FOR PUBLIC REGISTER

GrainCorp Operations Limited

Supplementary submission to the Australian Competition & Consumer Commission

Port Terminal Services Access Undertaking

Dated 24 June 2009

Supplementary submission to the Australian Competition & Consumer Commission

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1 Introduction

1.1 Purpose of submission

GrainCorp Operations Limited ("**GrainCorp**") provides this supplementary submission in response to:

- the Australian Competition & Consumer Commission's ("**ACCC**") letter dated 2 June 2009; and
- submissions from:
  - the Australian Grain Exporters Association ("**AGEA**") dated 7 May 2009, 15 May 2009 and 29 May 2009;
  - SGS Australia Pty Limited ("**SGS**") dated 26 May 2009 and Intertek Oil, Chemical & Agri ("**Intertek**") dated 29 May 2009;
  - Victorian Farmers Federation ("**VFF**") dated 28 May 2009;
  - AgForce Grains Ltd ("**AgForce**") dated 29 May 2009;
  - Riverina (Australia) Pty Ltd ("**Riverina**") dated 29 May 2009; and
  - Grain Industry Association of Victoria ("**GIAV**") dated 1 June 2009;

The supplementary submission provides further information in support of the Access Undertaking lodged with the Commission on 15 April 2009 and addresses the issues raised in the ACCC's issues paper dated 29 April 2009.

GrainCorp notes that a submission from the NSW Farmers Association was placed on the ACCC public register on 22 June 2009. There is considerable overlap between the issues raised in that submission and the issues which GrainCorp responds to in this Submission.

1.2 Context that should be considered by the ACCC

GrainCorp believes that the ACCC, in assessing the GrainCorp draft Port Terminal Protocol and draft Wheat Port Terminal Services Agreement, should consider these submissions in the context of the following 6 broad competition drivers.

1. The intent of submitters

GrainCorp commenced its domestic grain trading business in 1996 and export grain trading in 2000, providing additional competition within the deregulated domestic grains markets.

Many submitters are seeking to have a higher degree of regulation imposed upon bulk handlers as a means of obtaining a competitive advantage. This applies to multinational company ("**MNC**") members of the Australian Grain Exporters Association ("**AGEA**"). Most of these companies have directly indicated to GrainCorp that the Company as a bulk handler of grain should be prevented by regulation from trading and exporting grain.

These international based companies want their major competition, the Australian based GrainCorp, ABB and CBH-GrainPool, regulated out of the grain trade, as a method of reducing competition in their favour. This is in contrast to their business activities in the other countries, where they trade and export grain through their own port terminals.

Based upon our conversations with AGEA representatives we believe that they have inadvertently grouped the port management activities of the bulk handlers. This is fundamentally flawed as the GrainCorp business model is different to the CBH Grain Express model. It is also incorrect to group GrainCorp with CBH in terms of performance concerns as our 'mature market' conditions of the east coast have ensured delivery of superior service to that elsewhere in Australia.

2. GrainCorp has always provided open access at its country and port facilities

GrainCorp has always, without legislative compulsion, actively promoted and provided country and port storage and handling services to all growers (through warehousing) and all grain buyers and traders. The Company has done so because it has a commercial incentive to maximise grain receipts at country receival sites and the export of grain through port terminals.

This year, following the removal of AWB's bulk wheat export monopoly on 1 July 2008, over 65% of the grain shipped through GrainCorp port terminals was handled on behalf of grain exporters other than GrainCorp.

The first year without the single wheat desk was inevitably going to have some transition issues but the reality is that the industry has adjusted well and there is strong competition for bulk wheat exports. This has occurred without any access undertaking in place.

'Open access' for grain port terminal elevators is unique in the grain trading world, found only in Australia. Where port facilities are operated by MNCs in other countries, exporters wishing to use port elevator infrastructure have to purchase grain from the port terminal owner. No provision is made for a third party to ship grain they own through an MNC owned elevator.

3. Prescriptive port protocols would hinder operational efficiency and service

Many submitters are seeking prescriptive port protocols. Operations at grain port terminals are influenced by a large range of external variables at the port terminal and at numerous points along the grain logistics chain, most of which GrainCorp has no control over. These variables include grain infestation, grain chemical treatments, grain quality variations, rail delays, track shutdowns, port blockages, mechanical breakdowns, weather delays and so on.

To manage these external variables in a manner that minimises cost to both GrainCorp and its customers, particularly vessel demurrage costs, the Company requires a level of flexibility within the port terminal protocols to facilitate efficient infrastructure management.

The implementation of prescriptive protocols would have a significant negative impact port terminal efficiency and service standards, one consequence of which would be to drive up the costs of services, and thus reduce the competitiveness of Australian wheat and non-regulated grain exports.

4. Integrated port protocols and service guarantees are not possible

Many submitters are seeking port protocols that encompass other parts of the supply chain and incorporate related 'service guarantees'.

Grain port terminals are the interface between in-bound rail and road transport and out-bound shipping. GrainCorp does not control the movements and in many cases the contracting / supply of these transport services. Where delays occur in the transportation of grain to the terminal or with the arrival of vessels there is a 'knock-on' impact on port terminal services that impacts on the economic allocation of infrastructure resources and thus all customers can be disadvantaged.

GrainCorp, in its bulk handling role, doesn't take on the cost and risk of the provision and co-ordination of in-bound and out-bound transport for its port elevator customers.

In GrainCorp's case, this role is normally managed by the grain exporter. Grain exporters can make significant margins on the management of grain accumulation and logistics for their customers. If an exporter does not want to take on this cost and risk, they can readily purchase grain on a 'free on board' basis from another grain trader.

5. Undertakings and Port protocols should reflect local conditions

One of the objects of Part IIIA is to *"provide a framework and guiding principles to encourage a consistent approach to access regulation in each industry."* However, the ACCC should consider each individual Undertaking on its merits, having regard to the specific industry environment in which that applicant operates, and matters which relate specifically to the provision of the relevant services by that applicant.

There are substantial differences between the business model and operations of the bulk handlers and the markets in which they function. As such, it is not appropriate, nor is it necessary, for the Undertakings of all bulk handlers to be identical.

Imposing a 'one size fits all' approach will not only impose unnecessary new regulation on the provision of services at port terminals, but risks are increased that a significant mismatch between market demand and service provision could be created, where service provision is restricted by regulation.

This would result in reduced incentive to invest and innovate, and decrease efficiency, leading to an increase in service provision cost. This in turn will impose additional cost penalties on grain growers and thus disadvantage regional economies. The ultimate impact will thus be detrimental to the competitiveness of Australian grain exports.

6. MNC traders have significant bargaining power in grain exports

Most of the grain shipped through GrainCorp port elevators is owned by MNC traders. MNC traders have significant economic size, and control a dominant share of international grain shipping and trading.

For example while GrainCorp's turnover in 2008 was AUD$1.5B, Glencore's turnover was USD$152B, Cargill was USD$120B and Louis Dreyfus was USD$20B. Accordingly:

- MNC grain traders have significant bargaining power to negotiate with GrainCorp and to contract and manage all aspects of the grain supply chain, including (as recently demonstrated by Glencore) take a significant economic interest in GrainCorp itself.

- MNC grain traders have advantageous access to competitive shipping, third party origin grain from their own port facilities, finance and access to overseas customers.

- It is in Australia's national interest for the trading operations of Australian bulk handlers to competitively export Australian grain to overseas customers and to compete with MNC traders.

1.3 Key issues

While submissions have raised many issues of minor detail and a number of serious allegations of discriminatory conduct (without any real supporting evidence), there are in fact only a few issues of real substance.

Scope of the Undertaking

There is simply no basis for extending the Undertaking to upcountry facilities or provision of logistics. GrainCorp's upcountry facilities are not natural monopolies and can be easily replicated by other grain participants (as has occurred). GrainCorp competes with the bulk handling networks of other wheat exporters including AWB and ABA. They also compete against on farm storage which has increased significantly. The same issues were raised when the WEMA access test was being developed and the Government made a conscious policy decision to limit the access test to port terminal services.

Similarly, there is no basis for extending it to other grains, many of which have been exported in deregulated markets for some time. In any case, the practicalities of open ports means that there will need to be consistency in the application of port protocols and shipping stems to other grains as already occurs at GrainCorp ports without any regulatory compulsion to do so.

Price and non-price terms

GrainCorp has proposed a negotiate / arbitrate model. It is appropriate given the history of open access with few significant disputes. Submitters have failed to understand the approach or the context.

The industry has a history of annual recontracting with little change in terms and conditions. GrainCorp expects this to continue for almost all exporters given the Undertaking includes an obligation to provide access all the services that have been historically required.

However, in providing an Undertaking, GrainCorp is now required to negotiate in good faith with an Applicant who may require atypical or novel services. It is difficult to predict all the possibilities. In this context, it has adopted the detailed negotiate / arbitrate model from the ARTC Interstate Undertaking approved by the ACCC which gives rights to Applicants and protections to GrainCorp.

Having said that, GrainCorp is willing to make changes to address some of the concerns raised:

- It agrees to include the Wheat Port Terminal Services Agreement in the Undertaking (other than the Annexures being the fee schedule or the Protocols) such that it can only be varied with consent of the ACCC. These will comprise the "Standard Terms". This is on the assumption that the Undertaking term is only two years.

- It agrees to publish the Standard Terms and Reference Prices by 31 August of each year. For 2009/10, GrainCorp's intention is to publish the Reference Prices by early August 2009. (The Standard Terms applying for 2009/2010 will be included in the Undertaking).

- GrainCorp has recently updated its Protocols as a result of reviewing its operations based upon a continuous improvement focus, including customer consultations and a recent audit by WEA. These updated Protocols will be used for bulk wheat for 2009/2010 and GrainCorp will update the Initial Port Terminal Services Protocols in the Undertaking to reflect these updates.[1]

The vast majority of exporters will seek the Standard Services on the Standard Terms and the published Reference Prices. This should address any concerns about a cumbersome or overly long negotiation process - there will be no need for information exchanges, the access application is very simple and detailed negotiations unlikely to be necessary.

However, the detailed negotiate / arbitrate is still available should there be a request for non-standard services or special or varied terms. GrainCorp must negotiate in good faith and the dispute resolution procedures provide for the rapid referral of a matter to mediation or arbitration (after 10 business days of a dispute being raised). The arbitrator is required to decide the matter expeditiously and given broad discretion to run the arbitration in the manner which achieves this.

New structure and variation rights

As a result of the changes discussed above, the Undertaking provides for the following structure:

- **Standard Terms -** The Standard Terms being the WPTS Agreement (minus Annexures) will now be part of the Undertaking and can only be varied with the consent of the ACCC. This is on the basis that the term of the Undertaking is only two years and the fact that the basic terms and conditions have not changed substantially over the last 5 or more years. This does not prevent GrainCorp and a customer agreeing different terms in their WPTS Agreement subject to the requirements of the Undertaking regarding non-discrimination.

- **Protocols -** The initial Protocols will be included in the Undertaking to give certainty for the first season but it is necessary that GrainCorp be able to vary them. It can do this without consent of exporters before the start of a season but subject to the limitations in the Undertaking (clause 8.2(b)). It can update them during a season but practically, it can only implement changes mid-season if it gets the exporters who have contracts to agree to those changes as the Protocols form part of the contract. Obviously, this will only be possible if exporters see that the changes are provided for necessary operational issues or benefit them.

- **Reference Prices -** The Reference Prices, which will be included Annexure A to the WPTS Agreement (Port Terminal Services Fee Schedule) for Standard Services, must be published but will not form part of the Undertaking. The Reference Prices will be updated each year in advance of the season. They may be varied mid-season by GrainCorp on 30 days notice. The flexibility is necessary as it is possible that port, quarantine and testing processes and charges can all change during the season. This may also apply to other matters

[1] Please see letter to ACCC dated 15 June 2009 available on the ACCC website.

outside of GrainCorp's control. This can impact on the nature of the services and the costs. Having said that, GrainCorp does not have a history of changing prices mid-season.

Differentiation and discrimination

In this context, GrainCorp anticipates that differentiated contract terms will only apply to atypical or novel access requests. The criteria for differentiation are necessarily long because they must cover a multitude of possible requests and circumstances. GrainCorp rejects the suggestions that any of the criteria are inappropriate. They are consistent with Part IIIA of the TPA.

To the extent they do apply, then they must be consistent with the Undertaking objectives, commercially justified and offered on an arms' length commercial basis. GrainCorp must be prepared to justify differentiation to an arbitrator or to the ACCC.

In fact, allegations of discrimination can be reduced to three key complaints:

- GrainCorp Ports will offer more favourable price and non-price terms to GrainCorp Trading

  This would be a breach of the Undertaking. GrainCorp Trading will be required to comply with the Wheat Port Terminal Services Agreement and Protocols.

  GrainCorp already has audited accounts which reports separately for each business unit, including inter-segment sales and related accounting eliminations. Compliance can be confirmed through the ACCC's audit rights.

  Although justified under the TPA, GrainCorp is willing to remove the reservation for its Trading Division's reasonably anticipated requirements for port terminal services from the objectives section of the Undertaking (clause 1.2(e)(i)(D)) and has already removed reservation for other grains in the its most recently published Protocols (clause 3.1.6).

- GrainCorp will prioritise its own vessels at the port

  This would also be a breach of the Undertaking and the Protocols which form part of the agreements with exporters. The shipping stem and WEA audit requirements provide the transparency to ensure that this does not occur. The Undertaking adds another layer of regulatory control and disclosure.

  WEA has conducted a comprehensive audit of GrainCorp's compliance with the WEMA access test and, while some process issues were identified, the auditor concluded *"our audit did not find any evidence of unfair or inappropriate priority setting."* GrainCorp is seeking WEA's consent to provide the audit report to the ACCC on a confidential basis. The reality is that there is no evidence this has occurred and positive evidence it has not. In fact, GrainCorp provides examples where it has actually given priority over its customer's vessels over its own, despite the order in the shipping stem, in certain circumstances to ensure efficient operation of the ports.

  GrainCorp has taken a number of steps to improve the Protocols in consultation with customers on the basis of experience and the WEA audit. They now provide for improved transparency and a balance between certainty of process

and flexibility in the operation of a multi-user port whose efficient operation can be subject to so many variables outside of GrainCorp's control.

- GrainCorp forces exporters to use its storage and handling services by placing discriminatory terms on bulk wheat delivered to port from other sources

  This is not true. GrainCorp's practice in this regard both in relation to its requirements and fees are transparent and is justified on legitimate grounds related to port efficiency. In every case where a specific complaint has been raised, GrainCorp has demonstrated that its actions have been appropriate.

As discussed above, there will always be operational decisions which necessarily require a level of judgment for what is best for the efficient operation of a port and therefore all users. Port "block outs" affect all users. However, there is a great deal of regulatory oversight by the WEA and now the ACCC.

Ring fencing and information flows

The ACCC has previously conducted an analysis of the information flows and satisfied itself that the provision of storage, handling or logistics services does not enable GrainCorp to obtain access to and use customers' competitively sensitive information in a manner that would distort competition or provide any competitive advantage.

No factual evidence has been provided to demonstrate that GrainCorp obtains a benefit from information flows from its up-country storage which could lead the ACCC to come to a different conclusion. In fact, no credible case has been put forward as to exactly how GrainCorp could even use this information to its own benefit.

On that basis, there is no requirement for ring fencing to apply to information obtained from GrainCorp's upcountry storage and handling operations. Further, it is not warranted nor appropriate to extend ring fencing rules to information gained from the ownership of infrastructure such as upcountry storage which are not natural monopolies.

Ring fencing (to the extent it is required) should be limited to information obtained from the operation of port terminal infrastructure which is the subject of the Undertaking. This has been included in the Undertaking. On a proper analysis of the information involved, the time in the export sales cycle at which it is received and the very limited time before the substance of it is disclosed on the shipping stem, there is no need for an overworked, costly and intrusive ring fencing regime.

1.4 Revised Undertaking following the draft determination

In light of the consultation, GrainCorp agrees to make the changes discussed above. There are also some further minor changes listed in the submission which GrainCorp is willing to make to address issues raised if the ACCC believes it necessary. GrainCorp's intention is to relodge the Undertaking with these changes, following the ACCC's draft determination as it believes this to be the most efficient way forward.

Accordingly, GrainCorp requests the ACCC to take into account these changes in making its draft determination. The changes are clearly to the benefit of access seekers in that they respond directly to issues that they have raised and interested parties will get a further opportunity to comment on the changes during consultation on the draft determination.

1.5 GrainCorp is entitled to know which assertions apply to it

GrainCorp appreciates and supports measures taken by the ACCC to minimise duplication in its assessment of the Bulk Handlers' port terminal services Undertakings and the tight timeframes in which the ACCC is required to assess the Undertakings.

However, the Company is concerned that the ACCC's decision to release a joint issues paper in relation to the port terminal services Undertakings lodged by GrainCorp, ABB and CBH, has resulted in a lack of clarity as to which submissions are directed at GrainCorp, and to which matters GrainCorp is required to respond.

Notwithstanding that many submissions are expressed to apply to all three bulk handlers, many of them raise matters which do not relate to GrainCorp's operations. In our view, the concerns by AGEA are more directed towards CBH than they are to GrainCorp. This is obvious in some cases, but there are many instances where the focus of criticism or claims made by the party making the submission is not clear.

There are also some matters GrainCorp does not believe apply to the operations of the Company on the basis that:

- they have never been raised directly with GrainCorp;
- the submitter may, through a lack of understanding of GrainCorp's operations, think an issue applying to another bulk handler also applies to GrainCorp;
- submissions put forward matters based upon anecdote or hearsay;
- submissions refer to behaviour that 'might' or 'could' occur, whilst providing no corroborating evidence that GrainCorp has ever engaged in such behaviour, or intends to behave in such a manner, or could legally or operationally operate in such a manner claimed; or

Natural justice requires the ACCC to identify which of the matters raised by interested parties apply to GrainCorp, in order to ensure that GrainCorp can respond.

The following sections of this submission address the matters GrainCorp considers have been raised in relation to its operations. The ACCC should assume that if GrainCorp has not addressed a matter, GrainCorp has formed the view that the matter does not relate to the operations of GrainCorp.

In the circumstances, the ACCC has an obligation to advise GrainCorp if there are other matters GrainCorp has not addressed, but which the ACCC has been made aware of through its meetings or confidential submissions that have been raised against GrainCorp.

1.6 Assertions require evidentiary support

This submission addresses a number of questions raised by the ACCC, where the ACCC believes that GrainCorp has not provided sufficient evidence to support a point made in its application. This is entirely appropriate. The ACCC's decision should be based on objective evidence and a proper understanding of GrainCorp's commercial and operational structure, the existing business, legal and regulatory environment in which the Company operates, and normal legal obligations the Company has to its shareholders.

For the sake of equity and fairness, this same approach needs to be taken with the submissions of other parties.

As a general comment, it is clear that the majority of submissions make broad assertions, and in some cases very serious allegations which could constitute breaches of the law, without providing any evidence or supporting detail. It is difficult for GrainCorp to prove a negative, namely that it has not undertaken particular conduct. Assertions made by submitting parties often refer to the theoretical 'chance' that a company 'may' act in a certain manner.

This criticism refers particularly to the submissions made by the AGEA, wherein they continually refer to the 'possibility' of certain behaviours becoming apparent, without providing any evidence of precedent, or any evidence of intent on the part of GrainCorp, ABB or CBH.

The AGEA submission refers to confidential submissions made by its members separately. It is not appropriate for the ACCC to take these submissions into account without providing GrainCorp an opportunity to review and comment on them. The TPA provides for the ACCC to agree to keep submissions confidential where they include commercially sensitive information. However it is not appropriate, and it would be a denial of natural justice, for the ACCC to rely on such information without giving GrainCorp an opportunity to respond to factual evidence which has been submitted in support of allegations against it.

The evidence from the most recent (2008/09) grain harvest, where no Undertakings or any other form of port terminal regulation was in place, is that a combination of market forces, significant port terminal overcapacity and the powers of Wheat Exports Australia ("**WEA**") contained within the bulk wheat export accreditation scheme prevented monopolistic behaviour from occurring.

This claim has been validated by the recent WEA audit of GrainCorp's shipping schedule management, where the auditor found that GrainCorp had acted fairly to all parties seeking access to port terminals.

GrainCorp expects that, in assessing the Undertaking, the ACCC will also require evidence from the submitters to substantiate claims before relying on those submissions and that GrainCorp will be provided with an opportunity to address that evidence.

2 Term of the Undertaking

2.1 Submissions by interested parties

The following key submissions were made by interested parties in relation to the proposed term of the Undertaking:

- *a two year term is insufficient and should be extended to at least five years in order to provide certainty for a long term planning horizon of investment in the capital intensive wheat supply chain (p18 AGEA submission received 29 May 2009); and*
- *a two year term is excessive and should be reduced to one year in order to prevent damage to industry if the commercially unproven Undertaking adversely affects the industry (p5 AgForce Grains Ltd).*

2.2 Response

The two year time frame proposed strikes an appropriate balance between the current requirements of the Wheat Export Marketing Act (2008) (WEMA) and the need for the access regime framework to remain flexible.

No evidence "uncertainty" about access is hindering the industry

GrainCorp is not aware of any empirical data or factual evidence that has been provided to the ACCC by interested parties that demonstrates a failure in the operations of the grain market since 1 July 2008 (the date of removal of the bulk wheat export monopoly).

The 'uncertainty' over port terminal access cited by the AGEA in its submission has not become apparent this year, the first since the removal of the bulk wheat export monopoly. Logic would dictate that the first year post removal of the monopoly would be the year of maximum market disruption, and that subsequent years would see the market 'normalise'.

The fact that growers, domestic consumers, grain traders and exporters have adapted very quickly to the new market and regulatory environment has not been acknowledged by the AGEA, nor has the fact that members of the AGEA gained a significant share of the bulk wheat export market, despite the fact that there has been no regulated access to port terminals this season.

The factual evidence that the grain market has rapidly adjusted, the bulk wheat export sector in particular, invalidates the AGEA argument that there is 'uncertainty' in the market and that a new layer of regulation is needed to aid 'transition' of the market.

GrainCorp expects that the market will have fully 'adjusted' by the end of the next harvest and that the contentions raised by the AGEA and other interested parties will have no basis.

AGEA's assertion is not substantiated

GrainCorp agrees with AGEA that the wheat export supply chain is capital intensive but the Company is unclear about the 'capital investment' AGEA believes other exporters need to invest given the current over capacity of not only regional grain storage, but port terminal capacity.

In any case, if the WEMA continues to require an Undertaking after the two year term as a condition of accreditation, then GrainCorp will have to comply should the Company wish to continue to export wheat in bulk. If the WEMA were not to require access Undertakings, then this would be because policy makers are satisfied that the imposition of an access Undertaking as a condition of bulk wheat export accreditation is not necessary for ensuring access.

If the members of the AGEA believe investment in grain storage capacity or additional grain ship loading capacity is commercially viable, the term of the Undertaking for GrainCorp port terminals is immaterial, and if anything, may reduce the ability or incentive of any Bulk handler to invest. Either investment is warranted or it is not. Investment is either commercially feasible or it is not. The imposition of unnecessary regulation or any type of regulation which cannot be flexible and reflective of the operations of the parties against whom it is imposed, or the market per se, will more than likely lead to increased compliance and service costs due to the regulated market – which ironically will be servicing a market which does not have similar restrictions.

2 years is an appropriate balance

AGEA claims, in paragraph 7 of its submission, that the proposed two year term of the Access Undertaking is "*unacceptable…and unlikely to promote efficient investment*". Conversely, AgForce claims that " *a two year term is excessive and should be reduced to one year in order to prevent damage to industry if the commercially unproven undertaking adversely affects the industry."* On this basis, a two year term is appropriate and in GrainCorp's view, would strike a balance between the competing assertions of affected parties.

GrainCorp agrees with the additional submission made by AgForce that a two year term '*..is probably sufficient and allows some recognition of changes which may occur in the industry in coming years.'*

3 Variation of the Undertaking

3.1 ACCC information request

Question 13: *Clause 3.5 (b) contains the obligation to "consult" with various parties prior to seeking the ACCC's consent to vary the undertaking. What, specifically, does the obligation to "consult" on a proposed variation include?*

3.2 Response to information request

Question 13 - consultation

GrainCorp cannot vary the Undertaking in the circumstances outlined in clause 3.5 without the consent of the ACCC. The obligation in clause 3.5(b) to "consult" with various parties prior to seeking the ACCC's consent to vary the Undertaking will include standard procedures to be followed in any stakeholder consultation process, carried out in good faith, with a view to presenting a reasonable case to satisfy the ACCC in an application for variation.

GrainCorp envisages that it will prepare proposed changes and circulate those proposals to interested parties, along with an explanation for the amendments. The consultation process will give all interested parties sufficient time to review and respond to the proposals submitted.

GrainCorp will discuss the proposals, collate, review and actively consider the responses from interested parties. Depending on the level and nature of the responses, the initial proposals may be changed in order to ensure that any proposed amendments to the Undertaking are appropriate.

It is not necessary to be prescriptive on this issue. Clause 3.5(b) is the same as that contained in the ARTC Interstate Undertaking accepted by the ACCC. As highlighted by the recent ARTC request to vary its interstate Undertaking, the ACCC can form a view on whether the consultation is adequate or not when the variation proposal is made.

3.3 Submissions by interested parties

The following submissions were made by interested parties in relation to GrainCorp's ability to vary the Undertaking:

- *The circumstances in which GrainCorp can vary the undertaking are unnecessarily broader than the TPA (p18 AGEA submission No. 3)*
- *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 (p18 AGEA submission No. 3);*
- *GrainCorp 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 (p18 AGEA submission No. 3)*

- *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 (p18 AGEA submission No. 3)*

3.4 Response to submissions by interested parties

The Undertaking can only be varied with ACCC approval

As the ACCC is aware, under the TPA the Undertaking can only be varied with the consent of the ACCC, having regard to the factors set out in section 44ZZA(3). The circumstances in which GrainCorp considers variation will be appropriate as set out in section 3.4 and 3.5 of the Undertaking are subject to ACCC approval.

GrainCorp is not seeking to expand the legislative process set out in the TPA, as AGEA suggests. Nor will the inclusion of clause 3.4 and 3.5 fetter the ACCC's statutory discretion.

In fact, clause 3.5 places an additional consultation obligation and additional tests to be satisfied above those applying under Part IIIA. This does not apply for clause 3.4, which is appropriate, as it deals with variation in two very specific circumstances, namely where a certified state based regime applies to the port terminal services or where GrainCorp has sold the terminal (see discussion below).

GrainCorp will engage with the ACCC at least three months before the expiry of the undertaking

The Undertaking requires GrainCorp to notify the ACCC at least three months before the expiry of the Undertaking whether it intends to submit a new Undertaking. If GrainCorp intends to submit a new Undertaking, GrainCorp must also apply to the ACCC for an extension of the expiring Undertaking. This is consistent with the ARTC Interstate Undertaking accepted by the ACCC.

The ACCC will have sufficient notice of GrainCorp's intention to submit a new Undertaking and AGEA's requirement that GrainCorp submits a statement to the ACCC at least six months before the expiry of the current Undertaking outlining whether it intends to submit a new Undertaking to the ACCC is unnecessary. The process for ensuring a smooth transition from the current Undertaking to a future Undertaking is already addressed by clause 3.6 of the Undertaking.

