AgForce Grains Ltd.

A commodity council of AgForce Queensland ABN: 212 416 791 71

29 May 2009

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

RE: AgForce submission to the ACCC Port Terminal Service Undertakings for receival of bulk wheat.

Dear Mr Wing,

Please find attached a copy of the AgForce submission on the Port Terminal Services Access Undertakings of ABB Grains Ltd, Cooperative Bulk Handling Limited and GrainCorp Operations Limited. We welcome the chance to provide this written submission and thank you for the chance to present it in person in Brisbane on May 22nd 2009.

The Access undertakings presented by the bulk handlers/port operators seem to cover most aspects of the movement of wheat from its intake at port to ship loading and seems to, in most cases provide a fair access arrangement for all parties.

AgForce was a strong proponent of the requirement for ACCC Open Access Undertakings as part of the formation of the *Wheat Export Marketing Act 2008* and still believes these Undertakings are needed for the future prosperity of the industry.

AgForce has a good working relationship with our relevant port operator in QLD, GrainCorp Operations Limited. AgForce and GrainCorp work closely on issues such as transport of grain and GrainCorp have responded well to the needs of growers and industry in recent times. In 2008-09 grain production in QLD was at levels very close to long term records levels and the amount of grain to be exported from QLD this year will be one of the largest, if not the largest, ever. GrainCorp have responded well to this task.

However, despite this constructive relationship, we are well aware of issues in other states and with other monopolistic bulk handlers across Australia. The examples of other states show why regulation of these regional monopolies is necessary by organisations such as the ACCC.

The Port Services Access Undertakings are a good way to ensure the continued fair and competitive access to grain transport services in Australia, however, the operation of the up-country sites, their access pricing and arrangements and the link between up-country sites and the port are a real concern for AgForce moving forward.

Please accept our submission to this important regulatory process and as mentioned we look forward to discussing the submission with you further on Friday.

Sincerely

Lyndon Pfeffer
AgForce Grains President

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AgForce Grains Ltd

Submission to the ACCC Port Terminal Services Access Undertakings for GrainCorp Operations Ltd.

May 20 2009

1.0 Introduction

AgForce Queensland is the peak body for the grain, beef and sheep and wool industries of QLD. As the representative of the grain growers of QLD, AgForce Grains welcomes the opportunity to comment on the proposed Port Terminal Access Undertaking (the Undertaking) of the sole grain port operator in QLD, GrainCorp.

Whilst we and our members do not have direct dealings with the marketing and export of grain, the operations of GrainCorp and the fairness of the access and pricing arrangements at the port affect our farming members heavily.

Currently in QLD with two years of record or near record crops, export services, which had been reduced during drought years, are stretched to their limits. This has led to a situation where, due to transport constraints between the up-country sites and the port, buyers are unwilling to enter the market or are doing so at a discounted rate. These buyers cannot afford the commercial risk of moving grain in QLD to port for export. The discounting of grain prices to reflect transport risk is obviously a direct impact on our growers.

This issue is not solely related to port services or port access, but is an example of how issues and constraints in the supply chain directly affect our members and our organisation.

2.0 The WEMA and the limitations of the Undertakings

AgForce are of the opinion that the affect of the undertakings will be minimal in the total export of grain from QLD. Wheat only constitutes 50% of the exports of grain from QLD at this time, the other 50% being largely sorghum, with some chickpeas.

AgForce lobbied for the inclusion of other grains in the *Wheat Export Marketing Act 2008* (*WEMA*), but were obviously unsuccessful in our efforts. In the absence of such direct regulation, it is hoped the activities and procedures put in place under the wheat export access undertakings will be reflected in the export of all grain from QLD.

The other limitation of the Undertakings are the lack of connect between the port services and all other services in the supply chain from farm to port. This is covered in more detail where relevant below.

