

PUBLIC VERSION



GrainCorp Operations Limited

**Submission to the Australian Competition &
Consumer Commission**

2011 Port Terminal Services Undertaking

Dated 22 September 2010

1	Introduction and purpose of submission	1
1.1	Introduction	1
1.2	Summary	1
1.3	Term and commencement	2
1.4	Name and Contact Details of Applicant	3
1.5	Further information	3
2	Eastern Australian Competitive Grain Market Landscape	3
2.1	Introduction	3
2.2	Competitive export grain market characterised by increasing export capacity	4
2.3	The eastern Australian grain market is becoming increasingly internationalised	5
2.4	Constraining Influence of Multinational Grain Exporters	5
2.5	Conclusion	6
3	Overview of the 2009/2010 Export Season	6
3.1	Introduction	6
3.2	"Good Faith" negotiations with customers	7
3.3	Variation of the Port Protocols	9
3.4	Maintaining an efficient supply chain	9
4	Efficient and flexible terminal operations for the benefit of all exporters	10
4.1	Introduction	10
4.2	Flexible protocols benefit all exporters	10
4.3	Transparency of the shipping stem	12
4.4	Conclusion	14
5	Rail haulage and shipping stem capacity for the 2010/2011	15
6	Proposed Undertaking	16
6.1	Overview	16
6.2	Structure and Scope	17
6.3	Commencement date	17
6.4	Term	18
6.5	Standard Terms	19
7	Conclusion - the TPA Acceptance Criteria are satisfied	20
7.1	Introduction	20
7.2	The Objects of Part IIIA	20
7.3	The Pricing Principles Specified In Section 44ZZCA of The TPA	21
7.4	The Legitimate Business Interests of the Provider	21
7.5	The Public Interest, Including the Public Interest in Having Competition in Markets	21
7.6	The Interests of Persons Who Might Want Access to the Service	21

1 Introduction and purpose of submission

1.1 Introduction

This submission is made by GrainCorp Operations Limited (**GrainCorp**) in support of its proposed 2011 Port Terminal Services Undertaking (**Proposed Undertaking**). The Proposed Undertaking is submitted to the Australian Competition and Consumer Commission (**ACCC**) for approval under section 44ZZA of the *Trade Practices Act 1974* (Cth) (**TPA**).

1.2 Summary

GrainCorp's current Port Terminal Services Undertaking governs the provision of access to "Port Terminal Services" for purposes relating to the export of bulk wheat (**Current Undertaking**). The Current Undertaking is due to expire on 30 September 2011. As the Commission is aware, in order to be re-accredited by Wheat Exports Australia as a wheat exporter under the *Wheat Exports Marketing Act 2008* (Cth) (**WEMA**), and therefore to continue to have a right to export bulk wheat from Australia, GrainCorp must maintain an approved access undertaking under Part IIIA of the TPA. GrainCorp intends to apply for renewal of its wheat export accreditation from 1 October 2011.

The purpose of this submission is to provide the ACCC with information on GrainCorp's Proposed Undertaking in the broader context of the eastern Australian grain market and the Current Undertaking period. The submission explains how, in the context of an increasingly competitive industry, the Current Undertaking has:

- provided an appropriate level of regulation over GrainCorp's bulk export terminals in the context of the transition away from the AWB single desk monopoly;
- ensured fair and transparent third party access to GrainCorp's port terminals in eastern Australia, evidenced by GrainCorp successfully entering into two year agreements for port access with all its customers under the framework of the Current Undertaking;
- allowed GrainCorp sufficient flexibility in its port operations to meet the demands of its customers; and
- successfully achieved the objectives of Part IIIA of the TPA.

On that basis, it is appropriate that the Proposed Undertaking is a roll forward of the Current Undertaking and GrainCorp submits that the Proposed Undertaking satisfies the criteria for acceptance by the Commission under Division 6 of Part IIIA of the TPA. GrainCorp does not propose to modify the Current Undertaking, other than to reflect:

- the new term of the Proposed Undertaking;

- changes to the Standard Terms to align them with the final Bulk Wheat Port Terminal Services Agreements (“**BWPTS Agreements**”) entered into with customers in March 2010 under the Current Undertaking;
- changes made to the Port Terminal Services Protocols in May 2010; and
- other minor changes.

1.3 Term and commencement

GrainCorp proposes that the Proposed Undertaking apply to negotiations with customers for BWPTS Agreements commencing on or after 1 October 2011. GrainCorp anticipates that these negotiations will commence in August 2011. Clause 4.1(b) of the Current Undertaking provides that the Current Undertaking *does not apply to the negotiation of any Access Agreement which will have a commencement date after the expiry of this Undertaking*. Accordingly, in order to simplify the transition from the Current Undertaking to the Proposed Undertaking, to ensure the negotiations with customers for access to port terminal services in the 2011/2012 season are subject to the Proposed Undertaking, but to avoid any overlap between the Current Undertaking and the Proposed Undertaking, GrainCorp seeks approval for:

- (a) the Proposed Undertaking, other than clauses 5.5(b), 5.5(c), 9, 10, 11 and 12 and Schedule 6, to commence on 1 August 2011;
- (b) clauses 5.5(b), 5.5(c), 9, 10, 11 and 12 and Schedule 6 of the Proposed Undertaking, to commence on 1 October 2011; and
- (c) the Proposed Undertaking to expire on 30 September 2014. The Proposed Undertaking will have a 3 year term in respect of clauses 5.5(b), 5.5(c), 9, 10, 11 and 12 and Schedule 6 and a term of 3 years and 2 months in respect of all other clauses.

