PORT TERMINAL SERVICES ACCESS UNDERTAKING BY ABB GRAIN LIMITED, GRAINCORP OPERATIONS LIMITED AND CO-OPERATIVE BULK HANDLING LTD

SUBMISSION TO THE AUSTRALIAN COMPETITION AND CONSUMER COMMISSION BY THE AUSTRALIAN GRAIN EXPORTERS ASSOCIATION

1. Introduction

1.1 Australian Grain Exporters Association ("**AGEA**") is a representative body of exporters of Australian grain. It was formed in 1980.

1.2 Pursuant to section 44ZZBD of the *Trade Practices Act 1974* (Cth) ("**TPA**") the Australian Competition and Consumer Commission ("**ACCC**") has invited public submissions on the access undertaking applications of ABB Grain Ltd ("**ABB**"), GrainCorp Operations Limited ("**GrainCorp**") and Co-operative Bulk Handling Ltd ("**CBH**") (collectively referred to as "**bulk handling companies**" or "**BHCs**") for the provision of access to services for the export of bulk wheat at the port terminal facilities operated by the BHCs.

1.3 AGEA makes this submission on the access undertaking applications of the BHCs.

1.4 The structure of this submission largely follows the structure of the BHCs' proposed access undertakings. Schedule 1 contains AGEA's response to the Issues Paper published by the ACCC on 29 April 2009 ("**Issues Paper**"). This submission is additional to the Confidential Submissions made on behalf of AGEA members separately.

2. Executive Summary

2.1 The *Wheat Export Marketing Act 2008* (Cth) ("**WEM Act**") provides that parties seeking bulk wheat export accreditation that also provide "port terminal services" must satisfy an "access test". The access test is set out in section 24 of the WEM Act.

2.2 According to the *Wheat Export Marketing Act 2008 Explanatory Memorandum,* the access test was intended to ensure that accredited wheat exporters that own, operate or control port terminal facilities provide *"fair and transparent access to their facilities to other accredited exporters."*

2.3 The BHCs have submitted proposed access undertakings to the ACCC pursuant to Part IIIA of the TPA for the purpose of satisfying the "access test" for the period on or after 1 October 2009.

2.4 BHCs are monopoly providers of port terminal services. Access to port terminal services is essential to export bulk wheat from Australia. Australian wheat exporters ("**AWEs**"**)** have no option but to use BHCs' services where they wish to export wheat from their terminals.

2.5 The WEM Act seeks to address the uncompetitive effects of the port operators' monopoly by requiring that port operators provide "*fair and transparent access"* to their port terminal services.

2.6 Fair and transparent access requires, at the minimum, an access undertaking which has clarity, certainty and transparency. The rules must be detailed and clear. The rules must be capable of objective application. Discretionary or subjective decisions must be kept to the absolute minimum. Decisions and the reasons for them must be disclosed in a timely way and open to effective and timely review.

2.7 At present, the BHCs exercise their monopoly power by discriminating in favour of their Trading Divisions (as defined in paragraph 4.9 below), disadvantaging competitors by imposing unfair terms and conditions and restricting AWEs' access to port terminal services. The undertakings will not prevent this behaviour continuing, to the detriment of efficiency and competition in the Australian wheat export market. GrainCorp has advised AWEs that it will not grant vessel slots until the ACCC has made a decision in relation to its proposed access undertaking application. CBH has announced that it will not offer slots until after September 2009, which coincidentally is after the ACCC process is complete.

2.8 For the reasons expanded upon below, AGEA submits that the proposed access undertakings should not be accepted because:

(a) the undertakings do not satisfy the acceptance criteria under section 44AZ(3) of the TPA;

(b) interested parties cannot make meaningful submissions and the ACCC cannot properly evaluate the proposed access undertakings in the absence of prices and terms and conditions on which access to port terminal services will be provided;

(c) the failure to specify price and non-price terms in the undertakings and the restrictive definition of "port terminal services" in the undertakings are sufficient reasons for the ACCC to not accept the undertakings.

3. Background

3.1 ABB and GrainCorp hold stock at a site level in co-mingled stacks and accumulate wheat at the request of the AWEs. CBH offers a consolidated supply chain, or bundled service under Grain Express, where freight is paid by growers when grain is marketed and then storage and handling fees are charged to the marketer.

3.2 BHCs are monopoly providers of port terminal services within geographical areas. There is either very limited or no alternative providers of port terminal services within a distance that make them commercially viable competitors.

ABB

3.3 Recently, Credit Suisse reported that:[1]

"*ABB undertakes physical aggregation and exporting of grain in bulk and in containers. It has 111 inland storage and aggregation facilities and seven bulk grain export terminals. Total bulk storage capacity is more than 9.5m tonnes. The company also owns eight storage sites on the east coast of Australia and an interest in the Port of Melbourne grain terminal through a 50% interest in Australian Bulk Alliance (a joint venture with Japanese trading house Sumitomo).*

ABB's bulk export infrastructure is concentrated in South Australia where it is the dominant competitor."

GrainCorp

3.4 Credit Suisse went on to report that:[2]

"Strong position in grain export terminals

GNC has a dominant position in the bulk export of grain along the east coast of Australia, owning all except one of the bulk export grain terminals along the east coast of Australia. GNC's terminals are located at Mackay, Gladstone, Fisherman Islands, Carrington Newcastle, Port Kembla, Geelong and Portland."

CBH

3.5 CBH's monopoly position is exacerbated by Grain Express which allows CBH to supply grain storage and handling services on condition that growers and marketers of grain acquire grain supply coordination services from CBH and transport services from CBH whilst their grain remains in CBH's custody.

[1] Credit Suisse Asia/Pacific/Australia Equity Research Agriculture Products & Agribusiness report dated 27 April 2009, p. 12.

[2] ibid at p. 44.

Port Terminal Services

3.6 Port terminal services are but one part of the services necessary for access to bulk wheat export markets. Other necessary services include:

- receival services by which BHCs receive the wheat;
- grading;
- fumigation;
- sampling;
- storage services (for the storage and maintenance of quality/quantity of wheat);
- outturn services, which outturn wheat to road and rail transport services;
- weighing services;
- rail and road transport services which transport the wheat from storage to the port terminal facility;
- grain elevation;
- shipping belts.

3.7 Some of these services may be provided by facilities which are upstream from to the port terminal facilities. However, in Australia, the BHCs are both the monopoly provider of port terminal services and providers of upstream and downstream services. Upstream activities of port operators are closely related and cannot feasibly be separated from port terminal services. As the BHCs' standard grain storage and handling agreements illustrate, the port operator usually (either by itself or by a related body corporate) provides the upstream services and the port terminal services under a single contract. [3]

3.8 There is very limited ability to physically move wheat from one port to another owned by another terminal service provider. The cost of interstate movement of grain is prohibitive. To move grain to another BHC from Western Australia would require another 900 plus kms of travel and cost. The distance between CBH's port terminal facilities at Esperance to ABB's port terminal facilities at Thevenard is approximately 1,181 kms.

3.9 If AWEs wish to move grain from one port terminal provider to another, AWEs incur duplication of fees, such as receival fees, shrinkage and transport costs. Freight differentials, lack of efficient rail/road networks to alternate ports and added costs incurred by operating across two different bulk handling entities deter AWEs from contemplating alternate port movements.

[3] This is reflected in the recitals A and C of ABB's 2008/2009 contract.

3.10 The only regions where there is (limited) interstate competition (representing several hundred thousand tonnes only) is between southern NSW / Victoria, where grain can be transported to the Port of Melbourne or Port of Geelong and Western Victoria / Eastern South Australia, where grain may be transported to ABB ports in South Australia or GrainCorp ports in Victoria.

3.11 Rail links between ports owned by the differing port terminal service providers are limited to Victoria where ABA interrupts GrainCorp's east coast port management and to the Victoria western region where ABB and GrainCorp compete for accumulation. Differing rail gauges between states also limit AWEs' ability to switch between ports.

3.12 The absence of alternative port terminal facilities means that a multi-national company is not in a stronger position than other AWEs, when negotiating access to port terminal facilities.

3.13 At present the BHCs discriminate in the provision of port terminal services depending whether the wheat enters the port via BHCs' upcountry facilities and services or through services provided by third parties.

3.14 Following on from paragraph 3.13 above, there is no clear non-discriminatory pathway and opportunity for wheat from private third party upcountry facilities to be delivered into the port terminal facilities controlled by BHCs.

3.15 For the above reasons, AGEA disputes paragraphs 5.17 of ABB's Submission, paragraph 2.6 of GrainCorp's Submission and paragraph 6.1 of CBH's Submission regarding the extent of competition between ports.

3.16 Grain quality across Australia is not necessarily interchangeable. Quality and grain characteristics can be specific to a limited geographical region. It can also change season to season within the same zone. Once an AWE has committed to sell a quality specification, access to ports restricts an AWE's ability to switch ports due to BHC's shipping nomination and port protocol conditions.

3.17 The Australian position where AWEs have no alternative but to use the port terminal services owned by its competitor is unique when compared to other major wheat exporting nations. In Canada, the USA, South America and Europe including the Black Sea, the level of choice available to wheat exporters and the competition between port operators is extensive. AGEA would be pleased to provide further information of the systems and competition that exist in relation to wheat export in these countries.

3.18 The wheat export supply chain is highly capital intensive. The aggregation of grain for export requires the construction of a geographically spread network of storage and handling points.

3.19 Credit Suisse concluded in its recent report:[4]

"The port component of the supply chain requires capacity to be added in large increments. The structures of existing rail networks and the high cost of road transport limit the ports to which grain can be transported. These factors create significant barriers to entry for businesses seeking to compete in the provision of storage and handling or port services."

3.20 Credit Suisse also concluded that there are high barriers to entry into the South Australian market for the operation of grain export port terminals.[5] As the incumbent in the South Australian market, ABB has a strong competitive advantage.

3.21 The likelihood of a new entrant establishing a new port terminal to compete with port operators is negligible given the cost and current geographical spread of port terminals servicing the grain belt. The 40,000 tonne Melbourne Port Terminal cost $42 million (and took 2 years to build); and the 60,000 tonne port terminal at Outer Harbour at Port Adelaide an estimated cost of $150 million (and has so far taken 3 years and is not yet complete). Construction costs (in particular steel), have continued to increase significantly. Based on recent industry data, AGEA estimates that it would cost upwards of $150million to construct a new port facility. Additionally, obtaining suitable land, development approval from the relevant authorities and capital in a tight market for the building of port facilities and other infrastructure such as rail and roads are likely to prove prohibitive in the short to medium term.

3.22 In a Draft Report on the Review of Victorian Ports Regulation, April 2009, the Essential Services Commission stated at p. 16:

"[D]emand for port services is highly price inelastic, primarily because port infrastructure charges are only a small component of the total transport costs (absorbed in the final product price). So the sensitivity of demand to changes in price for port services was found to be unlikely to be a constraining factor inhibiting any exercise of market power."

3.23 Establishing a new port terminal to compete with BHCs is not necessary in order for the wheat export market to operate more efficiently. Broadly speaking, Australia has a surplus of storage/load capacity vis-a-vis the volume of crop cycles. Generally speaking, Australian port facilities are not run as efficiently as those in foreign jurisdictions, as measured by the "turn" of those facilities. AGEA is able to provide further details if that would be of assistance.

[4] Credit Suisse report dated 27 April 2009, p. 3.

[5] Credit Suisse report dated 27 April 2009, p. 9.

The market is inefficient and uncompetitive because BHCs exercise monopoly power and are not accountable for the way they operate their services. BHCs deal with large volumes of stock and require advance notice and payment for shipping services, yet they do not guarantee the quality of the grain (or provide information to ensure transparency on quality) and take on no responsibility, exclude liability for loss caused by their conduct and do not provide any transparency on performance.

3.24 BHCs have no incentive to manage the services efficiently. BHCs transfer the risk and cost on to AWEs by imposing unfair terms, charging prices that are unrelated to the cost of providing the service and by refusing access to services unless AWEs agree their terms and conditions. Examples where this has occurred are set out directly below and in the Confidential Submissions.

Example: CBH charges a vessel notification fee of up to $2.20 p/t, ABB charges a vessel nomination fee of up to $1.50 p/t and GrainCorp charges a (non-refundable) vessel notification fee of $2.00 p/t. The BHCs' actual operating costs associated with vessel notifications do not increase inline with the tonnage that is to be loaded onboard the vessel. All charges are in addition to other fees and are charged without any additional service being provided nor cost necessarily being incurred by the BHCs. In the event that the nominated vessel arrives outside the ETA, the same or similar fee is additionally charged to the AWE. Payment of the fee does not guarantee that the ship will be loaded on a scheduled date.