3.0 Joint preparation of Undertakings

AgForce was surprised to read in section 1.2 of the GrainCorp Submission to the ACCC Port Terminal Services Access Undertaking that the three bulk handlers had jointly prepared the access undertaking template.

Whilst the preparation of the template is an efficient and simple way to administer and assess the Undertakings, the fact that the companies were essentially allowed to work together to set their own ground rules is cause for concern.

If this occurred in commercial negotiations it would border on, if not amount to collusion. The ACCC has essentially allowed the three writers of the undertakings to share experiences and possibly ways in which to overcome competitive hurdles associated with their monopolistic port and other operations.

This joint preparation and sharing of ideas may not result in the best outcomes for the industry. Our preference would have been for the ACCC to ask for three separate Undertakings before picking the most competitive clauses and asking each company to include them, subsequently strengthening all Undertakings and reducing each organisation’s ability to avoid competition.

4.0 A response to the ACCC Issues Paper

In this response AgForce will attempt to answer the questions posed in the ACCC paper directly. Those areas where no comment is necessary have been excluded in order to keep this submission concise.

4.1 Issues for Comment - General

- *To what extent are bulk wheat exporters able to switch between different ports at different locations around Australia, including between different States?*

Bulk wheat exporters in QLD would find it impossible to export wheat of the quality found here, without that wheat passing through a GrainCorp port terminal.

Most wheat grown in QLD is of Prime Hard or Australian Hard classification, quality usually only found in QLD and NSW wheat.

- *Are there any limitations that prevent bulk wheat exporters from switching between ports (such as different grain types, infrastructure constraints, freight differentials?)*

This question depends largely on the climatic factors preceding the delivery of the grain across QLD and NNSW. In some cases limited supply or limited supply of a certain grade may restrict a bulk exporter from moving from one port zone to another. Transport of grain from one port zone to another is cost prohibitive, except for small amounts very close to some zone borders.

- *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?*

Given climatic variability and the fact that the current QLD port terminals are operating at rates well below their capacity, investment in new port facilities is very unlikely. The cost of construction, for the likely return could not warrant the development of any new terminals at any ports in QLD in the foreseeable future.

- *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.*

AgForce accepts the arguments of GrainCorp in saying that they require maximum tonnage throughput in their system to maintain their assets and that this requires open access arrangements. This has proven to be true in the past. However, increases in market power for GrainCorp since deregulation of the wheat industry place it in a position to use that market power to its advantage.

The current Undertaking allows for GrainCorp to take into account 'recovery of all reasonable costs associated with the granting of access to the Port Terminal'. There is little preventing GrainCorp from setting the compensation for the risk it carries at a level higher for its competitors than its own related entities, thus allowing it to have a competitive advantage across the supply chain. That is, if GrainCorp can operate the port at a cost which is at all lower than the cost imposed on its competitors, the cost of GrainCorp moving grain to port and onto ships is lower, thus allowing GrainCorp to offer higher prices to growers than its competitors and thus gaining more and more market share over time. Again this activity hasn't been evidenced in the past, but there is a possibility of it occurring.

- *Are provisions relating to capacity expansion and performance indicators (such as quality of service and timeliness) necessary or appropriate for inclusion in the Undertakings?*

  This issue is covered well by the submission of the Australian Grain Exporters Association. As in all areas of the transport supply chain, penalties should apply to poor service or delays in the chain. The Standard Terms of Access should include standard penalty clauses for port operators who fail to meet defined KPI's. This should take into account normal breakdown occurrences, but reflect poor management.

4.2 Issues for Comment – Objectives

- *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?*

  If the Undertaking was truly fair and competitive, there would be no need for such a clause. This clause seems to be directed at a situation where capacity is limited, but GrainCorp's own trading arm would not be affected and it would be able to export as much as it desired.

  Whilst the shipping stem would make this difficult to achieve – accumulation of a parcel of grain at port for a GrainCorp ship ahead of a competitors ship which is due to arrive before the GrainCorp one would be difficult, it should be questioned why GrainCorp needs such a clause.

