



Australian
Competition &
Consumer
Commission

**GrainCorp Operations
Limited's Application to
extend and vary its 2011 Port
Terminal Services Access
Undertaking
Draft Decision to accept**

21 August 2014

Australian Competition and Consumer Commission
23 Marcus Clarke Street, Canberra, Australian Capital Territory, 2601
First published by the ACCC 2014
10 9 8 7 6 5 4 3 2 1

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1. Summary

The Australian Competition and Consumer Commission (ACCC) has made a draft decision to extend the period in which GrainCorp Operations Limited's (GrainCorp) current 2011 Port Terminal Services Access Undertaking (2011 Undertaking) is in operation and to consent to GrainCorp's request for a variation of the 2011 Undertaking, subject to additional reporting provisions being incorporated to cover the period of the extension.

The 2011 Undertaking, which governs access to port terminal services at GrainCorp's East Coast bulk grain ports, is due to expire on 30 September 2014. A mandatory code of conduct (the Code) is anticipated to commence on 1 October 2014. If the Code is approved and declared by 30 September 2014, it will trigger the repeal of the *Wheat Export Marketing Act 2008* (Cth) (WEMA) and remove GrainCorp's requirement to have an access undertaking accepted by the ACCC.

On 28 July 2014 GrainCorp submitted an application to extend and vary its 2011 Undertaking (the Application) to the ACCC. The Application seeks to ensure GrainCorp's compliance with the access test in the WEMA and provide certainty over access arrangements at its seven East Coast bulk grain ports in the event that the Code does not commence on 1 October 2014.

The Application seeks to achieve these aims through extending the operation of the 2011 Undertaking by one year, until 30 September 2015 with an early expiry clause that would allow it to expire prior to 30 September 2015 if GrainCorp is no longer required to have an access undertaking in place upon the commencement of the Code.

The ACCC seeks the views of interested parties on the appropriateness of the proposed extension and variations and on the ACCC's draft decision to consent to the Application subject to additional reporting provisions being incorporated. The ACCC seeks these views by **Friday 5 September 2014**.

Submissions received in response to the draft decision will be considered by the ACCC prior to making its final decision.

2. Background to the Application

2.1 Access undertakings

Division 6 of Part IIIA of the *Competition and Consumer Act 2010* (Cth) (the CCA) provides that the ACCC may accept an undertaking from a person who is, or expects to be, the provider of a service, in connection with the provision of access to that service.

On 22 June 2011, the ACCC accepted GrainCorp's 2011 Undertaking which covers the port terminal services GrainCorp provides at its seven bulk grain exporting facilities on the East Coast of Australia – Mackay, Gladstone and Fisherman Island (Brisbane) in QLD, Carrington (Newcastle) and Port Kembla in NSW, and Geelong and Portland in VIC. This Undertaking is currently set to expire on 30 September 2014. GrainCorp provided the 2011 Undertaking in order to meet the access test, a requirement of the WEMA. The access test, in part, can be met if port terminal operators that also export bulk wheat, have an access undertaking accepted by the ACCC.

On 26 November 2012 GrainCorp published varied Port Terminal Service Protocols (PTSPs) for its 2011 Undertaking to allow it to offer long term agreements (LTAs) to users of its bulk grain export facilities on the East Coast of Australia. The ACCC did not object to these variations, which came into effect on 27 December 2012. GrainCorp published further variations to the PTSPs in March 2013, primarily to introduce transferability of port terminal capacity.

GrainCorp also applied to vary its 2011 Undertaking on 12 November 2013 to exclude its Newcastle port from most of the obligations of the undertaking and PTSPs. The ACCC consented to this application on 18 June 2014 having considered the relevant matters in Part IIIA of the CCA, including the degree of competitive constraint faced by GrainCorp at its Newcastle port.

2.2 Mandatory Code

In December 2012, the WEMA was amended to provide that the access test will be repealed if the Code is approved and declared before 1 October 2014. If the Code does commence on 1 October 2014, access to port terminal services at GrainCorp's East Coast Australian bulk grain ports will be governed by the 2011 Undertaking until 30 September 2014 and the Code from 1 October 2014.

