



Australian Grain Exporters Association

Submission to the Productivity Commission Wheat
Export Marketing Arrangements Inquiry

November 2009



Executive Summary

The Australian Grain Exporters Association (AGEA) welcomed the new wheat export marketing arrangements (WEMA) that came into force in July 2008 and enabled the introduction of competition into the Australian wheat market. The WEMA enabled this move to an open and contestable market to be undertaken in a managed way and as a transition measure.

These arrangements have been effective in facilitating the move to a competitive market environment and were an appropriate transitional measure. The Australian wheat market has matured and grower skills and understanding of markets have developed so that the vast majority are now comfortable operating in a competitive market. As such, the arrangements in their current form are not required as an ongoing measure.

In the first year of deregulated export wheat marketing, the Australian grains industry has shown its ability to respond to change and embrace the opportunities of a contestable market environment. The new marketing era has been a success and has enabled large volumes of Australian wheat to continue to be shipped in both bulk and containers.

However, issues remain in relation to the efficiency of the supply chain and specifically in relation to port access for Australian wheat exporters. AGEA strongly believes that a regulatory oversight in relation to the Port Access Undertakings must be maintained and believes further monitoring of the bulk handling companies (BHCs) outside the scope of the Undertaking is warranted.

AGEA believes that a sunset period for Wheat Exports Australia (WEA) should be put in place and that accreditation is not required beyond this. However, the port access test is necessary and should be maintained, even beyond the sunset of WEA if ACCC finds that BHC behaviour has not changed as directed by the Port Access Undertakings.

Wheat deregulation is part of a long process of change for the Australian wheat industry. As a result of the freeing up of markets, the industry has seen greater opportunity, albeit at a time of increased volatility in both grain and financial markets.

The grains industry has developed a number of functions and activities to ensure that it operates efficiently in a deregulated market. Grain Trade Australia (GTA) has a well developed set of tools to assist in the facilitation of trade, and supports this with a communications and professional development program to ensure all parties understand their obligations.

AGEA supports the industry moving to a self-regulation model similar to that which operates in other major export crops such as barley, sorghum and canola. AGEA believes that the wheat industry is ready for this approach. This self regulation model could be expanded to include an industry code of conduct for Australian wheat (grain) exporters through either AGEA or GTA.

AGEA believes that an industry self-regulation approach would also provide the most efficient method of ensuring that the interests of growers, and the wider Australian wheat industry, are safeguarded. AGEA does, however, see an ongoing requirement for ACCC to continue its oversight of the port access arrangements.

The wheat industry arrangements should have the objective of developing a whole-of-industry integrated approach i.e. all sectors of the industry working together. The industry self-regulated model will best deliver this.

Recommendations for the WEMA post 1 July 2010

AGEA believes that the next phase of the wheat market arrangements should enable the industry to move further towards a fully developed industry self-regulated model. AGEA outlined these principles in its 2006 document "Marketing Australian Wheat" and these are still relevant today.

Maximum benefit to growers will be delivered via a wheat industry structure where there is:

- maximum competition amongst exporters in purchasing, transporting, storing and marketing Australian wheat
- clear separation of roles and responsibilities within the BHC's to a point where they are seen as professional storage and handling providers who will be prepared to accept performance responsibilities on operational efficiencies
- clear separation of the commercial, market development, trade access policy, monitoring, and oversight activities of the wheat industry
- industry self-regulation and industry responsibility for stewardship functions

An industry self-regulatory approach would provide the most efficient method of ensuring that the interests of growers and the wider Australian wheat industry are safeguarded. This will enable the industry and growers to work together develop a system of oversight for exporters of Australian wheat that is responsive to their needs both now and in the future.

Specific recommendations include:

WEA, accreditation and port access

- Accreditation for exporters with three year approvals should not be continued past 2010. Accreditation for new entrants should be maintained until 2012 and BHC accreditation should be reviewed in 2011 when ACCC undertakings expire
- Wheat Exports Australia (WEA) to sunset in 2012. In the interim, WEA mandate should be defined and restricted to activities where a net benefit to community, market participants and growers is clearly demonstrated
- The port access test is necessary and should be maintained, even beyond 2012 if ACCC finds that BHC behaviour has not changed, as directed by the Port Access Undertakings
- The ACCC approved port operator undertakings should continue for the current term (30 September 2011) and BHC accreditation beyond this period should be linked to a review of their performance against the undertakings and demonstration of appropriate behaviours
- A number of areas in relation to port access need to be strengthened beyond those in the current port access undertakings. Outcomes sought by AGEA are:
 - Improved accountability i.e. BHCs need to act commercially and be accountable for services provided including implementation of commercially based risk sharing of activities, such as demurrage and despatch.
 - Adequate ring fencing provisions: while the AGEA highlighted the need for robust ring fencing provisions in its port access submission to the ACCC, for the current undertakings ACCC have accepted inclusion of the non-discrimination and non-hindering access clauses by the BHCs during this transition period. The adequacy of these provisions will be reviewed during the term of the undertakings

- Port loading protocols that provide fair access for all exporters, are transparent and promote supply chain efficiencies. As such, protocols need to provide incentives to improve capacity and efficiency of ports; improved clarity, certainty and transparency in relation to decision making about capacity management; greater accountability; ability for direct access to port; and fee structures that relate to cost of services provided, service the future demands for Australian wheat and encourage efficient practices. While some increased clarity around such protocols has resulted from the ACCC process, further improvement necessary and both BHCs and exporters will work to achieve a satisfactory commercial outcome
- Direct port access: should be the opportunity to use alternative supply chains on a non discriminatory basis and flexibility to draw grain from non-aligned storages and move it to port in the most cost effective manner

Infrastructure

- While there are significant infrastructure issues in the Australian wheat industry, these were pre-existing to the WEMA and should not be addressed via legislation. A continued move to a deregulated market will assist a market based solution to emerge
- Some of the storage/export fees and charging policies adopted by the BHCs will reduce the competitiveness of the Australian wheat industry and thereby reduce the returns of Australian farmers. In instances where a flat fee combining FOB and storage changes is applied, this will increase costs of direct port access; reduce transparency and camouflage price signals to the growers; and shift usage of facilities to timing that suits the operator, but not necessarily match customer demand
- Grain Express should not continue in its current form as it has not demonstrated the indicated improvements in performance and service; and CBH has not honoured commitments in regard to responsibility for performance against the service outcomes identified and accountability for non performance
- Non-discriminatory pathways and opportunities to move wheat from private third party upcountry facilities to port terminal facilities should be developed in order to enable alternative transport and storage arrangements to develop and to encourage further innovation in the development of specialty supply chains

