in the interests of persons who might want access to the service given the pre-existing financial exposure of access seekers to demurrage and the existence of booking and nomination fees. The ACCC is of the view that a financial incentive exists for access seekers to ensure that they have, or can, acquire required cargo and have robust assembly plans.

(iii) in relation to clauses 3.1.3 to 3.1.6, certain criteria and processes that are within GrainCorp's control or requires subjective determinations by GrainCorp are unclear and require further explanation (for example, 'phytosanitary and market access risks', 'whether GrainCorp has available and sufficient intake grain segregation, storage and shipping capacity', 'reserving capacity' [the ACCC notes that GrainCorp has submitted it has removed the 'reserving capacity' provision from its revised PTSPs], 'any other supporting information or documents', 'reputation or practical concerns').

(iv) in relation to clause 3.1 and 3.2, although it is clear that the risk assessment must be conducted within 7 days (the ACCC notes that the revised PTSPs state that the risk assessment must be conducted within 5 days), no timeframe is set within which GrainCorp must accept or decline a CNA based on that risk assessment. As a result, the current drafting allows a risk assessment to be conducted within 7 days but the decision to accept or decline never to be made. This current drafting provides excessive flexibility for GrainCorp and insufficient certainty for access seekers as the process is open-ended with GrainCorp not being obliged to make the relevant decision within a set timeframe.

(v) in relation to clause 3.3.2, there is a lack of clarity about the criteria to be used and process that GrainCorp will apply in determining to impose 'reasonable conditions' when accepting an access seeker's CNA and a lack of clarity as to what certain terms mean (for example, 'port operating arrangements', 'source of grain').

(vi) in relation to an acceptance of a CNA, the current drafting does not require GrainCorp to communicate an acceptance to an access seeker, and in relation to clause 3.4, GrainCorp is not obliged to provide reasons for decision within a set timeframe. The open-ended nature of this process provides excessive flexibility for GrainCorp and insufficient certainty for access seekers.

3. ***Load Date***

The ACCC's view is that the provision as currently drafted is not appropriate because in relation to clause 4.1, the criteria used and the process to be applied in the exercise of GrainCorp's discretion as to the assigning of an estimated time of loading and new queuing order is unclear and requires further explanation.

4. ***Site Accumulation***

The ACCC's view is that the provision as currently drafted is not appropriate because in relation to clause 5.3, it is unclear how the exclusion of liability provision in the PTSPs would operate in conjunction with an exclusion of liability provision in an Access Agreement. It is the ACCC's view that it is more appropriate that an exclusion of liability provision be contained in the Access Agreement.

5. ***Booking Fee***

The ACCC's view is that the provision as currently drafted is not appropriate for the following reasons:

(i) in relation to clause 6.1, the requirement for an access seeker to make payment in cleared funds within 24 hours of GrainCorp notifying them that a Load Laycan and Queuing Order has been assigned to their accepted CNA, otherwise the access seeker will lose their Load Laycan and Queuing Order, does not appropriately balance the legitimate business interests of GrainCorp and the interests of access seekers – as GrainCorp is under no set timeframe within which to notify an access seeker, yet on the other hand imposes a 24 hour deadline on an access seeker to pay a booking fee, with penalties applying for failure to do so.

(ii) in relation to clause 6.2, there are certain criteria and processes that are within GrainCorp's control or requires subjective determinations by GrainCorp within the clauses identified (and discussed above) as grounds for requiring an access seeker to renominate another cargo or provide a substitute vessel that are unclear and require further explanation.

6. ***Substituting Nominated Vessels***

The ACCC's view is that the provision as currently drafted is not appropriate because in relation to clause 7.1, the criteria used and the process to be applied in determining

whether a vessel is 'materially similar' to the original nominated vessel is unclear and requires further explanation.

7. ***Late or Cancelled Vessels***

The ACCC's view is that the provision as currently drafted is not appropriate because the details that must be provided by an access seeker to GrainCorp in a Notice of Readiness is unclear and needs further explanation.

8. ***Vessels Failing Regulatory Survey***

The ACCC's view is that the provision as currently drafted is not appropriate because in relation to clause 9.4, the circumstances under which GrainCorp may recommend a survey in connection with clause 3.1.6 are unclear and require further explanation. The current drafting of this clause provides too much discretion to GrainCorp and insufficient certainty for access seekers as GrainCorp can order an access seeker to incur the expense of a survey for what appears to be an excessively wide range of reasons – including, for example, if GrainCorp has any 'practical' concerns.

9. ***General comments***

Certain terms used in the proposed Undertaking are not applicable to the PTSP or the proposed Undertaking (for example, in the definition of 'Intention Notice', a reference is made to a 'Vessel Nomination Application', however this term is not defined in either the proposed Undertaking or the PTSPs), or are used inconsistently (for example, the PTSPs refer to the Port Terminal Rules (in clause 8.2(d)) – which is not a defined term and appears to be referring to the PTSPs). The lack of consistency (or references to outdated terms) can lead to confusion as to the operation of the PTSPs and the Undertaking for access seekers and GrainCorp and should be remedied.

### 12.6.5 The August PTSPs

#### 12.6.5.1 The ACCC's views

It is the ACCC's view that while the August PTSPs cover some of the issues raised in the recommendations set out in the Draft Decision on GrainCorp's 15 April 2009 proposed Undertaking, it considers that additional amendments would be necessary in order for them to be considered appropriate.

The ACCC notes that the following clauses in the revised PTSPs represent a non-exhaustive list of the areas in the PTSPs that would benefit from greater clarity and transparency:

- Clause 2 - the ACCC is of the view that the cargo nomination assessment process could be much clearer and more transparent.
- Clause 2.4 – the ACCC is of the view that more certain timeframes need to be applied to the cargo nomination assessment process.
- Clause 7 – the ACCC is of the view that the process relating to vessel loading needs to be clarified and more clearly defined.
- Clause 13 – the ACCC is of the view that timeframes and processes for dispute resolution under the PTSPs should be clearer.

Finally, the ACCC notes that the following represent some areas of the PTSPs that may benefit from greater flexibility:

- Clause 1.3 – regarding the information required by the Client to submit a Cargo Nomination Application to GrainCorp.

***Submissions from interested parties***

The ACCC notes that submissions by AGEA on the August PTSPs can be summarised as follows:

(i) the meaning of certain terms are unclear;

(ii) the circumstances in which particular provisions will operate are unclear;

(iii) certain provisions are either not binding on GrainCorp or are unduly burdensome on access seekers (for example, requiring the provision of information that may not be available when booking port capacity or allowing GrainCorp to take into account matters within its control);

(iv) certain provisions are open-ended;

(v) certain provisions lack transparency, provide insufficient guidance as to how GrainCorp's discretion will be exercised or allow GrainCorp to make subjective decisions.