This mechanism provides greater certainty than the transition process which applied at the commencement of the Current Undertaking. Customers who executed BWPTS Agreements prior to the commencement of the Undertaking did not have the protection of the arbitration provisions under the Current Undertaking. To address this, the Current Undertaking provided customers who had signed BWPTS Agreements before the Current Undertaking commenced, and who were dissatisfied with that agreement, a right to invoke the dispute resolution procedure in the Undertaking in relation to their executed BWPTS Agreement at any time up until 20 November 2009. The proposed transition arrangements described above provide customers with the benefit of the Proposed Undertaking at the time they will be negotiating with GrainCorp for the terms and conditions of BWPTS Agreements commencing on or after 1 October 2011. This is a preferable approach to the one under the Current Undertaking which was necessary at the time to give customers the ability to enter into BWPTS Agreements for the 2009/2010 and 2010/2011 export seasons prior to the commencement of the Current Undertaking on 1 October 2009

and still have the protection of the arbitration process under the Current Undertaking.

1.4 Name and Contact Details of Applicant

GrainCorp's contact detail for requests for further information and for the service of documents is set out below:

Mr Vishal Ahuja
Partner
Mallesons Stephen Jaques
Level 61, Governor Phillip Tower
1 Farrer Place
Sydney NSW 2000

Phone: 61(2) 9296 2116

Fax: 61(2) 9296 3999

Email: vishal.ahuja@mallesons.com

1.5 Further information

GrainCorp provided the Commission with considerable information on its operations, the wheat export supply chain in Australia and the global market for wheat in its:

- submission in support of its application for approval of the draft Current Undertaking dated 15 April 2010;
- submission dated 24 June 2009 responding to the Commission's information request dated 2 June 2009;
- submission dated 3 September 2009 in response to the ACCC's draft determination dated 6 August 2009; and
- various other communications with the Commission which are publicly available at <http://www.accc.gov.au/content/index.phtml/itemId/868801>

This submission does not seek to repeat the information provided to the Commission previously. The purpose of this submission is to update the Commission on GrainCorp's operations and changes to the eastern Australian grain market since the commencement of the Current Undertaking on 1 October 2009. However, GrainCorp would be pleased to provide any further information that would assist the Commission in its assessment of the Proposed Undertaking.

2 Eastern Australian Competitive Grain Market Landscape

2.1 Introduction

The eastern Australian grain industry is a highly competitive commodity market. Against this background, the level of regulation imposed by the Current Undertaking, together with the oversight provided by Wheat Exports Australia, is appropriate and there is no reason to impose any increased level of regulation on GrainCorp from 2011 onwards.

The distinguishing feature of the grain and wheat industry in eastern Australia, compared to South Australia and Western Australia, is the primary focus on the supply of grain to domestic customers. Grain prices in eastern Australia are set by a combination of domestic supply and demand factors, and international grain market dynamics, including supply / demand, carry stock levels, foreign exchange factors and the cost of sea freight.

On average eastern Australia produces 17 million tonnes (**mmt**) of grain crop annually. Of that, 10 mmt is consumed domestically. The domestic market is attractive for growers as net returns are higher as a result of lower transaction costs (cost of freight from grower / storage to consumer) when compared to exports (where the cost of freight to port, port elevation and sea freight is considerably higher).

The export market consumes 'residual' grain that is not consumed domestically. In an average year, eastern Australia exports an average of seven mmt of grain, ~ five million bulk and ~ two million in containers.

2.2 Competitive export grain market characterised by increasing export capacity

Of the seven mmt of grain exported annually from eastern Australian in an average crop year, four mmt is exported via GrainCorp's bulk elevators (representing approximately one quarter of GrainCorp's total annual elevator capacity), 2 to 2.5 mmt is exported in containers and 0.5 - 1 mmt is exported from the Melbourne Port Terminal.

An additional 0.5 mmt of bulk export grain capacity is being added in Queensland with the proposed commissioning of the Wilmar Gavilon Pty Ltd former sugar export terminal on the Brisbane river.

Louis Dreyfus is currently upgrading the former Dunavant Cotton grain storage and container packing capacity at Moree and Narrabri. This will increase container export capacity by 0.5 mmt, potentially taking that market to three mmt pa.

Aside from the addition of this additional one mmt bulk and container export handling competition, new bulk grain elevation capacity projects are proposed in NSW and Victoria at:

- The P&O berth at Kooragang Island;
- Port Waratah at Newcastle; and
- the Lascelles Wharf Project at Geelong.

Following completion of these projects, which will add up to two mmt of bulk elevation capacity, the total eastern Australian bulk grain export capability will be approximately 20 mmt, catering for approximately five mmt of actual bulk grain exports in an average year.

This increased level of export capacity (together with GrainCorp's existing excess capacity (other than at peak times)) provides a significant competitive constraint on GrainCorp.

2.3 The eastern Australian grain market is becoming increasingly internationalised

Of the 29 WEA licensed wheat exporters, only 13 are Australian owned. Recent merger activity involving multinational players indicates that, following the removal of the single wheat desk, the Australian grain market will become increasingly internationalised.

