4 April 2008

Ms Jeanette Radcliffe
Committee Secretary
Senate Rural and Regional Affairs and Transport Committee
Department of the Senate
PO Box 6100
Parliament House
Canberra ACT 2600
Email: rrat.sen@aph.gov.au

Dear Ms Radcliffe

GrainCorp comments on Draft Exposure Wheat Export Marketing Bill 2008

GrainCorp is pleased to respond to a request by the Senate Standing Committee on Rural and Regional Affairs and Transport for a submission on the Draft Exposure Wheat Export Marketing Bill 2008.

GrainCorp welcomes the Commonwealth Government's initiative to reform the wheat marketing arrangements. This will create a platform for competition and innovation in the grain industry that will drive the development of efficient grain supply chains which, in turn, would improve returns to growers and industry participants, and increase investment.

The most significant section of the Bill is Section 11 – Eligibility for Accreditation – which will achieve this objective by introducing new participants in the wheat export market. The intention of this section of the Bill has significant merit, as it closely mirrors the successful bulk barley exporter licensing scheme introduced in South Australia during 2007.

However, Section 20– Access Test – will impose a significantly higher level of regulation on grain port terminal operators than we believe is needed or was originally intended. We believe this approach is not needed or required given:

- The grain market is very competitive where in the eastern states, over 50% of grain is consumed by the domestic market and of the balance only 30% of grain produced is exported from GrainCorp ports;
- The grain market is contestable from other grain export facilities that include Melbourne Port Terminal (50% owned by AWB) and the numerous grain container packing facilities;
- We have a commercial incentive to maximise throughput given our low grain shipping utilisation of 15% to 24% at our port terminals and profitability challenges in the current financial year and 2 of the past 5 years;

- There is no evidence of market power or problems requiring intervention at port terminals;
- It will introduce excessive and costly additional layers of regulation and is inconsistent with Government Policy; and
- It is inconsistent with a State based approach adopted in Victoria that has operated successfully to date.

We believe the proposed access test is a disproportionate response to the recommendations made by the IEG which simply sought to ensure that there is an open access policy for wheat exporters at grain terminals. If the Bill is introduced in its present form, there is a real risk of replacing one form of regulation (wheat export) with another form of additional regulation (Commonwealth regulation of port terminals).

This will only lead to significant additional costs and inefficiency being added to Australian wheat exports which will increase costs with reduced returns to participants including growers for no corresponding benefit. There is a need to amend the draft Bill to ensure that the provisions therein will not precipitate unintended consequences that would effectively lead to the dual and multi-layered regulation of the port terminals.

The attached Submission outlines the issues and our views with supporting facts on the Draft Exposure Wheat Marketing Act 2008.

While GrainCorp questions the need for an access test at the port terminals at all, one possible solution would be for the access test to be redrafted to provide for a more light-handed approach where the bulk handling company submits to WEA (as the Accreditation body) an acceptable policy (or undertaking) by which access seekers can obtain access to terminal services, which accords with the principles of open access and the provision of fair and reasonable access terms. The terminals would still remain subject to potential regulation under Part IIIA of the Trade Practices Act if a grain terminal abused its position. Such an approach does not lead to multiple and costly additional layers of regulation but more proportionately addresses the issues at hand.

We would be pleased to provide further information and participate in any consultations with the Committee on the issues raised in this Submission.

Yours sincerely

Mark Irwin
Managing Director

Submission to the Senate Rural and Regional Affairs and Transport Committee's inquiry into the Wheat Export Marketing Bill 2008

Attention: Jeanette Radcliff, Committee Secretary

Dated 4 April 2008

GrainCorp Operations Limited

Submission to Senate Rural and Regional Affairs and Transport Committee

GrainCorp welcomes the opportunity to make a submission to the Senate Rural and Regional Affairs and Transport Standing Committee's inquiry into the introduction of the Wheat Export Marketing Bill 2008 (**"Bill"**).

The Bill is an important step to the introduction of competition in wheat exports and has significant ramifications for the future of the industry. However, it also has some unintended consequences of adding additional layers as well as duplication of regulation, thereby increasing costs for all of those involved in the agricultural industry, including Australian wheat growers. This submission focuses on the proposed "access test" criterion for accreditation in section 20 of the Bill.