The substance of AGEA's arguments is that there are certain terms and processes set out in the August PTSPs that AGEA considers could be more clearly defined and / or that could be spelt out in greater detail as to their applicability.

The ACCC agrees that as the PTSPs form part of the key processes by which GrainCorp will allocate and manage port terminal capacity, it is important that the proposed Undertaking provides for sufficient certainty and clarity in its terms, effect and operation in order to enable GrainCorp and access seekers to be aware of their respective rights and obligations.

However, the ACCC also recognises that the process of vessel nomination, acceptance and rejection and overall capacity management is an evolving process. This is (at least in part) due to the existence of a range of possible exogenous developments which can precipitate a change to any previously stated plan. As a result, the ACCC recognises that a flexible and pragmatic approach is required to maintain the overall efficiency of the system.

Therefore, the ACCC considers that the specific level of prescription suggested by AGEA in relation to the August PTSPs is, at this particular point in time, unnecessary in light of the combined effect of the ACCC's recommendations in the Draft Decision for clearer and more transparent PTSPs (which to a large extent reflect the substance of AGEAs comments on the revised August PTSPs) and the specific recommendations in relation to the non-discrimination and no-hindering access provisions that were included in the draft decision on the proposed Undertaking dated 15 April 2009 – both of which should be reflected in any revised Undertaking submitted to the ACCC.

Expanding on this, the ACCC recommends that GrainCorp's proposed revised Undertaking, in order to be considered appropriate by the ACCC, include robust non-discrimination and no-hindering access clauses, supported by the ability of the ACCC to request an audit of compliance with the non-discrimination clause.

These measures, together with the recommendations in relation to the Capacity Management provisions in the Undertaking should achieve the objective of providing fair and transparent access to port terminal services for access seekers by providing for sufficient certainty and clarity in its terms, effect and operation in order to enable the access provider and access seekers to be adequately aware of their respective rights and obligations, and thereby avoid unnecessary costs, monetary or otherwise, when utilising the processes set by any proposed revised Undertaking.

***Non-discrimination and specific provisions in the revised August PTSPs***

The ACCC notes that the robust non-discrimination provision and a no-hindering access provision that would be required by the ACCC in a revised undertaking (the particulars of which are contained in the Non-Discrimination chapter) are intended to constrain the ability of GrainCorp to exercise discretion under its PTSPs in an anti-competitive manner, including in relation to:

- Clause 1.34 – where a Cargo Nomination Application requires the Client to provide 'proof of ownership' of grain;
- Accumulating cargos from non-GrainCorp storages.

***Dispute Resolution***

The ACCC's view is that the provision as currently drafted is not appropriate because the current drafting of the dispute resolution process provides too much discretion to GrainCorp and insufficient certainty for access seekers. This is for the reasons that the process is open-ended and the final stage leaves the matter in GrainCorp's hands with GrainCorp not obliged to provide reasons for the decision within set times and no timeframes for the ultimate resolution of the dispute.

The ACCC's view is that the provision would be appropriate if the process applied to all disputes concerning the operation of the PTSPs (other than those disputes listed in clause 10.1.5), it was not open ended, reasons for decision were required to be given and set timeframes for final decisions to be made and the recommendations in the Non-Discrimination chapter for a robust non-discrimination clause in the Undertaking are accepted.

The ACCC notes that GrainCorp has agreed 'that use of the existing arbitration process offered by GTA would be an appropriate mechanism for the settlement of disputes relating to the provision of port terminal services'.[782]

The ACCC does not consider it necessary that disputes under the PTSPs be able to be referred to an independent arbitrator at this particular point in time, as the requirement may inappropriately affect the legitimate business interests of GrainCorp in being able to run their port terminal facilities with a sufficient degree of flexibility so as to maintain an efficient supply chain and may also impose significant costs on both

[782] GrainCorp Operations Limited, *Supplementary submission to the ACCC*, 24 June 2009, p. 102.

GrainCorp and access seekers. The ACCC also considers that to impose such a requirement could risk the undesirability of imposing regulation that is not appropriate at a time when the industry is newly liberalised and in transition.

### 12.6.6 Operational Decisions

#### 12.6.6.1 Interaction of the Operational Decisions clause and the PTSPs

Under the proposed Undertaking, 'Operational Decisions' constitute all decisions made in the course of providing the Port Terminal Services.

The ACCC notes that as a result of the definition of Operational Decisions, there is significant potential overlap with the provisions in the PTSPs. From this point of view, the interaction between the PTSPs and the Operational Decisions component of the proposed Undertaking is unclear. The ACCC's view is that it is more likely to be appropriate that the provisions under clause 8.4 are included in the PTSPs. See the Non-Discrimination chapter for more detail.

#### 12.6.6.2 Whether the Operational Decisions clause provides an appropriate balance between providing access seekers with sufficient certainty and clarity as to their terms, effect and operation and GrainCorp with sufficient flexibility in their management of the Port Terminal Services

Given the divergence of views as to the effect of the wording in the Operational Decisions clause in the proposed Undertaking (clause 8.4), the ACCC has considered the appropriateness of the wording of the clauses, noting that the ACCC considers it to be important that the proposed Undertaking provides for sufficient certainty and clarity in its terms, effect and operation in order to enable GrainCorp and access seekers to be adequately aware of their respective rights and obligations.

However, the ACCC also recognises that the process of making Operational Decisions in the provision of Port Terminal Services – namely overall capacity management – is an evolving process. This is (at least in part) due to the existence of a range of possible exogenous developments which can precipitate a change to any previously stated plan. As a result, the ACCC recognises that the maintenance of a flexible and pragmatic approach is required to maintain the overall efficiency of the system.

The ACCC's following comments on the particular provisions of the Operational Decisions clause are made in recognition of both sets of challenges.

1. The ACCC's view is that clause 8.4(b) and 8.4(c) as currently drafted are not appropriate for the following reasons:

    (i) the requirement to 'balance conflicts of interests of users' provides too much discretion to GrainCorp and insufficient certainty for access seekers given this balance is qualified by GrainCorp being able to make decisions based on objective commercial criteria and 'will adopt practices and policies to promote fair, reasonable and non-discriminatory Operational Decision making'. A clause that expands on these objective commercial criteria would be more likely to be appropriate.