- Elders – Toepfer Joint Venture in 2008.
- Glencore purchase of Brooks Grain in 2005.
- Dunavant Cotton purchased by Louis Dreyfus in 2009.
- In 2008 Singapore based Olam, a multinational company that operates a globally integrated supply chain for 14 agriculture and food products, successfully completed a takeover of Queensland Cotton Holdings.
- In May 2009, the Canadian based Viterra acquired Australian ABB Grain Ltd.
- Wilmar Gavlion purchase Queensland Sugar export terminal in Brisbane in 2009.
- In 2010:
 - Sumitomo, a Japanese based corporation took joint ownership of Australian Bulk Alliance Pty Ltd with ABB Grain Ltd (now Viterra). Sumitomo also acquired a 50% share of Emerald.
 - the Netherlands based Nidera BV entered into a joint venture with Australian based PentAg Commodities to form PENTAG Nidera Pty Ltd.
 - the Canadian based Agrium made a take-over bid for AWB.

2.4 Constraining Influence of Multinational Grain Exporters

The multinational companies accredited to export bulk wheat from Australia act as a significant constraint on GrainCorp. These companies have strong bargaining power derived from their international operations and trading activities, particularly their ability to 'multi-originate' the supply of grain to customers. This provides these companies the ability to shift supply to the 'lowest cost' point of origin, giving these traders significant market influencing power that is not available to companies that don't have these options. These companies also have long standing relationships with overseas consumers and an ability to source wheat from multiple international locations. They are generally owners and operators of 'proprietary' or non-open access supply chains and have the ability to shift their sources of supply (and crop

investments) and ship grain from other ports globally if they are dissatisfied with the services provided by GrainCorp.

2.5 Conclusion

The merger activity in the Australian grain industry described in section 2.3 above, and the concomitant market dynamics mentioned in section 2.4, demonstrate that the constraints created by GrainCorp's multinational customers are increasing. Together with the strong demand from domestic customers and increasing export grain handling capacity in eastern Australia, GrainCorp considers that it faces increased competition, and in this context, a rollover of the Current Undertaking is appropriate.

3 Overview of the 2009/2010 Export Season

3.1 Introduction

As the Commission will recall, GrainCorp submitted the Current Undertaking on the basis that it would be of only short duration (two years) to align with the timing of the Productivity Commission review of the WEMA, and would be subject to review by the Commission with the benefit of more experience in a wheat market no longer dominated by the export monopoly.¹

The performance of GrainCorp's port operations in the 2009/2010 export season demonstrates that the Current Undertaking was successful in creating a framework for exporters to obtain access to GrainCorp's port services on commercially negotiated terms, for GrainCorp's ports to operate efficiently and fairly, and for GrainCorp to provide access to its port terminals on a non-discriminatory basis.

This is supported by the draft findings of the Productivity Commission Review, which determined that:

*'The Commission considers the undertakings should stay relatively 'as is' because it considers their relatively 'light handed' nature to be appropriate to provide the incentives to participants to resolve and institutionalise access arrangements without significant further cost and more onerous regulation.'*²

The following section provides an overview of GrainCorp's port operations and negotiation process with customers in the 2009/2010 Export Season. The key milestones in the 2009/2010 Export Season were as follows:

- In Quarter 3 2009, GrainCorp entered into interim Bulk Wheat Port Terminal Services Agreements (**Interim BWPTS Agreement**) with its customers. A copy of the current Interim BWPTS Agreement is available at www.graincorp.com.
- On 29 September 2009, the Commission approved GrainCorp's Current Undertaking for a 2 year term commencing on 1 October 2009.

¹ GrainCorp submission to the ACCC 15 April 2010

² Productivity Commission, Inquiry into Wheat Export Marketing Arrangements, Draft Report, March 2010, p144

- On 29 September 2009, Wheat Exports Australia (**WEA**) granted GrainCorp accreditation as a Port Terminal Operator under the Scheme for 2 years. GrainCorp's accreditation is due to expire on 30 September 2011.
- From October 2009 to March 2010 GrainCorp negotiated in good faith with its customers and in March 2010 GrainCorp entered into final BWPTS Agreements with all its customers.
- In May 2010 GrainCorp consolidated its Port Protocols and Guidelines by following the process required by the Undertaking.

At the time of this submission, GrainCorp understands it is the only bulk handler to have successfully completed negotiations and entered into access agreements with customers under a Port Terminal Services Undertaking.

3.2 "Good Faith" negotiations with customers

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

During the negotiation period GrainCorp provided elevation services to applicants under the interim BWPTS Agreement and in accordance with the Current Undertaking.

In March 2010, following extensive negotiations with customers, GrainCorp entered into final BWPTS Agreements with all customers.

GrainCorp previously provided the Commission with a detailed overview of the concessions it made to the Standard Terms originally approved by the Commission in order to reach agreement with customers. GrainCorp made significant pricing and contract concessions for the benefit of all grain exporters.

In particular, GrainCorp:

- reduced its fees for:
 - road intake at port by \$1.29 per tonne;
 - intake from non-approved storage by \$4.63;
 - pre-blending by \$2.50 per tonne;
 - stock swap from \$1.00 to \$0.17 (internet) and \$0.33 (manual);
 - average potential storage fee from \$3.85 per tonne down to \$2.93 per tonne by introducing a pre-accumulation storage process;

- minimum cargo additional loading from \$3.59 per tonne to \$1.54 per tonne; and
- capped its fees for:
 - blending at \$2.10 per tonne and made it negotiable by cargo; and
 - additional storage for stock at port (late vessel) at 2 weeks.