GrainCorp submits that the Application is seeking to provide regulatory certainty in the event that the Code does not commence on 1 October 2014.¹ If the Code does not commence on 1 October 2014 and the 2011 Undertaking expires on 30 September 2014, from 1 October 2014 GrainCorp would fail to meet the access test of the WEMA and would not be entitled to export bulk wheat.

2.3 Application

The CCA allows the provider of an access undertaking to apply to the ACCC for an extension of the term of that undertaking.² The CCA also allows the provider of an access undertaking to vary that undertaking at any time after it has been accepted by the ACCC, but only with the ACCC's consent.³

On 28 July 2014 GrainCorp submitted the Application to extend and vary the operation of its 2011 Undertaking, pursuant to subs. 44ZZBB(1) and 44ZZA(7) of the CCA, to ensure continuity of compliance with the WEMA and access arrangements at its port terminals in the event that the Code does not commence as anticipated. The Application and associated documents including GrainCorp's supporting submission are available on the ACCC's website at www.accc.gov.au/wheat.

GrainCorp's supporting submission states that the Application seeks to provide GrainCorp with certainty. GrainCorp submits:

There is currently no visibility as to exactly when the Code will be finalised.

GrainCorp is seeking to vary its Undertaking by extending its term by up to 1 year as a prudent measure in case the Mandatory Code is not prescribed by 1 October 2014. It is proposed that the Undertaking will come to an end as soon as the Mandatory Code comes into effect.

¹ GrainCorp Operations Limited, *variation to Port Terminal Services Access Undertaking – Submission to the Australian Competition and Consumer Commission*, 28 July 2014, p. 1.

² Subs. 44ZZBB(1).

³ Subs. 44ZZA(7).

No other changes are proposed to the Undertaking at this time, from the ACCC's most recently approved variation to the Undertaking on 18 June 2014.

The Application also includes a variation to clarify the definition of the Code.

This draft decision provides the ACCC's preliminary views on the Application, its reasons for those views, and to seek comments from interested parties on the ACCC's preliminary views and the Application generally. The ACCC's preliminary views have been formed in consideration of the matters listed in subs. 44ZZA(3) of the CCA.

This draft decision also constitutes notice inviting public submissions for the purposes of subs. 44ZZBD(1) of the CCA.

3. ACCC's preliminary views on the Application

3.1 ACCC's preliminary views on the application to extend

The ACCC's preliminary view is that the one year term of the extension with an early expiry provision and the continuation of the provisions of the 2011 Undertaking for an additional year is appropriate.

3.1.1 Term of the extension

The ACCC considers that the circumstances in which GrainCorp has submitted the Application to extend and vary its 2011 Undertaking need to be taken into account in assessing the appropriateness of a one year extension.

The ACCC notes Viterra's 2013 Application to extend and vary its 2011 undertaking and CBH's proposed 2014 undertaking, where the uncertain commencement of the Code was a factor behind each of the port operators submitting these proposals. The uncertain commencement of the Code was a factor in the ACCC's subsequent acceptance of Viterra's application.

The ACCC has also issued a draft decision to accept Emerald Grain's Application to extend and vary its 2013 undertaking on the basis that it would assist the commercial certainty of Emerald Grain and its customers in the event that the Code does not commence as anticipated.

Viterra and Emerald both sought to extend their undertakings by one year. CBH proposed a new undertaking to apply for three years. All three port operators also included early expiry provisions (as discussed below).

Similarly, GrainCorp's Application seeks to provide regulatory certainty for its own commercial operations, as well as the commercial operations of its customers in the event that the Code does not come into effect on 1 October 2014.

The ACCC considers that the extension of the 2011 Undertaking for one year is an appropriate period of time, and in conjunction with the inclusion of an early expiry provision that would allow for the undertaking to expire if the Code does commence, provides this certainty.

The ACCC considers that the certainty provided by the proposed one year extension is in the interests of both GrainCorp and access seekers, having regard to subsections 44ZZA(3)(a) and 44ZZA(3)(c) of the CCA. The ACCC also considers that the operational certainty provided by the proposed extension promotes the operation of an efficient and

profitable bulk wheat export marketing industry, and is consistent with the objects of the WEMA.⁴

3.1.2 Early expiry

An early expiry provision at clause 3.2(b) of the undertaking specifies that the 2011 Undertaking may expire prior to the undertaking's proposed extended expiry date of 30 September 2015 if GrainCorp is no longer required by law to have an access undertaking accepted by the ACCC, including upon the commencement of the Code.