Example: In the ABB 2007/2008 storage and handling agreement pursuant to item 17, ABB sought to impose a “ship loading efficiency fee”, which had the effect of entitling ABB to impose additional fees if the rate at which ABB loaded a vessel exceeded certain parameters. However, the loading rate "exclude[d] all delays". This meant that ABB was entitled to charge an "efficiency" fee despite its delays in loading the vessel caused by equipment break downs or ABB running at a less than optimal rate. Further, ABB did not incur any penalties for delays in loading or transportation of the wheat to port. In other words, ABB could take an exorbitant amount of time to transport the wheat to port and still charge an additional fee (or the equivalent of overtime) to provide the services it was contractually obliged to provide.

Example: AWEs are constantly charged for “surge capacity” by CBH. In addition, CBH charges a transport recovery fee of $1.10 m/t. CBH says the transport recovery fee will be applied to all grain receivals to recover additional labour costs of resourcing rail and road outloading and the recovery of investment in transport related outloading infrastructure. AWEs understand the surge charge is meant to cover the matters CBH says justify the transport recovery fee.

Example: CBH charges a vessel cancellation fee of $1.15 m/t. In addition, CBH charges a shipping relocation fee of $2.30 m/t in Kwinana or $4.00 m/t in Esperance, Albany and Geraldton. CBH's explanation is that the shipping relocation fee may be charged if cargo for a nominated vessel is held at the terminal and needs to be relocated due to cancellation or delay – but this charge should be covered by the vessel cancellation fee.

Example: CBH charges a transfer of ownership fee of up to $0.30 p/t, ABB charge up to $1.00 p/t for the same service, plus a vessel variation and positioning fee up to $5.00 p/t, GrainCorp has an inter-zone transfer fee up to $2.50 p/t. CBH charges AWEs a $0.10 per tonne administration fee in the event that AWEs trade their vessel slots. CBH and GrainCorp apply a shrinkage factor of 0.5% for all wheat received. CBH and GrainCorp then apply a wheat dust deduction of 0.25% to AWEs wheat entitlement upon outturn. ABB applies a shrinkage factor of up to 0.6% of all wheat received and a grain dust deduction of 0.1% to AWEs wheat entitlement upon outturn. Dust and shrinkage are the same thing. The BHCs therefore apply two deductions to their outturn obligations for the one cause. Further, there is no evidence of dust volume provided. ABB charges a minimum cargo lift fee of $1.50 per tonne in the event that a vessel loads less than 15,000 tonnes at any one port. GrainCorp charges $3.50 per tonne where less than 5,000 tonnes is loaded and $1.50 per tonne where between 5,000 and 10,000 tonnes is loaded. These fees are not based upon additional costs incurred by the BHCs.

Example: ABB charges AWEs a fee of $2.50 per tonne for any wheat that is received into port from non-ABB up-country services. GrainCorp charges a similar fee of $1.50 per tonne. These fees are not based upon additional costs incurred by the BHCs, but merely act as a penalty (or disincentive) in the event that AWEs do not use certain BHCs' services.

Example: Despite GrainCorp charging AWEs $1.10 p/t for Pesticide Residue Free Grain, GrainCorp will not provide details as to where that stock is held. Further, GrainCorp excludes liability in the event that the grain is not free of such residues, unless negligence can be shown and in that case, GrainCorp limits its liability to commercially low levels.

Example: ABB charges four levels of administration fees ranging from $1,000 to $25,000. It is unclear what services these 'administration' fees are charged in respect of or whether these fees are based on the cost to the BHC of providing those services plus reasonable commercial margin.

Example: BHCs' storage and handling agreements allow BHCs to move AWEs' grain between sites without permission while requiring that AWEs bear the costs and delay associated with the unauthorised movement. An example where this has occurred is referred to in one of AGEA's Confidential Submissions.

Example: AWEs are forced to bear the risk on wheat specifications and phytosanitary certificates.

4. AGEA's response to the inadequacies of the undertakings

4.1 The proposed access undertakings do not meet the objective of ensuring BHCs will provide *"fair and transparent access"* to port terminal seasons and are inadequate for the following reasons.

Undertakings must contain price and non-price terms

4.2 "*Fair and transparent access*" means the proposed access undertakings must specify the prices and non-price terms on which access to port terminal services will be provided. The terms must also include the port protocols/rules which must be clear and capable of objective application.

"Port terminal services" must be clearly defined

4.3 The proposed access undertakings must clearly define the port terminal services to which access will be provided so that there is certainty as to the scope of the undertakings and the services to which access will be provided.

The scope of the undertakings should not be limited to services at the port

4.4 The scope of the proposed access undertakings should not be limited to services at the port terminal.

4.5 By excluding upcountry services from the proposed access undertaking, BHCs can restrict AWEs' access to port terminal services by frustrating the logistics of getting their product to port.

4.6 Port terminal services are only one part of the services necessary for access to bulk wheat export markets. Competition in bulk wheat export markets requires that BHCs provide access to *all* of the services provided by facilities which are upstream from and separate to port terminal facilities. It is artificial to try to compartmentalise port terminal services from the upstream services when such services are all provided by the same company and under the same contract. AGEA acknowledges that section 24 of the WEM Act is only directed at port terminal services. This fact should not be allowed to deflect the underlying commercial reality that both upstream and port terminal services are provided by the same entity or related entities.

4.7 At the time of making this submission, it is not clear to AGEA whether CBH proposes to exclude Grain Express from the terms of the access undertaking. If CBH seeks to exclude Grain Express from the access undertaking, then AGEA requests the opportunity to make further submissions on this issue.

The scope of the undertakings should not be limited to wheat

4.8 Without access to port terminal services, an accredited AWE cannot export wheat. BHCs effectively are able to negate the wheat export accreditation granted by Wheat Export Australia ("**WEA**") by either refusing or delaying access to port terminal services.

4.9 Limiting the scope of the proposed access undertakings to wheat has the potential to enable BHCs to restrict AWEs' access to port terminal services by exhausting the port terminal's capacity in favour of other grains.

Example: BHCs control the ability to accumulate stock at port. Historically, ABB has distorted accumulation of wheat in its port services, allowing it to reduce capacity at the port, by storing its own non-wheat commodities**.** The Confidential Submissions provide further examples where BHCs have refused or delayed in granting access to port terminal services.

The undertakings must ensure BHCs' decisions are transparent

4.10 Deregulation of the bulk wheat export market has meant that BHCs compete with their customers (by themselves or by related entities) in the bulk wheat export market. In the likely event of further industry consolidation and transfer of port terminal ownership, BHCs may also compete with their customers through merged entities, commercially associated entities or trading partners. In this Submission, the expression "Trading Divisions" is intended to apply to BHCs' related entities and any future merged entities, commercially associated entities or trading partners.

4.11 BHCs have an obvious conflict of interest. They have enormous potential and real incentive to exercise their monopoly power in the bulk handling services market to inhibit competition by discriminating in favour of their Trading Divisions and restricting access to services.

4.12 The proposed access undertakings do not provide transparency in relation to BHCs' management of shipping slots and accumulation at port. Unless the proposed access undertakings provide transparency in relation to BHCs' decisions, BHCs will be able to manipulate logistics, substitute vessels and/or vary the shipping stem to confer preferential treatment on themselves of their Trading Division.

Example: In 2009, CBH indicated that it would align the shipping stem with its freight program, leaving customers and commercial considerations subject to logistics management. CBH said they aimed *"to regulate bookings in its shipping stem or schedule so that monthly shipping requirements meet the capacity of the state's up-country transport network to bring grain to port"* (Dow Jones, 05/03/2009). The Confidential Submissions refer to other examples where discrimination against AWEs in the management (or manipulation) of the shipping stem has occurred. The position will be worse if the proposed access undertakings are accepted.

Example: AWEs are constantly charged for "surge capacity" by CBH and overtime by GrainCorp. This suggests BHCs transfer their stock during normal hours and AWEs' stock is moved after hours. Overtime charges also provide the potential for BHCs to amend the shipping program for their own trading groups' gain. This additional cost for so called "surge transportation" is levied against AWEs, yet no information is available about stock at port or stock movement to port. BHCs should provide AWEs with this information to allow AWEs to make decisions to minimise the cost impact on their own business and the business of their customers.

Example: The BHCs' current storage and handling agreements impose uncommercial monetary penalties and liability caps, effectively transferring the vast majority of risk to the users. The ACCC needs to know whether such penalties and liability caps will be applied to the trading and marketing entities associated with bulk handlers in the same way as they are applied to unrelated wheat exporting customers. It is not sufficient that AWEs merely have access to port terminal services and not be tied to using BHC upcountry services. It is necessary that access to port terminal services is provided to AWEs on a 'no less favourable' basis to the access provided by BHCs' Trading Divisions.

Example: GrainCorp's Initial Port Terminal Services Protocols provide that GrainCorp may accept or decline a Cargo Nomination Application based on confirmation that the exporter has *"contracted sufficient rail and/or transport to accumulate the grain tonnage."* This suggests that GrainCorp would be likely to discriminate in favour of applicants who use GrainCorp's rail services.

The undertakings must ensure equal access to information

4.13 There is a critical imbalance between the information available to BHCs as port operators and the information available to AWEs. BHCs control inventory movements, quality profile, transportation and capacity at ports and have within their control information relating to logistics of stock into port. BHCs know who is transporting stock into port, what stock is coming into port, how much stock is in the port and when and how much stock is due to

leave the port. BHCs could refuse to allow AWEs to accumulate stock on the basis that the port is full, but no-one would know if that is the case.

4.14 This imbalance in information is exacerbated in situations where, as is the case here, the BHCs provide upstream and downstream services. The result is that the BHCs possess a great deal of information about the trading activities of the AWEs (their competitors) and are consequently in a position to advantage the BHCs' related entities, or to disadvantage the AWEs. The undertakings do not ensure that AWEs obtain access to the same information that is available to BHCs.

4.15 AGEA disputes paragraphs 8.1 to 8.7 of GrainCorp's Submission, paragraphs 2.6 to 2.9 of ABB's Submissions and paragraph 4.9 of CBH's Submission. Information about who is holding what grain in the BHCs' system is not available through ABARE, however, this is valuable information to the BHCs' Trading Divisions. If the information is publicly available and of no commercial value, as the BHCs suggest, they should have no difficulty in making all information available to the industry.

4.16 BHCs should be required to provide AWEs with timely information relating to:

(a) port capacity;

(b) stock on hand at port;

(c) daily receivals by grade;

(d) the accumulation programme at port;

(e) stock movements;

(f) allocation and changes to vessel loading slots;

(g) weight, quality and AQIS compliance;

(h) all other necessary information for AWEs to assess whether BHCs have met the performance criteria.

Minimum terms and conditions to be contained in the undertakings

4.17 The proposed access undertakings must contain minimum terms and conditions in relation to the provision of access to port terminal services. In particular, the terms and conditions should include:

(a) the prices for the services;

(b) clearly specified circumstances in which higher charges (e.g., overtime) may apply, subject to AWEs being given an option to unload in peak times and BHCs providing documentary proof that overtime charges were incurred and why they were necessary;

(c) certainty of term, so that the price and non-price terms are binding for the duration of the contract; it is inappropriate for the BHCs to be in a position to unilaterally alter the contractual terms;

(d) limited opportunity to vary price and non-price terms (for example, only in the event of a material adverse change with reference to the Council of Australian Government's Competition and Infrastructure Reform Agreement pricing principles, i.e. that pricing must be based on the cost to the BHCs of providing the service, plus a reasonable commercial margin), and only if both parties agree to the changes, provided also that the varied price or non-price terms will only take effect after a minimum 6 months' notice to AWEs;

(e) provisions which require the terms and conditions to be applied to wheat of specific grades or quality specifications which require segregation from other parcels throughout the port terminal facility;

(f) the specification of minimum performance criteria which BHCs are required to meet including:

(i) acceptance of vessel nominations regardless of stock entitlements within 24 hours;

(ii) changes to vessel slots and cargo accumulation;

(iii) unloading of trains/road transport within six hours;

(iv) load rates and time to count as per Austwheat 2008 charterparty (as amended from time to time);

(v) benchmark criteria for grading, fumigation, weighing, compliance with AQIS requirements, loading to receival standards. The grain loaded to the ship should be of a standard not less than that delivered to the port terminal by or on behalf of the exporter. The terminal should provide running samples and/or analysis during loading so that any deviation from the required quality is known by the exporter prior to the completion of loading.