To increase the efficiency of wheat shipping GrainCorp:

- introduced booking fee credits if exporters nominated tonnage exceeded actual tonnage by 10%;
- reduced exporters shrinkage allowance from 0.5% to 0.25%;
- replaced 'approved' and 'non-approved' storage classifications with a single 'third party storage' classification;
- removed the deferred payment system for shipping stem bookings; and
- stopped charging exporters storage fees if delays occurred that were out of the exporters control.

GrainCorp backdated all of the abovementioned pricing and contract concessions to 1 October 2009.

In May 2010, GrainCorp varied its Reference Prices to reflect the terms and conditions that were offered to existing customers.

GrainCorp considers that the Current Undertaking provided an appropriate regulatory framework to manage negotiations with access seekers and ensured open, efficient and non-discriminatory access to its port terminal services.

3.3 Variation of the Port Protocols

In May 2010, GrainCorp made the following port protocol changes for the benefit of customers:

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

GrainCorp initially consulted with customers to obtain feedback on the Port Terminal Services Protocols. Via this process GrainCorp introduced Port Terminal Protocol Guidelines to clarify certain components of the Port Terminal Services Protocols.

Subsequently, GrainCorp followed the consultation process required by the Current Undertaking to formally vary the Port Terminal Services Protocols. Given GrainCorp's earlier consultation with customers prior to releasing its proposed Port Terminal Services Protocols for consultation under the Current Undertaking, the formal variation process under the Current Undertaking resulted in customers proposing only three very minor changes.

3.4 Maintaining an efficient supply chain

In addition to the concessions offered to customers during the contract negotiation process, during the 2009/2010 export season, GrainCorp worked with exporters to implement measureable service and supply chain improvements.

GrainCorp's supply chain improvements have culminated in the ability to increase export elevation capacity for the 2010/2011 shipping stem period. GrainCorp also voluntarily made improvements to rail, road and shipping accumulation planning and execution.

- GrainCorp increased total terminal capacity from 12.24 mmt pa to 15.12 mmt pa (a total increase of 2.7 mmt pa)

- Weekly planning meetings with major exporter customers to improve their Site Assembly Planning procedures.
- At the Carrington elevator, GrainCorp increased nominal maximum shiploading capacity from 2100 tonnes per hour, to 2800 tonnes per hour with the recommissioning of the fourth shiploader.
- GrainCorp reduced the risk of vessel survey failure creating port block-out by giving export customers the option, at an additional cost, of lay berths for ship surveying.

GrainCorp continues to work voluntarily with customers to improve the supply chain and its services. It plans to:

- Improve fatigue management compliance, safety and road intake efficiency.
- Complete the construction of additional truck marshalling areas at Fisherman Islands and Port Kembla in Portland in March 2011

4 Efficient and flexible terminal operations for the benefit of all exporters

4.1 Introduction

GrainCorp considers that the Current Undertaking, together with the current Port Terminal Services Protocols, provides an appropriate level of flexibility to ensure the efficient operation of GrainCorp's port elevators.

Similarly, GrainCorp considers that the variation process in the Current Undertaking has worked well and should be carried forward into the Proposed Undertaking.

The following sections provide further information on GrainCorp's operations in the 2009/2010 export season.

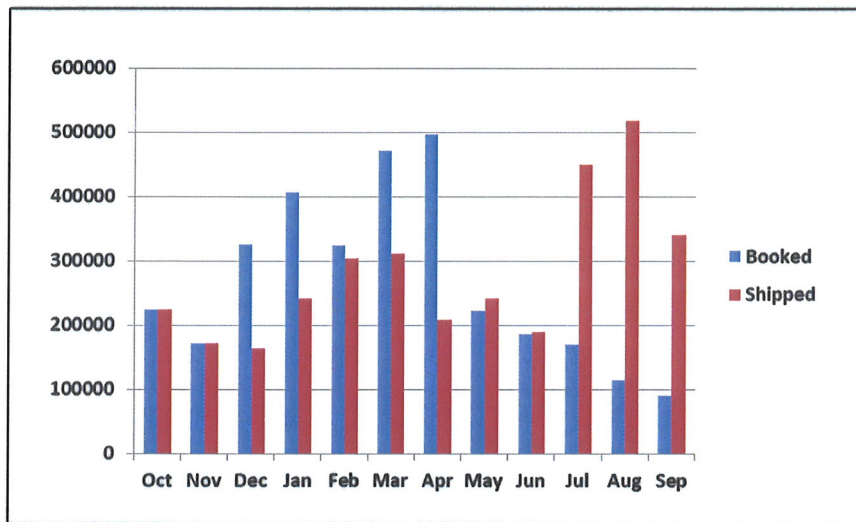
4.2 Flexible protocols benefit all exporters

During the 2009/2010 export season, GrainCorp efficiently managed the shipping of wheat for the benefit of all grain exporters. Where there was available capacity on the shipping stem, subject to appropriate notice, exporters were able to modify their CNAs by port, month, tonnes and commodity, without having to pay additional fees over and above the \$5 per tonne booking fee. This involved 199 requested changes to CNAs by customers, which GrainCorp accommodated.

This flexibility has enabled exporters to avoid significant costs, and has reduced the need for a secondary market for shipping slots, therefore decreasing the likelihood of speculative behaviour and gaming of the Port Protocols by exporters.

