



Australian
Competition &
Consumer
Commission

ABB Grain Ltd, Co-operative Bulk Handling Limited & GrainCorp Operations Limited

Port Terminal Services Access Undertakings

Issues Paper

29 April 2009



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List of abbreviations and terms

ABB	ABB Grain Limited
ACCC	Australian Competition and Consumer Commission
Act	<i>Trade Practices Act 1974 (Cth)</i>
CBH	Co-operative Bulk Handling Limited
GrainCorp	GrainCorp Operations Limited
NCC	National Competition Council
Port Operators	ABB, CBH and GrainCorp
Port Protocols (also known as Shipping Protocols, Port Loading Protocols and Port Terminal Services Protocols)	Policies and procedures (commonly published on the internet sites of Port Operators) for managing demand for port terminal services
Shipping Stem	A statement (commonly published on the internet sites of Port Operators) setting out, amongst other things, the name of each ship scheduled to load grain using port terminal services, the estimated date on which grain will be loaded into the ship, the date on which the ship was nominated and the date on which the nomination was accepted
Undertaking	The Undertakings provided by ABB, CBH and GrainCorp
WEA	Wheat Exports Australia
WEM Act	<i>Wheat Export Marketing Act 2008 (Cth)</i>

1. Introduction

Under Part IIIA of the *Trade Practices Act 1974 (Cth)* (**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 access undertakings from Co-operative Bulk Handling Limited (**CBH**) on 14 April 2009, from GrainCorp Operations Limited (**GrainCorp**) on 15 April 2009 and from ABB Grain Ltd (**ABB**) on 16 April 2009 (together, **the Undertakings**) for consideration under Part IIIA of the Act. The Undertakings relate to the provision of access to services for the export of bulk wheat at the grain terminals operated by CBH, GrainCorp and ABB (together, **the Port Operators**), as relevant.

The Undertakings have been submitted by the Port Operators in accordance with legislative requirements under the *Wheat Export Marketing Act 2008 (Cth)* (**the WEM Act**). Further detail about the relevant provisions of the WEM Act are set out in section 3 of this paper.

The Undertakings and other relevant materials, including supporting submissions from the Port Operators, are available on the ACCC's website at www.accc.gov.au by following the links to 'For regulated industries' and 'Wheat Export.'

Issues Paper – an invitation to make submissions

Section 44ZZBD of the Act provides that the ACCC may invite public submissions on an access undertaking application if it considers that it is appropriate and practicable to do so. The ACCC is therefore inviting submissions from interested parties on the Undertakings proffered by the Port Operators, and will have regard to any submissions provided within the relevant consultation period.

This Issues Paper provides information about the Port Operators' Undertakings in order to assist interested parties to prepare submissions as well as to identify matters that may be relevant to the ACCC's assessment. The ACCC has published a single Issues Paper in relation to all three Undertakings, but will be considering each Undertaking separately. **If you are making a submission, please therefore clearly specify the particular Undertaking to which your submission applies, or whether it applies to any combination of the three.**

The Issues Paper provides a summary of the main provisions of the Undertakings and is not intended as a detailed description of all the terms and conditions. Interested parties should therefore also refer to the relevant Undertaking itself for the detailed terms and conditions.

The matters discussed in this Issues Paper are for guidance only. If you wish to make a submission you need not limit your comments only to those matters - you are welcome to discuss any other matter relevant to the Undertakings. To assist the ACCC in its assessment of an Undertaking, submissions should, as far as practicable, refer to the legislative criteria set out below (see section 4 of this Issues Paper).

The ACCC also encourages you to provide as much information and evidence as possible in support of your views.

The ACCC invites written submissions from interested parties on each of the three Undertakings. Submissions should be forwarded by 5:00pm on **29 May 2009** to:

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

Email: transport@acc.gov.au

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

Important note: Please clearly specify the particular Undertaking to which your submission applies. The ACCC is consulting on three separate Undertakings, provided by each of CBH, GrainCorp and ABB, and recognises that not all interested parties will wish to comment on all three Undertakings. It is therefore important that you specify whether your submission applies to only the CBH, the GrainCorp or the ABB Undertaking, or whether it applies to any combination of the three.

Please also provide in your submission relevant background information to your organisation.

Further information

The Undertakings, this Issues Paper and other relevant materials are available on the ACCC's web site at www.accc.gov.au. The ACCC can provide hard copies of these documents on request.

Meetings

The ACCC has also set a schedule of dates in May 2009 during which ACCC staff will be available in each relevant capital city for the purpose of meeting with interested parties regarding the Undertakings. It is not intended that these meetings be a substitute for provision of written submissions to the ACCC – but rather an opportunity to discuss relevant issues with ACCC staff. Accordingly, parties attending these meetings are encouraged to also provide submissions to the ACCC in written form. The proposed schedule for the meetings is:

- 11 & 12 May 2009: Sydney
- 18 & 19 May 2009: Adelaide
- 21 & 22 May 2009: Brisbane

- 25 & 26 May 2009: Perth
- 28 & 29 May 2009: Melbourne

If you wish to meet with staff from the ACCC on one of these dates, please contact Ms Sarah Sheppard (see contact details below).

Confidentiality and information sharing

All submissions will be posted on the ACCC's website and made available to any person or organisation on request unless the submission or parts thereof are claimed as confidential and the ACCC accepts such claim of confidentiality. If your submission contains information you believe to be confidential, the sections of the submission that you consider confidential should be clearly identified and you should provide reasons supporting your claim of confidentiality.

The ACCC will consider each claim of confidentiality on a case by case basis. If the ACCC refuses a request for confidentiality, the submitting party will be given the opportunity to withdraw the information. The ACCC will then assess the Undertakings in the absence of that information.

CBH, GrainCorp and ABB may be asked to comment on submissions where this would assist the ACCC's assessment of the Undertakings.

For further information about the collection, use and disclosure of information provided to the ACCC, please refer to the ACCC publication "*Australian Competition and Consumer Commission / Australian Energy Regulator Information Policy – the collection, use and disclosure of information*", available on the ACCC website.

Further queries

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

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

2. Structure of the Issues Paper

Section 3 of the Issues Paper provides an overview of relevant provisions of the WEM Act, while section 4 provides background to Part IIIA, and in particular to access undertakings. Section 5 outlines the process the ACCC will use in assessing the Undertakings.

Section 6 describes the key features of the ABB, CBH and GrainCorp Undertakings and includes questions that may assist interested parties in making submissions to the ACCC.

3. *The Wheat Export Marketing Act 2008*

The *Wheat Export Marketing Act 2008 (Cth)* (**the WEM Act**) came into effect on 1 July 2008. The WEM Act replaced the Wheat Export Commission with a new statutory body, Wheat Exports Australia (the **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.

Under the WEM Act, 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 WEM Act further provides that parties seeking bulk wheat export accreditation that also provide ‘port terminal services’ must satisfy an additional ‘access test.’

