



Australian
Competition &
Consumer
Commission

Issues Paper

in relation to GrainCorp Operations Limited's proposed Port Terminal Services Access Undertaking

7 October 2010



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1 Introduction

GrainCorp Operations Limited (**GrainCorp**) has submitted a proposed access undertaking (**Proposed Undertaking**) to the Australian Competition and Consumer Commission (**ACCC**) for assessment under Part IIIA of the *Trade Practices Act 1974* (**TPA**). GrainCorp's Proposed Undertaking relates to the provision of access to services for the export of bulk wheat at seven grain terminals operated by GrainCorp in Queensland, New South Wales and Victoria. These terminals are:

- Queensland: Fisherman Islands, Gladstone and Mackay;
- New South Wales: Carrington and Port Kembla; and
- Victoria: Geelong and Portland.

The ACCC is conducting a public consultation as part of its assessment of the Proposed Undertaking and seeks submissions from interested parties by 4 November 2010.

1.1 GrainCorp's Proposed Undertaking

GrainCorp provided the Proposed Undertaking to the ACCC on 22 September 2010. The Proposed Undertaking and associated documents, including a version with changes from the existing undertaking marked-up and a supporting submission from GrainCorp, are available on the ACCC's website at:

<http://www.accc.gov.au/content/index.phtml/itemId/868801>

Alternatively, go to the ACCC's homepage at www.accc.gov.au and follow the links to 'For regulated industries' and 'Wheat Export: Port Terminal Services Undertakings' and 'GrainCorp.'

GrainCorp, in its supporting submission, submits that the Proposed Undertaking will have the following features:

- Publication of price and non-price terms for standard services: GrainCorp must publish price and non-price terms for standard Port Terminal Services.
- Non-discriminatory access: GrainCorp must provide access in accordance with price and non-price terms that include efficiency, fairness and transparency as central elements and must not discriminate between access seekers, or unreasonably in favour of its own operations.
- Negotiate access in good faith: GrainCorp is obliged to negotiate with access seekers in good faith in accordance with a detailed negotiation process to ensure that such negotiations are progressed according to benchmark timeframes.
- Arbitration of access disputes: There is a detailed dispute resolution mechanism which will provide access seekers who are dissatisfied with the terms and conditions on which they can obtain access (including price) with an ability to have those terms and conditions reviewed by an independent arbitrator and overseen by the Commission.

- Publication of key port information: GrainCorp is obliged to publish key port information including stocks held at each Port Terminal, cargo nominations and nominated monthly export capacity on a monthly basis.

The Proposed Undertaking has been submitted by GrainCorp in accordance with legislative requirements under the *Wheat Export Marketing Act 2008 (Cth)* (**the WEM Act**).

GrainCorp has submitted a proposed access undertaking that largely mirrors the undertaking accepted by the ACCC, pursuant to Division 6 of Part IIIA of the TPA on 29 September 2009 (2009 Undertaking). This is because of GrainCorp's view that the 2009 Undertaking worked well and that minimal changes are required.

In order to transition to the Proposed Undertaking, GrainCorp is proposing a period of two months overlap with the 2009 Undertaking which expires on 30 September 2011. Graincorp proposes that the majority of the provisions in the undertaking will commence on 1 August 2011, with the remainder of the provisions commencing on 1 October 2011. Graincorp has nominated an expiry date of 30 September 2014 for the Proposed Undertaking (three years from the expiry of the 2009 Undertaking).

1.2 ACCC assessment

The test the ACCC applies in deciding whether to accept an access undertaking is set out in section 44ZZA(3) of the TPA. Essentially, the ACCC may accept the undertaking if it thinks it appropriate to do so, having regard to various matters. The full test is set out in section 3 of this Paper.

1.3 Indicative timeline for assessment

The ACCC received the Proposed Undertaking from GrainCorp on 22 September 2010. Under section 44ZZBC(1) of the Act, the ACCC must make a decision in relation to the application within the period of 180 days starting at the start of the day the application was received (referred to as 'the expected period').

The Act also provides for 'clock-stoppers', meaning that some days will not count towards the 180 days of the expected period in certain circumstances. In particular, the clock is stopped where the ACCC publishes a notice inviting public submissions in relation to an undertaking application, or where the ACCC gives a notice requesting information in relation to an application.¹

For the purposes of the assessment of the Proposed Undertaking, the ACCC has developed the following indicative timeline:

- receipt of submissions on ACCC Issues Paper by 4 November 2010;
- ACCC draft decision by end of January 2011; and
- ACCC final decision by end of April 2011.

¹ See section 3 of this Paper for further information on these provisions of the TPA.

However, as stated above, this indicative timeline is subject to operation of clock-stoppers, which may extend the timeframes.