(vi) settling despatch demurrage at the applicable vessel rate.

(g) an effective right for AWEs to recover their loss and damage against BHCs if BHCs breach the terms and conditions of the port terminal services;

(h) a shipping protocol which provides:

(i) that if AWEs pay the vessel nomination fee and are allocated an estimated load date, BHCs must provide the necessary services to allow AWEs to load the vessel (within a three day spread), failing which BHCs will be liable for any loss or damage AWEs may suffer;

(ii) transparency as how the BHCs accept vessel nominations and provided vessel slots;

(iii) mutual rights to terminate on the grounds of force majeure;

(iv) a dispute resolution mechanism whereby disputes may be referred to an independent 'umpire' for a binding and timely decision; in order to be effective, this will require decisions to be made within 24 hours of one party notifying the other of a dispute;

(i) an obligation on BHCs to provide AWEs with information relating to weight, quality and AQIS compliance and all other necessary information to assess whether BHCs have met the performance criteria within 24 hours of the information being available;

(j) an obligation on BHCs to allow AWEs' superintendent (or independent third person nominated by AWEs) access to the port to sample AWEs' wheat and inspect the loading of AWEs' stock onto vessels;

(k) an obligation on BHCs to provide AWEs with daily updates on:

(i) stock on hand at port;

(ii) daily receivals by grade into port;

(iii) the port's capacity;

(iv) wheat accumulation;

(v) unloading from upcountry transporters into port;

(vi) stock movements;

(l) an obligation on BHCs to take running samples (for testing in relation to quality and specifications) as the grain is loaded onboard vessels;

(m) an obligation on BHCs to notify AWEs promptly if there is a problem or BHCs expect that they might not be able to perform their obligations;

(n) a complaints procedure to an independent body;

(o) a requirement that BHCs engage an independent auditor to undertake an audit of BHCs' compliance with the undertaking at such times as the ACCC may reasonably direct, but at least once in any 12 month period;

(p) an entitlement on the part of the ACCC to investigate any matters arising out of or relating to any complaints or the audit;

(q) a dispute resolution mechanism which allows for the speedy resolution of disputes, including a mechanism to refer any disputes under the undertaking to arbitration by the ACCC.

4.18 **The proposed access undertakings must not allow BHCs to**:

(a) charge prices which are unreasonable having regard to the actual cost to BHCs of providing the particular services, plus a reasonable commercial margin;

(b) determine shipping slot allocations with reference to stock entitlement;

(c) impose fees and charges by way of liquidated damages which are not a genuine pre-estimate of BHC's damage;

(d) swap grain held at site and require AWEs to bear the consequences of this; (an example where this has occurred is referred to in one of AGEA's Confidential Submissions);

(e) adjust stocks across sites or nominate sites without prior agreement with AWEs and without compensating AWEs for freight, as occurs under GrainCorp and CBH's standard service agreements;

(f) confer preferential treatment on themselves, their Trading Divisions or their associated entities;

(g) discriminate in favour of upstream or downstream operations;

(h) require AWEs to use BHCs' road or rail services, for example under Grain Express;

(i) charge receival, handling and shipping fees which are more expensive if wheat is delivered into port from third party storage facilities as opposed to the BHCs' upcountry facilities;

(j) attempt to pass on to AWEs the risk and responsibility for the actions or omissions of the BHCs' rail provider; see GrainCorp's standard services agreement for the period 1 October 2008 to 30 September 2009 at clause 2.31;

(k) cap or disclaim liability, except where the cap or disclaimer is in accordance with usual commercial practice and is not disproportionate to AWE's risk and investment.

5. Objectives

5.1 The "Objectives" clause (ABB/GrainCorp clause 1.2; [CBH clause 2])[6] is a mere statement of intent. The Objectives are stated as a conclusion, as though the undertakings do in fact meet the stated objectives, when that is not the case.

5.2 The Objectives clause defines the objectives of the proposed access undertakings using nebulous concepts like *"operating consistently with"*, "*reaching an appropriate balance"*, *"fair and reasonable return ... commensurate with ... commercial risk"*, *"the interest of the public"* and so on. There is no tangible basis upon which to assess actual compliance.

5.3 The Objectives clause highlights the BHCs' inevitable conflict of interest and may be used to condone discriminatory behaviour by BHCs. One of the stated objectives of the proposed access undertakings is *"reaching an appropriate balance"*, whatever that means, between various competing factors including the BHCs' own interests (such as their *"legitimate business interests"*, *"recover of all [their] reasonable costs"* and obtaining *" a fair and reasonable return on the Port Operators' investment"*).

5.4 This point is amply demonstrated by the link between:

(a) ABB/GrainCorp clause 5.4(a)(ii)(C) [CBH clause 6.4(a)(ii)(C)] which allows BHCs to discriminate on price and non-price terms where such different terms are consistent with the objectives of the undertaking; and

(b) ABB/GrainCorp clause 1.2(e)(i)(A) and (D) [CBH clause 2(e)(i)(A) and (D)] which, in effect, provide that one of the objectives of the undertaking is to reach an appropriate balance between *"the legitimate business interests of"* the BHCs including *"recovery of all reasonable costs"* and BHCs' ability "*to meet its own or its Trading Divisions' reasonably anticipated requirements for Port Terminal Services*".

5.5 The Objectives clause also makes the undertaking circular and biased in favour of BHCs by allowing BHCs to make decisions which are consistent with the objectives of the undertaking, when the objectives of the undertakings provide the opportunity for BHCs to favour their own interests.

[6] ABB and GrainCorp's proposed access undertakings are almost identical. References in this Submission to clauses of ABB's and GrainCorp's undertakings is made by referring to the clauses of ABB's and GrainCorp's proposed access undertakings together, where applicable (i.e. ABB/GrainCorp clause 1.2), followed by a reference in square brackets to the corresponding clause of CBH's proposed access undertaking (ie. [CBH clause 2].

6. Structure

6.1 The proposed structure of the undertakings is that the undertakings will contain "General Terms" that apply to "Port Terminal Services" and specific "Port Schedules" that include any specific terms and conditions relevant to a particular "Port Terminal Facility".

6.2 The appropriateness of this structure is impossible to assess because the proposed access undertakings do not contain or refer to the prices or terms and conditions on which access to the port terminal services will be provided. Therefore, it is impossible to say whether specific terms and conditions relating to a particular Port Facility should be permitted to override General Terms.

6.3 On a more general level, it is inappropriate for a potential applicant or a user of port terminal services to have to assess whether there is any inconsistency and which specific terms override the general terms.

6.4 The proposed structure of the access undertakings is premised on the assertion that the "Port Terminal Facilities" are geographically separate and have different physical and operating characteristics and modes of operation (see ABB/GrainCorp clause 2.1(a) [CBH clause 3.1(a)]). However, the proposed access undertakings do not address the alleged differences, nor do the BHCs' Submissions.

6.5 ABB/GrainCorp clause 2.3 [CBH clause 3.3], in effect, provides that where the performance of an obligation under the undertaking requires a "*Related Body Corporate*" to take some action or refrain from taking some action, "*the Port Operator must use reasonable endeavours to procure that Related Body Corporate to take that action or refrain from taking that action.*" This clause is unsatisfactory insofar as it enables the BHCs or their related entities to avoid their obligations under the proposed access undertaking. If a related entity is required to take or refrain from taking some action under the proposed access undertaking, the related entity should be a party to the undertaking or the BHCs should be obliged to procure the related entity to take or refrain from taking action. A "reasonable endeavours" obligation is not sufficient. There should also be an obligation for the BHCs to indemnify any party that suffers loss or damage as a result of the breach.

7. Term and variation

7.1 The proposed two year term of ABB's and GrainCorp's undertaking (and the three year term of CBH's undertaking) is unacceptable to AWEs and unlikely to promote efficient investment. The wheat export supply chain is highly capital intensive. Investment in capital is a long-term decision. In order to promote efficient investment, AWEs need the comfort of knowing that their investment is protected by guaranteed access to port terminal services for at least five years.

7.2 As presently drafted, the circumstances in which the BHCs may seek to vary the access undertakings are unnecessarily broader than the TPA. The provider of an access undertaking is adequately protected by section 44ZZA(7) of the TPA which provides that the provider of an access undertaking may withdraw or vary the undertaking at any time, but only with the consent of the ACCC. It is not appropriate for the undertaking to specify the circumstances in which the ACCC may (or may not) consent to a variation of an access undertaking as this may fetter the ACCC's statutory discretion.

7.3 ABB/GrainCorp clause 3.4(a) [CBH clause 4.4(a)] provides, in effect, that the BHCs may seek the approval of the ACCC to vary the undertaking by removing the Port Terminal Service provided at a particular Port if the Port Terminal is disposed of to a person who is not a Related Body Corporate of the BHCs and the BHCs cease to operate or control the Port Terminal Facilities at that Port Terminal. The purpose of the WEM Act is to ensure access to port terminal services. As is evident from the proposed Viterra-ABB merger, there is likely to be industry consolidation and transfer of port terminal ownership. Any disposal of a port terminal service that is the subject of an access undertaking should be strictly on terms that access to those services continues.

7.4 In terms of any extension of the access undertakings, there is presently a mismatch between the undertakings (ABB/GrainCorp clause 3.6(a) [CBH clause 4.6(a)] requires three months' notice of intention to submit a new undertaking) and section 44ZZBC(1) of the TPA (which gives the ACCC six months to consider an access undertaking application). For consistency, BHCs should be required to submit a statement to the ACCC outlining whether it intends to submit a new undertaking to the ACCC for its consideration at least six months before the expiry of the undertaking and to submit a new undertaking not less than six months before the expiry of the undertaking.

8. Scope

8.1 ABB/GrainCorp Clause 4 [CBH clause 5] of the proposed access undertakings (and associated definitions) identifies the scope of operation of the undertakings and defines the "port terminal services" to which access will be provided in accordance with the undertaking.

8.2 The term "port terminal services" must be clearly defined so that there is certainty as to the services to which access will be provided.

8.3 The "port terminal services" to which access will be provided must include all services provided by means of the port terminal facilities to which the undertaking applies, as well as the use of the port terminal facilities.[7] The definition should identify the geographic parameters of the port terminal facilities and include all services provided within that geographic area.

8.4 For the avoidance of doubt:

(a) the geographic boundaries of the port terminal facility should at least begin at the point where the wheat arrives and include every other point until the wheat is loaded into the ship's hold;

(b) the port terminal services covered by the undertaking must include:

(i) daily intake to port by grade;

(ii) information of stock on hand at port;

(iii) port capacity;

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

(v) managing port-related stock swaps;

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

(vii) unloading;

(viii) storage;

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

(x) segregating/blending as directed by AWE;

[7] See the definition of "port terminal service" in the WEM Act.

(xi) accumulating;

(xii) elevating to ship;

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

(xiv) loading, stowing and trimming;

(xv) access by independent superintendent/surveyor;

(xvi) documentation evidencing the process:

(A) weight

(B) quality

(C) AQIS compliance

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

(xviii) notifying problems and respond to requests from marketers on a timely basis e.g. daily report on quality loaded

8.5 Some ports have offsite bunkers or other infrastructure which contributes to storage capacity provided at the port terminal facilities. Storage facilities outside the geographic boundaries of the port terminal facility are so closely connected to the services provided at the port terminal facilities that they should also be covered by the access undertakings. For example, the ports of Esperance and Thevenard both have their bunkering supplies stored outside the geographical parameters of the port.

8.6 The definitions in the WEM Act and TPA are expansive, not restrictive. In contrast, the definition of "port terminal services" under the proposed access undertakings is narrow and restrictive. The TPA defines "*service*" as a service provided by means of a facility, which must include any of the above services where they take place within the confines of the port terminal facility.

8.7 The restrictive nature of the definitions in the proposed access undertakings is effected in two ways. The first, in ABB/GrainCorp clause 4.1 [CBH clause 5.1], is by defining "*Port Terminal Services*" to mean the services described in the Port Schedule, which contains its own definition of Port Terminal Services. The second is by improperly seeking to exclude various services or matters from the scope of the undertaking. CBH seeks to exclude "*fumigation of grain as a preventative measure...*" [CBH clause 5.4(b)(iii)]. CBH cannot exclude fumigation services where such services are provided within the geographic confines of a port terminal facility.