The ‘access test’ is outlined in section 24 of the WEM Act, and, in summary, provides that:

- *for the period between 1 July 2008 and 30 September 2009*: accredited exporters who operate bulk wheat terminals at ports are required to publish a statement on their website outlining the terms and conditions on which they will allow other accredited exporters access to their port terminal facilities (unless, at the relevant time, there is in force a decision under Part IIIA of the Act that a State or Territory regime is an ‘effective access regime’ and that regime provides for access to the port terminal service for purposes relating to the export of wheat); and
- *for the period on or after 1 October 2009*: accredited exporters that control port facilities will be required to have a formal access undertaking pursuant to Part IIIA of the Act accepted by the ACCC, or that there be 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 WEM Act. In summary, the continuous disclosure rules require the Port Operators to publish on their website:

- their policies and procedures for managing demand for port terminal services (commonly termed Port Loading Protocols or Shipping Protocols); and
- a statement, updated daily, setting out, amongst other things, the name of each ship scheduled to load grain using port terminal services, the estimated date on which grain will be loaded into the ship, the date on which the ship was nominated and the date on which the nomination was accepted (this statement is commonly termed the Shipping Stem).¹

The Port Operators have submitted their Undertakings to the ACCC pursuant to Part IIIA of the Act for the purpose of satisfying the access test for the period on or after 1 October 2009.

¹ See subsection 24(4) of the WEM Act for detail about the continuous disclosure rules.

Part IIIA of the Act requires the ACCC to use its best endeavours to complete its assessment of an undertaking within six months.

However, given the need of the Port Operators to satisfy the WEM Act, the ACCC's indicative timeline for assessment of the Undertakings (set out in section 4 of this paper) aims for the ACCC to release a final decision on the Undertakings by 1 October 2009.

It is important to note that the ability of the ACCC to meet this timeframe is dependent on parties providing complete information in a timely manner in response to any requests for information the ACCC may make.

4. Part IIIA of the Trade Practices Act and access undertakings

Overview of Part IIIA

Part IIIA was inserted into the Act in 1995 by the *Competition Policy Reform Act 1995 (Cth)*. It 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 focuses on third party access to services that have the following features:

- natural monopoly (where due to economies of scale or scope, a single facility can satisfy all the demand for its services in a market at lower cost than two or more facilities);
- strategic position in an industry (so that access to the facility's service is a prerequisite for businesses to be able to compete effectively in markets upstream or downstream of the facility (often referred to as a 'bottleneck' facility); and
- national significance (given its size and/or importance to the national economy or interstate or international trade).

Part IIIA provides three main mechanisms by which access can be obtained to infrastructure:

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

Declaration

Any person may apply to the National Competition Council (NCC) for a recommendation that a service provided by means of a facility be declared. After considering the NCC's recommendation, the relevant Minister can declare the service provided that certain criteria are satisfied (including that: access would promote a material increase in competition in another market; it would be uneconomical to develop another facility to provide the service; and the facility is of national significance).

Declaration does not prevent the provider of the declared service and a party who requests access to that service from negotiating the terms and conditions of access to the service. However, if the parties are unable to agree, the ACCC may, upon

notification of a dispute by either party, conduct an arbitration and make a determination that binds the parties.

Access undertakings and codes

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 section 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.

A service that is the subject of an access undertaking in operation cannot be subsequently declared. This provides greater regulatory certainty for the access provider and investors.

However, where a service has been declared, a service provider may still give an undertaking. Any future arbitration determination in respect of that service may only cover matters that are not dealt with in the undertaking (section 44ZZCB).

An undertaking may be withdrawn or varied at any time, but only with the ACCC's consent.

In addition to access undertakings, an industry body is able to give a code to the ACCC setting out rules for access to a service. The ACCC may accept the code considering the matters set out in subsection 44ZZAA(3) of the Act. If the ACCC accepts the code, this facilitates the process for assessing an undertaking submitted in accordance with the code.

This mechanism reflects the fact that, in some cases, industry codes are more appropriate than individual undertakings. The function of a code is to streamline the approval process for undertakings where it is advantageous for a number of access providers to provide access in a substantially similar way.

Effective State or Territory access regime

A State or Territory Minister may apply to the NCC for a recommendation to the Commonwealth Minister that a State or Territory regime is an effective access regime. If the Commonwealth Minister decides that the regime is an effective access regime (also described as 'certification'), a service that is the subject of the regime cannot be declared (subject to certain conditions) and the ACCC cannot accept an access undertaking or code in respect of that service.

Assessment of access undertakings

The ACCC may accept an undertaking if it thinks it appropriate to do so having regard to the following matters (set out in section 44ZZA of the Act):

- the objects of Part IIIA (see box 1, below);
- the pricing principles specified in section 44ZZCA (see box 1, below);
- the legitimate business interests of the service provider;
- the public interest, including the public interest in having competition in markets (whether or not in Australia);
- the interests of the 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.

To assist the ACCC in its assessment of an undertaking, submissions from interested parties should, as far as practicable, refer to the legislative criteria.

Box 1 Objects and Pricing Principles

Section 44AA - Objects of Part IIIA

The objects of this Part 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.

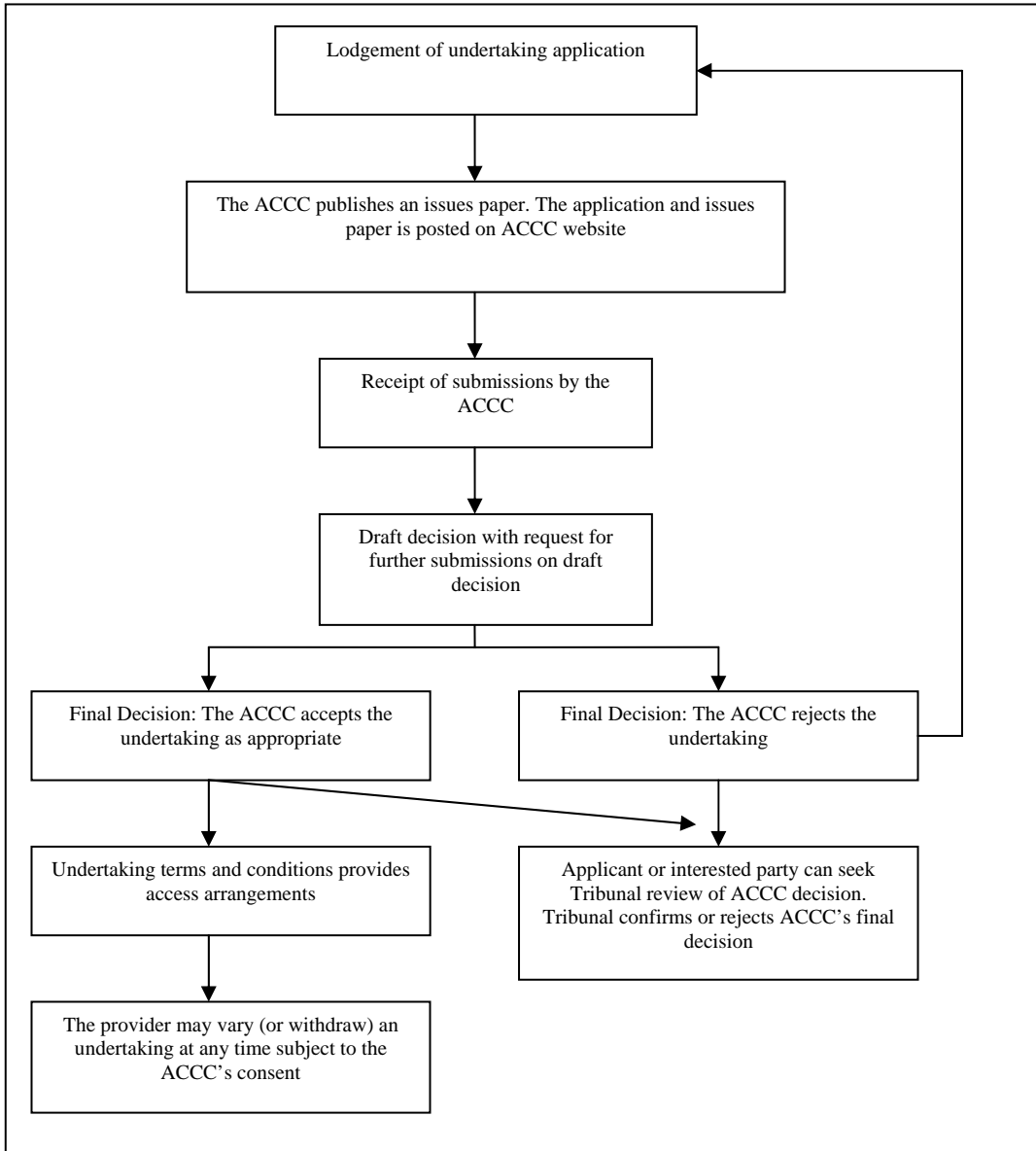
Section 44ZZCA - Pricing principles for access disputes and access undertakings or codes

