



Australian
Competition &
Consumer
Commission

Issues Paper

GrainCorp Operations Limited – Application to vary the 2011 Port Terminal Services Access Undertaking in relation to its Newcastle Port

12 December 2013

Australian Competition and Consumer Commission
23 Marcus Clarke Street, Canberra, Australian Capital Territory, 2601

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List of abbreviations and terms

Carrington	GrainCorp's Carrington (Newcastle) Port Terminal, located at Berth no.3 at Carrington at the Port of Newcastle in New South Wales.
CCA	<i>Competition and Consumer Act 2010 (Cth)</i>
CDRs	Continuous Disclosure Rules
LD	Mountain Industries in joint venture with Louis Dreyfus provide storage and handling services for Louis Dreyfus at Kooragang Newcastle.
Loading Statement	A current statement setting out a unique slot reference number for each ship scheduled to load grain using the port terminal service. GrainCorp also refer to this statement as the Shipping Stem
NAT	Newcastle Agri Terminal
PTSPs	Port Terminal Services Protocols
Undertaking	The Part IIIA Port Terminal Service Access Undertaking, accepted by the ACCC on 20 June 2011 and currently expiring on 30 September 2014.
WEMA	<i>Wheat Export Marketing Act 2008 (Cth)</i> (as amended by the <i>Wheat Export Marketing Amendment Bill 2012</i>)

1 Introduction

On 12 November 2013, GrainCorp applied to the Australian Competition and Consumer Commission (ACCC) to vary its Undertaking, pursuant to subsection 44ZZA(7) of the *Competition and Consumer Act 2010* (Cth) (CCA), in relation to its Undertaking obligations at its Newcastle Port (**Application to vary**). GrainCorp has proposed that the Undertaking obligations at its Carrington terminal in Newcastle should be largely removed because it now faces competition from two other bulk wheat export facilities.

The ACCC is conducting public consultation as part of its assessment of the application to vary its 2011 Undertaking and seeks submissions from interested parties by **31 January 2014**. The ACCC is seeking views from industry on whether the regulation of GrainCorp's bulk grain port terminal in Newcastle should be reduced, as proposed.

GrainCorp has proposed variations to exclude certain provisions of the Undertaking from applying at its Newcastle Port, and has also proposed changes to the Port Terminal Services Protocols to exclude the Newcastle Port from their application. Changes have also been proposed to reflect the amendments to the *Wheat Export Marketing Act 2008* (WEMA). The changes would have the effect of removing most of the existing access regulation at GrainCorp's Newcastle port, other than the existing Continuous Disclosure Rules under the WEMA.

GrainCorp submits that there is now competition for bulk wheat export port terminal services at the Port of Newcastle. The Newcastle Agri Terminal (NAT) (owned by its management as well as CBH, Olam and Glencore) is due to receive grain shortly, while Louis Dreyfus has operated a facility (in joint venture with Mountain Industries) at Kooragang at the Port of Newcastle since 2011.

GrainCorp's port terminal at Newcastle is currently subject to regulation because, as a vertically integrated port operator that also has a grain exporting arm, it is subject to the 'access test' in the WEMA. The access test can be met in part by having an access undertaking accepted by the ACCC. GrainCorp submits that it is at a competitive disadvantage as a result of the two competing facilities not being currently subject to regulatory oversight.

GrainCorp also submits that there is significant excess capacity available at the Port of Newcastle that will provide it with the incentive to continue to provide access to exporters.

The ACCC's assessment will examine the level of competition faced by GrainCorp's port in Newcastle, and whether it is appropriate to remove existing Undertaking obligations as a result, against the relevant matters in Part IIIA of the CCA.

1.1 Introduction of Port Terminal Services Access Undertakings

Following the abolition of the single desk for bulk wheat exporting, the Australian Government in 2008 established a new regulatory system for the export of bulk wheat in the form of the WEMA.