Further, if the WEMA access test remains unaltered, it is clearly in GrainCorp's interest to ensure that it has an undertaking in place if it wishes to continue to be accredited as a bulk wheat exporter and so ensure that it deals with the expiry of the Undertaking in a timely manner.

Finally, it appears (although it is not clear) that AgForce's submission proposes that there should be a three month timeframe for notice of proposed changes to agreements or standard terms, where GrainCorp seeks variation of the Undertaking. As discussed further below, GrainCorp will now include the Standard Terms (other than the Annexures) in the Undertaking so any variation of them will require ACCC consent. The ACCC can determine the appropriate length of consultation depending on the variation required.

There is no basis to impose access terms on the disposal of a port terminal

AGEA's demand that '*the disposal of a port terminal that is the subject of an access Undertaking should be strictly on terms that access to those services continues' (p18,*

AGEA submission no 3) has not contemplated the commercial detriment that this is likely to have on the valuation of GrainCorp's port terminal facilities and GrainCorp's ability to deal with its infrastructure assets.

AGEA's concern is directed at maintaining access to a port terminal facility should there be a change of control or ownership. This concern is addressed by the access test in the WEMA. Under the WEMA any purchaser of a port terminal who is also a wheat exporter will be required to have in place an access Undertaking for the port terminal services as a condition of its accreditation.

Alternatively, a port terminal may be acquired from GrainCorp by a party other than a bulk wheat exporter, in which case there is no commercial or legislative basis to require the imposition of an access undertaking on the services provided by that port terminal.

GrainCorp will still require the ACCC's consent to withdraw the Undertaking upon the disposal of a port terminal facility.

4 Scope of the Undertaking

4.1 ACCC Request for information

Question 9: *How, if at all, will the proposed Undertaking impact on the export of grains other than bulk wheat at GrainCorp's terminals? How will areas of potential overlap between wheat and non-wheat areas be dealt with (for example, will the shipping stem include vessels for wheat and other grains)?*

Question 10: *To the extent that GrainCorp proposes to offer bundled services (i.e. port terminal services plus up-country services), does GrainCorp envisage that the Undertaking (both in general, and specifically in relation to the negotiate/arbitrate process) will apply to those bundled offers*

4.2 Response to ACCC questions

Question 9 –impact on other grains

The Undertaking is not intended to impact other grains. However if the ACCC imposes conditions within the proposed Undertaking that reduces operational flexibility to the point where terminal efficiency is affected, the overall impact of this will flow through to both regulated and non-regulated grains.

This would be due to the fact that the majority of grain shipped through GrainCorp terminals is regulated (bulk wheat) and thus any measures that affect terminal operations for the majority of the grain handled will naturally affect the efficiency of handling and shipping non-regulated grains.

Following approval of the Undertaking, GrainCorp intends, where feasible and subject to the conditions imposed upon the Undertaking by the ACCC, to have consistent Protocols for all grains and to continue to include non-regulated grain vessels on the shipping stem. This is explained below.

(a) The Undertaking applies to the provision of port terminal services in relation to the export of bulk wheat only. Therefore the Undertaking and the attached Protocols will refer and apply only in relation to the export of bulk wheat. Similarly, GrainCorp has prepared a specific set of terms and conditions which apply to the provision of port terminal services for bulk wheat and which incorporate those Protocols.

(b) Practically, however, there should be consistency between the Protocols and terms and conditions applying for non-regulated grains. There may be minor differences necessary to accommodate specific issues relating to a particular grain type. For example, the physical character of differing grains, such as variations in volumetric density, and seasonality and frequency of exports, does play a determining role in the way in which some non-regulated grains are stored, handled and shipped. This will impact on the manner in which terminal storage is managed, how elevator equipment is cleaned, the application of fumigants and so on.

(c) In light of this, GrainCorp considered whether it should retain the same approach of having one set of terms and conditions for all grains and all services and one set of protocols. After consideration, it was decided that a clear demarcation in the documentation between the bulk wheat services regulated by the Undertaking and other services was a better approach.

- Firstly, it avoids confusion as to the scope of the Undertaking and when arbitration applies and to whom the regulated access seekers are (i.e. those parties accredited by WEA as bulk wheat exporters).

- Secondly, GrainCorp is concerned about the inflexibilities introduced in the Undertaking in dealing with its customers and new circumstances.

For example, if GrainCorp wished to amend the port protocols for a specific matter relating to the shipping of barley and no such changes are required for regulated grain exports, it is much clearer if there is a set of bulk wheat specific protocols subject to the Undertaking, and another set of protocols applying to non-regulated grains.

In the Protocols included in the Undertaking, at clause 3.1.5(c) GrainCorp included a right to reserve capacity for servicing its non-grain activities. GrainCorp had been concerned, among other things, that by introducing an Undertaking and specific Protocols for bulk wheat that bulk wheat could in fact have priority over other grains.

Following consultation with customers, GrainCorp has deleted this clause from its current Protocols as it was perceived as giving GrainCorp a right to prioritise other grains over bulk wheat, or to prioritise GrainCorp Trading over other port terminal service consumers. This was never the intention, despite claims to the contrary to the ACCC in submissions and via consultation.

The intention is that they should be treated equally, with scheduling done under a common basis through consistent Protocols.

Consultation with customers and the recent audit by WEA identified the need for some other improvements to the systems around the management and implementation of the protocols. See GrainCorp's letter to the ACCC dated 15 June 2009 which attaches the latest Protocols. GrainCorp intends to include these improvements in the Protocols attached to the Undertaking before the Undertaking commences.

Question 10 – no bundling

GrainCorp does not propose to offer bundled services in the sense that a discount will be offered for the acquisition of more than one type of service, nor has it done so in the past (ie port terminal services plus up-country services). This is one initiative GrainCorp wishes to maintain as there is a demarcation between management of operations, pricing and processes applying internally between these functions.

GrainCorp has split the Storage and Handling Agreement into separate contracts for 2009/2010 and will offer port terminal services to accredited bulk wheat exporters under a separate Wheat Port Terminal Services Agreement. Services for non-regulated grains will be offered to customers under the general Storage and Handling Agreement.

GrainCorp provided the Commission with a copy of the proposed Wheat Port Terminal Services Agreement on 18 May 2009.

Clause 12.16 of the Wheat Port Terminal Services Agreement sets out a number of services which are for convenience included in that agreement, but which are not Port Terminal Services and not subject to the Undertaking.

GrainCorp took this approach to assist exporters to understand which services are subject to the Undertaking, and in particular, to which services the negotiate / arbitrate framework applies.

In the event that GrainCorp chose to offer bundled services in the future, the Undertaking would continue to apply in relation to the component of the services which fall within the meaning of 'port terminal services'. The Undertaking would not apply to the non-regulated grain port terminal services component of any bundled offer.

4.3 Submissions from interested parties

Submissions from interested parties have raised the following issues in relation to the scope of the Undertakings:

- *The Undertaking seems to, in most cases provide a fair access arrangement for all parties (p1 AgForce)*
- *The port terminal services must be clearly defined (p9 AGEA submission No. 3) and should identify the geographic parameters of the port terminal facilities*
- *The scope of the Undertaking must include upcountry storage and handling services to prevent GrainCorp frustrating the logistics of getting their product to port (p 9, 42 AGEA submission No. 3)*
- *The Undertaking should not be limited to wheat but should apply to all grains (p 10, AGEA submission No. 3)*
- *The Undertaking should cover assets and services GrainCorp controls between upcountry sites and the port (p 6).*
- *The scope of the Undertaking seems to be very clear and includes all activities taking place at the port. The definitions of what activities, services and assets are included seem clear and those not included are also clear (AgForce Grains Ltd)*

4.4 Response to submissions from interested parties

The members of the AGEA, and others, are seeking to expand the scope of the Undertaking to create a discriminatory regulatory structure where regulation is imposed upon the bulk handling companies, while providing the exporters with a competitive advantage.

The members of the AGEA, and others, are in effect attempting to have the ACCC force bulk handling companies to provide grain receival, storage, handling, haulage and shipping services and infrastructure on terms which do not provide a commercial return and are not commensurate with GrainCorp's risk levels. Exporters are seeking to take advantage of the regulatory process under which they have certainty of access but will be protected from the financial obligations or the risks associated with the provision of port terminal services.

If the members of the AGEA and others are successful in their endeavours, they will encourage the creation of a regulatory environment that discriminates against companies that have invested in infrastructure, employment and operations, and favours companies that have no infrastructure similar investment.

The signal that this would send to investors would be extraordinarily damaging, as it would almost guarantee a cessation in infrastructure investment, and make it difficult to commercially justify the maintenance of existing infrastructure. Put simply there would be no return on investment to justify the cause.

Submissions from some interested parties, in direct contradiction to the submissions of others, raised the following key issues which GrainCorp addresses below:

- **The port terminal services are inadequately defined**: GrainCorp considers that the port terminal services are adequately defined to achieve the objects of the WEMA and an exhaustive list as that proposed by AGEA is not appropriate;

- **The Undertaking should apply to upcountry storage**: interested party submissions have not justified that upcountry storage facilities are natural monopolies and should be regulated by Part IIIA of the TPA; and

- **The Undertaking should apply to all grains**: Exporters have had adequate access to port terminal services for shipping non-regulated grains for many years. No justification has been provided for the Undertaking to be extended to non-wheat grains.

These are addressed in more detail below.

The port terminal services are appropriately defined

It should be noted that the members of the AGEA are seeking to have the whole of the grain logistics chain regulated as they believe that this will provide them, as asset light non regulated entities, with a commercial advantage and place the asset heavy companies (GrainCorp, ABB and CBH) at a commercial disadvantage.

The Undertaking uses the same definition of "port terminal services" as is contained in the WEMA. The WEMA limits port terminal services to the '*services provided by means of a Port Terminal Facility, and includes the use of a Port terminal facility*'. As the Undertaking is provided in satisfaction of the 'access test' in the WEMA, the use of the same definition is appropriate.

Port terminal services do not include services provided at other stages of the grain supply chain that do not involve the Port terminal facility.

In its submission dated 7 May 2009, AGEA states that *'the access Undertakings do not provide clear definitions of "port terminal services'. Instead they include very narrow and imprecise descriptions as to what may or may not, in their view, fall within the definition. At the same time, in their Undertakings, the bulk handlers reserve the right to rely upon matters and services that are clearly outside of their definitions as a basis to exclude access to 'port terminal services'.*

Paragraph 4.3 of AGEA's submission of 29 May 2009 states that *'the proposed access Undertakings must clearly define 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 port terminal services are defined adequately in the Undertaking and are consistent with and achieve the intention of the WEMA. The definition of port terminal services in the Wheat Port Terminal Services Agreement operates as follows:

- "Port Terminal Services" in clause 4.1 and 4.2 has a broad definition under the Undertaking which is consistent with the WEMA and is intended to cover the relevant services provided by GrainCorp at its port terminals.

- Schedule 2 sets out in detail the standard services to be provided under the Undertaking.

- Clause 4.4 clarifies what services are not covered under the Undertaking to avoid any confusion as to the scope of the Undertaking.

This approach strikes an appropriate balance between an 'exhaustive list' approach which carries the risk of inadvertently excluding a port terminal service and a 'principle based' or descriptive approach which has the potential to be too broad.

AGEA's comments at paragraph 8.9 of its submission dated 29 May 2009 that *'in light of the WEMA Act, BHC's cannot properly exclude "intake and receival services". Nor can they properly exclude "services at port terminals' and "shipping services*" indicate that AGEA has misinterpreted clause 4.4(a) of the Undertaking which is simply an explanatory provision describing the grain supply chain. GrainCorp is not seeking to exclude intake and receival services, services at port terminals or shipping services from the operation of the Undertaking. These are key port terminal services and are included in Schedule 2 of the Undertaking.

In contrast, GrainCorp agrees with the submission made by AgForce that *'the scope of the Undertaking seems to be very clear and includes all activities taking place at the port. The definitions of what activities, services and assets are included seem clear and those not included are also clear.'*

The Undertaking applies to port terminal services only, because upcountry storage and handling services are not monopoly services

No evidence has been presented to support the contention by the AGEA members that regulation of the whole of the grain logistics chain would promote competition in the whole of the grains industry, rather than be beneficial solely to the AGEA members themselves.

The Royal Commission into Grain Storage, Handling and Transport (October 1986 to March 1998) recommended a number of changes to the Australian grain transport and handling system which were expected to increase efficiency by reducing the degree of regulation and encouraging innovation.[2]

> *Changes include the deregulation of the domestic wheat market, the closure of a number of less efficient branch lines in the New South Wales, Victorian and South Australian rail systems, and the opening of new port facilities at Port Kembla and Fisherman Islands. Other changes include the greater use of price signals to reflect market values. The Australian Wheat Board is now paying growers on the basis of protein content of wheat, and has ceased to pool port costs regardless of the port of export. Taken together these changes have led to much greater flexibility in storing, transporting and selling grain.*

Increasing regulation of the grains industry by extending the need for access Undertakings up the logistics chain, will reverse decades of lessening the regulatory burden and encouraging the commercial provisions of commercial services, and return the grains industry to the inefficient highly regulated sector it was a quarter of a century ago.

[2] Shipping and port - - arrangements for grain in eastern Australia: a revised model. Australian Bureau of Agricultural and Resource Economics. Project 8151.101. November 1991

It is not appropriate that the WEMA or the Undertaking extends to upcountry storage facilities or freight logistics for the following reasons.

- Upcountry storage facilities can be economically duplicated and therefore are not monopoly infrastructure. Submissions from interested parties have not provided any economic or legal justification for extending the Undertaking to the services provided by these facilities. Parties are only seeking to have regulation extended to all sectors of the logistics chain because they believe that regulation of infrastructure will provide them with a commercial advantage over those companies that own infrastructure and provide related services. As a basic principle it is completely inappropriate for regulation to commercially advantage one class of organisation (asset light) while disadvantaging another class (asset heavy), particularly where the asset light companies (such as the members of the AGEA) have little or no investment in infrastructure themselves and are essentially 'free riders' on those companies that fund the on-going liabilities and take the "harvest" or "volume" risk related to heavy assets.

- Contrary to the assertions made by interested parties, GrainCorp does not hold a monopoly position in relation to the upstream elements of the grain supply chain. GrainCorp competes with the bulk handling networks of other wheat exporters including AWB and ABA. It also competes with on-farm storage. See section 4.2 of the April Submission which shows that GrainCorp's share of country storage is less than 50% overall and in all states, except Queensland where it is 54%. GrainCorp rejects AgForce's claim that GrainCorp controls over 90% of the bulk handling facilities in Qld – this ignores the very real competition provided by on farm storage.

- This is even more clear when it comes to Agforce's suggestion that the Undertaking should cover rail services between up country facilities and the port. GrainCorp does not own these facilities and anyone is free to contract rail and road haulage services – see sections 4.3 and 6.5 of the April Submission in relation to this point.

For these reasons, the extension of the Undertaking to services provided by upcountry storage and handling facilities and logistic services is inappropriate. Further, GrainCorp disagrees with AGEA's submission that *'Upstream activities of port operators are closely related and cannot feasibly be separated from port terminal services (para 3.7, 29 May 2009 submission)*. Upstream storage and handling is a separate level of the grain supply chain and involves many storage and handling service providers as well as on-farm storage.

To impose regulation on these services in the absence of evidence that they are a natural monopoly is manifestly inconsistent with competition policy and, in GrainCorp's view, an overreach of the ACCC's powers.

Rather than alleging monopoly behaviour in submissions, or seeking to have the logistics chain regulated through "regulatory creep", interested parties have had, and continue to have, the opportunity to apply to the National Competition Council ("**NCC**") to commence the process of having grain receival and handling infrastructure declared 'essential'. That no party has sought to do this indicates very strongly that no evidence is available to support such a declaration.

The recent review by the Essential Services Commission of Victoria ("**ESC**") of its regulatory powers relating to grain terminals found that grain port terminals were not 'essential infrastructure' and as such pricing and access controls were not required. The

findings of the ESC review followed several years of regulatory oversight and experience and GrainCorp submits, should be carefully considered by the ACCC.

Finally, the Government did not extend the WEMA access test to upcountry infrastructure despite submissions at the time that it should do so. This is, it was a deliberate policy decision to limit access obligations to the port. It would be extraordinary if the ACCC were to take a contrary position.

The Undertaking will apply to bulk wheat only as required by the WEMA

In paragraph 4 of the 29 May 2009 submission, AGEA asserts that the Undertakings "*should not be limited to wheat*".

The WEMA only requires the Access Test to be satisfied in relation to the export of bulk wheat. This was a policy decision made at the time the WEMA was introduced and is reflected in the legislation today.

Members of the AGEA, (largely international companies with little or no infrastructure investment in the Australian grain sector) supported passage of the WEMA as it removed the regulatory burden of the bulk wheat export monopoly granted to AWB International Ltd., regulation that was counter to the commercial interests of these companies (a point of common interest with GrainCorp).

The same organisations within the AGEA are now seeking the imposition of new regulation to disadvantage their competitors (the bulk handling companies).

There is no evidence that an Undertaking is needed to regulate access to port terminal services for non-regulated grains. This contention is supported by the findings of the Victorian ESC review referred to above. Other deregulated grain markets (such as barley) have operated well for many years, and there have been no material complaints by GrainCorp's competitors about access to export terminal services.

In the absence of systemic disputes or allegations concerning an exporters ability to obtain access to port terminal services for the shipping of non-regulated grains (eg barley, sorghum), there is no basis for requiring GrainCorp to extend the operation of the Undertaking to port terminal services for all grains to obtain the ACCC's approval.

Riverina claims that *'the interchangability of all grains and the systematisation of the processes adopted demonstrate the applicability to all grain exports from respective Ports.'* GrainCorp acknowledges that some processes which will be regulated by the Undertaking in relation to bulk wheat exports, will need to be applied consistently to non-regulated grains, for example, the Protocols discussed above. This is not sufficient reason to apply the Undertaking to all grains.

GrainCorp notes the submission made by AgForce that the Undertakings '*…seem to, in most cases provide a fair access arrangement for all parties."*

4.5 Other issues

Related bodies corporate

Clause 2.3 of the Undertaking 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.

At page 17 of its submission dated 29 May 2009, AGEA claims that a reasonable endeavours clause is insufficient. At p 13 of its submission, Riverina suggest that any body corporate who has such an obligation should be a party to the Undertaking.

As the operator of the port terminals, GrainCorp is the appropriate party to the Undertaking. GrainCorp is willing to delete the "reasonable endeavours" obligation. On review, the only related companies who could be the subject of this clause are fully owned subsidiaries.

Undertaking submitted to the Victorian Essential Services Commission

At paragraph 9.9 of its submission, AGEA suggested that "*the ACCC's review of the terms and conditions upon which the services will be provided would be assisted if the ACCC has the opportunity to assess whether they are substantially the same as those previously rejected by the Victorian Essential Services Commission. It also noted that GrainCorp's access undertaking, which was rejected in 2008 by the Victorian Essential Services Commission, contained a proposed storage and handling agreement, as well as details of GrainCorp's proposed pricing structure, details which are absent from the access undertakings submitted to the ACCC.*"

AGEA's submission in this regard requires clarification. While GrainCorp's 2007/2008 storage and handling agreement and current fee schedule **were attached** to the submission to the ESC, they did not form part of that undertaking as such. The undertaking which GrainCorp offered was an undertaking to publish updated standard terms and conditions, including charges, by no later than 30 September of each year, which the Company has done.

The Undertaking which GrainCorp has offered to the ACCC is more comprehensive than the undertaking which was rejected by the ESC and it is misleading to allege that it is "substantially the same" as that submitted to the Victorian ESC.

The undertaking which was rejected by the ESC is publicly available at http://www.esc.vic.gov.au/NR/rdonlyres/5C167112-EDC2-4FE4-B0E9-5EAA1853FBB9/0/GrainCorpGrainUndertakingforpublicconsultation.pdf .

5 Competition from other grain terminals

5.1 ACCC information request

Question 1: *Paragraph 5.5 of GrainCorp's supporting submission to its proposed undertaking dated 15 April 2009 (GrainCorp's submission) states that grain exporters in Victoria and southern NSW are able to ship grain through port terminals owned by three different companies (GrainCorp, ABB and Australian Bulk Alliance (ABA)). In this regard, please elaborate on the following:*

(a) What impact, if any, has this had upon terms and conditions of access to GrainCorp's port terminals that in GrainCorp's opinion compete with ABB and ABA port terminals? Please provide any relevant documents or materials to support your response'

(b) Is there any difference between the price and non-price terms offered to marketers exporting out of different GrainCorp terminals?

Question 2: *What factors influence the ability of bulk wheat exporters to switch between terminals (either located in different port zones or owned by different bulk handlers) for the export of bulk wheat? What is the effect of transport costs, infrastructure constraints, availability of transport providers, terminal capacity and terminal availability?*

5.2 Response to information request

Question 1(a) - impact of competition between port terminal facilities in Eastern States on terms and conditions of access

The terms and conditions for most port terminal services are similar across Australia given the role that the previous single desk monopoly provider played in agreeing the framework for wheat. The terms and conditions from a ports perspective also have common conditions that govern the shipping interface that are developed to meet international standards of operation. Competition from other terminals, in normal seasons, has not materially altered the existing non-price terms and conditions nor changed the pricing of services given the already low returns over the cycle that are being made on these assets.

There may be changes to pricing between different terminal facilities for example, where significant underutilisation occurs during drought periods.

Question 1(b) - difference between the price and non-price terms of access to different GrainCorp terminals

The non-price terms of access are the same across all terminals for all exporters. However, there is a difference in the price for using Queensland terminals based on the lower average utilisation of the ports and the need to obtain an adequate return to continue to support their ongoing viability. This is a structure that has been in place for many years and is applied on the same terms for all exporters.

Question 2 - factors influencing bulk wheat exporters ability to switch between terminals

Grain exporters will take into consideration a large range of factors when making a decision on which port terminal to export through. The general principle is that they will choose the least cost pathway given the requirement to maximise returns on behalf

of their owners and customers. The key factors include, but are not limited to, the following:

- commodity grade location;
- distance from port and the relative freight differentials between the same;
- time taken to transfer from country site to port relative to required load date;
- ownership interest in transport capacity;
- available export capacity at a point in time;
- available port storage capacity; and
- pricing of supply chain services.

The range of variables that will determine the flow of grain between terminals make it difficult to provide a definitive answer on the decision making process. However, on the basis that the GrainCorp service model is to provide price and non-price terms on the same basis to all exporters and that port terminal capacity, in most years, is underutilised the most significant factor influencing the flow of grain is the transport cost.

The typical differential between road and rail transport is $10 – 15 per tonne. Rail is, in almost all circumstances on the east coast, the most efficient and cost effective means of moving grain to port. Rail can be contracted by any party directly with rail providers on a take or pay basis or purchased from rail freight providers on a spot or contract basis. Road can be contracted through a multitude of providers with some major exporters purchasing and running their own fleet of trucks for this purpose.

Importantly, evidence given by WEA to the Senate Estimates Hearing on 25 May 2009 included that *'There is grain travelling from Queensland down to Victoria ...'*[3] This indicates that the market is working and clearly able to allocate resources were required if the appropriate commercial drivers are in place, and clearly indicates that domestic demand in the eastern states is the primary market, with the export market secondary due to the differences in gross returns available.

Our primary observation on exporter behaviour is a general reluctance by all exporters, due to the inherent variability in export volumes, to commit to sufficient forward capacity to give service providers certainty in providing assets to meet the export task. This is particularly the case with rail which is the major limiting factor on improved export performance. Where an exporter does make a commitment to forward capacity for a scarce resource like rail transport they are able to more effectively manage the choice in pathways and timing of exports from alternative port terminal service providers.

There is a strong element of 'free-riding' by almost all exporters on supply chain asset capacity in Australia with a general reluctance to take on or share risk. This is substantially different to all other markets across the globe where multi-national or local grain traders must build, or forward contract on a take or pay basis, significant supply chain capacity, be it country storage, rail road or port loading services.

[3] Senate Hansard, 25 May 2009, RRA&T 54

AGEA submits that *'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 (paragraph 3.17, 29 May 2009 submission.*

The geographical distribution of northern hemisphere grain growing regions and the tonnages (higher) and volatility (lower) of production there make infrastructure service provision a significantly different commercial proposition. The development of grain handling infrastructure in Europe has been significantly different from the growth of the industry in Australia. The Australian industry is shaped by its history as a collection of statutory organisations and the 69 year presence of the bulk wheat export monopoly.

Therefore it is not relevant to compare the structure of service provision in the northern hemisphere to that available in Australia; it is an apples and oranges comparison.

AGEA advised in their submission that they would be willing to assist the ACCC in reviewing supply chain practice in other countries. We concur that this would be a very useful and informative exercise. As an example of public access to port facilities we would recommend that the ACCC review the public access regime for the third party owned Port of Houston grain elevator which is managed by a multinational grain trading company. Details of the facility can be found at the following web address.

http://www.portofhouston.com/maritime/general_cargo/elevator.html

In addition the AGEA members should be invited to provide examples from their global operations specifically stating where they offer port terminal access to other competing exporters on equivalent terms to their own trading division i.e. that another trader can buy port terminal services on an equivalent pricing basis as their trading division without having to buy on a grain only FOB basis.

We reject the assertion by the AGEA members that they are unable to obtain a fair and competitive supply chain service on the east coast. We suggest that the key issue is their reluctance, but not the lack of financial capacity, to commit to forward investments in transport services.

5.3 Submissions by interested parties

The following issues were raised in submissions by interested parties

- *There is limited competition between port terminal facilities p4 (AGEA submission No 3)*
- *The cost of interstate movement of grain is prohibitive (p4 AGEA submission No 3)*
- *The only regions where there is (limited) interstate competition 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 (p5 AGEA submission No 3)*
- *Different rail gauges between states also limit Exporter's ability to switch between ports (p5 AGEA submission No 3)*
- *Quality and grain characteristics can be specific to a limited geographical region (AGEA submission No 3)*

These submissions were addressed in GrainCorp's April submission and in our response to Question 6 below.

GrainCorp notes the submission of the AGEA members in particular on the lack of, or limited, competition between port terminal service providers. As stated in our previous submission in sections 2.4 and 5.2 GrainCorp has significant excess capacity across all terminals and as such has the strongest possible incentive to export all available grain across an export period. This is also noted in the AGEA submission at section 3.23 page 6 where they indicate that terminal throughput is much less than overseas counterparts.

GrainCorp exports from Australia, particularly wheat, are counter cyclical to northern hemisphere production. There is a strong price driver to execute Australian export sales by July, the time at which the global cereal market generally softens in anticipation of the northern hemisphere harvest. Thus terminal capacity was established to:

a) cater for a 'front loaded' annual shipping program to take advantage of this cycle, and

b) built at a time when grain exports were approximately half the average tonnage they are today. (Annual average wheat exports have effectively doubled in the past 25 years).

As the terminals were built by Government and the provision of service was considered at the time to be a public good, the cost of the inbuilt overcapacity was socialised across the community.

Since the removal of compulsory acquisition of wheat by the Australian Wheat Board in 1984 (feed wheat) and milling wheat (1989), the domestic consumption sector has grown, at the expense of grain exports. This has exacerbated the export terminal over capacity. Put simply, the structure of grain handling infrastructure in the eastern states is a product of history.