2. The ACCC's view is that clause 8.4(d)(i) as currently drafted is not appropriate because the criteria used and the process to be applied in GrainCorp's assessment of the 'likely availability of sufficient Bulk Wheat' is unclear.
3. The ACCC's view is that clause 8.4(d)(ii)(A) and 8.4(d)(ii)(B) as currently drafted are not appropriate. The reasons for this is that the criteria that are within GrainCorp's control or require subjective determinations by GrainCorp when determining whether the objective of minimising demurrage or maximising throughput 'over a given period' is unclear and require further explanation. For example, GrainCorp could determine that an objective when making an Operational Decision to maximise throughput 'over a given period', with that given period to be 12 months. Clauses that remove the 'over a given period' qualifiers would be more likely to be appropriate.
4. The ACCC's view is that clause 8.4(d)(iii) as currently drafted is not appropriate because the criteria that are within GrainCorp's control or require subjective determinations by GrainCorp when varying a cargo assembly plan or queuing order for vessels are unclear and require further explanation (for example, 'vessel congestion', 'lack of performance of freight providers').
5. The ACCC's view is that clause 8.5 as currently drafted is not appropriate. See the Non-Discrimination chapter for more detail.

# 13 Publication of information

**Summary**

***Publication of stocks of grain at port***

It is not appropriate that GrainCorp's proposed Undertaking does not include an obligation to publish stocks of grains at port.

Such an obligation would address concerns raised by interested parties that port operators have the potential to restrict access to port for bulk wheat services by exhausting the port terminal's capacity in favour of other grains.

Specifically, it would be appropriate for this obligation to require publication (on GrainCorp's website) of information on stocks at port of bulk wheat as compared to non-wheat grains, on a monthly basis. The ACCC considers that this would provide a level of transparency over whether GrainCorp are restricting access to port by exhausting the port terminal's capacity in favour of other grains whilst not risking the imposition of onerous reporting requirements that are not appropriate at a time when the industry is newly liberalised and in transition.

For the avoidance of doubt, this obligation would not extend to publication of up-country information. This is because, as set out in the Scope chapter of this further draft decision, it is the ACCC's view that GrainCorp's approach of limiting its proposed Undertaking to port terminal services (and by extension, information about its port operations) is appropriate in the circumstances.

***Publication of key port terminal information***

As set out in the Ring-Fencing chapter, the ACCC considers that it is appropriate that arrangements be provided for in the proposed Undertaking to address the potential for GrainCorp's marketing arm to misuse port terminal information to its advantage.

Specifically, the ACCC considers that the appropriate approach to dealing with this issue would be for the proposed Undertaking to require publication of key port terminal information (such as cargo nomination applications) on the shipping stem a short time after its receipt by GrainCorp (i.e. the next business day). This would increase transparency of nominations that have been made and lessen the opportunity for GrainCorp's marketing arm to misuse key port terminal information whilst not imposing unduly prescriptive regulation on GrainCorp. It is important to note that any such discriminatory conduct would be prohibited by a robust non-discrimination clause, such as that recommended by the ACCC in the Non-Discrimination chapter.

***Publication of key service standards***

It is not appropriate that GrainCorp's proposed Undertaking does not include an obligation to report on a number of key service standards.

Such reporting (on GrainCorp's website) would provide 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. However, the ACCC does not intend this to be an onerous obligation and that, in the context of a newly liberalised industry, the obligation should not (in this particular context) require the collation of data that GrainCorp does not already collect, have on hand or have access to as part of its normal commercial practice.

**Introduction**

Part IIIA of the TPA does not prescribe what must be included in an access undertaking. Therefore, a potential access provider has a degree of discretion in how to structure its proposed Undertaking and what it includes in the undertaking. However, the ACCC notes that acceptance of an Undertaking by the ACCC precludes that service from being declared under Part IIIA (see section 44H(3)) of the TPA). In these circumstances, it is appropriate that the range of terms and conditions of access be sufficient to give access seekers certainty regarding the service subject of the undertaking, and the terms and conditions upon which that service will be provided.

This chapter addresses the need for additional clauses to those proposed in GrainCorp's proposed Undertaking dated 15 April 2009.

## 13.1 Publication of stocks at port

### 13.1.1 GrainCorp's proposed Undertaking dated 15 April 2009

GrainCorp's proposed Undertaking does not include an obligation to publish any information about stocks held in storage either in its ports or in its up-country storage and handling network.

### 13.1.2 GrainCorp's submissions in support of its proposed Undertaking dated 15 April 2009

In response to submissions from interested parties for GrainCorp to publish additional information (about stocks both at port and up-country), GrainCorp submits:

> There are adequate protections for ensuring GrainCorp complies with its obligations through the WEA directed audits and now the additional regulatory commitments under the Undertaking.[783]

Further, in relation to the information that GrainCorp possesses, it states:

> As for public disclosure, customers provide GrainCorp with information on a confidential basis. GrainCorp is not authorised to disclose this information to the market and would be surprised if growers wished to move to such a system.[784]

In response to the ACCC's further information request, GrainCorp states that:

> … consideration must also be given to the extent of the application of ring fencing. Will other upcountry facility providers who do not own ports also be

[783] GrainCorp Operations Limited, *Supplementary submission to the ACCC*, 24 June 2009, p. 90.
[784] GrainCorp Operations Limited, *Supplementary submission to the ACCC*, 24 June 2009, p. 55.

required to ring fence those operations from their trading arms or publicly disclose stock information as has been suggested in some submissions? If not then there cannot be said to be an equitable application of such a regime;

the WEMA clearly applies the Access Test and establishes the requirement for an Undertaking in respect of access to and services at port terminals. Seeking to include other infrastructure or the provision of information relating to matters other than the provision of port terminal access and services is counter to the intention of the Act as laid out in the relevant Reading Speeches and represents a significant increase in regulation that is not warranted, as the basis for the need for such an increase in regulation has never been established;

Further, GrainCorp responds to various submissions through the following comments:

Type of information GrainCorp has access to from upcountry facilities

GrainCorp has access to the following types of information via its up-country operations that is not publicly available:

- the quantity of grain in GrainCorp's storage and its location;
- available capacity in up-country storage facilities;
- the quality profile and type of grain in it's upcountry storage;
- approximate stock volumes moving to the domestic market.

Full details on why access to upcountry information does not provide GrainCorp with a competitive advantage are set out in sections 8.1 to 8.8 of its April submission.

In their submissions, interested parties have made various claims that this information can be used to manipulate the market or to the benefit of GrainCorp Trading. With the exception of one example (which is addressed below), it is not clear how submitters believe GrainCorp can achieve this.