The pricing principles relating to the price of access to a service are:

- (a) that regulated access prices should:
 - (i) be set so as to generate expected revenue for a regulated service or services that is at least sufficient to meet the efficient costs of providing access to the regulated service or services; and
 - (ii) include a return on investment commensurate with the regulatory and commercial risks involved; and
- (b) that the access price structures should:
 - (i) allow multi-part pricing and price discrimination when it aids efficiency; and
 - (ii) not allow a vertically integrated access provider to set terms and conditions that discriminate in favour of its downstream operations, except to the extent that the cost of providing access to other operators is higher; and
- (c) that access pricing regimes should provide incentives to reduce costs or otherwise improve productivity.

5. Assessment process for the Undertakings

The following figure summarises the procedures for the ACCC's assessment of the Undertakings submitted by the Port Operators. The process, which is indicative only, is designed to be transparent and public, relying on input from interested parties as well as the access provider making the application.



ACCC indicative timeline

Under section 44ZZBC of the Act, the ACCC is required to use its best endeavours to make a final decision on an undertaking within six months of receiving an undertaking application. The ability of the ACCC to meet this timeframe is dependent on parties

providing complete information in a timely manner in response to any requests for information the ACCC may make.

Following the receipt and consideration of submissions to this Issues Paper, the ACCC may release a draft decision that provides the ACCC's preliminary assessment of the Undertakings. The ACCC may then seek submissions on the conclusions reached in the draft decision before making its final decision on the Undertakings.

The ACCC may extend its assessment period beyond the six month timeframe if it requires further time to make its decision. The ACCC will provide written public notice of any extension to the decision-making timeframe.

The ACCC received the CBH Undertaking on 14 April 2009, the GrainCorp Undertaking on 15 April 2009 and the ABB Undertaking on 16 April 2009.

For the purposes of the assessment of the Undertakings, the ACCC has developed the following indicative timeline:

- publication of the Issues Paper on Wednesday, 29 April 2009;
- receipt of submissions by Friday, 29 May 2009;
- ACCC draft decisions by end of July 2009; and
- ACCC final decisions by end of September 2009.

6. Issues

6.1 Introduction

ABB, CBH and GrainCorp have each submitted separate Undertakings and supporting submissions to the ACCC, and while each Undertaking has features particular to each Port Operator, there are also a number of common elements. This section of the Issues Paper describes the key features of the three Undertakings, acknowledging common elements and elements particular to each Port Operator, and is set out to correspond with the relevant sections of the Undertakings.

The section also sets out questions that may assist interested parties in making submissions, and seeks to highlight for comment issues that may be of interest to the ACCC. To assist the ACCC in its assessment of an undertaking, submissions from interested parties should, as far as practicable, refer to the legislative criteria (outlined above in section 4). The questions are not, however, intended to limit discussion of the Undertakings – parties are welcome to comment on any aspect of the Undertakings they believe relevant to the ACCC’s assessment.

References to the ‘Port Operator’ in this section of the Issues Paper should be read as references to ABB, CBH or GrainCorp, as applicable. Many of the terms used in this section are defined in the Undertakings, and you are therefore encouraged to check particular definitions as used in the relevant Undertaking. Further, in answering the questions please provide reasons to support your comments.

The following questions are general matters on which the ACCC would appreciate the views of industry participants. Subsequent questions relate to particular clauses of the Undertakings.

Issues for Comment

- *To what extent are bulk wheat exporters able to switch between different ports at different locations around Australia, including between different States?*
- *Are there any limitations that prevent bulk wheat exporters from switching between ports (such as different grain types, infrastructure constraints, freight differentials?)*
- *What is the likelihood of a new entrant establishing a new port terminal to compete with the Port Operators? What would be the likely timing and cost of such a new terminal? What factors would limit the establishment of a new terminal?*
- *What factors, if any, constrain Port Operators from discriminating in favour of their own wheat export marketing businesses? Consider the various arguments raised by Port Operators in their supporting submissions as to these constraints.*
- *Are provisions relating to capacity expansion and performance indicators (such as quality of service and timeliness) necessary or appropriate for inclusion in the Undertakings?*

6.2 ‘Background’

The Undertakings each contain a ‘Background’ section, acknowledging the requirements in the WEM Act that a person seeking bulk wheat accreditation who also provides port terminal services must satisfy the ‘access test’ under the WEM Act. The section notes that CBH, GrainCorp and ABB operate ‘Port Terminal Facilities’ and also seek bulk wheat export accreditation,² and have therefore submitted the Undertaking to the ACCC to satisfy the relevant limb of the access test.

6.3. ‘Interpretation’

The ‘Interpretation’ section defines particular terms used in the Undertaking and sets out principles to be used in the interpretation of the Undertaking. In the CBH Undertaking the Interpretation section is in clause 1; in the GrainCorp and ABB Undertakings the Interpretation section is clause 11.

Key terms defined in the Interpretation section of all three Undertakings include: ‘Bulk Wheat’, ‘Business Day’, ‘Confidential Information’, ‘Dispute’, ‘Port’/‘Port Terminals’ and ‘Related Body Corporate.’ Other terms are defined in other clauses of the Undertakings.

