



Australian  
Competition &  
Consumer  
Commission

# **GrainCorp Operations Limited**

## **Port Terminal Services Access Undertaking**

### **Decision to Accept**

**22 June 2011**



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## Glossary

2009 Undertaking	Access undertaking for GrainCorp Operations Limited accepted by the ACCC on 29 September 2009
ABARES	Australian Bureau of Agricultural and Resource Economics and Sciences
ABS	Australian Bureau of Statistics
ACCC	Australian Competition and Consumer Commission
AGEA	Australian Grain Exporters Association
AWB	AWB Limited
BHC	Bulk handling company
BWPTS Agreement	Bulk Wheat Port Terminal Services Agreement
CBH	Cooperative Bulk Handling Limited
CNA	Cargo Nomination Application
CPI	Consumer Price Index
Emerald	Emerald Group Australia Pty Ltd
GFL	Goodman Fielder Limited
GrainCorp	GrainCorp Operations Limited
mt	Million tonnes
PC	Productivity Commission
Proposed 2011 Undertaking	Access undertaking received from GrainCorp Operations Limited on 22 September 2010
PTSP	Port Terminal Service Protocols
The Act	<i>Competition and Consumer Act 2010</i> (Cth) (previously the <i>Trade Practices Act 1974</i> (Cth))
Viterra	Viterra Operations Limited
WEA	Wheat Exports Australia
WEMA	<i>Wheat Export Marketing Act 2008</i> (Cth)

# 1 Executive Summary

On 22 June 2011 the ACCC made a decision pursuant to section 44ZZA(3) of the *Competition and Consumer Act 2010* (Cth) (**the Act**) to accept an undertaking lodged by GrainCorp Operations Limited (**GrainCorp**) on 20 June 2011 (**2011 Undertaking**). The reasons for the ACCC's decision to accept GrainCorp's Undertaking are set out in this document.

The 2011 Undertaking relates to the provision of access to services for the export of bulk wheat at seven grain terminals operated by GrainCorp in Queensland, New South Wales and Victoria. These terminals are:

**Queensland:** Fisherman Islands, Gladstone and Mackay

**New South Wales:** Carrington and Port Kembla

**Victoria:** Geelong and Portland.

GrainCorp has submitted the 2011 Undertaking to meet the access test provisions of the *Wheat Export Marketing Act 2008* (Cth) (**WEMA**) required for it to be re-accredited as a bulk wheat exporter from 1 October 2011.

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

GrainCorp's 2011 Undertaking is the first of four port terminal services access undertakings being considered by the ACCC in the 2011 round of undertakings. The ACCC has also received undertakings lodged by Viterro Operations Limited (**Viterro**) in relation to its operations in South Australia, Co-operative Bulk Holdings (**CBH**) in relation to its operations in Western Australia, and Australian Bulk Alliance (**ABA**) in relation to its operations at the Port of Melbourne in Victoria. GrainCorp, Viterro and CBH each has in place an access undertaking accepted by the ACCC in 2009 while ABA is proposing an undertaking to the ACCC for the first time. The ACCC will consider each undertaking on its own merits and notes that, while undertakings accepted by the ACCC from each bulk handling company (**BHC**) will reflect the particular circumstances of that company, there are certain aspects of the undertakings for which the ACCC will be seeking a consistent approach across the bulk wheat export industry.

In considering whether to accept an undertaking the ACCC has regard to the matters set out in s. 44ZZA(3) of the Act. These include, *inter alia*, the objects of Part IIIA which are to:

- (a) *promote the economically efficient operation of, use of and investment in the infrastructure by which services are provided, thereby promoting effective competition in upstream and downstream markets; and*
- (b) *provide a framework and guiding principles to encourage a consistent approach to access regulation in each industry.*

GrainCorp's Proposed 2011 Undertaking largely continues the arrangements in its 2009 Undertaking, which is a relatively light-handed form of undertaking, based on a

publish-negotiate-arbitrate framework. The ACCC considers that GrainCorp's 2009 Undertaking appears to have worked relatively well and GrainCorp has successfully negotiated access agreements with all of its customers. No bulk wheat exporter has raised a dispute with the ACCC under the provisions of the 2009 Undertaking. Further, there is evidence that the existence of the dispute resolution provisions has facilitated customer agreements.

Nevertheless, the ACCC formed the view that the Proposed 2011 Undertaking was not appropriate in the form lodged on 22 September 2010. The ACCC released a draft decision setting out its preliminary views regarding the Proposed 2011 Undertaking on 24 March 2011 (**Draft Decision**) and identifying those aspects of the Proposed 2011 Undertaking that the ACCC considered were unlikely to be appropriate. GrainCorp provided revised drafting to its Undertaking in relation to most of these issues to address ACCC concerns.

The Draft Decision also identified concerns with the capacity management arrangements under the Proposed 2011 Undertaking and sought comments on whether capacity bookings should be transferable. In submissions received to the Draft Decision, GrainCorp was opposed to bookings for its port terminal services being transferable while industry and access seekers were generally supportive (see section 4.25 in Appendix A to this paper for a summary of submissions; submissions are available on the ACCC website).

GrainCorp subsequently put forward proposals regarding its capacity management arrangements to promote more efficient use of its port terminal services as alternatives to transferability (see GrainCorp second draft revised undertaking dated 27 May 2011 on the ACCC website). The ACCC released a Draft Amendment Notice and Explanatory Statement for consultation on proposed amendments, including for these further proposals. Two submissions were received on the Draft Amendment Notice and Explanatory Statement. The ACCC notes that most of the issues raised had been discussed in the Draft Decision but recognises the need for greater clarity regarding preferential sharing of shipping stem information with its Trading Division by GrainCorp.

Shipping stem maintenance is a port terminal service to which the 2011 Undertaking applies and GrainCorp would be in breach of the undertaking if it were found to have provided this service on a preferential basis to its Trading Division. For certainty and clarity regarding this issue, the ACCC is of the view that the 2011 Undertaking explicitly recognise that the non-discrimination provisions apply to this service.

The ACCC considered the impact of these new proposals on the effectiveness of the proposed access arrangements and how well the arrangements met the various matters listed in s. 44ZZA(3). The ACCC is of the view that it is appropriate to accept the 2011 Undertaking having regard to these factors.

Nevertheless, it is the ACCC's view that auctions and transferability of capacity is a preferred approach to promote economic efficiency in the operation of, use of and investment in infrastructure used for the provision of port terminal services to the wheat export market where capacity is constrained. The ACCC will reconsider the need for such measures if it is required to decide on another undertaking proposed by GrainCorp after the expiration of the Proposed 2011 Undertaking.

The ACCC's decision to accept GrainCorp's 2011 Undertaking, including retention of its first come, first served capacity allocation arrangements is based on the particular circumstances relating to GrainCorp's 2011 Undertaking. The market conditions in which GrainCorp operates and the experience with the capacity allocation arrangements operated by GrainCorp will not necessarily apply to the access undertakings submitted by other BHCs. The ACCC will monitor the arrangements under GrainCorp's 2011 Undertaking to assess their effectiveness.

## 1.1 The 2009 Undertaking

The 2009 Undertaking provides a publish-negotiate-arbitrate approach to access provision by GrainCorp. The ACCC considered this approach to be relatively light-handed but appropriate at the time the decision to accept was made in September 2009.

In forming this view, the ACCC noted in its Decision to Accept<sup>1</sup> that the approach was supported by robust non-discrimination, no hindering access and continuous disclosure and reporting provisions. The transitional phase of the bulk wheat export industry at that time and the two-year term of the 2009 Undertaking were also relevant to the ACCC's view on the appropriateness of the 2009 Undertaking.

However, the ACCC noted in its Decision to Accept the 2009 Undertaking<sup>2</sup> that the continuing appropriateness of the approach of the 2009 Undertaking would be reviewed when considering subsequent undertakings from GrainCorp. In particular the ACCC flagged in the 2009 Decision to Accept that future assessment would be made regarding:

- whether the publish-negotiate-arbitrate approach to access provision continues to be appropriate, or whether it is more appropriate to move to an ex ante price determination approach
- if the publish-negotiate-arbitrate approach to access provision is retained, whether it should be further strengthened by ring-fencing rules
- whether GrainCorp's (first come, first served) capacity allocation approach is appropriate or whether alternative arrangements should be required for future undertakings
- whether the degree of flexibility afforded to GrainCorp by the 2009 Undertaking to vary its capacity management arrangements by varying its port terminal services protocols (PTSP) is appropriate.

## 1.2 The 2011 Undertaking given on 20 June 2011

The 2011 Undertaking provided by GrainCorp on 20 June 2011 proposes continuing the general approach of the 2009 Undertaking but incorporates a number of changes.

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<sup>1</sup> ACCC, *GrainCorp Operations Limited Port Terminal Services Access Undertaking Decision to Accept*, 29 September 2009 p. 223.

<sup>2</sup> ACCC, *Final decision on GrainCorp Undertaking*, 29 September 2009.

These changes followed consultation on the Draft Decision and the Draft Amendment Notice and Explanatory Statement.

Significant differences between the 2009 Undertaking and the 2011 Undertaking are:

- a three-year term (subject to commencement of publish-negotiate-arbitrate and dispute resolution provisions commencing from 1 August 2011)
- measures within the 2011 Undertaking to strengthen the non-discrimination and no hindering access provisions including:
  - a requirement for GrainCorp to provide the ACCC with a copy of the terms on which it provides services to its Trading Division
  - clarification that the non-discrimination provisions apply to shipping stem maintenance
  - improved processes required of GrainCorp when it varies its PTSP
  - an ability for the ACCC to issue an objection notice if it forms the view that a variation to the PTSP is material and raises concerns regarding the non-discrimination and no hindering access provisions of the undertaking
  - an ACCC information gathering power
- measures to promote efficient capacity use and to increase confidence on the part of access seekers that the first come, first served system for the allocation of capacity occurs in a non-discriminatory way. These include:
  - a conditional 50 per cent refund of booking fees for the return to the stem of capacity booked at peak periods
  - publication of more detailed information on stocks at port more frequently
  - improved customer notification arrangements regarding the opening of GrainCorp's shipping stem and changes to capacity available at GrainCorp ports
- the standard terms available to access seekers as set out in the Indicative Access Agreement in (Schedule 5 to) the Undertaking have been updated to reflect the agreements negotiated by GrainCorp with customers in March 2010
- the PTSP have been updated in line with the variation process undertaken in April-May 2010.

### **1.3 ACCC decision to accept**

The ACCC may accept an undertaking offered under Part IIIA if it thinks it appropriate to do so having regard to the matters specified under s. 44ZZA(3) of the Act. These matters include the economically efficient operation of and use of the infrastructure and encouraging a consistent approach to access regulation in each industry. Other matters specified in s. 44ZZA(3) are the legitimate business interests of the access provider, the public interest, including the public interest in having competition in markets, the interests of access seekers and any other matters the ACCC thinks are relevant. The ACCC recognises that GrainCorp has provided the



2011 Undertaking to meet the access test provisions of the WEMA and considers that the legislative framework established for the export of bulk wheat is a relevant matter in weighing up whether it is appropriate to accept the 2011 Undertaking.

In reaching its decision the ACCC has had regard to all matters listed in s. 44ZZA(3), and is of the view that the 2011 Undertaking is appropriate to accept having regard to each of those matters.

The ACCC has considered the views of stakeholders in reaching this decision to accept the 2011 Undertaking. Submissions were received in response to:

- an Issues Paper released on 7 October 2010
- a Draft Decision released on 24 March 2011
- a Draft Amendment Notice and Explanatory Statement released on 2 June 2011.

### **1.3.1 Overall publish-negotiate-arbitrate approach**

In deciding whether to accept the 2011 Undertaking, the ACCC considered the proposed framework for access provision and how the 2011 Undertaking gave effect to that framework. The ACCC considers that continuing the overall approach to access provision as provided in the 2009 publish-negotiate-arbitrate arrangements is appropriate and that prescriptive ex ante price regulation or ring fencing arrangements are not necessary in the case of GrainCorp's 2011 Undertaking.

The ACCC recognises views provided by some stakeholders, including WEA and AGEA, that the undertakings from all BHCs should include ring-fencing arrangements. The ACCC does not consider this is an aspect of the undertakings for which there should be a common approach. In the case of the 2011 Undertaking from GrainCorp, the ACCC is of the view that the publication of more detailed information on stocks-at-port and clarification regarding that sharing of shipping stem information provide sufficient safe guards and that ring-fencing is not necessary. The issue of ring-fencing will be considered for the other BHCs in light of their particular circumstances.

The ACCC is of the view that the 2009 Undertaking has generally been effective and notes, in particular, that GrainCorp has successfully negotiated access agreements with its customers and that no access seeker has resorted to arbitration under the 2009 Undertaking. The ACCC is of the view that the publish-negotiate-arbitrate approach to access provision incorporated in the 2011 Undertaking appropriately balances the interests of GrainCorp to manage its port terminal services in an operationally efficient manner, the interests of access seekers to obtain port terminal services on a non-discriminatory basis, and the public interest in the economically efficient operation and use of the services and promotion of competition in the bulk wheat export supply-chain. Thus, having regard to the matters in s. 44ZZA(3), the ACCC has decided to accept the overall approach to access provision incorporated in the 2011 Undertaking.

That said the ACCC is of the view that the 2009 arrangements could, and should, be strengthened without moving to more prescriptive ex ante price setting or ring fencing arrangements. This view is based on the particular circumstances relating to

GrainCorp's Proposed 2011 Undertaking and will not necessarily apply to the access undertakings submitted by other BHCs. The ACCC notes in particular that port terminal capacity is relatively unconstrained on the east coast and that the export of bulk wheat through GrainCorp's port terminals are subject to a number of competitive pressures, including from domestic users, up up-country supply chains, from other ports and the threat of customers by-passing GrainCorp facilities. These are discussed further in chapter 3 and supporting analysis is provided in Appendix B.

The 2011 Undertaking makes changes from the 2009 arrangements regarding the publish-negotiate-arbitrate approach to non-discriminatory access provision which appropriately strengthen the provisions. These are listed in 1.2 above and are detailed in chapter 3 of this document.

### **1.3.2 Capacity management**

The ACCC notes that different arrangements for the allocation of capacity exist across the ports operated by the different BHCs. In particular, an auction system operates in Western Australia, whereas first come, first served arrangements operate along the east coast and in South Australia. In considering the appropriateness of the capacity arrangements operated by GrainCorp (a first come, first served system), the ACCC has considered the effectiveness of existing or past arrangements for the port facilities operated by GrainCorp. While the practice by other operators in other markets may provide useful intelligence in forming a view as to what is appropriate in particular circumstances, it is the individual circumstances themselves which the ACCC considers when forming a view.

The ACCC considers auctions and transferability are preferred mechanisms on economic efficiency grounds to allocate capacity. This is particularly the case when capacity is constrained relative to demand and administered approaches—such as a first come, first served system—are unlikely to result in economically efficient outcomes. Auctions, by allocating capacity to the users with the highest willingness to pay, are the preferred approach. In the absence of an auction allocation, transferability will help in reallocating capacity to the most economically efficient uses.

The ACCC considered whether GrainCorp's proposed capacity management arrangements might, nevertheless, be considered appropriate. In particular, the ACCC notes the relatively unconstrained nature of capacity at GrainCorp's port terminals; the relatively greater flexibility available for shippers to change booking nominations allowed in GrainCorp's PTSP, which enables shippers to respond to changing circumstances; and the orderly way in which the first come, first served booking arrangements have operated. The ACCC considers that these arrangements contribute to achieving efficient use of port terminal services.

GrainCorp put forward alternatives to capacity transferability between users which it considered addressed the ACCC's capacity management concerns. These proposals are that:

- shippers with capacity booked for a peak period receive a partial refund of the booking fee if the capacity is subsequently taken up by another shipper
- more detailed information on stocks at port to be published more frequently

- improved transparency and certainty regarding capacity booking and management.

The ACCC formed the view that these amendments are sufficient for the undertaking to be appropriate. This view is based on an assessment that port capacity on the east coast is relatively unconstrained and the economic imperative for allocation by auction or transferability is weaker than in markets where capacity is more constrained relative to demand for it.

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

### **1.3.3 Variation of protocols**

Under the 2009 Undertaking it is not necessary for GrainCorp to submit to a formal undertaking variation under s. 44ZZA(7) of the Act in order to vary its PTSP. In deciding to accept the 2009 Undertaking, the ACCC recognised GrainCorp's need for operational flexibility and formed the view that it was appropriate to adopt a pragmatic approach. The ACCC formed a similar view for the each of the 2009 undertakings which provide that port protocols can be varied subject to consultation with access seekers and subject to the varied protocols being subject to the undertaking, including non-discrimination provisions.<sup>3</sup> The ACCC noted at the time that it would review the effectiveness of these arrangements when considering future undertakings.

Each of the 2009 undertakings accepted by the ACCC applying to GrainCorp, CBH and Viterra contain a version of port loading protocols, with a process for their variation. These differ to some extent between the different undertakings. Each operator has varied its protocols since acceptance by the ACCC and different issues have arisen with these variation processes.

In assessing the PTSP variation process, the ACCC considered the experience of each of the bulk handlers' variation processes, to determine a consistent approach across the industry that is appropriate. The minimum standards which the ACCC considers are necessary for an efficient, meaningful and transparent variation processes are set out in chapter 3 of this Decision to Accept.

Application of these standards to GrainCorp's Proposed 2011 Undertaking required the following changes, which are included in the 2011 Undertaking:

- Clarification that the PTSP is, and must continue to be, a comprehensive statement of GrainCorp's policies and procedures for managing demand for the port terminal service
- inclusion of further provisions regarding GrainCorp's consultation process when varying its PTSP
- inclusion of a provision for the ACCC to object to a protocol variation in circumstances where:

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<sup>3</sup> ACCC, *Final Decision on GrainCorp Undertaking*, 29 September 2009, p.289.

- the proposed variation is material; and
- the proposed variation gives rise to concerns under either the anti-discrimination and/or the no hindering access provisions of the undertaking .

### **1.3.4 In accordance with an industry code**

Section 44ZZAA of the Act provides that an industry body may give a written code to the ACCC setting out rules for access to a service.<sup>4</sup> The ACCC may accept the code, if it thinks it appropriate to do so having regard to matters set out in section 44ZZAA(3).<sup>5</sup> 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.<sup>6</sup>

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.

### **1.3.5 Decision**

The ACCC has reached a decision to accept the 2011 Undertaking submitted by GrainCorp in response to the Amendment Notice given in relation to the Proposed 2011 Undertaking. The ACCC is of the view that GrainCorp has responded to concerns raised adequately for the 2011 Undertaking to be acceptable. The ACCC reached its decision to accept after weighing the matters to which it must have regard under s. 44ZZA(3) of the Act (see Appendix D).

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<sup>4</sup> *Competition and Consumer Act 2010* (Cth) s 44ZZAA(1).

<sup>5</sup> *Competition and Consumer Act 2010* (Cth) s 44ZZAA(3).

<sup>6</sup> *Competition and Consumer Act 2010* (Cth) s 44ZZAA(8).

## 2 Procedural overview

### 2.1 GrainCorp's Proposed 2011 Undertaking

Under Division 6 of Part IIIA of the *Competition and Consumer Act 2010* (**the Act**), the Australian Competition and Consumer Commission (ACCC) may accept an undertaking from a person who is, or expects to be, the provider of a service, in connection with the provision of access to that service.

The ACCC received an access undertaking (the **Proposed 2011 Undertaking**) from GrainCorp Operations Limited (GrainCorp) on 22 September 2010 for consideration under Division 6 of Part IIIA of the Act. On 31 January 2011 GrainCorp submitted an amendment to the Proposed 2011 Undertaking that made technical changes to reflect the change in title of the Act and to provide for the possibility of changes to the legislative framework during the term of the 2011 Undertaking. The Proposed 2011 Undertaking considered by the ACCC for its Draft Decision was the Proposed 2011 Undertaking as revised on 31 January 2011.

The Proposed 2011 Undertaking relates to the provision of access to services for the export of bulk wheat at grain port terminals operated by GrainCorp in Queensland, New South Wales and Victoria.

GrainCorp submitted the Proposed 2011 Undertaking in accordance with legislative requirements under the *Wheat Export Marketing Act 2008* (**WEMA**), further details of which are set out in Appendix D.

### 2.2 Amendment notice

On 20 June 2011 the ACCC gave GrainCorp an Amendment Notice in relation to its Proposed 2011 Undertaking under s. 44ZZAAA(1) of the Act (**Amendment Notice**). The Amendment Notice is published on the ACCC website. This followed consultation on the ACCC's Draft Decision (**Draft Decision**) released on 24 March 2011.

The Amendment Notice related to a number of matters discussed in the ACCC Draft Decision released on 24 March 2011 and to additional matters regarding capacity management discussed in the Explanatory Statement accompanying the Draft Amendment Notice released on 2 June 2011 (**Explanatory Statement**). GrainCorp provided proposed revised drafting of the Proposed 2011 Undertaking (**second draft revised undertaking**) regarding the matters discussed in the Draft Decision and the Explanatory Statement on 27 May 2011 which can be viewed on the ACCC website.

The Amendment Notice provided a response period of 15 days with an expiry date of 4 July 2011. GrainCorp responded to the Amendment Notice on 20 June 2011 by giving the ACCC a revised undertaking under s. 44ZZAAA(5) of the Act (**2011 Undertaking**).

The 2011 Undertaking incorporates amendments that are of the nature proposed in the Amendment Notice.

The ACCC decided on 22 June 2011 to accept the 2011 Undertaking which is on the ACCC website.

## **2.3 Public consultation process**

The Act provides that the ACCC may invite public submissions on an access undertaking application.<sup>7</sup>

The ACCC published an Issues Paper on 7 October 2010 inviting submissions on the Proposed 2011 Undertaking. The ACCC directly advised approximately 80 stakeholders, including accredited wheat exporters, grain growers, farming organisations and state regulatory bodies, of the public consultation process.

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

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

The ACCC published a Draft Amendment Notice and Explanatory Statement on 2 June 2011. The Draft Amendment Notice related to those aspects of GrainCorp's Proposed 2011 Undertaking that the ACCC considered are not appropriate having regard to s. 44ZZA(3) of the Act. The Draft Amendment Notice included the ACCC's reasons for the suggested amendments. The Explanatory Statement on the Draft Amendment Notice set out the ACCC's updated views on relevant matters.

## **2.4 Submissions received**

The ACCC received submissions from GrainCorp and third parties on its Issues Paper, its Draft Decision and the Draft Amendment Notice and Explanatory Statement. GrainCorp also provided submissions in support of its Proposed 2011 Undertaking. A summary of all submissions received by the ACCC during consultation is at Appendix A to this Final Decision.

### **2.4.1 Submissions from GrainCorp**

GrainCorp has provided the following information in respect of the Proposed 2011 Undertaking:

- initial supporting information provided on 22 September 2010
- submission in response to third party submissions on the issues paper
- submission in response to draft decision in relation to trading of shipping slots provided on 7 April 2011

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<sup>7</sup> *Competition and Consumer Act 2010* s. 44ZZBD(1).

- supplementary submission addressing remaining issues raised in the draft decision and providing further information in relation to the ACCC's proposal for a secondary market for the transfer of shipping slots provided on 18 April 2011
- submission in response to third party submissions on the draft decision
- submission in response to third party submissions on the Draft Amendment Notice and Explanatory Statement.

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

#### **2.4.2 Submissions received from interested parties**

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

- Australian Grain Exporters Association (**AGEA**) – 10 November 2010, 2 May 2011 and 15 June 2011

Members of the AGEA are active participants in both domestic and export grain markets, with a particular focus on providing efficient access to international markets.

Members of AGEA are Bunge Global Markets Australia Pty Ltd, Cargill Australia Limited, Louis Dreyfus Australia Pty Ltd, Glencore Grain Pty Ltd, Noble Grain Australia Pty Ltd, Goodman Fielder Limited, Emerald Pty Ltd and Elders Toepfer Grain Pty Ltd.<sup>8</sup>

- AWB (Australia) Limited (**AWB**) – 12 November 2010 and 15 April 2011
- Mr Timothy Bush – 4 November 2010
- Emerald Group Limited (**Emerald**) – 6 April 2011
- Victorian Freight and Logistics Council – 21 April 2011
- Port of Portland – 21 April 2011
- Goodman Fielder Ltd (**GFL**) – 27 April 2011
- Wheat Exports Australia (**WEA**) – 14 June 2011

#### **2.4.3 Confidential submissions**

The ACCC received a confidential submission from GrainCorp and two confidential submissions from third parties in response to the Draft Decision. A comprehensive summary of the views put in the confidential submissions by third parties has been published on the ACCC website. The ACCC has relied on the views in this comprehensive summary in making its decision on whether to accept the 2011 Undertaking.