8.8 The definitions in the proposed access undertakings are also confusing. It is unclear whether the reference in ABB/GrainCorp clause 4.3 [CBH clause 5.3] to the services that *"may"* be included would exclude *"intake and receival services"*, which are clearly caught by the definition in the WEM Act. ABB/GrainCorp clause 4.4 [CBH clause 5.4] compounds the confusion by seeking to exclude *"shipping services (at port)"* and *"intake and receival services"*, whereas the former would seem to be caught by, and the latter is expressly within the definition in the WEM Act.

8.9 In light of the WEM Act, BHCs cannot properly exclude "*intake and receival services*". Nor can they properly exclude "*services at port terminals*" and "*shipping services*".

8.10 In relation to Schedule 2 of GrainCorp's proposed access undertaking and its proposed definition of "standard port terminal services", AGEA makes the following comments:

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

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

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

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

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

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

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

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

8.11 It is interesting to note that on page 23 of ABB's Submission, ABB states that "*Port Terminal Services are essentially a logistical function which takes place after the competition to accumulate the grain has been played out*".[8] This is an acknowledgement that restricting the access undertakings to the port terminal services will not achieve the objects of the WEM Act. It is too little, too late.

8.12 In 2008, the ACCC decided not to oppose an exclusive dealing notification lodged by CBH in relation to grain transport, storage and handling arrangements in Western Australia (known as 'Grain Express'). Under Grain Express, CBH offered to supply grain storage and handling services on condition that growers and marketers of grain acquire grain supply coordination services from CBH and transport services from CBH whilst their grain remained in CBH's custody. In its Submission, CBH stated that *"CBH is the only Supply Chain participant in possession of accurate information concerning all grain in the Supply Chain"* (Clause 1.6). It is clear that CBH does not regard port terminal services as separate from its other bulk handling services and illustrates the significance of the close link between port terminal services and upstream services.

[8] See also paragraph 8.8 of GrainCorp's Submission and p.29 of CBH's Submission.

9. Price and non-price terms

9.1 ABB and GrainCorp have not provided the price and non-price terms on which access will be provided to the port terminal services. CBH has provided draft standard terms and conditions, but not prices. CBH's draft terms and conditions are deficient as they are not binding, do not address the matters referred to in paragraph 4.16 above and do not ensure that there is fair and transparent access to port terminal services.

9.2 The proposed access undertakings contemplate that the price and non-price terms (which are meant to apply from 30 September of each year, for 12 months) can be:

(a) unilaterally imposed by the bulk handlers as late as 15 business days after the commencement of the undertaking, when the bulk handlers' storage and handling contracts are also due to commence (see ABB/GrainCrop clause 5.1(c) [CBH clause 6.1(c)] which give BHCs up to 15 business days to comply); and

(b) unilaterally varied by BHCs without negotiation with its customers (ABB/GrainCorp clause 5.6(a) [CBH clause 6.6(a)]).[9]

9.3 BHCs have submitted the proposed access undertakings in order to comply with their obligations under the WEM Act. The terms and conditions of access to port terminal facilities must comply with and, if not incorporated in the undertaking, be subordinate to the proposed access undertaking where necessary. It would be contrary to the WEM Act for the proposed access undertaking to be read subject to a Port Operator's unilaterally imposed or unilaterally varied terms and conditions.

9.4 It must be assumed that BHCs will take the 15 business days after the commencement of the undertaking to provide the price and non-price terms because there is presently no penalty if BHCs fail to provide the terms before the undertaking is to commence and therefore there is no incentive to do so. AWEs enter into forward sale contracts well before that time, with the export season beginning in earnest about the time that both the new storage and handling contracts and access undertakings are proposed to commence.

9.5 The consequences of providing the price and non-price terms 15 business days after they are due to commence will be that:

(a) AWEs will feel compelled to enter into contracts with BHCs without a proper opportunity to negotiate;

[9] CBH's right to vary the price and non-price terms is subject to a limitation that such variations are consistent with clause 6.4 and the objectives in clause 2, which is meaningless.

(b) AWEs will have to wait until they have negotiated access to the Port Terminal Services, before starting to look for export sales;

(c) grain marketers would be prevented from entering into wheat export sales contracts until the terms and conditions and pricing of port terminal services are provided, thus reducing the level of competition and the overall efficiency of the bulk wheat export market;

(d) alternatively to (b), AWEs must decide whether to take the commercial risk of entering into export sales contracts before knowing whether they will be able to perform the contracts, as BHCs may block access to port terminal services;

(e) further to (d), grain marketers could be forced to enter into export wheat sales contracts without knowing the price or level of service available at port (such as when vessels will be called to berth and the wheat load rate, exposing AWEs to extensive demurrage claims and possibly rendering them in default of wheat sales contracts) and the associated key bulk handling services which need to be priced into those contracts.

9.6 Price and non-price terms must be published in advance of the commencement of the undertakings. Users need to know the terms and conditions on which the services will be provided to assess the reliability of the service, plan, budget and generally compete in the market. AWEs need to be able to make long term decisions and require certainty in their contracts in order to do so. Examples include employment and investment levels, business strategies and fostering long-term customer relationships by researching the needs of customers and how to meet their required blends of wheat. Once an Australian exporter loses a market, it is very difficult to win that trade back. Price and non-price terms must operate for a minimum 12 month period to achieve these objectives.

9.7 The need for timely publication of price and non-price terms is recognised in the case of Victorian ports which are required to publish reference tariff schedules for prescribed services by the end of May each year for application for the financial year commencing 1 July of that year.[10]

9.8 BHCs should not be able to vary price and non-price terms except in clearly defined circumstances (such as a material adverse change) and provided both parties agree to the proposed changes, and then the implementation of the amended terms should only take effect after 6 months' notice, to give AWEs time to adjust.

[10] Essential Services Commission, Review of Victorian Ports Regulation, Draft Report, April 2009, p. 29.

9.9 It is to be noted that in 2008, the Victorian Essential Services Commission rejected access undertakings submitted by BHCs on the basis that the proposed terms and conditions failed to provide adequate non-discriminatory access to grain exporters. The ACCC's review of the proposed access undertakings would be assisted if the ACCC has the opportunity to assess whether the proposed terms and conditions upon which access will be provided are substantially the same as those previously rejected by the Victorian Essential Services Commission.

10. Non-discriminatory access

10.1 ABB/GrainCorp at clause 5 [CBH clause 6.4] purport to deal with "non-discriminatory access", whereas they in fact provide justification for discrimination.

10.2 ABB/GrainCorp clause 5.4 [CBH clause 6.4] gives BHCs complete discretion to decide whether discrimination is consistent with the objectives of the undertaking and therefore justified. The objectives of the undertaking include reaching an appropriate balance between factors including BHCs' own *"legitimate business interests"*, *"recovery of all [of their] reasonable costs"* and their "*ability to meet [their] own or [their] Trading Divisions' reasonably anticipated requirements for Port Terminal Services*". BHCs' conflict of interest would inevitably result in BHCs deciding to discriminate in its price and non-price terms in favour of its own interests or its Trading Divisions.

10.3 ABB/GrainCorp at clause 5.4(b) offer no protection to potential applicants and port users because it would be impossible to prove a subjective requirement that the discrimination was "*for the purpose of substantially damaging a competitor or conferring upon the Port Operator or its Trading Division any unfair competitive advantage*".

10.4 ABB/GrainCorp at clause 5.5 [CBH clause 6.5] provide a non-exhaustive list of factors justifying discrimination on the price and non-price terms on which access to port terminal services will be provided. The factors set out in clause 5.5/6.5 lack certainty and allow BHCs to favour their own interests.

(a) ABB/GrainCorp at clause 5.5(a) [CBH clause 6.5(b)] refer to BHCs' "*legitimate business interests and investment*" and provides a self-serving justification to adjust price and non-price terms in favour of its own interests;

(b) ABB/GrainCorp at clause 5.5(d) [CBH clause 6.5(e)] refer to "*the interests of all person which have rights to use the Port Terminal*", but there is no obligation for all rights to be afforded equal weight;

(c) ABB/GrainCorp at clause 5.5(f) refer to "*the economically efficient operation of the Port Terminal Services, the Port Terminal Facilities and the Port Terminal*", but it is unclear what this means: it may be impossible to show that an act of discrimination made a difference to the "*economically efficient operation of the Port Terminal Services"*;

(d) ABB/GrainCorp at clause 5.5(k) [CBH clause 6.5(k)] refer to "*available Port Terminal capacity, including receival, handling, storage and cargo accumulation capacity*": in most cases, BHCs control all of these elements and BHCs should not be entitled to discriminate on the occurrence of elements that it controls;

(e) ABB/GrainCorp at clause 5.5(p) [CBH clause 6.5(p)] refer to "*differences in modes of receival, storage or outturn including different transport modes to receive Bulk Wheat and different ship configuration*", which suggests that discrimination may occur in the event that non-BHC services are used;

(f) ABB/GrainCorp at clause 5.5(r) [CBH clause 6.5(r)] refer to "*minimisation of demurrage at the port over a given period*": this clause suggests that discrimination and the calling of vessels to berth out of order might be permitted according to which vessel has the highest demurrage rate. It is unclear how this clause would operate because demurrage rates ordinarily are confidential between the parties to the vessel charterparty and BHCs should not be privy to vessel demurrage rates. In any event, a AWE's ability to negotiate a low demurrage should not result in that AWE being penalised by having another vessel being given priority at berthing, because it has a higher demurrage rate;

(g) ABB at clause 5.5(v) refers to "*existing industry practices*": what constitutes industry practice to ABB may be very limited and self-serving given its dominant position in South Australia.

10.5 Finally, to ensure BHCs comply, and have an incentive to comply, with their obligations, the undertakings must also contain a complaints and audit procedure which:

(a) allows complaints in relation to actual or suspected breaches of the undertaking to be made to an independent person who must investigate the complaint and report to the ACCC on the outcome of the investigation;

(b) requires BHCs to engage an independent auditor to undertake an audit of BHCs compliance with the undertaking at such times as the ACCC may reasonably direct, but at least once in any 12 month period;

(c) allows the ACCC to investigate any matters arising out of or relating to complaints or the audit.

11. Negotiating for access

11.1 The BHCs are monopoly providers of bulk handling services, including port terminal services, which are essential services for AWEs. AWEs do not have a realistic alternative supplier of port terminal services. In reality, customers have little, if any, bargaining power. The imbalance in market power has resulted in BHCs refusing to negotiate, imposing unfair terms and prices and discriminating against AWEs who did not accept BHCs' standard terms and conditions**.**

11.2 This obvious imbalance in bargaining power is exacerbated by the current form of the undertaking which does not provide a genuine framework for negotiations because:

(a) BHCs are not required to negotiate in good faith and reach agreement on the terms of access;

(b) the practical effect of offering terms and conditions at the eleventh hour is that AWEs know that if they do not execute the agreements, they will be denied access to bulk handling services;

(c) the application process and timeframe for conducting negotiations is slow and unwieldy;

(d) the dispute resolution mechanism does not provide for the speedy resolution of disputes (see paragraph 13 below);

(e) BHCs are allowed to "*reserve the right to negotiate*", "*refuse to negotiate"* and to "*cease*" negotiations. Contrary to the WEM Act, BHCs have the opportunity to restrict access to port terminal services by reserving to themselves the right to refuse to negotiate with an applicant who is or has in the previous two years been in *"Material Default"* of **any** agreement with BHCs (see ABB/GrainCorp clause 6.4b(iv)(B) [CBH clause 7.4(b)(iv)(B)]).

11.3 BHCs may publish its terms and conditions as little as one day before or up to 15 business days after the undertakings take effect. ABB/GrainCorp clause 6.5(b)(i) [CBH clause 7.5(b)(i)] provides that upon receipt of the access application, BHCs have 5 business days to acknowledge receipt or alternatively to require additional information or clarification of information included in the access application. There is no limitation on what additional information may be requested. Upon being satisfied of any additional information requested, BHCs have a further 5 business days to acknowledge receipt of a completed access application and negotiations will commence after that acknowledgement. At this point, it will likely be mid-October.

The wheat season runs from 1 October to 30 September of each year. Negotiations for forward sales contracts begin well before this period. Therefore, AWEs must decide whether to take the commercial risk of entering into export sales contracts before knowing whether they will be able to perform the contracts, as BHCs may block access to port terminal services. Alternatively, the AWEs will have to wait until it has negotiated access to the Port Terminal Services, before starting to look for export sales.