6 Likelihood of new entry

6.1 ACCC information request

Question 3: *Paragraph 5.7 of GrainCorp's submission states that GrainCorp is competitively constrained by the possibility of new entry by a competing port terminal services provider.*

Please elaborate on this comment:

In relation to a new bulk wheat grain export terminal:

(a) What capacity (intake, storage and ship loading) would a new terminal need to be competitive?

(b) What is the likely cost of construction?

(c) What would be likely locations for a new terminal, and what would be required to obtain/utilise those locations?

(d) What would be the minimum level of volume required for the terminal to operate successfully?

(e) Would it be possible to obtain sufficient volumes for the terminal to operate successfully?

(f) Who would be likely to construct a new terminal?

(g) What regulatory or other approvals (such as approval from the port authority) would it be necessary to obtain in order to commence construction?

(h) Could an existing terminal be converted to export bulk wheat?

(i) What would be the likely timeframe for constructing and commissioning a new port terminal?

Question 4: *What were the total upfront capital costs incurred for each of GrainCorp's grain terminals? (for terminals that were purchased rather than built, please provide the purchase price for that terminal).*

Question 5: *For each of GrainCorp's grain terminals, what were the annual total operating costs for the grain terminal for financial years 2005/06, 2006/07 and 2007/08?*

6.2 Response to information request

Question 3 - possibility of new entry

GrainCorp noted in its April submission that the most recent export terminal construction on the east coast occurred at the Melbourne Port Terminal in 1999. In South Australia, the newly constructed Outer Harbour Terminal is due to become operational in 2009. This demonstrates that exporters singularly, or on a joint basis can, and do, have the capacity to build an export terminal to meet their own specific needs in competition with GrainCorp.

The specific questions posed by the ACCC are accordingly perhaps best answered by the MPT or other exporters who have investigated options for building port terminal capacity in either Australia or overseas markets.

Additionally we note that GrainCorp is a listed company without any shareholder ownership restrictions. Subject to a reasonable offer to shareholders all of the port and country assets could be taken over by a consortium of exporters for significantly less than replacement value if they determined that this would improve export supply chain access and efficiency.

In the United States and other major exporting nations, it is common for multiple exporters to own export capability in joint venture ownership.

Question 4 - upfront capital costs for GrainCorp's grain terminals

GrainCorp's current portfolio of port terminals is the outcome of a conversion to public company ownership of government owned assets and the mergers between GrainCorp, Vicgrain and Grainco.

[CONFIDENTIAL]

Question 5 - annual total operating costs for GrainCorp's grain terminals

The annual total operating costs flex on the basis of what grain and non-grain tonnes are exported each year. We do not separate costs for grain type or non-grain products. The operating costs below do not include corporate overhead costs for services such as IT, human resources, finance or other governance costs. Overall we have previously advised that the average return on assets is 8% (page 26 of the April submission).

Given the inherent volatility in the earnings of each port terminal, and across the terminals, it is recommended that the ACCC review EBIT by terminal to understand the financial drivers for the business. We have not separated non-grain EBIT from the terminal financial results historically and as such the results below include all earnings by Port Terminal.

[CONFIDENTIAL]

6.3 Submissions from interested parties

The following issues were raised in submissions by interested parties:

- *The likelihood of new entrants is negligible given the cost and current geographical spread of port terminals (p6 AGEA submission)*
- *Barriers to entry are high due to high capital costs (p6 AGEA submission)*

As noted above capacity has recently been built successfully by other exporters and GrainCorp is listed on the ASX without shareholder restrictions. We note that Glencore Grain, a member of AGEA, recently became one of GrainCorp's top 10 shareholders which demonstrates that the capacity exists for exporters to take ownership positions with export and supply chain capacity with little or no restriction other than their appetite to invest in a business with volatile earnings.

Whilst the barriers to entry are high in terms of construction of a new terminal, the barrier to access is low and a long history of open access on fair and reasonable terms for all non-wheat grains demonstrates that exporters can successfully export through the network of GrainCorp port terminals.

7 Power of customers

7.1 ACCC information request

Question 6: *Paragraph 5.4 of GrainCorp's submission states that many of the grain exporters seeking access to the port terminal services have a substantial degree of bargaining power and the ability to shift their supply sources to wheat produced in other countries.*

Please elaborate on this comment:

(a) If a port terminal customer was dissatisfied with proposed access terms, what alternatives for equivalent services are currently available in Australia, and what would be the typical costs (monetary and otherwise) to the customer in switching to such alternatives? Further, what would be the costs (monetary and otherwise) to the access provider of losing the customer to such alternatives?

(b) Please provide examples of the ways in which a bulk wheat exporter could use bargaining power in negotiating with GrainCorp in relation to the provision of port terminal services at a particular terminal.

(c) Currently, what options are available to a bulk wheat exporter in the event it believes that GrainCorp had engaged in discriminatory conduct in relation to the provision of port terminal services? In particular, would the exporter have any recourse under contractual arrangements with GrainCorp?

Question 8: *Since the removal of the 'single desk' for bulk wheat exports, what are the market shares of each accredited exporter of bulk wheat exported from each of GrainCorp's ports (by percentage and tonne)?*

7.2 Response to information request

Question 6(a) - available alternatives for port terminal customers

There are two alternatives for exporters if they are seeking equivalent export services within Australia.

Exports in Southern NSW and Victoria can be exported through Melbourne Port Terminal and ABB's South Australian Terminal Port Adelaide. The cost to an exporter to switch volume through these facilities is typically the transport cost which will vary depending on the distance from port and the mode of transport. The Grain Trade Australia (GTA) Location differentials for track delivered contracts provide a guide to assist in determining the relative cost of execution between port options. The Locations differentials can be found at:

http://www.nacma.com.au/location_differentials/location_differential_tables

They are a guide only and actual rates achieved for road and rail delivery may vary.

The other alternative is the export of grain in containers. In the April submission section 5.6 we provided a detailed explanation of the role of containerised grain as an alternative pathway to export. In some years up to 30% of wheat can be exported in containers from the east coast footprint.

A further alternative is to sell to the domestic market, which historically accounts for approximately 50% of the Eastern States wheat market. As stated earlier, according to statements made by WEA to the Senate Estimates Hearing on 25 May 2009, Victoria this year is a net importer. There is grain travelling from Queensland to Victoria to meet demand and they are looking at importing.[4]

The cost to GrainCorp of not receiving grain through its port terminals on a monetary basis is significant with the average EBITDA margin per tonne in a normalised year around $10 per tonne. As an example for every 100,000 tonnes the Company does not export the opportunity cost is approximately $1,000,000.

With an average return on the written down value of the port assets at 8%, and less than 1% on the replacement value of the assets, the loss of earnings on even a small amount of tonnes is significant. Therefore the incentive to ensure that access and pricing to port terminal services is undertaken on fair and reasonable terms for all parties is substantial.

The Ports Division of GrainCorp currently has a delayed program of approximately $12M in repairs and maintenance that is required to ensure that the ports can continue to provide a reliable service for exporters. The Company therefore has a significant incentive to provide fair and reasonable access to all parties to continue to fund the viable operation of these facilities.

In the absence of more adequate returns the potential cost to the exporting sector is significant most particularly with the smaller port terminals. Given the significant volatility in earnings between ports a significant degree of cross-subsidisation is required to continue to fund the ongoing viability of the current footprint of ports.

In Queensland, in particular, following a long period of poor returns, it is becoming increasingly difficult to sustain three port terminals given the requirement to maintain them in good condition to meet AQIS phytosanitary obligations and to provide safe systems of work. Mackay and Gladstone are very marginal businesses and in the absence of improved returns one or both will need to close in the next 3 years unless other non-grain business can be found to sustain their continuation. The cost to Central Queensland growers for increased road and rail freight alone may be an additional $10 – $15 per tonne or on average exports from this region of 400,000 tonnes around $6,000,000 per annum.

In summary, the economic cost to GrainCorp in not providing access on fair and reasonable terms is greater for GrainCorp than the cost to exporters of acquiring services elsewhere, given the likely loss of the ability to sustain terminal operations whereas exporters have the capacity to source grain from multiple sources for customers on a competitive basis.

Question 6(b) - ability of exporters to use their bargaining power in negotiating with GrainCorp

The current framework for the port terminal services has been developed over a long period of time, with input from most of the current exporters. As such, exporters are mature industry participants from an export trading perspective. Many also have significant experience gained from their overseas operations.

In Victoria, exporters have had the freedom to take action under the Victorian ESC framework, where an arbitrate and negotiate model was applied for all grains. To date there have been no formal arbitrations conducted on both price and non-price terms.

[4] Senate Hansard, 25 May 2009, RRA&T 54, statement by Mr Woods

Exporters' greatest ability to bargain comes from their ability to source wheat from overseas suppliers if they consider the terms on which they can access port terminal services in Australia are uncompetitive.

Exporters typically require an agreement that covers all of the terminals collectively given their need to export different grade types to their customers. We have not historically been approached to provide an agreement for the provision of port terminal services at a particular terminal as envisaged by Question 6(b).

Question 6(c) - options available to exporters in the event they believe GrainCorp has discriminated against them

Exporters may bring a claim for a breach of the Storage and Handling Agreement if they believe GrainCorp has not complied with the Protocols. The Protocols form part of the current Storage and Handling Agreement and set out the factors which GrainCorp must have regard to when performing a Risk Assessment.

All exporters can make a complaint to the ACCC or commence legal action under the misuse of market power provisions in section 46 of the TPA if they believe that GrainCorp has discriminated against them. We note that some complaints have been made and previously investigated by the ACCC but no actions have been commenced.

An application could have been made to the NCC to have the assets declared 'essential'. We note that no such application has been made by exporters. While this may not be expected in relation to wheat, given the introduction of the WEMA, and before that the presence of the single wheat desk, this option has been available in relation to non-wheat grains for many years.

In Victoria the Geelong and Portland Terminals continue to be subject to a regulatory regime (note section 4.6 of GrainCorp's April submission). We note that no actions have been taken by any exporter through the available negotiate/arbitrate model to amend terms that they allege to be discriminatory.

Evidence given by the WEA to the Senate Estimates Hearing on 25 May 2009 noted that *'there have been some state government regulators involved…in Victoria - the ESC - and ESCOSA in South Australia…'*[5]

Under the WEMA, there is a procedure for lodging complaints with WEA. To date, no complaints have been lodged.[6]

[5] Senate Hansard, 25 May 2009, RRA&T 53, statement by Mr Woodley, WEA

[6] Senate Hansard, 25 May 2009, RRA&T 4, statement by Mr Woods, WEA

Question 8 - market shares of exporters from each of GrainCorp's ports

[CONFIDENTIAL]

7.3 Submissions from interested parties

The following issues were raised in submissions by interested parties:

- *The absence of alternative port terminal facilities means that a multinational company is not in a stronger position than other Exporters when negotiating access (p5 AGEA submission No 3)*

7.4 Response to submissions from interested parties

Please refer to our response to Question 6(a)-(c) inclusive.

GrainCorp reiterates that multinational exporters are in a much stronger position than all other exporters through their ability to source wheat from multi-origins. They hold a substantial advantage in international trading of grains given the depth of relationships that they have with all key customers around the globe and very substantial balance sheets to manage the grain price risk. The substantial proportion of sales to multinationals on a FOB basis by both current and past domestically owned entities validates the existence of substantial power on a global basis.

As such they have significantly more power to negotiate access to services through withholding potential throughput from port terminal service providers.

While GrainCorp has previously highlighted 5 major multinational companies as providing a constraining influence, the majority of the 22 accredited wheat exporters are either multi-national operations, bulk handlers or major Australian operations[7]. The 22 accredited wheat exporters can be divided into the following categories:

Bulk Handlers

- ABB Grain Ltd
- GrainCorp Operations Limited
- Grain Pool Pty Ltd (CBH)

Multinationals

- Bunge Agribusiness Australia Pty Ltd
- Cargill Australia Limited
- Concordia Agritrading (Australia) Pty Ltd
- Elders Toepfer Grain Pty Ltd
- Glencore Grain Pty Ltd
- J.K. International Pty Ltd

[7] GrainCorp Limited surrendered its accreditation on 21 May 2009

- Lempriere Grain Pty Ltd
- Louis Dreyfus
- Marubeni Australia Pty Ltd
- Noble Resources
- Queensland Cotton Pty Ltd
- Riverina (Australia) Pty Limited
- Sumitomo Australia Pty Ltd

Australian companies

- AWB (Australia) Limited
- AWB Harvest Finance Limited
- Emerald Group Australia Pty Ltd
- Goodman Fielder Consumer Foods Pty Limited
- OzEpulse Pty Ltd
- Pentag Commodities Pty Limited

8 Incentive to maximise throughput

8.1 ACCC information request

> ***Question 7:*** *Paragraph 5.2 of GrainCorp's submission states that GrainCorp's incentive is to maximise throughput at its port terminals.*
>
> *Please elaborate on this comment:*
>
> *What significance, if any, does the vertical integration of GrainCorp as a provider of port terminal services and as a bulk wheat exporter have for the incentives of GrainCorp in relation to the port terminal services it provides to itself and other users of those services? Would GrainCorp's incentives change if it was not vertically integrated as a bulk wheat exporter?*

8.2 Response to information request

Question 7 - significance of vertical integration

Please refer to our response to Question 6(a).

On the basis that GrainCorp provides all port terminal services on the same non-price and price terms to all exporters, there is no advantage conferred on one party or another in using GrainCorp's port terminal services.

Given significant underutilisation of port assets and a requirement to provide an adequate return to shareholders there is a substantial incentive to ensure that all potential wheat is exported from all possible exporters in the most efficient manner through GrainCorp port terminals.

There is an efficiency advantage in being vertically integrated along the supply chain. These benefits can be obtained by any exporter who makes the investment to secure supply chain country storage and transport capacity, in particular rail. This is consistent with each component of the supply chain being offered as a separate service available to all operators.

9 Reference prices and standard terms

9.1 Wheat Port Terminal Services Agreement

(a) ACCC information request

Question 12 : *On 18 May 2009 GrainCorp's legal advisors provided the ACCC with a public version of the draft Wheat Port Terminal Services Agreement. The covering letter stated that:*

The terms and conditions of access proposed to be offered to wheat exporters under the Wheat Port Terminal Services Agreement do not differ significantly from the existing Storage and Handling Agreement under which market participants are currently operating.

Please list and provide reasons for any difference between the terms and conditions offered in the two documents referred to above.

(b) Response to information request

Question 12

Attachment 1 provides an outline of the differences between the GrainCorp Storage and Handling Agreement ("**S&H Agreement**") and the Wheat Port Terminal Services Agreement ("**WPTS Agreement**").

Attachment 2 provides a Deltaview comparison of the S&H Agreement and the WPTS Agreement.

The reasons for the changes which have been made to the WPTS Agreement from the S&H Agreement can be summarised as follows:

- changes have been made throughout the WPTS Agreement to reflect that it does not apply to upcountry storage and handling services and that Clients may now have more than one agreement with GrainCorp;
- a 'holding over' provision has been included (clause 4.1) to provide certainty for exporters in the event that the WPTS agreement is not published by 1 October;
- provisions relating to port terminal operation are now contained in the port terminal services Protocols;
- there are added obligations on the client to ensure wheat delivered to the port terminal is not contaminated. This is in response to the experience over the last year in relation to congestion at the port terminal facilities caused by contaminated or untested grain;
- there are added obligations to comply with all safety and quality requirements;
- changes have been made which reflect updated procedures or provide additional clarity in relation to GrainCorp and the client's operations; and
- there is a new obligation that the client must meet the appropriate accreditation requirements (clause 3.15-3.17 WPTS Agreement).

9.2 Publication of Standard Terms and Reference Prices

Submissions from interested parties raised the following issues:

- *Price and non price terms should be made available in advance of the commencement of the undertaking or the expiry of the current terms to provide certainty (p 42 AGEA Submission No. 3)*
- *The ability for GrainCorp to publish its Standard Terms and Reference Prices 15 days after the commencement of the undertaking is unsatisfactory and will be detrimental to the ability of Exporters to enter into forward contracts (p23 AGEA submission No. 3).*
- *Standard Terms and Reference Prices must be published by at least 1 September each year. (p29 AGEA submission No. 3).*
- *On occasion, Bulk Handlers have refused to provide any services to exporters who resist signing these standard term and attempt to negotiate contractual terms and prices (p4 AGEA submission No 2)*
- *It would not be feasible to set access prices for each customer (p5 AgForce submission)*
- *The 1 year length of these agreements does not provide exporters with the security they need to plan their business. Terms should be offered for longer if both parties agree (5, AgForce submission)*

9.3 Non price terms to be included in the Undertaking

AGEA claims that GrainCorp has not provided its price and non-price terms (p23, AGEA Submission No 3). This is not correct. GrainCorp provided its proposed WPTS agreement and fee schedule[8] to the ACCC on 18 May 2009 and it is available on the ACCC's website.[9]

GrainCorp now also proposes to include the Standard Terms (other than the Annexures) for the provision of Standard Services as part of the Undertaking (on the basis that the term of the Undertaking is 2 years). This should address AGEA's concern that the terms were not going to be published until after the Undertaking commenced.

GrainCorp's intention is to make the terms of the 2009/10 Storage and Handling Agreement and the Wheat Port Terminal Services Agreement and the relevant pricing schedule available by early August, and at least by 31 August each year in which the Undertaking is in force.

9.4 Change to 31 August publication as the latest date

Clause 4.1(a) of the WPTS Agreement and 5.1(a) of the Undertaking currently requires publication of reference prices and standard terms by no later than 30 September each year.

[8] The fee schedule does not include the actual fees as they are determined closer to the start of the season.

[9] GrainCorp acknowledges that they were not publicly available at the time of AGEA's first submission.

In previous years the terms and conditions of access have substantially been identical from year to year and so the timing of publication of the storage and handling agreement has not been a major issue.

As mentioned earlier, GrainCorp is proposing to move the publication date forward to 31 August.

9.5 No significant access disputes

The AGEA has claimed that Bulk Handlers have refused to provide any services to exporters who resist signing their standard terms. It is not unreasonable for parties to enter in to written agreements prior to commencing the provision of any services or access to facilities.

GrainCorp considers its standard terms are reasonable, have been accepted by the industry for a long period of time and there are many cases where consistency across agreements is needed for matters such as grain mixing, shrinkage, stock swaps etc which arise from the nature of the commodity. GrainCorp notes that exporters have had access to binding dispute resolution under the Victorian ESC regime for many years but it has never been used.

Riverina (p 9) raises some issues about access but these apply to variations and shipping nominations rather than disputes about entering into the initial agreement and are dealt with elsewhere.

GrainCorp agrees with AgForce that it would not be possible to have individual access prices for each exporter and this is not the intention. As can be seen by Schedule 2 of the Undertaking, the Standard Services cover the services which are likely to be required and there will be Reference Prices for each. It is only for non-standard requests that there may be differentiated prices and this is likely to be rare.

9.6 A one year term is appropriate

It is current grain industry practice to operate under annual storage and handling agreements. This arrangement has been suitable to both port terminal service providers and exporters. Accordingly, GrainCorp disagrees with the submission made by AgForce that '*the 1 year length of these agreements does not provide others in the market the security they need to plan their business at a length equivalent to what GrainCorp believes it needs it the market*."

GrainCorp has not received any indication from its customers that they are unhappy with a one year term.

AgForce suggests the parties should be able to agree to enter into a longer term. While it is correct that GrainCorp is only obliged to enter into an agreement for Standard Services for one year, there is nothing stopping the parties agreeing a longer term. It would however be administratively burdensome and costly for GrainCorp to have a multiplicity of contracted terms with different parties for the provision of what are essentially the same services.

There is also one major constraint on longer term contracts for bulk wheat - exporters must be accredited and WEA undertaking reaccreditation on an annual basis. Therefore, it is difficult to contract for, and accept vessel nominations for the future season in advance of re-accreditation.

10 Variation to Reference Prices and Standard Terms

10.1 ACCC information request

Question 17: *Under what circumstances, and how often, does GrainCorp envisage varying Standard Terms or Reference Prices? Are there limitations or restrictions on GrainCorp's ability to do so?*

Question 18: *What, if any, is the role of wheat exporters in the process proposed in the Undertaking to vary Standard Terms or Reference Prices? (such as consultation prior to publication of new prices, renegotiation of existing prices).*

10.2 Response to information request

Question 17 - variation of Reference Prices and Standard Terms

As GrainCorp now proposes to include the WPTS Agreement (other than the Annexures) as part of the Undertaking ("**Standard Terms**") it is necessary to distinguish between the Standard Terms, the Protocols and the Reference Prices when discussing variation rights.

Standard Terms - - GrainCorp's ability to vary the Standard Terms is limited in that the Standard Terms will form part of the Undertaking. Variations will require the ACCC's consent. . Please note that GrainCorp and an exporter can still agree changes to the Standard Terms when negotiating a contract.

Once a party has signed a WPTS Agreement for a season, the terms and conditions can only be varied with agreement of each counterparty and on 30 days notice (other than for Annexure A which contains the prices and is discussed below).

Reference Prices - GrainCorp is required to publish the Reference Prices for Standard Services under the Undertaking on its website. The Reference Prices will be included in Annexure A to executed WPTS Agreements. Both the published Reference Prices and Annexure A to the WPTS Agreement can be varied by GrainCorp on 30 days notice.

GrainCorp will issue new prices every season but GrainCorp does not have a history of changing prices mid-season. However, mid-season changes may be necessary where port fees imposed by port authorities change or for other matters outside GrainCorp's control. For example, the Government is proposing to remove the 40% subsidy on AQIS fees which could result in changes to the port fees.

Protocols - The initial Protocols will be included in the Undertaking. These may be varied without the ACCC's consent but subject to the limitations in the Undertaking (clause 8.2(b)). It is possible that the Protocols will be updated each season. However, mid-season changes to the Protocols (which form Annexure B to the WPTS Agreement) will require the consent of contract counterparties.

Please also refer to the discussion in section 10.4 below.

Question 18 - role of wheat exporters in the variation of Reference Prices or Standard Terms

It is GrainCorp's standard practice to consult with its customers prior to seeking any amendments to existing contracts. The consultation process between contracted parties

will give all interested parties sufficient time to review and respond to the proposals as required.

To put this in context, there are usually 8 to 12 customers acquiring port terminal services for bulk wheat. GrainCorp will therefore discuss any proposed contract or Protocol variations with customers and will consider their responses.

The recent changes to the Protocols are a good example of the consultation process which would be undertaken where specific feedback from customer interaction at a number of levels was incorporated into the Protocol revisions. A table illustrating this is included in Attachment 3.

10.3 Submissions by interested parties

Submissions from interested parties raised the following issues:

- *The terms and conditions should be incorporated in the undertaking or be subordinate to the undertaking. To do otherwise would contrary to the WEMA (p23 AGEA Submission No 3).*
- *GrainCorp should not be permitted to vary standard prices or terms during the twelve month term except in the event of a material adverse change and then only if both parties agree to the variation and GrainCorp has given at least 6 months notice (p42 AGEA Submission No. 3)*
- *Any ability for GrainCorp to unilaterally vary the Standard Terms and Reference prices is not satisfactory (p13 AGEA Submission No. 3)*
- *Where changes to standard access terms or pricing affects a current holder of an agreement or an application, they should be informed of these changed at least 30 days prior to them coming into effect (p5 AgForce submission)*
- *The undertakings should require notice of three months for any changes to either the standard terms or the access agreements (p4 AgForce submission)*
- *GrainCorp has a discretion to change price and non price items without consultation, with minimal notice to users of the facility and with no compensation for any losses (p2 Riverina) GrainCorp's ability to change price and non price terms without consultation and with contracts and profit margins which are already low (1-2%) (p3 Riverina submission). Minimal notice will have a significant impact on forward contracts.*

10.4 Response to submissions by interested parties

There are four key issues raised:

- whether the terms and conditions should form part of the Undertaking and therefore be locked in subject to the TPA variation process;
- GrainCorp's right to vary the price and non-price terms during a season;
- the ability to enter into forward contracts; and
- whether 30 days notice is sufficient.

At paragraph 4.17 AGEA sets outs a list of terms and conditions it considers must be included in the Undertaking. Riverina also proposed specific drafting suggestions in Schedule A and B of its submission. GrainCorp's responses to these are set out in Attachment 4

Standard terms and variation

On the first and second points above, please see the answer to Question 17.

The rationale behind this approach is as follows:

- The Standard Terms being the WPTS Agreement (minus Annexures) will now be part of the Undertaking and can only be varied with the consent of the ACCC. This is on the basis that the term of the Undertaking is only two years and the fact that the basic terms and conditions have not changed substantially over the last 5 or more years. However, the Company rejects the assertion by the AGEA that to not do so would be contrary to the WEMA.

- The initial Protocols will be included in the Undertaking to give certainty for the first season but it is necessary that GrainCorp be able to vary them. It can do this without consent of exporters before the start of a season but subject to the limitations in the Undertaking. It can update them during a season but practically, it can only implement changes if it gets the exporters who have contracts to agree to those changes as the Protocols form part of the contract.

- The Reference Prices which will be in Annexure A to the WPTS Agreement (Port Terminal Services Fee Schedule) will not be included in the Undertaking and may be varied by GrainCorp on 30 days notice. The flexibility is necessary as it is possible that port, quarantine and testing processes can all change during the season. This may also apply to other matters outside of GrainCorp's control. This can impact on the nature of the services and the costs.

There is an ability to forward contract

The claim by Riverina alleging that the existence of the right by GrainCorp to vary components of the Protocol restricts them from 'forward contracting' is incorrect.

Grain traders face significant volatility across the major factors that determine grain values and trading margins including;

- Grain prices;

- Interest rate and exchange rate fluctuations;

- Natural events impacting on domestic and international supply and demand;

- Variations in domestic freight rates, and

- Changes in shipping rates.

Traders have to manage their position and trading risk exposure to militate these risks. The relatively low cost of port terminal services as a percentage of the value of a tonne of grain, and their stability relative to other grain price determining factors, invalidate this claim.

A movement in the AUD$ against the US$ of one cent equates to a change in value of between AUD$3 and $5/T. Similarly changes in interest rates can push the value of currencies up and down over night, and regularly do. The possibility of change of a once a year $1 to $2 change to a $15/T service fee will not prevent a company from forward contracting grain, where the value of that grain may be $300/T.

An exporter can account for port terminal services costs based on historical price movements, and therefore this will not prevent them from forward contracting sales.

30 days notice is sufficient and realistic

GrainCorp notes that the AgForce submission supports the 30 day notice period where changes to a standard access term or pricing affects a current holder of an agreement or an application.

GrainCorp rejects the suggestion of another exporter that 30 days is '*minimal notice'* and is insufficient notice for variations to the Standard Terms and Reference Prices. The need to vary the terms and conditions of access arises from the fast changing dynamic nature of the wheat export industry post removal of the bulk wheat export monopoly.

11 Service Standards

11.1 ACCC information request

Question 42: *Does GrainCorp currently report (internally or externally) on any key performance indicators/service standards in relation to its port operations? If so, please list and explain the measures.*

11.2 Response to information request

Question 42 - reporting on performance measures

GrainCorp reports on its services standards through the following channels:

- GrainCorp is subject to significant reporting standards and requirements as a condition of obtaining, maintaining and or renewing accreditation as a bulk wheat exporter with WEA;
- Under the WEMA, GrainCorp is subject to an audit review of its operations to ensure compliance with the requirements of accreditation;
- GrainCorp maintains its own internal reporting to monitor compliance with regulatory standards and to monitor throughput at its port terminal facilities.