1.4 Consultation

The ACCC, by publication of this Issues Paper, is inviting submissions on the Proposed Undertaking.

Section 2 of this Paper outlines a range of matters to which the ACCC wishes to draw your attention. The matters in section 2 do not represent a comprehensive summary of all aspects of the Proposed Undertaking, nor do you need to comment on each of those matters. You are welcome to provide submissions on any relevant aspect of the Proposed Undertaking.

Section 3 of this Paper sets out background information on the legislative criteria, including an overview of recent amendments to Part IIIA of the Act. To assist the ACCC in its assessment of this Proposed Undertaking, submissions should, as far as practicable, refer to the legislative criteria.

In making your submissions please include detailed reasons to support your views. If you consider that an aspect of the Proposed Undertaking is *not* appropriate, please provide suggestions of changes that could be made to address the relevant concerns, including to the level of drafting amendments where possible.

1.5 Making a submission

Submissions should be addressed to:

Mr Anthony Wing
General Manager
Transport and General Prices Oversight
ACCC
GPO Box 520
MELBOURNE VIC 3001

Email: transport@acc.gov.au

1.5.1 Due date for submissions

Submissions **must** be received by 4 November 2010. It is in your interest that the submission be lodged by this date, as section 44ZZBD of the Act allows the ACCC to disregard any submission made after this date.

1.5.2 Confidentiality of information provided to the ACCC

The ACCC strongly encourages public submissions. Unless a submission, or part of a submission, is marked confidential, it will be published on the ACCC's website and may be made available to any person or organisation upon request.

Sections of submissions that are claimed to be confidential should be clearly identified. The ACCC will consider each claim of confidentiality on a case by case basis. If the

ACCC refuses a request for confidentiality, the submitting party will be given the opportunity to withdraw the submission in whole or in part.

For further information about the collection, use and disclosure of information provided to the ACCC, please refer to the ACCC publication *Australian Competition and Consumer Commission / Australian Energy Regulator Information Policy—the collection, use and disclosure of information*, available on the ACCC website.

1.6 Further information

The Proposed Undertaking and associated documents, including a version with changes from the existing undertaking marked-up and a supporting submission from GrainCorp, are available on the ACCC's website at:

<http://www.accc.gov.au/content/index.phtml/itemId/868801>

Alternatively, go to the ACCC's homepage at www.accc.gov.au and follow the links to 'For regulated industries' and 'Wheat Export: Port Terminal Services Undertakings' and 'GrainCorp.'

Public submissions made during the current process will also be posted at this location.

Background information on the legislative criteria, including an overview of recent amendments to Part IIIA of the TPA, are set out in section 3.

If you have any queries about any matters raised in this document, please contact:

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2 Matters for comment

The ACCC has outlined in this section various matters upon which it seeks comments from stakeholders on whether GrainCorp's Proposed Undertaking is likely to be appropriate to be in place for the three years following expiry of the 2009 Undertaking.

2.1 Approach to pricing

- How has the approach to pricing in the 2009 Undertaking (ie. a publish, negotiate, arbitrate approach) worked in practice?
- Did the measures allow access seekers to commercially negotiate with GrainCorp in a framework where both parties knew that prices, terms and conditions may be subject to arbitration by the ACCC or a private arbitrator, applying the pricing principles in section 44ZZCA of the TPA and general non-discrimination requirements?

2.2 Flexibility to vary the port loading protocols

- Has the flexible approach to the port loading protocols (ie. allowing GrainCorp to vary the port loading protocols without seeking formal approval from the ACCC) caused any concerns?
- Does the flexibility afforded to GrainCorp appropriately balance the interests of GrainCorp to run its operations effectively with the interests of access seekers in seeking access to GrainCorp's port terminal services?
- Are access seekers satisfied with the consultation process carried out by GrainCorp prior to varying its port terminal protocols?

2.3 Substance of the port loading protocols

- Have access seekers found that GrainCorp's port loading protocols have efficiently allocated port loading capacity?
- Will the 'first come, first served' approach to allocation of capacity (as put in place by GrainCorp's port loading protocols) be sufficient to efficiently allocate resources in a high-yield year where demand exceeds supply?

2.4 Substance of the Indicative Access Agreement

- How has the approach to the provision of standard terms in the form of the indicative access agreement worked in practice?
- Does the indicative access agreement in the Proposed Undertaking appropriately balance the interests of GrainCorp and access seekers as a starting point to commence commercial negotiations?

2.5 Dispute resolution

- How have the dispute resolution provisions in the 2009 Undertaking worked in practice?