11.4 BHCs require notification of a vessel's nomination 21 – 28 days before the vessel's estimated time of arrival. This causes anomalies as to how AWEs are to attempt to export wheat, when ABB will not accept a vessel nomination until after there is an executed access agreement. If BHCs accept a vessel nomination before there is an executed access agreement, AWEs will be at the mercy of BHCs. AWEs will practically have to accept any terms that are offered, otherwise AWEs may be exposed to claims of breach of sales contract and substantial damages associated with chartering a ship that will not be able to carry any cargo.

11.5 Competition in the bulk wheat export market requires fair and transparent access to port terminal services to *all* accredited AWEs. An accredited AWE must comply with WEA's stringent accreditation scheme. Among other things, WEA must have regard to the "*financial resources available to the company*" (s.13(1)(c)(i) of the WEM Act). It is unnecessary for BHCs to require AWEs to satisfy additional "Prudential Requirements" when they have already satisfied WEA's requirements in that regard under the WEM Act (see ABB/GrainCorp clause 6.4(b)(iv) [CBH clause 7.4(b)(iv)] and compare section 13(1) of the WEM Act).

11.6 ABB/GrainCorp clause 6.2 [CBH clause 7.2] of the proposed access undertaking does not protect a AWEs' confidential information. In particular:

(a) the obligation under clause 6.2 / 7.2 only applies to and during the negotiation process, after which time the obligation to comply with clause 6.2 / 7.2 ends (see ABB/GrainCorp clauses 6.2 and 6.3(b) [CBH clauses 7.2 and 7.3(b)]);

(b) clause 6.2 [clause 7.2] permits information to be disclosed to the extent necessary for the provision of advice from legal advisers, financiers, accountants or other consultants. The only situation where disclosure of confidential information should be permitted is where such disclosure is required by law. In any event, there is no obligation on third parties to also maintain confidentiality. The obligation on the third parties only extend to where they have a "*legal obligation not to disclose*".

To be effective, the contractual obligation must be extended to cover the third parties. Further there is no requirement for the BHCs to indemnify for any loss and damage suffered a AWE as a result of the confidentiality obligation being breached. There should also be an obligation upon the BHCs to notify the relevant AWE of any event that has or could likely result in a breach of the confidentiality obligation. This would be along the same lines as the notification obligation under section 17 of WEA Act.

12. Liability terms and offering standard terms to Applicants

12.1 AGEA accepts that offering standard terms to applicants for access is appropriate. However, reference prices and standard terms must be published by at least 1 September (the wheat season commences on 1 October of each year). Further, there must be a proper framework which allows good faith negotiations on terms of access.

12.2 BHCs should not be allowed to cap their liability, exclude consequential loss claims or exclude liability unless caused by negligence (gross or otherwise) or wilful default.[11]

12.3 In the draft terminal services agreement provided with its submission, at clause 13, CBH seeks to:

(a) exclude all warranties not provided in the agreement and to exclude, to the maximum extent permitted by law, all other conditions implied by custom, general law or statute;

(b) exclude all liability unless caused by gross negligence or wilful default;

(c) cap its total liability, in the event of gross negligence or wilful default, to $100,000 per event and to a maximum aggregate of $250,000 for the 12 month period over which the Access Agreement runs; and

(d) exclude consequential loss claims.

[11] In ABB's 2008/2009 storage and handling agreement, ABB:

(a) excluded all warranties not provided in the agreement and,, to the maximum extent permitted by law, excluded all other conditions implied by custom, general law or statute (cl.21.1);

(b) excluded all liability for any damage, destruction or contamination by ABB, unless caused by gross negligence or wilful default (cl.21.4);

(c) capped its total liability to $250,000 per event in the event of gross negligence or wilful default (cl.21.5);

(d) capped its liability for accidental loss or damage to the grain is limited to the AWE's proportion of insurance proceeds (cl.21.6); and

(e) excluded consequential loss claims (cl.21.7(i).

GrainCorp's 2008/2009 storage and handling agreement excludes loss unless caused by negligence and excludes consequential loss claims.

13. Dispute resolution

13.1 As the negotiation of access agreements is extremely time sensitive, there must be an effective mechanism for the speedy resolution of disputes. The dispute resolution mechanism under the undertakings is totally lacking in that regard.

13.2 For general disputes, the dispute resolution procedure must provide that:

(a) either party may notify the other party of a dispute;

(b) representatives of the parties must meet within 48 hours and endeavour to resolve the dispute;

(c) if the dispute cannot be resolved, either party may give notice to the ACCC that a dispute exists under the undertaking and may refer the dispute to arbitration, which is to be conducted by the ACCC;

(d) the arbitration must be conducted in accordance with arbitration rules to be specified in the undertaking, which must include an obligation to keep confidential any information disclosed during the arbitration;

(e) the arbitration must be heard and concluded within 14 days of the notice of referral to the ACCC and the ACCC must endeavour to make a determination within 14 days;

(f) BHCs must take reasonable steps to mitigate loss, including continuing to provide port terminal services during, and pending the determination of, any dispute.

13.3 There are certain disputes such as substitution of vessels in shipping stems or any dispute affecting the timing of a vessel's loading that require a resolution within 24 hours (see paragraph 14.9 below). For these types of disputes, there must be a clear dispute resolution mechanism whereby disputes may be referred to an independent umpire for a binding decision within 24 hours.

14. Port Protocols/Rules

14.1 The Port Protocols do not provide certainty or transparency in relation to the management and operation of BHCs' port terminals and shipping stem. The Port Protocols provide the BHCs with wide discretions and lack objective criteria for the allocation of shipping slots.

14.2 BHCs' conflict of interest make it inevitable that BHCs will give preferential treatment to their Trading Divisions and make operational decisions that allow them to maximise profits, to the detriment of other users of the port and competition in the bulk wheat export market. To mitigate against the risks of discrimination and decisions that restrict access to the services, a clearly defined shipping protocol and transparency in relation to BHCs' decision-making is required.

14.3 The promotion of competition in the bulk wheat export market requires that port users have the certainty of knowing that if they book a spot for a vessel on a particular day, the service will be delivered or they will be adequately compensated for the BHCs' failure to deliver the service. Pre-payment of the booking slot protects the interests of the BHCs, who will have been paid the requested charge for the service at the amount for which the service has been already priced. At present, the interests of AWEs and the risks incurred by them are not protected because BHCs have the discretion to change booking slots and do not incur any liability if they fail to deliver. AWEs cannot transport wheat "ex-farm to port". GrainExpress limits their ability to do so in Western Australia. Even if transport and storage upcountry is available, there is no certainty as to whether a shipping slot will be available when the wheat reaches the port.

14.4 AWE's ability to export stock should not be subject to BHCs being satisfied that AWEs have stock available because BHCs control the ability of AWEs to get stock to port and accumulation. BHCs can allow their stock to sit in port, taking up accumulation space from other AWEs. BHCs therefore have the ability to manipulate the logistics of getting stock to port to serve their own interests (or the interests of their Trading Division). In any event, AWEs enter into forward sale contracts. Therefore, an AWE may have legal title to another AWE's stock, but this would not be apparent from BHCs' system, and nor should it be.

14.5 Reordering of the load order of vessels in the shipping stem should only be allowed in certain, specified circumstances and with full transparency in the decision-making process. Otherwise, BHCs may assert that delays were encountered in getting stock to port or insufficient stock was accumulated, but AWEs would never know if that was the case.

14.6 At present, there is no transparency in relation to the shipping stems. AGEA is aware of a number of examples where shipping stems were altered to accommodate certain vessels, see the Confidential Submissions. This brings into question the transparency of the shipping stem and the ability of the BHCs to manipulate the shipping stem to their commercial advantage, contrary to the objectives and obligations under the WEM Act and the proposed access undertakings.

14.7 Transparency should ensure that port protocols are applied to BHCs' Trading Divisions and AWEs on a 'no less favourable' basis. This does not occur at present. When GrainCorp transports wheat from its upcountry sites, the quantity and quality of the wheat is tested on site and is not tested again when it reaches the port. In comparison, wheat transported to GrainCorp's port terminal facilities by third parties is graded and tested at port. In both cases, the wheat is stored in commingled stacks at the port. However, if the wheat transported by GrainCorp deteriorates before it arrives at port, this is not detected and all users are disadvantaged.

14.8 BHCs have a vested interest in prioritising Trading Divisions over the interests of AWEs. There must be complete transparency in relation to capacity allocation or an independent person should be appointed to make decisions about capacity allocation. An option would be a process where capacity is allocated by way of an auction process whereby AWEs can bid for capacity by port, for any month at par (ie. the export out-loading charge). The initial tender should take place as early as possible, with the full annual capacity put up for tender. In each tender, AWEs can bid for a maximum of 25% capacity in each port. The tender should be operated by an independent third party (eg PriceWaterhouseCoopers, or similar). Tenders for under-subscribed capacity could then be held at intervals to be determined. Where a tender is oversubscribed, the capacity should be issued on a pro-rated basis.

14.9 CBH's proposed 2009/2010 Shipping Capacity Access Allocations policy contains two auction methodologies for the allocation of shipping capacity. AGEA's position regarding the auction model contained in CBH's proposed access allocations policy is that it is labour intensive, time consuming and complicated. Furthermore, there is no proposed limit on capacity for any single party. The proposed auction model will not prevent related parties of CBH bidding up the auction and securing as many slots as required to the detriment of AWEs. AGEA's further comments on CBH's proposed 2009/2010 Shipping Capacity Access Allocations policy is set out in Schedule 4.

14.10 Where storage capacity at port is limited (ie. to 60 – 70 kmt or less), capacity should be allocated on the basis that a port user has access to storage facilities for a period of two weeks (or such other period as required or appropriate) to allow the user to accumulate and ship their vessel.

14.11 The logistics of moving stock to port and loading vessels is extremely time sensitive. Disputes in relation to substitution of vessels can have catastrophic consequences. If a dispute is not resolved within 24 hours, the opportunity to export stock may be lost because a slot may have been allocated to another party. The Port Protocols must contain a clear dispute resolution mechanism whereby disputes may be referred to an independent umpire for a binding decision to be made within 24 hours.

14.12 AGEA's comments on the ABB, GrainCorp and CBH Port Protocols are set out in Schedule 2 to 4 respectively.

15. Operational Decisions

15.1 The points made by AGEA in paragraph 14 above also apply to the clauses of the proposed access undertakings dealing with "Operational Decisions."

15.2 The BHCs' discretion to make Operational Decisions is too wide and subjective. AWEs need the certainty of knowing shipping slots will be available. The Port Protocols should clearly define the obligations to accept vessel nominations. If AWEs fail to get wheat to port by the load date, AWEs forfeit the booking fee and BHCs' interests are protected.

15.3 ABB clause 8.4(b) provides that in making "Operational Decisions", ABB must "*balance the conflicts of interests of users of the Port Terminals*". This clause does not provide any transparency or benchmarks to show that the Operational Decisions are made to ensure that fair access is provided to all AWEs.

15.4 ABB/GrainCorp clause 8.4(d)(i) [CBH clause 9.2(d)(i)] entitles BHCs to make Operational Decisions to give priority to vessels based on the "*lead time given between nomination and vessel ETA and likely availability of sufficient Bulk Wheat at the Port Terminal prior to vessel ETA*". BHCs control the movement and accumulation of wheat at port.

15.5 ABB/GrainCorp clause 8.4(d)(ii) [CBH clause 9.2(d)(ii)] provides opportunities for BHCs to restrict access to port terminal services and is vague and uncertain.

(a) In relation to ABB/GrainCorp clause 8.4(d)(ii)(A) [CBH clause 9.2(d)(ii)(A)], in the normal course of events, BHCs are not aware of the AWE's vessel demurrage rate. In any event, a AWE's ability to negotiate a low demurrage should not result in that AWE being penalised by having another vessel being given priority at berthing, because it has a higher demurrage rate.

(b) In relation to ABB/GrainCorp clause 8.4(d)(ii)(B) [CBH clause 9.2(d)(ii)(B)], as BHCs controls the movement and accumulation of wheat at port, it is within its means to show that the throughput of bulk wheat is maximised by loading its vessels in priority to other AWEs.

15.6 ABB/GrainCorp clause 8.4(d)(iii) [CBH clause 9.2(d)(iii)] provides BHCs with very broad entitlements to vary a cargo assembly plan or queuing order of a vessel. BHCs control the movement and accumulation of wheat at port facility (ABB/GrainCorp clause 8.4(d)(iii)(A) [CBH clause 9.2(d)(iii)(A)]). BHCs should not be entitled to vary a cargo assembly plan or queuing order as a result of vessel congestion (ABB/GrainCorp clause 8.4(d)(iii)(A) [CBH clause 9.2(d)(iii)(A)]).