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<sup>8</sup> <http://www.agea.com.au/>

## **2.5 Further information**

The accepted 2011 GrainCorp Undertaking and other relevant materials, including supporting submissions from GrainCorp and public submissions by interested parties, are available on the ACCC's website at [www.accc.gov.au](http://www.accc.gov.au) by following the links to 'For regulated industries' and 'Wheat Export,' or via the following link: [Wheat Exports: Port Terminal Services Access Undertakings](#).



### **3 ACCC decision to accept undertaking**

On 22 June 2011 the ACCC accepted a port terminal services access undertaking submitted by GrainCorp on 20 June 2011 for the period 1 August 2011 to 30 September 2014 (2011 Undertaking). The reasons for the ACCC's decision to accept the 2011 undertaking are set out in this chapter.

#### **3.1 GrainCorp revised 2011 undertaking**

##### **3.1.1 ACCC amendment notice**

As noted in section 2.2, on 20 June 2011 the ACCC issued GrainCorp with an Amendment Notice under s. 44ZZAAA(1) of the Act in relation to the Proposed 2011 Undertaking lodged by GrainCorp on 22 September 2010 (a copy of the Amendment Notice is at Attachment A to this Decision). Prior to giving the Amendment Notice the ACCC released a draft amendment notice and accompanying Explanatory Statement, on 2 June 2011. The draft amendment notice and Explanatory Statement can be viewed on the ACCC website.

The Amendment Notice dealt with a number of aspects of the Proposed 2011 Undertaking on which the ACCC had formed a view that, having regard to the matters in s.44ZZA, are not appropriate. Further, the ACCC formed the view that, were the Proposed 2011 Undertaking revised in accordance with the proposed amendments set out in the Amendment Notice, it was likely to be acceptable. The ACCC notes that the proposed amendments in the draft Amendment Notice reflect drafting provided by GrainCorp in the second draft revised undertaking given to the ACCC on 27 May 2011.

The Amendment Notice sets out the ACCC's reasons for the proposed amendments and the Explanatory Statement and Draft Decision provide further detail on the ACCC's views on relevant matters.

##### **3.1.2 Revised GrainCorp undertaking**

On 20 June 2011 GrainCorp provided a revised undertaking in response to the Amendment Notice (**2011 Undertaking**) under s. 44ZZAAA(5). The Act provides that the ACCC:

- must not accept a revised undertaking if it incorporates one or more amendments that the ACCC considers are not of the nature proposed in the amendment notice and do not address the reasons for the proposed amendments given in the amendment notice (s. 44ZZAAA(6))
- is not required to accept a revised undertaking (s. 44ZZAAA(9)).

#### **3.2 ACCC decision to accept 2011 Undertaking**

The ACCC considers that the 2011 Undertaking submitted by GrainCorp amends the Proposed 2011 Undertaking in accordance with the proposed amendments set out in the Amendment Notice. Further, the ACCC considers that there is no aspect of the 2011 Undertaking that requires the ACCC to not accept it pursuant to the provisions of s. 44ZZAAA(6).

The ACCC decided on 22 June 2011 to accept the 2011 Undertaking provided by GrainCorp. The ACCC reached its decision following consultations on its Draft Decision and on the Draft Amendment Notice and Explanatory Statement. In reaching its decision, the ACCC considered whether the overall approach of GrainCorp's 2011 Undertaking and its specific provisions are appropriate, having regard to the matters listed in s. 44ZZA(3).

The ACCC notes that its decision to accept GrainCorp's 2011 Undertaking, and the capacity management arrangements established by it, is based on GrainCorp's circumstances and the market within which it operates. These differ in a number of respects to circumstances in other wheat exporting regions, and for other bulk handling companies (**BHC**), and the ACCC's decisions on access undertakings provided by other port operators will be based on the circumstances relevant to them.

In forming its decision to accept the Revised Undertaking the ACCC has considered the submissions made by GrainCorp and by third parties during consultation on the Draft Decision regarding the Proposed 2011 Undertaking and the Draft Amendment Notice and Explanatory Statement. The submissions are available on the ACCC website and a summary is at Appendix A to this Decision to Accept.

The reasons for the ACCC decision to accept GrainCorp's 2011 Undertaking are set out below.

### **3.2.1 Overall approach to access provision**

The 2011 Undertaking is based on continuing the publish-negotiate-arbitrate model of access provision established in the 2009 Undertaking. This approach provides that:

- GrainCorp will publish the standard price and non-price terms on which it will provide access. Clause 5 provides for the standard price and non-price terms and requires GrainCorp to provide non-discriminatory access. Schedule 5 of the Proposed 2011 Undertaking contains the proposed Indicative Access Agreement (the Standard Terms). GrainCorp publishes the Reference Prices on its website.
- GrainCorp and an access seeker may negotiate price and non-price terms other than the Standard Terms and Reference Prices. Clause 6 outlines the process by which this negotiation will take place.
- Where there is a dispute between GrainCorp and an access seeker relating to the negotiation of new or additional access agreements, or a dispute is raised by an access seeker regarding a decision by GrainCorp to unilaterally vary the Reference Prices, the dispute will be resolved through the Dispute Resolution process outlined in clause 7 of the Revised Undertaking.
- The Dispute Resolution process includes a negotiation period between parties, provision for both formal and informal mediation, and referral to arbitration by the ACCC or an independent arbitrator.
- GrainCorp will publish information on the stock at port, vessel booking applications, and performance indicators to assist access seekers in their negotiations and increase the transparency of GrainCorp's operations, as outlined in clauses 10 and 11 of the Revised Undertaking.

The publish-negotiate-arbitrate model of access provision is one of a number of possible approaches to ensure that third parties obtain access to port terminal services on a non-discriminatory basis. More prescriptive alternatives include formal ring-fencing arrangements and ex ante regulation of prices.

In its Decision to Accept the 2009 Undertaking the ACCC noted that more prescriptive arrangements would not be required at that time but that, if the 2009 arrangements prove not to be effective it would adopt a more prescriptive approach in any future access undertakings. In forming this view, the ACCC took into account the transitional state of the industry and the possibility that any ring-fencing measures that were implemented at that time may need to be revised in the medium term in accordance with any regulatory changes. The ACCC is of the view that the 2009 Undertaking has generally been effective. That said, the ACCC is of the view that those arrangements could, and should, be strengthened without moving to more prescriptive ex ante price setting or ring fencing arrangements.

Measures to strengthen the 2009 arrangements were the subject of the s. 44ZZAAA(1) Amendment Notice given to GrainCorp on 20 June 2011 and are discussed in the following sections. It is the ACCC's view that the revised 2011 Undertaking given by GrainCorp in response to the Amendment Notice incorporates amendments that are of the nature proposed in and fully address the Amendment Notice.

As the ACCC noted in the Draft Decision and the Explanatory Statement, the publish-negotiate-arbitrate framework as set out in the 2009 Undertaking appears to have operated reasonably well in the case of GrainCorp. Under this framework parties were able to overcome initial difficulties and successfully negotiate access agreements in relation to GrainCorp's port terminal services.<sup>9</sup>

Third party submissions did not raise significant concerns with the overall publish-negotiate-arbitrate approach. However, AGEA submitted in relation to ring-fencing that the 2009 Undertakings of all the BHCs have not dealt with sharing of information by the port terminal operator that can be used to the advantage of its trading arm.<sup>10</sup> The ACCC also acknowledges submissions received from AGEA and WEA<sup>11</sup> that the undertakings accepted from all BHCs should include ring-fencing arrangements. The ACCC does not consider this is an aspect of the undertakings for which there need necessarily be a common approach. The ACCC is of the view that ring-fencing should be assessed with regard to the particular circumstances of each port operator.

In the case of the 2011 Undertaking from GrainCorp, the ACCC is of the view that the publication of more detailed information on stocks-at-port (see section 3.2.3.5) and clarification regarding that sharing of shipping stem information (see section 3.2.2.3) provide sufficient safeguards and that ring-fencing is not necessary.

The ACCC is of the view, based on the practical experience of the 2009 Undertaking, that the non-discrimination, no hindering access and dispute resolution provisions of

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<sup>9</sup> See Chapter 4 of the ACCC Draft Decision for a discussion of the experience and outcomes under GrainCorp's 2009 Undertaking.

<sup>10</sup> AGEA, 2 May 2011, p. 3.

<sup>11</sup> WEA, 14 June 2011, p. 4.

the 2011 Undertaking are sufficient to ensure fair access for access seekers in the case of GrainCorp. Therefore, the ACCC formed the view that it was appropriate to continue this overall approach in the 2011 Undertaking.

The ACCC notes that its decision in relation to the operation of the publish-negotiate-arbitrate arrangements of GrainCorp's 2011 Undertaking are made in the specific circumstances of GrainCorp. The ACCC will assess individually the overall approach to access provision proposed by each BHC and may not necessarily reach the same conclusions as that for GrainCorp.

### **3.2.2 Publish-negotiate-arbitrate arrangements**

Notwithstanding the acceptability of the overall framework of the 2011 Undertaking, as discussed in the Draft Decision,<sup>12</sup> there are a number of specific aspects of the publish-negotiate-arbitrate provisions in the Proposed 2011 Undertaking that the ACCC considered in forming a view on the 2011 Undertaking. The ACCC's view on these issues are discussed in this section (3.2.2).

#### **3.2.2.1 Application of 2011 Undertaking**

Those provisions of the 2011 Undertaking relating to the publish-negotiate-arbitrate arrangements (including the standard terms and conditions at Schedule 5 and the port terminal services protocols (PTSP) at Schedule 3) will commence on 1 August 2011 while the remainder of provisions will commence on 1 October 2011.<sup>13</sup>

To avoid possible confusion for access seekers resulting from the staggered start to the provisions of the 2011 Undertaking the ACCC considered that it was necessary that the 2011 Undertaking clarify that it applied to access agreements entered into during the period 1 October 2011 to 30 September 2014 (proposed amendment 1.3 of the Amendment Notice). The ACCC considers that the proposed amendment appropriately balances the legitimate business interests of GrainCorp and the interests of access seekers. It is in GrainCorp's interests to be able to commence negotiation with customers before 1 October 2011 for access agreements to apply after that date while access seekers need to have certainty at all times as to the terms and conditions applying to port access.

#### **3.2.2.2 Own trading terms**

To support the provision of services to access seekers on a non-discriminatory basis the ACCC formed the view that GrainCorp should provide with a copy of the terms on which it provides services to its Trading Division to the ACCC (proposed amendment 1.4 of the Amendment Notice). The ACCC considers that the proposed amendment balances the legitimate business interests of GrainCorp, to keep confidential its own terms and conditions with the interests of access seekers to receive access to GrainCorp's port terminal services on a non-discriminatory basis.

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<sup>12</sup> ACCC, *Draft Decision*, 24 March 2011, pp 32-9.

<sup>13</sup> See ACCC Draft Decision for further details on the staggered start of the 2011 Undertaking. *ACCC Draft Decision*, 24 March 2011, pp 22-3.

### **3.2.2.3 Clarification that shipping stem maintenance is subject to non-discrimination provisions of the 2011 Undertaking**

The ACCC acknowledges concerns raised by Wheat Exports Australia (WEA) in its submission to the Draft Amendment Notice and Explanatory Statement<sup>14</sup> that sharing of information about its shipping stem can be used to the advantage of a BHC's Trading division. GrainCorp has provided details of the operation of, and access to, its online shipping stem booking and maintenance software ('Workflow') and states that its Trading Division has the same access to the program as other shippers.<sup>15</sup>

The ACCC notes that the non-discrimination provision of clause 5.5(a) of the 2011 Undertaking applies to all port terminal services under the 2011 Undertaking, of which 'shipping stem maintenance' is one (Schedule 2 to the 2011 Undertaking). The ACCC considers that, if GrainCorp were found to have provided information to its Trading Division prior to that information being provided to other users, it would breach the non-discrimination provision of the undertaking.

However, the ACCC recognises that GrainCorp already has obligations under the 2011 Undertaking regarding the provision of information to its Trading Division. To further support the provision of services to access seekers on a non-discriminatory basis, the ACCC formed the view that the 2011 Undertaking should explicitly recognise that shipping stem maintenance is a port terminal service to which the non-discrimination provisions apply. This improved clarity and certainty is in the interests of access seekers.

In reaching its decision regarding the overall approach to access provision and whether stronger measures—including ring-fencing arrangements—are necessary, the ACCC considered as one relevant factor the robust nature of the non-discrimination provisions included in the 2011 Undertaking.

### **3.2.2.4 Information gathering provision**

The Draft Decision considered that for the ACCC to make an effective and appropriate decision in relation to the Proposed 2011 Undertaking—including, for example, on whether to issue an objection notice (see section 3.2.4.3)—it would be necessary to increase the ACCC's current ability to obtain relevant information from the GrainCorp in a timely manner.<sup>16</sup>

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

An ACCC directed audit only assesses whether GrainCorp has complied with clause 5.5(a) of the undertaking which requires it not to discriminate between access seekers in favour of its own Trading Division, except to the extent that the cost of providing access to the other access seekers is higher. Assessing the GrainCorp's performance against the non-discrimination clause may be a relevant consideration for a decision on whether to issue an objection notice; however, an audit does not encompass all the

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<sup>14</sup> WEA, Submission, 14 June 2011, p.4.

<sup>15</sup> GrainCorp, Submission, 16 June 2011, pp.5-6.

<sup>16</sup> Ibid., p. 66.

information that the ACCC would need in making the decision. For example, it does not provide information on the GrainCorp's compliance with the no hindering access requirements in clause 9.4.

Further, it may not be possible for the ACCC to receive the information within the variation timeframe using the audit provisions. However, as noted in the Draft Decision, any extension of the variation timeframe, even for the ACCC to investigate whether or not to make use of this notice power, may give rise to uncertainty regarding port operations and should be avoided if possible.<sup>17</sup>

Given the nature of the proposed ACCC power, the Draft Decision considered it appropriate for the ACCC to have the ability to compel GrainCorp to provide specified information in a timely fashion. Information gathering powers would allow the ACCC to obtain information from GrainCorp so that the ACCC could make a sound decision into whether or not to issue a notice regarding a proposed variation.<sup>18</sup> The Draft Decision noted that if such provisions were inserted into the undertaking, a failure by GrainCorp to provide the information requested by the ACCC would result in a breach of the undertaking.<sup>19</sup>

Accordingly, the ACCC has proposed that the 2011 Undertaking include an information gathering power (proposed amendment 1.5 of the Amendment Notice). The ACCC considers that this provision appropriately balances the interests of access seekers to have certainty that they will have continuing access to GrainCorp's port terminal services on terms that are non-discriminatory and do not allow for hindering behaviours and the interests of GrainCorp to have flexibility in managing its operations.

### **3.2.2.5 Application of dispute resolution arrangements to CPI price variations**

The Indicative Access Agreement at Schedule 2 of the Proposed 2011 Undertaking excludes disputes based on a variation of its prices by GrainCorp to reflect changes in the Consumer Price Index (CPI) and that there was an inconsistency in this regard between the general provisions of the 2011 Undertaking and Schedule 2. To remove this inconsistency, the ACCC proposed that the Proposed 2011 Undertaking be amended to remove this inconsistency (proposed amendment 1.6 of the Amendment Notice). Further, to avoid uncertainty, the ACCC proposed that the 2011 Undertaking include a definition of the CPI (proposed amendment 1.7 of the Amendment Notice).

The ACCC considers that the proposed amendment balances the legitimate business interests of GrainCorp, in raising prices in line with inflation, with the interests of access seekers, in disputing price increases they consider to be unreasonable.

### **3.2.2.6 Report on performance indicators**

The 2009 Undertaking provided for GrainCorp to publish twice yearly a report on key service performance indicators. GrainCorp is required to publish these reports within two months of the end of the six month period to which they relate. The ACCC

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<sup>17</sup> ACCC, *Draft Decision*, 24 March 2011, p. 66.

<sup>18</sup> The ACCC notes that there is precedent for the inclusion of information gathering powers in undertakings, as these powers are inserted into section 87B court enforceable undertakings given to the ACCC with respect to potential breaches of section 50 of the CCA.

<sup>19</sup> ACCC, *Draft Decision*, 24 March 2011, p. 66.

considers that it is in the interests of access seekers for there to be greater awareness regarding the publication of these reports. The ACCC proposed that the 2011 Undertaking provide that GrainCorp publish the service performance reports in a prominent position on its website and that it notify the ACCC within five business days of publication (proposed amendment 1.17 of the Amendment Notice).

The ACCC considers that the proposed amendments do not add to GrainCorp's costs of complying with the 2011 Undertaking and balances the legitimate business interests of GrainCorp with the interests of access seekers to have access to information relevant to decisions to seek access to GrainCorp's port services.

### **3.2.2.7 Approval power**

In its Draft Decision the ACCC noted that the Proposed 2011 Undertaking included provisions for the ACCC to authorise ACCC Commissioners to exercise its powers in relation to its functions regarding non-discrimination and arbitration provisions. The ACCC considers that the 2011 Undertaking should explicitly recognise the ACCC's function to monitor compliance with the undertaking.<sup>20</sup> Further, the ACCC considers that, given the inclusion of a decision making role in the undertaking and the short timeframes attaching to that role, the authorisation provisions should be extended and should apply to all ACCC functions under the Undertaking.

However, the ACCC notes that use of the term authorise in the 2011 Undertaking may give rise to confusion given its specific meaning in the Act in relation to the authorisation of notifiable conduct under Part IV. Therefore, the ACCC considers that a preferred term would be approval of ACCC Commissioners.

Accordingly, the ACCC proposes that the 2011 Undertaking include an explicit acknowledgement of the ACCC's monitoring functions and, also, a provision for the ACCC to approve the Regulated Access, Pricing and Monitoring Committee or a Commissioner to exercise a decision making function on its behalf (proposed amendment 1.2 of the Amendment Notice) and make an appropriate wording existing authorisation provisions (proposed amendments 1.4 and 1.8 of the Amendment Notice). These provisions balance the interests of access seekers to have certainty regarding the terms on which access is provided and the interests of GrainCorp to manage its operations in a flexible way and make necessary changes in a timely manner.

### **3.2.2.8 Indicative Access Agreement—limitation of liability**

The Indicative Access Agreement (IAA) which forms the Standard Terms accepted as part of the 2011 Undertaking incorporates changes from the 2009 Standard Terms that were negotiated between GrainCorp and its customers during the term of the 2009 Undertaking (Bulk Wheat Port Terminal Services (BWPTS) Agreements).

A number of submissions received from third parties raised concerns that there is an imbalance in risk sharing in the event of shipping delays and that the 2011 Standard Terms should include despatch-demurrage provisions that share risks and costs on a commercial basis. Submitters noted that such arrangements exist in international markets and noted that, without them, there is no incentive for GrainCorp to ensure

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<sup>20</sup> ACCC, *Draft decision*, 24 March 2011, p.65.

efficiency in its port operations.<sup>21</sup> The ACCC is of the view that there is a strong in-principle argument on efficiency grounds for despatch-demurrage arrangements that appropriately allocate costs and create incentive for efficient practices by shippers and GrainCorp.

As noted by the PC, deregulation of the wheat export market has resulted in greater occurrence of demurrage costs for shippers as there is no longer a single exporter to take into account logistical constraints in planning exports. Exporters are seeking to export at prime times and locations with congestion and delays resulting. As the PC further noted, 'efficient allocation of capacity would go a long way towards solving the demurrage problem.'<sup>22</sup> The ACCC also considers that a market based approach to capacity allocation would better align demand and supply for port terminal services at peak times, thereby reducing the congestion and delays that give rise to demurrage costs for exporters.

In reaching its decision, the ACCC took the view that demurrage and liability arrangements are contractual issues to be resolved through commercial negotiation between parties, and that the liability arrangements in GrainCorp's proposed IAA were likely to be appropriate as a starting point for commercial negotiation.<sup>23</sup> In forming this view the ACCC considered the unbundled nature of the port services offered by GrainCorp; the extent to which GrainCorp is subject to competitive pressures (see 3.2.3.2 below); and that parties seeking to negotiate in relation to the risk sharing and liability provisions of the IAA may avail themselves of the dispute resolution procedures in clause 7 of the Proposed 2011 Undertaking.

### **3.2.2.9 Price differentials**

The 2011 Undertaking provides that GrainCorp will publish its Reference Prices. GrainCorp's Port Elevator Fee Summary itemises fees and charges for port terminal services. These include an additional \$1.54 per tonne charge for grain received from third party storages.

The ACCC notes that GrainCorp removed the price differential that previously applied to grain receivals from 'approved' and non-approved up-country supply chains. However, GrainCorp has continued a differential between receivals through its own supply chain and third-party supply chains. The ACCC also notes AWB's concerns regarding both the removal of the price differential previously applied to non-approved supply chains and the retention of a differential in favour of GrainCorp's own supply chain.<sup>24</sup>

In reaching its decision, the ACCC has considered GrainCorp's pricing structure having regard to the pricing principles specified in s. 44ZZCA of the Act and also the interests of access seekers to transparency regarding fees and charges.

The ACCC considers that price differentials are justified under the pricing principles to the extent that they reflect differences in costs (s. 44ZZCA(b)(ii)). With respect to

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<sup>21</sup> AWB, submission 15 April 2011, p.3; AGEA, Submission, 15 June 2011, p.3. Get sub refs, AGEA, AWB.

<sup>22</sup> Productivity Commission, Wheat Export Marketing Arrangements: Inquiry report, July 2010, p. 229.

<sup>23</sup> ACCC, *Draft Decision*, 24 March 2011, p. 35.

<sup>24</sup> AWB, 11 November 2010.



the differential applying to grain received from different storages, the ACCC recognises the relatively low quantum of the differential charged by GrainCorp compared with that charged by other port terminal operators and GrainCorp's explanation that it compensates for a higher level of risk associated with receivals from third-party storages.<sup>25</sup> GrainCorp has also informed the ACCC that it has incurred costs in relation to upgrading road receival arrangements at some ports.

Further, the ACCC notes that if GrainCorp discriminated between different Applicants or Users in favour of its own Trading Division, except to the extent that the cost of providing access to other users is higher, it would breach the non-discriminatory access provision of the 2011 Undertaking.

### **3.2.3 Capacity management arrangements**

#### **3.2.3.1 Consistent approach to assessing port terminal capacity management**

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

However, while the ACCC is not of the view that capacity management arrangements should necessarily be the same for all operators, it does consider that it should apply a consistent approach when forming its view on each of the proposed undertakings. The ACCC has analysed the similarities and differences between the BHCs and the markets in which they operate so that its views regarding capacity management arrangements are made on a consistent basis across undertakings. This analysis was detailed in the Explanatory Statement to the Draft Amendment Notice and further detail is provided in Appendix B.<sup>26</sup>

As stated in the Explanatory Statement, the ACCC considers two key market characteristics relevant to the view formed on the appropriateness of particular capacity management arrangements in specific market circumstances:

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

In relation to the first of these factors, generally the more constrained is capacity relative to the demand for it, the greater the imperative on economic efficiency grounds for market based allocation arrangements. As the PC stated in its Inquiry Report on Wheat Export Marketing Arrangements, auctions can play a significant role in efficiently allocating limited port capacity.<sup>27</sup> This general economic principle, that

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<sup>25</sup> GrainCorp, *Submission to the ACCC in response to Draft Determination issued 6 August 2009*, 3 September 2009, p.19.

<sup>26</sup> ACCC, *Draft Amendment Notice and Explanatory Statement*, 2 June 2011, pp. 33-41.

<sup>27</sup> Productivity Commission, *Wheat Export Marketing Arrangements*, 1 July 2010, p. 205.

allocative efficiency is best achieved through a price mechanism, has greatest application when supply is limited relative to demand. When no binding capacity constraint exists the demands of all users can be met and the means by which allocation occurs is not as critical to achieving efficiency.

In all Australian states from which wheat is exported there are periods when port capacity is more highly valued. These periods follow harvest when new season grain is available to be shipped and can vary from season to season and between the ports operated by the BHCs. The extent to which each BHC's port capacity is constrained relative to the demand for it is relevant to the view the ACCC forms regarding appropriate capacity allocation and management arrangements.