Issues for Comment

- *Consider how the definition of terms in the ‘Interpretation’ section interact with*

² As either the ‘Port Operator’, or through a ‘Related Body Corporate.’

other clauses of the Undertaking

- *Is the scope of the terms defined in the Interpretation section appropriate, or are the definitions too narrow or too wide?*
- *Are the terms defined with sufficient clarity and certainty?*

6.4 ‘Objectives’

Clause 2 of the CBH Undertaking and clause 1.2 of the GrainCorp Undertaking and ABB Undertaking state that the Undertakings have several objectives, including, amongst others:

- providing a framework to manage negotiations with applicants for access to services provided by certain facilities at the port terminals in relation to export of bulk wheat;
- establishing a workable, open, non-discriminatory and efficient process for lodging and processing access applications;
- operating consistently with the principles and objectives in Part IIIA of the TPA and the Competition Principles Agreement; and
- reaching an appropriate balance between: (i) the legitimate business interests of the Port Operator (which is said to include, amongst other things, the Port Operator’s ability to meet its own or its trading division’s reasonably anticipated requirements for port terminal services); (ii) the interest of the public; and (iii) the interests of applicants wanting access to the port terminal services, including providing access to the port terminal services.

The Port Operators are required to have regard to these objectives when performing obligations under other clauses of the Undertakings, such as in relation to the provision of non-discriminatory access (see clause 5.4 of the ABB Undertaking and the GrainCorp Undertaking and clause 6.4 of the CBH Undertaking), and when seeking to vary port rules/protocols (see clause 8.2 of the ABB and GrainCorp Undertaking and clause 9.1 of the CBH Undertaking).

Issues for Comment

- *Are the objectives of the Undertaking appropriate and sufficiently certain and unambiguous?*
- *Do the objectives accord with the terms of the Undertaking set out in subsequent clauses?*
- *Is the reference to giving consideration to the ‘reasonably anticipated requirements’ of Port Operators appropriate?*
- *In commenting on this section, consider the interaction of the objectives with other*

clauses of the Undertaking.

6.5 ‘Structure’

‘Structure’ is described in clause 3 of the CBH Undertaking and clause 2 of the GrainCorp Undertaking and the ABB Undertaking. The CBH and ABB Undertakings note that they provide ‘General Terms’ that apply to each ‘Port Terminal Service,’ and specific ‘Port Schedules’ that include any specific terms and conditions relevant to a particular ‘Port Facility.’ All three Undertakings state that the terms of a (Port) Schedule will prevail over the General Terms to the extent of any inconsistency, and that CBH, GrainCorp and ABB, as applicable, must use reasonable endeavours to procure any relevant ‘Related Body Corporate’ to perform obligations pursuant to the Undertaking where appropriate.

Issues for Comment

- *Is it appropriate that the terms of a schedule prevail over the General Terms of the Undertaking to the extent that there is any inconsistency between them?*
- *Does the Undertaking provide sufficient clarity and certainty around what are General Terms and what is a (Port) Schedule?*
- *Does the Undertaking sufficiently provide for any different physical or operating characteristics at each of the respective Ports/Port Terminals?*

6.6 ‘Term and variation’³

The Undertakings are proposed to commence on 1 October 2009. The CBH Undertaking is proposed to expire on the earlier of 30 September 2012, or when the ACCC consents to its withdrawal, while the GrainCorp Undertaking and the ABB Undertaking are proposed to expire on the earlier of 30 September 2011, or when the ACCC consents to their withdrawal.

The Undertakings each set out circumstances in which CBH, GrainCorp or ABB, as applicable, may seek the approval of the ACCC for the withdrawal of or variation to the Undertaking (see clauses 4.3 – 4.5 of the CBH Undertaking and clauses 3.3 – 3.5 of the ABB Undertaking and the GrainCorp Undertaking). These circumstances include where:

- (a) there are changes to the requirements under the WEM Act;

³ See clause 4 of the CBH Undertaking and clause 3 of the GrainCorp Undertaking and the ABB Undertaking.

- (b) changes to the ownership of a particular port; or
- (c) changes to circumstances such that the Undertaking is no longer commercially viable for CBH, GrainCorp or ABB, or becomes inconsistent with the objectives referred to in section 6.4 above.

The Undertakings each refer to circumstances in which the Port Operator may seek the ACCC's approval to extend the operation of their Undertaking and, if appropriate, submit a new Undertaking to the ACCC. Each Undertaking also states that they apply only to the negotiation of new 'Access Agreements,'⁴ and that nothing in the Undertaking can require the variation of an existing 'Access Agreement.'

Issues for Comment

- *Is the proposed term of the Undertaking appropriate?*
- *Does having different expiry dates for the CBH Undertaking and the GrainCorp and ABB Undertakings raise any issues?*
- *Please comment on the circumstances in which the Port Operators may seek the ACCC's approval to withdraw or vary the Undertaking. Are they appropriate, in light of the provisions in section 44ZZA(7) of the Act?*
- *Is it appropriate that the Undertaking applies only to new Access Agreements?*⁵

6.7 'Scope' – services covered by the Undertakings

'Scope' – the services to which the Undertaking does and does not apply – is set out in clause 5 of the CBH Undertaking and clause 4 of the GrainCorp and ABB Undertakings. These clauses define the key terms 'Port Terminal Services' and 'Port Terminal Facility.'

Essentially, the Undertakings apply only to access to 'Port Terminal Services'. This is defined to mean the services described in the relevant Port Schedule in relation to bulk wheat provided by means of a Port Terminal Facility, and includes the use of a Port Terminal Facility.

The definition of 'Port Terminal Facility' reflects the definition of that term in the WEM Act, and the specific facilities at each terminal are described in the relevant schedule.

CBH

Port Schedules 3 to 6 of the CBH Undertaking describe the services to which parties may seek access at each of the Geraldton, Kwinana, Albany and Esperance terminals.

⁴ As well as the negotiation of access additional to access already the subject of an 'Access Agreement.'

⁵ As well as the negotiation of access additional to access already the subject of an 'Access Agreement.'

GrainCorp

Schedule 2 of the GrainCorp Undertaking specifies the Standard Port Terminal Services to which parties may seek access at each of the Carrington, Fisherman Island, Geelong, Gladstone, Mackay, Port Kembla and Portland terminals.

Schedule 2 proposes additional conditions for services involving the delivery of wheat to a GrainCorp terminal from an up-country site that is not a GrainCorp site. These conditions depend on whether the relevant up-country site is approved or unapproved by GrainCorp.

ABB

Port Schedules A to F of the ABB Undertaking describe the Port Terminal Services to which parties may seek access at each of the Port Adelaide, Outer Harbor, Port Giles, Wallaroo, Port Lincoln and Thevenard terminals.