Figure 1 (below) shows the booked v's shipped volumes on the shipping stem between October 2009 and September 2010 and demonstrates the volume of bookings which, at the election of customers, were moved to later in the season.

Figure 1: Booked v Shipped 09/10 Dec/Feb stem – 3.2 mmt [Confidential]



Importantly, GrainCorp was able to accommodate its Customers' requests to change their CNAs due to there being sufficient capacity on the stem. In circumstances where there is insufficient capacity on the shipping stem to accommodate requested changes, the Port Terminal Services Protocols provide certainty as to how requests for variations to CNAs will be treated.

Normally, a non-refundable booking fee is paid by shippers under the BWPTS Agreement. This fee is intended to act as a disincentive to shippers to over-nominate port capacity and disadvantage other exporters.

In February 2010, GrainCorp offered all exporters a one off option to review their requirements for unpaid cargo nominations on the stem for the May to September 2010 period.

Under the one-off option offered by GrainCorp, exporters were able to withdraw any nomination and reduce their bookings without having to pay the booking fee.

This resulted in customers withdrawing approximately [Confidential] of cargo nominations, equating to approximately [Confidential] in lost revenue (Figure 2).

Figure 2

[Confidential]

The elevation capacity booking fee of \$5/T imposes a reasonable price discipline that, in an international and Australian context, is reasonable. It constitutes [Confidential] of the value of a tonne of export wheat, but is of sufficient value [Confidential] to prevent speculative gaming behaviour, and in the 'take-or-pay' context, is a reasonable sharing of the commercial risk incurred by the port elevator owner.

Behaviour exhibited by exporters in Figure 2 demonstrates that they will readily walk away from a shipping stem booking if such behaviour were permitted and not subject to a 'take-or-pay' obligation. This behaviour reinforces the necessity for the existing 'take or pay' component of port capacity booking.

The flexible processes within the GrainCorp Port Protocols demonstrate a reasonable and balanced approach to access provision. GrainCorp contends that a shipping protocol system that has flexibility, rather than a rigid approach to the allocation of shipping slots, promotes port terminal efficiency.

4.3 Transparency of the shipping stem

In accordance with the Current Undertaking GrainCorp is required to publish key performance indicators including:

- Vessels failing survey;
- Average daily road receipt rate;
- CNA's rejected;
- Monthly tonnes shipped;
- Port block outs; and
- Average CNA assessment times,

for each period ending 31 May 2010, 30 September 2010, 31 May 2011 and 31 July 2011. **Figure 3** below provides an overview of GrainCorp's export shipping key performance indicators.

Figure 3
Monthly measures of performance

GrainCorp Shipping Statistics											
Assessment Criteria	OCT	NOV	DEC	JAN	FEB	MAR	APR	MAY	JUNE	JULY	YTD
Total Number of new CNAs Lodged	345	119	4	0	8	4	4	7	63	11	565
Number of Nominations Accepted by GrainCorp	223	74	4	0	8	3	4	7	62	11	396
Number of Nominations declined by GrainCorp	122	45	0	0	0	1	0	0	1	0	169
Number of AOA's cancelled/ declined by the Client	138	32	5	8	83	4	0	0	5	0	275
Average number of days to assess CNA's	N/A#	1	0	0	0	1	1	1	2	1	1
Average days from final ETA to Load Date											
Average days from final ETA to Load Date	2	1	2	1	1	2	3	2	1	1	2
Average days from NOR to Load Date											
Average days from NOR to Load Date	1	1	3	1	1	2	1	0	1	1	1
Average days where vessel load date is outside REP											
Average days where vessel load date is outside REP	2	0	3	3	1	0	0	0	0	0	1
Number of vessels that loaded outside their latest nominated REP											
Number of vessels that loaded outside their latest nominated REP	1	1	3	2	2	1	1	0	0	0	11
Number of vessels that failed survey											
Number of vessels that failed survey	0	0	0	2	3	2	2	3	2	2	16
Number of vessels that failed survey on two or more occasions											
Number of vessels that failed survey on two or more occasions	0	0	0	1	0	1	1	0	0	0	3
Number of Port Block outs											
Number of Port Block outs	0	0	0	0	0	1	1	0	0	0	2
Number of days lost due to Port Block out											
Number of days lost due to Port Block out	0	0	0	0	0	4	1	0	0	0	5
Number of vessels loaded											
Number of vessels loaded	11	9	8	9	10	12	8	8	10	16	101
Total Tonnes exported											
Total Tonnes exported	223,168	170,817	162,979	241,331	303,202	311,380	208,364	240,847	189,742	449,093	2,500,921

N/A# Initial cargo nomination application review for all nominations lodged prior to 1 October 2009.

GrainCorp documents its shipping stem arrangements to ensure that export customers have certainty and transparency in booking their capacity on the stem and are able to access capacity on a non-discriminatory basis.

This shipping stem information includes the nomination and scheduling of vessels for each port, the volumes of grain to be loaded and the estimated date of loading.

On 7 June 2010, following notification on 31 May to all customers, the 2010/2011 shipping stem was opened.

In accordance with the continuous disclosure rules in the Scheme, GrainCorp publishes on its website a statement of the policies and procedures for managing demand for port terminal services.