The WEMA's Explanatory Memorandum outlined an intention that:

[t]he reforms will achieve competition in the market and contestability of provision of export market services to growers.

The reforms were intended to provide wheat growers with increased choice with respect to both the quality and reliability of wheat export services. The reforms also established regulation of port terminal operators that also had a bulk wheat export function through the use of an 'access test', which was:

intended to ensure that accredited exporters that own, operate or control port terminal facilities provide fair and transparent access to their facilities to other accredited exporters. The test aims to avoid regional monopolies unfairly controlling infrastructure necessary to export wheat in bulk quantities, to the detriment of other accredited exporters¹.

1.2 GrainCorp's current undertaking arrangements

The ACCC may accept an undertaking under Part IIIA of the CCA from a person who is, or expects to be, the provider of a service, in connection with the provision of access to that service. 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.²

On 20 June 2011, the ACCC accepted, from GrainCorp, an access undertaking in relation to port terminal services (**Undertaking**). GrainCorp provided its Undertaking in order to meet the access test discussed above, as required by 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.

The Undertaking relates to the provision of access to services for bulk wheat export at the seven bulk wheat terminals operated by GrainCorp in Victoria, NSW and Queensland: Carrington (Newcastle), Fisherman Islands (Brisbane), Geelong, Gladstone, Mackay, Port Kembla and Portland.

The Undertaking commenced on the expiry of, and effectively replaced, GrainCorp's previous undertaking that had been accepted on 29 September 2009 (certain clauses commenced on 1 August 2011 with the remainder coming into effect on 1 October 2011). At the time of the 2011 undertaking decision, the ACCC noted that GrainCorp's access arrangements had successfully allowed access to GrainCorp's port terminal services by wheat exporters. The ACCC decided that it was appropriate for the existing arrangements from 2009 to largely continue.

¹ Explanatory Memorandum Division 8 – Access test Clause 24: Access test – port terminal service, Wheat Export Marketing Act 2008 (Cth).

² Subsection 44ZZAA(7), *Competition and Consumer Act 2010* (Cth)

In November 2012, amendments to the WEMA were introduced which stipulate that the access test will be repealed on 1 October 2014, subject to there being in place a mandatory code of conduct.³ The code must (among other things):

- deal with the fair and transparent provision to wheat exporters of access to port terminal services by the providers of port terminal services.
- be consistent with the operation of an efficient and profitable wheat export marketing industry that supports the competitiveness of all sectors through the supply chain.⁴

1.3 GrainCorp's proposed variation

GrainCorp provided the Application to vary the Undertaking to the ACCC on 12 November 2013. The application and associated documents are available on the ACCC's website and include:

- the Port Terminal Services Access Undertaking - with the variations marked up.
- revised Port Terminal Services Protocols (PTSPs) which form Schedule 2 to the Undertaking (excluding their application to the Newcastle Port Terminal) - with the variations marked up.
- proposed new PTSPs to apply at the Port of Newcastle (which will not form part of the Undertaking).
- a supporting submission.

The documents can be accessed by visiting to the ACCC's website at www.accc.gov.au/wheat.

In brief, GrainCorp is seeking to amend the Undertaking and PTSPs to make changes to exclude the current access provisions (other than those relating to the continuous disclosure rules required by the WEMA) from applying at Newcastle. GrainCorp also propose to exclude the application of the PTSPs to the Newcastle facility. It will introduce specific Newcastle PTSPs, but these will not fall under the Undertaking.

In its accompanying submission, GrainCorp states that in pursuing these variations it is seeking the equal application of regulation at GrainCorp and competing port terminals at Newcastle. It is seeking to achieve this through moving Newcastle to a commercial and competitive market for port elevation services.

GrainCorp submits that:

The combination of:

1. strong competition;
2. significant excess capacity; and
3. unequal application of regulation

³ Schedule 3, *Wheat Export Marketing Amendment Act 2012* (Cth)

⁴ Section 12 of the *Wheat Export Marketing Act 2008* (Cth)

provide a sound rationale for the ACCC to reduce the regulatory obligations for GrainCorp's port terminal at Newcastle.