Information

- Government support and requirement for reporting of stocks information should be maintained

Quality

- Wheat classification –needs to be maintained and also be more widely promoted to and better understood by market participants. It is important that the export market participants continue to play an active role in providing market signals
- Standards – quality standards are an important tool and receival standards are well handled by GTA.
- Monitoring – the industry should give consideration to the need for monitoring and reporting on conformance with grades shipped

Industry management

- The industry should be encouraged and enabled to move to a self-regulatory framework
- The industry should give consideration to the development of a forum that represents the whole of the grains industry supply chain in policy formulation and wider interests of the industry. This forum should involve growers and industry participants
- There is a need for national grower representation to be developed to enable growers to have effective linkages, communication and input into industry activities
- The opportunities for greater product/ customer differentiation alongside the bulk grain trade should be encouraged and promoted. If the environment is made contestable and competitive, Australian wheat exporters will seek ways to differentiate themselves and maximise the benefits for the Australian wheat industry

Introduction

The Australian Grain Exporters Association (AGEA) was formed in 1980 and is the representative body for exporters of Australian grain (refer Attachment 1 for AGEA membership). AGEA represents its members to facilitate an efficient and effective export industry and support Australian grains and oilseeds in both domestic and export markets. Members are active in grain accumulation, storage, handling and processing, as well as risk management and hedging strategies involving commodity futures, foreign currency and counterparty risk. The nature of their business results in contractual negotiation at the highest level, with both government and private clients, in Australia and international markets. AGEA member companies also have substantial investments in non-grain sectors of the rural economy, such as meat processing and intensive livestock production, oilseed crushing, fertiliser distribution, ocean freight ownership and bulk and container shipping.

AGEA's submission to the Productivity Commission Review of the Wheat Export Marketing Arrangements (WEMA) notes that the transition to a competitive and contestable export wheat market has been relatively smooth and that continuation of the arrangements in their current form are not warranted. It proposes that certain components of the arrangements should be viewed as a transitional arrangement and sunsetted. It also proposes that the most appropriate model for the industry going forward is one of self regulation and that there are existing industry organisations capable of ensuring that the best interests of wheat growers, the industry and community more broadly, are not only protected, but enhanced. However, it is also noted that elements of monopoly behaviour exists in some parts of the supply chain and regulatory oversight of these areas should be maintained.

Wheat deregulation is part of a long process of change for the Australian wheat industry. As a result of the freeing up of markets, the industry has seen greater opportunity, albeit at a time of increased volatility in both grain and financial markets.

Changes in the Australian grains industry landscape over time have seen expansion in average annual production to around 35-40 million tonnes today; rapid growth in domestic demand with usage now around 14 million tonnes; growth in freely traded exports to around 25 million tonnes; and the increasing domination of WA and SA in the export grain trade.

Since October 2008, over ten million tonnes of bulk wheat has been exported, by 17 accredited exporters, to more than forty countries. Total exports for the period to end August 2009 were 12.36 million tonnes and are on track to reach the ABARE 2008/09 forecast of around 14.5mmt. ABARE forecasts wheat exports for 2009/10 to increase to 15.5 million tonnes.

The introduction of competition to the Australian wheat market has provided significant benefit including an expanded range of marketing options for growers; continuation of wheat pools that offer improved features and greater flexibility; improved pricing options that have enhanced market signals to growers; and greater opportunities for growers/exporters and customers to work more closely together.

The structure of this submission draws on the Commission's issues paper and presents AGEA's views in relation to key issues identified in the paper.

Bulk wheat export accreditation

The WEMA have facilitated the introduction competition into the Australian wheat market. Accreditation has been an important component of the transition process and has assisted the industry to move to a contestable market in a managed way.

AGEA argued in its 2006 document "Marketing Australia Wheat" that a licensing or accreditation system was only justified in terms of economic benefit if it could be demonstrated that the licence holder had ability (market power) to price discriminate. It was proposed in this document that it is not possible to capture monopoly rents for Australian wheat from the rest of the world by price discriminating between markets of different elasticities of demand and then transferring those rents to Australian growers and therefore, suggested that there was no purpose to be served by seeking to use an export licensing authority to restrict trade.

This document also noted that there would be costs to the industry if export licences were restricted and some players were unable to access a licence as this would restrict the level of competition.

The accreditation process has been effective in facilitating the move to a competitive market environment and was an appropriate transitional measure. The grain market has matured and the opportunities and services available to support growers in a competitive market have increased. As such, the accreditation arrangements are not required as an ongoing measure.

The major benefit of the accreditation process as defined in the WEMA has been to provide a level of confidence to growers in relation to the capacity and capability of the parties participating in wheat export market to meet their obligations. The accreditation process does not provide growers with any guarantees in regard to security of payment or marketer performance and thus, can be said to provide little tangible additional benefit. AGEA members welcomed the opportunity to participate in the wheat export market and therefore, have been prepared to work with Wheat Exports Australia (WEA) to ensure obligations under the legislation are complied with.

While the accreditation process may have provided growers and others with comfort in regard to the capacity and capability of the exporters, in the main, growers were already dealing with the accredited exporters in relation to other grains and other services and were therefore, already known to growers. Similarly many of the accredited exporters already have global operations and established customer relationships.

The accreditation process has not had any direct impact on the efficiency of the industry and markets. Market conditions (grain, finance and freight) and individual company positioning are the major driver of exports in terms of markets, prices and form i.e. bulk or containers.

It does not appear that the accreditation process has presented a barrier to potential exporters, albeit that the process can be extensive, time consuming and expensive for some parties. It could possibly be a barrier for smaller players and/or growers wishing to export their own product although this is more likely to be a container activity and therefore, not impacted. Renewal has actually resulted in being equally, or more, onerous as WEA requirements have increased. Renewal and monitoring of companies accredited by renewal should be no more onerous than the original process unless there is a specific reason for providing greater scrutiny of an individual exporter due to their activity in the market.