This is in addition to the normal testing and verification of wheat quality done at the time of vessel loading for the purposes of shipping documentation.

(a) Reporting obligations as a condition of obtaining or renewing accreditation

Each bulk wheat exporter accredited by WEA has a range of reporting obligations including;

- A requirement to lodge an annual wheat export report as a condition of reaccreditation;
- The need each year to reapply for accreditation and supply the WEA with an exhaustive quantity of information relating to the operations of the Company. (The GrainCorp Operations application for accreditation for 2009/10 exceeded 400 pages of information);
- As a port terminal owner, GrainCorp is obliged to supply a daily shipping stem which provides sufficient information for all exporters to note the daily and monthly flow of grain through the terminal and issues with a vessel e.g. survey failure, awaiting stock etc.;
- The Company has to attest to the fact that it is complying with a range of programs and levy collection mechanisms;
- All accredited bulk wheat exporters have to notify the WEA of any 'notifiable matter' as defined in the accreditation scheme within 14 days of a matter occurring. These include any financial matters referred to in the application for accreditation or renewal, changes to executive officers, any legal matters that involve the Company; announcements made to the ASX, the release of any company results, etc;

- Each accredited bulk wheat exporter is subject to audit by the WEA of any aspect of the Company's business that relates to information provided in the application for accreditation or accreditation renewal.

(b) Audit of GrainCorp's compliance with accreditation

Under section 31.1 of the WEMA, WEA has the power to require GrainCorp to appoint an external auditor and arrange for an audit of;

- GrainCorp's compliance with one or more conditions of accreditation;
- the accuracy of information given to WEA; or
- the accuracy of statements made in GrainCorp's accreditation application(s).

The external auditor is required to provide a written report to WEA and to GrainCorp setting out the results of the audit.

For example, on 8 April 2009 an audit was required under section 31.3 of the WEMA and thereafter conducted. The audit review involved the targeted and random compliance audit of GrainCorp's files relating to 64 vessel nominations over the period between 15 December 2008 and 20 May 2009 for GrainCorp's Fisherman Islands, Carrington and Port Kembla ports.

In the course of the review the 64 vessels on the relevant shipping schedules at the relevant time for these three ports were analysed, using the individual hard copy vessel files or other internal GrainCorp documents, to verify that the information on the relevant Shipping Stem was accurate and to identify any anomalies in the handling of the nomination process and the prioritisation of vessels as they appeared on the Shipping Schedule. To achieve this, the steps taken included:

- confirming the nomination date, acceptance and other relevant shipping stem details;
- auditing the documentation trail for these vessels, through to loading; and
- auditing the systems, procedure and controls in place at GrainCorp, Toowoomba for vessel nomination and the relevant Shipping Schedules (or shipping stem) including activities with, or performed by, third parties.

Importantly, while the audit revealed some processes were less than optimal, no evidence of incorrect handling of nominations, setting of priority for vessels or unfair rationing of port capacity was identified.

(c) GrainCorp's internal reporting

GrainCorp internally measures the rate of daily receivals, quality performance, % capacity utilisation, volume throughput and product failure reporting.

GrainCorp interacts with customers on a daily basis on stock accumulation to port and informs them of any issues or changes required to the site assembly plan.

11.3 Submissions by interested parties

Submissions by interested parties raised the following issues:

- *The Undertaking should provide for penalties for Port Operators for failure to meet defined Key Performance Indicators (p3 AgForce submission)*
- *Standard penalty clauses should apply in relation to GrainCorp inefficiencies to secure the integrity of the shipping stem and all activities leading up to loading the ship (p3 AgForce submission)*
- *The terms and conditions of access should include minimum performance criteria which GrainCorp is required to meet as set out on page 13 of the AGEA Submission No 3.*
- *The appropriateness of liability caps imposed by the Bulk Handler and the ability of exporters to recover their loss and damage against Bulk Handlers if Bulk Handlers breach the terms and conditions was also raised (p29, 45 AGEA submission No. 3)*

11.4 Response to submissions by interested parties

There are two key issues raised:

(a) the need for performance indicators; and

(b) liability or penalties for poor performance.

Performance indicators

GrainCorp considers that the introduction of performance criteria measures will be ineffective, given the range of external influences which impact on GrainCorp's performance. The unpredictable nature of the supply chain makes it impossible to accurately measure performance standards in the way AGEA has suggested on page 13 of its submission. AGEA's submission is not developed sufficiently to account for external factors when attempting to provide benchmarks against which GrainCorp's performance should be assessed. In particular, in response to the measures proposed by the AGEA:

- It is not possible for GrainCorp to accept vessel nominations within 24 hours given the need to verify the information and validity of the nomination. This would require unreasonable turn around over weekends and public holidays and GrainCorp does not have the resources to do this.
- It is not clear what performance indicators GrainCorp would be expected to meet in relation to changes to vessel slots and cargo accumulation. However, changes to vessel slots can arise from vessels failing survey or being late – matters totally outside of GrainCorp's control.
- There are many factors outside of GrainCorp's control which will prevent it from unloading trains/road transport within six hours. The recent situation at the Fisherman Islands port terminal provides an example of this where road receivals of 7 – 9,000 tonnes per day are common, but GrainCorp doesn't control the time of arrival of vehicles, as transport companies are contracted by the exporter. This results in an uneven flow of receivals. As a typical example, on 17 June 2009 receivals occurred as follows:

6am to 1pm = 2350t = 335tph - bulk of tonnes in the block were received between 6am to 10am

1pm to 4pm = 1200t = 400tph – even spread

4pm to 2am = 6068t = 606tph - at 4pm a large number of trucks in queue.

Total = 9518t

It is therefore unreasonable to expect that a performance guarantee of 6 hours is put in place when control is not exercised by the port operator on actual arrival time. However, we are working on a protocol for receivals in set windows and are consulting with industry on the same. It will require exporters to demonstrate flexibility in working with each other for the orderly intake, typically by vessel order to make the process of port receivals more efficient.

- Load rates are not constant and depend the characteristics of particular vessels, and are also totally controlled by the vessel's Master. For example, load rates must slow down to trim (final loading of) vessel hatches and to account for the rate at which individual vessels can pump ballast. The use of nominal maximum belt, hopper or ship loader capacities for the establishment of 'performance measures' demonstrates the lack of understanding of grain handling on the part of those making the suggestion. The quoted operational maximum capacity of grain handling equipment is not unlike the maximum speed of a vehicle. While a car may be capable reaching 200 K/ph, 'real world' conditions dictate that the actual operation of the vehicle achieves an average usage much lower than the maximum. This principle applies to grain handling equipment, where the real world capacity across a given time period is always substantially lower than the nominal maximum capacity.

AgForce's submission acknowledges that its proposed penalty clauses for port operators who fail to meet defined KPI's *'should take into account normal breakdown occurrences but reflect poor management.'* AgForce fails to acknowledge the fact that breakdowns are not the only limiting factor that reduce the nominal efficiency of grain handling equipment and do not provide a suggestion as to how KPI's would operate. GrainCorp considers that, in a practical sense, defining measurable KPIs which accurately reflect GrainCorp's management without being affected by operational issues beyond its control, is not realistic.

The incentive created by a need to maximise throughput is sufficient, particularly in the context that there is significant annual shipping overcapacity. Any attempt to impose imprecise service standards subject to penalty clauses completely changes the risk profile in relation to assets that have struggled in recent years to achieve an acceptable commercial rate of return. If the risk profile to the terminal owner is changed significantly, it would be fair to expect that the charging regime related to the provision of terminal services would have to be altered to reflect that change.

Liability allocation

GrainCorp is concerned that AGEA's submissions may, inaccurately, suggest that all delays and additional costs on exporters are the result of "*bulk handler negligence*" and that all such costs should be borne by the port terminal operator. This is neither correct nor commercially viable.

It may be that certain users would prefer no limitations on liability, stronger commitments in relation to service timeframes and an ability to transfer more risk onto port terminal operators. However, this is inconsistent with the reality of operating a common use supply chain involving multiple participants in which delays and other operational issues may result from matters outside the control of the port terminal operator.

The apportionment of liability under its storage and handling agreement and proposed WPTS Agreement is appropriate and enable GrainCorp to provide services for the benefit of all exporters.

- ***Reduction in wheat quality -*** Clause 8 of the Wheat Port Terminal Services Agreement provides a detailed liability allocation regime for reduction in the standard and quality of wheat. It reflects GrainCorp's level of control taking into account the limitations of testing through sampling, the wheat received by GrainCorp coming from diverse sources and the need for commingling to maximise use of storage. GrainCorp does accept liability although capped at $500,000 for wheat outloaded onto ships and $10,000 for road or rail outloadings.

- ***GrainCorp does not exclude liability for negligence –*** The clause 9 exclusion of the Wheat Port Terminal Services Agreement does not exclude liability for negligence.

- ***Consequential loss*** – GrainCorp does exclude liability for consequential loss. This is entirely appropriate given the level of potential damages versus the level of return earned. On p 3 of AGEA's 15 May Submission, it includes a calculation of the potential losses in relation to one vessel load of $3.435M.

  Consider the potential liability for consequential losses to which GrainCorp would be exposed over a season in running seven ports.

  It is common commercial practice to exclude consequential loss – in fact, GrainCorp is of the view that it is rare to see a commercial contract which doesn't contain such an exclusion.

AGEA's suggestion of unlimited liability is not commercially reasonable, does not reflect the level of risk versus reward in operating the ports and is out of step with international practice at ports and commercial contracting in general.

12 Profitability and reasonable fees

12.1 Submissions by interested parties

- *The Victorian Farmers Federation, citing a Credit Suisse report,[10] claim that 'Returns to GNC's grain handling infrastructure are likely to increase due to high barriers to entry into the storage and handling market in NSW.*
- *Bulk handling fees appear to be greatly disproportionate to the actual cost incurred by the bulk handler (AGEA submission No. 2)*
- *The appropriateness of a number of specific fees are also raised.*

12.2 Response to submissions by interested parties

GrainCorp rejects any suggestion that its fees are unreasonable or that it is earning excessive profits from its port operations.

- Refer to section 5.3 of the April Submission which shows that GrainCorp has only earned an average return of 8% on its port terminals for FY2005 – FY 2008.
- After a number of poor seasons, GrainCorp has had greater throughput for FY2009 so should earn a return higher than 8%. This simply reflects the size of the harvest and explains the Credit Suisse comment about increased returns. The GrainCorp Ports business costs approximately $30 million per year to run, regardless of the tonnage of exports handled. GrainCorp does not agree that the barriers to entry are high, particularly for upcountry facilities as explained previously, in particular Part 6.

A number of examples provided by AGEA on fee's charge require correction (clause 3.24 p and 8 of the AGEA submission);

- Non-refundable nomination fee – the $2/t fee is charged to prevent phantom vessel nomination. A re-nomination fees applies in the event that if an exporter fails to provide proper notice that their vessel will not arrive this can cause significant disruption to the shipping program and capacity utilisation. The renomination fee can be easily avoided if an exporter provides adequate notification as prescribed under the protocol for vessel delays.
- The $2.50 inter-zone fee specifically applies to the Mackay Terminal and this is a requirement of the head lease with Mackay Port Authority for the repayment of the facility. This cannot be altered by GrainCorp.
- Regulatory authorities apply stringent controls to the emission of dust at port terminals. Port operators invest considerable sums in dust suppression, monitoring and emission control measures. Dust extraction is critical to the maintenance and continuation of terminal operation. Significant tonnages of dust are collected and disposed of each year at a substantial cost.
- Shrinkage of grain is a process where grain respiration leads to moisture (drying) and thus volumetric and weight losses. The longer grain is stored the

[10] Grant Saligari, Credit Suisse Equities (Australia) Limited, 27 April 2009, "Australian grains industry - Equity Research"

more it ‘shrinks’ in total weight and volume. Every time grain is handled there is a consequential loss that is also considered within ‘shrinkage’ tolerances. The standards used by GrainCorp for shrinkage losses are in line with international standards.

- The charges imposed by GrainCorp for small vessel loading are reasonable, considering the relative length of time these vessels occupy a berth. The actual loading rate of smaller vessels per tonne / hour of grain loaded is significantly slower than for larger vessels, as their ballast transfer rates are lower per hour and the time spent trimming hatches, as a proportion of total cargo, is significantly higher.

- The provision of Pesticide Residue Free (PRF) grain can only be undertaken on a best endeavours basis, due to the lack of rapid tests for chemical residues on intake. GrainCorp works closely with customers to plan PRF cargo requirements. The assembly of PRF cargos direct ex-farm is particularly risky, due to the difficulty of identifying the provenance of this type of grain. The new GrainCorp ex-farm and non- approved storage cargo accumulation protocol contributes the risk management in this respect. It is not possible to provide PRF cargos without good planning prior to receival.

13 Non-discrimination

13.1 ACCC information request

Question 15: *Clause 5.4 proposes a mechanism by which GrainCorp may provide access to Applicants or Users, including its own Trading Division[11], on differentiated terms, provided such terms are consistent with the objectives of the Undertaking, taking into account the 21 matters set out in clause 5.5, and offered on an arms length commercial basis.*

(a) If in a given circumstance GrainCorp considered that one of the matters listed in clause 5.5 provided 'commercial justification' for providing access on differentiated terms, what information or evidence would GrainCorp rely upon to demonstrate that such 'commercial justification' existed and different terms were appropriate?

(b) How would GrainCorp communicate the reasons for such terms to the Applicant/User?

(c) What measures does GrainCorp have in place to ensure that any differences in terms are developed and offered on an arms length commercial basis?

Question 16: *What conduct would be viewed as "substantially damaging a competitor" or "conferring … any unfair competitive advantage over a competitor" for the purposes of clause 5.4(b)?*

13.2 Response to ACCC questions

Question 15(a) - evidence to demonstrate a commercial justification

There are two issues raised in the questions shown above. First, differentiation in the negotiated WPTS Agreement and second, differentiation in relation to particular requests for services under that contract.

In relation to the WPTS Agreement, GrainCorp is not expecting significant issues of contention over the terms, especially given GrainCorp's experience under the Victorian ESC regulations, where access seekers have had recourse to binding 'negotiate / arbitrate' dispute resolution provisions for access and related claims. The terms and conditions within the proposed Wheat Port Terminal Services contract are essentially the same as those that have been operating successfully at all GrainCorp port terminals for a number of years.

While it is expected that exporters will request the Standard Services, it is envisaged unfortunately, that some exporters will see the new regulatory environment as a means by which they can threaten to, or in fact refer complaints to the ACCC, and seek to force GrainCorp to provide port terminal services on a concessional or 'special deal' basis as an outcome to resolve their complaint. This will undoubtedly have a negative impact on the industry, the relations of the parties and may also cause an overflow of such matters in the form of complaints to the ACCC. It would most of all, go against the purpose of the Undertaking – to create a non discriminatory and fair platform for access.

As mentioned above, in order to provide clarity and certainty for its exporter customers, GrainCorp proposes to include the Standard Terms for the provision of Standard

[11] Defined as the business division/section of GrainCorp that holds a licence to export bulk wheat.

Services to bulk wheat exporters within the Undertaking, as this inclusion of the Standard Terms within the Undertaking provides a process for notice and ACCC approval for amendments to be negotiated, and will assist in the ACCC dealing with parties and any queries or complaints that may be directed to the ACCC.

If however there was a request for non-standard services, the information or evidence which GrainCorp would use to assess and then demonstrate the existence of any 'commercial justification' for providing access on differentiated terms, would have to be assessed and resolved on a case by case basis, based on the nature of the access application made by the applicant. GrainCorp is aware that the information and evidence it receives or creates during the course of considering or determining such an application may be subject to review in accordance with the dispute resolution provisions of in the Undertaking. GrainCorp understands that ensure that all investigations, discussions, considerations and determinations in connection with such applications could be independently scrutinised and subjected to standards and regulations.

GrainCorp does not believe it would be productive or appropriate to introduce a detailed or documented process connected to requests for non standard services, especially as these are difficult to anticipate and in any case the anticipated frequency of such requests would not warrant it. It is possible that there may be specific requests for non-standard services for a particular export load, such as special segregation requirements. In GrainCorp's view, such an agreement to provide these non standard services will be generally governed by the provisions of the WPTS Agreement, revised to include amendments and additions reasonable and necessary in the circumstances, specific to the request in question. Again, it is difficult to anticipate all the possibilities but it is likely that such special requests will arise in relation to the Cargo Nomination Application and Cargo Assembly Plan. Any additional terms and differentiated prices will be based on the information in that documentation. The Protocol includes a process for evaluating such requests, a requirement to give reasons for rejecting a Cargo Nomination Application and an expedited dispute resolution process.

Question 15(b) - communication with Applicants / Users

In the event that GrainCorp receives a request for non standard services, which commercially justifies the need to depart from or vary in some way the Standard Terms and pricing, then further to the procedures and considerations detailed above GrainCorp would establish open lines of communication with the relevant customer and discuss the situation particular to that customer's needs. Following on from such, GrainCorp would communicate the basis for alterations to the Standard Terms and pricing, which relate to that customer's request and GrainCorp's provision of the non standard services, as well as matters incidental thereto. Given the small number of bulk wheat export customers, as well as their sophistication in terms of issues connected to the export market, GrainCorp envisages that this process will draw upon open lines of communication and adaptability to the situation as may be reasonable, commercial and practical for GrainCorp to provide such services.

Question 15(c) - measure to ensure arms length dealings

To the extent this question relates to dealings between GrainCorp's Ports and Trading Business Units, please see response to questions 11, 40 and 41.

Further, it should be noted that GrainCorp, as an accredited bulk wheat exporter and an operator of port terminals is subject to review, scrutiny and audits as directed by the WEA, which will include the extent to which the Protocols are being applied and complied with.

Given that the terms and conditions will be incorporated into the Undertaking, all parties seeking access to GrainCorp terminals for the provision of port terminal services for the export of bulk wheat will be required to enter into an WPTS Agreement. This will also apply to GrainCorp Trading.

An Access Agreement, in the form of the WPTS Agreement, will bind access seekers to the terms and conditions contained within the Undertaking, providing the transparency and certainty requested by the accredited bulk wheat exporters that have made submissions to the ACCC.

Question 16 - meaning of substantially damaging a competitor or conferring any unfair competitive advantage

GrainCorp expects that, as the competition regulator, the ACCC would understand what conduct constitutes substantially damaging a competitor (eg this is the same wording as used in section 46 of the TPA) or conferring a unfair competitive advantage.

On review of the drafting, we suspect that the ACCC's question arises out of a concern that the inclusion of this wording somehow allows GrainCorp to differentiate in all other circumstances, namely where it is not for those proscribed purposes. This is not the intent; differentiation of terms is subject to the restrictions in clause 5.4(ii). Clause 5.4(b) was meant to reinforce the restrictions on differentiation rather than derogating from it.

The reference to "substantially damaging a competitor or conferring upon GrainCorp or its Trading Division any unfair competitive advantage over a competitor in the marketing of Bulk Wheat" in clause 5.4(b) was intended to expressly prohibit the perceived harm that the Undertaking is designed to remedy.

GrainCorp is willing to remove the clause if it poses a concern to the ACCC after considering GrainCorp's response.

The context in which the original wording was submitted has been substantially changed following the decision to include the terms and conditions of port access within the Undertaking.

13.3 Submissions from interested parties

Submissions from interested parties have raised the following issues:

- *The undertaking should provide fair and transparent access. Rules must be capable of objective application and discretionary or subjective decisions must be kept to the absolute minimum (p2 AGEA submission No. 3)*
- *GrainCorp discriminates on the basis of whether wheat enters the port via third party storage or through GrainCorp's upcountry storage (p5 AGEA submission No. 3)*
- *The undertaking must provide transparency in relation to GrainCorp's management of shipping slots and accumulation at port (p10 AGEA submission No. 3))*
- *The objectives clause does not promote non-discrimination ((p 16, 25 AGEA submission No 3)*
- *Clause 5.4 and 5.5. does not adequately deal with non-discriminatory access (p25, 43 AGEA submission No 3)*
- *The factors set out in clause 5.5 provide a justification and allow GrainCorp to favour its own Trading Arm (p25, AGEA submission No 3)*
- *Clause 5.4 places an unrealistic burden of proof upon access seekers to demonstrate a breach of the non-discrimination clause by requiring proof that the differentiation was "for the purpose of substantially damaging a competitor or conferring upon the Port Operator or its Trading Division any unfair competitive advantage." Arm (p25, AGEA submission No 3)*

13.4 Response to submissions from interested parties

Introduction

The submissions by interested parties address the following four key areas:

- transparency and the removal of GrainCorp's ability to exercise discretion in making operational decisions (this is addressed further in section 18;
- the ability for GrainCorp to differentiate between Users in accordance with the objectives clause. Submissions have called for the removal of GrainCorp's ability to discriminate on the basis of its ability to meet its own or its Trading Divisions' reasonable anticipated requirements for Port Terminal Services (clause 1.2(e)(i)(D));
- the ability for GrainCorp to provide differentiated terms of access for non-Standard Services under clause 5.4 and 5.5 of the Undertaking; and
- the ability for GrainCorp to differentiate in relation to the source of the wheat delivered to its port terminal facilities (also addressed in section 18).

The measures in the Undertaking prevent GrainCorp from discriminating in favour of GrainCorp Trading for the reasons discussed below.

13.5 Transparency and flexibility for operational decisions.

GrainCorp's operational procedures are sufficiently transparent while allowing GrainCorp to provide port terminal services effectively

AGEA states, in paragraph 4 of its submission, that Port Terminal Operators "*have an obvious conflict of interest…and real incentive to…inhibit competition by discriminating in favour of their Trading Divisions*". AGEA also claims that the existing Undertaking does not provide transparency in relation to management of shipping slots and accumulation at port.

The claims fail to recognise:

- the requirement for GrainCorp to publish the shipping stem and update it every business day;
- the provisions of the Protocols which specify the manner in which and the factors relevant to GrainCorp accepting a cargo nomination application;
- the recent finding of the WEA directed audit that, while the process of rationing port terminal capacity where limited was not 'transparent', GrainCorp had not given preferential treatment to GrainCorp Trading.

Firstly, the shipping stem discloses information in relation to the name of each ship scheduled to load grain, the time where it is nominated to load, the time it was accepted to load, the quantity of grain to be loaded and the estimated date on which grain is to be loaded. This is in accordance with the WEMA.

To the extent GrainCorp has access to information which interested parties claim it could use to gain a commercial advantage, this information is confidential for a limited period, as GrainCorp in now placing all cargo nominations immediately on the shipping stem. This means that a cargo nomination effectively becomes immediately public and as such there is no ability on the part of GrainCorp to extract commercial advantage from any information contained therein.

Secondly, the Protocol prevents manipulation of logistics, substitution of vessels or variation of the shipping stem to favour GrainCorp's Trading division as it lists the factors which GrainCorp may take into account in accepting a cargo nomination application and its customers can take action under the WPTS Agreement if they consider GrainCorp refused to grant them a shipping slot without legitimate grounds.

GrainCorp rejects the AGEA's submission that the requirement that "*the Client must confirm it will/has contracted sufficient rail and/or road transport to accumulate the wheat tonnage to the Port Terminal for the nominated cargo prior to the nominated Load Laycan"* means that GrainCorp would be likely to discriminate in favour of applicants who use GrainCorp's rail service *(para 4.12, 29 May 2009 submission).* AGEA has not provided an example of this behaviour. It is also inconsistent with GrainCorp's incentive to maximise throughput at the terminal and in any event failure to obtain such confirmation could cause inconsistencies and inefficiencies at the ports.

GrainCorp also rejects the AGEA's submission that exporters are constantly charged for overtime by GrainCorp. GrainCorp charges overtime when the company has to provide labour outside normal day shift hours of 7.00 am to 3.30 pm.

Any penalties or overtime are be applied equally in like circumstances to all access seekers including GrainCorp Trading. Similarly, GrainCorp Trading is also charged a non-refundable booking fee when submitting a Cargo Nomination Application.

Flexibility is required

GrainCorp has contended on several occasions that efficient terminal management requires flexibility, and that the imposition of rigid operational rules will impact on the efficient management of port terminal infrastructure.

The accumulation of grain cargos and loading of vessels is a complex and time consuming task, where many components have to work in concert. A single element in the supply chain, or the inability to flexibly react to changed circumstances, can lead to a coordination failure, and thus a break down of efficiency.

For example, in Queensland at this time, Queensland Rail (QR) has ceased providing rail services on weekends. The allocation of port terminal capacity and the timely cargo accumulation risk assessments of cargos accepted onto the shipping stem for the Fisherman Islands (FI) terminal have been made on the basis of there being weekend rail services. The decision by QR has exacerbated shipping delays, will possibly cause some exporters to incur demurrage due to delays in timely cargo accumulation and will require more grain to be delivered to FI by road, thus driving up transport costs.

The decision by QR demonstrates how the efficient provision of port terminal services and the allocation of terminal capacity can be disrupted by factors beyond the control of GrainCorp. The Company has had to make adjustments to a range of shipping related activities to deal with the reduction by QR in rail services, and was able to bring these changes into place quickly.

It would be in conflict with the objectives of the Undertaking to make such an event a scenario for customers to then complain to the ACCC about and seek no standard treatment or services. Many of the submissions of several exporters however, seek to hold the Bulk Handlers accountable for such events, which are clearly outside our control.

Other factors that require port terminal management to adjust flexibly daily include;

- Variations in rail service frequency
- Train derailments, accidents and breakdowns
- Road works and traffic delaying the arrival of trucks
- Road transport availability
- Industrial action
- Changes to transport regulation such as those relating to fatigue management
- Terminal disruptions and machinery failures
- Rain, wind, flooding, etc, hindering, delaying or stopping vessel loading (experienced recently at FI for an extended period)
- Quarantine related matters such as the presence of insects in grain on receival
- The rejection of grain in the shipping path by AQIS due to insects, weed seeds or other material delaying or preventing vessel loading
- Vessels failing marine or AQIS survey

- Vessels arriving late and terminal capacity becoming 'blocked out'
- Vessel mechanical failure
- The capacity of vessels to ballast and trim at rates equal to ship loader rates
- Vessel air draft and tides; and
- Delays related to cargo ownership – insufficient grain to load vessels

During the current shipping year more than 95% of variations to cargo nominations post acceptance were requested by exporters, the parties primarily seeking to impose heavier regulation on the bulk handlers. In these instances an exporter may instruct variations to the vessel load date or change of vessel, changes to the grade mix, commodity mix, cargo tonnage, or actual load port. These are requests by exporters to **accepted** cargo nominations that GrainCorp has to seek to accommodate.

A rigid Undertaking containing a clearly defined set of 'rules' that preclude flexibility of the management of port terminal infrastructure in response to exporter requirements may lead to a situation where GrainCorp cannot accommodate the variations to accepted cargo nominations made regularly by exporters.

This would cause significant inefficiencies to arise that would materially harm, not only individual exporters, but the overall competitiveness of Australian grain exports.