1 Overview and executive summary

Existing competitive constraints do not require heavy handed access regulation

GrainCorp is strongly of the view that the proposed access regime involves an unnecessarily onerous obligation on those grain marketers which also own port terminals. The draft Bill will impose a significantly higher level of regulation than we believe was originally intended and which has the unintended consequence of duplicating regulation of the grain port terminals.

An access regime at the port terminals is not required as the grain industry enjoys considerable competition from both the domestic and export markets as reflected below:

- In the eastern states, over 50% of grain produced is consumed by the domestic market and of the balance only 30% of grain produced is exported from GrainCorp ports;
- There is considerable competition from other grain export facilities including Melbourne Port Terminal (50% owned by AWB) and the numerous grain container packing facilities; and
- These competitive market dynamics combined with variable grain export volumes is reflected in our low grain shipping utilisation of between 15% and 24% and further reflected in our overall profitability challenges this year and in 2 of the past 5 years.

Application to the industry introduces excessive and costly additional layers of regulation

We also believe the proposed access regime is out of step with the Government's national policy on streamlining infrastructure regulation and will ultimately undermine the intention behind the Bill. In particular GrainCorp notes:

- To obtain accreditation, GrainCorp would need to have all of its seven terminals throughout Australia regulated under either a certified State based access regime or lodge a voluntary undertaking or undertakings approved by the ACCC by 1 October 2009.

- In respect of the States such as Victoria which already have an access regime, the State regime would also appear to continue to apply, adding a separate and different access regime and an additional layer of cost and administration.

- This is an onerous and time consuming obligation. As an example of the costs potentially involved, the Productivity Commission in its 2004 review of the National Access Regime cited initial costs ranging from $150,000 to $250,000 for each access arrangement and ongoing annual costs of $50,000 to $100,000 per year. That is the potential cost for just one terminal, leaving aside compliance.

- Application to export terminals operating on an average utilisation of 15% in GrainCorp's case is unnecessary as there is an overwhelming commercial incentive to sell spare capacity.

- The proposed access undertaking approach to the ACCC, also involves a more complex and costly process of cost examination based on analysing costs of assets and rates of return. Such access regimes are more appropriate to start-up infrastructure or infrastructure which is heavily congested such as coal ports or which has been the subject of historical pricing access disputes.

Inconsistencies with Government Policy

It is contrary to the Government's stated policy intention of reducing the regulatory burden and moving towards lighter handed regulation.

- It is fundamentally inconsistent with the Competition and Infrastructure Reform Agreement (**"CIRA"**) agreed by the Council of Australian Governments in 2006 which:

    - stated ports should only be subject to economic regulation where a clear need for it exists; and

    - involved each jurisdiction undertaking public reviews of its ports to determine whether regulation is warranted. These reviews have not all been completed and are presumably now irrelevant to grain terminals on the basis that the Bill mandates regulation. However, this is not clear and the bulk handlers are facing the prospect of dual Commonwealth and State legislation.

In our view there is no evidence of problems requiring heavy handed intervention

The port terminals do not require regulation given the nature of the grain market and there is no history of monopolistic behaviour.

- Grain growers enjoy a competitive market where only 30% of grain produced in the eastern states is exported from GrainCorp port terminals. Over 50% of grain produced is consumed by the domestic market.

- A significant portion of exported grain is exported from competing facilities, including the containerisation of grain.

- GrainCorp has no incentive to hinder access given that its terminals average shipping utilisation is only 15% and only 24% usage in a maximum year. Our business model requires us to maximise throughput as demonstrated by GrainCorp's track record of providing public access rates to others without the need for regulation.

- GrainCorp's business model is based on open access. GrainCorp has had no history of refusing access perse or of acting in an anti-competitive manner in respect of grain export terminals. For example, GrainCorp voluntarily engaged with the NSW Government to allow multiple licences for export barley and canola when it acquired the NSW Grain Board export rights in 2003.

- Historical company earnings demonstrate that GrainCorp does not have the ability to generate monopoly profits from its port terminals.

Inconsistency with State based approach

GrainCorp, and the industry, have a long experience of grain terminal regulation in Victoria with the Essential Services Commission ("**ESC**"). The ESC has undertaken two thorough and detailed reviews and based on those reviews has moved to a lighter handed regulatory model.

