Ref: EXE/ASR1673/asr

21 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

ABB comments on Draft Exposure Wheat Export Marketing Bill 2008

ABB Grain Ltd ("ABB") is pleased to make a submission to the Senate Standing Committee on Rural and Regional Affairs and Transport on the Draft Exposure Wheat Export Marketing Bill 2008.

ABB welcomes the Commonwealth Government's initiative to reform the wheat marketing arrangements. We also acknowledge the concern of wheat traders that there will be a level playing field to facilitate the efficient export of wheat. In this regard we accept, as we have in the past, the need for open access and competitive neutrality ie that the bulk handlers (ABB, GrainCorp and CBH) should not unreasonably discriminate between traders or between their own trading operations and other traders in respect to access to the port grain terminals.

However, 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). Section 20 of the Bill – Access Test – will impose a significantly higher level of regulation on grain port terminal operators than is warranted or advisable.

The imposition of a regime under Part IIIA of the Trade Practices Act will not serve the growers of Australia, it will not serve the taxpayers of Australia and, apart from AWB Ltd, it is unlikely to serve the Australian grains industry as a whole. It will only lead to significant additional costs and inefficiency being added to Australian wheat exports, thereby increasing supply chain cost and reducing returns to participants, including growers, for no corresponding benefit.

Of more concern is that it will discourage future investment in the storage & handling system, which like the Australian rail grain haulage system will eventually require heavy contribution by the state and federal governments. Under heavy-handed regulation, the market is likely to discount ABB's share price and fetter ABB's ability to raise capital for new projects.

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

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Alternative and more appropriate approaches available to the Government include:

- a light-handed approach where the bulk handling company submits to WEA (as the Accreditation body) an acceptable undertaking which accords with the principles of open access and competitive neutrality. The undertaking would oblige the bulk handling company to arbitrate with its customers any commercial dispute that cannot otherwise be resolved by negotiation.
- a code of conduct among all bulk handlers addressing open access and competitive neutrality.

The role of the Australian Competition and Consumer Commission (ACCC) should be one of monitoring and reviewing structural changes and market performance of grain marketers and export terminal operators. This information should inform the Federal Government in determining what level of regulatory intervention is required in the industry and whether it is appropriate to impose a heavy handed access regime on wheat export terminals.

In the meantime, the Wheat Exports Australia (WEA) can provide an immediate and strong deterrent to any export terminal operator from inappropriately exercising market power via its licensing powers.

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

Michael Iwaniw
Managing Director

Annexure: ABB Grain Limited Wheat Export Marketing Bill submission

Johnson, Winter and Slattery opinion

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

ABB Grain Ltd

Dated 21 April 2008

ABB Grain Limited

Submission to Senate Rural and Regional Affairs and Transport Committee

ABB Grain Ltd ("ABB") 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"**).

ABB supports the Bill is an important step to the introduction of competition in wheat exports. However, it is our submission that the proposed licence condition (Section 20 – Access Test) would be an unwarranted and excessive regulatory intrusion into the commercial activities of ABB and would lead to counter-productive outcomes for grain growers. Accordingly our submission focuses on the proposed "access test" criterion for accreditation in section 20 of the Bill.

WHY IS ABB CONCERNED?

1. ABB operates in a commercial environment

ABB is a public listed company with a market capitalisation of over $1 billion. ABB's shareholders comprise growers and investors. Most of the larger investors are based in the UK, Hong Kong and the United States. It would be the reasonable expectation of ABB's investors that the Government of Australia would not impose heavy handed regulatory constraints on ABB's activities unless there was a compelling case of abuse or a systemic problem such as a bottleneck. Calls for price regulation from self-interested parties such as AWB Ltd and giant multinational grain traders do not constitute a compelling case.

It is important to distinguish between access regimes which have been imposed on telecommunications and other essential services such as water, electricity and airports. Typically these assets have been in public ownership and have transferred into private ownership. ABB itself owns such assets, its bulk loading plants ("BLPs") at each of the grain terminals in South Australia. The operations of the BLPs are subject to an access regime under the *Maritime Services (Access) Act* (SA).