AGEA does not believe that the net benefits of the accreditation process warrant its continuation. Proponents of the accreditation process as conducted by WEA should demonstrate the net benefit to the community, wheat export market participants and growers of the WEA activities.

Nor does AGEA does not believe that the accreditation process is required on an ongoing basis. It was an important and useful transitional tool. The industry has the appropriate tools and practices in place to deliver services required by growers and others and the market has evolved to where industry self regulation is the appropriate approach in relation to wheat exports. These systems and processes have been demonstrated and proven in relation to non-bulk exports of wheat and other grains, domestically traded wheat and other grains or other bulk export grains.

AGEA argued in its paper "Marketing Australian Wheat" that transition measures such as accreditation was not required beyond the two year transition period which would finish 30 June 2010. In the main, AGEA is still of the view that accreditation processes should sunset at this time, however, also recognises that there are some areas requiring some ongoing monitoring.

Current accreditations have recently been renewed for a three year period and this provides an appropriate date to sunset the WEA arrangements. Accreditation for exporters with three year approvals should not be continued past 2010. Accreditation for new entrants should be maintained until 2012 and BHC accreditation should be reviewed in 2011 when ACCC undertakings expire.

The eligibility criteria for, and conditions imposed on, accreditation of bulk wheat exporters could be said to be appropriate for the transition period. Ongoing monitoring and audits of the existing accreditation arrangements could be simplified in the period to 2012. There is no need to change the accreditation process for new exporters entering the market between now and 2012. A suggested alternative is audits only need to take place if there are complaints arising from the industry as to accredited exporters' inappropriate behaviour in the market.

This would see Wheat Exports Australia (WEA) to sunset in 2012. As AGEA proposes that the accreditation arrangements are sunsetted by 2012, comments on specific issues relating to the implementation process by WEA for accreditation have not been made. In general, however, AGEA is of the view that the mandate relating to the accreditation process needs to be clear and transparent and implementation should be made efficient, consistent and effective.

AGEA can only really comment on the costs to its members. While the application and audit processes incur considerable cost i.e. staff time to respond to which has an opportunity cost within the business, this is offset against the ability to be able to participate in the wheat market. When audits coincide with busy periods for exporters, this can take staff away from critical business activities.

In the period to 2012, the WEA mandate should be defined and restricted to activities where a net benefit to community, market participants and growers can clearly be demonstrated.

The other aspect of regulation under the WEMA is in relation to port access. The existing legislation required those companies seeking accreditation and with port facilities to submit access undertakings to the ACCC. The undertakings needed to be approved by the ACCC before accreditation could be renewed in 2009.

The current access undertakings have a term of only two years. The access arrangements should remain under ACCC and the requirement for the undertakings to remain and/or be strengthened should be reviewed prior to the end of this period. It is envisaged that there will be a need for ongoing ACCC oversight.

The port access test is necessary. The ACCC approved port operator undertakings should continue for the current term (30 September 2011) and BHC accreditation beyond this period should be linked to a review of their performance against the undertakings and demonstration of appropriate behaviours. The port access provisions should be maintained, even beyond 2012, if ACCC finds that BHC behaviour has not changed as directed by the Port Access Undertakings.

Port terminal access and services

There are significant competition concerns regarding port access. These were well documented in the AGEA submissions to the ACCC and the ACCC recognised the opportunity that a BHC had to treat their own divisions preferentially and sought to limit this in the agreed undertakings. The AGEA submission highlighted the areas of concern in regard to behaviour of the BHCs that could disadvantage of competitors through imposing unfair terms and conditions and restricting Australian wheat exporters' access to port terminal services. As the Undertakings were only approved by the ACCC end September, there has not been sufficient time to see how ACCC undertakings will impact and change BHC behaviour.

The AGEA submissions are available on the AGEA website (www.agea.com.au) and thus are not replicated in this submission.

Deregulation of the bulk wheat export market has meant that BHCs compete with their customers in the bulk wheat export market. In the likely event of further industry consolidation and transfer of port terminal ownership, BHCs may also compete with their customers through merged entities, commercially associated entities or trading partners. As such, BHCs have an obvious conflict of interest. They have enormous potential and real incentive to exercise their monopoly power in the bulk handling services market to inhibit competition by discriminating in favour of their trading divisions and restricting access to services.

The access test under the Wheat Export Marketing Act is necessary. AGEA believes that it has been well established that there is a basis for port terminals being a 'declared asset' even if the WEMA was removed. The Minister recognised this by including the provision in the Act for BHC accreditation to be subject to ACCC undertakings; the Senate noted this as a concern in their review; and the ACCC found that the BHC undertakings were not sufficient in their initial form. While the ACCC has approved undertakings, the impact of the ACCC action will not be seen by July 2010 (the date by which the Productivity Commission is due to report). Similarly the compliance costs (to exporters and others) and regulatory costs associated with the requirement to have access undertakings are also unknown at this stage.

The Undertakings need to be allowed to continue for the nominated term i.e. to September 2011 and BHC accreditation beyond this period should be linked to a review of their performance against the undertakings and demonstration of appropriate behaviours.

ACCC undertakings

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

BHCs are monopoly providers of port terminal services within geographical areas, with exception of Melbourne Port Terminal. There is either very limited, or no, alternative providers of port terminal services within a distance that make them commercially viable competitors. Access to port terminal services is essential to export bulk wheat from Australia. Australian wheat exporters have no option but to use BHC services where they wish to export wheat from BHC terminals.

AGEA identified in its submission to the ACCC that fair and transparent access requires, at the minimum, an access undertaking which has clarity, certainty and transparency. The rules must be capable of objective application.

The Undertakings approved by ACCC have delivered a number of outcomes for the Australian wheat exporters including that the ACCC has required more reasonable terms from the BHCs and laid down benchmarks against which BHCs are to be accountable.

BHCs are now obliged to negotiate rather than impose terms, are more restricted in the information they can require from port terminal users and are accountable to the ACCC in respect of services. ACCC has also limited the ability of BHCs to change prices and withdraw services and BHCs will be required to publish regular reports on their performance.