In addition, GrainCorp has made a number of more minor changes to reflect the changes made to the WEMA since the 2011 Undertaking was accepted.

The ACCC sets out the application in detail in Section 2 of this issues paper.

1.4 ACCC assessment process

Subsection 44ZZA(7) of the CCA provides that the ACCC may consent to a variation of an access undertaking if it thinks it is appropriate to do so having regard to the matters set out in subsection 44ZZA(3). These matters are:

- the objects of Part IIIA of the CCA
- the pricing principles specified in section 44ZZCA
- 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
- any other matters that the ACCC thinks are relevant.

One of these relevant matters is the objects of Part IIIA of the CCA.⁵ The objects of Part IIIA 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.⁶

In its assessment of GrainCorp's Application to vary, the ACCC will be required to form a view regarding what constitutes an appropriate access undertaking in the bulk wheat export industry. Where appropriate, the ACCC will consider industry-wide issues in its assessment of this application, in so far as they relate to access to port terminal services at the Port of Newcastle.

The legal framework is set out in greater detail in Section 3 of this Issues Paper.

1.5 Indicative timeline for assessment

Subsection 44ZZBC(1) of the CCA provides that the ACCC must make a decision on the application to vary the undertaking within 180 days, starting on the day that the

⁵ Section 44ZZA(3) of Part IIIA of the CCA.

⁶ Section 44AA sets out the objects of Part IIIA of the CCA.

application was received (referred to in the CCA as the ‘expected period’). The application was received from GrainCorp on 12 November 2013.

The CCA also provides for ‘clock-stoppers’, meaning that some days will not count towards the 180-day expected period. Specifically, the clock is stopped where the ACCC either publishes a notice inviting public submissions on an undertaking application (including an application to vary an undertaking), or gives a notice requesting information about an application.⁷ The consultation period following the release of this Issues Paper will not count towards the 180-day timeframe for this decision, in accordance with the ‘stopping the clock’ provisions.

As noted above, the ACCC is seeking submissions on this Issues Paper by **31 January 2014**. After considering submissions, the ACCC will release a draft decision on the Application to Vary, followed by a final decision. Currently, the ACCC intends to release a final decision by April 2014. Its actual timeframe for its assessment of the Application to Vary will depend on the nature of comments received from industry.

1.6 Consultation

Section 2 of this Issues Paper sets out specific matters on which the ACCC is seeking views. The matters listed in Section 2 do not represent a comprehensive summary of all aspects of the application to vary, nor are comments required on each of those matters. Further, interested parties are invited to comment on any aspect of the application they consider relevant to the ACCC’s assessment.

Background information on the legislative criteria by which the application to vary GrainCorp’s Undertaking will be assessed is set out in Section 3 of this Issues Paper. If practicable, submissions should refer to the legislative criteria, as this will assist the ACCC in assessing the application.

Please include detailed reasons to support the views put forward in submissions. If interested parties consider that any aspect of the Application to vary is not appropriate, please suggest specific changes that may address the concern/s, including drafted amendments where possible.

1.6.1 Invitation to make a submission

The ACCC, pursuant to section 44ZZBD of the CCA, invites public submissions on the application to vary GrainCorp’s Undertaking.

Submissions should be addressed to:

Mr David Salisbury
Deputy General Manager
Fuel, Transport and Prices Oversight
ACCC
GPO Box 520
MELBOURNE VIC 3001

Email: transport@acc.gov.au

⁷ See section 3 of the Issues Paper for further information on these provisions of the CCA.

The ACCC prefers that submissions be sent via email in Microsoft Word format (although other text readable document formats will be accepted).