Further, GrainCorp is subject to audit at the direction of WEA for compliance with its conditions of accreditation. The recent audit of GrainCorp's operations for the period 15 December 2008 to 20 May 2009 concluded that '*despite the confusion between the noted times of Notice of Intention to Nominate and the Vessel Nomination, our audit did not find any evidence of unfair or inappropriate priority setting.'*

The WEA directed audit was comprehensive and involved an examination of the documentation for 64 vessel nominations at GrainCorp's Fisherman Islands, Carrington and Port Kembla terminals. Where nominations had been rejected, WEA investigated the circumstances surrounding the rejections and in each case concluded that the process was carried out in a manner which showed no signs of incorrect setting of priority for vessels, and to have been fairly conducted.

13.6 Objectives clause is appropriate

Paragraph 5 of the AGEA submission claims that "*the 'Objectives' clause is a mere statement of intent*", that "*there is no tangible basis upon which to assess actual compliance*" and that the Objectives clause is "*biased in favour of bulk handlers*".

The Objectives clause of the Undertaking is a statement of what the Undertaking is intended to achieve. There is a clear basis on which to assess compliance with the terms of the Undertaking and, therefore, its Objectives.

Submissions have called for the removal of clause 1.2(e)(i)(D) which provides that one objective of the Undertaking is to reach an appropriate balance between…*the legitimate business interests of GrainCorp, including GrainCorp's ability to meet its own or its Trading Divisions' reasonably anticipated requirements for Port Terminal Services*

The language of this clause is based on section 44W of the TPA, which provides that in making an access determination in an arbitration of an access dispute in relation to a 'declared service' the Commission must not make a determination that would have the

effect of *preventing an existing user obtaining a sufficient amount of the service to be able to meet the user's reasonably anticipated requirements, measured at the time where the dispute was notified.*

In its decision in *BHP Billiton Iron Ore Pty Ltd v National Competition Council* [2008] HCA 45 the High Court referred to s44W(1) requiring that an existing user be able to obtain a sufficient amount of the service to be able to meet the user's reasonably anticipated requirements, measured at the time when the dispute was notified" and found that BHP would be an "existing user" by virtue of providing the relevant service to itself. The Court held that

> *It appears that if either of the services to which Fortescue seeks access are services within the meaning of Pt IIIA, then BHPBIO would properly be regarded as providing that service to itself. Therefore it would be an "existing user" whose interests would be afforded the protection given by par (a) of s 44W(1),*[12]

This is consistent with the objectives of Part IIIA to *promote the economically efficient operation of, use of* ***and investment in*** *the infrastructure by which service are provided, thereby promoting effective competition in upstream and downstream markets.*

On this basis clause 1.2(e)(i)(D) is justified and a decision by the ACCC to require the removal of that clause would be inconsistent with the High Court's decision in *BHP Billiton Iron Ore Pty Ltd v National Competition Council* and the objectives of Part IIIA. We note that submissions by interested parties have not raised any evidence to the contrary.

However, GrainCorp is willing to remove clause 1.2(e)(i)(D) from the Undertaking if the ACCC considers it necessary.

GrainCorp has also removed its rights to reserve capacity at Port Terminals solely for the use of GrainCorp Trading from its current Protocols. Accordingly, the concerns expressed by interested parties in relation to how the Objectives clause would impact the acceptance of Cargo Nomination Applications have been addressed.

13.7 Differentiation under clause 5.4 and 5.5

Clause 5.4 is appropriate

GrainCorp disagrees with the statement by AgForce that *'the clauses relating to non-discriminatory access are clear in stating that GrainCorp must not discriminate, but clause 5.5 allows them to avoid (through commercial incentives/penalties) clause 5.4 in almost all cases.*

In paragraph 10 of its submission, AGEA outlines its criticisms of the terms of the Undertaking under which non-discriminatory access is provided. AGEA claims that clause 5.4 of the Undertaking gives GrainCorp "*complete discretion to decide whether discrimination is consistent with the objectives of the undertaking and therefore justified*", with the inevitable result, in AGEA's view, of GrainCorp "*deciding to discriminate in its price and non-price terms in favour of its own interests or its Trading Divisions*" (AGEA submission, paragraph 10.2).

Firstly, as the Standard Terms will be included in the Undertaking and the majority of access applications will be for Standard Services provided on the basis of Standard

[12] *BHP Billiton Iron Ore Pty Ltd v National Competition Council* [2008] HCA 45

Terms and at Reference Prices, the discrimination factors will not be relevant in these circumstances.

Secondly, GrainCorp needs the ability to differentiate to be able to negotiate with an Applicant seeking a non-standard service on novel terms. In any case, the limits on GrainCorp's ability to differentiate are robust. Clause 5.4 distinguishes between legitimate differentiation for operational and commercial reasons and illegitimate differentiation (ie discriminatory access) for anti-competitive reasons which is not permitted under the Undertaking. Clause 5.5 can only be applied subject to the provisions in clause 5.4, being that terms that are different to the Standard Terms or Reference Prices may only be offered if they:

- are consistent with the objectives of the Undertaking;
- are commercially justifiable; and
- are offered on an arms length basis;

In its submission, AgForce's claimed that *'there is little preventing GrainCorp from setting the compensation for the risk it carries at a higher level for its competitors than its own related entities, thus allowing it to have a competitive advantage across the supply chain"* In fact, the Undertaking would prevent GrainCorp engaging in this conduct unless it was commercially justifiable, on an arms' length basis and in accordance with the objectives. GrainCorp would also be required to present evidence and information supporting its decision.

AgForce goes on to conclude that *'Again, this activity hasn't been evidenced in the past, but there is a possibility of it occurring'*

GrainCorp has a strong incentive to comply with the Undertaking as a result of the arbitration procedures, the threat of heavier regulation and the incentive to maximise throughput of wheat through its terminals.

Low burden of proof on access seekers

AGEA complains that the burden of proof which an access seeker must meet to show that GrainCorp has discriminated against them is too high.

The Undertaking only requires access seekers to satisfy a low burden of proof to show there has been prohibited discriminatory conduct. All that is required is that the arbitrator forms the view that access is not in accordance with any one of the three preconditions for legitimate differentiation of terms and conditions outlined in clause 5.4(a)(ii)(C) / (D) / (E). The Undertaking specifies that arbitration under the Undertaking is not required to follow the rules of evidence.

In fact, if GrainCorp was departing from the Standard Terms and Reference Prices, it would need to provide evidence justifying the departure.

Factors set out in clause 5.5 are reasonable and necessary

The factors in clause 5.5 were included in the Undertaking to address circumstances where different terms of access are appropriate. They are consistent with Part IIIA of the TPA and the Victorian ESC access regime.

As the Standard Terms will be included in the Undertaking, the complaints made in relation to GrainCorp's ability to provide differentiated terms of access in accordance with clause 5.5 are substantially limited. However, in the event that an exporter seeks

access to non-standard services GrainCorp is entitled to negotiate individually with its clients and on the basis of clause 5.5. GrainCorp has provided detailed particulars on this matter above in response to Questions 15(a) and 15(b).

GrainCorp is aware of submissions made in relation to several of the factors listed in section 5.5. There are legitimate reasons for providing access to port terminal services on different terms on the basis of these factors addressed below.

5.5(a) legitimate business interests and investment

This clause is intended to enable GrainCorp to apply a higher fee to Users for services which are more costly for GrainCorp to provide This is consistent with the pricing principles in section 44ZZCA(b)(ii) *"that access price structures should not allow a vertically integrated access provider to set terms and conditions that discriminate in favour of its downstream operations,* ***except to the extent that the cost of providing access to other operators is higher."*** GrainCorp does not agree with Riverina's proposal to delete this clause.

5.5(d) interests of all persons who have a right to use the port terminal

GrainCorp should be required to provide access on differentiated terms to customers to take into account the interests of other persons who have rights to use the Port Terminal, including exporters of other grains, containerised wheat and other non-grain commodities GrainCorp disagrees with AGEA's submission that *"there is no obligation for all rights to be afforded equal weight*." In fact, this paragraph was included to ensure other grains got equal priority.

5.5(f) economically efficient operation of the services and facilities

GrainCorp should be able to determine varying terms of access for each user depending upon whether the manner in which that party uses the Port terminal services either increases or decreases the efficiency of the operation of Port Terminal Facilities. This is consistent with the pricing principles in section 44ZZCA(b)(i) of the TPA *that the access price structures should allow multi-part pricing and price discrimination when it aids efficiency.*

5.5(h) opportunity cost of providing access

This is consistent with the *Grain Handling Act 1995 (Vic)* and reflects the language in section 17(4) of that Act, *that the terms and conditions of access may vary according to the actual and opportunity costs to the provider having regard to…"* For example, it would be reasonable for a user requesting a non-standard service which will result in a slower load rate to be charged a premium for decreasing the overall throughput at the terminal. GrainCorp does not agree with Riverina's proposal to delete this clause.

5.5(i) provision of quality related services

Differentiating between users level of quality related services will provide an incentive to improve the quality of the Bulk Wheat delivered to the port terminal, thereby reducing costs and improving productivity. GrainCorp has provided significant information on the requirement to differentiate between Users on the basis of quality related services in the context of grain received ex-farm to avoid terminal blockages and the risk of contamination. These measures seek to protect the exporters of grain.

5.5(k) available Port Terminal capacity and 5.5(p) differences in modes of receival, storage or outturn

GrainCorp should be able to differentiate between Users on the basis of their use of port terminal storage and on the rate at which they can move wheat through the terminal facilities based on the objective of achieving maximum utilisation of each part of the Port Terminal. Delays and blockages are more often than not attributable to GrainCorp's export customers, their changing requirements and the quality of grain brought to the port terminals – all factors within the user's control. GrainCorp disagrees with AGEA's submission that *"in most cases, BHC's control all of these elements and BHC's should not be entitled to discriminate on the occurrence of elements that it controls"*. This is not the case.

5.5(r) minimisation of demurrage

This clause does not, as AGEA suggests at paragraph 10.4 of its submission, mean that GrainCorp will call vessels to berth out of order according to which vessel has the highest demurrage rate. The clause is intended to enable GrainCorp to differentiate between users on the basis of minimising the detriment suffered by all Users overall, should the services requested by one user be likely to significantly increase the level of demurrage faced by all users. This is based on the age old concept of mitigation of loss.

5.5(u) credit risk

GrainCorp should be able to adjust the terms and conditions on which it offers access to a particular user or applicant, and to base its behaviour depending on the creditworthiness or credit history of that applicant or user. To differentiate between Users or Applicants on the basis of their creditworthiness is standard commercial practice, even for our export customers in their assessment of clients and risks.

13.8 Receival of grain from ex farm storage

GrainCorp differentiates between the terms offered for wheat stored at upcountry sites operated by GrainCorp and those received from sites not operated by GrainCorp. This differentiation is motivated solely by legitimate operational, quality, safety, and commercial factors.

GrainCorp notes the comments made by the Victorian Federation that *"there are some practical reasons for these restrictions in terms of grain hygiene. However, the VFF is concerned it is also a way of forcing growers to deliver to particular up country storage facilities and of forcing non-port operating marketers to use specific up-country facilities."*

However, GrainCorp also notes that that the VFF does not provide specific examples, but comments that there is "*much anecdotal evidence throughout the industry regarding actions taken by port operators to restrict movement of grain from up-country storages not in their control"*.

AGEA claims that "*at present, bulk handlers discriminate in the provision of port terminal services depending on whether the wheat enters the port via the bulk handlers' up country facilities and services or through services provided by third parties*" (AGEA submission, paragraph 3.13). AGEA goes on to state that "*GrainCorp charges wheat exporters a fee of $1.50 per tonne for any wheat that is received into port from non-GrainCorp up-country services*" (AGEA submission, paragraph 3.24).

GrainCorp rejects all such allegations of forcing growers to deliver to particular upcountry storages or any such discriminatory behaviour. At our own sites we can

implement procedures for testing and fumigation which are not at all times followed by non-approved storage sites. There have been instances where grain has been received in a non compliant manner, transported contrary to standards and regulations and which may arrive at port placing at risk all grain of all customers and the reputation of Australian exports. The related nominal fees charged in this respect allow for testing which can be carried out reliably by GrainCorp and which is aimed at protecting the port, its customers and consumers at large.

This issue is addressed in more detail in our response to Question 44.

Response to examples provided in the Riverina submission

Riverina has provided examples where it claims GrainCorp has unfairly discriminated against it by refusing access in breach of the terms of the 2008/2009 storage and handling agreement. GrainCorp addresses each of these examples below:

- ***Allegation that GrainCorp rejected a nomination on the basis that GrainCorp had too many nominations that month and Riverina did not have sufficient grain in GrainCorp's handling system to support provision of a laycan period***

  Both of these reasons for rejecting a nomination are clearly provided for in the port terminal protocols. GrainCorp will accept nominations and perform its risk assessment in the order in which nominations are received to ensure applications are treated fairly. .

- ***GrainCorp introduced ex-farm protocols at the Fisherman Islands terminal***

  GrainCorp has provided the Commission with detailed information in relation to the need for its ex-farm protocols at the Fisherman Islands terminal. For further information, please refer to section 18.

Riverina fails to acknowledge that GrainCorp has at all times sought to maximise the throughput at its port terminal facilities. The conduct which Riverina has highlighted provides no evidence that GrainCorp discriminated against Riverina in favour of its own operations or another exporter. GrainCorp has merely varied its processes to ensure the efficient and smooth operation of its port terminal facility.

It should be clearly noted that the claims made by Riverina relate to non-regulated grains and as such are not relevant to consideration in relation to the proposed Undertaking.

13.9 Conclusion

For the reasons set out above, the Undertaking adequately protects exporters against the risk of GrainCorp discriminating against them in favour of its GrainCorp Trading and the assertions and allegations submitted have no basis and have not been substantiated by reference to past conduct, or by reference to the Undertaking or Standard Terms and Reference Prices.

The ability of GrainCorp to manipulate the shipping stem and provide any advantage to its trading arm by giving its vessels priority in times of peak demand is suitably addressed by GrainCorp's history of not having acted in this manner previously, and further prevented by way of the requirement to publish the shipping stem, the terms of the Protocols and the compliance with WEMA as confirmed by the WEA directed audits of the company.

As the majority of access applications will be for standard services provided under the Standard Terms contained in the Undertaking, GrainCorp considers there will be few requests for negotiation. This is because exporters are familiar with the standard services and the Standard Terms which have been largely unchanged for many years.

Should an access seeker apply for access to non standard services on the basis of novel terms, GrainCorp has provided adequate reasons to justify its ability to differentiate between users on the basis of the provisions in clause 5.5 of the Undertaking. These provisions reflect cost and efficiency considerations and therefore achieve the objectives of the Undertaking and the objectives of Part IIIA of the TPA.

If an access seeker is dissatisfied with the terms of access, it can refer the matter to arbitration.

In any event and as provided in GrainCorp's case, as indicated in our initial submission, the under-utilisation of GrainCorp facilities drives GrainCorp to maximise throughput at its Port facilities. This is best achieved by providing non-discriminatory access, and this reflects GrainCorp's methods of access to date.

14 Negotiating for access

14.1 ACCC information request

Question 14: *In relation to the timeframes specified in clauses 5, 6 and 7 of the proposed undertaking, please provide an explanation as to why those timeframes are appropriate.*

Question 19: *What capacity is there for wheat exporters to negotiate terms prior to the commencement of Reference Prices and Standard Terms, given that GrainCorp is not required to publish price and non-price terms prior to 30 September in each year?*

Question 20: *In relation to the timeframes specified in the negotiate/arbitrate sections of the Undertaking, please provide an explanation as to why each timing requirement is appropriate.*

Question 21: *Clause 5.1 provides that GrainCorp must publish Reference Prices and Standard Terms by no later than 30 September of each year. Please elaborate on whether publication by this date allows sufficient time for an exporter to have an access agreement in place for the harvest season in a particular year.*

Question 22: *Under what terms and conditions will GrainCorp provide access to its port terminal services to wheat exporters prior to execution of an Access Agreement?*

Question 23: *In relation to clause 6.4(a)(ii)(B), what factors will GrainCorp take into account in deciding if a request is 'unduly onerous' or 'disproportionate'?*

Question 24: *In relation to clause 6.4(b)(i), why is it necessary for GrainCorp to have discretion not to negotiate with the Applicant if GrainCorp considers that the Applicant has not followed the process in the proposed undertaking? What factors will inform GrainCorp's consideration that an Applicant has not followed the process?*

Question 25: *In relation to clause 6.5 & Schedule 4 (on the proposed form requirements for an access application):*

(a) What is meant by 'Customer Application Type' and 'Business Category?'

(b) Why is it necessary for the Applicant to have a website in order to seek access? If the Applicant does not have a website, will GrainCorp refuse access?

Question 26: *In relation to clause 6.4(b)(i), what factors will inform GrainCorp's consideration that an Applicant has not followed the process?*

Question 27: *In relation to clause 6.6(b)(iv) what factors would GrainCorp take into account in deciding if the negotiations were not progressing in good faith towards the development of an Access Agreement within a reasonable time period?*

Question 28: *If the Negotiation Period ceases, will the Applicant be entitled to make another application for access? How would any further application be dealt with?*

Question 29: *What is meant by 'amended Standard Terms' in clause 6.7(b)(ii)? How does this clause interact with the ability of GrainCorp to offer different terms under clause 5.4? (That is, what, if any, is the difference between an 'amended Standard Term' and a 'different term'?)*

14.2 Response to information request

Question 14 - timeframes for negotiating access

Timeframes specified in clauses 5, 6 and 7 of the Undertaking strike a balance between encouraging quick and efficient dealings between GrainCorp and access seekers and the need for GrainCorp and access seekers to have adequate opportunity to complete their internal processes, particularly for non-standard or atypical access applications.

(a) Timeframes in clause 5

Please refer to section 9 - variation of Reference Prices and Standard Terms.

(b) Timeframes in clause 6

Context

The clause 6 negotiation process must be considered in light of two potential outcomes in relation to Access Applications under the new arrangements.

First, historically, the process for negotiation of access has been recontracting annually based on the standard terms and conditions which have not changed to any significant degree in the last 5 years. GrainCorp considers most negotiations of this type and nature will be straight forward and unlikely to give rise to disputes.

Second, applicants now have a legally enforceable right to negotiate for non-standard access terms. This is new. GrainCorp has no experience of this and is unable to predict with any accuracy the type of requests that may be received, but envisages this may relate to requests from export customers for dedicated storage and segregation requirements, additional testing or longer term agreements.

GrainCorp anticipates that there will be few access seekers who wish to negotiate any novel non-standard terms and conditions which involve new considerations. The Standard Services offered by GrainCorp at port terminals cover a wide range of activities, from offering multiple grain segregations, chemical residue testing and insecticide application and fumigation, to offering pesticide residue status. The negotiation process set out in the Undertaking provides certainty of process for all types of access applications, as well as providing reasonable commercial and legal protections for GrainCorp.***Process for applying for access for the shipping of bulk wheat under standard terms and conditions***

The procedure for applying for an annual Access Agreement by the entering in to a WPTS Agreement for the provision of port terminal services includes the following steps and timeframes, which GrainCorp considers are reasonable:

- ***Preliminary enquiry:*** This is entirely optional and for the benefit of access seekers by giving them access to information they need. This may be a flexible process at any time before an access application is submitted and does not require a firm timeframe. GrainCorp does not really expect existing customers who are recontracting to need to use this process.

- ***Access Application:*** This is a straight forward step. Schedule 2 to the Undertaking sets out the information to be included in an Access

Application. The requirements are not onerous and allow for information gathering and review.

- ***Acknowledgement within 5 Business Days:*** This timeframe is fair and reasonable. The Undertaking provides that GrainCorp will also request any further information or seek to clarify the information provided within 5 Business Days of receipt of the Access Application. The emphasis is on the word 'within' as this sets a limitation at the outer end – the clarification process may take place earlier. Again, this is unlikely to be an issue where it is a case of recontracting but may be an issue for an atypical request. Accordingly, GrainCorp disagrees with the AgForce submission at paragraph 4.12 that acknowledgement of Access Applications should be instantaneous, especially given the fact that this process is not simply an acknowledgement of receipt only.

Non-standard access requests

GrainCorp expects that all services for the shipping of bulk wheat will be delivered under the standard terms and conditions set out in the WPTS Agreement included in the Undertaking.

Where an exporter requests non-standard access that may raise new considerations in relation to which GrainCorp has no previous experience, negotiation over the non-standard terms will commence as soon as possible after the receipt of such a request.

The requirement that negotiations commence as soon as practicable, is reasonable and appropriate. GrainCorp has a strong incentive to commence negotiations in order to secure throughput as soon as possible. The progress of negotiations is also subject to the three month time frame set out in clause 6.6(b)(iii).

Applicants have the ability to seek initial meetings with GrainCorp under clause 6.5(a)(ii) and the right to request information under clause 6.4(a)(i) which will assist an applicant in preparing such an Access Application;

The protections given to in these circumstances are appropriate. In particular:

- GrainCorp's ability to request more information from the Applicant under clause 6.5(b)(ii) within 5 Business Days of receiving the application is reasonable;

- the circumstances where GrainCorp can refuse to provide information are reasonable and are designed to protect GrainCorp from Applicant's taking advantage of this process or to harm GrainCorp. For further information please see the response to Question 23;

- the prudential requirements are reasonable. In particular, GrainCorp does not require Applicants to provide any security at the time of applying for access. On this basis it is reasonable for GrainCorp to take into consideration the financial position of an Applicant. For further information please see section 14.4; and

- GrainCorp should have the right to cease negotiations if it considers an Applicant is abusing the regulatory process where negotiations have become vexatious or frivolous or are being conducted in bad faith.

In any case, the Applicant can refer a matter to the Arbitrator at any stage set out above if it considers GrainCorp has not complied with the Undertaking.

(c) Timeframes in clause 7

The timeframes and procedures in clause 7 are appropriate and provide for disputes to be resolved quickly and with certainty. An access seeker can potentially have the matter referred to arbitration within 10 Business Days of issuing a Dispute Notice. The arbitrator is then given broad discretion to run the matter as expeditiously as the circumstances permit.

Section 7 provides for the following procedures:

- ***Dispute Notice:*** A Dispute Notice is to be issued as soon as a dispute is identified. The obligation in clause 7.1 that the parties will use reasonable endeavours acting in good faith to settle the dispute as soon as is practicable will ensure that steps are taken immediately to attempt to resolve the dispute.

- ***Meeting of senior representatives within five Business Days:*** It would be unrealistic to require a shorter timeframe and in any event this may happen earlier as the requirement is expressed as being '***within***' the stipulated 5 Business Day meeting period.

- ***Referral to mediation or arbitration within 10 Business Days of Dispute Notice:*** An access seeker may refer a matter to mediation within 10 Business Days after issuing a Dispute Notice if there has been no resolution. Again, GrainCorp believes it would be unreasonable to impose a shorter timeframe for setting the outermost timeframe.

  It is important to note that the access seeker can also refer a matter directly to arbitration without mediation within 10 Business Days after issuing a Dispute Notice.

- ***Arbitration:*** The Undertaking sets out the principles with which an arbitrator must comply, including to *proceed as quickly as is possible and consistent with a fair and proper assessment of the matter.* Given that GrainCorp cannot predict the nature or substance of matters which may be referred to arbitration, this clause is appropriate and the inclusion of a more precise timeframe is likely to be unworkable. It is up to the arbitrator to determine how the arbitration is run having regard to the issues and the timing imperatives.

  Clause 7.6 also provides that the arbitrator must issue a draft and a final determination. This is standard procedure for arbitrations arising under Undertakings and is necessary to give the parties an opportunity to review the basis on which the arbitrator's decision is made prior to finalisation. GrainCorp disagrees with Riverina's suggestions in Schedule A to its submission that this obligation be removed.

Clause 7.7 requires the arbitrator to consider any guidance published by the ACCC or any submissions provided by the ACCC. In this way the progress of arbitration is still subject to oversight by the ACCC.

These procedures afford adequate protection to an access seeker and provide an efficient review mechanism if an access seeker is dissatisfied with any stage of the negotiation process or the terms and conditions of access it has been offered.

Question 19 - ability to negotiate prior to the commencement of Reference Prices and Standard Terms

Clause 5.1 requires GrainCorp to publish the Reference Prices and Standard Terms by 30 September each year. As discussed in sections 9.3 and 9.4, this is the latest date and GrainCorp agrees to now publish the Reference Prices and Standard Terms earlier than this date, namely by 31 August.

GrainCorp has stated in another section of this submission that the Company intends to circulate to customers the 2009/10 Storage and Handling Agreement and Wheat Port Terminal Services agreement and associated port protocols by early August and intends to include the Standard Terms in the Undertaking.

The Company will modify the relevant section of the Undertaking that relates to the timeline for provision of Reference Prices and Standard Terms to 31 August each year. Given that the commencement date of these prices and terms would continue to be 1 October, this will allow customers one full month to factor in to their proposed export schedule any changes.

From a practical perspective and based on long standing industry practice, the terms and conditions of access do not change materially from year to year (and GrainCorp notes that the terms of the standard Storage and Handling Agreement have not been a major source of dispute). Given the anticipated 5 business day turnaround in the Access Application process and the anticipation that few exporters will seek non-standard access terms, GrainCorp believe that these are reasonable concessions and the process is transparent and certain.

Question 20 - timeframes for negotiating access

Please refer to the response to Question 14

Question 21 - publication of Reference Prices and Standard Terms

Please refer to the response to Question 19.

Question 22 - access prior to execution of an Access Agreement

See response to Question 19.

In relation to an accredited bulk wheat exporter that has not exported through GrainCorp port terminals seeking access, for commercial reasons GrainCorp will require execution of an Access Agreement before the Company provides port terminal services to the new access seeker. Unless such an agreement is in place, GrainCorp will not provide access under the proposed Undertaking.

This means that for the first season, all exporters will need to enter into a WPTS Agreement before they can export. For the next season, the agreement contains holding

over provisions. New exporters will need to enter into a WPTS Agreement before they obtain port terminal services.

It is not unreasonable to require a binding agreement in place before services are provided. As GrainCorp will change the Undertaking to require publication of prices by 31 August and include the Standard Terms and also intends to issue the terms and prices two months before the 2009/10 season, this should address the primary concerns of submitters about being able to have agreements in place before a season starts.

Question 23 - unduly onerous or disproportionate information requests

GrainCorp is unable to say with precision what requests would be onerous or disproportionate. Factors could include GrainCorp's capability to gather and present the information requested, the volume of and timeframe within which information is required and whether it is readily at hand or requires collation or analysis, the demands imposed on GrainCorp's resources to provide the requested information in comparison to the benefit to be obtained by an access seeker, the ability of the access seeker to obtain the information elsewhere and the purpose for which the access seeker seeks the information. This is really a case by case issue.

- As discussed above, GrainCorp's ability to refuse onerous or disproportionate information requests under clause 6.4(a)(ii) is a protection for atypical or novel access applications which are difficult to anticipate and for situations where information requests are unreasonable.

- GrainCorp would not expect any material information requests in relation to the general recontracting of port terminal services with existing exporters.

- GrainCorp notes these provisions are the same as in the ARTC interstate Undertaking which was approved by the ACCC, and there seems no reason why this approach should not be adopted here.

- Failure to give requested information in response to a valid request would be a breach of Undertaking and no doubt, would be brought to the ACCC's attention.

Question 24 - requirement to follow the process

GrainCorp can only elect not to negotiate when it is a *material* non-compliance with the process or requirements of the Undertaking. Again, this should be considered in context.

- For general recontracting, there are in fact very few requirements as discussed above.