ACCC has put forward the key features of the Undertakings as being:

- robust prohibitions against BHCs anti-competitively discriminating in favour of its affiliated wheat trading business or hindering access to its port terminal services, with the ability for the ACCC to order independent audits of BHC's compliance with such anti-discrimination obligations
- clear and transparent port loading protocols that the BHC is obliged to follow in managing demand for the port terminal services, for example in making decisions about the allocation of shipping slots
- obligations to negotiate in good faith with eligible wheat exporters around price and non-price offers of access to port terminal services
- if negotiation fails, the ability of wheat exporters to seek mediation or binding arbitration on price and non-price terms of access to port terminal services
- for those wheat exporters who wish to take a standard offer, a set of clear and certain minimum non-price terms and conditions of access to port terminal services, and an obligation on BHCs to publish its standard prices for port terminal services at least one month prior to commencement of each new wheat exporting season
- obligations on BHCs to publish certain port terminal information to provide greater transparency over its operations

The Undertakings have, or have the potential to, improve access in some key areas. All BHCs have included an indicative access agreement in their Undertakings; and BHCs are obliged to negotiate in good faith with eligible wheat exporters around price and non price offers of access to port terminal services, which are now required to be published in a defined and timely manner. ACCC has a role in dispute resolution and there are some improvements in clarity and timing of dispute resolution processes. All BHCs have included an a clearer, more concise non-discrimination clause; and BHCs cannot anti-competitively discriminate between exporters on the basis of where grain was stored. In addition, all BHCs have included a broader 'no hindering access' clause. There are also broader obligations on BHCs in relation to the publication of information and port performance indicators; and obligation to publish regular reports on performance.

However, there remain a number of areas where AGEA believes there is still potential for discrimination to occur and that the current arrangements will not necessarily encourage BHCs to behave fairly or make investments to maximise supply chain efficiency. These areas are outlined below but include:

- ring fencing provisions
- port loading protocols
- direct access to port
- accountability
- charging policies and rates
- bundling of services with rail freight

Publish-negotiate-arbitrate approach

The effectiveness of the publish-negotiate-arbitrate approach is yet to be demonstrated. The ACCC considered in its draft decision, and AGEA agreed, that the proposed publish-negotiate-arbitrate framework needs to be underpinned by a robust set of mechanisms giving effect to the publication, negotiation and arbitration procedures.

The AGEA response to the ACCC draft decision on the Undertakings highlighted a number of areas where specific and robust requirements could be made. While the ACCC framework is less prescriptive, it does impose a series of obligations on the BHCs.

AGEA also argued that given that the BHCs are vertically integrated, adequate non-discrimination obligations and appropriate transparency measures are also appropriate.

The ACCC also considered in its draft decision, and AGEA agreed, that it is appropriate that non-discriminatory measures prohibit the BHCs from discriminating in favour of their marketing arms, except to the extent that the cost of providing access to other operators is higher, as per section 44ZZCA of the TPA. However, the interpretation of this section can be vague.

ACCC also noted that should the publish-negotiate-arbitrate framework prove to be ineffective, the ACCC may adopt a more prescriptive method in any future undertaking assessments.

Key issues for wheat exporters in relation to the ACCC undertakings

The background to the issues outlined following are discussed in detailed in the AGEA submissions to the ACCC (refer to www.agea.com.au).

Competing facilities

There is limited ability to physically move wheat from one port to another owned by another terminal service provider. The cost of interstate movement of grain is prohibitive.

The likelihood of a new entrant establishing a new port terminal to compete with port operators is negligible given the cost and current geographical spread of port terminals servicing the grain belt. Not only is the cost of building a new port facility limiting, obtaining suitable land, development approval from the relevant authorities and capital in a tight market for the building of port facilities and other infrastructure such as rail and roads are likely to prove prohibitive in the short to medium term.

There would be little economic justification for establishing a port terminal network to compete with BHCs, nor is it necessary in order for the wheat export market to operate more efficiently. Broadly speaking, Australia has a surplus of storage/load capacity vis-a-vis the volume of crop cycles. Generally speaking, Australian port facilities are not run as efficiently as those in foreign jurisdictions, as measured by the "turn" of those facilities.

However, while there are some ports where competing facilities are unlikely to be established, given the current pricing practices of some BHCs, there is potential for limited facilities to be built in strategic areas. In particular, the current CBH auction process and charges may be a catalyst to competing infrastructure.

BHC charging mechanisms and transparency

The AGEA submissions to the ACCC highlighted a number of areas where BHC charges lacked transparency with subsequent adverse impacts on exporters and the broader industry.

AGEA argued, and ACCC accepted, that BHCs should be required to publish prices in a timely manner and before the start of the new season. The published prices should include standard and non-standard services offered by the BHCs. The published prices should provide transparency in relation to BHCs costs of providing the service to ensure prices are based on actual costs and are not discriminatory.

The published prices should not be subject to change during the term of the port terminal services agreement. Alternatively, the opportunity to amend published prices should be limited to the same circumstances in which a variation of the Undertaking is permitted.

While the undertakings require prices to be published, some concerns remain as to the transparency of some charges vis a vis the costs of providing the service.

Accountability

AGEA noted in its ACCC submission that under the current arrangements, BHCs have no incentive to manage services efficiently as they transfer all the risk and cost on to Australian wheat exporters by imposing unfair terms, charging prices that are unrelated to the cost of providing the service and by refusing access to services unless Australian wheat exporters agree their terms and conditions.

AGEA is of the view that the current arrangements implemented by CBH have placed exporters in a more adverse position than previously. Under the current auction process and rules, exporters have to pay for all CBH fixed costs up front and are also obliged to pay all variable costs, whether they ship or not. This scenario removes all risk from the port operator and places all the risk on the exporter. In addition, the port operators continue to not accept any risk in relation to ship loading, performance and other related issues. Thus, AGEA sees the current system as lessening, rather than encouraging, competitive behaviour.

AGEA argued in its ACCC submission that the market is inefficient and uncompetitive because BHCs exercise monopoly power and are not accountable for the way they operate their services. BHCs take on no responsibility, exclude almost all liability for loss caused by their conduct and do not provide any transparency on performance.