On the issue of the incentive for self preferential treatment, the ACCC is of the view that a vertically integrated operator has an incentive to utilise infrastructure it controls to block competitors in upstream or downstream markets in order to gain market share at the expense of access seekers. The strength of such an incentive is determined by the existence, or threat, of competition to the integrated monopolist's position. Where actual or potential competition exists, the incentive to block competitors is moderated by the threat that the blocking behaviour may result in loss of business to an alternative supply-chain rather than increased market share for the integrated operator in upstream or downstream markets.

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

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

### **3.2.3.2 GrainCorp port capacity and the east coast wheat export market**

In forming its view regarding the capacity management arrangements proposed by GrainCorp, the ACCC considered that the following conclusions from its analysis regarding the extent capacity is constrained are relevant:

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

There is evidence that capacity constraints exist at GrainCorp ports during periods of peak demand and that, in years of high production and exports, peak periods can extend over a number of months.

In regard to the incentive for self preferential treatment, GrainCorp faces a level of competition to its port terminal services that is significant and that is greater than competition to the port terminal services provided in South Australia and Western Australia.

In reaching its decision on the 2011 Undertaking, the ACCC recognised that GrainCorp has a degree of market power in relation to its control of its port facilities and an incentive to advantage its activities, and those of its Trading Division, upstream and downstream of the port. However, the ACCC considered that countervailing competitive constraints arise from a number of factors including:

- competition in the east coast for up-country supply chain services
- a significant level of competition in the east coast between wheat supplied into the domestic market and export wheat
- some weak competition between port terminals located in sections of the east coast (New South Wales, Victoria and the easternmost parts of South Australia); these competitive pressures are less evident in Queensland, particularly for GrainCorp's facilities at Mackay
- competition from containerised wheat exports
- competition from access seekers prepared to bypass port terminals on the east coast.<sup>28</sup>

In summary, the ACCC considered that, while GrainCorp's ports are subject to capacity constraints at peak periods, port capacity on the east coast is adequate overall to meet the demands on it and is less constrained than in other wheat export regions. Further, the vertically integrated monopolist's incentive for self preferential treatment is moderated by countervailing competitive pressures in the case of GrainCorp. These conclusions informed the view reached by the ACCC with regard to the capacity allocation and management arrangements and its decision to accept the 2011 Undertaking discussed in the next section.

### **3.2.3.3 ACCC view on management of GrainCorp's port terminal services capacity**

In addition to an analysis of the factors outlined in the preceding section, the ACCC recognised that the appropriateness, or otherwise, of a particular proposed capacity allocation arrangement depends, *inter alia*, on the effectiveness of existing or past arrangements for the port facilities under consideration. While the practice by other operators or in other markets may provide useful intelligence in forming a view as to what is appropriate, the ACCC considers that it is the individual circumstances of a particular port operator that are of most relevance.

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<sup>28</sup> Further detail on the analysis of market conditions is provided in Appendix B.

In considering the capacity allocation methodology proposed by GrainCorp, the ACCC had regard to matters listed in section 44ZZA(3) of the Act. Section 44ZZA(3)(aa) requires the ACCC to have regard to the objects of Part IIIA which include to promote the economically efficient operation of, use of and investment in the infrastructure by which services are provided. Other relevant matters are the legitimate business interests of the provider (s. 44ZZA(3)(a)) and the interests of persons who might want access to the service (s. 44ZZA(3)(c)). Also, the ACCC considers the objectives of the WEMA to be a matter to which it may have regard when considering an access undertaking offered to meet the WEMA access test (s. 44ZZA(3)(e)).

It is in the interests of access seekers that access to capacity is provided on a fair and efficient basis; and it is in the public interest that port terminal services are used in an economically efficient manner and that competition in upstream and downstream markets is promoted. Implementation of an auction system is warranted if existing arrangements do not provide fair and efficient access or do not result in economically efficient outcomes.<sup>29</sup>

In this regard the ACCC recognises that that GrainCorp's first come, first served arrangements are supported by the publication of relevant shipping stem information, and most importantly, the total available capacity at each port. In addition, GrainCorp publishes a daily update of available capacity remaining at each port. The ACCC also notes that the operation of GrainCorp's first come, first served booking system has been orderly under the 2009 Undertaking and that competitive pressures lessen somewhat the incentive for self preferential treatment by GrainCorp.

In its Draft Decision, the ACCC formed the view was that the capacity management arrangements in the Proposed 2011 Undertaking were not appropriate because they did not adequately address the issue of capacity management at times of capacity constraint. The ACCC considered that the provisions contained in the 2011 Undertaking adequately address this concern.

While it considers that there is a strong economic efficiency argument for the use of auctions to allocate scarce capacity, the ACCC also recognises that a first come, first served system may be appropriate having regard to the matters listed in s. 44ZZA(3) if the arrangements include appropriate safeguards to prevent discriminatory or hindering behaviours on the part of the access provider.

This view on an administered primary allocation system is informed by the extent to which an economically inefficient initial allocation of capacity can be corrected by existing or proposed in-season adjustments to capacity utilisation.

Those mechanisms include flexibility for users to move the time and/or location of bookings, incentives for shippers to return unwanted capacity, measures to discourage or prevent hoarding and transferability of capacity between users. Of these, only transferability promotes the allocation of capacity to its highest value in use. For this reason, transferable capacity is a preferred approach to redressing the economic

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<sup>29</sup> Appendix D to this Decision includes the ACCC's view as to the meaning of economic efficiency in the use of scarce resources.

inefficiencies likely to result from allocating capacity on a first come, first served basis when demand exceeds available capacity.

As stated in the Draft Decision, the ACCC recognised that the flexibility within GrainCorp's PTSP for shippers to move the time and location of bookings allows exporters to change shipping arrangements in response to unanticipated market developments. However, the ACCC also noted that this flexibility may result in vacated capacity going unused at peak times and does not encourage the return of unwanted capacity.<sup>30</sup>

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

The ACCC formed a preliminary view, as set out in its Draft Decision,<sup>31</sup> that allowing exporters to transfer booked slots would reduce the risk that capacity is unused or not put to its most economically efficient use at peak times. It also provides a mechanism for an exporter who does not need a slot booked at a non-peak time to seek a commercial arrangement that reduces the loss incurred by the forfeiture of the booking fee.

GrainCorp submitted that it is opposed to having its capacity transferable and proposed alternative measures to address concerns regarding capacity management. The ACCC considered the measures proposed by GrainCorp which are to:

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

In forming a view on these proposals the ACCC considered how the measures would create incentives for unwanted capacity to be returned to the stem; help safeguard against discriminatory or hindering behaviours on the part of GrainCorp; and improve confidence on the part of access seekers in the non-discriminatory implementation of the first come, first served allocation arrangements (discussed in the following sections).

#### **3.2.3.4 Peak period elevation capacity management**

GrainCorp proposed a conditional 50 per cent refund of the booking fee when capacity booked for a peak period is surrendered at least 35 days prior to the first day of a confirmed elevation period. A peak period is defined as one for which total tonnage showing as 'accepted' on the shipping stem equals the published total tonnage of elevation capacity for the corresponding elevation period.

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<sup>30</sup> ACCC, *Draft Decision*, 24 March 2011, pp. 53.

<sup>31</sup> ACCC, *Draft Decision*, 24 March 2011, pp. 53.-7.

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

The ACCC notes that AGEA submitted that the forfeiture of the booking fee should escalate as the shipping date approaches.<sup>32</sup> The proposal put by GrainCorp is more focused, applying only at peak times, and including conditions that eliminate incentives to 'game' the refund arrangement.

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

The ACCC proposed changes to GrainCorp's PTSP to give effect to a 50 per cent refund of booking fees when the surrendered booking is for a peak period conditional on a new booking being made for the surrendered capacity (proposed amendment 3.2 of the Amendment Notice). The ACCC is of the view that the proposed change to capacity management arrangements will result in a reduced risk that capacity will go unused during peak demand periods and, hence, will aid greater economic efficiency.

In reaching its decision, the ACCC formed the view that the inclusion of this provision in the 2011 Undertaking balances the interests of GrainCorp to maintain operational efficiency; the interests of access seekers to have more flexible access; and the public interest in the economically efficient use of GrainCorp's port facilities at peak times.

### **3.2.3.5 Additional stocks at port information**

GrainCorp proposed to publish more detailed information on stocks at port and to reflect the recent move to more frequent publication of stocks at port information in the 2011 Undertaking.

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

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

The ACCC received submissions from industry<sup>33</sup> that GrainCorp's Trading Division is advantaged by greater information on stocks-at-port and that GrainCorp should

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<sup>32</sup> AGEA, *Submission on ACCC Draft Decision*, 2 May 2011, p. 3.

<sup>33</sup> AGEA, *Submission*, 2 May 2011.

publish on the tonnages of grades and grain quality in stocks at port. The ACCC considers that unequal access to key port terminal information confers a market advantage on GrainCorp relative to other wheat exporters using GrainCorp's port terminals. Therefore, ACCC is of the view that greater transparency regarding stocks at port is in the interests of access seekers as it improves information relevant to developing strategies to swap wheat and to assess the level of potential congestion at port. In forming this view, the ACCC recognised that the level of blending at port and the number of grades handled creates difficulties in providing grades by volume. The ACCC also recognised that the publication of such information may disclose customers' grain quality and blending strategy for shipment.

The ACCC proposed that the 2011 Undertaking be amended to reflect a more detailed and frequent publication of information on stocks at port (proposal 1.15 of the Amendment Notice). The ACCC is of the view that the proposal will improve efficiency in the wheat export market and appropriately balances the legitimate business interests of the access provider, the interests of access seekers wanting more stock information and also those shippers whose interests may be disadvantaged by more detailed disclosure of stocks for shipment.

In reaching its decision, the ACCC considered that the more detailed and more frequent publication of information on stocks-at-port supported efficient use of capacity and competition in upstream and downstream markets.

#### **3.2.3.6 Elevation capacity booking, allocation and management**

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

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

The ACCC considers that this proposal will provide GrainCorp's customers with greater confidence that elevation capacity is allocated on a fair and transparent basis. It will also assist access seekers to better manage logistics and export sales. These outcomes will improve the economic efficiency in use of capacity at GrainCorp's port terminals and promote competition in upstream and downstream markets.

The ACCC proposed that clause 2 of Schedule 3 of the 2011 Undertaking be amended to provide that GrainCorp will open its shipping stem by the end of June at the latest each year for the following season, will provide customers with two weeks notice of the date and time of the stem opening, will publish the announcement on its website and will inform customers of changes to port capacity two weeks prior to such change being implemented (proposed amendment 3.3 of the Amendment Notice).

The ACCC further proposed amendments to Schedule 3 of the Proposed 2011 Undertaking as follows (proposed amendment 3.4 of the Amendment Notice):

- clause 5 to include that the management of CNAs will be recorded in an individual 'shipping file', which will include a copy of the original CNA upon which the date and time of receipt of the CNA will be recorded
- clause 6 to provide that CNAs will be assessed in chronological order of receipt where chronology will be established by the date and time recorded by GrainCorp's online Workflow system
- subclause 7.5 to make minor wording changes to the CNA assessment criterion dealing with whether GrainCorp has sufficient capacity to accept a booking.

In reaching its decision, the ACCC considered that the inclusion of these provisions in the 2011 Undertaking increased transparency regarding the operation of the first come, first served system of capacity allocation. This transparency is in the interests of access seekers to obtain port terminal services on a non-discriminatory basis and with no hoarding of capacity by the port operator.

### **3.2.3.7 Measures to counter anti-competitive behaviours**

In reaching its decision, the ACCC recognised that a number of stakeholders raised concerns regarding the lack of competitive neutrality in GrainCorp's capacity allocation arrangements and the lack of disincentive on GrainCorp to hoard capacity. Submitters provided views on measures to ensure that a first come, first served allocation arrangements operates in a competitively neutral way and discourages hoarding by the port operator.<sup>34</sup> These measures include:

- ensuring that the port operator faces the same financial disincentive to hoarding as other exporters by holding booking fees in escrow until the slot is executed and permanently withholding the booking fees for the operator's own bookings when the slot is unused
- placing management of the booking arrangements in the hands of an independent body.

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<sup>34</sup> AGEA, Submission, 2 May 2011, pp.2-3; GFL, Submission, 27 April 2011 pp.3-4.



The ACCC considers that, as a general principle, capacity allocation arrangements should be competitively neutral and that ring fencing or other arrangements such as an independent capacity manager may be effective mechanisms to help avoid self preferential treatment on the part of a vertically integrated operator of bottleneck capacity. However, the ACCC notes that the need for measures to combat incentives for anti-competitive behaviour is lessened when countervailing competitive pressures exist. ACCC analysis (see 3.2.3.2 above and Appendix B) indicates that GrainCorp faces competitive pressures from a number of sources, including from domestic grain users, on up-country supply chains and from the threat of by-pass.

In reaching its decision, the ACCC also noted that the 2011 Undertaking includes robust non-discrimination provisions, continuous disclosure rules and publication requirements. As noted above (section 3.2.1), the ACCC has formed the view that, given the level of competitive pressure it faces, these arrangements are sufficient to protect against anti-competitive behaviour in the case of GrainCorp. Further, the ACCC considers that the need to require measures such as those proposed by stakeholders or ring fencing rules to ensure competitive neutrality is not strong in the case of GrainCorp.

In forming this view the ACCC has had regard to the legitimate business interests of GrainCorp to itself manage its port terminal facilities and the interests of access seekers to obtain access to GrainCorp's port terminal facilities on a non-discriminatory basis. In particular, the ACCC considered that wheat exporters are able to obtain access to GrainCorp's port terminal facilities on a non-discriminatory basis and that further measures to ensure competitive neutrality are not necessary.

In conclusion, the ACCC recognises that one way of dealing with problems of hoarding capacity is by independent management of the shipping stem and/or the booking fees. For the reasons given above, the ACCC does not consider that these are required of GrainCorp at this time but it will continue to monitor the situation and will reconsider this issue if it is called on to again consider access arrangements at GrainCorp's port terminals.

#### **3.2.4 Variation of PTSP**

The provisions for variation of the PTSP contained in the 2011 Undertaking continue the provisions of the 2009 Undertaking. As noted in the Draft Decision, each of the three operators that have 2009 undertakings (GrainCorp, Viterra and CBH) has varied its protocols since acceptance by the ACCC and different issues have arisen with these variation processes.

In assessing the PTSP submitted by GrainCorp and the PTSP variation process, the ACCC has taken into consideration the experience of each of the bulk handlers' variation processes. The ACCC considers this to be appropriate given the object of Part IIIA of the Act specified in s. 44AA(b) to

provide a framework and guiding principles to encourage a consistent approach to access regulation in each industry.

In its Draft Decision the ACCC identified aspects of the 2009 provisions regarding processes for varying port protocols where changes from the 2009 arrangements are necessary.<sup>35</sup> These are discussed in this section.

#### **3.2.4.1 The comprehensive nature of the PTSP**

GrainCorp varied its PTSP under the 2009 Undertaking conformed to the provisions of subclause 9.3, including a consultation process which began on 21 April 2010.

However, prior to undertaking the variation process, GrainCorp published Port Terminal Protocols Guidelines (Guidelines) in January 2010. Stakeholders expressed concerns to the ACCC about the introduction of the Guidelines and the ambiguity of the Guidelines' legal status. GrainCorp explained to the ACCC that the Guidelines were developed to clarify and improve the operation of the PTSP in response to feedback and questions from industry.

The ACCC considers that, notwithstanding the stated intent of developing the Guidelines to clarify and improve the PTSP, the existence of two documents gave rise to the potential for uncertainty for shippers to the extent that there was inconsistency between the Guidelines and the PTSP.

Further, and more important, the access undertaking given by GrainCorp to the ACCC is structured to incorporate the PTSP which set out the key processes by which GrainCorp will allocate port terminal capacity. The effect of the Guidelines was to put in place additional or alternative arrangements that may impact access to port terminal services but which did not form a part of the access undertaking.

As noted in the Draft Decision, the ACCC considers that clause 9.1(a) of the Proposed 2011 Undertaking (which incorporates the Continuous Disclosure Rules as set out in section 24(4) of the WEMA), requires the published PTSP to be comprehensive. The ACCC formed the view that, to ensure clarity and certainty, GrainCorp's 2011 Undertaking should be amended to provide that the PTSP must be, and continue to be, a comprehensive statement of GrainCorp's policies and procedures for managing demand for the port terminal service (proposed amendment 1.9 of the Amendment Notice). It is the ACCC's view that such a provision is in the interests of all parties to have greater certainty and less potential for confusion regarding the procedures and protocols applicable to capacity management and port operations and therefore is appropriate having regard to s. 44ZZA(3). The ACCC will actively monitor future compliance by GrainCorp in this area.

#### **3.2.4.2 Process for varying protocols**

In 2009 the ACCC accepted a PTSP variation mechanism based on an industry consultation process rather than a formal ACCC consultation process. In its Further Draft Decision on GrainCorp's 2009 Undertaking the ACCC stated that it would monitor the success of this variation model and take its findings into account in any future review of access undertakings.<sup>36</sup>

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<sup>35</sup> ACCC, *Draft decision*, 24 March 2011, pp. 59-65.

<sup>36</sup> ACCC, *GrainCorp/Viterra/CBH Operations Limited Port Terminal Services Access Undertaking Further Draft Decision*, 23 December 2009, p. 223.

The ACCC recognised at that time that the model accepted for variation of the PTSP carried some risks as the ACCC would not review proposed amendments to determine their appropriateness. The ACCC further noted that this risk was mitigated by:

- the inclusion of a robust consultation mechanism
- the inclusion of a provision allowing the ACCC to treat a breach of the amended PTSP as a breach of the Undertaking
- the recommendation of a robust non-discrimination provision and the inclusion of a provision that any variation to the PTSP must be made in accordance with and subject to the non-discrimination provisions of the Undertaking.

As noted in the Draft Decision<sup>37</sup>, the ACCC considers that there are a number of minimum standards that should apply to a variation process, in order to ensure an efficient, meaningful and transparent consultation process. In doing so the ACCC has had regard to the matters listed in s. 44ZZA(3), in particular the object in s. 44AA(b) aimed at a consistent approach to access regulation across the industry and the interests of access seekers to have clarity and certainty regarding access to port terminal services.

The minimum standards that the ACCC considers are necessary for an efficient, meaningful and transparent variation process, and which should be applied consistently across the industry, are:

- a draft variation and an explanation for the changes, circulated to interested parties and the ACCC
- a reasonable consultation timeframe, which allows for meaningful consultation between industry participants and the port operator
- an obligation on the port operator to consider submissions in good faith, with submissions to be made publicly available
- an ability for the port operator to amend the draft variation based on consultation, without having to withdraw the draft variation and start another process
- a reasonable period of time following publication of a finalised variation before the variation takes effect.

The ACCC notes that, although the variation process in the Proposed 2011 Undertaking met some of these standards, the ACCC considered that some changes were necessary. These are:

The ACCC remains of this view following consultation on the Draft Decision.

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<sup>37</sup> ACCC, *Draft decision*, 24 March 2011, pp.59-60.

***The port operator to consider submissions in good faith and make them publicly available***

GrainCorp's Proposed 2011 Undertaking contained a requirement for GrainCorp to 'actively consider' responses received in consultation while the existing undertakings applying to other port operators contain a good faith requirement.<sup>38</sup>

GrainCorp's Proposed 2011 Undertaking did not provide for the publication of written submissions received during the variation process. The ACCC considered that a more transparent approach is necessary and that GrainCorp should publish on its website written submissions received during the variation process consultation.

The ACCC recognises that an unqualified requirement to publish submissions may give rise to GrainCorp being required to publish on its website material that is offensive, abusive or otherwise inappropriate. Therefore, the ACCC considers that the requirement to publish submissions regarding a proposed variation to the PTSP should allow GrainCorp to withhold inappropriate material from publication but that it should provide the ACCC with copies of submissions withheld from publication within five days of their receipt.

The ACCC proposed that the 2011 Undertaking include provisions requiring that GrainCorp consider submissions received on a PTSP variation process in good faith (proposed amendments 1.10 of the Amendment Notice) and that GrainCorp be required to publish submissions received on a proposal to vary its PTSP, subject to the material not being offensive or abusive (proposed amendments 1.11 of the Amendment Notice). The ACCC is of the view that these proposals provide an appropriate balance between the interests of access seekers in there being a transparent PTSP variation process and confidence that views regarding proposed change receive adequate consideration by GrainCorp; and GrainCorp's legitimate business interests not to be required to publish material that causes unwarranted reputational damage.

***Revised variation notice does not restart PTSP variation process***

The ACCC's Draft Decision took the view that, while not explicitly provided for, the Proposed 2011 Undertaking does allow GrainCorp to consider responses from interested parties and amend its proposed variation in response to consultation before publishing the final variation notice. However, problems have arisen with the variation processes of other operators, resulting in the need for a variation process to be restarted to accommodate desired changes to a proposed variation.

As stated in the Draft Decision, the ACCC is concerned that this is not in the interests of efficiency and that port operators should be able to amend a proposed variation, taking into account submissions made during the consultation process.<sup>39</sup> In the interests of certainty and transparency for users and the interests of GrainCorp to maintain efficient port operations, the ACCC proposed that the 2011 Undertaking should explicitly recognise the ability of GrainCorp to amend a proposed variation to take into account feedback received from interested parties or from the ACCC, without commencing a new variation process (proposed amendment 1.12 of the Amendment Notice).

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<sup>38</sup> ACCC, *Draft Decision*, 24 March 2011, pp. 60-1.

<sup>39</sup> *ibid.*, p. 61.

***A reasonable period of time following publication of a finalised variation before the variation takes effect.***

Clause 9.3(a)(iv) of GrainCorp's Proposed 2011 Undertaking provided that the variation must be published at least 30 days prior to the date on which it is to become effective. The ACCC is of the view that this timeframe is appropriate.<sup>40</sup> However, the ACCC notes that the timeframes in the variation process in the Proposed 2011 Undertaking are not measured consistently.

The ACCC proposed that the timeframe for prior publication of a PTSP should be measured as 20 Business Days, in order to be consistent with other timeframes in the variation process which are measured in Business Days (proposed amendment 1.13 if the Amendment Notice). The ACCC considered that a 20 Business Day period appropriately balances the interests of GrainCorp and access seekers in having sufficient time to prepare for the implementation of the varied PTSP.

#### **3.2.4.3 The ACCC's role in the process for varying the PTSP**

As noted above, in the Further Draft Decision on GrainCorp's 2009 Undertaking, the ACCC considered the variation process for the PTSP and at that time decided that it was appropriate for GrainCorp to retain flexibility for varying the PTSP without the ACCC determining the appropriateness of the proposed variation, noting that the variation mechanism could be strengthened in any future undertaking, if necessary.<sup>41</sup>

The ACCC's Draft Decision acknowledged that the PTSP is an operational document and, as such, a degree of flexibility is required to ensure efficient operations at port. However, the ACCC noted that the wide scope of the PTSP means that quite significant aspects of port operations, such as capacity allocation, can be altered through a variation to the PTSP without the ACCC having any role in the variation process.<sup>42</sup>

During the operation of the 2009 undertakings from GrainCorp, Viterra and CBH, the ACCC has gained insight into the scope of the potential changes that could be made through a variation to the PTSP. While the ACCC still considers it important for port operators to have sufficient flexibility to manage operations at port, the Draft Decision stated that *in certain limited circumstances* the lack of regulatory oversight is inappropriate.<sup>43</sup> These limited circumstances are where:

- the proposed variation is material
- the proposed variation gives rise to concerns under either the anti-discrimination (clause 5.5) and/or the no hindering access (clause 9.4) provisions of the undertaking.

The Draft Decision proposed that if these circumstances arise, the ACCC may send a written notice to the port operator outlining its concerns, with reasons. Upon receipt of the notice, or earlier, the port operator must withdraw the proposed variation. The

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<sup>40</sup> ACCC, *Draft Decision*, 24 March 2011, p. 61.

<sup>41</sup> ACCC, *Further Draft Decision*, 23 December 2009, p. 288.

<sup>42</sup> ACCC, *Draft Decision*, 24 March 2011, p. 62.

<sup>43</sup> ACCC, *Draft Decision*, 24 March 2011, p. 62.

ACCC considered it necessary to support this notice making power with an information gathering provision. This issue is discussed in section 3.2.2.4 above.