In short, no evidence has been provided, as far as GrainCorp is aware, that addresses the detailed information provided in the GrainCorp April Submission and which the ACCC has accepted in the past.

GrainCorp can contact growers directly in a receival site catchment area

Riverina claims that GrainCorp has information on "uncommitted" grain in storage sites, including geographical location and grower details, that provides GrainCorp with a competitive advantage in securing export sales, in that it can directly contact the relevant growers to acquire wheat.

The benefit to GrainCorp of 'stocks information' is overstated and has been addressed in the April Submission.

- Growers sell to the buyer with the best price or terms. They have the ability to warehouse their grain for 30 to 60 days free of charge before sale. Growers are not under pressure to sell to the first offer received.
- The receival sites are open market places where cash prices are posted by up to 30 or more grain buyers. There is little "first mover" advantage.

- In any case, GrainCorp has an incomplete picture of the wheat not yet committed for sale. GrainCorp's share of country storage is less than 50% overall and in all states (except Qld where it is 54%). There are competing storage facilities and significant on farm storage (see 4.2 of April Submission) where buyers, including GrainCorp Trading, source wheat.

- The reality is that buying wheat is competitive, taking place at various points in the supply chain over time.

AGEA notes, at paragraph 14.4 of its 29 May 2009 submission that accredited wheat exporters (AWE) enter into forward sale contracts. Therefore, an AWE may have legal title to another AWE's stock, but this would not be apparent from GrainCorp's system, nor should it be.

It is interesting to compare this position on the part of the AGEA with that of Riverina relating to forward contracting. The AGEA clearly state that Australian wheat exporters enter into forward sales, and Riverina claim they cannot as a result over 'uncertainty' of port terminal services and charges.

It is also interesting to note that Riverina does not say that GrainCorp actually derives a benefit, only that it would do so. In fact, Riverina says it is unclear if information is shared between GrainCorp's Ports and Trading Business Units (p8).

The 'evidence' offered by Riverina is anecdotal at best. They claim that that the improvement in GrainCorp's market share performance during the harvest season is due to access to this stock information. As has been explained previously, the focus of grain supply in the Eastern Australian States is into the domestic market due to lower transport costs and correspondingly higher margins. Typically sales are made into the domestic market early in the season due to the higher returns which can be achieved.

Improvement in GrainCorp's market share performance throughout the season is attributable to this market characteristic, rather than because of its access to confidential information.

As previously discussed, growers seek to commit sales to the domestic market prior to delivering grain into the bulk handling system. This means that approximately the first 1/3 of grain harvested in the Eastern States in a normal year bypasses the bulk handling system. Thus GrainCorp's 'market share' is very limited early in the season due to the selling patterns of growers, the attractiveness of the domestic market and the ability of growers to bypass the GrainCorp storage network.

The claim by Riverina that GrainCorp has an 'unfair' advantage in the market cannot be supported. Riverina has the opportunity to 'post' prices at GrainCorp receival sites and they can offer prices through the online GrainCorp site-by-site price enquiry system.

Given that grain growers themselves operate their business in a 'public' manner, Riverina is not prevented from allocating resources to establishing their own 'grower contact database', or purchasing a database from a commercial provider, and contacting growers directly themselves.[785]

[785] GrainCorp Operations Limited, *Supplementary submission to the ACCC*, 24 June 2009, p. 84.

### 13.1.3 Submissions from interested parties in response to ACCC Issues Paper dated 29 April 2009

#### 13.1.3.1 AGEA

AGEA submits that the BHCs have the ability to discriminate against other traders through manipulating other grain stocks at port:

> The proposed access undertakings do not provide transparency in relation to BHCs' management of shipping slots and accumulation at port. Unless the proposed access undertakings provide transparency in relation to BHCs' decisions, BHCs will be able to manipulate logistics, substitute vessels and/or vary the shipping stem to confer preferential treatment on themselves of their Trading Division.[786]

Further, AGEA submits:

> BHCs can allow their stock to sit in port, taking up accumulation space from other AWEs. BHCs therefore have the ability to manipulate the logistics of getting stock to port to serve their own interests (or the interests of their Trading Division).[787]

AGEA also submits that:

> There is a critical imbalance between the information available to BHCs as port operators and the information available to AWEs. BHCs control inventory movements, quality profile, transportation and capacity at ports and have within their control information relating to logistics of stock into port. BHCs know who is transporting stock into port, what stock is coming into port, how much stock is in the port and when and how much stock is due to leave the port. BHCs could refuse to allow AWEs to accumulate stock on the basis that the port is full, but no-one would know if that is the case.
>
> This imbalance in information is exacerbated in situations where, as is the case here, the BHCs provide upstream and downstream services. The result is that the BHCs possess a great deal of information about the trading activities of the AWEs (their competitors) and are consequently in a position to advantage the BHCs' related entities, or to disadvantage the AWEs. The undertakings do not ensure that AWEs obtain access to the same information that is available to BHCs.[788]

To overcome some of these issues, AGEA submits that the following information should be published by GrainCorp on a timely basis:

> (a) port capacity;
>
> (b) stock on hand at port;
>
> (c) daily receivals by grade;
>
> (d) the accumulation programme at port;

---

786 Australian Grain Exporters Association, *Submission to Port Terminal Services Access Undertakings*, 29 May 2009, p. 10.

787 Australian Grain Exporters Association, *Submission to Port Terminal Services Access Undertakings*, 29 May 2009, p. 31.

788 Australian Grain Exporters Association, *Submission to Port Terminal Services Access Undertakings*, 29 May 2009, para 4.14, p. 12.

(e) stock movements;

(f) allocation and changes to vessel loading slots;

(g) weight, quality and AQIS compliance;

(h) all other necessary information for AWEs to assess whether BHCs have met the performance criteria.[789]

AGEA also submits that the BHCs should provide daily updates on:

(i) stock on hand at port;

(ii) daily receivals by grade into port;

(iii) the port's capacity;

(iv) wheat accumulation;

(v) unloading from upcountry transporters into port;

(vi) stock movements.[790]

#### 13.1.3.2 AgForce

AgForce submits the following in relation to the information held by GrainCorp:

> The three bulk handlers who are required to submit Port Access Undertaking are recognised in the industry as having a great deal of market information not available to others in the industry in their region.
>
> By holding such a large amount of the total storage, and a great deal of the grain which will be exported these bulk handlers know:
>
> - How much grain is in storage
> - Where that grain is
> - The type and grade of that grain
> - How much has been sold to the trade and how much is still warehoused by growers – essentially who owns what tonnage of grain, marketer by marketer and grower by grower
> - The tonnage moving to domestic markets (roughly)
> - The tonnage moving to export markets (accurately) from each region
>
> There is no other player in the QLD grain market who has anywhere near the amount of information that GrainCorp does and whilst there is a significant amount of grain in on-farm storage the percentage of that grain which moves into GrainCorp storage, at some stage, is high.