  Perhaps further security of the integrity of the shipping stem and all activities and procedures leading up to loading the ship on that stem needs to be created through standard penalty clauses for GrainCorp inefficiencies.

4.3 Issues for Comment – Structure

- *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?*

This matter may be debateable depending on the issue and has likely been included to account for the differences in operations at each port. However, the General Terms are quite broad and should not restrict the activities at any one port more than another.

- *Does the Undertaking provide sufficient clarity and certainty around what are General Terms and what is a (Port) Schedule?*

It is assumed, but not defined in the undertaking that the General Terms are those of the Undertaking and the Port Schedules are those attached to the Undertaking.

4.4 Issues for Comment – Term and variation

- *Is the proposed term of the Undertaking appropriate?*

The two year life of the undertaking is probably sufficient and allows some recognition of changes which may occur in the industry in coming years, allowing for review of the document. The two year length of the Undertaking may also be cause for concern. With the Undertakings unproven in commercial grain exports, a poorly executed Undertaking may adversely affect the industry for longer than necessary. A one year term should be instigated, to allow a chance for review before the damage to the industry is too great.

The timing of the Undertakings is unfortunately inconvenient for most growers in QLD. With the wheat harvest starting in QLD in late August or early September, adjustments by industry to any changes

- *Does having different expiry dates for the CBH Undertaking and the GrainCorp and ABB Undertakings raise any issues?*

With the three operators working in mostly different states and different markets it should not create issues, especially not in QLD.

- *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?*

AgForce is concerned that the no timeframe is offered to counterparties with Access Agreements or Applications. A specific timeframe of 3 months should be allowed for notice of proposed changes to agreements or standard terms.

- *Is it appropriate that the Undertaking applies only to new Access Agreements?*[5]

Yes.

4.5 Issues for comment – Scope

- *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?*

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

- *Is the scope of the Undertaking and, in particular, the concept of port terminal services, defined with sufficient certainty and clarity?*

  Yes.

- *How are issues of bundling of port terminal services with freight and up-country storage and handling relevant, if at all?*

AgForce does have some concerns over the ability of GrainCorp to use their market power to their advantage in the supply chain. Having control over around 90% of the bulk handling facilities in QLD, contracting the majority of the states grain trains and controlling the ports means they are in a very strong position to use these assets to their advantage over others.

The connection between up-country sites and delivery at port is a major area of concern for us as it is the major bottleneck in the industry at this time. Any manipulation of this sector of the supply chain would be detrimental to short term industry prosperity and is likely to lead to a reduction in competition across the supply chain.

Bundling of port and up-country services in one agreement may work to the advantage of some in the industry with GrainCorp being obliged to offer services on a similar basis up-country and in transport, to those under the Port Access Agreement.

It is the opinion of AgForce that the Undertakings should cover all services related to the operation of the port conducted by GrainCorp and that includes any asset and service they control between up-country sites and the port.

- *Are there any additional services that should be covered by the Undertaking?*

As above.

4.6 Issues for comment – Price and non price terms

- *Is the obligation to publish price and non-price terms appropriate?*

As the owner of a monopoly asset it is completely acceptable for reference prices and standard terms to be published. These prices are obviously unlikely to be offered to any customer given the long list of 'Price and non price terms' listed in section 5.5 of the Undertaking and GrainCorp's own arm are obviously going to meet these terms very well.

- *To what extent does the publication requirement provide sufficient certainty and transparency for access seekers?*

As it is likely that GrainCorp will impose section 5.5 upon all access applications and administer these differently for each organisation it is difficult to determine the effectiveness of the published pricing and terms. However, it would also not be feasible to set access prices for each customer, and not commercially viable to publish the terms and prices of each Agreement.

- *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?*

In any case where changes to standard access terms or pricing affects a current holder of an agreement or an application, they should be directly informed of these changes by GrainCorp at least 30 days prior to them coming into affect.