- For atypical access applications, then there are some further rights and protections for both parties as discussed above, eg information provision by GrainCorp, proof of solvency etc.

- GrainCorp must provide reasons why it is not obliged to negotiate (clause 6.1(b)(iv).

- If the applicant thinks GrainCorp is being unreasonable, it can seek arbitration (clause 6.1(b)(iv)) or it could complain to the ACCC as this would also be a potential breach of the Undertaking.

It is reasonable to require access seekers to follow the process in the Undertaking, given that it is not onerous and GrainCorp is also bound by it.

As noted above, GrainCorp can only elect to cease negotiations when there is a material departure from the process in the Undertaking, but it is difficult to say in advance what this might be. Factors which GrainCorp might consider as a basis for ceasing negotiations could include:

- where the Applicant entity does not have export accreditation as a bulk wheat exporter (and it is not clear that such accreditation is being sought by that entity) (clause 6.4(b)(ii)).

- whether, if requested, the Applicant provides information on the prudential requirements or insurance set out in the Undertaking (clause 6.4(b)(ii));

- whether the Applicant has complied with the confidentiality obligations under clause 6.2;

- whether an Applicant's demands are frivolous, unreasonable or vexatious noting that GrainCorp may go to the arbitrator for a determination to this effect and therefore be entitled to break off negotiations (clause 6.4(b)(vii)).

Question 25 - meaning of terms in Schedule 1

"Customer Type" requires the customer to indicate if they are accredited by WEA under the bulk wheat export accreditation scheme and if any conditions have been applied by the regulator to that accreditation.

"Business Category" requires the customer to indicate if they are a grain trader, agent, broker, buyer, processor, etc.

It is not necessary for the Applicant to have a website to seek access to the port terminal services. GrainCorp will not refuse access purely because an Applicant does not have a website. If the Applicant does not have a website, it should merely indicate that in its access application.

However the existence of a website that provides information in the public domain about an access seeker is of some value in establishing the bona fides of the applicant. Similarly, if an access seeker were unwilling or unable to provide a physical office address, it may be difficult to establish relevant bona fides.

Question 26 - factors to determine whether an Applicant has followed the process set out in the undertaking

See response to Question 24.

Question 27 - factors GrainCorp would consider indicating negotiations were not progressing in good faith

Again, this will be determined on a case by case basis and it is difficult to anticipate the relevant factors. However:

- As well as being a generally understood and commonly used term in Undertakings and contracts, there is also case law interpreting the meaning of good faith.

- GrainCorp appreciates that demonstrating a lack of good faith by another party would involve a relatively high threshold and is willing to accept this threshhold.

- The applicant can always seek an arbitrator's determination that GrainCorp has unreasonably ceased to negotiate (clause 6.4(b)(vi)) or notify the ACCC of a potential breach of the Undertaking.

Question 28 - Applicant can make a new application

The applicant will be entitled to make another application for access after the negotiation period ceases. Further applications would be dealt with in the same manner using the same procedure as initial applications under clause 6, but would need to have addressed the issues (if any) which lead to the cessation of negotiations on the original application, or rejection of same.

Question 29 - amended Standard Terms

Clause 5.1(e) provides that *'if an Applicant seeks access to non-standard Port Terminal Services, GrainCorp and the Applicant may negotiate prices and non-price terms that are different from the Reference Prices and Standard terms'.*

Amended Standard Terms refer to the varied terms which are offered in relation to non-standard Port Terminal Services.

Clause 6.7(b)(ii) refers to the provision of non-standard Port Terminal Services. Specifically, if an Applicant seeks access to non-standard Port Terminal Services, GrainCorp may, subject to the non-discrimination provisions, offer access to those services on terms which include certain variations to the Standard Terms (Amended Terms) and Reference Prices. As indicated in that clause, those variations are reasonably necessary or desirable to accommodate the different nature of the services.

As stated previously GrainCorp considers it likely that most Access Applications will be for standard services provided on the basis of Standard Terms.

14.3 Submissions by interested parties

In their submissions, interested parties raised the following key issues:

- *Bulk Handlers are not required to negotiate in good faith and reach agreement on the terms of access (p27 AGEA submission no. 3, p7 AgForce submission)*

- *More definition should be given to what good faith is for the purpose of the Undertaking (p2, p5 Riverina)*

- *The practical effect of offering terms and conditions at the eleventh hour is that exporters know that if they do not execute the agreements, they will be denied access to bulk handling services and will be exposed to further risk on forward contracts for wheat (p27 AGEA submission no. 3)*

- *The application process and timeframe for conducting negotiations is slow and unwieldy - for example there is no limit to the amount of further information that a bulk handler may request from an access seeker and the dispute resolution mechanism does not provide for the speedy resolution of disputes (p27 AGEA submission no. 3);*

- *Contrary to the WEM Act, Bulk Handlers 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 Bulk Handlers(p27 AGEA submission no. 3)*

- *It is unnecessary for Bulk Handlers to require Exporters to satisfy additional "Prudential Requirements" when they have already satisfied WEA's requirements in that regard under the WEM Act (p28 AGEA submission no. 3)*

- *The negotiation framework does not protect an access seekers' or third parties' confidential information after the cessation of the negotiation process (p28 AGEA submission no. 3)*

- *Undertakings should require the Bulk Handlers, as part of the negotiation process, to disclose the costs of providing the services to be covered by the undertakings. (p44 AGEA submission no. 3)*

14.4 Response to submissions

The main issues raised in relation to negotiating agreements are:

- more definition around good faith negotiation;
- the processes and timeframes around negotiations are too cumbersome;
- some of the pre-conditions to obtain access;
- protection of confidential information;
- disclosure of costs.

GrainCorp is obliged to negotiate in good faith

Bulk handlers are not required to negotiate in good faith and reach agreement on the terms of access" (AGEA submission, paragraph 11.2).

AGEA's claim that the Undertaking does not require Port Terminal Operators to "*negotiate in good faith and reach agreement on the terms of access*" is incorrect. Under clause 6.1 of the Undertaking GrainCorp is required to negotiate with access seekers in good faith on the terms of access.

Clause 6.1 provides that *GrainCorp will negotiate with an Applicant for the provision of Access to Port Terminal Services in good faith in accordance with the terms of this undertaking.*

Clause 5 of the Undertaking provides that GrainCorp must offer access to bulk wheat exporters which does not unreasonably discriminate between traders, or between a trader and GrainCorp Trading. Further, the provisions of clause 6 of the Undertaking set out clear procedures for reaching agreement on the terms of access which ensure that negotiations take place on good faith terms and are non-discriminatory.

As the terms and conditions of the WPTS Agreement will be included in the Undertaking, GrainCorp Trading will be required to adhere to these terms and conditions. GrainCorp anticipates the majority, if not all applications for access will be for Standard Services, and as such these concerns are unlikely to materialise.

Riverina has called for *'specific identification of the types of conduct to demonstrate GrainCorp's understanding of good faith in this commercial context'* and *'more definition to be given to what good faith is for the purpose of this Undertaking (p2 Riverina submission)*

Refer to the response to Question 27.

The meaning of good faith is widely understood and Riverina's wish for specific identification and a more comprehensive definition of good faith to be included in the Undertaking is unnecessary.

The meaning of good faith is commonly used and has been explored by the Courts on numerous occasions. An attempt to define it or provide categorical examples of what amounts to negotiating in good faith in the Undertaking may have the reverse result to that intended, ie a narrow and overly strict legal meaning which does not anticipate all behaviour.

Further, on page two of its submission, Riverina has called for an independent review board with authority to resolve all disputes pertaining to Port Terminal access where 'good faith' negotiations have failed.

GrainCorp believes this would add nothing other than additional cost to the comprehensive dispute resolution procedures contained in the Undertaking. An arbitrator agreed to by the parties or appointed by the ACCC is sufficient.

Negotiation process

The application process and timeframes for conducting negotiations is slow and unwieldy (p27 AGEA Submission No. 3)

Refer to response to Question 14.

The bulk handlers adopted the negotiation regime from the ARTC interstate Undertaking approved by the ACCC on the basis that parties seeking access would prefer to see a detailed negotiation regime.

As set out in the response to Question 14, GrainCorp was of the view that the process would be a quick one where access seekers are essentially recontracting on the basis of the continuation of many of the current terms and conditions contained in the current Storage and Handling agreement, current port protocols and the new WPTS Agreement, but that it was appropriate to have the detailed regime apply for atypical requests.

Given the commitment by GrainCorp to include the WPTS Agreement within the Undertaking, the process of establishing the Access Agreements should be straightforward.

No material default and prudential requirements are appropriate

As noted above, AGEA believes 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 a bulk handler is contrary to the WEMA or unnecessary. The AGEA cite the presence of the prudential requirements assessed by WEA as a condition of bulk wheat export accreditation being sufficient guarantee that an access seeker presents no commercial risk to GrainCorp if the Company agrees to provide port terminal services. It is reasonable that GrainCorp maintains the discretion as to whether to negotiate with any access seeker that is currently, or has within a reasonable timeframe, been in Material Default of an agreement with GrainCorp. The ACCC approved this condition in the

ARTC Interstate Undertaking, so GrainCorp sees no reasons why it is not appropriate here. It is also not clear how such a requirement is contrary to the WEMA.

The WEMA is directed at maintaining the standard of Australian wheat exports and requires WEA to have regard to the company's business record and the financial resources available to the company when satisfying itself that the company is a fit and proper company for the purpose of accreditation.

In fact, if an accredited bulk wheat exporter has been in 'Material Default' of a service provision agreement such as that proposed under the Undertaking, it is highly likely that this will have come to the attention of WEA, and that such a default would be a factor in the Regulator assessing if a company is 'fit and proper'.

It needs to be understood that accreditation by WEA provides **no guarantee** of the financial or prudential security of an accredited bulk wheat exporter. WEA has made it very clear in public that no grower of other party should consider the prudential or financial assessment processes undertaken by it as part of the accreditation process to be a basis upon which financial or other risk can be calculated.

By stating that GrainCorp should rely on the financial and prudential evaluations made by WEA, the members of the AGEA are demonstrating an alarming lack of understanding of the role of the Scheme and the position of the industry Regulator.

GrainCorp, and not WEA, is ultimately responsible for the cash flow and financial position of the Company's port terminal operations and has an obligation to its shareholders to minimise the risk of default by its customers, and undertake risk assessments to ensure the business initiatives of Company and its officers are sound.

Again, an applicant can always seek an arbitrator's determination that GrainCorp has unreasonably ceased to negotiate (clause 6.4(b)(vi)) or notify the ACCC of a potential breach of the Undertaking.

Confidentiality requirements in the Undertaking are sufficient

The negotiation framework does not protect an access seekers' or third parties' confidential information after the cessation of the negotiation process (p28 AGEA submission no. 3);

The obligations for the parties to maintain confidential information acquired during the negotiation process survive the cessation of the negotiation process. Neither clause 6.2 nor clauses 6.3(b) provide that the confidentiality obligations terminate upon the cessation of the negotiation process. Any Confidential Information supplied by a party during the negotiation in relation to third parties will also remain confidential as the confidentiality obligation is based on the source of the information and not on to whom the information relates.

As stated earlier and in the context that the WPTS Agreement will be contained within the Undertaking, GrainCorp believes that few if any of the current bulk wheat exporters using GrainCorp terminals will seek non-standard access. This being the case, it is difficult to see what information of a confidential nature can be released during the access agreement application process.

At page 28 of its submission dated 29 May 2009, AGEA has also misinterpreted the conditions on which a party may disclose Confidential Information to the extent necessary for the provision of advice from legal advisors, financiers, accountants or other consultants. The Undertaking envisages that the recipient of Confidential

Information will have a legal obligation imposed upon it by a confidentiality Undertaking in relation to the Confidential Information to it.

Disclosure of GrainCorp's cost base is inappropriate

Undertakings should require the Bulk Handlers, as part of the negotiation process, to disclose the costs of providing the services to be covered by the undertakings. (p44 AGEA submission no. 3)

This is overly onerous and is akin to having upfront regulated pricing, which is contrary to the proposed negotiate / arbitrate mode. Many of the exporters are large multi-nationals, or experienced domestic players, with a good understanding of the cost structures involved. They are in a position to know if charges are unreasonable. GrainCorp has publicly disclosed a return on port terminal assets of 8%, which is not considered to be a 'commercial rate of return' in any event. If an applicant truly believes that GrainCorp is monopoly pricing, then they can seek arbitration. We reiterate that GrainCorp has publicly disclosed a return on port terminal assets of 8%, which is not considered to be a 'commercial rate of return'.

The demand by the AGEA that the cost of providing services be included in the Undertaking is another example of the underlying agenda of these member companies. Both privately and publicly AGEA members have stated that regulation of port terminals and the supply chain should be used to exclude the Australian bulk handling companies from participating in the bulk wheat export. This is an attempt by the members of the AGEA to seek commercial advantage under the guise of seeking 'transparency' and a 'level playing field'.

15 Dispute resolution

15.1 ACCC information request

Question 30: *In the definition of 'Dispute', what does GrainCorp mean by a 'bona fide dispute'? Please provide examples of disputes that GrainCorp considers would be bona fide, and examples of disputes GrainCorp considers would not be bona fide.*

Question 31: *Clause 7.1(b) proposes that any disputes in relation to an Access Agreement once executed will be dealt with in accordance with the provisions of that Access Agreement. Does this include disputes regarding claims of discriminatory conduct?*

Question 32: *In relation to clause 7.1(c) why should the report to the ACCC only deal with material disputes? What does GrainCorp mean by a material dispute? Are material disputes different to bona fide disputes? If so, how?*

Question 33: *In relation to clause 7.3(c), has GrainCorp confirmed with the Institute of Arbitrators and Mediators of Australia (TAMA) that its involvement as a mediator, as contemplated by the proposed undertaking, is workable? Please provide copies of any correspondence between GrainCorp and the IAMA to this effect.*

15.2 Response to information request

Question 30 - meaning of bona fide dispute

GrainCorp considers that a "bona fide dispute" refers to a dispute that is "genuine", "real", "of substance" and not created by an access seeker as an abuse of process, in bad faith with a vexatious or frivolous purpose, or in relation to trivial matters. See responses to other questions in relation to these terms.

The inclusion of the term "bona fide" is intended to ensure that only genuine disputes, which raise issues relating to the negotiation of access agreements (and which are not trivial, vexatious or frivolous) are escalated by either GrainCorp or access seekers through the dispute resolution process in the Undertaking.

It is intended to ensure that disputes have a degree of relevance and substance, and relate to genuine issues, before they are escalated to senior representatives of the respective parties or to mediation or arbitration.

Question 31 - disputes in relation to an Access Agreement once executed will be dealt with in accordance with the provisions of that Access Agreement.

If a claim is made that GrainCorp is discriminating in relation to the terms of the access agreement, then that would be dealt with in accordance with the Undertaking dispute resolution process.

If the disputes relates to claims of discriminatory conduct in relation to services provided under an executed WPTS Agreement contract, then the terms of that agreement and the protocols contained therein would apply.

For example, Protocols will provide that GrainCorp will accept or decline a cargo nomination application based on a risk assessment that takes into account specific criteria. If a customer considers that GrainCorp has refused its cargo nomination application on inappropriate grounds, there is a dispute resolution process in clause 10 of the Protocols which is designed to achieve an expeditious resolution of the dispute.

The likelihood of disputes arising out of the new Protocol are minimised as exporters have been provided greater freedom to nominate cargos beyond the old 49 day regime. This new Protocol places much greater control in the hands of individual exporters and will require of them a more commercial attitude to planning their own logistics and export schedule.

As the new Protocols allow exporters to nominate cargos between 1 October and 30 September of the following year, the requirement for proving 'grain ownership' as a critical component of cargo accumulation risk management assessment has been reduced, eliminating a degree of subjectivity from the assessment of cargo nomination applications. Exporters will still be required to provide detailed stock information to GrainCorp for the development of a site assembly plan a minimum of 21 days prior to the assigned load date, to ensure that cargos are assembled in a timely manner and that other exporters are not inconvenienced.

GrainCorp reiterates that claims made by the AGEA about discrimination in the allocation of slots on the shipping stem have not been supported by any credible evidence, and in fact, these allegations are contrary to the findings in the WEA directed audit which confirmed that the process is implemented fairly by GrainCorp. Accordingly, the AGEA has again provided an unsubstantiated allegation.

Finally, discriminatory conduct would be a breach of the Undertaking enabling the ACCC to take action.

Question 32 - it is appropriate for the report to the ACCC to deal with material disputes only

Clause 7.1(c) requires reporting of material disputes both under the Access Undertaking and under executed WPTS Agreement. It is unclear to GrainCorp why the ACCC wants to be aware of immaterial disputes or indeed what an 'immaterial' dispute is.

In relation to disputes under the Access Undertaking, GrainCorp would consider that where an applicant has lodged a Dispute Notice, it would generally be a material dispute.

In relation to disputes under the Access Agreements, any formal dispute raised under clause 10 of the protocols would be 'material' to report on.

GrainCorp does not accept that any testing and grading dispute under clause 11.1 of the WPTS Agreement would be sufficiently material to be reported to the ACCC. The arbitration process in the WPTS Agreement exists for this purpose and disputes about grain meeting quality specifications.

Clause 7.1(c) reflects GrainCorp's view, based on its previous experience that the majority of disputes which arise between GrainCorp and its competitors are likely to be resolved quickly by negotiations between operational and commercial managers, or via existing GTA arbitration.

Materiality is a different metric to the bona fide nature of a matter. The materiality of a dispute refers to the importance of its potential consequences or impacts in the context of the port's general operations as determined in the particular circumstances of a dispute. The bona fide nature of a dispute refers to an whether a dispute has genuinely arisen for the purposes alleged on its face or whether the dispute resolution process is being used to achieve a different purpose not related to the reasons alleged on the face of the complaint, or is otherwise frivolous, vexatious or without merit. A material

dispute would be bona fide. However, it is possible that some bona fide disputes would be raised in relation to immaterial matters.

It is difficult to provide in advance clear examples of when a dispute would be "material" and when it would not. It is likely that a dispute will be material if:

- it cannot be resolved between the parties' operational personnel and need to be escalated internally or referred to an external mediator or arbitrator;
- it raises issues directly relevant to a parties' ability to obtain access to the Port Terminal Services (eg a refusal to provide access, or to negotiate access); or
- the matter in dispute is likely to have a material impact on the business of operations of either GrainCorp or the access seeker.

Similarly, a dispute is unlikely to be material if:

- it is resolved quickly by the parties operational and commercial personnel by and with no need for escalation or more so, external involvement;
- relates to grain quality standards, biosecurity, quarantine or chemical residue matters (unless and to the extent this may impact adversely on GrainCorp's operations);
- it does not raise any issues relevant to a party's ability to obtain access to the Port Terminal Services; or
- the matter in dispute would not have any real or significant impact on the business or operations of either GrainCorp or the access seeker.

If the ACCC wishes to have objective clarity, GrainCorp is willing to trigger the reporting obligation in relation to disputes, at the point at which they are subject to formal dispute notices.

Question 33 - IAMA is appropriate to appoint a mediator

GrainCorp's legal representatives have confirmed with IAMA that it would be prepared to appoint a mediator if requested by GrainCorp or an Applicant (in the event that they cannot, within 10 Business Days, agree on the identity of a mediator).

It is common to appoint IAMA under commercial agreements to undertake this function. However several customers have informed GrainCorp that they would prefer to use the existing GTA arbitration process for dispute resolution as this is a known process, accepted across the industry as being fair and effective, and arbitrators possess a high level of industry expertise and knowledge, pertinent to the effective and prompt resolution of relevant disputes.

If required by the ACCC, GrainCorp is prepared to amend the Undertaking to provide that a mediator is to be appointed by either IAMA or GTA.

15.3 Submissions by interested parties

In their submissions, interested parties raised the following key issues:

- *As the negotiation of access agreements is extremely time sensitive, there must be an effective mechanism for the speedy resolution of disputes (p30 AGEA submission no. 3);*
- *For general disputes, the dispute resolution procedure must provide that Bulk Handlers must take reasonable steps to mitigate loss, including continuing to provide port terminal services during, and pending the determination of, any dispute (p30 AGEA submission no. 3).*
- *Remove the mediation option (Riverina, p 14).*

15.4 Response to submissions

GrainCorp considers that the submissions made by interested parties do not improve or add recommendations of substance to the dispute resolution procedures in the Undertaking.

GrainCorp rejects AGEA's assertion in paragraph 13 of its submission that "*the dispute resolution mechanism under the undertakings is totally lacking*" (AGEA submission, paragraph 13.1). See the response to Question 14. An applicant can potentially have a dispute referred to arbitration approximately 10 business days after lodging a dispute notice. The arbitrator is required to resolve the dispute expeditiously and is given broad discretion to set the process.

In response to AGEA's submission that the dispute resolution procedure must provide that Bulk Handlers must take reasonable steps to mitigate loss, including continuing to provide port terminal services. It is in GrainCorp's interests to have maximum terminal throughput, so depending on the nature of a dispute, it may be possible to enter into interim arrangements for provision of services pending dispute where practical and provided this does not affect or alter a parties' rights in connection with the dispute. However, it is not clear how AGEA proposes to institute its 'solution' formally. Effectively, it is saying that GrainCorp must provide services even if there is no agreement between the parties, and where there is no agreement and a dispute arises, clearly there must be some limits and it is not clear how the AGEA proposes this is to be done.

The Undertaking provides a mechanism for both parties to formally agree on the terms of access. If the Standard Terms are included in the Undertaking, as requested by AGEA, Standard Services will be provided on those terms.

As for removing the mediation option as suggested by Riverina, either party can require the dispute to go straight to arbitration. Thus it is optional if both parties agree.

16 Arbitration

16.1 ACCC information request

Question 34: *In relation to clause 7.4(b) how soon after referral to arbitration must GrainCorp notify the ACCC of the details of the dispute?*

Question 35: *Who does GrainCorp envisage as likely candidates for Arbitrator, especially considering the matters set out in clauses 7.6 — 7.9?*

Question 36: *What does GrainCorp estimate as the likely duration and cost of an arbitration process?*

Question 37: *In relation to clause 7.9(b) who determines whether an Applicant does not comply with a determination or direction of the Arbitrator? What is the basis for reaching a conclusion that non-compliance has occurred?*

16.2 Response to information request

Question 34 - notification to the ACCC of referral to arbitration

The Undertaking does not specify how soon after referral to arbitration, GrainCorp must notify the ACCC of the details of a dispute. GrainCorp will notify the ACCC as soon as is practicable and will provide the ACCC with a copy of the Notice of Dispute.

Having said that, if the parties fail to agree an arbitrator within 10 Business Days of the referral, either party may request the ACCC to appoint an arbitrator.

As mentioned in response to Question 32 previously, if the ACCC wishes to have objective clarity, GrainCorp is willing to trigger the reporting obligation in relation to material disputes, at the point at which they are subject to formal dispute notices. Thereafter the ACCC will be advised of the status of resolution attempts, or the referral to arbitration.

Question 35 - likely candidates for Arbitrator

Importantly, clause 7.5(a) provides that any arbitration will be conducted by an arbitrator appointed by "the agreement of the parties." If an Applicant disagrees with GrainCorp's suggested arbitrator, it is free to propose an alternative, and GrainCorp cannot appoint its preferred arbitrator without the Applicant's agreement.

If the parties fail to agree an arbitrator within 10 Business Days of the referral, either party may request the ACCC to appoint an arbitrator.

Question 36 - likely costs and duration of arbitration

Likely duration and costs of an arbitration process are impossible to estimate in advance - they will vary on a case by case basis according to the specific circumstances of a dispute.

Question 37 - compliance with the Arbitrator's determination

Typically an arbitrator's determination and orders can be expected to be clear and easily interpreted. If either party considers there has been a breach of the arbitrator's determination, they are able to seek a court order to enforce the determination, or report the non compliance to the ACCC.

16.3 Submissions by interested parties

In their submissions, interested parties raised the following key issues:

- *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 (p30 AGEA submission no. 3);*
- *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 (p30 AGEA submission no. 3).*
- *the dispute resolution procedures should provide that 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 (p30 AGEA submission No. 3);*
- *IAMA not the ACCC should appoint the arbitrator if the parties cannot agree (Riverina, p 14).*

16.4 Response to submissions

GrainCorp responds to the submissions made by interested parties in relation to the arbitration process as follows:

- Clause 7.6(c), 7.7 and 7.8 provide detailed principles by which the arbitration should be conducted, including provisions in relation to confidentiality. These principles are adequate to ensure a robust arbitration is conducted - it is not clear why AGEA considers them insufficient. Further, over-prescription would constrain the arbitrator's ability to set a process which is appropriate to the dispute and might in fact lead to longer rather than shorter arbitration periods.
- AGEA's submission that the arbitration must be heard and concluded within 14 days fails to allow for any flexibility, nor does it consider that the nature of a dispute may be complex in terms of preparation and determination. It is likely that by the time a matter has reached arbitration, the basis of the dispute will be reasonably significant and may not be possible to complete within 14 days. GrainCorp considers that the better approach is the inclusion of a clause such as 7.6(c) which requires the arbitrator to proceed as quickly as possible and consistent with a fair and proper assessment of the matter.
- In light of resource constraints upon the ACCC and the likelihood of the need for specialist industry knowledge related to the provision of grain handling services, it is not reasonable or appropriate to expect the ACCC to arbitrate the dispute itself, but rather to appoint an independent arbitrator as provided for under clause 7.5(b) in the event that the parties are unable to select an arbitrator by agreement.
- GrainCorp would be prepared to consider suitable alternative solutions for the appointment of a mediator or an arbitrator (failing their agreement) including appointment by IAMA or the ACCC. Alternatively, GrainCorp would be prepared to have the dispute dealt with in accordance with the established GTA arbitration process which all the parties are familiar with, and which currently is the body that has dealt with all grain related disputes in the past.

17 Information flows and Ring fencing

17.1 ACCC information request

Question 11: *Please outline the basis on which GrainCorp will provide access to port terminal services to its Trading Business. That is, will it be at 'arms length'? If so, how will this be effected? Will it be on the same terms of access as offered to other bulk wheat exporters?*

Question 38: *On page 6 of its supporting submission, GrainCorp states the information available from its up-county operations is of little competitive value. Please describe the information relating to bulk wheat exporters that GrainCorp has access to via its up-country operations that is not publically available, and expand on why it does not bestow any practical competitive advantage on GrainCorp.*

Question 39: *Will the Compliance Auditor's report be required to identify potential breaches (if any) of the Ring Fencing Rules?*

Question 40: *How does GrainCorp define 'Financial Records'? Please list the type of records and/or accounts which will be made available to the independent auditor.*

Question 41: *Will the provision of Financial Records involve an accounting separation regime? If so, what would be the costs of implementing such a regime, and what cost allocation methodology would GrainCorp propose to use in allocating costs to different business areas?*

17.2 Response to information request

Question 11 - arms' length conduct with its trading arm

GrainCorp will provide access to port terminal services to GrainCorp Trading on an 'arms length' basis. This is made clear in clause 5.4(ii)(E) and clause 8.3 of the port terminal services Undertaking.

As offered to date, access and services will be offered and provided to GrainCorp Trading on the same terms as offered to other bulk wheat exporters.

GrainCorp Trading will be required to enter into a WPTS Agreement and comply with the following obligations;

- pay to GrainCorp Operations Limited the standard fees payable under each agreement; and
- be subject to the Undertaking and the Protocols; and
- comply with all other terms and conditions contained within that Agreement.