GrainCorp also publishes

- its pricing in accordance with the Pricing Principle set out in section 44ZZCA of the TPA;
- the total stocks of Bulk Wheat held at each elevator;
- the total stocks of all other grain held at each elevator on an aggregated basis; and
- nominated monthly export capacity.

The publication of shipping stem and pricing information provides transparency in the provision of elevation services and the availability of shipping stem capacity, thereby eliminating any ability of GrainCorp to hinder access by third party exporters in favour of its own Trading division.

4.4 Conclusion

The continuation of efficient operation by GrainCorp of its port elevators requires minimal and flexible regulation, if any. The 2009/2010 export season, particularly the number of requested amendments to CNAs, demonstrates the benefits of allowing Graincorp a sufficient level of flexibility to manage its operations for the benefit of exporters.

GrainCorp's export customers have received numerous benefits throughout the Current Undertaking period:

- GrainCorp Ports waived [Confidential] in net port revenue in 09/10 due to [confidential] and exercising fairness for all exporters
- GrainCorp Ports waived additional storage fees where exporters vessels had not performed where port elevator capacity was not effected. i.e. where vessels failed survey and loaded outside the 10 day loading window
- Pre-accumulation of grain to port to assist in export rail and road efficiency has worked well. In excess of 300 kt or 12% of grain for 5 customers.

Under the Current Undertaking, GrainCorp has led the way in developing a fair and transparent process for managing the provision of port elevator capacity.

Against this background, it is appropriate for GrainCorp's Proposed Undertaking to be a rollover of the Current Undertaking. GrainCorp has demonstrated a desire to deal with exporters in a commercial manner that is consistent with the TPA.

Regulatory impositions have substantial impacts, including increased administrative and compliance costs, the need for additional training of GrainCorp employees and customers, and reduced competitiveness. This is manifested in WEA's decision to grant GrainCorp and the other bulk handlers a shorter wheat export accreditation period than their competitors in order to align with the length of the Port Terminal Services Undertakings.

The Productivity Commission draft report recognised that the requirement for the Current Undertaking has imposed costs including:

- compliance and administrative costs (possibly about \$1million so far);
- market opportunities lost by the port operators, due to the greater level of uncertainty surrounding their accreditation;
- shorter accreditation periods for bulk handlers c.f. other exporters.³

Importantly, given the different structure of the eastern Australian grain market compared with South Australia and Western Australia, and given GrainCorp's compliance with the Current Undertaking and willingness to negotiate with customers in order to enter into final BWPTS Agreements in the 2009/2010 season, GrainCorp should not be subject to a 'one size fits all' regulatory regime and should not be subject to the same judgements made against other service providers.

Statements directed at the 'bulk handlers' generally should be tested to identify whether parties making the statements are in fact users of GrainCorp's ports in the eastern states and, if so, whether their statements in fact relate to GrainCorp's operations.

5 Rail haulage and shipping stem capacity for the 2010/2011

On 7 June 2010 GrainCorp opened the 2010/2011 shipping stem, following a media statement and notification to customers on 31 May 2010. On 10 September 2010, GrainCorp published on its website its rail capacity available for supply under spot contracts on a take or pay basis.

The monthly port elevation capacities published by GrainCorp represent the total possible throughput at GrainCorp's port elevators, having regard to available rail and road transport capacity. This includes trains contracted by GrainCorp, AWB and others and truck capacity. Published elevation capacity is therefore based on a combination of throughput capacity of GrainCorp's terminals and GrainCorp's calculation of known / estimated rail and road transport capacity.

GrainCorp considers this is a fair and transparent process to ensure that terminal capacity is not over-booked in circumstances where there is insufficient road or rail capacity available for customers to transport their grain to port. Importantly:

- GrainCorp's previous Port Terminal Services Protocols included a requirement that customers demonstrate sufficient access to road or rail transport before their CNAs would be accepted. In response to customer complaints that the requirement was too onerous, GrainCorp removed this requirement from the Port Terminal Services Protocols but made it clear that access to sufficient road or rail transport was the customer's responsibility.
- GrainCorp does not provide a bundled port elevation/transport service. Port elevation bookings do not include, and are not required to include, the

³ Productivity Commission, Inquiry into Wheat Export Marketing Arrangements, Draft Report, March 2010, P 127

provision of transport services by GrainCorp, either by rail or road. However, importantly, over the last two years, GrainCorp sold approximately [Confidential] of its rail capacity to third parties. The fact that GrainCorp did sell export rail capacity should not be taken as an indication that the company will continue to do so at the cost of its own export operations, particularly in instances where exporters are not willing to share commercial risk over multiple years.

- [Confidential]

6 Proposed Undertaking

6.1 Overview

The Proposed Port Terminal Services Undertaking is a 'roll forward' of the Current Undertaking. GrainCorp considers this is appropriate for the following reasons:

- (a) The Current Undertaking was successful in providing a regulatory framework under which GrainCorp reached commercially negotiated agreements with all its customers for access to bulk wheat port terminal services;
- (b) The 2009/2010 Export Season has demonstrated that the Current Undertaking strikes a reasonable balance between providing non-discriminatory access for export customers while ensuring that the resulting regulatory intervention in GrainCorp's operations is not set at an unreasonable level in the circumstances;
- (c) The Productivity Commission's draft report on the review of wheat marketing arrangements supports a rollover of the Current Undertaking (see section 3.1 above);
- (d) GrainCorp had an appropriate degree of flexibility under the Port Loading Protocols to operate its terminals effectively and to accommodate exporters requirements. GrainCorp also successfully amended the Port Loading Protocols to accommodate its customers' demands;
- (e) A rollover of the Current Undertaking will provide regulatory certainty to exporters. GrainCorp has dedicated significant resources to educating its customers on the new procedures required under the Current Undertaking. Given the AWB single monopoly was in place since the 1939, the transition to a competitive market in the last season has involved a significant re-education process. Maintaining the same procedures for the next three years will give rise to significant advantages in terms of cost savings, efficiency and certainty; and
- (f) The Productivity Commission's draft report also highlighted that "*While the access test has provided benefits, it has also imposed costs*"⁴. GrainCorp has spent approximately a million dollars on compliance and administrative costs

⁴ Productivity Commission, Inquiry into Wheat Export Marketing Arrangements, Draft Report, March 2010, P 127

during the Current Undertaking period. A rollover of the Current Undertaking will assist to minimise costs in the future.

In its final decision to accept the Current Undertaking, the ACCC acknowledged that a two year term and a relatively 'light handed' approach including no ringfencing was appropriate given the transitional nature of the wheat export industry. The ACCC indicated that 'it would closely monitor the effectiveness of the Undertaking in ensuring against anti competitive discrimination during its operation.' For the reasons set out above, and described fully in sections 2, 3 and 4 above, the Current Undertaking has been successful in ensuring access to GrainCorp's port terminals on non-discriminatory terms. In these circumstances, there is no justification for any higher level of regulation and a 'roll forward' of the Undertaking is appropriate.

6.2 Structure and Scope

The key components of the Proposed Undertaking will remain unchanged. The Proposed Undertaking will have the following features:

- (a) **Publication of price and non-price terms for standard services:** GrainCorp must publish price and non-price terms for standard Port Terminal Services.
- (b) **Non-discriminatory access:** GrainCorp must provide access in accordance with price and non-price terms that include efficiency, fairness and transparency as central elements and must not discriminate between access seekers, or unreasonably in favour of its own operations.
- (c) **Negotiate access in good faith:** GrainCorp is obliged to negotiate with access seekers in good faith in accordance with a detailed negotiation process to ensure that such negotiations are progressed according to benchmark timeframes.
- (d) **Arbitration of access disputes:** There is a detailed dispute resolution mechanism which will provide access seekers who are dissatisfied with the terms and conditions on which they can obtain access (including price) with an ability to have those terms and conditions reviewed by an independent arbitrator and overseen by the Commission.
- (e) **Publication of key port information:** GrainCorp is obliged to publish key port information including stocks held at each Port Terminal, cargo nominations and nominated monthly export capacity on a monthly basis

6.3 Commencement date

GrainCorp seeks approval for:

- (a) the Proposed Undertaking, other than clauses 5.5(b), 5.5(c), 9, 10, 11 and 12 and Schedule 6, to commence on 1 August 2011; and
- (b) clauses 5.5(b), 5.5(c), 9, 10, 11 and 12 and Schedule 6 of the Proposed Undertaking, to commence on 1 October 2011.

As the Commission is aware, the Current Undertaking was accepted on 29 September 2009, only 2 days before its commencement date of 1 October 2009. It was also intended that BWPTS Agreements for the 2009/2010 and 2010/2011 seasons would commence on 1 October 2009. This meant that customers who wished to sign a BWPTS Agreement before 1 October 2009 did not have the benefit of the dispute resolution procedure in the Current Undertaking at the time they were negotiating with GrainCorp. To address this, the Current Undertaking provided that customers could invoke the dispute resolution procedure at any time up until 20 November 2009 in relation to the terms of BWPTS Agreements entered into before 1 October 2010.

Although the Current Undertaking expires on 30 September 2011, its scope does not include the negotiation of any Access Agreement which will have a commencement date after 30 September 2011.

In order to:

- simplify the transition from the Current Undertaking to the Proposed Undertaking,
- ensure that negotiations for agreements commencing on or after 1 October 2011 are covered by the Proposed Undertaking; and
- avoid overlap between the provisions of the Current Undertaking and the Proposed Undertaking which do not relate to the negotiation process for agreements commencing on or after 1 October 2011,

GrainCorp seeks approval for the provisions of the Proposed Undertaking which relate to the negotiation of BWPTS Agreements and the dispute resolution process (all clauses in the Proposed Undertaking except clauses 5.5(b), 5.5(c), 9, 10, 11 and 12 and Schedule 6) to be in place prior to the commencement of negotiations for the 2011/2012 season. GrainCorp anticipates that these negotiations will commence in August 2011.

GrainCorp seeks approval for clauses 5.5(b), 5.5(c), 9, 10, 11 and 12 and Schedule 6 of the Proposed Undertaking to commence on 1 October 2011. It is appropriate that these clauses do not commence prior to the expiration of the Current Undertaking to ensure that there is no overlap between the Current Undertaking and the Proposed Undertaking.

6.4 Term

GrainCorp seeks a term of 3 years and 2 months for the provisions of the Proposed Undertaking which relate to the negotiaton process and the dispute resolution process and a term of 3 years for all remaining provisions of the Proposed Undertaking. The 2 year term of the Current Undertaking was appropriate given the transitional nature of the wheat industry at that time. However, on the basis of the previous export season and evidence that the Current Undertaking was effective, a longer term is now appropriate, The proposed term also aligns with the 3 year

accreditation period WEA granted to all non bulk handlers. The Commission's draft report relevantly stated:

'...if both accreditation and access undertakings were to continue beyond October 2011, it would be preferable from a 'level playing field' perspective if the periods of accreditation and access undertakings were brought into alignment..)'⁵.