The Draft Decision stated that an approval role in respect of each proposed variation is inappropriate as the ACCC considered that certainty, flexibility and timeliness regarding the operation of the PTSP are important, given the PTSP is the document by which the port operates.<sup>44</sup> The suggested role would be specifically limited to the circumstances set out above.

Hence, the ACCC is of the view that for the undertaking to be appropriate it should include:

- a) the ability of the ACCC to:
  - gather the necessary information to assess whether the ‘limited circumstances’ exist
  - issue a notice that the proposed variation raises concerns in relation to the provider’s anti-discrimination and/or no hindering access obligations
- b) an obligation on the port operator to withdraw the proposed variation upon receipt of the notice.

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

The Draft Decision provided that where the ACCC has concerns with the port operator’s proposed variations, it would raise those concerns with the port operator, and access seekers if appropriate, prior to issuing a notice.<sup>45</sup>

The ACCC considered that in practice the assessment and notification would be applied within the current timeframe for variation. Clause 9.3(a)(iv) of the Proposed 2011 Undertaking provided that the variation must be published at least 30 days prior to the date it is to become effective (the effective date). As noted earlier, the ACCC is aware of the importance of timeliness in the variation process and the consideration of operational certainty for the port operator and access seekers.

The ACCC considered that it would be required to issue the notice no less than ten days before the effective date, taking into account the overall period of time specified for the variation process in the Proposed 2011 Undertaking. Such a notice would include reasons.

#### ***Effect of the proposed ACCC role once exercised***

The Draft Decision noted that the effect of the ACCC issuing a notice and the proposed variation to the PTSP not taking effect would depend on whether the notice related to the entire variation or only part of it. If the notice related to the entire variation, the variation could not take effect and the port operator would be required to commence a new variation process (if it still wished to vary the PTSP), that had been amended to address the ACCC’s concerns. Correspondingly, if only part of the

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<sup>44</sup> *ibid.*, pp. 62-3.

<sup>45</sup> ACCC, *Draft Decision*, 24 March 2011, p. 63.

proposed variation was the subject of a notice, it would not prevent the variation in respect of those changes not a subject of the notice. It would only be possible for the ACCC to disallow the variation in part where the proposed varied terms were not intrinsically related.<sup>46</sup>

### ***Suggested form of the provision***

The Draft Decision included proposed provisions for the ACCC to have the ability to issue an objection notice. In its draft revised undertaking (dated 11 March 2011) provided to the ACCC, GrainCorp included provisions in line with the drafting proposed by the ACCC with an additional provision that the ACCC must issue a draft notice five business days before issuing a notice of objection.

The ACCC took the preliminary view in its Draft Decision that a requirement for it to issue a draft notice of objection prior to issuing a final notice is appropriate. However, the ACCC noted that the time between publication of the variation notice—after the minimum 10 business day consultation period—and the issuing of a draft notice is 5 business days. This is a very short time for the ACCC to respond but the ACCC also noted that this function is intended to be used only where a variation is material and raises concerns in relation to the non-discrimination or no hindering access provisions of the undertaking. The ACCC anticipated that, in these circumstances, it will have time to identify the concern and act if necessary.<sup>47</sup>

The ACCC has proposed that the 2011 Undertaking incorporates the provisions for the ACCC to issue an amendment notice in certain limited circumstances as outlined above, (proposed amendment 1.14 of the Amendment Notice). The ACCC considers that this proposal appropriately balances the interests of GrainCorp to have adequate flexibility in managing its operations and the interests of access seekers to have sufficient certainty regarding the terms of access.

## **3.2.5 Technical and consequential matters**

The Amendment Notice included proposals to deal with technical issues and changes consequential on the substantive matters discussed in the foregoing sections. These are:

### **3.2.5.1 Providing for possible legislative change**

The ACCC notes that, in its Inquiry Report on Wheat Export Marketing Arrangements, the PC recommended certain changes to the legislative framework for bulk wheat exports (set out in Appendix D). The ACCC further notes that the Government has not responded to the PC's findings and recommendations at the time of this Decision but that legislative changes may be implemented during the term of the 2011 Undertaking. Relevantly, the PC has recommended that the requirement for persons seeking export bulk wheat to be accredited by Wheat Exports Australia (WEA) cease and that there may be changes in the way the access test requirements on vertically integrated bulk wheat exporters are legislated

The ACCC proposed drafting changes for the 2011 Undertaking to recognise that there may be changes to the legislative framework for bulk wheat exports during the

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<sup>46</sup> *ibid.*

<sup>47</sup> ACCC, *Draft Decision*, 24 March 2011, pp. 64-5.

life of the 2011 Undertaking (proposed amendment 1.1 of the Amendment Notice). The ACCC considers that this proposal balances the interests of access seekers to have certainty regarding access to port terminal services and GrainCorp to avoid the need to seek ACCC acceptance of a technical variation of the 2011 Undertaking.

### **3.2.5.2 Definitions and terminology changes**

As outlined above, the 2011 Undertaking includes changes to the PTSP to give effect to new measures to encourage the return of capacity to the stem at peak times, through a conditional partial refund of booking fees for peak periods and to improve certainty and transparency of the first come, first served booking arrangements. These provisions have introduced new defined terms into the 2011 Undertaking, including Schedule 3.

The ACCC proposed that the Schedule 3 of the 2011 Undertaking include definitions necessary for clarity and certainty regarding new provisions in the PTSP and that Schedule 5 include an amendment to more accurately describe services provided (proposed amendments 1.16, 3.1 and 2.1 in the Amendment Notice). The ACCC considers that these proposed amendments provide necessary clarity and certainty and are in the interests of both GrainCorp and access seekers.

### **3.2.6 Access code**

Section 44ZZAA of the Act provides that an industry body may give a written code to the ACCC setting out rules for access to a service.<sup>48</sup> The ACCC may accept the code, if it thinks it appropriate to do so having regard to matters set out in section 44ZZAA(3).<sup>49</sup> 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.<sup>50</sup>

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 2011 Undertaking.

### **3.2.7 Decision**

In conclusion, the ACCC has reached a decision to accept the 2011 Undertaking submitted by GrainCorp in response to the Amendment Notice given on 20 June 2011 in relation to the Proposed 2011 Undertaking. The ACCC reached this decision after considering the matters to which it must have regard under s. 44ZZA(3) of the Act. The ACCC is of the view that GrainCorp’s response to concerns raised and to the Amendment Notice has been adequate for the 2011 Undertaking to be acceptable.

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<sup>48</sup> *Competition and Consumer Act 2010* (Cth) s. 44ZZAA(1).

<sup>49</sup> *Competition and Consumer Act 2010* (Cth) s. 44ZZAA(3).

<sup>50</sup> *Competition and Consumer Act 2010* (Cth) s. 44ZZAA(8).



# Appendices

## 4 Appendix A: Submissions

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

- an Issues Paper released on 7 October 2010
- a Draft Decision released on 24 March 2011
- a Draft Amendment Notice and Explanatory Statement released on 2 June 2011

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

### 4.1 Submissions on the overall approach

#### 4.1.1 GrainCorp's submission in support of the Proposed 2011 Undertaking (22 September 2010)

GrainCorp states that it submits its Proposed 2011 Undertaking for approval by the ACCC under section 44ZZA of the Act in order to be re-accredited as a wheat exporter under the *Wheat Export Marketing Act 2008* (WEMA).

GrainCorp submits that its Proposed 2011 Undertaking should roll forward its 2009 Undertaking for a three-year period commencing 1 October 2011. GrainCorp supports this proposal in the following terms:

... in the context of an increasingly competitive industry, the Current [2009] Undertaking has:

- Provided an appropriate level of regulation over GrainCorp's bulk wheat export terminals in the context of the transition away from the AWB single desk monopoly;
- Ensured fair and transparent third party access to GrainCorp's port terminals in eastern Australia, evidenced by GrainCorp successfully entering into two year agreements for port access with all its customers under the framework of the Current [2009] Undertaking;
- Allowed GrainCorp sufficient flexibility in its port operations to meet the demands of its customers; and
- Successfully achieved the objectives of Part IIIA of the TPA [Act].<sup>51</sup>

GrainCorp also notes that it:

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

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<sup>51</sup> GrainCorp Operations Limited, *Submission to the Australian Competition & consumer Commission 2011 Port Terminal Services Undertaking*, 22 September 2010, p. 1.

...

In March 2010, following extensive negotiations with customers, GrainCorp entered into final Bulk Wheat Port Terminal Services (BWPTS) Agreements with all customers.

...

GrainCorp made significant pricing and contract concessions for the benefit of all grain exporters.<sup>52</sup>

With respect to the term of the Proposed 2011 Undertaking, GrainCorp submits that:

The two year term of the Current [2009] Undertaking was appropriate given the transitional nature of the wheat industry at that time. However, on the basis of the previous export season and evidence that the Current [2009] Undertaking was effective, a longer term is now appropriate. The proposed term also aligns with the 3 year accreditation period WEA granted to all non bulk handlers.<sup>53</sup>

With respect to the staggered start of the Proposed 2011 Undertaking—that results in a term of three years and two months for the provisions which relate to the negotiation process and the dispute resolution process and a term of three years for all remaining provisions—GrainCorp submits that this is:

to ensure the negotiations with customers for access to port terminal services in the 2011/2012 season are subject to the Proposed [2011] Undertaking, but ... avoid overlap between the Current [2009] undertaking and the proposed [2011] Undertaking.<sup>54</sup>

GrainCorp's submission also highlights the success of the publish-negotiate-arbitrate arrangements under the 2009 Undertaking. GrainCorp submits that the eastern Australian grain industry is highly competitive, and that the current level of regulation is therefore appropriate and should not be increased.<sup>55</sup> GrainCorp submits that the 2009 Undertaking has provided:

an appropriate regulatory framework to manage negotiations with access seekers and ensured open, efficient and non-discriminatory access to its port terminal services.<sup>56</sup>

GrainCorp notes that it is currently the only bulk handler to have successfully entered into Access Agreements with all of its customers under a Port Terminal Services Undertaking.<sup>57</sup> GrainCorp considers that this demonstrates both the success of the 2009 Undertaking as a framework for negotiation and GrainCorp's desire to deal with exporters in a commercial manner.

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<sup>52</sup> GrainCorp, *Submission to the Australian Competition & Consumer Commission 2011 Port Terminal Services Undertaking*, 22 September 2010, p. 7.

<sup>53</sup> *ibid.*, p. 19.

<sup>54</sup> *ibid.*, p. 2.

<sup>55</sup> *ibid.*, p. 3.

<sup>56</sup> *ibid.*, p. 8.

<sup>57</sup> *ibid.*, 22 Sep 2010, p. 7.

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

the requirement to publish pricing for standard services, the obligations not to discriminate and the detailed negotiate/arbitrate mechanisms.<sup>58</sup>

GrainCorp notes that it has amended the Standard Terms to align with the final Bulk Wheat Port Terminal Services Agreements entered into with customers in March 2010.

GrainCorp submits that given the structure of the eastern Australian grain market, GrainCorp's compliance with the 2009 Undertaking and its willingness to negotiate Access Agreements with customers,

GrainCorp should not be subject to a 'one size fits all' regulatory regime and should not be subject to the same judgements made against other service providers.<sup>59</sup>

## **4.1.2 Australian Grain Exporters Association (AGEA) submissions**

### **4.1.2.1 AGEA response to Issues Paper (10 November 2010)**

In its submission to the ACCC issues paper AGEA makes the following statement on the approach to pricing:

AGEA believes that the 'publish and negotiate' approach has worked in relation to the port terminal services agreements offered by GrainCorp.<sup>60</sup>

AGEA further states:

The measures have provided a framework that has allowed access seekers to commercially negotiate with GrainCorp. There were some initial challenges in achieving an agreement that was satisfactory to users as GrainCorp adopted a 'no-negotiate' approach', however this position changed in early 2010, and negotiation was entered into. AGEA understands that all port users have now signed agreements with GrainCorp.<sup>61</sup>

AGEA also states in its submission that it 'has no issues with the [three year] term of the Proposed Undertaking as put forward by GrainCorp'.<sup>62</sup>

With respect to the publish-negotiate-arbitrate framework, AGEA submits that it has allowed access seekers to commercially negotiate with GrainCorp. AGEA notes that there were initially some challenges as:

GrainCorp adopted a 'no-negotiate approach', however this position changed in early 2010, and negotiation was entered into. AGEA understands that all port users have now signed agreements with GrainCorp.<sup>63</sup>

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<sup>58</sup> *ibid*, p. 21

<sup>59</sup> *ibid*, p. 15

<sup>60</sup> AGEA, *Submission to ACCC Issues Paper*, 10 November 2010, p. 1.

<sup>61</sup> *ibid*, p. 1.

<sup>62</sup> *ibid*, p. 2.

AGEA similarly notes that the Standard Terms proposed initially were not acceptable but that ‘the GrainCorp approach improved in March 2010 and negotiation became possible.’<sup>64</sup> AGEA also notes that it was not clear that the Standard Terms could be varied, and suggests that the ACCC have a clarifying role:

AGEA believes it would assist if ACCC provided clear guidelines on the ability to vary standard terms to deliver a better outcome... and that such terms should not be less advantageous than those applying to the GrainCorp trading division where similar benchmarks apply.<sup>65</sup>

AGEA notes that while the dispute resolution provisions have not been tested, in principle AGEA does not expect any issues with the provisions. AGEA also states that it does not have any issues with GrainCorp’s proposed publication of key port information.

#### **4.1.2.2 AGEA response to Draft Decision (2 May 2011)**

AGEA submits that the ACCC’s approach should be to maximise consistency in application of access arrangements across Australia, and that ‘the objective of port access arrangements must be to promote an efficient supply chain’.<sup>66</sup>

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

[and that]

...appropriate demurrage/despatch clauses should be created within the Port Access Undertakings in line with the global grain industry to encourage greater efficiencies through Australian ports.<sup>67</sup>

Regarding ring-fencing, AGEA does not consider that the arrangements in the Proposed 2011 Undertaking are adequate, and considers that the 2009 Undertakings have not dealt with sharing of information by the port terminal operator that can be used to the advantage of GrainCorp’s trading arm. In this regard, AGEA submits that ‘anything that a BHC trading team sees/receives should be made available to the market’.<sup>68</sup>

#### **4.1.2.3 AGEA response to Draft Amendment Notice and Explanatory Statement (15 June 2011)**

AGEA noted its continuing regarding demurrage/despatch, stating that it:

...appropriate demurrage/despatch clauses should be created within the Port Access Undertakings in line with the global grain industry to encourage greater efficiencies through Australian ports. In particular, where the incumbent BHC offers a bundled service, this should

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<sup>63</sup> AGEA *Submission*, 10 Nov 2010, p. 1.

<sup>64</sup> *ibid*, p. 2.

<sup>65</sup> *ibid*, p. 2.

<sup>66</sup> AGEA *Submission*, 2 May 2011, p. 1.

<sup>67</sup> *ibid*, p. 3.

<sup>68</sup> *ibid*, p. 3.

be accompanied by commercially realistic load rates and the payment of demurrage/despatch at prevailing market shipping rates.<sup>69</sup>

### **4.1.3 AWB (Australia) Limited submissions**

#### **4.1.3.1 AWB response to the Issues Paper (11 November 2010)**

In its submission dated 11 November 2010, AWB raises a number of specific issues in relation to the terms on which it obtains access to GrainCorp's port terminal services but does not comment more generally on the success of the 2009 Undertaking approach, or the appropriateness of continuing that approach in the 2011 Undertaking.

With regards to publish-negotiate-arbitrate framework AWB notes that GrainCorp has removed the price differential that previously applied between wheat arriving from approved and non-approved third party storage. AWB considers that this increases the costs to investments in quality storage and logistics infrastructure as they are placed in the same position as infrastructure of varying quality. AWB submits that this:

discourages investment in competing upcountry storage and rail capacity, and directly discourages the use of non-GrainCorp supply chain into port. AWB views these changes as discriminatory towards previously 'approved' storage handlers and the efficient movement of grain for export.<sup>70</sup>

AWB is concerned that under the proposed Indicative Access Agreement it is the shippers, rather than GrainCorp, that will be required to meet the costs of delay where GrainCorp allows its capacity to be overbooked in order to maximise throughput. AWB considers:

a market based approach of demurrage and dispatch will be the fairest system of allocating risk. Under this system GrainCorp will not be able to over allocate slots as they will be liable for demurrage claims.<sup>71</sup>

AWB emphasises the importance of the shipping stem and submits that its transparency under the 2009 Undertaking should be maintained and its scope expanded:

AWB would like more data to be available through the stem including commodity, and country of destination, such information is critical to an efficient market place.<sup>72</sup>

#### **4.1.3.2 AWB response to the Draft Decision**

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

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<sup>69</sup> AGEA, *Submission*, 15 June 2011, p. 3.

<sup>70</sup> AWB, *Submission*, 11 Nov 2010.

<sup>71</sup> *ibid*, 11 Nov 2010.

<sup>72</sup> *ibid*, 11 Nov 2010.

providing awareness of the terms and conditions of GrainCorp's port terminal facilities and as a methodology for seeking practical and pragmatic alterations to existing processes or decisions on a case by case basis as necessary.<sup>73</sup>

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

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

- AWB does not understand the justification for the charge of a differentiated port receival fee based on grain storage ownership and considers these charges to be an unjustifiable monopoly rent.
- AWB believes that despatch-demurrage arrangements should be used to drive supply chain efficiency.
- AWB questions the inclusion of a requirement to pay fees in relation to force majeure events.
- AWB recommends certain performance indicators should be published on GrainCorp's website within a reasonable period.

#### **4.1.4 Timothy Bush submission**

Mr Bush's submission discusses the publication of information by GrainCorp under the 2009 Undertaking.

GrainCorp is required under subclause 11(a)(vi) of the 2009 Undertaking to provide details on the 'average daily road receival rate'. Mr Bush argues that GrainCorp's publication of the average on the days of road receival is insufficient to meet this requirement, and that GrainCorp should specify how many days of grain receival there were in the month.

Mr Bush also raises concerns regarding the timeliness of GrainCorp's publication of the 'End of Month Stock Report' under subclause 10.1 of the 2009 Undertaking.

#### **4.1.5 Wheat Exports Australia (WEA) submission**

##### **4.1.5.1 WEA response to Draft Amendment Notice and Explanatory Statement (14 June 2011)**

WEA submitted that:

...ring-fencing arrangements should apply to all BHCs that have an associated accredited exporter ...[as they are] privy to information that is not publicly available. Sharing of the information between the BHC and its associated accredited exporter gives rise to information

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<sup>73</sup> AWB, *Submission*, 15 April 2011.

asymmetry ...[regarding] location, volume and quality of wheat stocks at port ... [and] activities on the shipping stem.<sup>74</sup>

#### **4.1.6 GrainCorp submission in response to third party submissions**

##### **4.1.6.1 GrainCorp's response to submissions on Issues Paper (13 December 2010)**

GrainCorp provided a submission responding to certain of the views expressed in the submissions made by interested parties to the ACCC's Issues paper. In that response it notes that AGEA's submission:

... clearly indicates that GrainCorp's efforts to build constructive commercial relationships with [AGEA's] members, who are both consumers of GrainCorp's grain handling services, and grain trading competitors, have been successful.<sup>75</sup>

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

...this has not decreased grain handling efficiency, and AWB has failed to provide any evidence to sustain its claim. The changes were driven by the changing demands of the market...<sup>76</sup>

In response to AWB's request for changes to despatch-demurrage arrangements, GrainCorp notes that the supply chain delivering grain to GrainCorp's port elevators is not integrated. Consequently, GrainCorp does not have full control over the grain delivered to its port elevators, particularly the grades or commodity to be shipped, the quality of the grain, and the method of transport. GrainCorp does not consider it should be responsible for failures by third parties, including:

- failure to accumulate sufficient grain for a cargo to be loaded on time
- failure of transport not provided by GrainCorp
- failure of grain to meet relevant receival standards or the exporter's own contract standards.

GrainCorp considers that a despatch-demurrage arrangement as proposed by AWB would effectively transfer all supply chain risk onto GrainCorp and present an 'unacceptable commercial risk'. GrainCorp also notes that an integrated supply chain as experienced in Western Australia 'has proven to be inefficient, unworkable and not favoured by industry participants'.<sup>77</sup>

In response to AWB's suggestion that GrainCorp should publish additional data on its shipping stem, GrainCorp submits that the nominated commodity has been published on the shipping stem since 2008, and that it would not be necessary or appropriate to publish information relating to customer destinations. GrainCorp considers that the country of destination has no impact on the management of port elevator capacity or

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<sup>74</sup> WEA, *Submission* 14 June 2011, p. 4.

<sup>75</sup> GrainCorp, *Response to third party submissions*, 13 December 2010, p. 1.

<sup>76</sup> *ibid.*, p. 4.

<sup>77</sup> *ibid.*, pp. 4-5.



grain cargo accumulation and is therefore not relevant or critical information for an efficient market place.<sup>78</sup>

#### **4.1.6.2 GrainCorp's response to submissions on Draft Decision (6 May 2011)**

GrainCorp also provided a submission responding to certain views expressed in the submissions made by interested parties to the ACCC's Draft Decision in which it states that it has dealt with many of the issues in past submissions to the ACCC, including price differentials, dispatch-demurrage arrangements and ring-fencing.<sup>79</sup>

GrainCorp submits that there is no statutory basis for AGEA's statement that the objective of the undertaking to promote an efficient supply chain.<sup>80</sup>

Regarding AWB's views on payment of fees in relation to force majeure events, GrainCorp submits that it is beyond the terms of the legislation to link matters affecting cargo accumulation in other parts of the supply chain to port elevator services.<sup>81</sup>

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

...the current reporting requirements, when combined with the daily shipping stem and the daily Elevation Capacity Available email sent to all customers, is sufficient information to meet the objectives of Part IIIA of the *Competition & Consumer Act* (2010) (CCA) as set out in 44AA.<sup>82</sup>

#### **4.1.6.3 GrainCorp's response to submissions on Draft Amendment Notice and Explanatory Statement (16 June 2011)**

GrainCorp noted the ACCC's findings regarding ring-fencing of GrainCorp's trading operations and rejected the suggestion that its Trading Division has access to information not available to other users. GrainCorp outlined its online booking and shipping stem management system ('Workflow') and noted that

...no 'customer user', including *GrainCorp Trading staff*, has any access to the 'back end' of the Workflow system, and as such, there is no opportunity for the trading section of GrainCorp to access any Workflow data entered by other customers, or see any information related to the management of competitor bookings prior to that information being published on the shipping stem. GrainCorp also has in place a compliance program that is internally audited by KPMG. This ensures that information related to shipping stem activities that is not publicly available via the shipping stem is not shared between the operational and trading sections of the business. This compliance program was introduced in 2009.<sup>83</sup>

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<sup>78</sup> GrainCorp, *Submission*, 13 December 2010, p. 5.

<sup>79</sup> GrainCorp, *Submission*, 6 May 2011, pp. 6, 20.

<sup>80</sup> *ibid.*, p. 18.

<sup>81</sup> *ibid.*, p. 7.

<sup>82</sup> *ibid.*, p. 8.

<sup>83</sup> GrainCorp, *Submission*, 16 June 2011, pp. 5-6.

## 4.2 Submissions on capacity management

### 4.2.1 GrainCorp's submission in support of the Proposed 2011 Undertaking (22 September 2010)

In its submission in support of the Proposed 2011 Undertaking, GrainCorp states that the 2009 Undertaking allowed it sufficient flexibility in its port operations to meet the demands of customers.<sup>84</sup> With respect to the 2010 PTSP it states that it:

... made the following port protocol changes for the benefit of customers:

- Shipping windows were increased from 5 days to 10 days before penalties were applicable.
- The period in which a vessel could be swapped or changed was reduced from 21 days to 10 days.
- Once elevation capacity was booked by customers, flexibility to move the time in which this service was delivered was increased, without any additional fees applying to move booked elevation from month to month, forward or back, split tonnage, change grain type and move from port to port if capacity was available.
- Booking fee forfeiture was changed to allow a customer one shipping month plus 5 days to 'perform' (i.e. accumulate a cargo or supply a fit vessel within the time periods provided by the Protocols). Previously, the booking fee was forfeited where a customer where a customer was unable to perform within 5 days of the ETA.<sup>85</sup>

In addition, GrainCorp notes that the issue of superintendents' access to inspect cargo samples was resolved through provisions in the access agreements concluded with clients, with the Grain and Feed Trade Association (GAFTA) acknowledging changes.<sup>86</sup>

### 4.2.2 Third party submission to the ACCC Issues Paper

#### 4.2.2.1 AGEA (10 November 2010)

AGEA provides comments on a number of aspects of GrainCorp's Proposed 2011 Undertaking, including the substance of, and the process for variation of, the PTSP. In its submission AGEA stated that it 'does not believe that GrainCorp's port loading protocols have been fully tested in terms of the ability to efficiently allocate port loading capacity due to the small crop on the east coast in 2009. This is likely to be tested in the current season.'<sup>87</sup>

AGEA also states that '[s]imilarly, it is hard to be definitive on whether the "first come, first served" approach to allocation of capacity is sufficient to efficiently allocate resources in a year where demand exceeds supply as this has not yet been tested. In principle, AGEA believes that the "first come, first served" approach can work efficiently, however, the effectiveness will be impacted by a couple of factors, such as whether:

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<sup>84</sup> GrainCorp, Submission 22 September 2010, p. 9.