---

789 Australian Grain Exporters Association, *Submission to Port Terminal Services Access Undertakings*, 29 May 2009, para 4.16, p. 12.

790 Australian Grain Exporters Association, *Submission to Port Terminal Services Access Undertakings*, 29 May 2009, para 4.17(k), p. 14.

> It is clear that there is a risk that this information could be used to manipulate the market to the advantage of the bulk handler and it is difficult to prevent this happening through a Port Access Undertaking alone.[791]

#### 13.1.3.3 New South Wales Farmers Association

The NSW Farmers Association submits that there is a lack of transparency of information relating to the grain supply chain. It states:

> It is widely known within the industry that Australian storage and handlers have information readily available to them relating to stocks on hand, which can be updated on a daily basis. In fact WEA may be within its rights to request this information, if it believes this is appropriate. Therefore if WEA were directed it might provide an additional and useful service to the wider industry in receiving and publishing the relevant information.[792]

### 13.1.4 GrainCorp's submissions in response to Draft Decision

GrainCorp's submissions on the ACCC's draft decision on the 'publication of stocks at port' were as follows:

> **2.10 Publication of Stock Levels and Performance Indicators**
>
> The ACCC has directed that GrainCorp include in the Undertaking the publication of a number of 'transparency measures' and 'performance indicators'.
>
> ***Information on Stock Held at Port***
>
> GrainCorp currently publishes on its website[793] the following information:
>
> - Cargo nominations pending assessment.
> - Cargo nominations that have been accepted and allocated an Assigned Load Date (confirmed cargo 'bookings').
> - Updates on the status of vessels and / or port terminal, including maintenance shutdown periods.
> - Estimated monthly port terminal elevation capacity.
>
> GrainCorp does not agree with the requirement to publish stocks held at port on a weekly or other basis. GrainCorp understands the request for publishing port stock information originates from a submission made by the AGEA to the ACCC which suggests that GrainCorp could favour unregulated grains at the port terminals at the expense of Bulk Wheat exporters.
>
> The ACCC's proposed solution is unnecessary. The Port Terminal Services Protocols and Shipping Stem make it obvious what commodities are being shipped at what time. Stocks of grains will be accumulated at the port terminal to service the vessels on the shipping stem. There can be no incentive on GrainCorp to block the port out with unregulated grains and then put itself in a position that it cannot meet its obligations to load vessels booked for bulk wheat.
>
> ***Currently Published Information is Sufficient***

---

791 AgForce Grains Ltd, *Submission in relation to proposed GrainCorp access undertaking*, 29 May 2009, para 4.14, p. 8.

792 NSW Farmers Association, *Submission in relation to proposed access undertakings*, June 2009, p. 5.

793 http://www.graincorp.com.au/prodserv/Ports/Pages/ShippingStem1.aspx

> Simple calculation of the tonnage accepted for elevation in a given month, deducted from the estimated elevation capacity for the relevant terminal, will provide an indication of the capacity that has been allocated for a particular month.
>
> *Example*
>
> - The Carrington terminal currently has approximately 485,000 tonnes of elevation capacity provisionally booked for January 2009.
> - The estimated monthly elevation capacity for Carrington is 175,000 tonnes.
> - This indicates that there is 310,500 tonnes of elevation capacity requested that is not available.
>
> In assessing the relevant CNA's, GrainCorp has to reject all but the 175,000 tonnes available.
>
> During the month of January, GrainCorp will manage, via the Site Assembly Plans developed with exporters, grain intake, and elevation to vessel in a manner that should, discounting external limiting factors, allow 175,000 tonnes to be shipped. GrainCorp reiterates that publication of any port terminal stock level information is potentially misleading as a method for assessing port terminal 'performance', will not increase the 'transparency' of elevation capacity allocation (as this is addressed [by] the information published on the shipping stem), and increases the likelihood that traders who are short stock will be 'gamed' by other traders.
>
> While GrainCorp objects to the requirement to publish stocks held at port on a weekly basis by commodity type, the company has advised the ACCC that if it requires such a provision in the Undertaking, GrainCorp will comply.[794]

### 13.1.5 Submissions from interested parties in response to Draft Decision

#### 13.1.5.1 Port of Portland

The Port of Portland submits that it supports "the ACCC's position on the publication of stocks at the port terminal" but also "suggests that this is expanded to include information pertaining to the percentage utilisation of the available grain storage." The Port of Portland notes that their grain terminal has available grain storage of 80,000 tonnes in silos and a shed.[795]

#### 13.1.5.2 VFF

The Victorian Farmers Federation submits that "at the least; stocks of grain at port should be published consistently by all providers of port terminal services."[796]

#### 13.1.5.3 AGEA

AGEA submits that it was not appropriate that the BHCs' proposed Undertakings do not include an obligation to publish stocks of all grains at port.[797] AGEA submits that

---

794 GrainCorp Operations Limited, *Submission in relation to Draft Decision on GrainCorp Access Undertaking*, 3 September 2009, 2.10

795 Port of Portland, *Submission in relation to Draft Decisions on Port Terminal Services Access Undertakings*, 3 September 2009, p. 1.

796 Victorian Farmers Federation, *Submission in relation to Draft Decisions on Port Terminal Services Access Undertakings*, 3 September 2009, p. 1.

the BHCs should provide port stocks "by grain and grade".[798] AGEA submits that such an obligation "would address concerns … that port operators have the potential to restrict access to port for bulk wheat services by exhausting the port terminal's capacity in favour of other grains."[799]

AGEA also submits that the information provided should be broken down on a port by port level and updated every 24 hours.[800]

### 13.1.6 ACCC's view on publication of stocks at port

The ACCC considers that it is not appropriate that GrainCorp's proposed Undertaking does not include a requirement to publish information about stock held at port.

The ACCC notes the submission made by AGEA that, given the proposed Undertaking relates only to wheat, port operators have the potential to restrict access to port by exhausting the port terminal's capacity in favour of other grains.[801]

While the ACCC does not have evidence to suggest that such behaviour has occurred, the ACCC recognises that providing a greater level of transparency over stocks at port would assist to alleviate the potential for port operators to engage in this behaviour. Accordingly, the ACCC considers that it would be appropriate for GrainCorp's proposed Undertaking to state that it will publish information relating to the stocks held at port on a regular basis. The ACCC also considers that it would be appropriate for GrainCorp's proposed Undertaking to require publication of that information in a prominent position on GrainCorp's website.