Therefore, if it were it to be determined that both the accreditation and access undertakings would not continue after 1 October 2014, GrainCorp contends that it would be logical for the Proposed Access Undertaking to also end on 30 September 2014. On this basis, the proposed term is appropriate.

6.5 Standard Terms

GrainCorp has made the following changes to the Standard Terms to align them with the final BWPTS Agreements entered into with customers for the 2009/2010 and 2010/2011 export seasons and to reflect the Proposed Undertaking:

- References to 'approved' and 'non-approved' storage have been replaced with 'third party storage';
- Provisions enabling customers to 're-open' and negotiate the terms of an agreement executed prior to the commencement of the Undertaking have been removed as the Proposed Undertaking will be in place prior to the commencement of negotiations for new BWPTS Agreements;
- Provisions requiring GrainCorp to offer to amend a BWPTS Agreement entered into to reflect standard terms approved by the ACCC have been removed as the Proposed Undertaking will be in place prior to the commencement of negotiations for new BWPTS Agreements;
- The term will be three years. Any variation of prices will be subject to the dispute resolution procedure, except where a variation only reflects a change to CPI;
- Terminology has been updated to reflect GrainCorp's GrainTransact stock management system.

6.6 Port Terminal Services Protocols

The Proposed Undertaking will include GrainCorp's Port Terminal Services Protocols, as varied in May 2010. The provisions in the Proposed Undertaking relating to

⁵ Productivity Commission, Inquiry into Wheat Export Marketing Arrangements, Draft Report, March 2010, P135

compliance with, and variation of, the Port Terminal Services Protocols will be unchanged from the Current Undertaking.

7 Conclusion - the TPA Acceptance Criteria are satisfied

7.1 Introduction

In its submission to the Commission in support of the Current Undertaking, GrainCorp outlined reasons why the Current Undertaking satisfied the criteria for acceptance by the Commission under Division 6 of Part IIIA of the TPA. For the reasons set out below, those criteria continue to be satisfied by the Proposed Undertaking.

7.2 The Objects of Part IIIA

To the extent that port elevator facilities cannot be economically duplicated, an undertaking to provide access to services from those facilities on transparent and non-discriminatory terms will 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 established.

During the Productivity Commission inquiry, the NCC noted that *'In the Council's view, to date little if any evidence has been provided to establish that it is necessary to regulate port terminal services for bulk wheat export'*⁶

The merger activity in the Australian grain industry in the previous 12 months suggests there is scope for new entry, and there is some potential for intra-port competition. GrainCorp had historically provided access to Port Terminal Services in the absence of a formal access undertaking, and reached commercially negotiated agreements for access under the Current Undertaking. For these reasons, the Commission should again 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 will protect investment incentives and promote economically efficient investments in port terminal facilities.

Accordingly, the Proposed 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. The Proposed Undertaking will continue to give industry confidence that they will be able to access GrainCorp's port terminals on commercial terms.

⁶ Productivity Commission, Inquiry into Wheat Export Marketing Arrangements, Draft Report, March 2010, P132

7.3 The Pricing Principles Specified In Section 44ZZCA of The TPA

The Proposed Undertaking requires access to Port Terminal Services to be provided on non-discriminatory terms and has provisions specifically prohibiting GrainCorp from discriminating in favour of its own business. An undertaking that allows GrainCorp to determine its own access prices at the first instance, together with a binding dispute resolution process, ensures that GrainCorp will provide access at prices that generate expected revenue for Port Terminal Services that is at least sufficient to meet the efficient costs of providing access to the Port Terminal Services including a return on investment commensurate with risk.

Furthermore, the publish / negotiate / arbitrate model on which the Proposed Undertaking is based creates incentives for GrainCorp to continue to reduce costs and improve productivity. This is demonstrated by the initiatives GrainCorp has undertaken in the 2009/2010 export season which are described in sections 3.4, 4.2 and 4.4 above. Accordingly, the published pricing under the Current Undertaking and proposed under the Proposed Undertaking is consistent with the Pricing Principles set out in section 44ZZCA of the TPA.

7.4 The Legitimate Business Interests of the Provider

GrainCorp has a 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. GrainCorp is satisfied that the Proposed Undertaking would not prevent this outcome.

7.5 The Public Interest, Including the Public Interest in Having Competition in Markets

The public interest will 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. This will protect incentives for economically efficient investment in Port Terminal Services which will 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.

7.6 The Interests of Persons Who Might Want Access to the Service

Under the Proposed 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.

It is also relevant to observe that, if the Commission did not approve the Proposed Undertaking or required onerous regulatory requirements, there is a real risk that GrainCorp would cease to be an accredited wheat exporter.

This may reduce competition between exporters of bulk wheat, which would not be in the interest of the Australian export industry or Australian farmers who would face reduced choice of bulk wheat exporters.

Such an outcome would also impose a punitive financial cost upon GrainCorp, and would significantly penalised GrainCorp shareholders unfairly, as it would prevent the company from participating in 1.5 mmt (or more) pa of wheat export sales, from which significant income is generated.

GrainCorp Operations Limited
22 September 2010