The ACCC notes that it has endorsed the inclusion of equivalent early expiry provisions as part of its analysis of Viterra's Application to extend and vary its 2011 undertaking and its preliminary analysis of Emerald Grain's Application to extend and vary its 2013 undertaking.

The ACCC considers that the inclusion of an early expiry provision is appropriate. The ACCC considers that incorporating the ability for the 2011 Undertaking to continue its operation until such a time that GrainCorp is no longer required to meet the access test provides certainty to access seekers regarding access arrangements at GrainCorp's East Coast ports, ensures GrainCorp's compliance with the access test, and removes the possibility of double regulation.

This is in the legitimate business interests of GrainCorp and consistent with the policy objectives of the WEMA, having regard to subss. 44ZZA(3)(a) and 44ZZA(3)(e) of the CCA.

3.1.3 Continuation of the 2011 Undertaking for the period of the proposed extension

The Application proposes to maintain and roll forward features of the 2011 Undertaking that were accepted by the ACCC on 22 June 2011, as subsequently amended. These include:

- a publish-negotiate-arbitrate model for price and non-price terms of access
- obligations not to discriminate in favour of its trading division in providing access to port terminal services or engage in conduct with the purpose of hindering access
- obligations to negotiate access in good faith
- arbitration of access disputes
- requirements to publish a loading statement and key port information.

These features are common across all four Wheat Port Terminal Access Undertakings currently accepted by the ACCC.⁵

GrainCorp also proposes to maintain and roll forward the varied features of its 2011 Undertaking. These include GrainCorp's LTAs that the ACCC did not object to and were incorporated into the undertaking at the end of 2012. It also includes the exclusion of GrainCorp's Newcastle port terminal from most of the obligations of the undertaking, which was accepted by the ACCC in June 2014.

While the initial assessment of GrainCorp's 2011 Undertaking occurred in 2011, subsequent assessments of variation to the undertaking have taken a wide variety of issues into account. In particular, when considering GrainCorp's LTAs the ACCC considered GrainCorp's capacity allocation system as a whole as well as the degree of competitive constraint faced

⁴ Section 3(a) of the WEMA.

⁵ The ACCC has also accepted Wheat Port Terminal Access Undertakings from CBH, Viterra and Emerald Grain.

by GrainCorp.⁶ GrainCorp also made a subsequent variation to its capacity allocation procedures to introduce transferability of capacity in April 2013, promoting a more efficient use of capacity by reducing the chance that capacity will go unused at peak times.

Additionally, the ACCC's recent acceptance of GrainCorp's variation to reduce the level of regulation at its Newcastle port terminal noted that the 2011 Undertaking would continue to apply at GrainCorp's six other port terminals.

Accordingly, the ACCC considers that its previous analyses as to the appropriateness of these features remains relevant.⁷ The ACCC also considers that a one year extension of the 2011 Undertaking is most appropriately accompanied by a continuation of the existing features of the 2011 Undertaking. The ACCC considers that this is in the interests of GrainCorp and access seekers by way of providing certainty.

As such the ACCC's preliminary view is that the continuation of the features of GrainCorp's existing undertaking for a further year until 30 September 2015 is appropriate and in accordance with the matters listed in subs. 44ZZA(3) of the CCA.

3.2 ACCC's preliminary views on the application to vary

The ACCC's preliminary view is that GrainCorp's proposed variation to its 2011 Undertaking is appropriate, subject to additional reporting provisions being incorporated into a revised version of the Application to cover the period of the extension.

3.2.1 Variation

GrainCorp proposes a variation to its 2011 Undertaking to include an amendment to clarify the definition of the Code in clause 13.1 of the undertaking.

The ACCC considers this change to be administrative in nature and provide clarity to the operation of the extended undertaking and accordingly, is in the legitimate business interests of GrainCorp and access seekers, having regard to subs. 44ZZA(3)(a) and 44ZZA(3)(c) of the CCA.