In relation to the regularity of publication and the type of information to be published the ACCC considers that a requirement to publish information on stocks at port of Bulk Wheat as compared to non-wheat grains, on a monthly basis, is likely to be appropriate. The ACCC considers this would provide a level of transparency over whether port operators were restricting access to port by exhausting the port terminal's capacity in favour of other grains whilst not risking the imposition of onerous reporting requirements that are not appropriate at a time when the industry is newly liberalised and in transition.

In this regard, while the ACCC notes AGEA's further submission that port stocks by grain and grade should be broken down on a port by port basis and updated every 24 hours,[802] the ACCC considers that such reporting could be unduly prescriptive at this point in time. The ACCC also notes that breaking down stocks by grain and grade at

---

797 Australian Grain Exporters Association, *Submission in relation to Draft Decisions on Port Terminal Services Access Undertakings*, 3 September 2009, 1.27.

798 Australian Grain Exporters Association, *Submission in relation to Draft Decisions on Port Terminal Services Access Undertakings*, 3 September 2009, 13.3(iii).

799 Australian Grain Exporters Association, *Submission in relation to Draft Decisions on Port Terminal Services Access Undertakings*, 3 September 2009, 1.28.

800 Australian Grain Exporters Association, *Submission in relation to Draft Decisions on Port Terminal Services Access Undertakings*, 3 September 2009, 13.4.

801 Australian Grain Exporters Association, *Submission to Port Terminal Services Access Undertakings*, 29 May 2009, para 4.9, p. 10.

802 Australian Grain Exporters Association, *Submission in relation to Draft Decisions on Port Terminal Services Access Undertakings*, 3 September 2009, para 13.4.

every port could potentially compromise confidential information in relation to the stock position of smaller users of the port terminal.

The ACCC considers GrainCorp's approach of not including an obligation to publish stocks held *up-country*, is appropriate in the circumstances.

The ACCC recognises that it is clear that the intention of the WEMA is that the proposed Undertakings should apply only to services offered at port.

In this regard, the ACCC notes that the Explanatory Memorandum to the WEMA responded to calls to extend the access test to cover up-country services, stating that:

> Up-country facilities do not display natural monopoly characteristics as they have low barriers to entry and there are already a number of competitors in the industry who provide up-country storage services. [803]

The Explanatory Memorandum goes on to note that an extension of the access arrangements to up-country storage facilities would 'impose an excessive regulatory burden'.[804] Further, the Second Reading Speech of the WEMA provides:

> The Senate inquiry also identified concerns in relation to the potential for bulk-handling companies to restrict access to up-country storage facilities in a similar manner to concerns in relation to port facilities.
>
> It is unclear from the evidence presented to the Senate inquiry whether the problem would necessarily arise, and if so, the extent of legislation that would be required to correct it.
>
> If the highest level of regulation were to be imposed on the more than 500 up-country facilities, there is no doubt that this would create increased compliance costs which would almost certainly be directly passed back to growers.
>
> The government will, therefore, continue to monitor the ability of exporters to access up-country storage facilities.
>
> Let me say here, if any problems are identified then the government will take steps to remedy the situation including, if necessary, the development of a code of conduct.[805]

Nevertheless, the ACCC is cognisant of the submissions made calling for the publication of information in relation to stocks held in GrainCorp's up-country storage and handling facilities. Further, the ACCC considers that it is likely that this information *does* potentially give GrainCorp's trading arm a competitive advantage over other wheat exporters.

However, given the clear express intention of the WEMA, and having regard to the risk and undesirability of imposing regulation that is not appropriate at a time when the industry is newly liberalised and in transition, the ACCC considers that it is appropriate pursuant to section 44ZZA(3) of the TPA, that GrainCorp's proposed

---

803 Explanatory Memorandum, *Wheat Export Marketing Bill 2008*, p. 13.
804 Explanatory Memorandum, *Wheat Export Marketing Bill 2008*, p. 14.
805 House of Representatives, *Votes and Proceedings, Hansard*, Thursday 29 May 2009, pp. 76-77.

Undertaking does not include a requirement to publish stocks held in its up-country network.

## 13.2 Publication of key port terminal information

### 13.2.1 GrainCorp's proposed Undertaking dated 15 April 2009

GrainCorp's proposed Undertaking does not include an obligation to publish key port terminal information.

### 13.2.2 GrainCorp submissions in response to Draft Decision

GrainCorp made no submissions on this particular issue.

### 13.2.3 Submissions from interested parties in response to Draft Decision

#### 13.2.3.1 Port of Portland

The Port of Portland concurred with the view that:

> key port terminal information and shipping stems should be visible to the market, preferably within a defined timeframe after being received by GrainCorp, thus enabling other exporters to clearly direct their grain to a port terminal where they are likely to encounter the minimum downtime. To complement this process, on a daily basis, POPL will provide on its website an updated expected vessel schedule looking ahead at the next 30 days so all exporters are well informed. This will avoid confusion over conflicting shipments at Berth 1 (the grain berth) at the Port of Portland.[806]

#### 13.2.3.2 AGEA

AGEA submits that the BHCs should provide the following information:

- Port intake capacity;
- Intake booking slots;
- Refusal of request for acceptance of cargo receival;
- Refusal of request for cargo outturn;
- Acceptance of vessel nominations regardless of stock;
- Changes to vessel slots and cargo accumulation;
- Unloading of trains/road transport within six hours;
- Load rates and time to count as per Austwheat 2008 charterparty (as amended from time to time);
- Benchmark criteria for grading, fumigation, weighing,
- Compliance with AQIS requirements, loading to receival standards. The grain loaded to the ship should be of a standard not less than that delivered to the port terminal by or on behalf of the exporter. The terminal should provide running samples and/or analysis during loading so that any deviation from the required quality is known by the exporter prior to the completion of loading;
- Settling despatch demurrage at the applicable vessel rate.[807]

---

[806] Port of Portland, *Submission in relation to Draft Decisions on Port Terminal Services Access Undertakings*, 3 September 2009, p. 2.

[807] Australian Grain Exporters Association, *Submission in relation to Draft Decisions on Port Terminal Services Access Undertakings*, 3 September 2009, 13.3.