However ABB's grain terminals have never been public assets. They were funded by tolls and service fees paid by ABB's grower members. They are commercial assets which should not be subject to Government price control.

2. Over-regulation will stifle future investment

While the National Competition Policy Review conducted in 1993 contemplated national access regimes, the Committee placed "*special emphasis on the need to ensure access rights did not, undermine the viability of long term investment decisions, and hence risk deterring future investment in important infrastructure projects*."

Australia's international competitiveness in grain exporting will depend in the future on investment in efficient infrastructure. The grains industry has so far been remarkable in that the investment in the current system has in the past has come mainly from growers, not from the taxpayers of Australia. As de-regulation takes hold, however, future

investment must come from the investors in grain companies, and possibly investors in infrastructure funds. Investors will not invest in over-regulated businesses.

For example ABB's investment in export terminals is based on being able to commercially price access to the ports and on the estimated through-put at the relevant ports. ABB's $120 million investment in the new Outer Harbour grain terminal has a number of investors and financiers backing the infrastructure development. The impact of imposing a Part IIIA regime on the Outer Harbour project may have meant that these investors and financiers would have been less likely to invest. ABB's share price and market standing continue to depend on being able to operate in an open market.

The rail industry provides an unfortunate example of what happens when investment is stalled. The grains industry is now in crisis because virtually all of the rail operators in Australia are unable to operate efficiently on dilapidated grain paths and consequently prefer not to offer services for grain.

3. 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*".

ABB 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 in the world.

4. Part IIIA of the TPA allows gaming by access seekers

It is the legitimate expectation of ABB that its port terminals will provide a fair return for investors. Users of those services will naturally want the services provided as cheaply as possible, ideally, if they could, for no cost. Part IIIA provides access seekers with a mechanism whereby non-genuine complaints can trigger expensive and time-consuming inquiries by the ACCC and consequent arbitration where the access seeker has very little "skin in the game" and every reason to make complaints. Part IIIA is an inappropriate mechanism to determine commercial disputes in a commercial context.

An example of "light handed" regulation leading to a commercial settlement of a dispute is the pricing dispute that arose between AWB and ABB under ABB's s87B voluntary undertaking to the ACCC in relation to South Australian ports for the export of grain. The arbitration settled the dispute in favour of ABB. Whilst ABB suspects that AWB engaged in the dispute for purposes of gaming and testing the s87B undertaking, the outcome nevertheless was successful. If instead of a voluntary undertaking, a Part IIIA access regime had been in place, the parties would, failing private negotiations and arbitration, have had the further option of calling the ACCC to arbitrate the dispute. The ACCC's decision making would have been constrained by the pricing principles

relevant to Part IIIA and the ACCC would have been mindful of setting some form of precedent, not only for grain export terminals, but potentially for other sectors and industries.

In contrast, due to the voluntary undertaking provided by ABB, the private arbitrator was able to solely consider the undertaking to determine whether the discrimination as to price was "unfair or unreasonable". Private arbitration which occurs at the parties' time, costs and expense and is final and determinative is a preferable option to the arbitration involving the ACCC at the expense of public resources and time. Over the long term Part IIIA provides access seekers with the potential to use the arbitration model under Part IIIA to increase the scope and number of disputes against access providers. Therefore, it seems contrary to reason to require wheat export terminal operators to be subject to the high end of regulatory intervention (Part IIIA) where there has been no evidence of on-going disputes between access seekers and access providers in the absence of Part IIIA.

5. Inconsistencies with Government Policy

The application of Part IIIA 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.

The Essential Services Commission of South Australia ("ESCOSA") recently completed a review of whether ABB's port terminals should be brought within the access regime laid down in the *Maritime Services (Access) Act (SA).* ESCOSA was unable to identify a clear need for increased regulation.

6. There is no evidence of abuse requiring heavy handed intervention

The port terminals do not require regulation given the nature of the grain market and the lack of history of monopolistic behaviour.