Issues for comment

- *Is the scope of the Undertaking appropriate? That is, does the Undertaking sufficiently provide for access to all appropriate port terminal-related services necessary to export wheat in bulk?*
- *Is the scope of the Undertaking and, in particular, the concept of port terminal services, defined with sufficient certainty and clarity?*
- *How are issues of bundling of port terminal services with freight and up-country storage and handling relevant, if at all?*
- *Are access seekers likely to use the services specified in the Undertaking?*
- *Are there any additional services that should be covered by the Undertaking?*

6.8 ‘Price and non-price terms’

The ‘Price and non-price terms’ clause is clause 6 in the CBH Undertaking and clause 5 in the ABB and GrainCorp Undertakings.

6.8.1 Obligation to publish price and non-price terms

The Undertakings stipulate that Port Operators must publish Reference Prices and Standard Terms on their website by no later than 30 September of each year, (or within 15 days of the commencement of the Undertaking if not already published). The Port Operator must give the ACCC copies of Reference Prices and Standard Terms promptly following publication.

Unless varied, the Reference Prices and Standard Terms must apply for a period of at least 12 months. If an Applicant seeks access to non-standard Port Terminal Services, the Port Operator and the Applicant may negotiate different prices and non-price terms.

Under the CBH Undertaking, the Standard Terms must include an obligation for CBH to comply with the Port Terminal Rules when providing the Port Terminal Services. The CBH Undertaking additionally requires that the Reference Prices and Standard Terms must be consistent with the non-discriminatory access clause 6.4 and the objectives under clause 2.

Issues for comment

- *Is the obligation to publish price and non-price terms appropriate?*
- *To what extent does the publication requirement provide sufficient certainty and transparency for access seekers?*
- *Are the proposed timeframes for publishing Reference Prices and Standard Terms appropriate, having regard to periods of contract negotiation, the commencement date of Access Agreements and balancing the interests of the Port Operator and the access seeker?*

6.8.2 Access to Port Terminal Services

The Undertakings provide that unless otherwise specified in a Port Schedule, access to a Standard Port Terminal Service (and the Port Operator's obligation to enter into an Access Agreement for them) will only be offered for a term expiring no later than 30 September of the year following the year in which the Standard Terms were first published.

Issues for comment

- *Is a maximum 12 month access agreement appropriate for access seekers, having regard to commercial considerations and the length of the term of the access Undertaking? Should the access agreement term be longer or shorter?*

6.8.3 Standard Terms

The Undertakings provide that parties may agree to include terms applying to other services provided by the Port Operator in an agreement, but that the Undertaking only applies to the terms relating to the provision of Port Terminal Services.

The GrainCorp Undertaking provides that the Standard Terms must include the Port Terminal Services Protocols. The ABB Undertaking provides that the Standard Terms must include the Port Loading Protocols. The CBH Undertaking does not include a similar provision.

Issues for comment

- *Is it appropriate for the parties to be able to include terms applying to access to services other than Port Terminal Services in an Access Agreement governed by the access Undertaking (i.e., to bundle other services together with Port Terminal Services)?*
- *To what extent is it possible to clearly separate the upstream activities of Port Operators (i.e., freight and up-country storage and handling) from the Port Terminal Services?*
- *In relation to CBH's Undertaking, is it appropriate that the standard terms include the 'port protocols'?*
- *Is it appropriate for the Undertaking to include, on an indicative basis, the standard terms that will be published once the Undertaking comes into effect?*

6.8.4 Non-discriminatory access

The Undertakings provide that the Port Operator must offer the Port Terminal Service on the Standard Terms and at the Reference Prices applicable from time to time, in accordance with the 'Negotiating for Access' clause of the Undertaking.

The Port Operator must not provide access to Port Terminal Service Applicants or Users on terms and conditions which are different from the Reference Prices or Standard Terms in the case of Port Terminal Services, or in all cases, the price and non-price terms offered to another Applicant or User, except where the different terms are:

- (a) consistent with the objectives of the Undertaking;
- (b) commercially justifiable taking into account the matters listed under the 'Price and non-price terms' clause of the Undertakings; and
- (c) offered on an arms length commercial basis.

The 'price and non-price terms' clause of the Undertakings lists a range of factors the Port Operator may take into account when providing access to different Applicants or Users. These factors include the legitimate business interests of the Port Operator, the economically efficient operation of the Port Terminal, and geographic and seasonal variations. The ABB Undertaking lists 'existing industry practices' as an additional factor.

Additionally, ABB and GrainCorp undertake (in clause 5.4(b) of both Undertakings) to:

"...not discriminate against an Applicant in breach of this Undertaking where the terms and conditions are different to those offered to another User of the Trading Division for providing like Port Terminal Services and the differentiation is for the purpose of substantially damaging a competitor or

conferring upon the Port Operator or its Trading Division any unfair competitive advantage over a competitor in the marketing of Bulk Wheat.”

Issues for comment

- *Are the clauses related to non-discriminatory access appropriate? Are the clauses sufficient to effectively prevent discrimination in relation to the provision of Port Terminal Services?*
- *Are the clauses relating to non-discriminatory access sufficiently clear and certain?*
- *Are the obligations relating to publication of Reference Prices and Standard Terms consistent with the non-discriminatory access provisions and the objectives of the Undertaking?*
- *Are the various factors that a Port Operator may take into account in deciding to offer different terms to different Applicants/Users appropriate? Are these factors sufficiently certain and clear?*
- *Is the list of factors that the Port Operator may consider when offering access to different Applicants/Users consistent with the obligation not to discriminate?*

6.8.5 Variation to Reference Prices and Standard Terms

The Undertakings allow the Port Operators to vary the Standard Terms and the Reference Prices once published.

Each Undertaking provides that any variation must be published in the same locations as Reference Prices and Standard Terms, at least 30 days prior to the date on which it is to become effective. The Undertakings also provide that any variations to the Reference Prices or Standard Terms do not automatically override the terms of existing Access Agreements.

The CBH Undertaking provides that the Port Operator may vary the Reference Prices or the Standard Terms, provided that the amended Reference Prices and Standard Terms are consistent with the non-discriminatory access clause 6.4 and the objectives in clause 2. Neither the ABB Undertaking nor the GrainCorp Undertaking include similar provision regarding consistency with non-discriminatory access clauses or objectives clauses.

The Undertakings each provide that the Port Operator must provide the ACCC with copies of variations to the Reference Prices and Standard Terms promptly following publication.

Issues for comment

- *Is the regime regarding variations to Standard Terms and Reference Prices appropriate? To what degree do Port Operators require the commercial flexibility to change their Standard Terms and Reference Prices?*
- *Does the publication of variations 30 days prior to their effective date provide sufficient notice to access seekers?*
- *Is it appropriate that the regime does not include a period of consultation with relevant stakeholders prior to variation?*
- *Is it appropriate that the ACCC is provided with copies of variations to the Reference Prices and Standard Terms following publication?*

6.9. ‘Negotiating for Access’

This clause sets out the framework within which ABB, CBH and GrainCorp undertake to negotiate with bulk wheat exporters seeking to access their Port Terminal Services. It covers the preliminary negotiation processes and procedures, confidentiality, the framework under which Applicants may gain access to Port Terminal Services, the negotiations following the lodgement of an application and the finalisation of an access agreement.