The recently completed WEA directed audit of GrainCorp focused primarily on shipping and logistics. Whilst the auditor commented on areas that required some improvement (some which were addressed before the finalisation of the audit), he concluded the following; "*...we found no evidence of incorrect handling of Nominations, nor the incorrect setting of priority for vessels in the relevant Shipping Schedules*."

Question 38 - upcountry information

At the outset, GrainCorp reiterates:

- that the Undertaking relates to the provision of port terminal services and not to the upcountry grain receival and storage facilities;

- the upcountry facilities are not monopoly infrastructure and can be easily replicated by other grain participants (as has occurred) and compete against on farm storage which has increased significantly;

- any ring fencing should be limited to information obtained from the operation of port terminal infrastructure which is the subject of the Undertaking. The harm which the ring fencing seeks to address does not exist. Further, consideration must also be given to the extent of the application of ring fencing. Will other upcountry facility providers who do not own ports also be required to ring fence those operations from their trading arms or publicly disclose stock information as has been suggested in some submissions? If not then there cannot be said to be an equitable application of such a regime;

- the WEMA clearly applies the Access Test and establishes the requirement for an Undertaking in respect of access to and services at port terminals. Seeking to include other infrastructure or the provision of information relating to matters other than the provision of port terminal access and services is counter to the intention of the Act as laid out in the relevant Reading Speeches and represents a significant increase in regulation that is not warranted, as the basis for the need for such an increase in regulation has never been established;

- even though it is unnecessary, GrainCorp has, to alleviate any concerns, included appropriate ring fencing for information obtained from port operations for the short period in which that information is not public. This is explained in more detail, further below

In any case, GrainCorp has demonstrated that the information available to it from its upcountry storage facilities is of little commercial value in section 8 of its April Submission.

Further, GrainCorp has provided information to the ACCC in relation to:

- GrainCorp's and Cargill's acquisition of Milling Australia in 2002

- GrainCorp's proposed Grain Logistics joint venture with AWB 2005.

- GrainCorp's attempt to acquire Ridley Corporation in 2008;

In each of these matters the ACCC conducted an analysis of the information flows and satisfied itself that the provision of storage, handling or logistics services did not enable GrainCorp to obtain access to and/or use customers' competitively sensitive information in a manner that would distort competition or provide any competitive advantage.

In this regard, we refer the ACCC to the following:

- the ACCC's announcement that it would not appose a GrainCorp/Cargill joint venture to acquire Milling Australia from Goodman Fielder dated 16 August 2002, available at

www.accc.gov.au/content/index.phtml/itemId/476569/fromItemId/751043. The ACCC concluded that *'there were strong constraints on GrainCorp's ability to discriminate against particular users of its storage and handling facilities.*

- the ACCC's determination to grant authorisation to GrainCorp and AWB in relation proposed joint venture arrangements for export grain freight and logistics in eastern Australia dated 15 April 2005, available at http://www.accc.gov.au/content/index.phtml/itemId/744744/fromItemId/401858/display/acccDecision. The ACCC confirmed its findings in the decision not to oppose the acquisition of Milling Australia by a GrainCorp/Cargill joint venture and went on to note that *'…the issue and potential conflict of incentives has existed prior to the joint venture. As storage and handling operators, both AWB and GrainCorp could behave in this way* ***but are restricted by how the system presently operates***.

- the ACCC's announcement that it would not oppose the acquisition by GrainCorp of Ridley Corporation dated 1 July 2008, available at www.accc.gov.au/content/index/phtml/itemId/833894/fromItemId/751043. The ACCC concluded that "*GrainCorp was unlikely to have the ability to discriminate against competitors given the difficulties GrainCorp would face in identifying with certainty the end use of any parcel of grain."*

GrainCorp believes it has, through a number of processes, including its April Submission, provided sufficient information for the ACCC to form a view on this matter, but will in any case attempt to expand on the point herein.

Type of information GrainCorp has access to from upcountry facilities

GrainCorp has access to the following types of information via its up-country operations that is not publicly available:

- the quantity of grain in GrainCorp's storage and its location;
- available capacity in up country storage facilities;
- the quality profile and type of grain in it's upcountry storage;
- approximate stock volumes moving to the domestic market.

Full details on why access to upcountry information does not provide GrainCorp with a competitive advantage are set out in sections 8.1 to 8.8 of its April submission.

In their submissions, interested parties have made various claims that this information can be used to manipulate the market or to the benefit of GrainCorp Trading. With the exception of one example (which is addressed below), it is not clear how submitters believe GrainCorp can achieve this.

In short, no evidence has been provided, as far as GrainCorp is aware, that addresses the detailed information provided in the GrainCorp April Submission and which the ACCC has accepted in the past.

GrainCorp can contact growers directly in a receival site catchment area

Riverina claims that GrainCorp has information on "uncommitted" grain in storage sites, including geographical location and grower details, that provides GrainCorp with

a competitive advantage in securing export sales, in that it can directly contact the relevant growers to acquire wheat.

The benefit to GrainCorp of 'stocks information' is overstated and has been addressed in the April Submission.

- Growers sell to the buyer with the best price or terms. They have the ability to warehouse their grain for 30 to 60 days free of charge before sale. Growers are not under pressure to sell to the first offer received.

- The receival sites are open market places where cash prices are posted by up to 30 or more grain buyers. There is little "first mover" advantage.

- In any case, GrainCorp has an incomplete picture of the wheat not yet committed for sale. GrainCorp's share of country storage is less than 50% overall and in all states (except Qld where it is 54%). There are competing storage facilities and significant on farm storage (see 4.2 of April Submission) where buyers, including GrainCorp Trading, source wheat.

- The reality is that buying wheat is competitive, taking place at various points in the supply chain over time.

AGEA notes, at paragraph 14.4 of its 29 May 2009 submission that accredited wheat exporters (AWE) enter into forward sale contracts. Therefore, an AWE may have legal title to another AWE's stock, but this would not be apparent from GrainCorp's system, nor should it be.

It is interesting to compare this position on the part of the AGEA with that of Riverina relating to forward contracting. The AGEA clearly state that Australian wheat exporters enter into forward sales, and Riverina claim they cannot as a result over 'uncertainty' of port terminal services and charges.

It is also interesting to note that Riverina does not say that GrainCorp actually derives a benefit, only that it would do so. In fact, Riverina says it is unclear if information is shared between GrainCorp's Ports and Trading Business Units (p8).

The 'evidence' offered by Riverina is anecdotal at best. They claim that that the improvement in GrainCorp's market share performance during the harvest season is due to access to this stock information. As has been explained previously, the focus of grain supply in the Eastern Australian States is into the domestic market due to lower transport costs and correspondingly higher margins. Typically sales are made into the domestic market early in the season due to the higher returns which can be achieved. Improvement in GrainCorp's market share performance throughout the season is attributable to this market characteristic, rather than because of its access to confidential information.

As previously discussed, growers seek to commit sales to the domestic market prior to delivering grain into the bulk handling system. This means that approximately the first 1/3 of grain harvested in the Eastern States in a normal year bypasses the bulk handling system. Thus GrainCorp's 'market share' is very limited early in the season due to the selling patterns of growers, the attractiveness of the domestic market and the ability of growers to bypass the GrainCorp storage network.

The claim by Riverina that GrainCorp has an 'unfair' advantage in the market cannot be supported. Riverina has the opportunity to 'post' prices at GrainCorp receival sites and they can offer prices through the online GrainCorp site-by-site price enquiry system.

Given that grain growers themselves operate their business in a 'public' manner, Riverina is not prevented from allocating resources to establishing their own 'grower contact database', or purchasing a database from a commercial provider, and contacting growers directly themselves.

Question 39 - reporting of potential breaches

If the ACCC requires a Compliance Auditor's report to identify "potential" breaches (if any) of the Ring Fencing Rules, GrainCorp will include that requirement in the Auditor's brief.

However, GrainCorp notes the practical difficulties in identifying a "potential" breach, and would be grateful for further information from the ACCC as to what, in their view, constitutes a "potential" breach. Additionally, given that a potential breach is one that has not yet occurred, how can one identify a breach before it becomes a breach?

Further, it is likely to be highly problematic for an auditor to confirm in the negative that there have been no "potential breaches" during the reporting period, as it is not possible in retrospect to identify things that didn't happen, or that should have happened differently.

Question 40 - Financial Records

GrainCorp was proceeding on the basis that 'Financial Records' has the meaning in the *Corporations Act 2001 (Cth)* as follows:

(a) invoices, receipts, orders for the payment of money, bills of exchange, cheques, promissory notes and vouchers; and

(b) documents of prime entry; and

(c) working papers and other documents needed to explain:

  (i) the methods by which financial statements are made up; and

  (ii) adjustments to be made in preparing financial statements.

The types of records and accounts that will be made available to the independent auditor under clause 1 of the ring fencing rules will include relevant sections of the management accounts that relate to internal charging of the Ports Business Unit to GrainCorp Trading for services provided.

Question 41 - Accounting separation

By accounting separation, GrainCorp understands the ACCC to mean that GrainCorp should establish and maintain separate accounts for the ports business from GrainCorp's other businesses. Presumably, the ACCC views accounting separation as beneficial so as to ensure:

- that internal transactions between GrainCorp Port and Trading are recorded and auditable, with a view to ensuring compliance with the obligation not to treat the trading business favourably; and

- that there is no cross-subsidisation between the Ports and Trading business to make the latter more competitive.

GrainCorp already separately reports on its individual business units (Ports, Trading[13] and Storage & Logistics). As a listed company, these accounts are audited and publicly released. This includes details on inter-segment sales and related accounting eliminations.

For example, in its 2008 Financial Reports, GrainCorp provided the following information:

4. SEGMENT INFORMATION

Primary reporting format – business segments

	2008						
	Storage & Logistics	Marketing	Ports	Other	Inter-segment eliminations	Unallocated	Consolidation
	$'000	$'000	$'000	$'000	$'000	$'000	$'000
Sales to external customers	118,548	1,268,754	51,195	88,810	-	588	1,527,895
Inter-segment sales	67,043	20,954	-	1,503	(91,118)	1,618	-
Total sales revenue	185,591	1,289,708	51,195	90,313	(91,118)	2,206	1,527,895
Other revenue	883	1,462	608	84	-	3,238	6,275
Total segment revenue	186,474	1,291,170	51,803	90,397	(91,118)	5,444	1,534,170
Segment result before interest, depreciation, amortisation and income tax	21,577	28,439	10,484	4,191	-	2,827	67,518
Corporate overheads						(26,842)	(26,842)
Share of profits of associates accounted for using the equity method						10,576	10,576
Profit before interest, depreciation, amortisation and income tax	21,577	28,439	10,484	4,191	-	(13,439)	51,252
Depreciation and amortisation	(22,285)	(578)	(12,073)	(1,332)	-	(3,841)	(40,109)
Segment result	(708)	27,861	(1,589)	2,859	-	(17,280)	11,143
Interest expense							(46,961)
Profit / (loss) from continuing operations before income tax							(35,818)
Income tax benefit / (expense)							15,880
Profit / (loss) from continuing operations after income tax							(19,938)
Segment assets	222,626	387,870	173,652	61,352	-	247,973	1,093,473
Segment liabilities	14,229	259,400	8,582	47,923	-	327,194	657,328
Investments in associates	-	-	-	-	-	-	96,866
Acquisitions of property, plant and equipment and other non-current segment assets	13,675	3,412	5,043	911	-	9,462	32,503
Other significant non-cash items	564	39,543	-	-	-	-	40,107

Source: GrainCorp Financial Report 2008, p46

As of 1 January 2009, GrainCorp was required to comply with Accounting Standard AASB8 - Operating Segments.

To comply with the standard, GrainCorp is required to report profit or loss and total assets for each reportable segment. GrainCorp is also required to report measures including revenues from external customers, revenues from transactions with other GrainCorp operating segments, interest revenue and expense, depreciation and amortisation and income tax expense or income, if the measures are included in a measure of segment profit or loss reviewed by the chief operating decision maker for the purposes of allocating resources.

[13] Trading is referred to as 'Marketing' in the relevant accounts.

Accounting Standard AASB8 is available at
http://www.aasb.com.au/admin/file/content105/c9/AASB8_02-07.pdf

GrainCorp's reporting obligations under AASB 8, which are independently audited, are adequate to achieve the 'accounting separation' sought by the ACCC.

As discussed in the April Submission, given the circumstances of a short term Undertaking with no history of significant issues, it would be unduly onerous for the ACCC to demand any higher level of reporting on accounting separation than that required by the Accounting Standards and GrainCorp's reporting requirements as a listed entity.

17.3 Submissions from interested parties

The following key issues were raised by interested parties in relation to information flows and ring fencing:

- *GrainCorp possesses logistics information relating to the quality and volume of stock entering, stored at and shipped from the port terminal. There is no visibility into the basis for GrainCorp's decisions (p12, 34 AGEA submission No. 3);*
- *GrainCorp possesses information about the trading activities of its competitors and can use this information to the advantage of its own Trading Arm (p12 AGEA submission No. 3);*
- *GrainCorp has access to information advantages including how much grain is in storage, the type and grade of that grain, where the grain is located, how much has been sold and how much is available for sale or is uncommitted. (para 4.14 AgForce submission). This information provides GrainCorp with a competitive advantage in securing export sales and use of Port Terminal Services;*
- *GrainCorp's ability to contact Growers directly in the Silo storing area and contract for uncommitted grain places GrainCorp at a competitive advantage (p8 Riviera submission);*
- *Information about uncommitted grain stored in upcountry facilities should be made public or should be included as "restricted information" for the purposes of ring fencing in the undertaking (p8 Riviera submission);*
- *The undertaking does not ensure that Exporters obtain access to the same information available to GrainCorp. If the information is publicly available and of no commercial value, GrainCorp should make all information available to the industry (p12 AGEA submission No 3);*
- *GrainCorp's performance typically improves towards the end of the season, suggesting that it's Trading Arm takes advantage of information flows through its logistics division (p8 Riviera submission).*
- *The ring fencing rules and the definition of Restricted Information are inadequate (p34 AGEA submission No. 3).*
- *There should be accounting separation to ensure that Trading Arms are being dealt with at arms length (p49 AGEA submission No. 3).*

17.4 Response to interested party submissions

The purpose of this section is to respond to specific comments made in submissions by interested parties in relation to information flows and ring fencing.

Lack of knowledge of port capacity

AGEA claims "*BHCs could refuse to allow wheat exporters to accumulate stock on the basis that the port is full but no-one would know if that is the case*" (AGEA submission, paragraph 4.13 - emphasis added).

This is raised as a theoretical risk rather than any specific allegation that this has ever occurred. Given GrainCorp's primary incentive is to maximise throughput at ports this suggestion is illogical. What advantage would GrainCorp derive, since it must follow the shipping stem? Audits under the WEA would reveal such behaviour if it was used as a means of overriding the shipping stem.

No ability to improperly use knowledge of vessel nomination

AGEA claims that exporters have limited time to accumulate a cargo at the port and if the BHC's trading divisions know of the vessel nomination, they will immediately buy stock knowing that the exporter will need it to load the vessel. Further, some bulk handlers "*have delayed or refused to supply freight to move stock that is owned by a wheat exporter to port, so as to apply pressure on wheat exporters to buy stock from the bulk handlers' Trading Divisions on unfavourable terms*" (AGEA submission, paragraph 16.5).

AGEA does not provide specific examples of these alleged episodes in its submission, and it is not clear if these allegations are made against GrainCorp. If so, GrainCorp is not aware of the occurrence of these alleged events.

It must again be emphasised that GrainCorp is not the 'default' provider of rail services in Queensland, NSW or Victoria. GrainCorp has no obligation to 'provide' rail or other transport services to an individual wheat exporter, other than to those parties GrainCorp has a commercial contract with.

In section 6.2 of the April 2008 submission, GrainCorp went to some length to explain the rail capacity problems affecting Queensland and NSW. Put simply, there are rail capacity problems and it may be that the allegation, if it relates to GrainCorp, has arisen from these practical constraints. GrainCorp rejects the allegation but without knowing if it applies to GrainCorp and the circumstances, GrainCorp is unable to give a detailed response.

In any case, the allegation is misconceived.

- There is no obligation on exporters to lodge an intention to nominate a vessel greater than 28 days out. It is voluntary. In any case, it has now been removed from the latest Protocols

- Before putting in a formal cargo nomination application, exporters are expected to be able to show that they already have sufficient grain for the nominated cargo.

- The ring fencing procedures in the Undertaking prevent the ports business sharing the cargo nomination application data with Trading prior to acceptance or rejection of a nomination.

GrainCorp is about to commence the practice of placing all cargo nomination applications received onto the shipping stem as they are received, prior to commencement of the timely cargo accumulation risk assessment process.

Under this process, if a cargo is accepted, the shipping stem will be updated to reflect this outcome. If a nomination is rejected, the nomination will be removed from the stem. This process has been developed following the recent WEA directed audit.

Public disclosure of port and upcountry information

There are a number of suggestions that GrainCorp should publish all grain storage information to ensure a "level playing field", and that such a requirement should become a matter of compliance for bulk handling companies that are accredited bulk wheat exporters.

Despite previous evaluations by the ACCC concluding that GrainCorp doesn't derive a significant competitive advantage from incomplete grain stocks information, the AGEA claim that if grain stock information is not of commercial value, then GrainCorp should have no difficulty disclosing it. For example:

- AGEA suggests that GrainCorp should publish information relating to port operations listed at paragraph 4.16 of AGEA's 29 May 2009 submission. The purpose being to ensure that exporters can assess BHC's compliance.

- Riverina suggests that GrainCorp disclose details of the uncommitted grain in its upcountry facilities to all Licence Holders of its STORM IT network in a geographical manner (p9).

There are adequate protections for ensuring GrainCorp complies with its obligations through the WEA directed audits and now the additional regulatory commitments under the Undertaking.

As for public disclosure, customers provide GrainCorp with information on a confidential basis. GrainCorp is not authorised to disclose this information to the market and would be surprised if growers wished to move to such a system.

As for creating a level playing field, GrainCorp notes that this obligation would not apply to companies that receive and store grain on behalf of growers and traders who do not own ports.

The ring fencing rules are adequate

GrainCorp has included rules relating to information received from its operation of port terminal infrastructure subject to the WEMA and the Undertaking.

In its submissions AGEA raised a number of specific points in relation to the proposed ring-fencing, which are addressed below:

- *"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…until the date on which it is accepted by GrainCorp" (AGEA submission dated 29 May 2009, paragraph 16.2).*

  GrainCorp rejects this view. The information set out in the definition of Restricted Information adequately covers the type of information provided to a Port Terminal Operator in order to obtain Port Terminal Services. It applies to

this confidential information for the period before the information becomes public through the shipping stem.

Given the proposed new process of immediately placing cargo nominations on the public shipping stem, the quantity of Restricted Information relating to a cargo nomination handled by GrainCorp will be minimal.

AGEA has failed to recognise that information is "Restricted Information" only until a Nomination is placed by GrainCorp on the public shipping stem.

- the "*clause 3…prohibition should apply to **any** disclosure to **any** entity*" (AGEA submission, paragraph 16.3).

  The prohibition is against disclosure to GrainCorp Trading or other persons exporting wheat. Who else is AGEA concerned about? For example, GrainCorp must disclose information to the WEA.

- "*providing [aggregated information concerning the grade, quality, quantity, location or attributes of Bulk Wheat received by GrainCorp] may confer an unfair advantage on the bulk handlers*" (AGEA submission, paragraph 16.5).

  GrainCorp is bound by the Census and Statistics Act 1905 (Cth) and provisions within the Bulk Wheat Accreditation Scheme to provide grain stocks information to the Australian Bureau of Statistics on a monthly basis by state, by commodity (for all grains and oilseeds, not just wheat). This is a level of reporting that did not occur prior to the removal of the bulk wheat export monopoly.

18 Capacity Management and Port Protocols

18.1 ACCC information request

Question 43: *Why does clause 2.4 (b)(i) of schedule 2 refer only to 'vertical' storage at port?*

Question 44: *GrainCorp's Port Terminal Services Protocols (schedule 3) sets out the differences between the services offered to access seekers pursuant to the undertaking depending on whether wheat is delivered via a GrainCorp up-country site, another Approved Site, or an unapproved site. Please provide further information on how and why the port terminal services offered by GrainCorp differ depending on the source of the grain.*

Question 45: *In relation to clause 3.1.2 of GrainCorp's Port Terminal Services Protocols, what evidence does GrainCorp require to be satisfied that the exporter has `sufficient grain tonnage'?*

Question 46: *Clause 1.2(e)(i)(D) refers to reaching an appropriate balance between the legitimate business interests of GrainCorp's ability to meet its "reasonably anticipated requirements" for Port Terminal Services with the interest of the public and access seekers.*

(a) Does this objective mean that GrainCorp intends to reserve and set aside its Trading Division's 'reasonably anticipated requirements' and then provide access to third parties for the remaining capacity? If setting aside capacity for its Trading Division, what criteria will be used to assess what will be its 'reasonably anticipated requirements'?

(b) If GrainCorp does intend to set aside capacity for its Trading Division, how does this interact with the relevant ring-fencing obligations?

(c) How does GrainCorp otherwise propose to balance the port capacity requirements of itself or its own Trading Division with third party bulk wheat exporters?

Question 47: *In relation to clause 8.4(e) what are the "objective commercial criteria" that GrainCorp will use to make Operational Decisions that involve conflicts of interests between users of the Ports?*

18.2 Response to information request

Question 43 - vertical storage at port

GrainCorp port terminal infrastructure was built to store, handle and ship grain using vertical storages supplied by rail, as this is acknowledged globally as the most efficient method of handling grain. The first bulk grain export terminal in Australia was the Sydney bulk terminal commissioned in 1922.

Shed or bunker storage of grain (horizontal storage) is not used at the Geelong, Portland, Port Kembla, Carrington, Gladstone and Mackay terminals due to the cost of horizontal storage and handling of grain being approximately three times that of vertical storage. GrainCorp applies a standard storage and handling fee at port terminals, so the additional cost of any horizontal storage is carried by the Company.

Shed storage at Fisherman Islands (FI), in the export sugar shed, is only employed in emergency situations, such as when grain intake logistics are impacting on the timely assembly of cargos. The timely accumulation of cargos at FI is being compromised by the reduction in rail services to the terminal and the heavy reliance on road transport. GrainCorp was forced to use the export sugar shed to accumulate sorghum, as the time taken to accumulate cargos by road was delaying the shipping program.

Damage sustained to the export sugar shed has forced the Company to use bunkers at Fisherman Island. These would not normally be used due to their cost.

If GrainCorp, due to the need to continue to rely on the more inefficient road based method of accumulating cargos as a result of rail service reduction, were to continue to rely on shed and bunker storage at FI, or if the Company was forced by regulation to offer horizontal storage as a 'standard service', the Company would have to introduce a storage and handling fee variation that would recover the additional costs of handling grain through shed or bunker storage.

Question 44 - deliveries from GrainCorp sites or ex farm

The delineation between 'approved' and 'unapproved' storages has existed for many years and is in place to militate against both quality and logistical risks.

Grain is a food product, and understanding the 'provenance' of grain is becoming increasingly important for many international and domestic grain processors.

GrainCorp 'approves' storages on the basis of the capability of the companies storing grain to do so in a manner that ensures the correct and safe storage of grain, and awareness of food safety concerns, are important factors in ensuring that that the quality characteristics are preserved.

With knowledge of the provenance of grain from within approved storages, GrainCorp is able to minimise the risks associated with quality failure of grain within the logistics path to shipping. Our risk management measures reduces the likelihood of vessels being delayed due to grain failing AQIS inspection, or failing quality testing at a port terminal.

Where GrainCorp is not able to assess the provenance of grain being delivered to a terminal, the risk of quality failure and vessel delays (to one or a number of exporters) was illustrated early in 2009 at the Carrington terminal.

- GrainCorp agreed to allow an exporter to assemble two durum cargos direct ex-farm by road. Both cargo accumulations suffered significant logistical and quality problems that led to delays of vessels and inefficient use of port terminal storages.

- Delays to trucks delivering durum to the Carrington became the subject of media reports on two occasions, and questions during a Senate Estimates Hearing of the industry regulator, WEA.

- On the first occasion, grain intake was delayed due to the consecutive survey failure of 4 vessels causing the terminal capacity to be 'blocked out' (full). This prevented trucks from being unloaded and caused vehicles to be lined up on public roads.

- On the second occasion, trucks turned up 36 hours prior to their time arranged with the exporter for the commencement of grain receival. Both instances demonstrate how one external factor can cause 'knock on' effects.

- The durum delivered ex-farm had significantly higher than average quality and insect infestation failure rates that would normally be expected from grain delivered ex-approved storages.

To compound these problems, the accumulation of the second cargo was disrupted by high levels of insect infestation (grain had been stored on farm for up to 5 months and had become heavily infested with insects) and to combat this problem, truck drivers were fumigating their trucks in transit with Phosphine, which is an illegal practice in all States and Territories. This meant that grain was being delivered to the terminal with chemical residue levels that were both hazardous and illegal.

This durum also had to be treated with a contact insecticide on receival to ensure that grain did not become infested within the terminal. This in turn caused problems with the movement of grain within the terminal, where treated grain was leaving residues of insecticides on belts and other machinery. +

As these matters related directly to the suitability of the durum to the relevant market (Italy) and could possibly have had an impact on market access for other exporters, GrainCorp kept WEA fully informed of the progress of this matter.

The quality failures associated with the cargo accumulations mentioned above led GrainCorp to develop a new protocol for the accumulation of cargos ex-non approved storages (including ex-farm storage). This new protocol requires grain quality to be verified upcountry, prior to dispatch to port.

This protocol is an initiative by GrainCorp to try and ensure that infested grain, or grain that won't meet the exporters quality requirements, is rejected prior to reaching the port terminal, closer to the point of origination. This will not only save customers significant transport costs related to rejected loads, but will increase the efficiency of cargo accumulation, as it will minimise or eliminate the rejection of trucks at the port and allow exporters to 'campaign' trucks of known quality and insect status to the port.

GrainCorp has to be mindful of the insect status of grain received at terminals. The export of grain from Australia containing live insects is illegal. All export terminals are controlled quarantine zones under the direct control of AQIS, who have the ability to withdraw export certification if infested grain is received at a terminal or found at a terminal.

Given that each port terminal is assembling cargos for multiple customers at any one time, GrainCorp has to take care not to 'cross contaminate' grain that contains either insects of chemical residues. The separation of each customers cargo is vital to ensure that what is received at the terminal is shipped on the customers vessel.

This applies particularly to pesticide residue free (PRF) grain and there is a significant demand for PRF grain emerging which attracts a price premium. GrainCorp can verify PRF status of grain from approved storages, but cannot do so for grain that is stored on farm or by other parties.

Significant cleaning of terminal equipment is required after handling any grain treated with a fumigant and this can cause shipping delays.

Cargo assembly from grain received and stored at sites that have been specifically sited on rail lines and developed to out load grain into rail at high capacity is more efficient. These sites generally constitute 'approved' storages managed by companies such as GrainCorp, AWB and Australian Bulk Alliance (ABA). The capability of these sites generally reduces the risk of logistical delays and thus makes the planning of country to port logistics less risky.