1.6.2 Due date for submissions

Submissions must be received before 5:00pm (AEDST), **31 January 2014**. The ACCC may disregard any submissions made after this date, as prescribed by section 44ZZBD of the CCA. Therefore it is in interested parties' interest to make submissions within this timeframe.

1.6.3 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. The ACCC will then assess the Application to vary in the absence of 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

1.7 Further information

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

Mr Michael Eady
Director
Fuel, Transport and Prices Oversight
ACCC
GPO Box 520
MELBOURNE VIC 3001
Ph: 03 9290 1945
Email: michael.eady@acc.gov.au

⁸ Available at www.accc.gov.au

2 Matters for comment

This section outlines matters on which the ACCC is seeking comment from stakeholders in order to assess whether the Application to vary GrainCorp's Undertaking is appropriate, having regard to the matters in Part IIIA of the CCA.

The ACCC is in particular seeking views on the reasons put forward for GrainCorp's application, the specific changes that GrainCorp is seeking to make, and the level of competition in the Newcastle port zone. The chapter has the following sections:

- Section 2.1 discusses the existing regulatory regime and the general nature of GrainCorp's application.
- Section 2.2 discusses and seeks views on the role of the access test and the Continuous Disclosure Rules.
- Section 2.3 outlines in detail and seeks views on each of the proposed variations to the Undertaking on a clause by clause basis.
- Section 2.4 discusses and seeks views on GrainCorp's proposal to introduce a specific port loading protocol for Carrington, which would be excluded from the remit of the Undertaking.
- Section 2.5 seeks views on the level of competition in the Newcastle port zone.
- Section 2.6 outlines developments in the regulatory regime for the wheat industry.

As noted in section 1, the matters listed below do not represent a comprehensive summary of all aspects of the application to vary, nor are comments required on each of those matters.

In this document, the ACCC has used the name Carrington to describe the GrainCorp port operations at Newcastle, consistent with GrainCorp's own approach.

2.1 Current regulatory arrangements

GrainCorp submits that its current Undertaking places its terminal at Newcastle at a disadvantage because the two neighbouring wheat export operations at the Port of Newcastle are not subject to regulatory oversight under the *Wheat Export Marketing Amendment Act 2012* (WEMA).

GrainCorp submits the following two objectives for seeking to vary the access arrangements in place at Carrington:

Equity	Equal application of regulation at GrainCorp and competing port terminals at Newcastle
Competition	Move Newcastle to a commercial and competitive market for port elevation services

GrainCorp submits that there will be significant excess elevation capacity and competing elevation options for exporters at the Port of Newcastle, as provided by its own facility and from:

- Newcastle Agri Terminal (NAT) (owned by its management as well as CBH, Olam and Glencore) and;
- Louis Dreyfus Commodity Terminal (a Louis Dreyfus joint venture with Mountain Industries, with port elevation provided by Qube).

While the NAT facility has not yet commenced exporting, it is scheduled to be commissioned in December 2013, and for exports to commence in early 2014.

GrainCorp proposes to exclude most of its activities and operations at Carrington from the current obligations in the GrainCorp Undertaking. It submits that, under the current regulatory arrangements, it is competitively disadvantaged against NAT and LD because it has:

- a) Limited commercial freedom to enter into flexible and private contractual arrangements for our own grain and with other exporters to secure and retain export grain volume into our port.
- b) Limited operating freedom to manage elevation capacity between conflicting customer requirements in a flexible manner to optimise our service offering and minimum operating costs.
- c) Limited freedom to apply flexible pricing and to enter into private pricing arrangements to allocate elevation in an efficient manner.
- d) Limited ability to manage our commercial business and operations in a confidential manner.

GrainCorp suggests that, unlike itself, NAT and LD are not required to:

- Publish information on their operations that include shipping stem and stocks;
- Publish reference rates and be bound by minimum standard terms;
- Operate on a non-discriminatory basis;
- Be subject to dispute resolution procedure;
- Be subject to an ACCC audit right; and
- Have a public and common port protocol governing how elevation capacity is allocated and managed.