The ‘Negotiating for Access’ clause is clause 6 in the ABB and GrainCorp Undertakings and clause 7 in the CBH Undertaking.

6.9.1 Good faith negotiation and confidentiality

The Undertakings provide that the Port Operator will negotiate with an Applicant for the provision of Port Terminal Services in good faith.

The Undertakings provide that if a party provides Confidential Information to the other party as part of the negotiation process, the party receiving the Confidential Information will treat the information as secret and confidential and the property of the provider. The party receiving the Confidential Information is not permitted to use the information for any purpose outside the provisions of the Undertaking.

A party is permitted to disclose Confidential Information to the extent necessary for the provision of advice from legal advisors, financiers, accountants or other consultants, provided they are under a legal obligation not to disclose the Confidential Information to any third party.

6.9.2 Preliminary inquiry

Provision of information

If requested by the Applicant, the Port Operator will provide the Applicant with information related to access to the Port Terminal Services that may be reasonably

required by the Applicant in relation to the access application, subject to the Applicant paying the reasonable costs incurred by the Port Operator in obtaining information that is not ordinarily and freely available to the Port Operator.

The Port Operator may also refuse the request if it is unduly onerous or the expense and resources required to provide the information is disproportionate to the benefit to be obtained from the information.

Parties to negotiation

The Port Operator reserves the right to negotiate only with Applicants who comply with the requirements and processes set out in the Undertaking. If an Applicant does not comply and the Port Operator considers that such non-compliance is material, the Port Operator is not obliged to continue negotiations with the Applicant.

The Undertakings provide that the Port Operator may refuse to commence negotiations or may cease negotiations with an Applicant if they do not meet or are unable to demonstrate that they meet certain Prudential Requirements.⁶

The ABB and GrainCorp Undertakings state that if the Applicant considers that the Port Operator has unreasonably refused to commence or unreasonably ceased negotiations, then the Applicant may refer the matter to an arbitrator (see further below). The CBH Undertaking has a similar provision, and notes that the matter will constitute a ‘Dispute’. If the arbitrator determines that the Port Operator has unreasonably refused to commence or ceased negotiations, the Port Operator will recommence negotiations immediately.

The Undertakings provide that, at any time, if the Port Operator is of the view that an Applicant’s request for access is frivolous in nature or that the Applicant is not negotiating in good faith, the Port Operator may refer the request to the arbitrator for determination. If the arbitrator determines that the request is frivolous, the Port Operator will be entitled to cease negotiations, and will not be obliged to comply with the Undertaking in respect of the request.

The CBH Undertaking has additional provision for the Port Operator to apply to the arbitrator for an order for the Applicant to pay the Port Operator’s reasonable costs incurred in relation to the request for access.

Issues for comment

- *Is the obligation on the Port Operator to provide information sufficient to enable meaningful and effective access negotiations? What type of information should be provided by the Port Operator in these circumstances?*
- *Is it appropriate that the Applicant must agree to pay the ‘reasonable costs’ incurred by the Port Operator in obtaining information that is not ordinarily and freely available to the Port Operator?*

⁶ For the definition of Prudential Requirements, refer to clause 7.4(b)(iv) of the CBH Undertaking, and clause 6.4(b)(iv) of the GrainCorp and ABB Undertakings.

- *Is it appropriate that the Undertaking proposes a number of grounds on which the Port Operator may cease negotiations with the Applicant? Are the specified grounds sufficiently certain and clear? Are time periods for the Port Operator to provide reasons for its decision to refuse to negotiate appropriate?*
- *Is the definition of Prudential Requirements in Undertaking appropriate?*
- *Is the clause relating to the avenue of appeal directly to the arbitrator appropriate?*
- *Are there any other relevant matters that are necessary to negotiate access that should be reflected in the Undertaking? If yes, please specify.*

6.9.3 Access Application

The Undertakings provide that requests for access to Port Terminal Services are to be submitted in the form of an Access Application as outlined at the relevant Schedules. Prior to submitting an Access Application, an Applicant may seek initial meetings with the Port Operator to discuss the application and seek clarification on the process as outlined in the Undertaking, and the information requirements under the relevant Schedules.

Under the Undertakings, the Port Operator will acknowledge receipt of the Application in writing or electronically to the Applicant within five business days of receipt, or longer period as required. Prior to acknowledging the Access Application, the Port Operator may seek additional information or clarification of information already provided.

Issues for comment

- *Is the provision for an Applicant to seek pre-submission meetings and discussions appropriate?*
- *Are the timeframes for acknowledgment appropriate?*
- *Is the information required to be provided in an Access Application appropriate? Is more or less information required?*

6.9.4 Negotiation of Access Agreement

The Undertakings provide that both parties will commence negotiations as soon as reasonably possible to progress towards an Access Agreement. Negotiations for access will cease:

- (a) after three months if an extension is not agreed upon;

- (b) if the Port Operator believes that the negotiations are not progressing in good faith towards the development of an access agreement within a reasonable time period; or
- (c) if the Port Operator receives evidence confirming that the Applicant no longer satisfies the Prudential Requirements.

The Port Operator will advise the Applicant of the evidence and issue a notice of intent to end the Negotiation Period to become effective ten business days after the issue of the notice. The Port Operator will be required to provide the Applicant with written reasons for its decision to end the Negotiation Period.

The Undertakings state that the Port Operator will be entitled to cease negotiations with the Applicant at the end of the Negotiation Period.

The CBH Undertaking additionally provides that in circumstances where both the Port Operator and Applicant negotiate in good faith but fail to execute an access agreement before the end of the Negotiation Period, the matter will constitute a “Dispute” which either party may then refer to arbitration.

Issues for comment

- *Does the negotiation process achieve an appropriate balance between the interests of the Port Operator and access seekers?*
- *Are the timeframes for the negotiation process appropriate and sufficiently clear, certain and cost effective?*
- *Are the circumstances in which the Port Operator has discretion to cease negotiations appropriate?*
- *Are liability terms and limits able to be negotiated effectively under the proposed arrangements? Is it appropriate for the Undertaking to acknowledge such arrangements?*

6.9.5 Access Agreement

The Undertakings note that access rights are finalised by the execution of an Access Agreement with the parties to the Access Agreement being the Port Operator and an Accredited Wheat Exporter.

The Port Operator is required to offer the Standard Terms to the Applicant where the Applicant requests access to a Port Terminal Service, subject to the Applicant satisfying Prudential Requirements, the non-discriminatory access clause and the circumstances that the Port Operator has regard to in determining price and non-price terms under clause 6.5 of the CBH Undertaking and clause 5.5 of the ABB and GrainCorp Undertaking.

The Port Operator may offer amended Standard Terms to reflect terms which the Port Operator considers reasonably necessary or desirable to accommodate a request for access to a service other than Port Terminal Services. The Port Operator may also agree changes to the Standard Terms requested by the Applicant.

The GrainCorp Undertaking additionally provides that a negotiated Access Agreement will, unless otherwise agreed between GrainCorp and the Applicant, at least address the essential elements set out in the Initial Port Terminal Services Protocols in Schedule 3.