The alternative cargo assembly method is to employ road transport to haul grain stored on farm, or at other sites, direct to port. This method of cargo assembly is both more costly (road transport versus rail) and time consuming, requiring the allocation of more storage space at a port terminal for a longer period of time. The risk of delays to timely cargo assembly are increased when cargos are assembled from 'unapproved' storages, and thus the threat of delays being experienced at port terminals to the shipping of grain for all service users is increased.

GrainCorp believes it is essential that the risk of shipping delays be viewed holistically, and not just on an exporter by exporter basis. A cargo assembly method that may suit one exporter may increase the risk of costs being incurred by other exporters, GrainCorp has a responsibility to all port access and service consumers to ensure that the potential for delays is minimised.

GrainCorp charges differential fees for grain received from non-approved storages as the quality and logistical risks associated with handling and shipping this grain are much higher to both GrainCorp and the customers using port terminal services.

Question 45 - information required for GrainCorp to be satisfied that the exporter has sufficient grain tonnage

The process of evaluating the risk of timely accumulation of a grain cargo is necessarily subjective, as a number of the factors of relevance cannot be adequately expressed or quantified at the time in which a cargo nomination application is made.

GrainCorp applies risk management judgements informed by the following considerations;

- The experience of the exporter, how long they have been exporting and the tonnage they ship;
- The reputation of the exporter and their record of successful 'on time' accumulation of cargos;
- The provision of evidence that the exporter has the capability of accumulating the cargo on time using road and / or rail transport in a manner that would minimise potential disruption to other port terminal customers;
- If a cargo is to be accumulated from approved or non approved storages and the risks associated with delays caused by the latter;
- Demand for port terminal services at or around the time of a cargo nomination, and any relevant terminal operational arrangements (including use of the berth by other vessels as directed by the relevant Port Authority), and the likely requirement for overtime.

GrainCorp doesn't set empirical ownership 'limits' on risk assessments, unlike ABB and CBH that require proof of ownership of a whole cargo. An exporter with a large presence in the market has a lower risk of failing to accumulate a cargo on time than an

exporter with a smaller market share. Thus a large and active exporter may be judged a low timely accumulation risk and thus no evidence of stock ownership may be required prior to acceptance of a cargo nomination.

On the other hand, a smaller exporter with a history of grain accumulation problems, or a history of timely cargo accumulation failure, may have to supply proof of ownership of the majority of a cargo prior to the acceptance of a nomination, as they may present a high risk of causing delays at port that would then impact on other exporters in the form of vessel delays and demurrage.

Under the Port Terminal Service Protocols introduced on 8th June 2009, the form of which would be largely the same for the new shipping year commencing 1st October 2009, GrainCorp will now allow exporters to nominate cargos up to 30th September each year.

This means that the risk assessment process for forward bookings will not rely on grain ownership as a decision making criteria, as it is not possible to require an exporter to provide proof of ownership for cargos nominated 2, 6 or 11 months ahead.

So under the current Protocols concerns over the 'sufficient grain tonnage' question have been largely addressed.

The critical point under the current protocols relating to ownership of sufficient tonnage of wheat to accumulate a cargo in a timely manner is now not at the time of acceptance of a cargo nomination, it is at a point no later than 21 days from the assigned load where the nominee has to advise GrainCorp of stock information that will allow the Company to develop a site assembly plan in conjunction with the exporter (Ref. Cls. 4.1 of the GrainCorp Port Terminal Services Protocol, 3 June 2009).

At that point in time, if the exporter is not able to prove that they have sufficient grain ownership that will minimise the risk of a failure to accumulate the cargo by the assigned load date, GrainCorp may be forced to compel the exporter to renominate and secure a new assigned load date, when not doing so risks disruption and delays to other customers (Ref. Cls. 8 of the GrainCorp Port Terminal Services Protocol, 3 June 2009).

GrainCorp notes that some parties are requesting that GrainCorp apply more objectivity to the process of vessel acceptance. If GrainCorp is forced to move to be become more 'prescriptive' with respect to how it accepts vessel nominations the only way in which this can be achieved will be to introduce a protocol rule that an exporter must demonstrate full ownership of the quantity of grain an exporter at the time a cargo is nominated. This would be counterproductive for all exporters and will make the new Protocols unworkable with exporters unable to have the freedom they now have to nominate cargos up to 364 days ahead.[14]

Question 46 - reasonable anticipated requirements

The reference to 'reasonably anticipated requirements' will be removed from the Protocols. As a result, this question is no longer relevant.

Question 47 - objective commercial criteria

The focus of the operation of a port terminal is to receive and ship the maximum tonnage allowable in the shortest and most efficient time available.

[14] Assuming that an exporter nominates a cargo on the 1st of November for loading on or around 30th September the following year.

The 'objective commercial criteria' referred to in the Undertaking focuses on how terminal management can deliver services to customers in the most efficient and commercially viable manner.

Flexibility is required to efficiently manage complex infrastructure that services multiple customers. Management decisions have to be made on a day to day basis that consider the impact of dynamic externalities.

For example scheduled operations are regularly disrupted by;

- Rain or high winds preventing vessels from being loaded or berthing,
- Transport delays leaving cargo accumulation incomplete, forcing vessels to stand off to await the accumulation of the remainder of a cargo,
- Vessels failing survey and their assigned load date being missed can cause terminals to 'block out' (fill to storage capacity),
- Grain presented to AQIS failing inspection slowing ship loading or causing vessels to stand off while replacement grain is sourced or grain is fumigated (for between 2 and 9 days),
- Machinery failures delaying ship loading.

In such circumstances, terminal management has to be able to respond to the circumstances and challenges posed, and act and make decisions, such as changing the order of vessel loading, in order to minimise disruption to all customers.

If rigid prescriptive rules are placed on the management of shipping at terminals efficiency will be reduced and the cost of exporting will increase for all exporters.

18.3 Submissions by interested parties

In their submissions, interested parties raised the following key issues:

- *The port protocols must be part of the undertaking. (p9, 48 AGEA submission No. 3)*
- *The port protocols must be applied in a non-discriminatory manner. This does not occur at present (p32)*
- *The port protocols do not provide certainty or transparency in relation to the management and operation of Bulk Handlers' port terminals and shipping stem (p31, 48 AGEA submission No 3)*
- *The port protocols do not contain clearly defined rules which are capable of objective application (p48, AGEA submission No 3)*
- *The procedures in the port protocols must be clearly defined and transparent to mitigate against the risk of GrainCorp giving preferential treatment to its Trading Arm (p31 AGEA submission No 3)*
- *The port protocols should provide transparency as to how the Bulk Handlers accept vessel nominations and provide vessel slots (p 14 AGEA submission No 3)*

- *Exporters ability to obtain a shipping slot should not be subject to GrainCorp being satisfied the Exporter will have sufficient wheat available as GrainCorp can influence their ability to transport wheat to port (p31 AGEA submission No 3)*

- *Re-ordering 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 (p31 AGEA submission No 3)*

- *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 (p33 AGEA submission No 3)*

18.4 Response to submissions by interested parties

- *The port protocols must be part of the undertaking. (p9, 48 AGEA submission No. 3)*

GrainCorp does not accept the proposition that the Protocols should be locked in for the term and only be capable of variation through an inflexible TPA variation process.

- *The port protocols must be applied in a non-discriminatory manner. This does not occur at present (p32)*

The AGEA is accusing GrainCorp of applying port terminal protocols in a discriminatory manner without providing evidence or data to back up their claim but are not able to provide examples and evidence, because GrainCorp has not acted in a discriminatory manner.

As an example, review of the manner in which the protocol was applied to the busiest GrainCorp terminal, Fisherman Islands, for the April 2009 shipping program reveals that GrainCorp requested its own Trading Division, and received their consent, to move vessels to other ports to accommodate vessels from other customers that were nominated after the GrainCorp Trading vessels.

Of the 18 vessels nominated for the month, a total demand of 361,650 tonnes, only 10 vessels could reasonably be loaded. Logistics constraints limited intake to 200,000 tonnes, despite the terminal having a capability of 300,000 tonnes per month.

Only 2 of the 18 vessels were nominated prior to GrainCorp Trading's 7 vessel nominations. Of the 7 GrainCorp vessel nominations 3 vessels were moved to Newcastle and 1 to Mackay. One AWB vessel was moved to Newcastle. Ten vessels were accepted onto the shipping stem, of which GrainCorp Trading held 3.

This has been independently validated by an external audit of the GrainCorp shipping stem and cargo nomination procedures carried out at the direction of the industry regulator WEA. The independent audit found that there was *"…no evidence of incorrect handling of Nominations, nor the incorrect setting of priority for vessels in the relevant Shipping Schedules."*

With reference to the allocation of port terminal capacity, where there was demand exceeding available supply, the WEA audit also found that, while the *"… process of rationing was not transparent to the market, … our Audit showed the process in itself to have been fairly conducted."*

Prior to the audit, GrainCorp changed its nomination rules to reflect the practice that had developed with all customers on the process of shipping intentions that were received greater than 49 days out from the Load Date. GrainCorp has consistently acted in a fair manner toward all customers when allocating shipping at ports where logistics capacity is limited.

GrainCorp also notes the submission by AgForce that *"GrainCorp have responded well to the needs of growers and industry in recent times. In 2008 - 2009 grain production in Queensland was at levels very close to long term record levels and the amount of grain to be exported from Queensland this year will be one of the largest, if not the largest ever. GrainCorp have responded well to this task"*.

- *The port protocols do not provide certainty or transparency in relation to the management and operation of Bulk Handlers' port terminals and shipping stem (p31, 48 AGEA submission No 3)*

Once again the AGEA are making claims without providing evidence or examples to substantiate their claims. GrainCorp engaged customers in a process of reviewing the previous protocols to improve their effectiveness. The responses from most major customers are contained in the attached analysis of evolution of the Port Protocols (refer Attachment 3).

GrainCorp believes that the process of consultation was effective and that our response and subsequent introduction of revised protocols reflects an active and flexible approach to improving transparency and compliance with Protocol requirements on behalf of both parties.

GrainCorp appreciates that some requests by customers for shorter notification periods from customers were received during consultation and the Company believes, based on operational experience that the time frames adopted reflect good practice.

- *The port protocols do not contain clearly defined rules which are capable of objective application (p48, AGEA submission No 3)*

The Protocols provide clear rules for the nomination of cargos, advising vessel ETA's, assigning load dates, advising GrainCorp of a vessels laycan, processes for nominating multi port loads or changing ports, information requirements about a vessels readiness to load, the development of a site accumulation plan, deadlines for when information has to be lodged and so forth.

The assertion by the AGEA is that the Protocols don't contain clearly defined rules is patently incorrect.

- *The procedures in the port protocols must be clearly defined and transparent to mitigate against the risk of GrainCorp giving preferential treatment to its Trading Arm (p31 AGEA submission No 3)*

The AGEA are alleging that GrainCorp is guilty of discrimination without providing any substantiation to validate their claim.

Under the Protocols, GrainCorp Trading is subject to the same requirements as other port terminal service customers. Under the Undertaking GrainCorp Trading will be required to enter into an WPTS Agreement and will be subject to the terms and conditions for provision of access and services described within the Undertaking.

GrainCorp has provided details of how it has managed capacity at Fisherman Islands which clearly demonstrates the contrary view to the AGEA allegation.

- *The port protocols should provide transparency as to how the Bulk Handlers accept vessel nominations and provide vessel slots (p 14 AGEA submission No 3)*

Section 1.3 of the GrainCorp Port Protocols clearly describes the information required in a Cargo Nomination Application (CNA).

Section 2 of the Protocols describes the Application Review and Acceptance procedure. Section 2.1 states, *GrainCorp will accept or decline a **CNA** based on a **Risk Assessment** that takes into account the criteria outlined in Clause 2.1.*

GrainCorp contends that this is a very transparent set of requirements that are not difficult to understand.

- *Exporters ability to obtain a shipping slot should not be subject to GrainCorp being satisfied the Exporter will have sufficient wheat available as GrainCorp can influence their ability to transport wheat to port (p31 AGEA submission No 3)*

This request by AGEA appears to contradict the requirement to be more objective. The only mechanism to have full objectivity is to have a system of requiring full stock ownership before accepting a nomination. It is unclear therefore, what AGEA are actually asking for.

On the matter of influencing transport of grain all exporters can, and do, organise their own freight program. We refer to Section 4.3 of our April submission noting that not only has GrainCorp secured rail capacity that it is making available to all exporters but the Company has increased the efficiency of the rail transport task on a per train basis. Again this demonstrates that GrainCorp is incentivised to maximise throughput to export markets. We also note that it would appear that again a free-riding element is evident in the AGEA member claims.

It is important to reiterate that the risk management process GrainCorp uses to assess cargo nominations takes into account the possible impact on all customers of the failure by one party to accumulate a cargo in a timely manner.

It is the exporter that will carry the burden of any costs associated with shipping delays or from a decrease in port terminal efficiency. If exporters are willing to participate in a system of vessel nomination and load date allocation that is 'higher risk' (i.e. one where GrainCorp is not actively managing shipping allocation in a manner that minimises delay related risks) then they are the parties that will have to carry the burden of any resultant or consequential costs.

- *Re-ordering 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 (p31 AGEA submission No 3)*

The AGEA have once again sought to misrepresent the day to day reality of export grain shipping. It has been stated elsewhere in this submission that more than 90% of the modifications to loading order at GrainCorp terminals are directly related to;

(a) Requests by exporters for variations in load date or loading port, or

(b) Reordering caused by vessel survey failure or insufficient stock at port requiring the shipping stem to be rearranged to avoid terminals 'blocking out', or other exporters incurring demurrage.

As an example Newcastle port has had the following vessels fail survey from 1 January 2009 with vessels failing survey:

Vessel	Initial Survey date	Date passed survey	Days past load date
Ocean Breeze	12 Jan 2009	13 Jan 2009	1
Urawee Naree	19 Jan 2009	22 Jan 2009	3
Praire Sky	3 Feb 2009	5 Feb 2009	2
Siam Jade	30 Jan 2009	6 Feb 2009	5
Ostende Max	2 Feb 2009	12 Feb 2009	11
Accord	16 Feb 2009	19 Feb 2009	3
Daria	25 Feb 2009	27 Feb 2009	2
Tenko Maru	14 Mar 2009	18 Mar 2009	3
Catriena	23 Mar 2009	4 April 2009	11
B Asia	3 Apr 2009	Removed	New vessel required
Tien Hau	22 Apr 2009	24 Apr 2009	2
Bianco Venture	12 May 2009	14 May 2009	2
Ratu Tembaga	25 May 2009	26 May 2009	1

The failure of 3 consecutive vessels in Newcastle in late January 2009 and early February 2009 resulted in the terminal reaching its full storage capacity. This had the consequence of stopping rail and road into port with some 8,000 tonnes of potential freight lost. With limited rail resources this has a significant impact on the forward program.

Reordering vessels in this instance is therefore required to ensure that the operations can continue to operate effectively. The Protocols and WPTS Agreement provide clear direction to customers on the process of removing failed vessels and the consequential effect on queuing. It is erroneous of AGEA to suggest that reordering of vessels is undertaken on a non-transparent basis and in the absence of clearly defined rules.

Another significant factor in vessel reordering is the availability of stock at port to load. We cannot partially load vessels and allow the vessel to sit on the berth whilst further stock is delivered. Throughout the current shipping period approximately 50% of vessels did not have sufficient stock accumulated at port to load their vessel on the assigned load date.

The consequence of failing to have stock at port results in delays to the shipping program, a loss of revenue to GrainCorp through reduced throughput and potentially results in other customers incurring additional costs. GrainCorp proactively worked on ensuring that these vessels could load on their assigned load date and managed the stocks at port to continue to load vessels more often than not in the assigned order. GrainCorp notes that the AGEA have not recognised in the effort GrainCorp takes to assist all exporters manage the shipping program and the numerous occasions GrainCorp has assisted with load completion this year.

If the AGEA are proposing that the shipping stem become a rigidly enforced order of loading, they are demonstrating that they have a low level of knowledge of shipping logistics and that they concede to proof of grain ownership and site assembly will be pre requisites to access and bookings.

A change to a nomination requested by an exporter is not 'transparent' to other exporters. It is a change that is negotiated between GrainCorp and the exporter. Would the AGEA, for the sake of transparency, support the removal of the ability of exporters to make modifications to their own cargo nominations? Or would the AGEA support a process where a request to change a cargo nomination be subject to public input from other exporters using a port terminal (i.e. those exporters who may be impacted upon by a proposed change)? This would be a very transparent, but ultimately unworkable process, as it would be cumbersome and may mean that other exporters would object to the proposed modification(s).

- *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 (p33 AGEA submission No 3)*

Section 10 of the Protocols contains an expedited dispute resolution process. GrainCorp is required to give reasons for any decision to reject a cargo nomination application and there is a rapid escalation process should the exporter be dissatisfied with GrainCorp's response. The mechanism provides accountability for GrainCorp's decision making at the port.

However, the Company, following recent consultation with customers under the aegis of Grain Trade Australia (GTA), has agreed that use of the existing arbitration process offered by GTA would be an appropriate mechanism for the settlement of disputes relating to the provision of port terminal services and those relating to the provision of access via the Undertaking.

More information on the GTA arbitration process is available at http://www.nacma.com.au/arbitration

Approval of cargo nomination applications past 30 September 2009

At paragraph 2.7 of its submission dated 29 May 2009, AGEA notes that "*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.*"

GrainCorp is unable to approve cargo nomination applications past 30 September 2009 as that is the date at which all accreditations regulated by Wheat Exports Australia cease. GrainCorp would be in contravention of the WEMA if the Company were to facilitate the export of bulk wheat by an unaccredited exporter if that exporter were not re-accredited by the regulator.

Similarly GrainCorp cannot provide services under the proposed Undertaking until;

(a) The Undertaking is approved, and

(b) Access seekers sign Access Agreements under the Undertaking.

GrainCorp is also not able to provide port terminal services to parties the Company doesn't have a contractual agreement with, as to do so would expose the Company to an unreasonable level of risk.

19 Access to GrainCorp's port terminals by Superintendence Companies

19.1 Submissions by interested parties

The following section sets out GrainCorp's response to the submissions lodged by SGS ("**SGS**") on 26 May 2009 and Intertek Oil, Chemical and Agri ("**Intertek**") on 9 May 2009.

In their submissions, SGS and Intertek raised the following key issues:

- *The port terminal services Undertaking should include a requirement that Superintendent companies can obtain access to port terminal facilities, including the operational areas of the port terminal facilities;*
- *Australian port operators are generally very restrictive in granting access to Superintendent companies' representatives at the time of loading;*
- *The impact of restricted access is that exporters and buyers cannot gain the same level of assurance of quality they expect based on their international experiences;*
- *Restricted access to Superintendent companies may result in sellers from Australia being in breach of their export contracts or failing to meet importing country regulations.*

19.2 Access is provided subject to safety requirements

SGS and Intertek (and other cargo superintendents) have historically been granted access to GrainCorp port terminal facilities to conduct their operations, following appropriate notification of GrainCorp management. Any limitations placed on access to operational sections of terminals are necessary having regard to employee and visitor safety.

Superintendence company representatives are, on request, accompanied on inspections of grain terminals, allowing them to view and assess relevant operational areas such as grain sampling stands, grain intakes, conveying equipment, the shipping path and ship loading equipment.

GrainCorp has no incentive to restrict superintendence companies as they are not competitors. They provide additional assurance services which ensures compliance with quality requirements and which aligns with GrainCorp's legal obligations in relation to export and its interests in protecting its own reputation and that of Australian export grain.

For the reasons below, the inclusion of a requirement in GrainCorp's Undertaking for superintendent companies to obtain access to the operational areas of GrainCorp's port terminal facilities is inappropriate having regard to the factors the ACCC is required to consider under section 44ZZA of the TPA and the objectives of Part IIIA of the TPA.

19.3 Quarantine control of grain terminals

It is important to note that all grain export terminals in Australia are 'quarantine zones', regulated by AQIS. Each grain export terminal is licenced as an 'export facility', and as such these facilities are subject to a range of controls that are described in relevant Acts and Orders.

The policies and practices of GrainCorp at each grain export terminal are influenced by the relevant quarantine requirements. Part of the licensing requirements is strict control over the manner in which access is granted to individuals visiting and working within each licensed export facility.

19.4 Sampling validity

GrainCorp provides cargo superintendents with samples from the automatic sampling systems used in each terminal. These systems provide real time sampling of grain from the shipping path in quantities that represent a statistically sound 'representative' sample of grain being loaded.

The automatic systems have been established to comply with the relevant quarantine and biosecurity Acts and Orders implemented by the Australian Quarantine and Inspection Service (AQIS).

The rate at which Australian quarantine authorities require samples to be taken is the highest in the world, and some 4 / 5 times the rate of the sampling undertaken in the United States of America and Canada.

Country	Sample in kilograms per 33 T
Australia	1.6 kg
USA	0.3 kg
Canada	0.37 kg

AQIS relies on the automatic sampling systems to assess the insect status of grain being loaded onto a vessel and they assess samples for the presence of any prohibited materials, to ensure all grain loaded meets Australian law relating to grain exports and the legal biosecurity requirements of the importing country.

Superintendents seeking access to operational parts of a terminal will, and historically have sought to, take samples from different parts of the grain path. Samples taken in this manner are not statistically representative (that is the rate and distribution of the samples taken do not represent a methodologically secure sampling rate). Thus samples taken from the grain path by any method other than via the automatic sampling system cannot be taken to be representative samples, and thus any conclusions as to the quality of grain assessed from these samples will not be valid.

Superintendent companies can provide no statistical or scientific rationale for requiring that samples be taken from different parts of the shipping path, or at different rates, to those required by quarantine law. The point of sampling and the rate at which samples are taken by the automatic sampling equipment allow grain exports to meet Australian and importing country quarantine and biosecurity laws, and this standard and method of sampling should be satisfactory for the purposes of the superintendent.

19.5 Safety must be the first priority

GrainCorp is committed to providing a safe working environment for employees and also for visitors to all GrainCorp sites, as the Company is required under law to do so.

By seeking access to operational parts of the terminal to take samples, superintendents will be increasing risk of injury, not only to themselves, but to GrainCorp employees. Current Safe Work Instructions prevent experienced GrainCorp employees from accessing certain operational areas while machinery is operating. SGS, by seeking "*unrestricted access to loading areas throughout the entire loading operation."* is proposing to manually take samples from grain conveyors (ie heavy moving machinery) during operations. This presents a level of potential injury risk that GrainCorp finds unacceptable.

GrainCorp's policy for access to its port terminals by superintendent companies is appropriate to minimise the risk of injury to personnel and rejects the assertions made by SGS and Intertek that GrainCorp's safety requirements are too onerous or inconsistent with standard international practice.

19.6 Adequate access is provided

Superintendent companies have adequate access to the Port Terminal to conduct their operations as required by their customers. In this regard, SGS and Intertek provide services to a number of exporters at GrainCorp's port terminals.

The terms on which GrainCorp provides access to Superintendent companies to its port terminals are clearly set out in its company policy on access to Terminal Facilities by Superintendents. This policy has been communicated to SGS and Intertek and is applied uniformly to all Superintendent companies.

- Superintendents can inspect the relevant sections of the plant, including the sample room prior to loading.
- They are then escorted to a safe and suitable waiting area.
- The taking of samples may be observed once or twice per shift.
- Samples (taken in accordance with relevant standards) are brought to them on a regular basis during vessel loading.
- Access to the vessel during loading is at the discretion of the exporter and ship's master.

The level of access is sufficient to undertake their services to their customers. Australia is a major wheat exporter and its grain has a reputation for being reliable and of high quality. This would not be the case if exporters were unable to rely on the existing quality assurance processes, including those of superintendent companies. GrainCorp rejects the following assertions which suggest that the Company processes are inconsistent with international practices or are detrimental to Australian exports.

- SGS is not correct in saying that exporters are unable to obtain the same level of quality assurance that they expect based on their international experiences.

- As explained in Section 19.4, the rate at which samples are taken from the shipping part comply with Australian quarantine law and export orders and meet importing country biosecurity requirements / laws. Sampling at this rate is sufficient to establish the quarantine status of grain being shipped and as such it is at a rate that is sufficient to establish other quality parameters.

- The claim by SGS that superintendence companies cannot issue GAFTA compliant certificates is puzzling. Company representatives are allowed inspect relevant areas of the shipping and grain paths, and rate at which samples are taken provide a statistically sound sampling regime. Given that similar companies in the USA and Canada, where sampling rates are lower, can issue GAFTA compliant certification, it is unclear why Australian companies cannot. This is not fully explained by SGA in their submission.

- To the best of GrainCorp's knowledge, there is no restriction on the export of grain to Kenya, where the sampling regime required by AQIS precludes grain meeting import country biosecurity requirements. It may be the case that the Kenyan Authorities will not recognise superintendence certification, but this doesn't restrict the export of grain to that country. What is does do is to simply restrict the role of the superintendence company in this context.

- There has only been one bulk wheat export sale to Kenya in the last 5 years, that sale occurring this year (2009). Clearly the restriction referred to by SGS has not prevented Kenya from becoming a new market for bulk Australian grain in 2009. (Source. WEA)

- SGS and Intertek have not provided any examples where they have been unable to defend quality claims made overseas against Australian export cargoes of wheat and other grains. As a consequence of the lack of evidence presented, the claims made should be considered anecdotal and thus without any credibility.

- The suggestion by SGS that the certificates resulting from their inspection and testing form a crucial part of shipping documents required for payment against Letter of Credit (LOC)which often require full supervision is not correct. These services are optional and, where required, in GrainCorp's experience, the access provided has been sufficient to meet the customer's requirements. GrainCorp is not aware of any instances where an exporter has been denied an LOC, where denial was related to the inability of a superintendence company to gain full and unfettered access to a GrainCorp terminal. When an exporter applies to book a cargo for shipping through a GrainCorp terminal, matters relating to LOC's and other contractual obligations will have already been dealt with by the exporter. It has to be remembered that exporters book cargos for shipping after a sale has been made. Therefore, all aspects of sale financing will have been dealt with prior to cargo assembly and shipping. Letters of Credit are not arranged at the time shipping take place.

- It is not a recent policy to restrict access during loading. GrainCorp has never permitted this.

19.7 GrainCorp is not a competitor of SGS and Intertek

GrainCorp does not compete with SGS and Intertek in the provision of additional quality verification services. Accordingly, GrainCorp has no incentive to limit access to the port terminals by SGS and Intertek for 'competitive' reasons, and inclusion of Superintendent services within the scope of the Undertaking is unnecessary and unwarranted.

The services provided by the Superintendent companies are consistent with GrainCorp's legal obligations to ensure that grain exported from its terminals meets international standards, in particular:

- ensuring that the integrity of grain quality is maintained, to minimise the possibility of quarantine rejections.
- meeting its AQIS quarantine licence obligations for nil insects received at the port terminal; and
- ensuring that the chemical treatment history of the grain received for shipping meets the market access and / or biosecurity requirements of importing countries, ie a large number of cargoes for the European and Asian markets are required to be 'pesticide residue free'.

In the event that the quality of grain exported from Australia does not meet destination requirements, it also impacts directly on GrainCorp's reputation, that of Australian wheat and ultimately port throughput.

19.8 Charging for access

Intertek has argued that access to terminal operations and equipment should not have special fees charged. As noted in GrainCorp's policy, fees are only charged where the demand for samples is in excess of that normally provided.