Both GrainCorp and Australian Bulk Alliance are in the process of finalising light handed access undertakings after two years of consultation with the ESC and the industry.

Under the Bill, the ACCC would need to start from scratch with its assessment - incurring costs for the bulk handlers, introducing uncertainty as to regulation and imposing a regulatory response with no evident need.

Proposed balanced solution

The access test is a disproportionate response to the recommendations made by the IEG which simply sought to ensure that there is an open access policy for wheat exporters at grain terminals.

- The access test is an inconsistent and uneven response given that non wheat grains and other services (for example bulk export rail) are not subject to an access arrangements.

- The access test runs the real risk of replacing one form of regulation (for export wheat) with another form of regulation (for port terminals). This will lead to significant additional costs and inefficiency being added to Australian wheat exports and potentially reduced returns to growers for no corresponding benefit.

- **In GrainCorp's view the proposed access test is unworkable. If the Bill is passed in its current form, GrainCorp will need to consider whether it will seek accreditation.**

- While GrainCorp strongly questions the necessity of an access test, it would be far better if the access test was satisfied where access to a port terminal was available under a light handed access model - we suggest approved by the Wheat Export Authority ("**WEA**") as it grants the licence or a state based access regime with any party having access problems having recourse to Part IIIA of the Trade Practices Act ("**TPA**") as with any other industry.

2 Affected GrainCorp ports

The proposed 'access test' will create an entirely new regulatory process for GrainCorp and other bulk handling companies, even where the terminals currently operate efficiently or where effective regulatory regimes are already in place. GrainCorp operates 7 terminals. The following table provides a summary of GrainCorp's port terminals and the existing regulatory framework.

Port location		Regulated under a state regime?
Vic	Geelong Portland	Yes - *Grain Handling and Storage Act 1995* (Vic) administered by the ESC. This is not a certified effective access regime under the TPA.
Qld	Gladstone Fisherman Island Mackay	No but State regulation is possible under the *Queensland Competition Authority Act 1997* ("**QCA Act**") (which is not a certified effective access regime under the TPA).
NSW	Newcastle Port Kembla	No. NSW Review carried out, awaiting recommendations.

Two issues become obvious from this table. First, at this stage, there is no State based regime available which meets the access test. Where the States have applicable access regimes, they have agreed to have them certified but there is no guarantee this will be done by 1 October 2009. The current implementation timetable agreed by the jurisdictions has certification of port regulation occurring in 2009/10. Parties wishing to "game" the regulations have various regulatory strategies available given the proposed overlap of legislation. This is unlikely to have been intended.

Second, for some ports, the only option for bulk handlers under the proposed Bill is to lodge an access undertaking with the ACCC. This is an onerous obligation. The statutory process is likely to take at least 6 months for each port and the statutory criteria for approval means that the undertakings are extensive with potentially intrusive and burdensome price regulation when there has been no need to such regulation. As an example, ARTC's draft access undertaking currently being assessed by the ACCC is 56 pages with the terms and conditions for access being another 57 pages.

Accordingly, it is quite clear the proposed Bill in current form would introduce additional costs and multiple levels of regulation for GrainCorp.

3 Contrary to Government policy

3.1 Recent government statements in support of 'light handed' regulation

The proposed Bill is contrary to statements recently made by members of the Federal Government in support of a more light handed and consistent national regulatory approach.

As recently as 27 March 2008 at the Economic and Social Outlook Conference, the Federal Treasurer, Wayne Swan, when outlining the Government's policy in relation to its long term plan for national federalism said the following:

'The Rudd Government has also taken significant steps to address regulatory burdens which are stifling productivity, innovation and geographic mobility. Businesses must comply with multiple regulations when operating across state borders. Complying with this maze of regulation costs time and money. The Productivity Commission has estimated that compliance costs could be as high as four per cent of GDP per annum. Through the COAG reform process we are working to lower the regulatory burden on businesses across this country...

By increasing competition and enhancing the role of market mechanisms in energy and the provision of key economic infrastructure, and removing inefficient and duplicative business regulation, we can lift productivity and the economy's growth potential'.

Prime Minister Rudd, at the same conference, also acknowledged that in pursuing its economic reform agenda, the Government has '*identified 27 areas for deregulation and red tape reduction to improve efficiency and reduce the regulatory burden on the economy*'. This includes the development of a nationally consistent regulatory environment for public infrastructure.