GrainCorp submits that:

The current regulation in respect of the Newcastle Port Terminal fails to meet the object of Part IIIA of the Competition & Consumer Act (2010) contained in section 44AA(b) to 'provide a framework and guiding principles to encourage a consistent approach to access regulation in each industry'.

GrainCorp submits that it has a strong commercial incentive to continue operating the Carrington facility on an open access basis, as there is:

- Numerous viable alternative pathways for grain to be exported from eastern Australia;
- Strong domestic demand; and
- Substantial excess capacity along the whole grain supply chain.

Issues for Comment

- *What bulk wheat export services are available at the Port of Newcastle?*
- *Given the existing regulatory regime, will exporters have access to either of the NAT or LD facilities to ship wheat? Have any exporters already established arrangements for the use of NAT once it commences operation?*
- *At the Port of Newcastle, under the current regulatory arrangements is GrainCorp competitively disadvantaged against NAT and LD?*

2.2 Access Test and Continuous Disclosure Rules (CDRs)

As discussed in section 1, a provider of a port terminal service who exports wheat using a port terminal service, is required to pass the access test under the WEMA. The access test will be passed if there is in operation an access undertaking relating to the provision to wheat exporters of access to the port terminal service for purposes relating to the export of bulk wheat, and that the access undertaking obliges the person to comply with the CDRs, which require the publication of its loading statement/ shipping stem and a port protocol. Further information on the access test and CDRs is set out at *Section 3.4 Current legislative arrangements*.

GrainCorp proposes that excluding the majority of its Carrington operations from the remit of the Undertaking will not prevent it from satisfying the access test. GrainCorp submits it will continue to meet its CDR obligations at Carrington and has retained the operation of those obligations in the Undertaking.

GrainCorp proposes that its amendments can be implemented and its obligations fulfilled by:

- The ACCC approving a variation to GrainCorp's current Access Undertaking that would still meet the required Access Test under the WEMA.
- The variation of the Access Undertaking, to support commercial and pricing flexibility, would exclude the application of certain obligations at GrainCorp's Newcastle port terminal, in order to return Newcastle to a more equitable playing field.

Under this arrangement, GrainCorp would continue to be required to meet the Continuous Disclosure Rules as required under the WEMA, which include the publication of the shipping stem and having a port protocol. To support operational flexibility, this port protocol would be amended for Newcastle to include the basic principles of receiving and managing vessel nominations.

GrainCorp notes that the proposed amendments will continue to place a higher regulatory burden on operations at Carrington. LD and NAT are not required to publish a loading statement/shipping stem, or have a port protocol to receive and manage vessel nominations.

Issues for Comment

- *Do submitting parties have views on GrainCorp's obligations to publish its loading statement/ shipping stem and port loading protocols?*

2.3 Proposed variations to the Undertaking

GrainCorp proposes to exclude certain provisions of the Undertaking from applying at Carrington. It proposes that clause 4.1 of the undertaking, will be amended to exclude certain specific provisions of the Undertaking from applying in relation to Port Terminal Services provided by means of the Port Terminal Facility at Carrington:

- Clause 5 ‘Price and non-price terms’
- Clause 6 ‘Negotiation for access’
- Clause 7 ‘Dispute resolution’
- Clause 8.2 ‘Dispute resolution’ (relating to confidentiality)
- Clause 9 ‘Capacity Management’ (except clause 9.1 Continuous Disclosure Rules and 9.2 Port Terminal Services Protocols)
- Clause 10.1 ‘Information on stock at the port’
- Clause 11 ‘Report on Performance Indicators’

GrainCorp also submits that:

- Clause 8.1 ‘Treatment of Confidential Information’ will remain but be amended to apply to any confidential information that may have been provided to GrainCorp by a customer previously, to ensure that a confidentiality obligation remains in respect of the confidential information.
- Clause 9.1 ‘Continuous Disclosure Rules’ will remain in order to comply with section 9(1)(b) of the WEMA, which requires that *‘the access undertaking obliges the person to comply, at that time, with the continuous disclosure rules in relation to the port terminal service’*

Overall, other than maintaining the CDRs, this removes essentially all existing access provisions and has the effect of removing the current negotiate-arbitrate framework from applying at Carrington. Each of these proposed changes are discussed in greater detail at section 2.3.1 to 2.3.5.