2.6 Term of the undertaking

- Is the proposed term of the Proposed Undertaking appropriate (three years in respect of clauses 5.5(b), 5.5(c), 9, 10, 11 and 12 and Schedule 6 and three years and two months in respect of all other provisions)?
- Is the Proposed Undertaking drafted in a way to ensure a smooth transition from the 2009 Undertaking to the Proposed Undertaking?

2.7 Publication of key port information

- Have access seekers found GrainCorp's publication of key port information met their information requirements?

Apart from the specific questions posed in this Issues Paper, the ACCC welcomes any other comments you wish to make relevant to the assessment of the Proposed Undertaking.

3 Appendix: Background information

3.1 The *Wheat Export Marketing Act 2008*

The *Wheat Export Marketing Act 2008* (Cth) (**the WEM Act**) came into effect on 1 July 2008. The WEM Act and associated transitional legislation replaced the Export Wheat Commission with a new statutory body, Wheat Exports Australia (**the WEA**), which has the power to develop, administer and enforce an accreditation scheme for bulk wheat exports, including the power to grant, vary, suspend or cancel an accreditation.²

Under the WEM Act, parties without WEA accreditation are prohibited from exporting wheat in bulk from Australia. Parties seeking accreditation as bulk wheat exporters must be deemed by the WEA to be ‘fit and proper’ having regard to certain criteria. The WEM Act further provides that parties seeking bulk wheat export accreditation that also provide ‘port terminal services’ must satisfy an additional ‘access test.’

Part of the ‘access test’ is linked to Part IIIA of the TPA. The relevant part of the access test will be satisfied if either:

- the ACCC has accepted from a person who owns or operates a port terminal facility used to provide a port terminal service an access undertaking under Division 6 of Part IIIA of the TPA, and that undertaking relates to the provision to accredited wheat exporters of access to the port terminal service for purposes relating to the export of wheat; or
- there is in force a decision under Part IIIA of the TPA that a State or Territory regime is an ‘effective access regime’ and that regime provides for access to the port terminal service for purposes relating to the export of wheat.

On 29 September 2009 the ACCC accepted, pursuant to Division 6 of Part IIIA of the TPA, an access undertaking provided to the ACCC by GrainCorp on 24 September 2009 relating to the provision to accredited wheat exporters of access to port terminal services for the purposes relating to the export of bulk wheat. This followed a lengthy process of consultation on an earlier version of GrainCorp’s Undertaking.

GrainCorp’s 2009 Undertaking expires on 30 September 2011.

3.2 Legal test for accepting an access undertaking

Part IIIA of the TPA establishes a regime to assist third parties to obtain access to services provided through facilities with natural monopoly characteristics to promote competition in upstream or downstream markets.

² The relevant transitional legislation is the *Wheat Export Marketing (Repeal and Consequential Amendments) Act 2008* (Cth).

Part IIIA focuses on third party access to services that have the following features:

- natural monopoly (where due to economies of scale or scope, a single facility can satisfy all the demand for its services in a market at lower cost than two or more facilities);
- strategic position in an industry (so that access to the facility's service is a prerequisite for businesses to be able to compete effectively in markets upstream or downstream of the facility (often referred to as a 'bottleneck' facility); and
- national significance (given its size and/or importance to the national economy or interstate or international trade).

Part IIIA provides three main mechanisms by which access can be obtained to infrastructure:

- declaration of a service (under section 44H) and arbitration (under section 44V);
- access undertakings and access codes (under sections 44ZZA and 44ZZAA respectively); and
- decision that a State or Territory access regime is effective (under section 44N).

In relation to access undertakings, a provider of a service (or a person who expects to be the provider of a service) may give an undertaking to the ACCC in connection with the provision of access to the service. An undertaking may specify the terms and conditions on which access will be made available to third parties. The ACCC may accept the undertaking if it thinks appropriate to do so after considering the matters set out in section 44ZZA(3).

If the ACCC accepts the undertaking, the provider is required to offer a third party access in accordance with the undertaking. An access undertaking is binding on the access provider and is able to be enforced in the Federal Court upon application by the ACCC.

An undertaking may be withdrawn or varied at any time, but only with the ACCC's consent.

In assessing a proposed access undertaking under Part IIIA of the TPA, the ACCC must apply the test set out in section 44ZZA(3), which provides that the ACCC may accept the undertaking if it thinks it appropriate to do so, having regard to the following matters:

- the objects of Part IIIA of the TPA, which are to:
 - promote the economically efficient operation of, use of and investment in the infrastructure by which services are provided, thereby promoting effective competition in upstream and downstream markets; and
 - provide a framework and guiding principles to encourage a consistent approach to access regulation in each industry;

- the ‘pricing principles’ specified in section 44ZZCA of the TPA (see further below);
- the legitimate business interests of the provider of the service;
- the public interest, including the public interest in having competition in markets (whether or not in Australia);
- the interests of persons who might want access to the service;
- whether the undertaking is in accordance with an access code that applies to the service; and
- any other matters that the ACCC thinks are relevant.