<sup>85</sup> *ibid.*

<sup>86</sup> *ibid.*

<sup>87</sup> AGEA *Submission to ACCC Issues Paper*, 10 November 2010, p. 2.

- GrainCorp over-allocates or favours its trading division (this has not been evident to date)
- inland inefficiencies/capacity allocation overrides port capacity allocation.’<sup>88</sup>

#### **4.2.2.2 AWB (11 November 2010)**

AWB comments on the offer made by GrainCorp in February 2010 for exporters to review their requirements for the May-September 2010 period and withdraw unwanted nominations without forfeiting the booking fee. AWB states it was prevented from booking required slots during that period and implies that this inability was due to the bookings made by GrainCorp’s trading arm. AWB further states that ‘its analysis indicates that GrainCorp’s trading arm represented as much as 41% of all slots booked through the Period [May to September 2010]’.

It is also AWB’s assessment that this one-off decision by GrainCorp is evidence that ‘GrainCorp’s proclaimed “disincentive” in reality only applies to true third parties.’<sup>89</sup>

The AWB submission also provides views on the 2010 variation to GrainCorp’s PTSP. It is AWB’s view that:

... the lack of rigidity in relation to capacity, shifting slots across time and geographic location effectively means that AWB’s exporting activities often take place in accordance with the subjective views of GrainCorp port operations. AWB would prefer to see the market deal with surplus slots, and a secondary market should be able to trade slots freely. Such an approach has no negative effect on GrainCorp (as it still receives its “take or pay” fee), but has the positive effect of augmenting an exporter’s ability to directly influence its operational outcomes, rather than having to rely on uncertain outcomes associated with GrainCorp’s purported port “flexibility”.<sup>90</sup>

#### **4.2.2.3 Mr Timothy Bush (4 November 2010)**

Mr Bush’s submission provides views on the quantification and utilisation of capacity at GrainCorp port terminals, and of the extent to which capacity exceeds utilisation. In particular the submission notes that ‘the “average utilisation” of “nominal port terminal capacity” i.e. 23-24% is calculated over the last 6 years; the period of the longest running, most widespread drought in the eastern Australian states.’<sup>91</sup> The submission does not comment on the approach to capacity allocation used by GrainCorp.

#### **4.2.3 GrainCorp response to third party submissions (13 December 2010)**

GrainCorp provided a submission responding to certain of the views expressed in the submissions made by interested parties.

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<sup>88</sup> Australian Grain Exporters Association, *Submission to ACCC Issues Paper*, 10 November 2010, p. 2.

<sup>89</sup> AWB (Australia) Limited, *Submission to ACCC Issues Paper*, 12 November 2010, p. 1.

<sup>90</sup> *ibid*, p. 2.

<sup>91</sup> Timothy Bush, *Submission to ACCC Issues Paper*, 12 November 2010, p. 9.

### ***Response to submission by AGEA***

GrainCorp notes in reference to AGEA's comments regarding the protocol variation process that it 'cannot unilaterally modify the Protocols. GrainCorp is required to notify the ACCC of any proposal to modify the Protocols, and any proposed modification is subject to a formal consultation process and period.'<sup>92</sup>

### ***Response to submission by AWB (Australia) Limited***

GrainCorp responds to a number of the statements in the submission by AWB. In particular:

- GrainCorp acknowledges that its booking fee is a means by which port elevator booking speculation can be prevented and stated that the waiver of booking fees in February 2010 was 'in recognition of the dramatic changes in the availability of exportable grain that occurred during the preceding three months.'<sup>93</sup>
- In response to AWB statements that it was prevented from booking elevation capacity for the period May to September 2010 because of the slots already booked by the GrainCorp trading arm, GrainCorp states:

...under the first-in-first-served port elevation booking process, *all* exporters have an equal opportunity to make bookings ... [and] ... exporters can consult the daily shipping stem to see what capacity has been booked and which exporter has booked the capacity.<sup>94</sup>

- GrainCorp also states that bookings in favour of its own trading operations were not excessive and did not prejudice any other exporter given its 'elevation bookings [during the May to September 2010 period] represented 41% of bookings made (being 30% of available capacity) and GrainCorp's bookings, therefore, represented only 13% of total elevation capacity available during the period.'

In response to AWB's submission regarding the bookings for GrainCorp's trading arm GrainCorp further notes that each of the three bulk handlers conduct most of their export activity in the states where they have their storage network. GrainCorp states that 'the comparisons made by AWB between the quantum of bookings made by GrainCorp on the eastern Australian shipping stem, and the quantum of GrainCorp's bookings on the South Australian shipping stem, is contextually misleading.'<sup>95</sup>

In response to AWB comments on the 2010 PTSP, GrainCorp disagrees with the AWB view that the subjective views of GrainCorp impact AWB's export activities.

GrainCorp expresses strong views against the AWB proposal for a secondary market to trade booked slots. GrainCorp's concerns are that:

... 'creation of a secondary market for port elevation capacity would lead to:

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<sup>92</sup> GrainCorp Operations Limited, *Response to third party submissions*, 13 December 2010, p. 1.

<sup>93</sup> *ibid.*, p. 2.

<sup>94</sup> *ibid.*, p. 2.

<sup>95</sup> *ibid.*, p. 3.

- speculative booking of capacity by traders at peak times ...,
- an increase in the cost of elevation [due to] the “premium” demanded by the secondary market ...,
- false market signals based not on export demand, but on the activities of parties seeking to speculate in, and make windfall gains from, trading elevation capacity,
- a decrease in port elevator efficiency driven by uncertainty created by speculative trading of elevation capacity.<sup>96</sup>

#### **4.2.4 GrainCorp submissions on the ACCC Draft decision**

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

##### **4.2.4.1 GrainCorp submission (7 April 2011)**

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

- ‘...there is no identifiable harm to be redressed by the imposition of a capacity based trading system on GrainCorp’s port terminals, as there are actually very limited circumstances where GrainCorp’s elevation services are fully utilised’<sup>97</sup>
- ‘The introduction of elevation capacity transfer and trading will have the following effects:
  - reduce export supply chain efficiency, resulting in congestion at GrainCorp’s terminals and reduced total grain exports...
  - increased cost of execution of export sales, particularly at peak times
  - reduced grower net returns as increased costs arising from the secondary trading and related execution costs are passed back to growers by exporters’<sup>98</sup>
- requiring a secondary market risks jeopardising efficient operation of GrainCorp’s port terminal elevators, introduces capacity for gaming of elevation capacity and encourages speculation.<sup>99</sup>

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<sup>96</sup> GrainCorp, *Response to third party submissions*, 13 December 2010, p. 4.

<sup>97</sup> GrainCorp submission to ACCC Draft Decision, 7 April 2011, p.1

<sup>98</sup> *ibid*, p.2

<sup>99</sup> *ibid*, 7 April 2011, p.2

- transfer and trade is experimental and inherently risky and ‘GrainCorp is not aware of any international jurisdiction where grain elevation capacity is traded in the manner proposed by the ACCC.’<sup>100</sup>
- transferability would increase uncertainty of elevation capacity execution
- existing flexibility allows exporters to move capacity between ports and elevation periods and to swap stocks to facilitate cargo accumulation and vessel loading
- existing arrangements are equitable, transparent and fair
- transferability would raise issues for smaller exporters that ‘do not have the financial capacity or risk appetite to make speculative elevation capacity bookings’<sup>101</sup>

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

- there is excess port capacity with utilisation in 2010/11, which is a high demand year, will be between 44 and 47 percent
- constraints on exports are due to shortage of freight to port capacity, not elevation capacity
- there is no data published supporting the contention that the current elevation capacity booking system is either inefficient, or hindering the export of grain through GrainCorp elevators.<sup>102</sup>

GrainCorp characterises the ‘transfer and trade market as ‘experimental’<sup>103</sup> and considers that the use of an auction system by Co-operative Bulk Handling Limited (CBH) as having flaws and inefficiencies and that ‘CBH are now seeking to by-pass their own auction and secondary market with their proposition to introduce Base Load Allocation ...’<sup>104</sup>

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

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

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<sup>100</sup>      ibid, 7 April 2011, pp.4-5

<sup>101</sup>      ibid, 7 April 2011, p.5

<sup>102</sup>      GrainCorp, *Response to ACCC Draft Decision*, 7 April 2011, pp. 3-4.

<sup>103</sup>      ibid, p. 4.

<sup>104</sup>      ibid, p. 4.

- reduction in export competition in eastern Australia.

#### **4.2.4.2 GrainCorp submission (18 April 2011)**

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

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

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

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

GrainCorp notes that it has ‘significant concerns with the proposed transfer of booked elevation capacity’.<sup>105</sup> In particular GrainCorp is of the view that:

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

#### **4.2.5 Third party submissions on the ACCC Draft Decision**

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

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<sup>105</sup> GrainCorp, *Response to ACCC Draft Decision*, 18 April 2011, p. 4.

#### **4.2.5.1 Emerald Group Australia (6 April 2011)**

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

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

#### **4.2.5.2 AWB Limited (15 April 2011)**

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

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



#### **4.2.5.3 Victorian Freight and Logistics Council (VFLC) (21 April 2011)**

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

#### **4.2.5.4 Port of Portland (21 April 2011)**

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

#### **4.2.5.5 Goodman Fielder (27 April 2011)**

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

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

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

- more timely publication of relevant port performance information is required.

#### **4.2.5.6 AGEA (21 April 2011)**

AGEA' submission identifies the following:

- AGEA seeks greater flexibility to transfer shipping slots across counterparties as well as across ports and time but 'does not support tradeable slots via some form of formalised exchange/market'. Rather it supports 'flexibility and efficiency of the allocation of slots. AGEA provides suggested transfer rules including a cap on the number of transfers between counterparties and timeframes. AGEA considers that 'had a transfer system been in place for 2010/11 it would have assisted in reducing congestion and that such transfers would not result in additional speculation to that already evident.
- AGEA believes that current booking arrangements favour the incumbent port operator for whom the fee is simply a journal entry across divisions while other participants 'wears these non-performance costs as real'. AGEA proposes all booking fees be placed in an escrow/trust account with fees paid to GrainCorp on non-performance by third parties and to charity/goodwill on non-performance by GrainCorp.
- AGEA seeks greater accountability for services provided by port operators through commercially based risk sharing demurrage/despatch arrangements.
  - Mechanisms should be put in place that avoid vertically integrated port operators from advantaging their trading arms through access to information/services that are not available to other exporters.

#### **4.2.6 GrainCorp submission in response to submissions on the ACCC Draft Decision by third parties**

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

##### **Response to submission by Emerald Group Australia**

GrainCorp notes Emerald's concerns regarding transferability but while it agrees that other traders may acquire capacity for speculative purposes it repudiates a suggestion that GrainCorp itself would be encouraged to hoard capacity. GrainCorp rejects measures suggested by Emerald to 'regulate' elevation capacity trading.<sup>106</sup>

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<sup>106</sup> GrainCorp, *submission to ACCC in response to submissions by third parties*, 6 May 2011, p. 5.

#### 4.2.6.1 Response to submission by AWB Limited

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

- GrainCorp submits that the information on its shipping stem contains all of information required to make the allocation of assigned load dates as transparent as it can be and rejects AWB's call for it to be audited.<sup>107</sup>
- GrainCorp considers current reporting requirements and continuous disclosure requirements provides adequate information to meet objectives of Part IIIA of the Act; further, it submits that additional reporting would increase the administrative burden and compliance costs without assisting exporters, increasing port elevator efficiency or adding value for customers<sup>108</sup>
- GrainCorp submits that the significant number of changes to its proposed PTSP between 2009 and 2011 are the result of a PTSP variation process<sup>109</sup>
- GrainCorp reiterates its position in previous submissions that a system of transfer or trading of elevator capacity bookings will have 'significant unintended consequences and will increase costs for growers'<sup>110</sup>
- GrainCorp submits that there is no evidence of current inefficiencies in the allocation of elevator capacity on the East Coast that would support the introduction of an auction system, and that no bookings have gone unexecuted in the year to date, indicating that the current system is efficient<sup>111</sup>
- GrainCorp submits that an auction system would add administrative costs and significantly inflate the cost of execution at peak times and that, as in Western Australia, an auction would add significant uncertainty for users<sup>112</sup>
- GrainCorp submits that the \$5 per tonne booking fee is currently an effective discipline against speculation, but that introducing transferable and tradeable slots would result in speculation.<sup>113</sup>
- GrainCorp notes that AWB does not provide evidence to support its claim that GrainCorp has not applied the protocols correctly<sup>114</sup>
- GrainCorp notes that the ESC did not consider grain export elevators were essential infrastructure<sup>115</sup>

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<sup>107</sup> *ibid.*, p. 7.

<sup>108</sup> *ibid.*, p. 8.

<sup>109</sup> *ibid.*, p. 9.

<sup>110</sup> *ibid.*, p. 9.

<sup>111</sup> *ibid.*, p. 10.

<sup>112</sup> *ibid.*, p. 11.

<sup>113</sup> *ibid.*, pp.11-2.

<sup>114</sup> *ibid.*

- GrainCorp submits that there are fundamental market differences between eastern Australia, South Australia, and Western Australia, and that uniformity of regulation across the four port elevator service providers would discourage investment and stifle innovation.<sup>116</sup>

#### **4.2.6.2 Response to submission by Port of Portland Proprietary Limited**

GrainCorp submits that the matters raised by Port of Portland Pty Ltd are operational matters and should not be considered by the ACCC in its assessment of the Proposed 2011 Undertaking as they are not linked to the provision of access. GrainCorp considers that its decision to operate the Portland elevator on a day shift only is efficient, and notes that customers are able to request additional shifts.<sup>117</sup>

#### **4.2.6.3 Response to submission by Victorian Freight Logistics Council**

GrainCorp submits that a trading, auctioning or transfer between parties of elevation capacity will not address the problems raised by Victorian Freight Logistics Council (VFLC) relating to the upcountry supply chain constraints.<sup>118</sup>

Regarding formation of a Grain Supply Logistics Group, GrainCorp submits that VFLC has not directly approached GrainCorp to discuss its proposal and that it would involve agreement between competing grain exporters and transport service providers. GrainCorp notes that any arrangement would require an authorisation from the ACCC under the Act. GrainCorp considers that the risks raised by VFLC are outside the scope of the ACCC's assessment of the Proposed 2011 Undertaking.<sup>119</sup>

#### **4.2.6.4 Response to submission by Goodman Fielder Limited**

GrainCorp notes that much of what GFL has suggested is outside the scope of the provisions of the Act in relation to the Proposed 2011 Undertaking. GrainCorp does not consider the decision by exporters to book elevation capacity in advance of having firm export sales is unreasonably speculative, as exporters need certainty of elevation capacity in order to make related forward decisions in their grain business.<sup>120</sup>

GrainCorp submits that the \$5 per tonne booking fee mitigates unreasonable speculation, and that the current booking system is fair and transparent, and that in the year to date no capacity has gone unexecuted.<sup>121</sup>

GrainCorp notes that GFL has not provide detail or supporting data around its claim that there are barriers to fair and open access to vessel slots.<sup>122</sup>

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

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<sup>115</sup> *ibid.*

<sup>116</sup> *ibid.*

<sup>117</sup> *ibid.*, p.13.

<sup>118</sup> *ibid.*

<sup>119</sup> *ibid.*, pp.13-4.

<sup>120</sup> *ibid.*, pp.14-5.

<sup>121</sup> *ibid.*, p. 15.

<sup>122</sup> *ibid.*

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- it is unclear how the contracts would be verified and dispute resolution mechanisms would function
- a sale contract may not represent an obligation to export grain, as sale contracts can be changed
- a sale contract represents only one component of the commitments, which also include grain and transport ‘ownership’.<sup>123</sup>

GrainCorp submits that GFL’s proposal would result in a significant increase in regulatory intervention which is counter to the deregulation of the sector. GrainCorp also submits that giving an independent body operational control of GrainCorp’s assets would be intrusive and beyond what is necessary to ensure fair and reasonable access.<sup>124</sup>

In relation to a secondary market, GrainCorp reiterates its position that this will increase the incentive for exporters to act in a speculative manner.<sup>125</sup>

In response to GFL’s proposal that a sales contract be required 12 weeks prior to the vessel slot spread, GrainCorp submits that this would affect the efficient operation of the grain market, as it would reduce certainty for participants to forward buy and sell grain and contract transport, and reduce flexibility in the grain chain, countering others’ calls for greater flexibility.<sup>126</sup>

In relation to GFL’s submission that GrainCorp should simultaneously notify all interested parties where excess port terminal capacity becomes available, GrainCorp submits that this is accomplished by the daily update on available elevation capacity that is currently provided to customers.<sup>127</sup>

#### **4.2.6.5 Response to submission by Australian Grain Exporters Association (AGEA)**

GrainCorp considers that grain supply chains in eastern Australia are operating efficiently, and that there is no statutory basis for AGEA’s statement that the “objective” of the port access arrangements is to promote an efficient supply chain<sup>128</sup>.

GrainCorp responds to specific concerns raised by AGEA as follows:

- GrainCorp submits that the shipping stem is already sufficiently transparent.<sup>129</sup>
- GrainCorp considers that significant flexibility is already provided in the ability to move elevation capacity between ports and across elevation periods. However, allowing the transfer of slots between exporters would encourage speculative activity. GrainCorp considers it is not the purpose of the Proposed 2011

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<sup>123</sup> *ibid.*, pp. 15-6

<sup>124</sup> *ibid.*, p. 16.

<sup>125</sup> *ibid.*

<sup>126</sup> *ibid.*, p. 17.

<sup>127</sup> *ibid.*

<sup>128</sup> *ibid.*, p. 18.

<sup>129</sup> *ibid.*

Undertaking to prescribe operational aspects where they do not relate to the provision of access in a non-discriminatory manner.<sup>130</sup>

- GrainCorp submits that AGEA’s desire for one consistent set of terms across Australia goes beyond the terms of the legislation and is inconsistent with the principle of competition between parties, and that it would also create inflexibility and is not within the ambit of the Proposed 2011 Undertaking.<sup>131</sup>
- GrainCorp submits that the provision of a daily shipping stem, a daily email to customers about available elevation capacity, and a weekly summary of stocks at port provide sufficient transparency.<sup>132</sup>
- GrainCorp notes that AGEA has not provided evidence that the allocation of capacity is inefficient, or that allowing ‘transfer’ between parties would make allocation more efficient. GrainCorp submits that allowing transfer of capacity would result in an informal market place for capacity, which would encourage speculation.<sup>133</sup>
- In response to AGEA’s reference to the need for business rules, GrainCorp submits that AGEA does not provide substantive guidance on how the transfer of slots would be managed which highlights the problematic nature of such a task.
- GrainCorp states that it derives 90 per cent of its earnings from non-grain trading activities, including the provision of port elevation services. In order to highlight the incentive GrainCorp has to maximise the use of port elevators, so as not to deny the company significant revenue, GrainCorp states that:
  - the annual cost of maintaining and operating the company’s port elevators is in excess of \$50 million, and
  - if GrainCorp handles 2.5 million tonnes of its own export bookings, the fixed allocated cost of these bookings is more than \$20 per tonne, which is more than four times the \$5 per tonne charged to other customers.<sup>134</sup>
- GrainCorp submits that AGEA’s proposition to create a national escrow account for all port elevator booking fees lacks sound economic basis and is not realistic for a publicly listed company such as GrainCorp.<sup>135</sup>
- GrainCorp considers that the request for dispatch demurrage provisions in the Proposed 2011 Undertaking is inappropriate given that GrainCorp does not manage the whole supply chain.<sup>136</sup>

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<sup>130</sup> *ibid.*

<sup>131</sup> *ibid*1, p. 19.

<sup>132</sup> *ibid.*

<sup>133</sup> *ibid.*, pp. 19-20.

<sup>134</sup> *ibid.*, p. 20.

<sup>135</sup> *ibid.*

<sup>136</sup> *ibid.*

- GrainCorp submits that AGEA’s views on ring-fencing are dealt with by the ACCC in the draft decision and in relation to the 2009 Undertaking.<sup>137</sup>
- GrainCorp does not consider that additional amendment provisions are required.<sup>138</sup>

#### 4.2.6.6 Response to confidential submissions

GrainCorp considers that the ACCC should require a redacted version of the confidential submissions to be published on the ACCC website or supply GrainCorp with a copy of the confidential submissions subject to confidentiality restrictions. GrainCorp submits that it is not procedurally fair for GrainCorp to be required to respond to an amendment notice issued by the ACCC where the ACCC has made a decision to issue such a notice based on material that GrainCorp has not seen.<sup>139</sup>

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

- GrainCorp does not consider that an independent body would be more suitable to manage the allocation of capacity, and submits that this is outside the scope of the Act. GrainCorp submits that this proposal would increase the regulatory intervention, be inappropriately intrusive, and drive up costs which would be passed back to growers.<sup>140</sup>
- GrainCorp submits that defined terms and conditions of the allocation of slots are set out in GrainCorp’s current indicative access agreement and protocols.<sup>141</sup>
- GrainCorp notes that it updates its shipping stem daily on the company website, which includes a significant amount of detail.<sup>142</sup>
- GrainCorp submits that the current terms and conditions for allocation and execution of shipping slot bookings effectively deal with perceived risk that exporters will try to hoard capacity.<sup>143</sup>

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

GrainCorp submits that, due to speculation, transfer of capacity will most likely reduce available elevation capacity for exporters.<sup>144</sup>

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<sup>137</sup> *ibid.*

<sup>138</sup> *ibid.*, p. 21.

<sup>139</sup> *ibid.*

<sup>140</sup> *ibid.*

<sup>141</sup> *ibid.*, p. 22.

<sup>142</sup> *ibid.*

<sup>143</sup> *ibid.*

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

- new practices of indemnification and contractual arrangements would be required
- create a value for relevant loading slot at a particular time and place, which would quickly become a secondary market and result in speculation
- speculation would lead to the most desirable shipping times being blocked out, necessitating an auction system.<sup>145</sup>

GrainCorp reiterates its position that the transfer / trading of elevation capacity will lead to the bidding up of all elevation capacity, and the consequent increased costs will be passed back to all grain growers.<sup>146</sup>

In response to concerns in the confidential submissions regarding the treatment of booking fees and penalties for non performance, GrainCorp submits that it has no commercial incentive to block other exporters from utilising the port terminals and incurs significant costs in maintaining and operating the port terminals. GrainCorp also submits that the proposition to create a national escrow account lacks sound or rational economic or legal basis under the Act.<sup>147</sup>

GrainCorp reiterates its position that the inclusion of demurrage and dispatch clauses would not be appropriate given that GrainCorp does not manage the whole supply chain, in contrast to other jurisdictions such as the USA. GrainCorp submits that it is not in a position to manage demurrage or dispatch risk.<sup>148</sup>

In response to concerns in the confidential submissions regarding access to information and requests for ring fencing, GrainCorp states that the matter has been dealt with by the ACCC in its draft decision. GrainCorp also submits that sufficient information is available on the shipping stem, and that GrainCorp's trading division does not have the ability to gain a competitive benefit from any information it receives which is not available on the shipping stem, published elsewhere on the GrainCorp website or private information sources.<sup>149</sup>

In response to requests for publication of relevant performance measures and key stock at port information, GrainCorp submits that it currently publishes weekly stocks at port, monthly port performance statistics, and the shipping stem. GrainCorp considers that this information is adequate and notes that it is also in daily contact with customers in the act of or preparing to accumulate cargos.<sup>150</sup>

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<sup>144</sup> *ibid.*

<sup>145</sup> *ibid.*, pp.22-3.