16. Ring-fencing

16.1 The ring fencing rules are critical to a fair and transparent access regime. The rules in the drafts are inadequate. Examples where the ring-fencing rules have broken down are set out in the Confidential Submissions.

ABB/GrainCorp's ring fencing rules

16.2 ABB/GrainCorp undertake to not use or disclose "*Restricted Information*" other than for the purposes of "*providing access to Port Terminal Services in compliance with the terms of this Undertaking"*. The definition of "*Restricted Information*" is extremely narrow, falls well below the usual standards applied to such levels of commercially sensitive information and arguably protects only the information provided by a User in respect of an Intention Notice or Vessel Nomination Application until the date on which it is accepted by ABB/GrainCorp.

16.3 ABB/GrainCorp clause 3 prohibits ABB/GrainCorp from disclosing "*Restricted Information"* to its Trading Divisions or other entities involved in trading Bulk Wheat. The prohibition should apply to *any* disclosure to *any* entity.

16.4 ABB/GrainCorp clause 3(b) is inadequate as it arguably limits ABB/GrainCorp's obligation under clause 2(a) by incorporating a subjective element that entitles ABB/GrainCorp to access or use Restricted Information so long as it is not "*for the purpose of substantially damaging a competitor or conferring upon it or its related bodies corporate any unfair competitive advantage over a competitor in the market in bulk wheat*". Such purpose would be very difficult to prove.

16.5 Under ABB/GrainCorp clause 4(b), ABB/GrainCorp retain the sole discretion to pass on to "*any person*" information concerning grade, quality quantity, location or attributes of bulk wheat received by ABB/GrainCorp, provided that the information is aggregated. That the information is aggregated does not render it useless and, in fact, providing that information may confer an unfair advantage on the BHC to the detriment of the applicant or user. AWEs must give forward nomination of a vessel in order to load wheat. AWEs have a limited amount of time to transport wheat to port for accumulation. If BHCs' Trading Division is aware of this, they will immediately start to buy stock knowing the AWE might need it to load the vessel which is on its way. On occasions, BHCs have delayed or refused to supply freight to move stock that is owned by a AWE to port, so as to apply additional pressure on the AWE to buy stock from the BHC's Trading Division on unfavourable terms. Additionally information concerning warehouse stocks provide a lot of value to the BHCs Trading Divisions as it entitles them to assess the risks associated with additional sales programs.

16.6 GrainCorp's ring-fencing rules do not include an obligation to provide training to its officers, employees and agents who are involved in the provision of access to port terminal services (compare ABB clause 5(c)).

<u>CBH's ring fencing rules</u>

16.7 CBH clause 5 provides that CBH's Trading Business and Other Business Units must have separate work areas. AGEA understands that CBH's Trading Business and Other Business Units occupy different floors (one level apart) in the same building. The physical separation of work areas does not of itself protect the flow of confidential information. CBH has not explained any process it intends to implement to create or ensure Chinese Walls exist.

16.8 If the work areas are to be kept separate, no employees should be permitted access to the other businesses' work area. Qualifying the issue of access to permit such access for the alleged *"purpose of arm's length dealings"* allows the ring-fencing arrangement to breakdown.

16.9 CBH clause 6(a) permits Support Services Staff to be involved in the Operations Business and the Trading Business, provided such involvement is not "simultaneous". This is inadequate and it is not clear why it is limited to Support Services Staff. There must be a strict separation of all staff at all times. Further, no employee of the Trading Business or any employee of a previous Third Party Trader should be permitted to be employed with the Operations Business for at least 12 months after they cease employment with the Trading Business or a previous Third Party Trader (and vice versa).

16.10 Clause 6(c)(ii) allows the Operations Business to pass on to "any person" information concerning grade, quality quantity, location or attributes of bulk wheat received by CBH, provided that the information is aggregated. That the information is aggregated does not render it useless and, in fact, providing that information may confer an unfair advantage to the particular exporter to the detriment of the applicant or user. This clause entitles CBH to provide GrainPool with valuable information that is not available to AWE. For example, GrainPool will know what grain is stored and where throughout the CBH grain system, which will assist GrainPool to plan its sales contracts, and vessel requirements. Understanding what portion / grades of crop is sold / warehoused gives Grainpool significant advantage in planning sales programs and potential when setting bids for acquisition.

16.11 Clause 8(d) is vague and uncertain. It provides that "*Item 8(c)(ii) shall not apply to prohibit the Operations Business from disclosing Third Party Confidential Information amongst its employees, advisors and contractors on a need to know basis.*" It is unclear what is a "*need to know basis*" in this context.

16.12 The complaints handling procedure in clause 12 must provide for complaints to be made to an independent third party. CBH lacks the impartiality to conduct a proper and independent investigation into a complaint about its own potential breach of the ring fencing rules.

Australian Grains Export Association
29 May 2009

SCHEDULE 1

AUSTRALIAN GRAIN EXPORTERs ASSOCIATION'S RESPONSE TO THE ISSUES PAPER PUBLISHED BY THE AUSTRALIAN COMPETITION AND CONSUMER COMMISSION

A. Introduction

A1. The ACCC has raised the following Issues for Comment (p. 14 of the Issues Paper) in relation to the Australian wheat export market and port terminals:

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

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

(ii) *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?*

(iii) *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.*

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

A2. AGEA's response on these issues is more fully set out in paragraph 3 of AGEA's Submission. By way of summary, AGEA's position on these issues is as follows:

(i) AWEs have limited ability to physically move wheat between different ports at different locations around Australia, particularly between different States.

(ii) Moving wheat between different ports, particularly between States, is cost prohibitive.

(iii) Other factors which limit AWEs' ability to physically move wheat between different ports include differences in grain quality and characteristics, BHCs' quality specifications and BHC's shipping nomination and port protocols/rules.

(iv) Freight differentials, lack of efficient rail/road networks to alternate ports and added costs incurred by operating across two different bulk handling entities deter AWEs from contemplating alternate port movements.

(v) The likelihood of a new entrant establishing a new port terminal to compete with port operators is negligible given the cost and current geographical spread of port terminals servicing the grain belt.

(vi) Absent regulation, there are no factors which effectively constrain the BHCs from discriminating in favour of their own Trading Divisions.

(vii) To address these issues, among other things, the proposed access undertakings should include minimum terms and conditions in relation to the provision of access to port terminal services by BHCs and BHCs should be liable for losses (including demurrage) if they breach those terms and conditions.

B. Objectives

B1. The ACCC has raised the following Issues for Comment (p. 15 of the Issues Paper) in relation to the objectives of the undertakings:

(i) Are the objectives of the Undertaking appropriate and sufficiently certain and unambiguous?

(ii) Do the objectives accord with the terms of the Undertaking set out in subsequent clauses?

(iii) Is the reference to giving consideration to the 'reasonably anticipated requirements' of Port Operators appropriate?

B2. AGEA's response to these Issues is as follows:

(i) The objectives of the undertakings are not appropriate or sufficiently certain and unambiguous.

(ii) The objectives do not accord with the terms of the undertakings because, *inter alia*, the Undertakings do not provide an effective opportunity to negotiate access or an open, non-discriminatory process for obtaining access to port terminal services.

(iii) The reference to giving consideration to the 'reasonably anticipated requirements' of Port Operators is vague, lacks transparency and provides opportunity for BHCs to discriminate because the disparity between the information available to BHCs and that available to AWEs means that the 'reasonably anticipated requirements' of Port Operators cannot be objectively determined.

C. Structure

C1. The ACCC has raised the following Issues for Comment (p. 16 of the Issues Paper) in relation to the structure of the undertakings.

(i) 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?

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

(iii) Does the Undertaking sufficiently provide for any different physical or operating characteristics at each of the respective Ports/Port Terminals?

C2. AGEA's response to these Issues is as follows:

(i) It is impossible to assess the appropriateness of the General Terms prevailing over the Port Schedules in the absence of the terms and conditions.

(ii) As a matter of principle, that there is potential for inconsistency between competing terms is not compatible with clarity, certainty and transparency.

(iii) Clarity and certainty cannot be achieved if potential applicants or users are left to determine whether there is inconsistency and which specific terms and conditions override the general terms. AGEA's response on these issues is more fully set out in paragraph 6 of AGEA's Submission

D. Term and variation

D1. The ACCC has raised the following Issues for Comment (p. 17 of the Issues Paper) in relation to the term and variation of the undertakings:

(i) Is the proposed term of the Undertaking appropriate?

(ii) Does having different expiry dates for the CBH Undertaking and the GrainCorp and ABB Undertakings raise any issues?

(iii) 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?

(iv) Is it appropriate that the Undertaking applies only to new Access Agreements?

D2. AGEA's response on these issues is more fully set out in paragraph 7 of AGEA's Submission. By way of summary, AGEA's position on these issues is as follows:

(i) The undertakings must operate for a minimum of five years and have a common expiry date.

(iii) It is unnecessary for the undertakings to specify the circumstances in which Port Operators may seek the ACCC's approval to withdraw or vary the undertakings as this is covered by section 44ZZA(7) of the TPA.

(iv) If the proposed access undertakings are to contain a term regarding variation of the undertaking, that term should be consistent with section 44ZZA(7) of the TPA.

(v) It is appropriate that the Undertaking applies only to new Access Agreements.

E. Scope

E1. The ACCC has raised the following Issues for Comment (p. 18 of the Issues Paper) in relation to the scope of the undertakings:

(i) 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?

(ii) Is the scope of the Undertaking and, in particular, the concept of port terminal services, defined with sufficient certainty and clarity?

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

(iv) Are access seekers likely to use the services specified in the Undertaking?

(v) Are there any additional services that should be covered by the Undertaking?

E2. AGEA's response on these issues is more fully set out in paragraph 8 of AGEA's Submission By way of summary, AGEA's position on these issues is as follows:

(i) The scope of the proposed access undertaking is unduly restrictive, is not in accordance with the WEM Act or the TPA and is not defined with sufficient certainty or clarity.

(ii) The definition of port terminal services should identify the geographic boundaries of the port terminal facilities and include all services provided within that geographic area.

(iii) The scope of the undertaking should provide for access to all appropriate port terminal-related services necessary to export wheat in bulk, including bundling, road, rail and upcountry services. AGEA's response on these issues is more fully set out in paragraphs 8.3 to 8.5 of AGEA's Submission.

(iv) AWEs will have no option but to use BHCs' port terminal services if they wish to export wheat from BHCs' port terminals.

F. Price and non-price terms

F1. The ACCC has raised the following Issues for Comment (p. 19 – 20 and 22 of the Issues Paper) in relation to the price and non-price terms of the undertakings.

(i) Is the obligation to publish price and non-price terms appropriate?

(ii) To what extent does the publication requirement provide sufficient certainty and transparency for access seekers?

(iii) 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?

(iv) 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?

(v) 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)?

(vi) 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?

(vii) In relation to CBH's undertaking, is it appropriate that the standard terms include the 'port protocols'?

(viii) 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?

(ix) 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?

(x) *Does the publication of variations 30 days prior to their effective date provide sufficient notice to access seekers?*

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

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

F2. AGEA's response on these issues is more fully set out in paragraph 9 of AGEA's Submission. By way of summary, AGEA's position on these issues is as follows:

(i) Price and non-price terms should be part of the undertaking and made available well in advance of the commencement of the undertaking or the expiry of the current terms.

(ii) Port protocols should be part of the undertakings.

(iii) The publication requirement does not provide certainty and transparency unless publication occurs well in advance of the proposed commencement date.

(iv) 12 month's duration for the access agreements is appropriate.

(v) BHCs should not be permitted to vary standard prices or terms during that 12 month period except in the event of a material adverse change and then, only if both parties agree to the variation and the BHCs have given AWEs at least 6 months' notice of the proposed change, to give AWEs time to adjust.

(vi) The access agreements should also apply to all services provided by a port operator as it is not feasible to separate such closely–related services from port terminal services which are all provided by the same entity.

(viii) BHCs should not be permitted to vary the undertakings except with the consent of the ACCC. Further, such variation should not be permitted except after consultation with relevant stakeholders and at least 6 months' notice to AWEs.

G. Non-discriminatory access

G1. The ACCC has raised the following Issues for Comment (p. 21 of the Issues Paper) in relation to non-discriminatory access:

(i) *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?*

(ii) Are the clauses relating to non-discriminatory access sufficiently clear and certain?

(iii) 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?

(iv) 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?

(v) 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?

G2. AGEA's response on these issues is more fully set out in paragraph 10 of AGEA's Submission. By way of summary, AGEA's position on these issues is as follows:

(i) The clauses relating to non-discriminatory access are neither appropriate nor sufficient to effectively prevent discrimination in relation to the provision of port terminal services.