4.7 Issues for comment – Access to Standard Port Terminal Services

- *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?*

In all negotiations for transport assets GrainCorp tries to enter into long standing (minimum of three year) agreements to provide themselves with some certainty. The 1 year length of these agreements does not provide others in the market the security they need to plan their business at a length equivalent to what GrainCorp believes it needs in the market. Terms should be offered for longer if both parties agree.

4.8 Issues for comment – Standard Terms

- *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)?*

Despite the Undertaking only applying to the port services themselves, there should be a seamless transition between up-country, transport and port services if the supply chain is going to work efficiently. To separate these commercial agreements would break down this efficiency in the

supply chain. Hopefully the good faith provisions and other provisions of the Port Undertaking should spill over into areas further up the chain to maintain competition in the long run.

- *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'?*

In any division of departments of a large company like GrainCorp it is difficult to truly partition the activities of one department from another. No matter how good that separation is, the holder of assets from one end of the supply chain to the other will be able to advantage all its departments involved in the trade and transport of grain from those assets and services. Without regulation of the whole supply chain this is impossible to prevent.

- *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?*

4.9 Issues for comment – Price and Non-price terms and non discriminatory access

- *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?*

The clauses are clear in stating that GrainCorp must not discriminate, but clause 5.5 allows them to avoid (through commercial incentives/penalties) clause 5.4 in almost all cases.

- *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?*

Yes

- *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?*

The factors are broad and wide ranging. They will allow GrainCorp to be flexible in almost all aspects of determining price and terms. It appears that each Applicant will have to negotiate on all aspects of their access agreement to gain maximum advantage.

- *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?*

Whilst a set of standard terms and prices is useful for transparency, the varying nature of business of those applying for access means flexibility is needed. This may allow a level of discrimination, but this would be very difficult to determine.

4.10 Issues for comment – Variations to Standard Terms and Reference Prices

- *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?*

In any case where changes to a standard access terms or pricing affects a current holder of an agreement or an application, they should be directly informed of these changes by GrainCorp at least 30 days prior to them coming into affect.

- *Is it appropriate that the regime does not include a period or consultation with relevant stakeholders prior to variation?*

A period of notice or consultation for all stakeholders would be helpful in allowing the market to operate efficiently and prevent disputes. Such a period should be enacted in the Undertaking. Again any changes to an Undertaking should be enacted at a time which allows the market to plan for those changes ie not in September when harvest has already begun in QLD.

- *Is it appropriate that the ACCC is provided with copies of variations to the Reference Prices and Standard Terms following publication?*

4.11 Issues for comment - Information

- *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?*

  Paying for information that is not freely available to GrainCorp is probably fair, however, it is difficult to say if GrainCorp will implement this clause fairly.

  One area of concern is the ability for GrainCorp to use clause 6.4(a)(ii)(A) and (B) to avoid releasing necessary information. History has shown that operators of monopolies in the grains industry have used such clauses to prevent the release of information vital to the industry and regulators. A good example is the inability of the Wheat Export Authority to effectively glean information from the single desk operator on performance of its pools and its relationship with its commercial services provider under the bundled services agreement, despite the WEA having the power to access that information.

4.12 Issues for comment – Access Application

- *Are the timeframes for acknowledgment appropriate?*

  Five working days seems excessive to acknowledge receipt of an application. In a digital world, acknowledgement of receipt should be instantaneous.

4.13 Issues for comment – Negotiating for Access

- *Does the negotiation process achieve an appropriate balance between the interests of the Port Operator and access seekers? Are the circumstances in which the Port Operator has discretion to cease negotiations appropriate?*

  In a word – no. GrainCorp have set obligations on access seekers to act in good faith and can cease negotiations on the basis that good faith was not expressed by the access seeker, but there is no counter obligation and ability.