A key issue highlighted by AGEA to the ACCC was the BHCs accountability in relation to ship loading. Any adjustment in the shipping stem has the potential to expose AWEs to demurrage. To ensure BHCs are accountable for shipping performance and the efficient operation of the facilities, wheat exporters should be compensated for delays caused by BHCs' including vessel demurrage. Conversely, BHCs should be entitled to be rewarded by way of a share in despatch rates if vessels are loaded at a faster than contracted or agreed rate.

Thus, AGEA believes that there is little, or no, accountability by the BHCs and no sharing of risk. Across a number of areas such as Demurrage and Despatch, freight management, quality, tolerances, etc all the risk is borne by the exporters with no responsibility or accountability accepted by the BHCs. AGEA believes that where a BHC manages upcountry, transport and port terminal operations (e.g. CBH's Grain Express), the BHC must assume accountability via guaranteed load rates and demurrage and despatch participation.

Ring Fencing

AGEA argued in its ACCC submission that the ACCC should not discard the need for robust and enforced ring-fencing policies (with a requirement for an annual audit as to compliance with the ring-fencing provisions) even if the BHCs' Undertakings contain a robust non-discrimination and no hindering access clause. Removing ring-fencing policies will remove any protection against the BHCs providing confidential information to their marketing arm. The result will be a failure of operators being required to provide "*fair and transparent access*" to their port terminal services to Australian wheat exporters.

The ACCC considered in its draft decision, and AGEA agreed, that the BHCs' current ring-fencing rules are not an effective safeguard against anti-competitive discrimination in the provision of port terminal services.

However, ACCC's view was that if the BHCs' proposed Undertakings were amended to contain "*robust non-discrimination and no hindering access clauses, fair and transparent port terminal protocols and an indicative access agreement (as well as measures to deal with the potential for information about port terminal services to be used to the advantage of [the BHCs'] wheat exporting arm), then, in the circumstances, it would not be necessary for ring-fencing measures to be included in [the BHCs'] undertaking at this particular point in time.*" AGEA did not agree with this.

The ACCC has taken the above view due to transitional nature of the industry and the short duration of the proposed Undertakings. While the ACCC is of the view that the BHCs ring fencing rules are weak, it believes that the inclusion of the non-discrimination and no-hindering access clauses, supported by the ability of the ACCC to request an audit of compliance will provide sufficient safeguards and therefore a robust ring fencing policy is not required.

AGEA recognises that the duration of the Undertaking may be considered to be short. However, in an industry that is in transition and now involves multiple accredited Australian wheat exporters, it is essential that robust ring-fencing rules are in place.

ACCC has stated that its views on the ring-fencing policy may change in the event that it is shown that current measures do not stop BHCs discriminating in favour of their trading arms. The lack of any prescriptive ring fencing provisions may provide opportunities for the marketing arms of the port operators.

Port loading protocols

As noted above the port loading protocols are a critical element in ensuring Australian wheat is exported in a timely and efficient manner to meet customer requirements. AGEA is seeking an allocation system that is fair, efficient and cost effective.

In general, the port loading protocols are not appropriate as they lack sufficient clarity, certainty and transparency in relation to decision making about capacity management. Across all the BHCs, the lack of accountability is a critical issue for Australian wheat exporters.

AGEA argued that, in particular, the CBH auction proposal fell short of the above criteria. AGEA believes the proposed auction process by CBH will be labour intensive, time consuming and complicated and will do nothing to ensure fair and transparent access to vessel slots.

AGEA has highlighted (both to CBH and ACCC) a number of issues with the CBH auction process for allocation of shipping slots. It is AGEA's view that an auction of shipping slots is not equivalent to access to ports i.e. those that miss out must turn to the secondary market, thus creating a demand for a secondary market and driving up prices in the primary and secondary market. The main issues with the CBH approach are:

- Capacity allocation - AGEA believes that CBH should provide details of capacity by port and that the full capacity should be auctioned upfront. AGEA believes that there is potential for core capacity to be understated and that this will create artificial limits on capacity and therefore, force prices up. CBH has indicated that core capacity will be calculated on a basis that is consistent with historical usage and seasonal crop conditions. The current CBH allocation process essentially seeks to maximise the use of port facilities in a manner that will spread usage evenly over a twelve month period. This is not maximising the value for Australian wheat growers which may be optimised by selling in the early part of the year thus lessening the impact of northern hemisphere grain. AGEA believes that the system needs to be based on future demand patterns and that the system should be designed to provide incentives to increase capacity in a manner that maximises value for wheat growers. Further in relation to transport capacity, this is based around the core transport resources that CBH has contracted. AGEA maintains that allowing direct port access on a fair basis will offer flexibility and reduce capacity constraints. The risk created for exporters will be built in to costs and the eventual impact of this will be borne by growers.
- Surge capacity - AGEA strongly opposes any auction process based on notions of “core” and “surge” capacity. CBH claims that the reason for auctioning shipping slots is that they anticipate that demand exceeds supply after the harvest period and therefore additional capacity, in the form of “surge” capacity, will be made available at a premium over the base core price. However, the capacity either exists or it does not. Describing it as “surge” capacity is a misnomer – it is the capacity at which CBH charges a premium for the service. Furthermore, any premium paid for surge capacity is not included in the rebate to exporters

In relation to all port operators, issues of concern are:

- Direct access to ports - AGEA believes that exporters should have the opportunity to use alternative supply chains. The current system provides little incentive to increase capacity. All supply chains should be treated equally in terms of pricing and access to port terminal services. AGEA believe that it is important that there is flexibility to draw grain from storages and move to port in the most cost effective manner.

In particular, the CBH system is of concern as successful bidders in the auction system have to declare whether they will make use of Grain Express or select Direct Access within seven days of the auction. No change is allowed after that date. It should be sufficient to declare the option of Grain Express or Direct Access when nominating the ship. This is another attempt by CBH to provide “direct access” on paper, but in reality force exporters to lock themselves into one or the other for the year in advance.