- ABB needs throughput through its grain terminals to generate an adequate return on investment.
- ABB as a trader does not have the financial strength to buy the wheat crop in South Australia. We welcome other traders and their throughput.
- ABB has had no history of refusing access or of acting in an anti-competitive manner in respect of grain export terminals.
- ABB was required as a condition of approval by the ACCC to the merger of ABB and AusBulk in 2004 to offer an undertaking not to unreasonably discriminate between traders as to access to our ports and to arbitrate any disputes. To date there has only been one arbitration, which was decided in ABB's favour.
- Historical company earnings demonstrate that ABB has not generated monopoly profits from its port terminals.

7. There is no "bottleneck"

South Australia is in a favourable export position in that there are six ports: Port Adelaide (inner harbor); Port Lincoln, Port Giles, Wallaroo, Port Pirie and Thevenard. A new grain terminal, Port Adelaide (Outer Harbor) will shortly be commissioned. The limited available cropping area means that ports are relatively accessible to all South Australian growers.

In an average SA cropping year (5.9m tonnes) the ports have proved themselves more than capable of handling the export task. The addition of Outer Harbor will enhance this capability by providing one-load panamax capability.

In past years, the Australian Wheat Board has relied on South Australia as a reliable and responsive source of export wheat, at times when shipping windows were tight and NSW and Victorian ports have been choked. With the growth of the domestic market in the Eastern states, GrainCorp's export ports are now under-utilised. ABB's own facilities would welcome increased shipping activity.

Against this background it is difficult to see where in South Australia there are "bottlenecks" which would justify heavy-handed regulation of port terminals.

8. The Bill is philosophically flawed

The language of Part IIIA, as it has been interpreted by the courts, is in some respects over inclusive and creates a large catchment of facilities for declaration in circumstances where there is no demonstrable (economic) need. The high social costs associated with access regimes forms the rationale for the safeguards which the courts have overlaid in this area.

Unfortunately, the *Wheat Export Marketing Bill 2008* Exposure Draft, goes even further than Part IIIA declaration provisions and mandates an access undertaking under Part IIIA without any regard to whether there is a dispute between an access seeker or an access provider or whether the facility meets the economic/competition tests for a declaration. The *Wheat Export Marketing Bill 2008* therefore, usurps the executive and administrative processes without any regard to the social costs associated with Part IIIA.

We attach an analysis by our lawyers, Johnson Winter & Slattery, of the Bill and judicial consideration of Part IIIA TPA.

8. Inconsistency with State based approach

When the barley single desks were dismantled in Queensland and NSW in 2005, the respective state governments did not see the necessity to protect competition by imposing an access regime, notwithstanding that GrainCorp was and is both a barley trader and owner of the Queensland and NSW export grain terminals.

When the barley single desk in South Australia was dismantled in 2007, the South Australian Government did not see the necessity to protect competition by imposing an access regime, notwithstanding that ABB was and is both a barley trader and owner of the SA export grain terminals.

These observations beg the question: what is different about the wheat market? The answer may be that it is in the interests of the incumbent single desk holder, AWB Ltd to fetter its competitors. It is understandable but not acceptable that AWB would want to "minimise incentives to exploit market power" (Allen report March 2008); this should not be at the expense of commercial businesses operating in a commercial environment.

ABB, 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 ABB's 50% owned joint venture, Australian Bulk Alliance, are in the process of finalising light handed access undertakings after two years of consultation with the ESC and the industry.

10. ACCC has chosen a light-handed approach for ABB in the past

When ABB proposed a merger with AusBulk, the ACCC was concerned that ABB, as the then holder of the single desk for barley in South Australia, would have an incentive if there was deregulation of the barley or wheat markets, to frustrate competitors by making access to South Australian port terminals difficult. The ACCC eventually approved the merger on the basis of a light-handed undertaking. As discussed above this undertaking has proved to be effective without imposing an undue burden on ABB's business.

THE WAY FORWARD?

Access seekers to Australian grain ports have not failed to negotiate commercial agreements nor is ABB aware of there having been any serious anti-competitive allegations having been made to regulators concerning the conduct of terminal operators against wheat marketers. Hence, a "light handed" regulation would be justified in this competitive industry at this critical moment of deregulation of wheat exports.

ABB envisages and recommends a monitoring role for the ACCC whereby information may be provided to the government and industry on, for example, any competition concerns arising in downstream markets or at the ports and price monitoring on tariffs. This information may then form the basis for the Federal Government to determine the nature of future oversight arrangements rather than prematurely pursuing the high end of regulatory intervention in the form of Part IIIA.