Issues for Comment

- *Do the proposed amendments set an appropriate balance between the interests of GrainCorp and other stakeholders?*
- *Is it appropriate that GrainCorp be relieved of all of the above obligations, or could some subset of these obligations be removed?*
- *Are the proposed amendments sufficiently clear as to how GrainCorp will manage operations between Carrington and the ports which are covered by the Undertaking ?*

2.3.1 Price and non-price terms

GrainCorp proposes to exclude the application of the entirety of Clause 5 ‘Price and non-price terms’ at Carrington from its Undertaking. Currently Clause 5 provides that GrainCorp on request will provide an access seeker Standard Port Terminal Services.

Specifically GrainCorp proposes to remove the application of the following:

- Clause 5.1 ‘Access to Standard Port Terminal Services’, clause 5.2 ‘Standard Port Terminal Services’ and clause 5.4 ‘Standard Terms’. If these clauses did not apply, GrainCorp would no longer be required under the Undertaking to provide access to any customer at Carrington (including according to standard terms) and will have discretion about who it contracts with.
- Clause 5.5 ‘Non-discriminatory access’. If this clause did not apply, GrainCorp would no longer be subject to a requirement under the Undertaking not to discriminate at Carrington between different Applicants or Users in favour of its own Trading Division. A requirement on GrainCorp to undertake, if required, an independent audit would also be removed.
- Clause 5.3 ‘Reference Prices’. If this clause did not apply, GrainCorp would not be required to provide services at Carrington at the Reference Prices. Furthermore there would be no requirement to adhere to the requirements in Clause 5.6 ‘Variation to Reference Prices and Standard Terms’ which set out how GrainCorp must implement a change to its port terminal fees.
- Clause 5.7 ‘Request for Information’, If this clause did not apply, the ACCC would not have the power to request information about Carrington to enable it to exercise its powers or functions in the Undertaking.

Issues for Comment

- *Do the current undertaking obligations in relation to price and non-price terms limit GrainCorp in competing with NAT and LD at port?*
- *Is it appropriate that GrainCorp no longer be required to offer Standard Port Terminal Services in accordance with the provisions set out in Clause 5?*
- *Is it appropriate that GrainCorp no longer be subject to the non-discrimination provision at Carrington? What could be the ramifications of removing this requirement?*
- *Would GrainCorp have a sufficient incentive, due to competition from other ports, to provide access at Carrington to other exporters and compete for customers with NAT and LD? If not, why not?*
- *Would the NAT and LD facilities constrain GrainCorp from exploiting the absence of the requirements in Clause 5 in an anti-competitive way?*

2.3.2 Negotiation for access

GrainCorp proposes to exclude the application of the entirety of Clause 6 ‘Negotiation for access’ at Carrington from its Undertaking. Currently Clause 6 provides that GrainCorp will negotiate with an Applicant for provision of access to Port Terminal Services in good faith in accordance with the terms of the Undertaking.