Further, the Finance Minister, Lindsay Tanner, in discussing the Government's reform agenda in relation to regulation in producer industries (such as grain) stated that '*exercising deregulatory discipline across the length and breadth of government is central to th[e] task'. He notes that 'excessive regulation tends to have a regressive effect'.*

3.2 Regulation is not in the public interest

There are compelling arguments against regulation on a public interest basis. The Exports and Infrastructure Taskforce have recognised this issue at page 20 of their Report where they state that:

"*It is important to be realistic about what regulation can and cannot achieve. The information available to regulators is necessarily highly imperfect, so regulators cannot hope to mimic the outcomes that would be secured by fully efficient markets. In fact, the search for fully efficient markets is likely to merely add delay, cost and uncertainty to the regulatory process. As a result, any feasible system of regulation is likely to be characterised by a level of 'government failure'. Reflecting this, regulation should be used cautiously, and the costs of regulation taken fully into account in decisions about whether and how to regulate*".

GrainCorp believes that there should be a presumption that issues associated with export orientated infrastructure will be resolved by commercial negotiation between the infrastructure provider and users – as in the case of most other port facilities.

4 No case for regulation

4.1 No case for regulation

Under the CIRA, COAG agreed that ports should only be subject to economic regulation where a clear need for it exists in the promotion of competition in upstream or downstream markets or to prevent the misuse of market power.

The discussion paper published by the IEG did not identify any flaws with the current access regime at grain terminals. There has been no identification of a systemic problem with either the industry nor any of the current bulk grain handlers. In fact, GrainCorp has both the incentive to, and track record, of providing access.

4.2 There is effective competition

There is vigorous and competition for grain in both the domestic and export markets. GrainCorp Port Terminals are subject to substantial countervailing competition, where grain growers and buyers have substantial choice and alternatives in selling and buying grain. This is demonstrated by the following:

- Growers in QLD, NSW and Victoria have access to around 12 million tonnes of on-farm storage, which capacity is sufficient to store most of the east coast's grain production.

- Grain growers have effective alternatives to market their grain. As shown in Table 1 only around 30% of grain produced in the eastern states is exported via GrainCorp ports. In excess of 50% of grain is now consumed by the domestic market.

- The export of grain from GrainCorp port terminals is subject to competition from containerised grain and Melbourne Port Terminal (50% owned by AWB Limited). AS shown in Table 1 it is estimated that around 15% of grain produced in the eastern states is exported by competing facilities.

Table 1: Proportion of grain production exported from GrainCorp ports

Eastern States	2002/03	2003/04	2004/05	2005/06	2006/07	Average
Grain Production	6,684,800	18,455,000	16,155,000	18,869,000	5,871,400	13,207,040
Domestic (1)	3,776,509	10,514,188	9,237,768	11,291,479	2,798,423	7,523,673
Containers & MPT (2)	919,375	2,000,741	2,182,000	2,370,000	2,113,000	1,917,023
GrainCorp Ports (3)	1,988,916	5,940,071	4,735,232	5,207,521	959,977	3,766,343
Percent	**30%**	**32%**	**29%**	**28%**	**16%**	**29%**

(1) Grain not exported - includes domestic grain and grain carried over

(2) Estimated of containerised grain and grain exported from Melbourne Port Terminal

(3) Bulk export from GrainCorp ports

4.3 Overcapacity incentivises throughput

Today there is substantial (excess) capacity in upcountry storage and port terminals which has and will continue to drive competition in both grain storage and marketing. There are no "bottlenecks" in terms of grain storage – the only "bottlenecks" involve rail capacity. It is difficult to argue there is a bottleneck if there is excess capacity.

As shown in Table 2 below GrainCorp ports have substantial over capacity whereby:

- There is substantial variability in the export grain task – ranging from 1Mt to 6Mt.

- Average shipping utilisation for export grain is currently 15% (and only 24% in maximum year). At some port terminals (that is Brisbane, Geelong and Portland) we handle other non grain products. However these products do not utilise the grain storage and currently do not have an adverse impact on our berth utilisation.

- Average storage turnover for grain is 4.7 times per annum (and only 7.5 times per annum in a maximum year). This compares to an average turnover of 49 times in USA[1] – that it the port terminal is turned over once every week compared to once every 11 weeks for GrainCorp Port Terminals.