<sup>146</sup> *ibid.*, p.23.

<sup>147</sup> *ibid.*

<sup>148</sup> *ibid.*, p. 24.

<sup>149</sup> GrainCorp, 6 May 2011, p. 24.

<sup>150</sup> *ibid.*, p. 25.



## **4.2.7 Third party submissions to the ACCC Draft Amendment Notice and Explanatory Statement**

### **4.2.7.1 WEA (14 June 2011)**

WEA submitted that:

- bookings should be tradeable or swappable
- the partial refund of booking fees should be dependent on the number of days prior to loading that the nomination is cancelled and should not be dependent on GrainCorp rebooking the slot
- bookings should not simply ‘disappear’ from the stem
- there should be a mechanism to alert exporters of potential congestion and shipping delays
- booking fees forfeited by exporters should be held in a separate account and distributed pro rata to exporters who utilise their slots
- bookings should be well documented booking arrangements and measures that discouraged hoarding
- BHCs should face the same financial penalty as other users when a slot is cancelled
- proposals regarding publication of more detailed information on stocks-at-port should go further
- all BHCs should publish information on port capacity that is consistent across operators
- shipping stem information should be more detailed, including destination country, and more information on dates of vessel arrival, loading and departure.<sup>151</sup>

### **4.2.7.2 AGEA (15 June 2011)**

AGEA reiterated its view that capacity should be transferable and that:

...it would be relatively simple and would not require the establishment of a secondary market. AGEA believes that slots should be transferable across approved counterparties; as well as ports, grain and elevation periods.

...

AGEA believes that transferable slots will greatly enhance flexibility and efficiency, particularly in periods of peak demand and strongly encourages ACCC to require GrainCorp to develop a proposal that allows for transferable slots across counterparties...<sup>152</sup>

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<sup>151</sup> WEA, 14 June 2011, pp.2-5.

<sup>152</sup> AGEA, 15 June 2011, pp.2-3.

AGEA provided suggested rules that it considered would protect the interests of GrainCorp and exporters including:

- a limit on the number of times slots are transferable between counterparties
- the party to which the slot is transferred to hold a current agreement with GrainCorp and meet GrainCorp's terms
- all rights and obligations transfer with the slot
- timeframes for rules related to port operations, such as when the grain can be changed.<sup>153</sup>

AGEA also submits that

... a process for the independent management of shipping stem and/or booking fees should be established as a matter of priority and utilised across GrainCorp, Viterra and CBH. AGEA strongly encourages the ACCC to establish an independent management to ensure that capacity allocation and management occurs in a competitively neutral way.<sup>154</sup>

#### **4.2.8 GrainCorp submission in response to submissions on the ACCC Draft Amendment Notice and Explanatory Statement by WEA (16 June 2011)**

- GrainCorp submits that:the partial refund of booking fees arrangements are designed to include safeguards against gaming and that to calculate fees on the time from execution is complex and administratively burdensome
- it does not agree that capacity 'disappears' from the shipping stem and that it provides relevant information on bookings on its stem and daily updates of the capacity available to be booked by shippers
- a mechanism to alert exporters of shipping delays is not necessary as this occurs by direct contact between GrainCorp and its customers
- the argument that inequity exists between the GrainCorp Trading and other exporters has been dealt with in previous submission
- publication of tonnage by grade is not appropriate; that new proposals to publish the three major grades constitutes a significant proportion of grain received at port; the stock profile is subject to continual change and more detailed information may mislead
- GrainCorp disagrees with the view that vessel loading is determined by the number of shifts and notes that it published elevation capacity and does not offer 'surge capacity'

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<sup>153</sup> *ibid.*

<sup>154</sup> *ibid.*, p.3.

- Ring-fencing is not required
- Provides details of its shipping stem management systems to demonstrate that its Trading Division has the same access to information as other exporters
- It already provides most of the shipping stem information requested by WEA and questions the relevance of the other information

## 4.3 Submissions relating to variation of the PTSP

### 4.3.1 GrainCorp's submission in support of the Proposed 2011 Undertaking (22 September 2010)

In its submission in support of the Proposed 2011 Undertaking, GrainCorp states that the 2009 Undertaking allowed it sufficient flexibility in its port operations to meet the demands of customers.<sup>155</sup> With respect to the 2010 PTSP it states that it:

... made the following port protocol changes for the benefit of customers:

- Shipping windows were increased from 5 days to 10 days before penalties were applicable.
- The period in which a vessel could be swapped or changed was reduced from 21 days to 10 days.
- Once elevation capacity was booked by customers, flexibility to move the time in which this service was delivered was increased, without any additional fees applying to move booked elevation from month to month, forward or back, split tonnage, change grain type and move from port to port if capacity was available.
- Booking fee forfeiture was changed to allow a customer one shipping month plus 5 days to 'perform' (i.e. accumulate a cargo or supply a fit vessel within the time periods provided by the Protocols). Previously, the booking fee was forfeited where a customer where a customer was unable to perform within 5 days of the ETA.<sup>156</sup>

In addition, GrainCorp notes that the issue of superintendents' access to inspect cargo samples was resolved through provisions in the access agreements concluded with clients, with the Grain and Feed Trade Association (GAFTA) acknowledging changes.<sup>157</sup>

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

With respect to the provisions in the Proposed 2011 Undertaking regarding variation of the protocols, AGEA states:

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<sup>155</sup> GrainCorp, *Submission* 22 September 2010, p. 9.

<sup>156</sup> *ibid.*, p. 9.

<sup>157</sup> *ibid.*, p. 9.

‘The flexible approach to the port loading protocols [i.e. allowing GrainCorp to vary the port loading protocols without seeking formal approval from the ACCC] has not caused any concerns. AGEA supports this flexibility as part of the framework and is not aware of any issues for Australian wheat exporters as a result of this flexibility.’<sup>158</sup>

#### **4.3.3 GrainCorp response to third party submissions (13 December 2010)**

GrainCorp notes in reference to AGEA’s comments regarding the protocol variation process that it ‘cannot unilaterally modify the Protocols. GrainCorp is required to notify the ACCC of any proposal to modify the Protocols, and any proposed modification is subject to a formal consultation process and period.’<sup>159</sup>

#### **4.3.4 AWB Submission in response to Draft Decision (15 April 2011)**

AWB agrees with the ACCC’s recommendations intended to ensure the PTSP is comprehensive and yet able to be varied by GrainCorp without unfairly impacting market participants.<sup>160</sup>

#### **4.3.5 GrainCorp response to Draft Decision (18 April 2011)**

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

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

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

...there are dangers in regulators imposing themselves in commercial variation processes between commercial parties, as this increases the cost and complexity of what should be the provision of a commercial service at an economically efficient price.<sup>161</sup>

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

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<sup>158</sup> AGEA, *Submission to ACCC Issues Paper*, 10 November 2010, p. 1.

<sup>159</sup> GrainCorp, *Response to third party submissions*, 13 December 2010, p. 1.

<sup>160</sup> AWB, *Submission*, 15 April 2011, s. 5.3.4.

<sup>161</sup> GrainCorp, *Submission*, 18 April 2011, p. 7.

## 5 Appendix B: Analysis of bulk wheat export markets

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

Capacity allocation arrangements include two main components:

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

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

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

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

## 5.1 Extent of capacity constraint

As the PC stated in its Inquiry Report on Wheat Export Marketing Arrangements, auctions can play a significant role in efficiently allocating limited port capacity.<sup>162</sup> This general economic principle, that allocative efficiency is best achieved through a price mechanism, has greatest application when supply is limited relative to demand. When no binding capacity constraint exists the demands of all users can be met and the means by which allocation occurs is not critical to achieving efficiency.

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

On this basis, it might be considered appropriate for all port operators to use auction systems to allocate port capacity as all (with the possible exception of ABA) have limited capacity at least at some ports for some periods. This was the view of the PC which noted that port operators other than CBH might also consider adopting a similar [auction] system where there is a likelihood of excess demand for port capacity at certain points in time (effectively, a shifting peak demand problem driven by movements in the supply and demand for wheat).<sup>163</sup>

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

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

The ACCC notes that measures of capacity are not always directly comparable as port capacity depends on cargo accumulation capacity (in turn determined by road and rail receivals and storage) as well as by ship loading capacity. Operators that provide bundled up-country and at-port services (Viterrra's Export Select and CBH's Grain Express) provide port capacity measures that reflect capacity to provide the integrated service. The information in Table 8.1 is based on estimates of capacity to

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<sup>162</sup> Productivity Commission, *Wheat Export Marketing Arrangements*, 1 July 2010, p. 205.

<sup>163</sup> *ibid.*

receive and store grain for cargo accumulation and to load ships and abstracts from the impact of freight capacity limits and other up-country bottlenecks on the grain supply chain and exports. The ACCC recognises the significance of up-country bottlenecks in the grain supply chain but its concern in forming a view on wheat access undertakings is access to port terminal services. For this, the capacity of the port to in-load is relevant but the capacity of the upcountry supply chain to deliver is not.

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

**Table 8.1: Port terminal capacity and demand**

Region	Characteristics
East Coast (Queensland, NSW and Victoria)	<p><b><u>Capacity</u></b></p> <p>GrainCorp monthly capacity across 7 ports: 1.26mt (reduced to 1.09mt in January and February peak months when storage at Geelong is diverted for harvest receiptal.</p> <p>ABA monthly capacity (approx): 90,000 tonnes</p> <p>Average monthly east coast capacity: 1.32mt</p> <p><b><u>Demand for port services</u></b></p> <p>Domestic demand accounts for a high proportion of production on the east coast the year to year variability of exports is greater than either SA or WA where domestic demand is much lower.</p> <p>Average monthly export task:</p> <p>High demand year (2010/11) all grains:- 0.72mt</p> <p>High demand year (2010/11) wheat:- 0.51mt</p> <p>Three year average (2008/09-2010/11) wheat:- 0.45mt</p> <p><b><u>Capacity utilisation</u></b></p> <p>High demand year (2010/11) all grains:- 54%</p> <p>Three year average (2008/09-2010/11) wheat:- 34%</p> <p>Three year average (2008/09-2010/11) all grains:- 48%<sup>164</sup></p>

<sup>164</sup> All grains utilisation rate is based on the same ration of wheat to non wheat exports as in 2010/11

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

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

## **5.2 Incentive for self-preferential treatment**

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

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

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

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

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

The extent of competition varies significantly across the markets in which the BHCs operate. A high level summary of the key features of each region (including the



differences that exist) in terms of their existing supply chain characteristics and competitive dynamics is outlined below.

### 5.3 Up-country supply chains

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

**Table 8.2: up-country supply chain characteristics by region**

Region	Characteristics
East Coast	<p>The provision of wheat storage and handling services is dominated by GrainCorp (in New South Wales, Victoria and QLD) and Viterra (in South Australia).</p> <p>There is significant competition for the provision of such services from:</p> <ul style="list-style-type: none"> <li>▪ on-farm storage (which makes up a relatively greater proportion of total storage capacity than in other regions)<sup>165</sup>;</li> <li>▪ a significant number of independent bulk handlers. There is a wider choice of independent storage and transport providers compared to other regions; and</li> <li>▪ limited overlap of GrainCorp’s and Viterra’s up-country storage networks.</li> </ul>
South Australia	<p>The provision of wheat storage and handling services is dominated by Viterra.</p> <p>There is some competition from:</p> <ul style="list-style-type: none"> <li>▪ on-farm storage; and</li> <li>▪ independent bulk handlers, and.</li> <li>▪ to a limited competition from GrainCorp’s up-country storage networks in western Victoria</li> </ul>
Western Australia	<p>The provision of bulk wheat storage and handling services is dominated by CBH which has significant market power.</p> <p>There is some very limited competition from on-farm storage but none from independent bulk handlers. There is no overlap in the storage network of CBH and any other vertically integrated bulk handler.</p>

<sup>165</sup> The PC report observed that the larger stock of on-farm storage in the East Coast may be attributable to the relative importance of the domestic market and longer history of choice in domestic marketing: Productivity Commission *Inquiry Report No. 51: Wheat Export Marketing Arrangements*, 1 July 2010, p. 68.

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

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

## 5.4 Domestic and non-bulk export wheat

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

**Table 8.3: domestic and export wheat supply characteristics by region**

Region	Characteristics
East Coast	<p>Annual domestic demand for wheat on the east coast is close to 5mt which is approximately 60% of average annual production with the remainder exported. The bulk wheat export supply chain therefore faces significant competition from the storage and transport of wheat to be sold into the domestic market.</p> <p>The bulk wheat supply chain also faces competition from export wheat in containers and bags. Containerised export grain volumes on the east coast are significant and have expanded in recent years. The Essential Services Commission (ESC) found that containerised grain exports in Victoria and southern New South Wales expanded to represent all grain exports in Victoria and southern NSW.<sup>166</sup></p>
South Australia	<p>70% of wheat production in South Australia is exported, with only a relatively small proportion supplied into the domestic market.<sup>167</sup> The bulk wheat supply chain therefore does not face significant competition from the storage and transport of wheat to be sold into the domestic market.</p> <p>Almost all wheat exports from South Australia is exported in bulk with only limited competition from wheat exported in containers and bags.</p>
Western Australia	<p>90% of wheat production in Western Australia is exported, with only a small amount required to supply the domestic market. The bulk wheat supply chain therefore does not face significant competition from the storage and transport of wheat to be sold</p>

<sup>166</sup> Essential Services Commission, *Review of Victorian Grain Handling and Storage Access Regime Final Report*, May 2009, pp 39-40.

<sup>167</sup> Productivity Commission *Inquiry Report No. 51: Wheat Export Marketing Arrangements*, 1 July 2010, p. 56.

Region	Characteristics
	<p>into the domestic market.</p> <p>Almost all wheat in Western Australia is exported in bulk with only limited competition from wheat exported in containers and bags.</p>

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

As Table 8.3 illustrates, the bulk wheat export supply chain faces greater competition from the storage and transport of wheat to be sold into the domestic market on the east coast than in Western Australia and South Australia. Also, there is a somewhat higher level of competition to bulk wheat export from containerised and bagged exports on the east coast than in either South Australia or Western Australia.

## 5.5 Port terminal facilities

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

**Table 8.4: competition between port terminals by region**

Region	Characteristics
East Coast	<p>GrainCorp does not currently face competition from alternative grain port terminal operators in New South Wales or Queensland. However, as the ESC, noted in its review of grain handling and storage arrangements in Victoria, there is a “significant degree of competitive substitutability” between the port terminals operated by ABA and GrainCorp.<sup>168</sup></p> <p>Also, some very limited competition to Port of Portland in western Victoria may come from ports in South Australia.</p>
South Australia	<p>Viterra operates all wheat port terminals in South Australia and is not likely to face competition from any alternative port terminal operator for wheat throughput, with the possible exception of weak competition from Port of Portland.</p>
Western Australia	<p>CBH operates all wheat port terminals in Western Australia and is not likely to face competition from any alternative port terminal operator for wheat throughput.</p>

<sup>168</sup> *ibid.*, p. 48.

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

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

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

## 5.6 Conclusion

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

### *Capacity constraint*

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

### *Incentive for self preferential treatment*

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

Accordingly, the ACCC considers that there is less incentive for GrainCorp to discriminate in favour of its own operations in the allocation of capacity at port terminal facilities given the competitive constraints that exist in the east coast along various key elements of the supply chain. However, the ACCC notes that these

competitive pressures are less evident in Queensland, particularly for GrainCorp's facilities at Mackay. The reduced incentive across other regions on the east coast suggests arrangements to preclude the port operator from anti-competitive behaviours in the management of its capacity allocation arrangements (either by auction or measures to make administration of first come, first served allocation system competitively neutral) are not likely to be required in an access undertaking relating to operations for much of the east coast, as compared to South Australia and Western Australia where very different competitive conditions exist.

## 6 Appendix C: Industry overview

### 6.1 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.<sup>169</sup>

GrainCorp owns and operates 270 receival sites throughout New South Wales, Victoria and Queensland, with a total storage capacity of 20 mt.<sup>170</sup> GrainCorp also owns and operates seven grain export terminals on the eastern seaboard.

GrainCorp's principal business activities are aligned into three business units – grain trading, ports, and storage and handling. These comprise the following activities:

- storage and logistics—provision of receival, handling and storage of wheat and other bulk commodities as an agent for marketing organisations, end users and growers in relation to both domestic and export markets
- transport—rail operations are primarily for the use of GrainCorp's own grain trading and exporting operations, but excess rail haulage capacity is provided to other grain traders and exporters.<sup>171</sup>
- port terminals—provision of receival, handling and storage of grain and other products
- Grain Trading and Hunter Grain—trading of grain, meals and other bulk commodities and the operation of grain pools in relation to both domestic and export markets
- Merchandising—provision of farm input products
- Allied Mills—flour milling and mixing services
- GrainCorp Malt—malt production and export.<sup>172</sup>

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

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<sup>169</sup> GrainCorp, *Submission to the ACCC*, 15 April 2009, Schedule 1, p. i.

<sup>170</sup> Productivity Commission (2010) *Wheat Export Marketing Arrangements*, Report no. 51, Canberra, p. 254.

<sup>171</sup> GrainCorp (2010), *GrainCorp Shareholder Review*, p. 6.

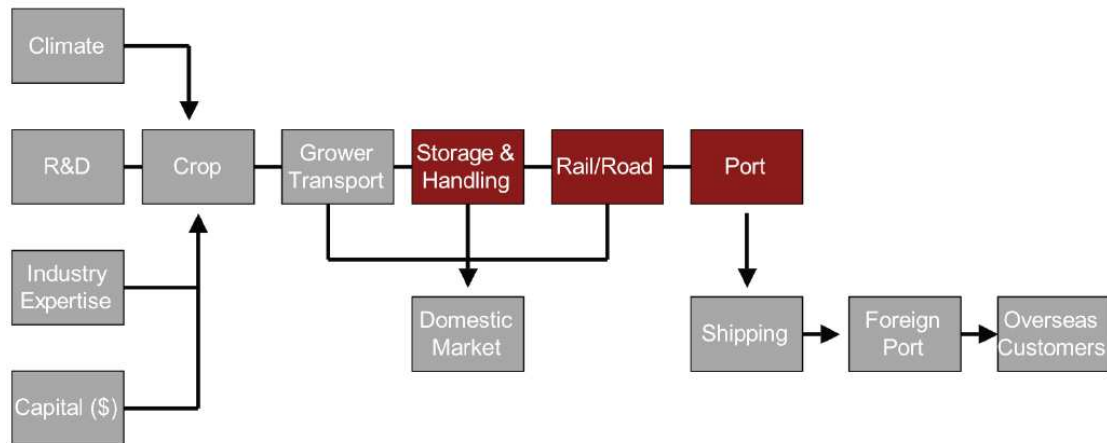
<sup>172</sup> GrainCorp, *Submission to the ACCC*, 15 April 2009, Schedule 1, p. ii; GrainCorp, *GrainCorp at a Glance*, accessed on 9 February 2011 at <http://www.graincorp.com.au>.

## 6.2 The wheat industry in Eastern Australia

Figure 1 sets out the grain supply chain for eastern Australia and includes primary inputs (climate, research and development, industry expertise and capital), grain production, transportation (road, rail and ship), storage and handling and the domestic and foreign markets.<sup>173</sup>

**Figure 1**

### GRAIN INDUSTRY SUPPLY CHAIN



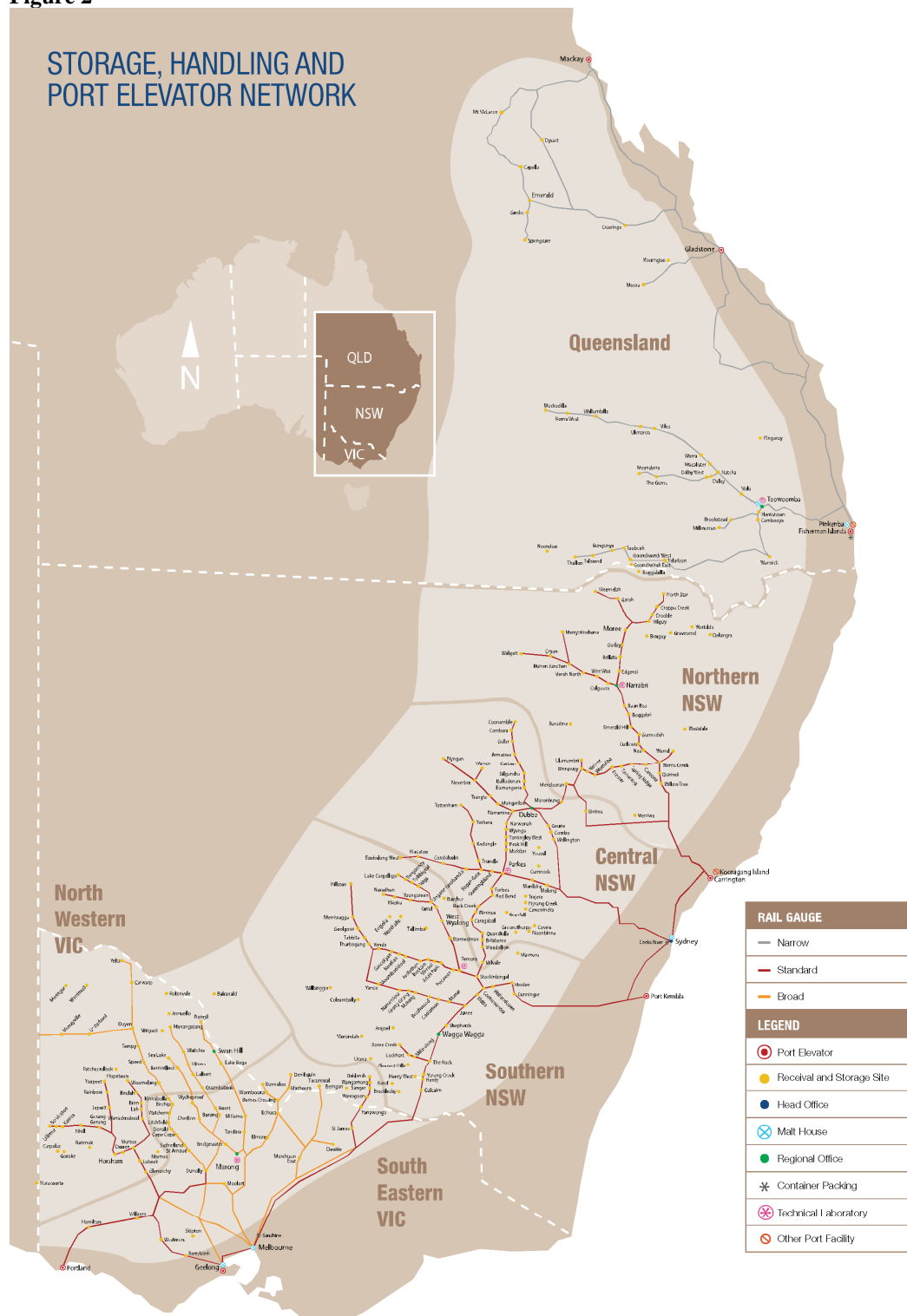
Source: Ernst & Young (2008)

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

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

<sup>173</sup> Allen Consulting Group (2008) Competition in the Export Grain Supply Chain, March, p. 11.

Figure 2



Map not to scale

Source: GrainCorp Operations Limited, (2010).



ABARES forecast that winter crop production in the eastern states for the 2010-11 would reach a total of 27.5 mt with wheat representing 17.7 mt. On 31 January 2011 GrainCorp announced that its receivals for the 2010 grain harvest were complete at a total volume of 13.3 mt.<sup>174</sup> 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.

## **6.2.1 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.<sup>175</sup> The area planted to wheat in New South Wales in 2009-10 is estimated to have fallen to just over 4 million hectares. Total wheat production is estimated at 5.3 mt in 2009-10, which is around 1.6 mt less than what was produced in the 2008-09 season. Wheat production for the 2010-11 season is forecast at 11.8 mt, which represents a substantial increase on previous seasons.<sup>176</sup>

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).<sup>177</sup>

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.

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<sup>174</sup> ABC (2011), *Wheat Harvest Over at Last: GrainCorp*, accessed 8 February 2011 at <http://www.abc.net.au/rural/news/content/201101/s3125966.htm?site=sydney>.

<sup>175</sup> ABARES (2010) Australian Crop Report, report no. 156, December 2010.