The ACCC notes that the proposed variations do not currently include provisions for publishing key service performance indicators for the one year period of the proposed extension. These indicators detail service performance on a range of measures including the number of vessels failing survey, the number of cargo nomination applications rejected and the average assessment times for nominations, volumes of tonnes shipped each month and the daily average road receipt rate.

The ACCC considers it appropriate for additional provisions relating to key performance indicator reporting to be included in clause 11(a) of the undertaking to cover the period of the proposed extension. These provisions are consistent with those in the 2011 Undertaking and provide transparent information about the operation of GrainCorp's ports. As such the ACCC considers the publication of these indicators to be in the interests of access seekers, having regard to subs. 44ZZA(3)(c) of the CCA, and also in the public interest in promoting competition in the bulk wheat export market, having regard to subs. 44ZZA(3)(b) of the CCA.

The ACCC therefore considers it would be appropriate for these additional provisions to be incorporated into a revised version of the Application prior to a final decision being made.

⁶ ACCC media release, *ACCC allows GrainCorp to introduce long-term port access agreements*, 30 November 2012

⁷ Analysis of the 2011 Undertaking and its subsequent variations are available at www.accc.gov.au/wheat.

4. Draft decision to consent to the Application

The ACCC has considered the Application provided by GrainCorp to the ACCC on 28 July 2014, pursuant to subsection 44ZZA(7) of the CCA.

The ACCC's preliminary view is that, having regard to the matters listed in subs. 44ZZA(3) of the CCA, it would be appropriate to extend the period in which the undertaking is in operation and to consent to the variation, subject to additional reporting provisions being incorporated to cover the period of the extension.

The ACCC seeks views from interested parties on this draft decision and GrainCorp's Application. Submissions received in response to this draft decision will be considered by the ACCC prior to it making its final decision.

Appendix A: The ACCC's assessment process

Legislative tests applied in assessing the Application

The ACCC's assessment of the Application is guided by s. 44ZZBB and subs. 44ZZA(7) of the CCA.

Legal test for accepting an application to extend an access undertaking

The test the ACCC applies in deciding whether to extend an undertaking is set out in section 44ZZBB of the CCA. This section provides that the ACCC may extend the period for which the undertaking is in operation if it thinks it appropriate to do so having regard to the matters in subsection 44ZZA(3) including, but not limited to:

- the objects of Part IIIA of the CCA (including promoting 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)
- the legitimate business interests of the provider of the service
- the public interest, including the public interest in having competition in markets
- the interests of persons who might want access to the service.

Legal test for accepting an application to vary an access undertaking

The test the ACCC applies in deciding whether to consent to the variation of an undertaking is set out in subs. 44ZZA(7) of the CCA. This section provides that the ACCC may consent to a variation of an undertaking if it thinks it appropriate to do so having regard to the matters set out in subsection 44ZZA(3), listed above.

In practice, in assessing a dual application to extend and vary, the ACCC considers whether it is appropriate for the undertaking, including the variations, to continue for the period specified.

Assessment timeline

Subsection 44ZZBC(1) of the CCA provides that the ACCC must make a decision on an access undertaking application within 180 days starting on the day the application is received.

Section 44B of the CCA defines an 'access undertaking application' to include a request made to the Commission to vary an access undertaking, and an application under subsection 44ZZBB(1) for an extension of the period for which an access undertaking is in operation.

The ACCC is seeking to complete its assessment of the Application as quickly as possible, although the timeline may depend on the nature of comments made by interested parties and potential developments in relation to the Code.

How to make a submission

The ACCC, pursuant to subs. 44ZZBD of the CCA, invites public submissions on this draft decision. If possible, submissions should refer to the legislative framework, as this will assist

the ACCC in assessing the Application. Interested parties are asked to include detailed reasons to support the views put forward in submissions.

Submissions should be addressed to:

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Email: transport@acc.gov.au

The ACCC prefers that submissions be sent via email in Microsoft Word format (although other text readable document formats will be accepted). Submissions must be received on or before **5 September 2014**.

The ACCC may disregard any submissions made after this date, as prescribed by subs. 44ZZBD(3) of the CCA. Therefore it is in interested parties' interest to make submissions within this timeframe.

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 its entirety or in part. The ACCC will then assess the undertaking without that information.

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.⁸

Further information

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

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⁸ Available at www.acc.gov.au.