- Accountability and sharing of risk (refer to page 11)
- Fees and charges - AGEA believes that the proposed CBH auction system combined with rules relating to direct access and flat fee charging policies will increase the cost of exporting wheat from Australia, reducing the competitiveness of accredited exporters compared to suppliers of wheat from other countries and reduce the returns of Australian farmers. It will also place in jeopardy long term sales arrangements as it will undermine the security of shipping supply inevitably necessary to ensure performance of long term sales contracts.

In relation to GrainCorp the non deductible booking fee, which has apparently been introduced to manage the shipping stem, can also be argued to raise costs as a deductible deposit would achieve the same objective. The role of GrainCorp in managing the stem (and controlling country outturn and rail freight), can provide the opportunity to force Australian wheat exporters to have their cargo to arrive at port earlier than required, and therefore, incur port fees. This is a significant penalty on the exporter given the differential between port and up country fees.

Arbitration

AGEA welcomes the ongoing role of the ACCC in monitoring BHC compliance with the Undertakings, monitoring the effectiveness of the Undertakings in protecting against anti-competitive discrimination; and receiving and handling complaints in relation to alleged breaches of the Undertakings and other anti-competitive conduct. The ACCC has the power to enforce the BHCs Undertakings obligations, pursuant to section 44ZZJ of the Trade Practices Act, by applying to the Federal Court for an order:

- directing the BHC to comply with the terms of the Undertaking
- directing the BHC to compensate any other person who has suffered loss or damage as a result of the breach; or
- any other order that the Court thinks appropriate.

In relation to disputes around operational matters, AGEA indicated in its submission to ACCC that the preference was for there to be one body to whom disputes would be referred. AGEA recommended that mediations and arbitrations to be referred to GTA as it has the requisite industry experience to conduct such dispute resolution.

Infrastructure

There have been many reviews of infrastructure issues and needs in the Australian grains industry, largely as a result of infrastructure throughout Australia having been run down significantly over the past fifteen or more years.

There are ongoing concerns about both the quality and ongoing viability of grain rail lines. Many lines are in need of significant capital investment if they are to continue to operate. However, many of the lines are unlikely to generate commercial returns and operators and governments face dilemmas determining whether such investments should take place. There is also concern regarding road transport and the community impact as more grain is shifted by road.

A significant challenge for the Australian grains industry is the ongoing sustainability and maintenance of an infrastructure system. Logistical constraints, rail transport and port access are ongoing issues that need to be resolved.

The wheat export monopoly has influenced the way the storage, handling and transport system for grain has evolved in Australia. This has seen the Australian system built primarily as a storage system, whereas in overseas countries the grain handling systems have been built for fast and efficient throughput of grain. Cost savings in other countries are shared between growers and end users in contestable markets, through competition to accumulate and market grain.

However, the issues relating to road and rail infrastructure were pre-existing to the WEMA and, as such, are neither a result of the WEMA nor an area that WEMA should extend to. The WEMA may, however, indirectly assist to improve some infrastructure limitations as the increased number of operators may provide a better chance of a market based solution emerging.

It is expected that competing upcountry facilities will be built and in fact are already occurring through both on farm storage and private facilities. The extent of this will vary from region to region based on crop and market characteristics, but will also be influenced by BHC charging practices. For example, the move by CBH away from time based storage charges will make investment in alternative facilities less attractive.

This example of flat fee charging was raised in an additional submission to ACCC. This has seen CBH remove the standard storage carry charge, which is normally accumulated on a per month basis for grain over the period of the shipping season and include this as an export fee (bundled with the fobbing charge) and invoiced to exporters up front as a flat fee. A flat fee on FOB including storage will have the impact of making the direct access cost higher, thus further restricting the ability for exporters to have choice in supply chains. This move reduces transparency and camouflages price signals to the growers. Given the basis of this charging policy, it is critical that exporters are not bound to nominate Grain Express or direct port access within seven days from auction as it makes pricing anti-competitive to developing direct port access supply chains.

To date, the BHCs have discriminated in the provision of port terminal services depending whether the wheat enters the port via BHCs' upcountry facilities and services or through services provided by third parties. While this is addressed in the ACCC Undertakings, and the differential in charges between direct access and bundled services has diminished, there are elements that remain, which while on paper appear to provide access, in reality do not. For example, CBH requires wheat exporters to nominate within seven days of the auction as to whether they will use Grain Express or direct access and, once nominated, this cannot be changed; while GrainCorp applies differential quality management requirements for grain from 3rd party storages.

AGEA provided initial support to CBH for Grain Express when it was proposed in 2008 in an effort to ensure a smooth transition to a deregulated market. This support was given on the basis of commitments that by giving CBH control of the supply chain, CBH would take on responsibility for performance against the service outcomes identified and would be accountable for non performance. This has not materialised and AGEA has advised CBH that it does not support Grain Express in its current form. AGEA members believe that it is important that they have the flexibility to draw grain from CBH and/or private storages and move the grain to port in the most cost effective manner.

In AGEA's view, there is no clear non-discriminatory pathway and opportunity for wheat from private third party upcountry facilities to be delivered into the port terminal facilities controlled by BHCs. This is inhibiting alternative transport and storage arrangements from being developed and stifling innovation in development of specialty supply chains.

AGEA believes that pricing practices by the BHCs should be non-discriminatory to third party supply chains and charges should reflect the services being delivered and used. If these practices are in place, the most efficient supply chains will develop in a competitive environment without any need for rationalisation or intervention from the Government.

Information

The issue of information requirements was debated extensively at the time that the Federal Government's Industry Expert Group (IEG) reported and the need for data flow and transparency within the grains industry was highlighted in the IEG recommendations to the Minister in March 2008.

The Australian wheat grower today has more information and more services available than ever before. A large number of service providers covering market information news and advisory services have emerged and investment in this area is continuing. While the nature, cost and delivery of these may not suit every individual, there is a variety of options available to growers.

Similarly growers have access to more pools and marketing options than prior to deregulation. In an attempt to improve transparency of pools, the recently released GTA Australian Grain Industry Code of Conduct has provided guidelines for pool operators regarding transparency of reporting in relation to terms and conditions of the pool and the basis of prices. The protocols also state that pool managers should have in place the necessary skills, payment systems, risk systems/procedures and resources to effectively manage the pools offered. It also states that there should be clear protocols in place, and where appropriate, operational and accounting separations to manage the interface between pools and any proprietary trading the company may undertake separate from the pooling business.