In relation the pricing principles, section 44ZZCA of the TPA provides that:

- regulated access prices should:
 - be set so as to generate expected revenue for a regulated service that is at least sufficient to meet the efficient costs of providing access to the regulated service or services; and
 - include a return on investment commensurate with the regulatory and commercial risks involved; and
- access price structures should:
 - allow multi-part pricing and price discrimination when it aids efficiency; and
 - not allow a vertically integrated access provider to set terms and conditions that discriminate in favour of its downstream operations, except to the extent that the cost of providing access to other operators is higher; and
 - access pricing regimes should provide incentives to reduce costs or otherwise improve productivity.

3.3 Recent changes to Part IIIA

The *Trade Practices Amendment (Infrastructure Access) Act 2010* (Cth) took effect on 14 July 2010 and introduced changes to Part IIIA of the Act, including to the procedures set out in Part IIIA for the assessment of access undertakings.

3.3.1 Timeframes for ACCC decisions and clock-stoppers

Section 44ZZBC(1) of the Act now provides that the ACCC must make a decision on an access undertaking application within the period of 180 days starting at the start of the day the application is received (referred to as ‘the expected period’).

If the ACCC does not publish a decision on an access undertaking under section 44ZZBE of the TPA within the expected period, it is taken, immediately after the end of the expected period, to have:

- made a decision to not accept the application; and
- published its decision under section 44ZZBE and its reasons for that decision: see section 44ZZBC(6).

The changes to the TPA also introduce ‘clock-stoppers’ that mean certain time periods are not taken into account when determining the expected period (see section 44ZZBC(2)). In particular, the clock may be stopped:

- by written agreement between the ACCC and the access provider (in this case, GrainCorp), and such agreement must be published: section 44ZZBC(4) & (5);
- if the ACCC gives a notice under subsection 44ZZBCA(1) requesting information in relation to the application;
- if a notice is published under subsection 44ZZBD(1) inviting public submissions in relation to the application;
- a decision is published under subsection 44ZZCB(4) deferring consideration of whether to accept the access undertaking, in whole or in part, while the ACCC arbitrates an access dispute.

3.3.2 Amendment notices

3.3.2.1 Changes to the TPA

Section 44ZZAAA(1) provides that the ACCC may give an ‘amendment notice’ in relation to an undertaking before deciding whether to accept the undertaking.

An ‘amendment notice’ is a notice in writing to the access provider that specifies:

- the nature of the amendment or amendments (the ‘proposed amendment or amendments’) that the ACCC proposes be made to the undertaking; and
- the ACCC’s reasons for the proposed amendment or amendments; and
- the period (the ‘response period’) within which the person may respond to the notice, which must be at least 14 days after the day the notice was given to the person: see section 44ZZAAA(2).

An access provider may give a revised undertaking in response to the notice (within the response period), incorporating amendments suggested in the notice, and provided that undertaking is not returned to the provider by the ACCC, that revised undertaking is taken to be the undertaking the ACCC is assessing under Part IIIA: see sections 44ZZAAA(5) & (7). In other words, the access provider may ‘swap over’ the revised undertaking for the original undertaking if it agrees to the amendments suggested by the ACCC in the notice.

If the access provider does not respond to the notice within the response period, it is taken to have not agreed to the proposed amendment: section 44ZZAAA(8). If the access provider provides a revised undertaking that incorporates one or more amendments that the ACCC considers are not of the nature proposed in the amendment notice, and which do not address the reasons for the proposed amendments given in the

amendment notice, the ACCC must not accept the revised undertaking and must return it to the provider within 21 days of receiving it: section 44ZZAAA(6).

The Commission is not required to accept the revised undertaking under section 44ZZA even when it incorporates amendments (see section 44ZZAAA(9)) and does not have a duty to propose amendments when considering whether to accept the undertaking (see section 44ZZAAA(10)).

3.3.3 Other changes

3.3.3.1 Information requests

Section 44ZZBCA(1) provides that the ACCC may give a person a written notice requesting the person give to the ACCC, within a specified period, information of a kind specified in the notice that the ACCC considers may be relevant to making a decision on an access undertaking application.

As noted above, the period within which the ACCC requests information constitutes a clock-stopper.

3.3.3.2 Fixed principles

Section 44ZZAAB of the TPA now provides that an access undertaking given to the ACCC under subsection 44ZZA(1) may include one or more terms that, under the undertaking, are fixed for a specified period (known as ‘fixed principles’). Such principles must extend beyond the term of the undertaking: section 44ZZAAB(3).