- *Are the timeframes for the negotiation process appropriate and sufficiently clear, certain and cost effective?*

The timeframes in section (v) of clause 6.6(b) of 10 days notice to suspend negotiations should be applied at all stages of the application process and for all reasons for cessation.

4.14 Issues for Comment – Ring Fencing

- *To what extent is accounting separation necessary or unnecessary in order for the ring fencing regimes to be effective?*

Given the ability for any organisation to adjust accounting procedures to assist its various bodies, it is difficult to determine the effectiveness of separate accounting for the ports. However, in saying that, separation of accounts will make assessment of activities and profits more streamlined for the regulator or auditor.

The CBH provision of requested information, in the event of an audit by the ACCC into their ring fencing, is a good clause and should also be included in the GrainCorp Undertaking.

The three bulk handlers who are required to submit Port Access Undertaking are recognised in the industry as having a great deal of market information not available to others in the industry in their region.

By holding such a large amount of the total storage, and a great deal of the grain which will be exported these bulk handlers know:

- How much grain is in storage
- Where that grain is
- The type and grade of that grain
- How much has been sold to the trade and how much is still warehoused by growers – essentially who owns what tonnage of grain, marketer by marketer and grower by grower
- The tonnage moving to domestic markets (roughly)
- The tonnage moving to export markets (accurately) from each region

There is no other player in the QLD grain market who has anywhere near the amount of information that GrainCorp does and whilst there is a significant amount of grain in on-farm storage the percentage of that grain which moves into GrainCorp storage, at some stage, is high.

It is clear that there is a risk that this information could be used to manipulate the market to the advantage of the bulk handler and it is difficult to prevent this happening through a Port Access Undertaking alone.

5.0 Concluding Comments

AgForce has significant concerns about the ability of GrainCorp to slowly increase market power and use that power to their advantage in a manner which is detrimental to competition and likely to border on anti-competitive.

The history of the operation of a single desk by a commercial company has shown that it is possible for a company to use that market power, become introverted and difficult to extract information from. We have also seen in the single desk an inability of a regulator to have a real impact on the activities of such a monopoly operator. This is the reason growers are concerned with the impacts of the formation of a regional bulk handling monopoly.

Many parallels between the issues of the single desk monopoly operator and the provision of port services can be found. Under the single desk AWB Ltd's subsidiary AWB International Ltd was required to maximise returns to pool participants (essentially act in everyone's interest – similar to the 'open access arrangements' for ports), but the parent company AWB Ltd was also required to maximise returns to its shareholders, something GrainCorp is required to do.

This balance between maximising returns to shareholders across the business, whether in ports, trading or others, whilst keeping its main assets fairly open to access from all trading entities will be a difficult one for GrainCorp to manage and even harder to regulate.

We have seen in the single desk the complexities and lack of transparency of services between AWBI and AWB Ltd through the services agreements which led to, in many growers opinions, a far greater loss of income than other wise should have occurred under a single desk arrangement.

The same situation could easily occur between GrainCorp's port operations division and other related bodies corporate. With issues clouded by commercial in confidence material and some creative accounting it is possible for a monopoly to manipulate the access to all of its assets and services and very difficult for the ACCC to access true and honest information.

In short growers right across Australia do not want a single monopoly replaced by three regional monopolies and without very strong regulation and monitoring there is a great risk this will occur.

Fortunately the Access Undertakings provide some security over this, but in most areas of the undertaking the bulk handlers have provided themselves the protection of commercial returns, commercial in confidence material and reasons for offering different access pricing and arrangements to almost any party on a wide range of grounds which will make it difficult for the ACCC to enforce with any significant impact.

The scant resources of grain growing organisations means our input into the formation of Access Undertakings is somewhat limited – we do not have the luxury of a team of lawyers to glean the relevant documents – we hope our input is useful to be added to the resources of the ACCC and the rest of the industry to ensure these Undertakings are fair and competitive now and in the future.