(ii) The obligations relating to publication of Reference Prices and Standard Terms are not consistent with the non-discriminatory access provisions and objectives of the Undertakings because BHCs may provide as little as one day before or up to 15 business days after the undertakings take effect to publish its terms and conditions.

(iii) Port Operators must be required to offer access to port terminal services to *all* accredited wheat exporters.

H. Negotiating for access

H1. The ACCC has raised the following Issues for Comment (p. 21 of the Issues Paper) in relation to negotiating for access:

(i) 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?

(ii) 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?

(iii) 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?

(iv) Is the definition of Prudential Requirements in Undertaking appropriate?

(v) Is the clause relating to the avenue of appeal directly to the arbitrator appropriate?

(vi) Are there any other relevant matters that are necessary to negotiate access that should be reflected in the Undertaking? If yes, please specify.

(vii) Is the provision for an Applicant to seek pre-submission meetings and discussions appropriate?

(viii) Are the timeframes for acknowledgment appropriate?

(ix) Is the information required to be provided in an Access Application appropriate? Is more or less information required?

(x) Does the negotiation process achieve an appropriate balance between the interests of the Port Operator and access seekers?

(xi) Are the timeframes for the negotiation process appropriate and sufficiently clear, certain and cost effective?

(xii) Are the circumstances in which the Port Operator has discretion to cease negotiations appropriate?

H2. AGEA's response on these issues is more fully set out in paragraph 11 of AGEA's Submission. By way of summary, AGEA's position on these issues is as follows:

(i) The undertakings should clearly stipulate the categories of information the BHCs must provide if requested (i.e. information relating to cost, the services to be provided, availability and so on). The requirement that the information be "reasonably required" is subjective.

(ii) In order to assess whether it is appropriate that the applicant pay the 'reasonable costs' incurred by the Port Operator in obtaining information, clarification is required as to what is meant by 'information that is not ordinarily and freely available.'

(iii) In order to negotiate access, the undertakings should require BHCs to disclose the costs of providing the services to be covered by the undertakings.

(iv) It is not appropriate that the undertakings propose a number of grounds on which the Port Operator may cease negotiations with the Applicant. The dispute resolution process is lengthy and the right to cease negotiations could lead to BWEs incurring substantial losses for non-compliance with sales contracts. BHCs should be required to negotiate on reasonable terms with any person that is an accredited AWE. If negotiations stall, BHCs' interests are adequately protected by a right to refer a dispute to arbitration.

(v) The definition of Prudential Requirements in the undertakings is neither appropriate nor necessary. Once an AWE obtains accreditation under the WEM Act, it should not be necessary for BHCs to enquire into the AWE's financial standing.

(vi) The proposed access undertakings must contain a right to refer disputes to arbitration, according to the dispute resolution procedure discussed in paragraph 13.2.

(vii) Pre-submission meetings and discussions are unnecessary as they make the negotiation process slow and unwieldy.

(viii) The information required to be provided in an Access Application is appropriate.

(ix) The timeframe for acknowledgements is inappropriate and slows down the negotiation process.

I. Liability terms and offering standard terms to Applicants

I1. The ACCC has raised the following Issues for Comment (p. 25 of the Issues Paper) in relation to the liability terms and offering standard terms to applicants:

(i) Are liability terms and limits able to be negotiated effectively under the proposed arrangements? Is it appropriate for the Undertaking to acknowledge such arrangements?

(ii) Is it appropriate for the Port Operator to offer the standard terms to the Applicant subject to the Applicant meeting the specified requirement?

(iii) Is there sufficient certainty and clarity regarding what particular types of terms and conditions an Access Agreement must cover?

(iv) Is it appropriate for the Access Agreement to include or refer to the "Port Protocols/Rules"?

I2. AGEA's response on these issues is more fully set out in paragraph 12 of AGEA's Submission By way of summary, AGEA's position on these issues is as follows:

(i) Liability terms and limits must reflect commercial reality and contain realistic limits on liability. Given the volume of stock BHCs handle, BHCs should not be able to exclude or limit liability. Requiring BHCs to be responsible for loss or damage caused would improve efficiency.

(ii) Port Operators must be required to offer the standard terms to any applicant which is an accredited wheat exporter.

(iii) The port protocols/rules must be set out in the undertakings.

J. Dispute resolution

J1. The ACCC has raised the following Issues for Comment (p. 28 of the Issues Paper) in relation to dispute resolution:

(i) Is the dispute resolution process, including the timeframes, appropriate and effective?

(ii) Is the ACCC role in the arbitration process appropriate?

(iii) Are the matters listed for consideration by the arbitrator appropriate?

(iv) Are the restrictions on determinations appropriate (for example, the restriction relating to section 44W of the Act)?

(v) Do the confidentiality provisions contained within the Dispute Resolution clause sufficiently provide for the protection of commercially sensitive information?

J2. AGEA's response on these issues is more fully set out in paragraph 13 of AGEA's Submission. By way of summary, AGEA's position on these issues is as follows:

(i) The dispute resolution process is inadequate.

(ii) The dispute resolution process should provide that either party may give notice to the ACCC that a dispute exists under the undertaking and may refer the dispute to arbitration, which is to be conducted by the ACCC.

(iii) The arbitration must be conducted in accordance with arbitration rules to be specified in the undertaking, which must include an obligation to keep confidential any information disclosed during the arbitration.

(iv) The arbitration must be heard and concluded within 14 days of the notice of referral to the ACCC and the ACCC must endeavour to make a determination within 14 days (for resolution of urgent disputes, see K2 below).

(v) BHCs must take reasonable steps to mitigate loss, including continuing to provide port terminal services during, and pending the determination of, any dispute.

(vi) The restriction relating to determinations and section 44W of the TPA is appropriate.

(vii) Disputes relating to substitution of vessels in shipping stems or which affect the timing of a vessel's loading must be resolved within 24 hours through a clear dispute resolution mechanism such as referral to an independent umpire for a binding decision within 24 hours.

(viii) The confidentiality provisions relating to dispute resolution do not sufficiently protect commercially sensitive information. There should be an obligation upon the parties and the arbitrator that that the entire arbitration process is confidential, unless and only to the extent that both parties agree in writing otherwise.

K. Port Protocols/Rules and Operational Decisions

K1. The ACCC has raised the following Issues for Comment (p. 29 - 30 of the Issues Paper) in relation to port protocols/rules and operational decisions:

(i) Is it appropriate for the provisions in the 'Port Protocols' 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?

(ii) 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?

(iii) Are the Port Protocols sufficiently detailed? Do they address all necessary issues? What further issues should be included, if any?

(iv) Are the dispute resolution provisions in the Port Protocols appropriate? Are they sufficient to provide certainty and transparency to access seekers?

(v) 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?

(vi) 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?

(vii) 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?

(viii) Is the process for varying the Port Protocols appropriate and sufficiently detailed?

(ix) Are the criteria the Port Operator can take into account when making operational decisions appropriate? Are they sufficiently clear and certain?

K2. AGEA's response on these issues is more fully set out in paragraphs 14 and 15 and Schedules 2 to 4. By way of summary, AGEA's position on these issues is as follows:

(i) The port protocols/rules must be part of the undertakings.

(ii) The balance between the need for BHCs to retain flexibility and the need for transparency and certainty can be achieved by clearly specifying the obligations of the BHCs.

(iii) The proposed port protocols/rules do not provide transparency and certainty for access seekers. The protocols/rules do not contain clearly defined rules which are capable of objective application.

(iv) There is no clarity or transparency in relation to the link between ship nomination, estimated time of arrival, and the timing and quantum of cargo accumulation into the port.

(v) Further, the criteria the Port Operator can take into account when making operational decisions is largely discretionary and therefore are not clear or certain.

(vi) Allocation of Port Operator overtime (and other related out of the ordinary course resources and costs) is not appropriate, transparent or reasonable.

(vii) BHCs' right to unilaterally vary the Port Terminal Rules, is inconsistent with the requirement of clarity and certainty. BHCs are only required to "consult" with AWEs before implementation of the varied terms and conditions.

(viii) The port protocols/rules must contain a more effective dispute resolution mechanism along the lines set out in paragraph [##] of AGEA's Submission.

L. Ring-fencing

L1. The ACCC has raised the following Issues for Comment (p. 32 - 33 of the Issues Paper) in relation to the ring-fencing rules:

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

(ii) Is the scope of Restricted, Prohibited and Permitted information flows appropriate and adequate?

(iii) 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?

(iv) *Are the compliance and training obligations applying to Port Operator employees handling Restricted and Prohibited information appropriate?*

(v) *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?*

(vi) *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?*

(vii) *Are there any other obligations that should be included in the ring fencing regime? If yes, please specify.*

L2. AGEA's response on these issues is more fully set out in paragraphs [##] of AGEA's Submission. By way of summary, AGEA's position on these issues is as follows:

(i) There must be transparency and accounting separation to ascertain whether BHCs' Trading Divisions are required to make the very substantial payments which AWEs are required to make for port terminal services, or whether there are merely book entries between the trading and operating divisions.

(ii) The Restricted, Prohibited and Permitted information flows are neither appropriate nor adequate.

(iii) The requirement for training is not addressed in GrainCorp's undertaking.

(iv) There is no provision for employees to be adequately sanctioned for breaches that they might commit.

(v) The flow of information between the BHCs and their Trading Divisions must be prohibited. This includes but is not limited to information that could be transmitted by:

(A) emails;

(B) meetings;

(C) reports;

(D) board meetings/papers;

(E) committee meetings/papers;

(F) staff movements;

(G) IT systems;

(H) databases;

(I) consultants;

(J) secondees.

(vi) Employees must not have the opportunity to transfer between divisions and employees of the Trading Division or third party trader must not be employed by Operations Division (and vice versa) for at least 12 months.

(vii) There ought to be an obligation upon the BHCs to notify the relevant AWE of any event that has or could likely result in a breach of the ring-fencing policy. This would be along the same lines as the notification obligation under section 17 of WEA Act.

SCHEDULE 2

ABB GRAIN SHIPPING PROTOCOLS

Adopting the headings used in the ABB Grain Shipping Protocols, AGEA makes the following comments in relation to the ABB Protocols:

Vessel Nomination

1. The ABB Protocol provides that *"Acceptance of a nomination of a vessel will be at the discretion of the Company."* It is inappropriate for acceptance to be at ABB's discretion; the exercise of a discretion can be arbitrary. A negative exercise of the discretion means the AWE has no access to export bulk wheat from ports under ABB's control.

Allocation of estimated load dates

2. The ABB Port Protocol provides that vessels will be allocated estimated load dates based on accumulation priority and then lists a number of factors, most of which are within ABB's complete control, for example ABB will allocate an estimated load date "*based on the ability of the Company…to accumulate the cargo*". It is ABB that controls the accumulation of cargo.

Estimated load dates may change ...

3. Many of the reasons entitling ABB to change estimated load dates are directly within its control and allow ABB too much flexibility and no certainty for AWEs. For example, *"accumulation issues"*, "*lack of performance of freight providers*" and *"ability to utilise cargo already at port"*. Why should ABB's ability to utilise cargo already at port affect a AWEs' opportunity to accumulate? ABB also controls the determination of *"quality problems identified during accumulation for client's vessel or other vessels already in the queue."*

Vessel Nomination Form

4. The Vessel Nomination Form is required to provide details of, among other things, the name and details of vessel, current location of vessel and so on. The vessel nomination form is to be provided a minimum 21 days prior to the vessel's ETA. It is not commercial to require the name and details of a vessel 21 days prior to its arrival.

Notification prior to vessel nomination and company acceptance

5. The ABB Protocol states that ABB "*may commence accumulation into port subject to port space, where there are no nominated vessels or for supply chain efficiencies purposes*". There is no transparency in relation to *'supply chain efficiencies'* and what this means. This highlights the control that ABB has over the ability for a AWE to be able to accumulate grain into a port for loading.

5.1 ABB retains the right to accumulate and thus take up valuable port space under the guise of "*supply chain efficiencies*". In most cases, supply chain efficiencies will be impossible to prove, with the result that it will not be possible to show that ABB's real purpose for reducing available space for AWEs is to allow ABB to accumulate its own grain.

5.2 ABB also has sole discretion to alter the priority of accumulation (i.e. the fourth dot point *"unless, in the Company's discretion there are over-riding reasons to alter that priority*").