- The key issue in relation to exports is not access to the port terminal but securing sufficient rail transport to move grain into the port terminal. In GrainCorp's view the recent decision on 11 December 2007 by the major rail provider to exit or substantially reduce the provision of rail services for grain is a matter that should be the primary focus of Government policy.

Table 2: GrainCorp port metrics for grain by state

			Tonnage Exported		Shipping utilisation (%)		Storage Turnover (days)	
State	Shipping Capacity (1)	Storage Capacity	Maximum	Average	Maximum	Average	Maximum	Average
QLD	**5,986,000**	**164,000**	1,084,045	667,112	**18%**	**11%**	**6.6**	**4.1**
NSW	**13,140,000**	**420,000**	3,499,131	1,845,050	**22%**	**14%**	**6.9**	**4.4**
VIC	**5,694,000**	**210,000**	2,590,660	1,254,181	**45%**	**22%**	**12.3**	**6.0**
TOTAL	**24,820,000**	**794,000**	5,940,071	3,766,343	**24%**	**15%**	**7.5**	**4.7**

(1) Based on 50% berth utilisation - loading at half stated elevation tonne per hour 16 hours per day

4.4 Track record

GrainCorp has open access arrangements in place in New South Wales and Queensland without regulation. GrainCorp has a track record of providing access to third parties to ensure maximum utilisation of our port. This is demonstrated by the following:

- GrainCorp has always published tariff charges and conditions for use of our port terminals by other parties;

- There have been no complaints where sorghum deregulation in QLD and barley deregulation in Victoria and NSW did not lead to any allegation of abuse of port terminal ownership;

- GrainCorp has always provided third party access to our port terminals for non-regulated grains. For example as shown in Table 3 below – 60% of barley, sorghum and canola shipped through our port is on behalf of others.

Table 3: Customers of non-regulated grain exported from GrainCorp port terminals

Customer	2002/03	2003/04	2004/05	2005/06	2006/07	Average
GrainCorp	19%	36%	33%	24%	32%	39%
Non GrainCorp	81%	64%	67%	76%	68%	61%

[1] AWB, Grain Storage, Handling and Transport Performance Indicators Report (Part 1), March 1993

4.5 GrainCorp earnings do not reflect market power

If GrainCorp did have significant GrainCorp market power at it port terminals, this would be reflected in monopoly profits. This is clearly not the case as GrainCorp has experienced losses in 3 of the past 6 years as shown in Table 4.

Table 4: GrainCorp Net Profit

Customer	2002/03	2003/04	2004/05	2005/06	2006/07	2007/08 F
Net profit after tax	($18.2M)	$25.7M	$13.5M	$31.7M	($19.8M)	($20.0M)

4.6 This is not best practice regulation

The Productivity Commission has recently considered best practice in determining when regulation is required. In its review of the Consumer Policy Framework, it found decision-making should be underpinned by a set of best practice and implementation principles which are broadly consistent with those adopted in a number of other countries. These include:

- identifying the problem facing consumers (industry structure or firm behaviour for example);
- identifying the appropriate policy response; and
- ensuring that the policy addresses the problem.

As discussed above, it seems a very strange result that this Bill would require regulation of ports with no assessment of the need for it, particularly when the jurisdictions are committed under CIRA to undertaking reviews to consider whether such regulation is warranted in the first place.

Further, under CIRA, COAG agreed to establish a 'simpler and consistent national approach to economic regulation of significant infrastructure'. It is difficult to see how this test is met where the Bill effectively requires GrainCorp to operate under a multitude of access regimes and regulators.

Proportionality has long been recognised as an important factor when devising, implementing, enforcing and reviewing regulations and regulators should assess whether the regulatory response is proportionate to the risks to consumers. In GrainCorp's view the proposed access test in the Bill is disproportionate to the risk it intends to address - the risk has not even been shown to exist. Further, no cost benefit analysis has been taken to justify the imposition of a significant regulatory burden which is a standard requirement in many jurisdictions before new obligations are imposed.

A better response would be to allow these publicly transparent port reviews under CIRA to be undertaken and "heavier handed" regulation introduced under that process if it is actually found to be necessary. In the meantime, the Bill needs, at the very most, to require a binding commitment to provide access at the ports.