AGEA also submits that the information provided should be broken down on a port by port level and updated every 24 hours.[808]

AGEA argue that it is appropriate for the proposed Undertaking to address the potential for the BHCs' marketing arm to misuse port terminal information to its advantage.[809] AGEA also noted that they agreed with the ACCC's view that the appropriate approach to deal with the issue would be for the proposed Undertakings to require publication of key port terminal information (such as cargo nomination applications) on the shipping stem within a short time after it is received by the BHC, and suggest that the information should be provided within 24 hours.[810]

### 13.2.4 ACCC's view on publication of key port terminal information

As set out in the Ring-Fencing chapter, the ACCC considers that it is appropriate that arrangements be provided for in the proposed Undertaking to address the potential for GrainCorp's marketing arm to misuse port terminal information to its advantage.

The ACCC considers that the appropriate approach to dealing with this issue would be for the proposed Undertaking to require publication of key port terminal information (such as cargo nomination applications) on the shipping stem a short time after its receipt by GrainCorp.

The ACCC considers that a requirement to publish information about vessel nominations that are updated each business day is likely to be appropriate as it would appropriately balance 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 lessen the opportunity for GrainCorp's marketing arm to misuse key port terminal information.

Therefore, while the ACCC notes the further submissions from AGEA arguing for the publication of various categories of additional information about the port terminals, the ACCC is concerned that this would risk the imposition of onerous reporting requirements that are not appropriate at a time when the industry is newly liberalised and in transition.

The ACCC also notes that it considers that GrainCorp's Undertaking, in order to be considered appropriate by the ACCC, would need to include robust non-discrimination and no-hindering access clauses, supported by the ability of the ACCC to request an audit of compliance with the non-discrimination clause. The ACCC considers that these measures, together with clear and transparent port loading protocols and a robust arbitration framework regarding access to port terminal services, would be likely to achieve the objectives of providing fair and transparent access to port terminal services for wheat exporters (without the need to publish such extensive information sought by AGEA and others).

---

808 Australian Grain Exporters Association, *Submission in relation to Draft Decisions on Port Terminal Services Access Undertakings*, 3 September 2009, 13.4.

809 Australian Grain Exporters Association, *Submission in relation to Draft Decisions on Port Terminal Services Access Undertakings*, 3 September 2009, 1.29.

810 Australian Grain Exporters Association, *Submission in relation to Draft Decisions on Port Terminal Services Access Undertakings*, 3 September 2009, 1.31-1.32.

## 13.3 Port performance indicators

### 13.3.1 GrainCorp's proposed Undertaking dated 15 April 2009

GrainCorp's proposed Undertaking does not place any obligation on it to maintain and publish performance indicators.

### 13.3.2 GrainCorp's supporting submissions

In response to a question in the ACCC Issues Paper published 29 April 2009, GrainCorp states:

> - GrainCorp reports on its services standards through the following channels:
> - GrainCorp is subject to significant reporting standards and requirements as a condition of obtaining, maintaining and or renewing accreditation as a bulk wheat exporter with WEA;
> - Under the WEMA, GrainCorp is subject to an audit review of its operations to ensure compliance with the requirements of accreditation;
> - GrainCorp maintains its own internal reporting to monitor compliance with regulatory standards and to monitor throughput at its port terminal facilities.[811]

In response to submissions from interested parties, GrainCorp states that it considers that the introduction of performance indicators will be ineffective, given the range of external factors which impact on GrainCorp's performance.[812]

In response to the performance indicators proposed by AGEA (set out at section 1.2.3 below), GrainCorp submits:

> It is not possible for GrainCorp to accept vessel nominations within 24 hours given the need to verify the information and validity of the nomination. This would require unreasonable turn around over weekends and public holidays and GrainCorp does not have the resources to do this.
>
> It is not clear what performance indicators GrainCorp would be expected to meet in relation to changes to vessel slots and cargo accumulation. However, changes to vessel slots can arise from vessels failing survey or being late – matters totally outside of GrainCorp's control.
>
> There are many factors outside of GrainCorp's control which will prevent it from unloading trains/road transport within six hours. The recent situation at the Fisherman Islands port terminal provides an example of this where road receivals of 7 – 9,000 tonnes per day are common, but GrainCorp doesn't control the time of arrival of vehicles, as transport companies are contracted by the exporter. This results in an uneven flow of receivals. As a typical example, on 17 June 2009 receivals occurred as follows:
>
> 6am to 1pm = 2350t = 335tph - bulk of tonnes in the block were received

[811] GrainCorp Operations Limited, *Supplementary submission to the ACCC*, 24 June 2009, p. 44.
[812] GrainCorp Operations Limited, *Supplementary submission to the ACCC*, 24 June 2009, p. 46.

between 6am to 10am

1pm to 4pm = 1200t = 400tph – even spread

4pm to 2am = 6068t = 606tph - at 4pm a large number of trucks in queue.

Total = 9518t

It is therefore unreasonable to expect that a performance guarantee of 6 hours is put in place when control is not exercised by the port operator on actual arrival time. However, we are working on a protocol for receivals in set windows and are consulting with industry on the same. It will require exporters to demonstrate flexibility in working with each other for the orderly intake, typically by vessel order to make the process of port receivals more efficient.

Load rates are not constant and depend upon the characteristics of particular vessels, and are also totally controlled by the vessel's Master. For example, load rates must slow down to trim (final loading of) vessel hatches and to account for the rate at which individual vessels can pump ballast. The use of nominal maximum belt, hopper or ship loader capacities for the establishment of 'performance measures' demonstrates the lack of understanding of grain handling on the part of those making the suggestion. The quoted operational maximum capacity of grain handling equipment is not unlike the maximum speed of a vehicle. While a car may be capable reaching 200 K/ph, 'real world' conditions dictate that the actual operation of the vehicle achieves an average usage much lower than the maximum. This principle applies to grain handling equipment, where the real world capacity across a given time period is always substantially lower than the nominal maximum capacity.[813]

### 13.3.3 Submissions from interested parties in response to ACCC Issues Paper dated 29 April 2009

#### 13.3.3.1 AGEA

AGEA calls for the following minimum performance criteria to be included in the standard terms:

(f) the specification of minimum performance criteria which BHCs are required to meet including:

i) acceptance of vessel nominations regardless of stock entitlements within 24 hours;

ii) changes to vessel slots and cargo accumulation;

iii) unloading of trains/road transport within six hours;

iv) load rates and time to count as per Austwheat 2008 charterparty (as amended from time to time);

v) benchmark criteria for grading, fumigation, weighing, compliance with AQIS requirements, loading to receival standards. The grain loaded to the ship should be of a standard not less than that delivered to the port terminal by or on behalf of the exporter. The terminal should provide running samples and/or analysis during loading so that any