<sup>176</sup> *ibid.*

<sup>177</sup> Allen Consulting Group (2008) *Competition in the Export Grain Supply Chain*, March, p. 9.

The smallest of the three storage and handling companies in New South Wales is Australian Bulk Alliance (ABA). It owns four receival sites in the state located in the Riverina and the South West, which handled approximately 3 per cent of the state's wheat receipts between 2001-02 and 2005-06.<sup>178</sup>

### **Transportation in New South Wales**

Rail is the dominant method of transporting grain from receival sites in New South Wales. The average export haul distance in New South Wales is around 450 km and the industry relies heavily on rail to move at least 90 per cent of exports and about 75 per cent of wheat for milling.<sup>179</sup> The volume of annual grain exports from New South Wales ranges from less than 1 mt to over 5 mt.<sup>180</sup> Exports are sourced largely from the northern and south-western regions.

Rail also serves a large percentage of domestic demand, with flour mills and feed mills regularly requiring 1mt of wheat and other grains delivered by rail. The largest mill is at Manildra in the central west which consumes over 2 000 tonnes of grain per day from the surrounding region.<sup>181</sup>

Concern over the NSW rail network's ability to handle an increase in grain rail freight led to the announcement of an audit and a review of New South Wales grain freight in October 2008 by the Federal Department of Infrastructure, Transport, Regional Development and Local Government. The final report was released on 21 October 2009 and contained eighteen recommendations designed to support the industry's access to reliable, well maintained transport infrastructure, including:

- stabilising specific branch lines, and appropriate cost-sharing arrangements between the NSW government and owners for upgrading infrastructure
- a review of access charges to determine an appropriate level of user contribution to ongoing maintenance of the network
- investigating options to address capacity constraints on the track to Newcastle
- that the branch line network should remain in public ownership, with management and maintenance consolidated in the hands of ARTC
- planning a dedicated grain road network to support rail
- a government/industry grain logistics coordination group, which would assist in managing the challenges of bumper harvests and peaks in demand.<sup>182</sup>

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<sup>178</sup> *ibid*, p. 10.

<sup>179</sup> Single Vision Grains Australia (2007) *Transport Infrastructure Issues paper One – Network Review for the Australian Grains Industry*, January, pp. 17-19.

<sup>180</sup> Department of Infrastructure, Transport, Regional Development and Local Government, *NSW Grain Freight Review – Final Report*, September 2009, p. 25.

<sup>181</sup> Single Vision Grains Australia (2007) *Transport Infrastructure Issues paper Two – Commercial Aspects for the Australian Grains Industry*, January, pp. 7-8.

<sup>182</sup> Department of Infrastructure, Transport, Regional Development and Local Government, *NSW Grain Freight Review – Final Report*, September 2009, pp. 8-14

## **Port terminals in New South Wales**

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

The terminal located at Carrington in Newcastle has overall storage capacity of 164 400 tonnes. It is serviced by both road and rail and can handle bulk exports of wheat, barley, oilseeds, legumes and sorghum. The Carrington terminal also receives and stores bulk orange juice under refrigeration and is the largest facility of this type in Australia.<sup>183</sup>

The terminal at Port Kembla (near Wollongong) has 30 storage bins and a storage capacity of 260 000 tonnes. Port Kembla is serviced by both road and rail, and at the time of completion in 1989 was considered to be the most advanced grain elevator in the world. The terminal can handle bulk exports of all cereal grains, sorghum, legumes and oilseeds.<sup>184</sup>

## **6.2.2 Victoria**

### **Grain production in Victoria**

Victoria produces around 11 per cent of wheat in Australia.<sup>185</sup> The area planted to wheat in Victoria in 2009-10 is estimated at just over 1.7 million hectares. Total wheat production is estimated at about 2.9 mt for 2009-10, which is around 1.2 mt more than what was produced in the previous season. Wheat production for the 2010-11 season is forecast to increase further and is estimated at 4.4 mt.<sup>186</sup>

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.<sup>187</sup>

### **Up-country storage and handling in Victoria**

The up-country storage facilities are largely controlled by three firms: GrainCorp, AWB GrainFlow (a subsidiary of AWB), and Australian Bulk Alliance (ABA).

Approximately 76 per cent of wheat receivals in Victoria were handled by GrainCorp between 2001-02 and 2005-06, achieved with a network of two sub-terminals, 27 primary sites and 63 storage sites. Sixteen per cent was handled by AWB GrainFlow which owns and operates five receival sites.<sup>188</sup> The remainder was handled by ABA at its four receival sites, and Viterra which also operates two up-country receival sites in Victoria. An increasing proportion of grain destined for the domestic market is being stored on-farm and transported to market by road.

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<sup>183</sup> GrainCorp Operations (2010), *Port Operations*, pp. 10-11.

<sup>184</sup> Ibid.

<sup>185</sup> ABARES (2010) Australian Crop Report, report no. 156, December 2010.

<sup>186</sup> Ibid.

<sup>187</sup> Victoria Department of Primary Industries (2005) *Priorities for Action: Victoria's Grain Industry*, p. 2.

<sup>188</sup> Allen Consulting Group (2008) *Competition in the Export Grain Supply Chain*, March, p. 11.

## Transportation in Victoria

The majority of Victorian export grain is moved to port by rail. Rail has significant advantages over road for transporting export grain as it can transport larger volumes in shorter periods to meet shipping requirements and minimise at-port storage. However, transport to port by road has been increasing since the deregulation of the wheat industry.<sup>189</sup>

A large amount of the Victorian rail network is a broad gauge network. The Melbourne and Geelong port terminals both have dual gauge rail access, while the Portland terminal has only standard rail gauge access. Following the withdrawal of Pacific National from the management of Victoria's freight lines, El Zorro entered into an agreement with AWB GrainFlow to operate two trains to transport grain from its inland facilities, while GrainCorp has entered into a five year contract with Asciano. Viterra has a memorandum of understanding with Genesee and Wyoming to operate one train on Victoria's broad gauge lines to rail grain from Viterra and ABA sites.

## Port terminals in Victoria

There are three export grain terminals in Victoria—namely, Geelong, Portland, and Melbourne Port Terminal. Both Geelong and Portland are owned and operated by GrainCorp. Melbourne Port Terminal at Appleton dock in the port of Melbourne is owned by a joint venture of ABA and AWB, with each owning 50 per cent. ABA has operational management and control of the terminal, and during 2010 ABA became a wholly-owned subsidiary of Sumitomo Corporation.<sup>190</sup>

Geelong is the largest of the terminals in terms of storage, with a total vertical storage capacity of 225 000 tonnes (wheat equivalent).<sup>191</sup> It has 99 concrete silos and 66 inner spaces, and can therefore provide a high degree of segregation between types and grades of grain. As well as grains and pulses, Geelong terminal handles woodchips and imports of fertiliser. Geelong is the largest regional port in Victoria and an important hub for the movement of cargo into and out of Victoria. It is situated at the western end of Port Phillip Bay, in reasonably close proximity to Melbourne Port Terminal (50 km).

The Portland grain terminal facility is situated in the far west of Victoria near the border with South Australia (approximately 300 km from Geelong Port and 350 km from Melbourne Port Terminal). It is a deep-water bulk port strategically located between the ports of Melbourne and Adelaide. It is the international gateway for the Green Triangle Region, an area with an abundance of natural resources and exports

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<sup>189</sup> Productivity Commission (2010) *Wheat Export Marketing Arrangements*, Report no. 51, Canberra, p. 257.

<sup>190</sup> The ACCC notes that on 23 December 2010 ABA submitted an access undertaking for the Melbourne Port Terminal to the ACCC. Wheat Exports Australia has previously stated that the operator of the Melbourne Port Terminal is not required to be the subject of an access undertaking for accreditation purposes as it is neither an accredited exporter, nor is it an associated entity of any companies which are accredited exporters. See: [http://www.wea.gov.au/Publications/FactSheets/090623\\_MPT.pdf](http://www.wea.gov.au/Publications/FactSheets/090623_MPT.pdf).

<sup>191</sup> GrainCorp Operations (2010), *Port Operations*, pp. 10-11

grain, woodchips, logs, aluminium ingots and livestock, while import commodities are alumina, liquid pitch and fertiliser products. The port is served by rail as well as by road which bypasses the City of Portland to allow 24-hour access. No wheat has been exported from the Portland terminal during the 2008-09 and 2009-10 seasons.<sup>192</sup>

Melbourne Port Terminal was commissioned in 2000 and has 20 steel bins of various sizes holding a total of 48 000 mt storage.<sup>193</sup> It is designed to operate as a high throughput just-in-time facility, and typically handles prime grades of wheat, as well as barley, canola and rice. On average, approximately 50 per cent of wheat exported from Victoria is shipped from Melbourne Port Terminal.<sup>194</sup>

### 6.2.3 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.<sup>195</sup> 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.<sup>196</sup> The area planted to wheat in Queensland in 2009-10 is estimated at just under 1 million hectares. Total wheat production is estimated at just under 1.4 mt for 2009-10, which is around 0.6 mt less than what was produced in the previous season. Wheat production for the 2010-11 season is forecast to increase to just over 1.4 mt.<sup>197</sup>

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.<sup>198</sup>

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

Grain storage and handling infrastructure in Queensland is predominately owned and operated by two companies. The largest of these is GrainCorp, which handled approximately 79 per cent of the state's wheat receivals between 2001-02 and 2005-06.<sup>199</sup> It did so through a network of 10 primary sites and 32 storage sites.<sup>200</sup>

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

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<sup>192</sup> WEA (2010), *2009/10 Marketing Year: Report for Growers*, December, p. 13.

<sup>193</sup> Australian Bulk Alliance, *Export Operation Guidelines for Melbourne Port Terminal*, accessed 9 February 2011 at <http://www.bulkalliance.com.au/ShippingStem/tabid/154/Default.aspx>

<sup>194</sup> WEA (2010), *2009/10 Marketing Year: Report for Growers*, December, p. 13.

<sup>195</sup> Allen Consulting Group (2008) *Competition in the Export Grain Supply Chain*, March, p. 66;

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

<sup>196</sup> Australian Bureau of Statistics (2006) *Value of Agricultural Commodities Produced*, Australia 2004-05, Catalogue No. 7503.0, Canberra.

<sup>197</sup> ABARES (2010) Australian Crop Report, report no. 156, December 2010.

<sup>198</sup> Allen Consulting Group (2008) *Competition in the Export Grain Supply Chain*, March, p. 66.

<sup>199</sup> ITS Global (2007) *Grain Marketing Transition Factsheets: Competition in the Domestic Grain Supply Chain*, prepared for AWB, Melbourne.

<sup>200</sup> Allen Consulting Group (2008) *Competition in the Export Grain Supply Chain*, March, p. 12.

2005-06.<sup>201</sup> AWB GrainFlow maintains four receival sites in Queensland, all of which are located in the Darling Downs.<sup>202</sup>

### **Transportation in Queensland**

Transport of grain for export from receival sites in Queensland is delivered by rail, where transport of grain for domestic milling is delivered by road. The volume of grain for export is generally three times larger than that for milling.<sup>203</sup>

Rail services in Queensland are provided by QR National, a state-owned corporation which provides both track and above rail services. The Queensland Competition Authority has the responsibility of setting the rail tariff rates for services offered by QR National, and accepted an access undertaking from QR National on 1 October 2010.

### **Port terminals in Queensland**

There are three grain terminals in Queensland, all of which are owned and operated by GrainCorp. The three terminals are all serviced by both road and rail.

The most significant of these is located at Fisherman Islands, near Brisbane. It uses a combination of multi-commodity sheds, pads and bins to store grain, and has a total capacity of 192 700 tonnes fumigable. As well as grain for export, the Fisherman Islands port can handle legumes, cottonseed, mineral sands, sugar and woodchips.<sup>204</sup>

A further grain terminal is located at Gladstone. It uses a combination of silos and bulk sheds to store grain, and has a total capacity of 86 000 tonnes. The Gladstone elevator can handle wheat, barley, sorghum, legumes and oilseeds, as well as the export of magnesia.<sup>205</sup>

GrainCorp also has a grain terminal at Mackay. It has eight concrete silos and pads, with a total storage capacity of 74 000 tonnes. As well as wheat, the Mackay elevator can handle barley, sorghum, legumes, oilseeds and maize.<sup>206</sup>

## **6.3 Industry structure – GrainCorp submissions**

### **6.3.1 GrainCorp 2009 Submission**

GrainCorp submitted to the ACCC in 2009 that unlike Western Australia and South Australia, the Eastern Australian Grain market is highly complex and fragmented, where:

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<sup>201</sup> ITS Global (2007) *Grain Marketing Transition Factsheets: Competition in the Domestic Grain Supply Chain*, prepared for AWB, Melbourne.

<sup>202</sup> Allen Consulting Group (2008) *Competition in the Export Grain Supply Chain*, March, p. 12.

<sup>203</sup> *ibid.*, p. 13.

<sup>204</sup> GrainCorp Operations (2010), *Port Operations*, accessed 9 February 2011 at <http://www.graincorp.com.au/Documents/Port%20Operations.PDF>.

<sup>205</sup> *ibid.*

<sup>206</sup> *ibid.*

- 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’s annual bulk grain exports can range from 0.8 to 10 mt
- Eastern Australia is serviced by over 40 mt of country storage, comprising of GrainCorp, AWB, ABA, ABB (now Viterro), other independent storage providers and on farm storage. GrainCorp receives on average 9 mt of grain, which accounts for approximately 60 per cent of grain produced
- a large number of grain traders aggressively compete for the purchase of wheat from growers to supply both domestic and export customers, as well as trading between each other for the purposes of speculation, and managing customer orders and logistics—this means that the ownership of the wheat may change hands many times through the supply chain
- the distinguishing feature of the grain and wheat industry in Eastern Australia is the primary focus in the supply of grain to domestic customers. Domestic end users have ‘first call’ on grain produced, currently consuming at least 9.5 mt of grain annually. GrainCorp handles around 4.5 mt of domestic grain, around 45 per cent of grain consumed domestically
- the export market consumes the ‘residual’ grain that is not consumed locally. This is handled at GrainCorp export terminals, Melbourne Port Terminal and via the expanding container market. GrainCorp handles on average 4 mt of bulk grain, of which 80 per cent is generally wheat.<sup>207</sup>

GrainCorp also provided answers to several questions posed by the ACCC. Their answers included the following points:

Rail is, in almost all circumstances on the east coast, the most efficient and cost effective means of moving grain to port.

Evidence given by WEA to the Senate Estimates Hearing on 25 May 2009 included that ‘there is grain travelling from Queensland down to Victoria...’<sup>208</sup>

There are key differences between grain growing and handling industries in the northern hemisphere and in Australia:

The geographical distribution of northern hemisphere grain growing regions and the tonnages (higher) and volatility (lower) of production there make infrastructure service provision a significantly different commercial proposition. The development of grain handling infrastructure in Europe has been significantly different from the growth of the industry in Australia. The Australian industry is shaped by its history as a collection of statutory organisations and the 69 year presence of the bulk wheat export monopoly.

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<sup>207</sup> GrainCorp, *Submission to the ACCC*, 15 April 2009, para. 4.1, p. 14.

<sup>208</sup> Parliament of Australia, Hansard, *Senate Standing Committee on Rural and Regional Affairs and Transport*, 25 May 2009, p. 54.

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.<sup>209</sup>

### 6.3.2 GrainCorp 2010 Submission

GrainCorp's submission to the ACCC in 2010 states that the eastern Australian grain industry is a highly competitive commodity market, where:

- the supply of grain to domestic customers is the primary focus. Eastern Australia produces 17 mt of grain crop annually, of which 10 mt is consumed domestically and 7 mt is exported
- of the 7 mt exported annually from eastern Australia, 5 mt is in bulk and 2 mt is in containers
- of the 5 mt bulk exports, 4 mt is exported via GrainCorp's bulk elevators and 0.5-1 mt is exported from the Melbourne Port Terminal.<sup>210</sup>

GrainCorp also provided information around changes to capacity:

- Total GrainCorp terminal capacity for the 2010-11 season increased from 12 mt pa to 15.12 mt. This was achieved through improvements in supply chain efficiency, including improved rail, road and shipping accumulation planning and execution.
- Total eastern Australian bulk grain export capability will expand to approximately 20 mt following completion of new project and upgrades.
- Capacity expansion projects for bulk and container grain export include:
  - commissioning of the Wilmar Gavilon former sugar export terminal in Queensland, which will add 0.5 mt of bulk export grain capacity
  - upgrade of the former Dunavant Cotton grain storage and container packing capacity at Moree and Narrabri, which will increase container export capacity by 0.5 mt
  - the P&O berth at Kooragang Island, Port Waratah at Newcastle, and the Lascelles Wharf Project at Geelong, which together will add up to 2 mt of bulk elevation capacity.<sup>211</sup>

## 6.4 Regulatory Regimes

Since 1 October 2009, access to GrainCorp's port terminals for the export of bulk wheat has been regulated via an access undertaking accepted by the ACCC. The Melbourne Port Terminal currently does not have an ACCC access undertaking in place. However, on 23 December 2010 Australian Bulk Alliance submitted an access undertaking for the Melbourne Port Terminal to the ACCC for assessment.

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<sup>209</sup> GrainCorp, *Supplementary submission to the ACCC*, 24 June 2009, pp. 23-25

<sup>210</sup> GrainCorp, *Submission to the ACCC*, 22 September 2010, pp. 3-4.

<sup>211</sup> *ibid.*, pp. 3-4, 9.



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

#### **6.4.1 New South Wales**

No regulatory framework specifically applies to port terminal operators in New South Wales other than the 2009 Undertakings. Rather, there are commercial agreements with the port corporations, and with stevedores or land and sea transport operators. Agreements are either based on common user access or directly with clients if they are able to offer guaranteed allocations.

The terms and conditions offered by the port corporations for port access are not specified by the regulatory framework. In practice, most key port facilities make their terms and conditions publicly available so that potential customers are able to assess and potentially negotiate charges. Port corporations lease facilities they own or control to other service providers and this usually gives the tenant exclusive long-term access. In addition to this, some port charges are specified under Part 5 of the *Ports and Maritime Administration Act 1995* (NSW).

There has been much discussion over the regulatory framework in place for New South Wales ports themselves (as opposed to the port terminal operators). New South Wales committed to the National Reform Agenda (NRA) and the Competition and Infrastructure Reform Agreement in February 2006.

#### **6.4.2 Victoria**

In 1995, as part of the privatisation of the Grain Elevator Board, the Victorian Government introduced specific legislation in the form of the *Grain Handling and Storage Act 1995* (Vic) to regulate specific prescribed grain shipping services at Portland and Geelong. The purpose of this legislation is to promote competition in the storage and handling of grain, ensure charges are fair and reasonable, and ensure reasonable access to grain facilities.

Following amendments made in 2003 to the Grain Handling and Storage Act, direct price regulation of the services at the ports of Geelong and Portland was replaced by a negotiate-arbitrate access regime.<sup>212</sup> 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

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<sup>212</sup> Regulation of prices for prescribed services was discontinued on 9 October 2003.

- to protect the interests of users of the grain handling and storage facilities in terms of price by ensuring that charges across users and classes of services are fair and reasonable
- to ensure users and classes of users have fair and reasonable access for grain to the port facilities whilst having regard to the competitiveness and efficiency of the regulated industry.

Also under the Grain Handling and Storage Act, the ESC is confined to resolving access disputes between access seekers and access providers and to arbitrate any disputes over the conditions of access that could not be resolved through commercial negotiation. Under the negotiate/arbitrate framework, the ESC will only make a determination concerning prices if notified that parties cannot agree on terms and conditions of access to the prescribed services.

In January 2008, ABA and GrainCorp made an application to the ESC for general access determinations (seeking approval of the proposed undertakings) under section 19 of the Grain Handling and Storage Act. The ESC final determination (16 April 2008) was not to make general access determinations mainly on the basis that the ESC was not satisfied that the access providers substantially addressed the specific requirement of the ESC as to non-discriminatory access.<sup>213</sup>

In May 2009, the ESC released its final review of the Victorian grain handling and storage access regime, which considered whether access regulation through the Act should continue to apply to any or all bulk grain handling terminals in Victoria, and if so what changes would need to be made to the Act to ensure that it could be certified as an effective state-based access regime.

The ESC previously found that increased competition between facilities had reduced the need for regulation, and the ESC was not convinced that the risk of misuse of market power was sufficient to warrant the continuation of access regulation. The ESC recommended that the Grain Handling and Storage Act cease to apply on 1 October 2009 in order to ensure a smooth transition to federal regulatory arrangements.

In accordance with this recommendation, on 28 September 2009 the Minister for Finance, Workcover and the Transport Accident Commission determined that the facilities used for grain bulk handling in the ports of Geelong, Melbourne and Portland are no longer 'significant infrastructure facilities'. The effect of this determination is that the Grain Handling and Storage Act regulatory framework ceased to apply to those ports from 1 October 2009.<sup>214</sup>

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<sup>213</sup> 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.

<sup>214</sup> Essential Services Commission (2009) *Review of the Victorian Grain Handling and Storage Access Regime*, Final Report, May, pp. 11-12.

### 6.4.3 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 a QCA-administered access regime.

## 6.5 The Productivity Commission inquiry

The Productivity Commission (PC) conducted an inquiry into wheat export marketing arrangements, publishing its final report on 1 July 2010. In its final report, the PC stated that access to port terminal facilities represented the most significant issue in its inquiry, and that the ability of wheat exporters to access port terminal facilities is critical to the success of the deregulated market.<sup>215</sup>

The PC identified several characteristics particular to the wheat export industry in the eastern states:

*A significant proportion of wheat is consumed domestically.* Wheat is exported and consumed domestically. Wheat destined for domestic markets is often delivered directly from farms to end users.<sup>216</sup>

*Bulk wheat transport faces competition from transport in containers and bags.* The bulk supply chain competes with exports in containers and bags and the storage and transport of grain for sale in the domestic market.<sup>217</sup> There is also a wider choice of storage service providers in the eastern states as the major bulk handlers storage networks overlap to some extent, and compete with independent storage providers.<sup>218</sup>

*Bulk wheat storage faces competition from on-farm storage.* The east coast typically has more private on-farm storage, more competition in bulk handling facilities and more contestability in the supply chain than the west coast.<sup>219</sup> Major bulk handler storage capacity is approximately 20 mt and on farm storage is 12 mt.<sup>220</sup> The trend

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<sup>215</sup> Productivity Commission (2010) *Wheat Export Marketing Arrangements*, Report no. 51, Canberra, p. 173.

<sup>216</sup> *ibid*, p. 255.

<sup>217</sup> *ibid*, p. 68.

<sup>218</sup> *ibid*, p. 67.

<sup>219</sup> *ibid*, p. 251.

<sup>220</sup> *ibid*, p. 69.

toward on-farm storage began prior to deregulation, but it is likely that a deregulated environment gives increased incentives for growers to use on-farm storage.<sup>221</sup> Since deregulation, uneconomic bulk storage facilities have been closed down due to the increase in site-based costing.<sup>222</sup>

*There may be competition in provision of port services.* Bulk grain export terminals in New South Wales, Victoria and South Australia operated by GrainCorp, Melbourne Port Terminal and Viterra are in relatively close proximity and might compete for some grain throughput.<sup>223</sup>

*The share of wheat transported by road has increased relative to rail transport.* Prior to deregulation, 80-100 per cent of export wheat was transported by rail in the eastern states, excluding road transport from farm to bulk receival sites. Since then it is likely that the share of grain transported by road has risen.<sup>224</sup> This is partly a result of the privatisation of rail and deregulation of the wheat export industry, as:

- the cost efficiency of road compared with rail transport has improved due to investment in road infrastructure and increased capacity of heavy vehicles.
- competition in the wheat export market puts increased pressure on peak periods, resulting in increased use of trucks in conjunction with rail transport.
- more cost reflective freight rates are being set across the different segments of the network. This has meant that in some areas road transport is now more cost effective.<sup>225</sup>

*Investment in transport infrastructure is likely to be required in the future.* The Productivity Commission suggested that a thorough cost-benefit analysis, taking into account the economic and social costs and benefits of road and rail use, is required.<sup>226</sup>

## **6.6 Impact of flooding on the 2010-11 harvest**

In response to flood events in eastern Australia in January 2011, ABARES published a special report outlining the effects of the flood on various commodities. Recent flooding in eastern Australia is estimated to have reduced agricultural production by at least \$500-600 million. At the time of publication it was considered too early to estimate the likely total losses in grain production, however, ABARES noted that if 1 million tonnes of the production not yet received by grain handlers or held on farm was lost, the total cost would be around \$250 million.<sup>227</sup> Heavy rainfall during

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<sup>221</sup> *ibid*, p. 259.