5 Amendments to the access test

5.1 There is no need for an access test

GrainCorp does not believe that bulk handlers should be set apart from other applicants to meet an access test in the Wheat Marketing Act to obtain accreditation to export wheat. We are confident that the competitive grain market in Australia will deliver a commercial and efficient outcome for both growers and industry participants.

In the unlikely event competition or access issues did arise, as in any other industry, an aggrieved party can seek a range of potential remedies under the Trade Practices Act.

5.2 Light handed access model

Currently, the Bill provides only two options for access - either the existence of a certified State based effective access regime, or the submission of a voluntary access undertaking with the ACCC under Part IIIA of the TPA.

While GrainCorp questions its necessity, one solution would be for the access test to be redrafted to provide for a more light-handed approach similar to the regime that currently exists in Victoria. This has the benefit of taking the experience gained in Victoria of finding the right regulatory balance and the extensive consultation already undertaken with industry over the last two years.

In 2007, the ESC moved from heavy to light handed regulation of the port[2] on the basis that "*it is not persuaded that, at the present time, the risk of misuse of market power directed towards the minor marketers is sufficient to warrant the continuation of access regulation*."

5.3 Principles applicable to the access test

The Bill should provide for the following access principles where a bulk handling company seeks accreditation. A terminal service operator will satisfy the 'access test' in any of the following circumstances:

(a) where the port terminal service has been declared or a voluntary access undertaking has been given to the ACCC under Part IIIA of the TPA;

(b) where the port terminal service is subject to a state-based access regime which provides for open access on non-discriminatory terms (such as the regime currently operating in Victoria, or the regime available under the QCA Act) - we question whether this regime needs to be certified given the timing of certification for state based port regimes under CIRA as discussed above; or

(c) where the bulk handling company submits to WEA an acceptable policy (or undertaking) by which access seekers can obtain access to terminal services, which accords with the principles of open access and the provision of fair and reasonable access terms. We believe this is proportionate and in accordance with the Productivity Commission recommendations.

Outlined at Appendix 1 is some suggested re drafting of section 20 of the Bill.

[2] ESC, Grain Handling Access Regime, Final Report, June 2006 p2-3

Appendix 1 - Amendments to 'Access Test'

1. Amend Section 20(2) of the Bill to read as follows:

(2) For the purposes of this Act, a body corporate passes the access test in relation to a port terminal service at a particular time if that time is on or after 1 October 2009 and:

(a) at that time, there is in operation, under Part IIIA of the *Trade Practices Act 1974*, any of the following:

(i) the port terminal service has been declared by the designated Minister under Division 2 of the *Trade Practices Act 1974*; or

(ii) the Australian Competition and Consumer Commission has accepted an access undertaking under Division 6 of the *Trade Practices Act 1974* relating to the port terminal service; or

(iii) a regime established by a State or Territory for access to the port terminal service is an effective access regime under Division 2A of the *Trade Practices Act 1974,*

and an accredited wheat exporters has access to that port terminal service for purposes relating to the export of wheat; or

[This ensures that if any of the Part IIIA mechanisms under the TPA applies to the port then that is sufficient for the purposes of accreditation.]

(b) at that time, there is in operation, a state-based regime for the provision to accredited wheat exporters of access to the port terminal service, which provides for access on fair and reasonable terms and conditions and is governed under legislation and by an administrative body or regulator; or

[This deals with the situation where a state based regime is not yet certified as effective under Division 2A of the TPA by 1 October 2009].]

(c) at that time, the provider of a port terminal service has provided an undertaking to WEA or policy statement setting out terms and conditions for the provision to accredited wheat exports of access to the port terminal service which are consistent with the following criteria:

(i) the provider must provide access to the port terminal services to accredited wheat exporters on fair and reasonable terms and conditions; and

(ii) the provider must commit to publish maximum charges and terms and conditions on its website.

[These criteria are consistent with the Victorian requirement in the Grain Handling and Storage Act 1995 and the Competition Principles Agreement.]

2. Section 20(3) of the Bill should be amended as follows:

The reference to 'paragraph (2)(a)' should be replaced with the words 'paragraph (2)(a)(ii)'

3. Insert a new section 17(2)(c) (in relation to discretionary cancellation) as follows:

(c) WEA is of the view that the provider of a port terminal service no longer complies with the undertaking or policy statement provided to the WEA.