In a competitive market environment, growers have a greater need to understand global production trends and seasonal market patterns and how they are impacting on the marketing of Australian wheat. Growers need, and a competitive market system will deliver, good market signals on customer requirements, quality specification and information to assist them in making better business decisions. GTA has, and continues to, develop professional development programs to help industry participants knowledge of how to use market information.

While there is considerable data and information available in the industry today, there remain some gaps and a need for the information to be timelier in order to be useful to relevant for stakeholders.

The Federal Government adopted the IEG recommendation and charged ABARE and ABS with fulfilling this role. Some of the information gaps identified by industry participants and commentators are a result of information being available, but on a fee for service basis. One area where the industry needs better information is on stocks. Information should cover all major grains. It is important for the Government as well as industry to have access to stocks information. It is recognised that collection of this information was only funded by the Government for a period of time and that this may need to move to a fee for service basis in the future. However, the Government should continue to require reporting on stocks.

Quality

Quality is a very important issue for the Australian wheat industry and has been a major factor in establishing the reputation for Australian wheat in global markets. There are a number of aspects that need to be considered including standards, classification, branding and quality management.

The definition of market is changing rapidly in this new era of deregulation and is shifting from country to customer and there will be further product differentiation. Producers, exporters and marketers need to evaluate the customers or end users needs and deliver the integrated package of requirements.

As with other elements, AGEA believes that the most effective model will be one of industry self-regulation to ensure that quality is maintained.

In a competitive market, Australian wheat quality standards will be maintained through competition to export grain which will force exporters to meet, or exceed, the standards that overseas buyers require to maintain market share; and through buyers developing new, often niche, markets that will lead to increased differentiation. However, there will always be buyers who prepared to pay less for lower quality grain and it is important that the industry's self-managed system ensures the 'brands' associated with specific qualities and standards of wheat are maintained. In a competitive market, buyers of Australian wheat can, and will, determine the supplier who best meets their demands for quality, supply and value; and will regard those suppliers more favourably than others who supply an inferior product or service.

There a number of important industry functions that assist to maintain Australia's quality reputation including wheat classification, receival standards and industry monitoring. In addition, there are a number of industry codes of practice in various sectors of the industry; and individual industry participants have quality management programs and processes in place.

Wheat classification has played an important role in translating market signals into wheat breeding and classification targets to enable the facilitation of the ongoing development and production of wheat varieties that meet the requirements of key markets. The Wheat Classification Council (WCC) was created with the support of GRDC following recommendations made by the 2008 Wheat Industry Expert group and industry consultation. It is composed of representatives from wheat producing, marketing, exporting, storage and handling, breeding and domestic processing organisations. The WCC provides structure and market direction for wheat breeding and research activities in Australia.

The WCC plays an important role in ensuring that the 'brand' or reputation of the common classes of Australian wheat is protected and/or enhanced. The two key functions required for wheat varietal classification are:

- establishing grades i.e. determining the specific make up of grades required by end-users and the formulation of criteria by which a variety would be considered to be eligible for a given grade. These criteria will evolve in response to changing market signals; and
- grading of varieties i.e. the technical and objective process for assessing a variety or proposed variety against given grade criteria (a function of the Wheat Classification Panel).

AGEA is a member of the WCC and brings valuable market intelligence to this forum. While the model for the WCC is still developing and may evolve further as the market becomes more open and contestable, it is very important that the industry has a process in place to provide integrity around industry standards and grades.

Trade in the Australian grains industry is based on a set of grain receival standards and contracts that enable buyers to have clarity and confidence in the products that purchased. GTA plays a key role in establishing industry-wide grain standards and contract terms and conditions. Buyers and sellers can agree to use these standards or develop other standards to suit their own particular needs. The GTA Grain Standards are underpinned by industry classification and accreditation systems via the WCC.

Wheat varietal classification together with wheat standards aims to deliver grain of consistent physical quality, processing performance and end-product quality to customers and end-users in a differentiated form (grades) allowing exporters to optimise value capture from markets for the benefit of industry.

Under the regulated system of the past, BHCs have played in ensuring compliance with industry standards. As the industry transitions to a fully competitive environment, there may need to be changes to the industry's quality management activities.

It is important that the industry maintains and enhances the key tools of quality i.e.

- Classification – a process for translating market signals into targets and categories that enable the development and production of wheat varieties that meet customer requirements needs to be maintained. As the market participants expand, this process needs to be more widely known and better understood by market participants. It is also important that the export market participants continue to play an active role in providing market signals
- Standards – quality standards are an important tool for communicating with buyers and should be maintained through GTA
- Monitoring – currently the industry has a monitoring system in place to track issues such as chemical residues. There may be benefit for the industry in random sampling/checks of exported grain to provide information in relation to conformance with grades shipped. This could be 'soft' monitoring e.g. technical reports such as the recently published BRI Crop Quality Report or 'hard' monitoring e.g. testing of grain shipped

'Industry good' functions

AGEA proposed in its 2006 document "Marketing Australian Wheat" that enhancements to the competitiveness of the Australian grains industry will be achieved by:

- creating an environment that maximises incentives to develop new products and services across the entire supply chain and drive innovation;
- increasing transparency and improving price signals across the supply chain to allow maximum efficiency in resource allocation;
- ensuring that the industry can adjust to changing circumstances in a manner that is as responsive and flexible as possible; and
- encouraging investment in the Australian wheat industry from domestic and international sources by enhancing the prospects of attractive returns.

The new industry era is moving towards this, although some barriers remain as outlined earlier in this submission.

The IEG identified a range of industry good functions in its report to the Minister. Many of these have been, or are already being, picked up by industry organisations and/or commercial groups.

The wheat/grains industry structure is still evolving as it adjusts to the new environment. However, some gaps have emerged and been identified. These relate to the need for a whole of industry group and grower representation.

It has been recognised that a whole of chain organisation may be an outcome of transitional arrangements to bring together a range of existing industry bodies into one forum that represents the whole of the grains industry supply chain in policy formulation and to represent the wider interests of the industry. It is essential that the major players/sectors in the wheat industry contribute to industry policy and practice at all stages in the production and marketing process. However, a clear distinction must be drawn between bodies responsible for technical standards and development, monitoring ethical behaviour, research and market development on the one hand, compared with industry policy and advocacy on the other.