A potential criticism that may be made of a monitoring role for the ACCC is that it will not of itself fix the problems identified. "*For it to be effective, monitoring needs to be linked to a series of thresholds that trigger other actions...the [monitoring] role can be thought of as like manning an observer post watching a bushfire. We can look at the smoke and alert others that there may be a fire – but unless they are ready to respond by finding the source of the fire and doing something about it, simply watching the fire spread won't stop houses from burning down*."

The body most suited to react in an immediate sense to the possibility of a fire is the WEA responsible for issuing accreditation for wheat exporters. The threat of revoking or actual revocation of a wheat export license is likely to be a very strong deterrent for export terminal operators from exercising market power inappropriately. Also, in the short to medium term, the ACCC may under Part IV investigate any complaints of anti-competitive behaviour and where appropriate recommend/request voluntary undertakings under Part IIIA or seek a declaration of the relevant infrastructure.

The preference for a monitoring role and light handed regulation was advocated by the Prime Minister's Export Infrastructure Taskforce in May 2005:

"In our view, there should be a presumption that issues associated with export oriented infrastructure will be resolved by commercial negotiation between the infrastructure provider and users…further tightening is desirable of the hurdles that need to be met before regulatory solutions are imposed on export oriented infrastructure.

When those hurdles are met, and regulation is imposed, the initial presumption should be for light handed regulation (that is, price monitoring). Only where light handed

regulation has demonstrably failed should more intrusive regulatory approaches be applied" [our emphasis].

The above recommendations were accepted by the Council of Australian Governments (COAG) and supported by the Labor Party (whilst in opposition). The COAG meeting on 10 February 2006 agreed that in relation to Port competition,

"*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"*

Where economic regulation of significant ports is warranted, the COAG agreement sets out a step-up guide on increasing regulatory control to situations that warrant such a response, not to prematurely impose an access regime. Relevantly, clause 4.1(b) sets out:

i. Wherever possible, third party access to services provided by means of ports and related infrastructure facilities should be on the basis of terms and conditions agreed between the operator of the facility and the person seeking access;

ii. Where possible, commercial outcomes should be promoted by establishing competitive market frameworks that allow competition in and entry to port and related infrastructure services, including stevedoring, in preference to economic regulation;

iii. Where regulatory oversight of prices is warranted pursuant to clause 2.3, this should be undertaken by an independent body which publishes relevant information; and

iv. Where access regimes are required, and to maximise consistency, those regimes should be certified in accordance with *Trade Practices Act 1974* and the Competition Principles Agreement.

On 20 March 2008, the Rudd Government established *Infrastructure Australia* a new national body that will develop a strategic blueprint for unlocking infrastructure bottlenecks and modernising the nation's utilities. The *Infrastructure Australia* will also advice on regulatory reforms which is expected to unlock billions of dollars of new investment[1].

Hence in our view, a light handed regulatory approach is consistent with the broader Federal and State Governments policy of unlocking infrastructure bottlenecks and new investment in export infrastructure.

END

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21 April 2008

Mr Michael Iwaniw
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Dear Mr Iwaniw,

Part IIIA TPA application to Grain Export Ports to regulate access for wheat exporters

Short Summary

The Federal Government is contemplating the introduction of mandatory Part IIIA *Trade Practices Act 1974* (TPA) undertakings by export terminal operators.

Mr Graeme Samuel referred to Part IIIA access provisions as "a regulatory framework that oversees access conditions including negotiations to determine access prices. Undoubtedly this can be the high end of regulatory intervention" (our emphasis).[1]

In our view, Part IIIA TPA is an inappropriate level of regulatory intervention in wheat export terminals, at this stage, because no empirical case has been established for introducing mandatory Part IIIA undertakings.

Therefore, at least initially, a light handed regulatory approach is recommended for wheat export terminals. The role of the Australian Competition and Consumer Commission (ACCC) should be one of monitoring and reviewing structural changes and market performance of

[1] Mr Graeme Samuel, "Competition at Australia's ports" (Paper presented at the Association of Australian Ports and Marine Authorities Biennial Conference, 11 October 2006) p9.

grain marketers and export terminal operators. This information should inform the Federal Government in determining what level of regulatory intervention is required in the industry and whether it is appropriate to impose a "high end" access regime on wheat export terminals.