Guiding principles for determining accumulation priority and therefore allocation of estimated load date(s)

6. As to clause 1(a), ABB reserves the right to place a vessel in front of an earlier nominated vessel in the event that ABB "*deems it can manage the impact of accepting the second nomination*". There is no requirement on ABB to determine whether there will be a negative impact upon the first nominated vessel and there is no transparency as to what is meant by "*can manage the impact*" – on whom? Further, ABB does not undertake to indemnify the accredited grain exporter for the additional demurrage and losses under the sales contract caused by ABB's unilateral decision.

6.1 As to clause 1(b), it is unclear how ABB would incur significant costs that it could not charge to the AWE. The expression *"port efficiencies being negatively impacted"* is also uncertain and biased in favour of ABB.

6.2 Under clause 3, ABB reserves the right "*not to fully accumulate a vessel cargo into Outer Harbour to maximise all Client vessel turnarounds where multiple vessels are arriving in a short time frame*." This is open to abuse and will not ensure fair access where a vessel that is nominated earlier is only part loaded and then moved from berth to allow other vessels to load out of turn. There is no transparency as to how this policy will be put in place.

6.3 Under clause 4, ABB reserves the right to allocate load dates in reliance of "*Specific supply chain efficiencies including an ability to fully utilise available resources may result in vessels loading out of arrival order based on an ability to fully position enough stock at port."* Once again, ABB retains the right to act in its own interests and make decisions regarding allocation of load dates or accumulation in port under the guise of "*supply chain efficiencies*".

6.4 Clause 5 provides that if *"a Client is willing to work outside of the standard operating conditions or increase accumulating capacity the vessel may receive accumulation priority if the initial prioritised client rejects a similar offer."* Although it is not entirely clear what this means, it appears to indicate that if a AWE is willing to pay ABB additional fees, its vessel will be loaded out of turn.

6.5 Under clause 6, ABB reserves the right to adjust accumulation priority based on, inter alia, increased terminal efficiencies and an ability to minimise the total accumulation time based on total wait time of all vessels (although an individual client's vessel may be delayed).

Vessel substitution/cancellation

7. The ABB Protocol states that "*where export select option is taken, [ABB] may be able to mitigate the cost by utilising this cargo for another export select Client",* thus displaying a preference for clients which choose its bundled services. Further ABB "*reserves its right to amend the accumulation priority by treating this as a new nomination*".

7.1 There is no transparency as to how the "*variation fee*" is quantified or is to be applied.

Vessel repositioning

8. Again, ABB retains the discretion to apply "*variation fees*" where a nominated vessel is cancelled or delayed from its original ETA by more than 3 days. There is no transparency as to how this fee is quantified or is to be applied.

8.1 ABB refers to various costs such as "*freight cost*" and "*Shipping Re-positioning fee*". These costs are neither explained nor are prices provided.

Limitation of liability

9. ABB "*reserves the right to cease loading if, in its opinion, continued loading may result in breaches of any safety or environmental requirements*." The right to cease loading is not tempered with a requirement that ABB act reasonably. Nor are there any guidelines provided for how this decision will be made.

9.1 ABB also seeks to exclude liability for any losses that result from its actions.

Disputes

10. The ABB Protocol contemplates that the client must notify ABB in writing of the dispute and ABB must respond within 5 working days. If the client is not satisfied, it may serve an escalation process. By this time, the client will most likely have lost its spot and it will be too late. The dispute mechanism does not protect the interests of clients by providing a speedy mechanism for resolving disputes.

SCHEDULE 3

GRAINCORP PORT TERMINAL SERVICES PROTOCOLS

AGEA makes the following comments in relation to GrainCorp's Initial Port Terminal Services Protocols:

1. The Protocol requires the AWE to provide GrainCorp with a Cargo Nomination Application not less than 28 days prior to arrival laycan of the vessel, and may nominate a cargo with an estimated time of arrival of less than 28 days *"only at the discretion of GrainCorp"* (clause 2.1).

2. Pursuant to clauses 3.1 and 3.2 of the Protocol, GrainCorp has 7 business days of receipt of a Cargo Nomination Application to undertake a risk assessment and GrainCorp will accept or decline a Cargo Nomination Application based on a risk assessment that takes into account the criteria in clause 3.1. The factors listed in clause 3.1 include factors that are largely within GrainCorp's knowledge or control (see clauses 3.1.2 to 3.1.5). The process for undertaking risk assessments is not transparent and does not show how the process will work in practice.

3. For example, in undertaking its risk assessment, under clause 3.1.2 GrainCorp may take into account *"confirmation to GrainCorp that [the exporter] will have sufficient grain tonnage of the relevant grade (at GrainCorp, approved or non-approved storage facilities) against the CAP for the nominated cargo.*" In the vast majority of circumstances, GrainCorp will have access to this information.

4. In relation to clauses 3.1.3 and 3.1.4, it is likely that GrainCorp or its contractors will accumulate the grain as the wheat will most likely be under the control of GrainCorp, as per its Storage & Handling Agreement.

5. Clause 3.1.5 provides that GrainCorp may take into account whether *"GrainCorp has available and sufficient intake, grain segregation, storage and shipping capacity at the Port Terminal that will allow loading of the grain onto the nominated cargo."* GrainCorp controls Port Terminal intake, grain segregation, storage and shipping capacity.

6. The Protocol contemplates that the client must notify GrainCorp in writing of the dispute and GrainCorp must respond within 5 working days. If the client is not satisfied, it may serve an escalation process. By this time, the client will most likely have lost its spot and it will be too late. The dispute mechanism does not protect the interests of clients by providing a speedy mechanism for resolving disputes.

SCHEDULE 4

CBH's PORT TERMINAL RULES

CBH's Submissions attach current draft Port Terminal Rules (see Attachment 1) and advise that CBH is in the process of re-drafting its Port Terminal Rules. CBH has subsequently issued a proposed 2009/2010 Shipping Capacity Access Allocations policy.

1. AGEA makes the following comments in relation to the CBH draft Port Terminal Rules (included as Attachment 1 to its Submissions).

1.1 Clause 4 provides that "In each Year, within the Forecast Submission Period each User must submit to the Port Operator a forecast of the User's Port Terminal Services requirement for the current Year, including the following details:

(a) anticipated gross tonnage of Bulk Wheat; and

(b) anticipated shipment plan."

A "Year" is defined as being 1 November to 31 October. However, a year in the Port Terminal Services Agreement is 1 October to 30 September. Accordingly, the Forecast Submission Period is not properly defined. Furthermore, there is no reason why CBH needs to know AWEs' future requirements and it is not clear what CBH would do with this information or whether it would be obliged not to pass on the information to Trading Division.

1.2 Similarly, in clause 5.2, the booking process applies from 15 September until 14 October in each Year, or such other period as the BHCs may publish from time to time. Once again, this period does not correspond with CBH's Port Terminal Services Agreements.

1.3 Clause 5.2(c) provides that in determining the allocation of Harvest Capacity, CBH may have regard to *"the relevant Users' shipping history"*, *"the efficient operation of the relevant Port Terminal Facility"* and *"the Port Operator's Bulk Wheat storage network."* The expression *"the efficient operation of the relevant Port Terminal Facility"* is uncertain. Clause 5.2(c) highlights the lack of transparency in the way CBH can exercise unfettered discretions to discriminate in favour of its own interests or to the detriment of AWEs. This comment also applies to clause 6.2(c).

1.4 Clause 5.2(d)(iii) provides that Users must pay the BHCs *"$[insertl per tonne of Bulk Wheat in respect of which the User will receive Port Terminal Services under the Harvest Period Port Terminal Services contract, with such payment being non-refundable"*. In the event that the AWE does not ship the wheat (i.e. use CBH's services), the AWE is not entitled to a refund of the undisclosed fee (see clause 5.2(e)). However, CBH does not incur any liability if it fails to provide the service.

1.5 Clause 6.2 sets out the Standard Shipping "Booking Process" during times other than the Harvest Period. Clause 6.2(a) provides that Shipping Windows from the Port Terminal Facilities are allocated by the application of an expression of interest (EOI) process. Under this process the BHC advertises dates between which it will seek EOIs from Users for the provision of Port Terminal Services during a particular period (EOI Period). At the close of each advertised period, the BHC will assess all EOIs received and allocate Capacity for the relevant period. CBH decides what EOIs to offer (clause 6.2(a). CBH retains the discretion to accept all or part of the EOI (clause 6.2(d)).

1.6 In relation to clauses 6.5 to 6.8, there is no way for AWEs to know how CBH applies these rules because CBH refuses to provide AWEs with relevant data. Further, 22 days is a long lead time pending confirmation of a exporter's status in the nomination and accumulation process.

1.7 CBH's export accumulation guidelines apply after a User's Shipping Window is booked. Any clarity that might have been achieved by CBH's Shipping Rules can be frustrated by CBH's export accumulation guidelines. Under the terms of its current Port Export Accumulation Guidelines, CBH states that:

- *"Vessels arriving before their contracted lay-can window may be considered for early loading at **CBH discretion** for operational reasons such as port blockages and the continuation of port efficiencies"* (page 2).[emphasise added]

- *"Priority changes due to updated ETA's within this stage will be at the **sole discretion of CBH** base on how advanced accumulation arrangements have progressed for each nomination"* (page 4) [emphasise added]

- "*Priority for vessels that have progressed from the Assembly stage will be locked in, however **CBH Operations reserve the right at its sole discretion to make changes** for operational reasons such as port blockages and the continuation of port efficiencies. These changes will also take into account the impact on cargo accumulations for other vessels within this window*" (page 5) [emphasise].

1.8 Finally, it is not clear whether the "Timetable of Port Terminal Rules" would apply to CBH sites only, or to CBH and non-CBH sites.

2. *This section still refers to base and surge capacity as per the old AGEA proposal. It should be consistent with the document sent to CBH dated 25 May.* In relation to CBH's proposed 2009/2010 Shipping Capacity Access Allocations policy, AGEA notes that the policy is subject to change. In the meantime, AGEA's position is that CBH's proposed 2009/2010 Shipping Capacity Access Allocations policy should be amended to contain or deal with the following provisions:

2.1 there should be one system that applies for the entire season – the policy currently provides a different set of rules for, essentially, peak and non-peak periods;

2.2 CBH must provide details of the port's operational capacity prior to the tender process. The capacity referred to in the proposed policy is conservative and needs to be reviewed. Capacity should be based on the port terminal operational capacity ie. daily intake, storage flexibility and outturn, and should not be linked to inward logistics;

2.3 tenders for shipping slots should be held on a fortnightly basis;

2.4 tenders should be managed by an independent third party (e.g. Price Waterhouse or similar);

2.5 AWEs should be permitted to bid for Capacity by port, for any month at Par to the Export Outloading Charge for the relevant month;

2.6 bids should be submitted in 10,000mt increments;

2.7 alternative supply chains should be able to be nominated and treated by CBH equally in terms of pricing and access to port terminal services, i.e. Grain Express or direct port access model.

2.8 where a tender is oversubscribed, the capacity should be issued on a pro rata basis. (Capacity / total tonnage bid * tonnage bid by individual shipper);

2.9 part certificates should be offered to the nearest 1,000 tonnes;

2.10 successful bids in each tender should be issued with Shipping Certificates in 10,000mt increments;

2.11 shipping Certificates should be able to be traded in a secondary market, independent of CBH;

2.12 in the event that CBH fails to load a vessel within the dates specified on the Shipping Certificates, storage should not be levied against the shipper beyond the last day specified on the Shipping Certificates;

2.13 Shipping Certificates must be paid for within 3 days of allocation at 50% of the price

2.14 any unpaid Shipping Certificates should be reoffered in the next fortnightly tender;

2.15 in case of pro-rata allocation due to oversubscription excess deposit should be returned to the bidder 24 hrs after the tender;

2.16 only AWEs with a current CBH grain services agreement should be entitled to bid for certificates;

2.17 remaining 50% should be payable at presentation of Shipping Certificates;

2.18 Shipping Certificates should be presented to CBH latest 30 days prior to the first day of the shipment period specified on the Shipping Certificate;

2.19 the holder of the Shipping Certificates should narrow the shipping period to a 10 day window within the shipping month no later than 30 days prior to the first day of the narrowed shipping window;

2.20 AWEs should provide the name of performing vessel 7 days prior vessel ETA;

2.21 AWEs should have stock entitlement not less than 5 working days prior vessel's ETA;

2.22 Shipping Certificates that are not presented should be forfeited without refund and capacity will be reallocated at the next fortnightly tender;

2.23 CBH and AWEs should be liable where they fail to meet benchmarks and other obligations.