However, it is also likely that this will be difficult to evolve without effective grower representation which is currently an issue being discussed by the various grower and industry groups. National grower representation is important to have input and influence into policies and practices that can mean significant changes to growers' profitability, security and long term sustainability. It is also important to enable the grower community to engage, and participate in discussions and activities, with the broader grains industry. Development of effective national grower representation mechanism will assist to enable an overall grain industry group to develop.

There has been a lot of focus on Australia's competitors and their activities in relation to technical customer support and promotion. It has been suggested that Australia needs a similar presence and organisation the US Wheat Associates. It is common in other agricultural export markets that there is a separation of generic and industry-wide promotion and commercial trading activity and AGEA supports this principle. AGEA supports promotion by private grain companies as it will be in their interests to do so, once they have made investments in marketing services and infrastructure.

Models such as the US Wheat Associates were developed during a time when the major exporters viewed miller customers as potential 'single origin' purchasers. The market has changed and miller views have changed. Economics and technology have provided opportunities for non traditional wheat suppliers to enter the market and for millers to develop more cost effective raw material supplies. Millers today typically blend more cost competitive commodity wheats from markets such as the Black Sea suppliers with higher quality wheats from Australia, US or Canada to meet flour quality specifications. The trade environment has become increasingly competitive, with the non traditional exporters having a significant impact on the market. While there is increasing customer differentiation, cost pressures are also leading to practices such as freight consolidation, global sourcing and blending.

The industry has responded favourably to the new commercial environment and the opportunities for greater product/ customer differentiation alongside the bulk grain trade. Australian wheat remains in strong demand globally and growers now have more flexible access to a selection of accredited buyers, offering a variety of marketing options. Product differentiation provides opportunities across the value chain and a competitive deregulated system can best deliver this need, while also servicing large volume customers.

Australian wheat exporters will seek ways to differentiate themselves in this competitive environment and this may be in one, or all, of the following:

- offering competitive terms of trade, including better pricing, improved storage and handling options, and enhanced payment terms
- ensuring the quality of their wheat gives an end user a competitive advantage
- providing market intelligence and risk management services for buyers and sellers
- investing in technical support services for customers, which assists them to use the wheat purchased more efficiently
- developing new varieties of wheat for niche markets and emerging users

Maximum benefit to growers will be delivered via a wheat industry structure where there is:

- maximum competition amongst exporters in purchasing, transporting, storing and marketing Australian wheat
- clear separation of roles and responsibilities within the BHC's to a point where they are seen as professional storage and handling providers who will be prepared to accept performance responsibilities on operational efficiencies
- clear separation of the commercial, market development, trade access policy, monitoring, and oversight activities of the wheat industry
- industry self-regulation and industry responsibility for stewardship functions

An industry self-regulated model

The Australian wheat industry has adapted rapidly and well to the new competitive market environment. An ongoing challenge is to develop an industry that can operate effectively and efficiently in a commercial market environment in order to take advantage of the opportunities. While exporters were prepared for deregulation and grain was efficiently accumulated and marketed, there needs to be a greater focus on the logistical task to service the demand for Australian wheat. The industry needs to continue to work on overcoming the supply chain shortfalls and increase efficiencies.

The challenge for the Australian wheat industry is to develop a profitable supply chain within the new environment. There is a need for open access to storage and handling infrastructure. Open access needs to be accompanied by transparent processes for cargo accumulation, shipping nomination and loading.

At an industry level, there is an ongoing challenge to develop effective industry organisations, co-ordination and oversight. This will be based on the continued move to commercial facilitation and moving from regulation to industry based oversight.

AGEA believes that the industry should now complete the transition to a model of industry self regulation. As such, AGEA does not see the need to consider alternative arrangements to the existing accreditation process but rather, determine a period for these arrangements to finish.

The aim would be a industry self regulated system that gives all stakeholders sufficient confidence that the industry itself can take responsibility for managing the wheat industry, and providing sufficient assurances for growers, that their interests are being protected.

The grains industry in Australia has developed a comprehensive set of tools for facilitation of trade including a series of grain quality standards; standard contract terms and conditions; and dispute resolution processes for virtually all grain grown and marketed in Australia.

This is delivered via GTA which was formed to allow the Australian grains industry to formulate and agree on a wide range of tools to facilitate trade, discuss industry issues, and reduce the cost of marketing grain in Australia. This set of tools will continue to be enhanced and modified to meet new needs of the industry. For example, the industry has recently developed an industry code of conduct. A more specific and binding code could be developed to govern behaviour of exporters in the absence of an accreditation system.

An industry self-regulatory approach would provide the most efficient method of ensuring that the interests of growers and the wider Australian wheat industry are safeguarded. This is because industry and growers can together develop a system of oversight for exporters of Australian wheat that is responsive to their needs now, and in the future. As indicated the preceding section, it is expected that part of the industry's evolution will be the development of national body representing both farmers and Industry participants in a single forum.

A code of conduct for exporters could be managed through either GTA or AGEA and would provide growers, industry participants, and government with confidence that grain exporters complying with the Code as:

- reputable and trades in an ethical manner
- experienced
- investing in education and training programs for staff
- enhancing the reputation of the Australian wheat industry in export markets
- utilising the GTA trading contracts where appropriate and applicable
- disclosing all contract terms and conditions to growers (and ensures that growers understand and accept them) and, in the event of a dispute, will enter into a dispute resolution process, such as that provided by GTA

An industry self-regulation model would provide a transparent and secure trading environment that will gain the confidence of growers who are already enjoying the benefits of this approach when they trade a range other grains.

Attachment One: AGEA Members

AWB Limited

Bunge Global

Cargill Australia

Concordia Agritrading Australia

Elders Toepfer Grain

Emerald Group

Glencore Grain

Goodman Fielder Consumer Foods

Greentree Farming

J K International

Louis Dreyfus Australia

Noble Grain

OzePulse

PentAG Commodities

Riordan Grain Services

Riverina (Australia)

Touton Australia

Viterra