<sup>222</sup> *ibid*, pp. 261-2.

<sup>223</sup> *ibid*, p. 68.

<sup>224</sup> *ibid*, p. 257.

<sup>225</sup> *ibid*, pp. 263-5.

<sup>226</sup> *ibid*, p. 251.

<sup>227</sup> ABARES (2011), *The impact of recent flood events on commodities*, ABARES Special Report, Canberra, January 2011, p. 1.

November and December 2010 has had broader effects on the quality of production and delays to the winter grain harvest.<sup>228</sup>

The effects of the rainfall and associated flooding have been varied throughout the eastern states:

- *Queensland:* The harvest is already complete in central Queensland. In southern Queensland, the harvest was 70-80 per cent complete prior to the floods and is unlikely to progress further, resulting in the abandonment of unharvested winter crops. The rail line between Toowoomba and the Fisherman Islands grain terminal in Brisbane is damaged and could take months to repair, and may cause some disruption to the transport of grain for export.<sup>229</sup>
- *New South Wales:* The harvest in the north was largely finished prior to flooding and has sustained limited impact, and the harvest in the south was progressing at the time of publication. Significant rainfall has affected grain quality.
- *Victoria:* The winter crop harvest is around 80 per cent complete in Victoria and is currently a month behind schedule. Further harvest of weather damaged crops in the flood affected regions, such as the Wimmera, is likely to be limited.<sup>230</sup>

While the rainfall and flooding has caused significant short term damage, there may be some benefit to agriculture production in the medium to long term through increases in soil moisture, improved pasture growth and increased water storages.<sup>231</sup> In the current season, the value of winter crop exports is not expected to be significantly reduced further. Adverse effects on the quality and volume of exports are likely to be offset by higher grain prices on world markets.<sup>232</sup>

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<sup>228</sup> *ibid*, p. 3

<sup>229</sup> *ibid*, p. 10.

<sup>230</sup> *ibid*, p. 11.

<sup>231</sup> *ibid*, p. 3.

<sup>232</sup> *ibid*, p. 10.

## 7 Appendix D: Legislative framework and outlook

### 7.1 Access test

The *Wheat Export Marketing Act 2008* (Cth) (**the WEMA**) came into effect on 1 July 2008. The WEMA Act and associated transitional legislation replaced the Export Wheat Commission with a new statutory body, Wheat Exports Australia (**WEA**), which has the power to develop, administer and enforce an accreditation scheme for bulk wheat exports, including the power to grant, vary, suspend or cancel an accreditation.<sup>233</sup>

Under the WEMA, parties without WEA accreditation are prohibited from exporting wheat in bulk from Australia. Parties seeking accreditation as bulk wheat exporters must be deemed by the WEA to be ‘fit and proper’ having regard to certain criteria. The WEMA further provides that parties seeking bulk wheat export accreditation that also provide ‘port terminal services’ (Port Terminal Operators) must satisfy an additional ‘access test.’

Part of the ‘access test’ is linked to Part IIIA of the *Competition and Consumer Act 2010* (Cth) (**the Act**), (previously the *Trade Practices Act 1974* (Cth)). The relevant part of the access test will be satisfied if either:

- the ACCC has accepted from a person who owns or operates a port terminal facility used to provide a port terminal service an access undertaking under Division 6 of Part IIIA of the Act, and that undertaking relates to the provision to accredited wheat exporters of access to the port terminal service for purposes relating to the export of wheat; or
- there is in force a decision under Part IIIA of the Act that a State or Territory regime is an ‘effective access regime’ and that regime provides for access to the port terminal service for purposes relating to the export of wheat.

Under the ‘access test’ providers of port terminal services must also comply with ‘continuous disclosure rules’ set out in subsection 24(4) of the WEMA. In summary, the continuous disclosure rules require the Port Terminal Operators to publish on their website:

- their policies and procedures for managing demand for port terminal services (which GrainCorp has titled its Port Terminal Services Protocols (**PTSP**))
- a statement, updated daily, setting out, amongst other things, the name of each ship scheduled to load grain using port terminal services, the estimated date on which grain will be loaded into the ship, the date on which the ship was nominated

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<sup>233</sup> The relevant transitional legislation is the *Wheat Export Marketing (Repeal and Consequential Amendments) Act 2008* (Cth).

and the date on which the nomination was accepted (this statement is commonly termed the Shipping Stem).<sup>234</sup>

GrainCorp has submitted its Proposed 2011 Undertaking to the ACCC pursuant to Part IIIA of the Act for the purpose of satisfying the access test.

## **7.2 Productivity Commission inquiry**

The Productivity Commission (PC) completed an inquiry into the wheat export marketing arrangements following the deregulation of the industry. The PC has provided a final report to the government which was released on 1 July 2010. The report made several findings and recommendations, including:

The accreditation scheme has facilitated a smooth transition but the benefits will rapidly diminish in the post-transitional phase. Accreditation and WEA should be abolished on 30 September 2011.

The access test has provided greater certainty for traders and made access easier, more timely, and less costly compared to reliance on Part IIIA of the Act. The access test should remain in place for a further three years until 30 September 2014.

The benefits of the access test will diminish and could become costly in the long term. Therefore, from 1 October 2014 regulated access should rely on Part IIIA of the Act supported by mandatory disclosure and a voluntary code of conduct.

The full report is available on the PC website at

<http://www.pc.gov.au/projects/inquiry/wheatexport/report>.

As at the date of release of this issues paper, the government has not yet responded to the PC's report.

## **7.3 Legal test for accepting an access undertaking under Part IIIA**

Part IIIA of the Act establishes a regime to assist third parties to obtain access to services provided through facilities with natural monopoly characteristics to promote competition in upstream or downstream markets.

Part IIIA provides three main mechanisms by which access can be obtained to infrastructure:

- declaration of a service (under section 44H) and arbitration (under section 44V);
- access undertakings and access codes (under sections 44ZZA and 44ZZAA respectively); and

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<sup>234</sup> See subsection 24(4) of the WEMA for detail about the continuous disclosure rules.

- decision that a State or Territory access regime is effective (under section 44N).

In relation to access undertakings, a provider of a service (or a person who expects to be the provider of a service) may give an undertaking to the ACCC in connection with the provision of access to the service. An undertaking may specify the terms and conditions on which access will be made available to third parties. The ACCC may accept the undertaking if it thinks appropriate to do so after considering the matters set out in subsection 44ZZA(3).

If the ACCC accepts the undertaking, the provider is required to offer a third party access in accordance with the undertaking. An access undertaking is binding on the access provider and is able to be enforced in the Federal Court upon application by the ACCC.

An undertaking may be withdrawn or varied at any time, but only with the ACCC's consent.

In assessing a proposed access undertaking under Part IIIA of the Act, the ACCC must apply the test set out in subsection 44ZZA(3), which provides that the ACCC may accept the undertaking if it thinks it appropriate to do so, having regard to the following matters:

- the objects of Part IIIA of the Act, which are to:
  - promote the economically efficient operation of, use of and investment in the infrastructure by which services are provided, thereby promoting effective competition in upstream and downstream markets; and
  - provide a framework and guiding principles to encourage a consistent approach to access regulation in each industry;
- the 'pricing principles' specified in section 44ZZCA of the Act (see further below);
- the legitimate business interests of the provider of the service;
- the public interest, including the public interest in having competition in markets (whether or not in Australia);
- the interests of persons who might want access to the service;
- whether the undertaking is in accordance with an access code that applies to the service; and
- any other matters that the ACCC thinks are relevant.

In relation to the pricing principles, section 44ZZCA of the Act provides that regulated access prices should:



- be set so as to generate expected revenue for a regulated service that is at least sufficient to meet the efficient costs of providing access to the regulated service or services; and
- include a return on investment commensurate with the regulatory and commercial risks involved; and
- that access price structures should:
  - allow multi-part pricing and price discrimination when it aids efficiency; and
  - not allow a vertically integrated access provider to set terms and conditions that discriminate in favour of its downstream operations, except to the extent that the cost of providing access to other operators is higher; and
- access pricing regimes should provide incentives to reduce costs or otherwise improve productivity.

### **7.3.1 WEMA**

The ACCC considers that the regulatory scheme established by the WEMA, and the rationale for the inclusion of the access test in the statute are, under section 44ZZA(3)(e), matters relevant to the current decision.

In particular, the ACCC acknowledges that the intention of Parliament to promote competition in the export of bulk wheat has various dimensions, including:

- the promotion of competition between marketers for the acquisition of bulk wheat from growers;
- the promotion of competition between exporters for the export of wheat from Australia; and
- the concomitant promotion of competition for associated products and services, such as supply chain services and grower services.

The ACCC further acknowledges Parliament's recognition that the promotion of competition in the form described may potentially be limited by anti-competitive conduct associated with port terminal facilities, and that the inclusion of the access test demonstrates a clear intention to legislate measures to mitigate the possibility of such conduct undermining the broader intent of the legislation.

### **7.3.2 The objects of Part IIIA and the public interest**

The ACCC 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).

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. .

## **7.4 Recent changes to Part IIIA**

The *Trade Practices Amendment (Infrastructure Access) Act 2010* (Cth) took effect on 14 July 2010 and introduced changes to Part IIIA of the Act, including to the procedures set out in Part IIIA for the assessment of access undertakings.

### **7.4.1 Timeframes for ACCC decisions and stopping the clock**

Subsection 44ZZBC(1) of the Act now provides that the ACCC must make a decision on an access undertaking application within the period of 180 days starting at the start of the day the application is received (referred to as ‘the expected period’).

If the ACCC does not publish a decision on an access undertaking under section 44ZZBE of the Act within the expected period, it is taken, immediately after the end of the expected period, to have:

- made a decision to not accept the application; and
- published its decision under section 44ZZBE and its reasons for that decision: see subsection 44ZZBC(6).
- The changes to the Act also introduce provisions for ‘stopping the clock’ that mean certain time periods are not taken into account when determining the expected period (see subsection 44ZZBC(2)). In particular, the ACCC may disregard a period:
  - by written agreement between the ACCC and the access provider, and such agreement must be published: subsections 44ZZBC(4) & (5);
  - if the ACCC gives a notice under subsection 44ZZBCA(1) requesting information in relation to the application;

- if a notice is published under subsection 44ZZBD(1) inviting public submissions in relation to the application;
- a decision is published under subsection 44ZZCB(4) deferring consideration of whether to accept the access undertaking, in whole or in part, while the ACCC arbitrates an access dispute.

#### **7.4.2 Amendment notices**

Subsection 44ZZAAA(1) provides that the ACCC may give an ‘amendment notice’ in relation to an undertaking before deciding whether to accept the undertaking.

An ‘amendment notice’ is a notice in writing to the access provider that specifies:

- the nature of the amendment or amendments (the ‘proposed amendment or amendments’) that the ACCC proposes be made to the undertaking; and
- the ACCC’s reasons for the proposed amendment or amendments; and
- the period (the ‘response period’) within which the person may respond to the notice, which must be at least 14 days after the day the notice was given to the person: see subsection 44ZZAAA(2).

An access provider may give a revised undertaking in response to the notice (within the response period), incorporating amendments suggested in the notice, and provided that undertaking is not returned to the provider by the ACCC, that revised undertaking is taken to be the undertaking the ACCC is assessing under Part IIIA: see subsections 44ZZAAA(5) & (7). In other words, the access provider may ‘swap over’ the revised undertaking for the original undertaking if it agrees to the amendments suggested by the ACCC in the notice.

If the access provider does not respond to the notice within the response period, it is taken to have not agreed to the proposed amendment: subsection 44ZZAAA(8). If the access provider provides a revised undertaking that incorporates one or more amendments that the ACCC considers are not of the nature proposed in the amendment notice, and which do not address the reasons for the proposed amendments given in the amendment notice, the ACCC must not accept the revised undertaking and must return it to the provider within 21 days of receiving it: subsection 44ZZAAA(6).

The ACCC is not required to accept the revised undertaking under section 44ZZA even when it incorporates amendments (see subsection 44ZZAAA(9)) and does not have a duty to propose amendments when considering whether to accept the undertaking (see subsection 44ZZAAA(10)).

#### **7.4.3 Other changes**

##### *Information requests*

Subsection 44ZZBCA(1) provides that the ACCC may give a person a written notice requesting the person give to the ACCC, within a specified period, information of a

kind specified in the notice that the ACCC considers may be relevant to making a decision on an access undertaking application.

As noted above, the period within which the ACCC requests information constitutes a clock-stopper.

*Fixed principles*

Section 44ZZAAB of the Act now provides that an access undertaking given to the ACCC under subsection 44ZZA(1) may include one or more terms that, under the undertaking, are fixed for a specified period (known as ‘fixed principles’). Such principles must extend beyond the term of the undertaking: subsection 44ZZAAB(3).

**Attachment A**

**GrainCorp Operations Limited**

**Port Terminal Services Access Undertaking**

**Amendment Notice**

**20 June 2011**

## **Section 44ZZAAA(1) Amendment Notice**

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

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

The ACCC's proposed amendments to the Proposed 2011 Undertaking, including the reason for each proposed amendment, are set out in this notice. References in this amendment notice to the 'Explanatory Statement' are references to the ACCC Explanatory Statement to the Draft Amendment Notice released on 2 June 2011.

Part 1 of this notice sets out the proposed amendments to the General Terms, Part 2 sets out the proposed amendments to the Standard Port Terminal Services in Schedule 2 and Part 3 sets out the proposed amendments to the Port Terminal Services Protocols in Schedule 3 of the Proposed 2011 Undertaking.

Typographical errors should be corrected, and cross references to amended clauses, should be updated.

GrainCorp has until 5pm on 4 July 2011 ("due date") to respond to this notice. GrainCorp may give the ACCC a revised undertaking incorporating the proposed amendments in response to this notice. If GrainCorp does not respond by the due date, the proposed amendments are taken to not be accepted by GrainCorp.

# 1 General Terms

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

## 1.1 Proposed amendment

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

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

AND

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

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

## Reasons

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

## 1.2 Proposed amendment

Clause 1.1, insert the following —

- The ACCC monitors compliance of undertakings accepted under Part IIIA of the CCA.
- (b) The ACCC may approve the Regulated Access, Pricing and Monitoring Committee or a member of the ACCC to exercise a decision making function under this Undertaking on its behalf and that approval may be subject to any conditions which the ACCC may impose.

## Reasons

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

regarding the non-discrimination and arbitration provisions. As explained in the reasons for proposed amendment 1.8, the provision should be that the ACCC may approve ACCC Commissioners to exercise the power to appoint an arbitrator to avoid confusion for both the access provider and access seekers regarding the use of the term authorise. The approval provisions should be extended to cover all the ACCC's functions and powers under the Proposed 2011 Undertaking. Extending the approval provisions will allow the ACCC to respond and act in a timely manner, thereby facilitating the efficient operation of the undertaking. This will assist GrainCorp in running its operations efficiently for the benefit of the supply chain.

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

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

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

### **1.3 Proposed amendment**

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

1. the negotiation of any new Access Agreement entered into, or to be entered into, by the Port Operator and a User in respect of Port Terminal Services to be provided by the Port Operator at any time during the period 1 October 2011 to 30 September 2014;

### **Reasons**

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

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

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

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



## 1.4 Proposed amendment

Clause 5.5, insert the following subsection (b) —

For the avoidance of doubt, Shipping Stem Maintenance is a Port Terminal Service to which clause 5.5(a) applies.

AND

Clause 5.5, insert the following subsection (c) —

Within five Business Days of executing an Access Agreement with its own Trading Division, GrainCorp must provide to the ACCC a copy of that Access Agreement.

AND

Amend subsection 5.5(d) —

The ACCC may approve a member of the ACCC to exercise any powers under clause 5.5(c) or Schedule 6 of this Undertaking on behalf of the ACCC.

## Reasons

Shipping stem maintenance is a Port Terminal Service to which GrainCorp's undertaking, including its non-discrimination provisions, applies. It is appropriate that there is greater clarity regarding the requirement for GrainCorp to not discriminate in the provision of this service.

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

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

GrainCorp should provide that the ACCC may approve, rather than authorise, a member of the ACCC to make a decision regarding appointment of an arbitrator under clause 7.5. The use of the word approve is preferred to avoid any confusion for either the access provider or the access seeker which may arise with the use of the term authorisation which has specific meaning in the *Competition and Consumer Act 2010* (Cth).

The ACCC notes that if these proposed amendments are adopted in the undertaking, the numbering of the existing clause 5.5 in the Proposed 2011 Undertaking will be renumbered clause 5.5(a)-(e) and references to subsections amended in line with the renumbering.

## 1.5 Proposed amendment

Insert the following clause —

### 5.7 Request for information

- 2 The ACCC may, by written notice, request GrainCorp to provide information or documents that are required by the ACCC for the reasons specified in the written notice to enable it to exercise its powers or functions in relation to this Undertaking.
- 3 GrainCorp will provide any information requested by the ACCC under clause 5.7(a) in the form and within the timeframe (being not less than 14 days) specified in the notice.

## Reasons

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

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

## 1.6 Proposed amendment

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

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

## Reasons

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

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

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

## 1.7 Proposed amendment

Clause 13.1, insert the following definition —

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

## Reasons

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

## 1.8 Proposed amendment

Clause 7.5(b), amend as follows —

If within five Business Days of receiving notice in accordance with clause 7.5(a), the ACCC advises GrainCorp and any other party to the Dispute in writing that it wishes to be the arbitrator in respect of the Dispute, then the ACCC will be appointed to arbitrate the dispute and the arbitration will be conducted in accordance with clause 7.6. The ACCC may approve a member of the ACCC to make a decision under this clause 7.5(b).

AND

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

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

## Reasons

GrainCorp should provide the ACCC with details of the arbitrator appointed by the parties. Clause 7.7 of the Proposed 2011 Undertaking sets out the arbitration process where the ACCC is not the arbitrator. The process allows for ACCC involvement and actually requires the arbitrator to keep the ACCC informed about the progress of the

arbitrator. Considering the ACCC's involvement in the arbitration process even when not acting as arbitrator, it is a clear step to provide the ACCC with the name of the arbitrator once appointed.

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

GrainCorp should provide that the ACCC may approve, rather than authorise, a member of the ACCC to make a decision regarding appointment of an arbitrator under clause 7.5. The use of the word approve is preferred to avoid any confusion for either the access provider or the access seeker which may arise with the use of the term authorisation which has specific meaning in the *Competition and Consumer Act 2010* (Cth).

## **Port Terminal Services Protocols variation process**

The following discussion relates to proposed amendments 1.9-1.14.

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

### **1.9 Proposed amendment**

Clause 9.2, insert the following —

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

### **Reasons**

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

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

### **1.10 Proposed amendment**

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

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

## Reasons

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

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

### 1.11 Proposed amendment

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

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

AND

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

GrainCorp is not required under clause 9.3(a)(iii)(D) to publish on its website any written submissions which are offensive, abusive or inappropriate for publication. GrainCorp will however provide any such submission to the ACCC within 5 Business Days of receiving the submission.

## Reasons

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

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

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

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

## 1.12 Proposed amendment

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

(E) at any time during the consultation process under this clause 9.3(a)(iii) GrainCorp may prepare and circulate a further variation to the proposed changes to take into account feedback from interested parties or from the ACCC. To avoid doubt, this clause 9.3(a)(iii)(E) does not require GrainCorp to recommence the consultation process under clause 9.3(a)(iii).

### Reasons

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

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

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

## 1.13 Proposed amendment

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

- any variation must be published at least 20 Business Days prior to the date on which it is to become effective in the same locations as GrainCorp publishes its Port Terminal Services Protocols.

### Reasons

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

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

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

## 1.14 Proposed amendment

Insert new clause 9.4, Objection notice —

i. If GrainCorp seeks to vary the Port Terminal Services Protocols in accordance with clause 9.3, the ACCC may object to the proposed variation (or part thereof). If the ACCC objects to a proposed variation (or part thereof), it must issue a notice to GrainCorp stating that it objects to the proposed variation and providing reasons for its objection. The ACCC will publish any notice issued under this clause 9.4(a) on the ACCC website.

ii. Any notice issued under clause 9.4(a) must be issued at least 10 Business Days prior to the date on which the variation is proposed to become effective.


iii. At least 5 Business Days before issuing a notice under clause 9.4(a), the ACCC must provide GrainCorp with a draft notice stating that it objects to the proposed variation and providing reasons for its objection.


iv. In issuing a draft notice under clause 9.4(c) or a final notice under clause 9.4(a), the ACCC must have regard to whether the proposed variation:

- is material; and
- amounts to a breach of the anti-discrimination provision in clause 5.5 and/or the no hindering access provision in clause 9.5.

v. The ACCC may withdraw a draft notice issued under clause 9.4(c) or a notice issued under clause 9.4(a) if in all the circumstances it becomes aware that the reasons specified in the draft notice issued under clause 9.4(c) or the notice issued under clause 9.4(a) no longer exist.

vi. If the ACCC issues a notice under clause 9.4(a), GrainCorp will, within 3 Business Days:

 withdraw the proposed variation and commence a new variation process and place a notice to that effect in a prominent place on the GrainCorp website and notifying the ACCC in writing; or

 withdraw the proposed variation and confirm the status of the existing Port Terminal Services Protocols by publishing a notice in a prominent place on the GrainCorp website and notifying the ACCC in writing.

## Reasons

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

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

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

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

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

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

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

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



## 1.15 Proposed amendment

Clause 10.1, replace subsection 10.1 (a) with—

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

AND

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

AND

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

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

## Reasons

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

## 1.16 Proposed amendment

Clause 13.1, insert the following definitions —

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

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

### Reasons

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

## 1.17 Proposed amendment

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

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

### Reasons

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

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

## 1.18 Proposed amendment

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

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

### Reasons

It is appropriate to include a requirement on GrainCorp to notify the ACCC when it publishes a performance report on its website. Such a requirement will allow the ACCC to more easily monitor GrainCorp's compliance with reporting requirements under the Proposed 2011 Undertaking. A notice requirement is a simple measure to increase transparency and not onerous on GrainCorp.

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

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

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

### **2.1 Proposed amendment**

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

Site Assembly Plan co-ordination;

AND

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

Site Assembly Plan co-ordination;

### **Reasons**

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

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

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

#### 3.1 Proposed amendment

Schedule 3, clause 1, insert the following –

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

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

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

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

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

AND

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

#### Reasons

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

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

## 3.2 Proposed amendment

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

### 11 Conditional Refund on Surrender of Bookings at Peak Periods

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

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

11.1.1 The total tonnage of Surrendered BEC will be placed back on the Shipping Stem the next business day following receipt by GrainCorp of notice in accordance with Clause 11.1. Customers will be notified that BEC has been returned to the Shipping Stem and is available for booking via the daily ‘Available Elevation Capacity’ email.

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

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

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

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

11.2.2 If no later than 28 days prior to the first day of the CEP in which the Surrendered BEC was to be executed and a new booking is made by a customer (other than the customer that Surrendered BEC under Clause 11.1);

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

would replace as the Surrendered BEC,

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

11.2.3 For the avoidance of doubt;

- (a) A new booking is defined as the lodgement of a new CNA under Clause 3; and
- (b) BEC transferred from another elevator, or from another Elevation Period at the same elevator, is not considered a 'new' booking for the purposes of this Clause 11

## Reasons

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

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

### 3.3 Proposed amendment

Schedule 3, clause 2, insert the following –

#### **2 Shipping Stem**

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

##### **2.1 Opening of the Shipping Stem**

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

##### **2.2 Provision of Announcement of Stem Opening**

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

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

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

### **Reasons**

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

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



### 3.4 Proposed amendment

Schedule 3, clause 5, insert the following –

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

AND

Clause 6, insert the following –

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

AND

Clause 7, amend subclause 7.5 as follows –

7.5 Whether GrainCorp has available sufficient intake, grain segregation, storage and Elevation Capacity at the Port Terminal that will allow accumulation of the cargo at the Port Terminal, taking into account, other Booked Elevation Capacity previously accepted by GrainCorp that appears as ‘accepted’ on the GrainCorp Shipping Stem.

To promote efficient use of its port terminal services, GrainCorp should ensure that customers have clarity and certainty regarding the systems used to allocate and manage capacity bookings on its shipping stem.

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