The ABB Undertaking also provides that a negotiated Access Agreement will, unless otherwise agreed between the Port Operator and the Applicant, at least include the Port Loading Protocols.

Issues for comment

- *Is it appropriate for the Port Operator to offer the standard terms to the Applicant subject to the Applicant meeting the specified requirements?*
- *Is there sufficient certainty and clarity regarding what particular types of terms and conditions an Access Agreement must cover?*
- *Is it appropriate for the Access Agreement to include or refer to the 'Port Protocols/Rules'?*
- *Do the Undertakings provide sufficient certainty as to when a binding agreement is in place?*

6.10. 'Dispute Resolution'

This section outlines the approach to Dispute Resolution as proposed in the Undertakings.

6.10.1 Disputes

The Undertakings provide for Disputes to be resolved in accordance with the Dispute Resolution clause unless expressly agreed otherwise. Either party to a Dispute may give the other party a 'Dispute Notice' specifying the Dispute and requiring it to be dealt with under the Dispute Resolution clause. The parties are required to use reasonable endeavours acting in good faith to settle the Dispute as soon as practicable.

Disputes in relation to an executed Access Agreement will be dealt with under the provisions of that Access Agreement.

The Undertakings all state that by 31 July of each year the Port Operator will report to the ACCC on any material Disputes in relation to an Access Agreement and any Disputes in the last 12 months, which will include the details of any resolution and the status of unresolved matters.

6.10.2 Mediation

The Undertakings provide that if a Dispute is not resolved by negotiation within 10 business days after the date of the Dispute Notice, if the parties agree they can attempt to resolve the Dispute by mediation, or if they do not agree the Dispute may be referred to arbitration. There is also provision for the Dispute to be referred to Chief Executive Officers of the parties involved and for a mediator to be appointed by the State Presidents of the Australian Chapter of the of Arbitrators and Mediators of Australia (IAMA).

6.10.3 Arbitration

Under the Undertakings, parties may refer the Dispute to arbitration.

The Undertakings provide that the Port Operators must notify the ACCC of the details of any Dispute which has been referred to arbitration and also provide the ACCC with the arbitrator's final determination. The Undertakings all include provisions on indemnity in relation to claims made against the arbitrator.

The Undertakings outline the process for selecting an arbitrator. CBH and ABB's Undertakings have the added provision for the ACCC to be notified of the identity of the arbitrator and provide the option for the ACCC to object to the parties' appointed arbitrator and ask the parties to nominate an alternative arbitrator.

The Undertakings state that should the parties fail to agree on an arbitrator, either party may request the ACCC to appoint an arbitrator. The CBH Undertaking and ABB Undertaking both state that this must not be the ACCC.

The Undertakings outline arbitration procedures. Under this process, the arbitrator will permit the ACCC, on request, to make submissions to the arbitrator on matters relevant to the Dispute. Matters which the arbitrator must take into account include the objectives and principles in Part IIIA of the TPA and the Competition Principles Agreement, as well as any guidance published and any submissions provided by the ACCC. The Undertakings note that the arbitrator must not make a decision which, among other things, has any of the effects described in section 44W of the Act.⁷

The Undertakings provide for the arbitrator to protect commercially sensitive information provided by the parties. Clauses in the Undertakings outline the effect of the arbitrator's determination, which includes the Port Operator's obligations should an Applicant not comply with an arbitrator's determination. The arbitrator's costs and the costs of the parties to the arbitration will be borne by the parties in such proportions as the arbitrator determines.

⁷ Section 44W incorporates a restriction upon the making of a determination which would, amongst other things, prevent an existing user obtaining a sufficient amount of the service to be able to meet the user's reasonably anticipated requirements, measured at the time when the dispute was notified.

Issues for comment

- *Is the dispute resolution process, including the timeframes, appropriate and effective?*
- *Is the ACCC role in the arbitration process appropriate?*
- *Are the matters listed for consideration by the arbitrator appropriate?*
- *Are the restrictions on determinations appropriate (for example, the restriction relating to section 44W of the Act)?*
- *Do the confidentiality provisions contained within the Dispute Resolution clause sufficiently provide for the protection of commercially sensitive information?*

6.11. ‘Capacity Management’

6.11.1 Continuous disclosure rules under the WEM Act

The Undertakings have provision for the establishment of policies and procedures for managing demand for the Port Terminal Service.

The GrainCorp Undertaking includes Port Terminal Services Protocols. Schedule 3 sets out the Initial Port Terminal Services Protocols which GrainCorp will offer to include in its Access Agreements. Similarly, the ABB Undertaking includes Port Loading Protocols in Schedule 3. CBH’s Draft Port Terminal Rules are provided in an attachment to its supporting submission.

The GrainCorp and ABB Undertakings also commit to publishing a Shipping Stem (as a condition of the Undertaking), to be updated daily, and outline the information the shipping stem will set out. The CBH Undertaking does not provide a similar provision regarding publication of the shipping stem (although it is noted that CBH is subject to the same provisions as GrainCorp and ABB under the WEM Act).

All three Undertakings outline the process through which the Port Operator may vary the Port Rules/Protocols. ABB’s Undertaking has the added proviso that the Port Operator may vary the Port Loading Protocols whether or not they are included in an Access Agreement.

The Undertakings state that any variation must be published at least 30 days prior to the date on which it is to become effective. Further, the Port Operator must provide the ACCC with copies of variations to the Port Rules/Protocols promptly following publication.

The ABB Undertaking also states that the Port Operator must consult with Major Users⁸ in relation to any proposed variation to the Port Loading Protocols at least 14 days prior to implementing that variation.

The GrainCorp Undertaking states that the Port Terminal Services Protocols must include an expeditious Dispute Resolution mechanism for dealing with Disputes relating to GrainCorp's rejection of Cargo Nomination Applications. The ABB Undertaking states that the Port Loading Protocols must include an expeditious Dispute Resolution mechanism for dealing with Disputes over compliance with the Port Loading Protocols.

6.11.2 Operational decisions

The Undertakings define 'Operational Decisions' as Decisions made in the course of providing the Port Terminal Services including day to day decisions concerning scheduling, cargo accumulation and ship loading.

The Undertakings state that many Operational Decisions made relating to the provision of Port Terminal Services will necessarily involve 'conflicts of interest' of users of the Port and that, particularly when viewed in isolation, some decisions necessarily confer a relative disadvantage on one user of the Port and an advantage on others.

The Undertakings set out circumstances in which the Port Operator may give priority to vessels, take into account certain objectives or vary a cargo assembly plan or queuing order for vessels.

The Undertakings state that the Port Operator must not engage in conduct having a purpose of hindering access to the Port Terminal Services by any user in the exercise of a reasonable right of access.