In the meantime, the Wheat Exports Australia (WEA) can provide an immediate and strong deterrent to any export terminal operator from inappropriately exercising market power via its licensing powers.

Over Regulation and Weaknesses in Part IIIA TPA

The effect of *Wheat Export Marketing Bill 2008 Exposure Draft* is to require an accredited bulk wheat exporter to have an access undertaking in place after 1 October 2009. The ACCC may accept an undertaking after taking into account factors specified in s44ZA(3), namely:

> (aa) the objects of this Part;
>
> (ab) the pricing principles specified in section 44ZZCA;
>
> (a) the legitimate business interests of the provider;
>
> (b) the public interest, including the public interest in having competition in markets (whether or not in Australia);
>
> (c) the interests of persons who might want access to the service;
>
> (da) whether the undertaking is in accordance with an access code that applies to any service;
>
> (e) any other matters that the Commission thinks are relevant.

Although there are differences in the wording of the factors the ACCC takes into account in approaching an undertaking and the factors that the Minister takes into account in declaring a facility, the ACCC's approach to the above factors, especially the public interest criterion in (b) above, will most likely be guided by the approach of the Competition Tribunal and the Federal Court on whether a facility should be declared. A cursory view of some relevant judicial determinations demonstrates that in declaring a facility to be subject to Part IIIA, regulatory over-reach has resulted and relevant safeguards for whether a facility should be declared under Part IIIA have been weakened.

'Competition in markets'

In *Sydney International Airport*[2] the question before the Tribunal was whether increased access to the declared services would promote competition in at least one market other than the market for the declared services.[3] The Tribunal did not consider the notion involved the idea of creating conditions or an environment for improving competition from what it would be otherwise. The Tribunal was satisfied that if the conditions or environment for improving competition are enhanced, then there is a likelihood of increased competition that is not trivial. The Tribunal's decision means that an access seeker need not demonstrate an increase

[2] [2000]ACompT 1 (1 March 2000).

[3] Subsequent amendments to s 44H(4)(a) in Part IIIA requiring that the service be declared if access to the service would promote a material increase in competition in at least one market does not address the concerns expressed above. The Explanatory Memorandum (Paragraph 4.7) to the amendment only requires that the "expected increase in competition in an upstream or downstream market is not trivial".

in competition in a downstream market but merely an 'opening of the door' to competitive processes.[4]

'Uneconomic' to duplicate

Sydney International Airport[5] also interpreted whether it would be "uneconomic" for a person to develop another infrastructure service as not limited to a narrow accounting view of "uneconomic" or simply issues of profitability. Rather, "uneconomic" was to be construed in a broader social cost-benefit sense. That is, the criterion has been interpreted broadly by the Tribunal in a manner favouring access seekers.

In *Re Duke Eastern Gas Pipeline Pty Ltd*[6] the Tribunal again considered whether it would be uneconomical for anyone else to develop another gas pipeline facility to provide the service of forward/backward haul of gas from a point to point. The Tribunal took that this service was so defined, "irrespective of the substitution possibilities that might exist"[7] at either end of the gas pipeline and "independent of any analysis of the market or markets within which those services might be provided." [8] The Tribunal's failure to consider substitution possibilities meant that the constraints on an access provider to behave in a monopolistic manner were not considered. Arguably, an access provider can only distort, harm or hinder competition where there are no viable alternatives to the service provided by the facility. The Tribunal's approach again weakened the prescribed competition safeguards to declaring access.

Interventionist Approach

In *Sydney Airport Corporation Limited*[9], the Full Federal Court viewed Part IIIA as applicable not only when "denial, or restriction of supply of the service can be demonstrated" but rather "as a public instrument for the more efficient working of essential facilities in the economy".[10] The Full Federal Court's approach was that Part IIIA should have application even where access to the essential facility is being provided in full. This interventionist approach is wider than the US approach to "essential facility doctrine" which requires[11]:

1. control of the essential facility by a monopolist;
2. a competitor's inability practically or reasonably to duplicate the essential facility;
3. the denial of the use of the facility to a competitor; and
4. the feasibility of providing the facility.