[813] GrainCorp Operations Limited, *Supplementary submission to the ACCC*, 24 June 2009, pp. 46-47.

deviation from the required quality is known by the exporter prior to the completion of loading.

vi) settling despatch demurrage at the applicable vessel rate.[814]

### 13.3.4 GrainCorp submissions in response to Draft Decision

GrainCorp submits the following on the issue of publication of key service standards:

> GrainCorp has agreed to provide the following information required by the ACCC:
>
> - *vessels failing survey;*
> - *average daily road receival rate (to be provided monthly);*
> - *CNAs rejected;*
> - *monthly tonnes shipped;*
> - *port blockouts; and*
> - *average CNA assessment times.*
>
> The current GrainCorp shipping stem provides a status report that notes when a vessel has failed survey, when a CNA is rejected and when a terminal is blocked out.
>
> The information required by the ACCC can be provided in a form that would detail the following:
>
> - the exporter and vessel name of all vessels that fail regulatory (marine and quarantine) surveys;
> - average daily road intake rates;
> - a list of wheat CNA's rejected, including details of the exporter, tonnage and proposed laycan;
> - a monthly total of grain elevated to vessel;
> - dates on which port terminals may be blocked out;
> - a monthly average of CNA assessment times.
>
> GrainCorp notes that provision of information relating to the [average daily road receival rate] may lead to confusion. The rate at which grain is received by road is heavily influenced by the following factors:
>
> - the timing of when road deliveries of grain arrive at the terminal, and the frequency with which vehicles arrive;
> - vehicle configuration, particularly B-double configuration, and the rate at which configuration influences the speed at which trucks can tip;
> - commodity mix and grade mix being received, and the requirement for grain path cleaning;
> - the occurrence of rain, which may limit receival, where road intake is not covered;
> - The testing requirements related to individual cargo assembly, including the need for time consuming tests such as the falling number test, or assessment of pesticide residues;
> - The rate at which road receivals fail quality testing;
> - The presence of fumigants in grain and if vehicles are rejected.

[814] Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 4.17(f), p. 13.

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

- overtime charged;
- demurrage.

GrainCorp does not have demurrage information. This is confidential information between exporters and the vessel providers.

The 2009/10 Schedule of fees removes overtime charges and contains 'normal working hours' charges. Where required and at the request of an exporter, GrainCorp will work additional 'overtime' shifts, during which normal charges will apply.

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

All relevant fees are contained in Annexure A to the 2009/10 Bulk Wheat Port Terminal Services Agreement.[815]

### 13.3.5 Submissions from interested parties in response to Draft Decision

#### 13.3.5.1 AGEA

AGEA submits the following in relation to the publication of port performance indicators or key service standards:

> 13.1 AGEA agrees with the ACCC that it is not appropriate that the BHCs' proposed Undertakings do not include a requirement to report on a number of service performance levels. Such reporting would provide a degree of transparency around the level of service being provided to AWEs and assist potential access seekers in assessing the appropriateness of the price offered for a service.
>
> 13.2 AGEA agrees with the ACCC that the BHCs should publish the following performance indicators below, which should be specified and included in the BHCs proposed Undertakings:
>
> (i) The shipping stem
>
> (ii) Ship rejections;
>
> (iii) Cargo assembly times;
>
> (iv) Transport queuing times;
>
> (v) Port blockouts; and
>
> (vi) Overtime charged.
>
> …
>
> 13.4 The above information in paragraphs 13.2 … should be broken down on a port by port level and updated every 24 hours.
>
> …

[815] GrainCorp Operations Limited, *Submission in relation to Draft Decision on GrainCorp Access Undertaking*, 3 September 2009, 2.10.

> 13.6 A further useful indicator as to whether non-discriminatory port terminal access is being provided, could be the percentage of vessel slots that are allocated to the BHCs' trading arms. Further guidance may be attained by determining the number of vessel slots that are subsequently traded by the BHCs' trading arms to AWEs.[816]

### 13.3.6 ACCC's views on port performance indicators

The ACCC considers that it is not appropriate that GrainCorp's proposed Undertaking does not include a requirement to report on a number of service performance indicators.

Such reporting would provide 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.

While not seeking to prescribe what service performance indicators should be included in an undertaking, the ACCC notes the following possible indicators:

- Ship rejections;
- Cargo assembly times;
- Transport queuing times;
- Port blockouts;
- Overtime charged;
- Demurrage.

The ACCC notes that including obligations to report on service standards is an obligation that has been included in other access undertakings.[817]

The ACCC also notes that it does not intend the requirement to publish port performance indicators to be an onerous obligation and recognises that, in order to appropriately balance the legitimate business interests of the provider and the interests of persons who might want access to the service, the obligation should not (in this particular context) require the collation of data that GrainCorp does not already collect as part of its normal commercial practice. To do so would risk the imposition of regulation that is not appropriate at a time when the industry is newly liberalised and in transition.

Given this, while the ACCC notes AGEA's further submission recommending that the BHCs be required to publish a significant number of specific performance indicators, broken down on a port by port basis and updated every 24 hours, the ACCC considers that such reporting could be unduly prescriptive at this point in time.

---

[816] Australian Grain Exporters Association, *Submission in relation to Draft Decisions on Port Terminal Services Access Undertakings*, 3 September 2009, 13.1-13.2, 13.4, 13.6, 1.34.

[817] See, for example, the access undertaking submitted by the Australian Rail Track Corporation (**ARTC**), and accepted by the ACCC on 30 July 2008.

The ACCC considers that the indicators proposed by GrainCorp would be likely to be appropriate as they 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.

The ACCC notes that, in the interests of transparency, it would be appropriate for GrainCorp's proposed Undertaking to require publication of the performance indicators in a prominent position on GrainCorp's website.

# 14 Further Draft Decision on GrainCorp's access Undertaking

**Summary**

The ACCC's further draft decision is that it should not accept the proposed Undertaking given to the ACCC by GrainCorp on 15 April 2009.

## 14.1 Further Draft Decision on GrainCorp's proposed undertaking

In relation to the proposed Undertaking given to the ACCC by GrainCorp on 15 April 2009, the ACCC's further draft view is that, having regard to the matters listed in s.44ZZA(3) of the TPA, it would not be appropriate to accept the proposed Undertaking.

As a result, the ACCC's further draft decision is that it should not accept the proposed Undertaking in its current form.

The ACCC has provided the reasons for its further draft decision throughout this document, including final views on provisions that would not be appropriate, and alternatives that would likely be appropriate.