Issues for comment

- *Is it appropriate for the provisions in the 'Port Protocols'⁹ themselves to be included in the Undertaking? To what extent does a balance need to be struck between the need for Port Operators to retain flexibility over their operations and the need for transparency and certainty around the Port Protocols?*
- *Are the provisions in the Port Protocols sufficient to provide transparency and certainty for access seekers? If not, what other information should be included and why?*
- *Are the Port Protocols sufficiently detailed? Do they address all necessary issues? What further issues should be included, if any?*
- *Are the dispute resolution provisions in the Port Protocols appropriate? Are they sufficient to provide certainty and transparency to access seekers?*

⁸ Defined as Users that, as at the date of the proposed variation to the Port Loading Protocols, have shipped more than 20,000 tonnes of Bulk Wheat through the Port Terminals in the past 2 years.

⁹ Referred to as 'Port Terminal Services Protocols' in the GrainCorp Undertaking, 'Port Loading Protocols' in the ABB Undertaking and 'Port Terminal Rules' in the CBH Undertaking.

- *Is the process for the ordering and queuing of ships, and the decision criteria determining the order and speed within which ships will be loaded, appropriate and sufficiently certain and transparent?*
- *Is there an appropriate degree of clarity and transparency in relation to the link between ship nomination, estimated time of arrival, and the timing and quantum of cargo accumulation into the port?*
- *Is the availability and allocation of Port Operator overtime (and other related out of the ordinary course resources and costs) appropriate and sufficiently transparent and reasonable?*
- *Is the process for varying the Port Protocols appropriate and sufficiently detailed?*
- *Are the criteria the Port Operator can take into account when making operational decisions appropriate? Are they sufficiently clear and certain?*

6.12 ‘Information flow restrictions’ – ring fencing

There are substantive differences between the ring fencing models put forward by CBH and those put forward by ABB and GrainCorp. Accordingly, in providing submissions on the ring fencing measures interested parties are requested to take particular care to identify which particular ring fencing regime is being addressed.

6.12.1 Organisational structure and governance arrangements

The CBH Undertaking sets out details of CBH’s organisational structure and undertakes to implement measures to ensure that CBH’s trading business is organisationally separate from its other business units and that its trading business not carry out any Port Terminal Services. The CBH Undertaking also provides for the separation of work areas, the separation of employees and for information technology access controls.

The models put forward by ABB and GrainCorp do not include provisions regarding organisation structure or governance arrangements.

6.12.2 Restricted and Prohibited information flows

CBH

CBH’s ring fencing provisions place restriction on the CBH’s ability to share Third Party Confidential Information. Third Party Confidential Information means information exchanged between a Third Party and CBH’s Operations Business (or any of their nominated representatives) that relates to commercially sensitive information, such as Bulk Wheat entitlements, or the quality and quantity of Bulk Wheat owned by the Third Party.

The CBH Undertaking further outlines information disclosure restrictions which apply to the Operations Business—the business unit which manages storage and handling operations. The Operations Business must not disclose Third Party Confidential Information to other entities, including its own Related Bodies Corporate and their employees.

Additionally, the CBH Undertaking states that CBH may not access or use Restricted Information for the purpose of substantially damaging a competitor or conferring an unfair competitive advantage on it or its Related Bodies Corporate over any third party in the marketing of Bulk Wheat.

Finally, the Undertaking states that CBH may not allow other entities, including Related Bodies Corporate, their agents or employees to have access to Restricted Information in the Port Operator’s possession.

GrainCorp and ABB

The GrainCorp and ABB Undertakings state that the Port Operator must not use or disclose Restricted Information other than for the purpose of providing access to Port Terminal Services in compliance with the terms of the Undertaking.

The GrainCorp and ABB Undertakings state that Restricted Information shall not be disclosed to Trading Divisions or other entities, including Related Bodies Corporate, or agents or employees who are involved in trading Bulk Wheat.

The GrainCorp and ABB Undertakings state that GrainCorp and ABB may not access or use Restricted Information for the purpose of substantially damaging a competitor or conferring an unfair competitive advantage on the Port Operator or its Related Bodies Corporate over any third party in the marketing of Bulk Wheat.

6.12.3 Permitted information flows

The Undertakings provides that the Port Operator may disclose to an Applicant or User any Restricted Information that solely relates to the Bulk Wheat owned by that Applicant or User.

The Undertakings also provide that the Port Operator may disclose to any person information concerning the grade, quality, quantity, location or attributes of grain received by the Port Operator as long as the information is aggregated such that any identifiers are removed.

6.12.4 Financial records

The CBH Undertaking provides for accounting separation – that is, it provides for the accounts and records of CBH’s Trading Business to be kept separate from those of the Port Operator and its Related Bodies Corporate. Further, the Port Operator must provide the ACCC with requested documents in relation to any audit the ACCC is directing in accordance with the auditing provisions of the ring fencing rules.

No such accounting separation requirement is set out in the GrainCorp and ABB Undertakings. These Undertakings state that GrainCorp and ABB must make the financial records relating to the Port Operator’s provision of access to and the provision

of the Port Terminal Services available to the independent auditor appointed by the ACCC when requested to do so by notice in writing given to the ACCC.

6.12.5 Compliance

The Undertakings provide that the Port Operator's employees will be made aware that a failure to comply with the ring fencing obligations may constitute a disciplinary offence and expose the individual and the Port Operator to penalties under the Act or the WEM Act.

Further, the Undertakings provide that the Port Operator will make its employees aware that engaging in deliberate conduct in repeated or serious breach of the ring fencing rules will be grounds for dismissal. The CBH and ABB Undertakings include added provisions on which type of employees will be provided with training on the obligations under the ring fencing rules.

The CBH Undertaking also outlines a complaints handling procedure. Third Parties may lodge written complaints to CBH, after which CBH must conduct an internal investigation of the complaint to determine whether there has been a compliance failure by CBH.

6.12.6 Audit

The Undertakings require compliance with the ring fencing rules to be independently audited by an independent auditor at the direction of the ACCC, but not more than once in any 12 month period. The Port Operator will select the auditor and must notify the ACCC.

The GrainCorp and ABB Undertakings state that the auditor will be selected by GrainCorp/ABB but must be approved by the ACCC.

The Undertakings provide that the auditor may access a number of documents in the course of conducting the audit. The auditor must provide a report to the ACCC, including recommendations for any improvements in the Port Operator's policies or processes and a report on the Port Operator's past compliance with any recommendations previously made by a compliance auditor.

Issues for Comment

- *To what extent is accounting separation necessary or unnecessary in order for the ring fencing regimes to be effective?*
- *Is the scope of Restricted, Prohibited and Permitted information flows appropriate and adequate?*
- *Do the provisions on Restricted, Prohibited and Permitted information flows appropriately, sufficiently and transparently provide for the separation of Port Terminal Services from the bulk wheat export business of the Port Operator?*
- *Are the compliance and training obligations applying to Port Operator employees handling Restricted and Prohibited information appropriate?*

- *Are the audit provisions under the ring fencing rules appropriate and sufficient, having regard to the number of audits allowed in a 12-month period, the scope of the audit, record keeping requirements and the ability for further action arising out of audit findings?*
- *Beyond employee training, should there be other processes through which compliance with the ring fencing rules can be achieved? If yes, what should they be?*
- *Are there any other obligations that should be included in the ring fencing regime? If yes, please specify.*