The US essential facilities doctrine contemplated that the doctrine was to play a remedial role. This criterion is similarly found in New Zealand's essential facilities doctrine. The omission

[4] Centre for Law and Economics, Australian National University, Australian Law and Economics Conference, "The Competition Policy Experiment-10 Years Since Hilmer" (PowerPoint presentation by Mr Henry Ergas on 1-2 June 2007) slide 9.
[5] Note 2 *supra*.
[6] (2001) A CompT 2 (4 May 2001).
[7] *Ibid* para 67.
[8] *Ibid.*
[9] *Sydney Airport Corporation Limited v Australian Competition Tribunal* (2006) FCAFC 146.
[10] *Ibid* para 78.
[11] National Competition Policy Review Committee, Commonwealth of Australia, *National Competition Policy* (August 1993) p244.

of the third criteria from Part IIIA has taken Australia to a more interventionist ("heavy handed") regulatory approach than in the US or New Zealand.

In *Sydney Airport Corporation Limited*[12], the Full Federal Court also interpreted s44H(4)(a) as to "not incorporate the requirement for comparison with what is factually the current position in any given circumstances". Once a declaration is made any potential user can take advantage of it. "Thus, it is an unnecessary constriction of a provision by way of pre-condition, to engage in a detailed factual enquiry heavily dominated by the past and the present….how the provider has behaved and the degree to which it can be said that monopolistic behaviour … has not impeded the efficient operation of the market in question may not be relevant considerations attending the making of the decision."[13] The approach adopted by the Full Federal Court to not consider the counterfactual further weakens the competition analysis in s44H(4)(a).[14]

In contrast to the liberal approach shown above, the National Access regime when introduced in November 1995 was expected to be "conscious of the need to carefully limit the circumstances in which one business is required by law to make its facilities available to another. Failure to provide appropriate protection to the owners of such facilities has the potential to undermine incentives for investment."[15] The approach suggested by National Competition Policy Review Report (Hilmer Report) was one of caution that took into account the terms and conditions required to protect the owner of the facility and safeguards to protect competition**.**

The above brief analysis is not set out to identify problems with the Tribunal's or the Federal Courts' approach or reasoning. It is simply laid out to demonstrate that the language of Part IIIA, as it has been interpreted, is in some respects over inclusive and creates a large catchment of facilities for declaration in circumstances where there is no demonstrable (economic) need. The high social costs associated with access regimes forms the rationale for the safeguards described above.

Unfortunately, the *Wheat Export Marketing Bill 2008* Exposure Draft, goes even further than Part IIIA declaration provisions and mandates an access undertaking under Part IIIA without any regard to whether there is a dispute between an access seeker or an access provider or whether the facility meets the economic/competition tests for a declaration. The *Wheat Export Marketing Bill 2008* therefore, usurps the executive and administrative processes without any regard to the social costs associated with Part IIIA.

Preferred Interim Arrangements

At least initially, a light handed regulatory approach is recommended for wheat export terminals. For example, the ACCC could be given the role of formally monitoring and reviewing structural changes and market performance of grain marketers and export terminal operators. Further, the ACCC could be tasked with reporting on the effect of wheat export deregulation in 18 months time. This information may inform the Federal Government in determining what further level of regulatory intervention, if any, is appropriate to impose on the industry.

[12] Note 9 *supra.*

[13] Note 9 *supra* para 84.

[14] An application to appeal the decision in *Sydney Airport Corporation Limited* was made to the High Court of Australia. However, the special leave to appeal was dismissed. See *Sydney Airport Limited v Australian Competition Tribunal & Ors* (2007) HCATrans98 (2 March 2007).

[15] Note 11 *supra* p248.

In the meantime, together with the knowledge of the ACCC's monitoring role, what will provide an immediate and strong deterrent to any export terminal operator from inappropriately exercising market power is the licensing power of Wheat Exports Australia (WEA).

Yours faithfully,

Johnson Winter & Slattery

cc: Ashley Roff, ABB Grain Ltd.