Specifically GrainCorp proposes to remove the application of the following provisions:

- Clause 6.1 ‘Good faith negotiation’ which outlines that GrainCorp will negotiate access in good faith in accordance with the terms of the Undertaking.
- Clause 6.2 ‘Framework’ which outlines the process to be followed for an Applicant to gain access to the Port Terminal Services and also provides for recourse to dispute resolution processes.
- Clause 6.3 ‘Preliminary inquiry’ establishes detailed provisions setting out how information will be provided between GrainCorp and the Applicant as part of access negotiations. It also provides clarification and if necessary recourse to an arbitrator to determine who are the relevant parties to a negotiation.
- Clause 6.4 ‘Access Application’ details the process for making an access application including appropriate timeframes.
- Clause 6.5 ‘Access to Standard Port Terminal Services before an Access Agreement is executed’ which requires GrainCorp to provide an Applicant access to services on standard terms prior to concluding a final agreement.
- Clause 6.6 ‘Negotiation of Access Agreement’ outlines the process for negotiation including set timeframes and the opportunity to refer the matter to arbitration if required.
- Clause 6.7 ‘Prudential requirements’
- Clause 6.8 ‘Access Agreement’ which sets out how the agreement is executed.

The removal of these clauses will have the effect of removing the current mandated process in the Undertaking for an exporter to commence the negotiation of access to the Carrington facility, and for executing an access agreement.

Issues for comment

- *Do the current undertaking arrangements for access negotiation limit GrainCorp in competing with NAT and LD at port?*
- *Would GrainCorp have a sufficient incentive due to competition from other ports to negotiate access arrangements at Carrington and compete for customers with NAT and LD? If not, why not?*
- *Would it be appropriate that exporters at Carrington would not have recourse to a process to facilitate access negotiations, and that the process will be at GrainCorp's discretion?*
- *Would the NAT and LD facilities constrain GrainCorp from exploiting the removal of the obligations in Clause 6 in an anti-competitive way? If not, why not?*

2.3.3 Dispute resolution

GrainCorp proposes to exclude the application of the entirety of Clause 7 'Dispute resolution' and Clause 8.2 'Dispute resolution (relating to confidentiality)' at Carrington from its Undertaking.

GrainCorp proposes to withdraw the application of the Clause 7 'Dispute resolution' at Carrington through the removal of following provisions which set out how disputes may arise in the negotiation of an access agreement, how they should be managed and a process for parties to follow to resolve the matter, including recourse to mediation and arbitration by an independent third party.

Specifically, GrainCorp proposes to remove the application of the following provisions:

- Clause 7.1 'Disputes'
- Clause 7.2 'Negotiation'
- Clause 7.3 'Mediation'
- Clause 7.4 'Referral to arbitration'
- Clause 7.5 'Appointment of arbitrator'
- Clause 7.6 'Arbitration procedure if the ACCC is the arbitrator'
- Clause 7.7 Arbitration procedure if the ACCC is not the arbitrator'

GrainCorp will also remove the application of Clause 8.2 'Dispute resolution (relating to confidentiality)'.

Issues for comment

- *Do the current undertaking arrangements for dispute resolution, including mediation and arbitration, limit GrainCorp in competing with NAT and LD at port?*
- *Is it appropriate that exporters at Carrington would no longer have access to the guaranteed dispute resolution processes as provided for in the Undertaking?*
- *Is it important to have a defined process in place that allows for mediation and independent arbitration in negotiating access?*
- *Would the NAT and LD facilities constrain GrainCorp from exploiting the removal of the obligations listed at Clause 7 in an anti-competitive way? If not, why not?*

2.3.4 Capacity Management

GrainCorp proposes to exclude the application of Clause 9 ‘Capacity management’ (except Clause 9.1 ‘Continuous Disclosure Rules, and Clauses 9.2(a), (b) and (d) ‘Port Terminals Services Protocols’) at Carrington from its Undertaking.

Specifically, GrainCorp proposes to remove the application of the following provisions:

- Clause 9.3 ‘Variation of Port Terminal Services Protocols’. GrainCorp at Carrington would no longer be subject to the variation process as prescribed in the Undertaking.
- Clause 9.4 ‘Objection notice’. The ACCC would no longer, with respect to the GrainCorp Newcastle Port Terminal Services Protocols, have a role where it is able to object to proposed variations.
- Clause 9.5 ‘No hindering access’. GrainCorp would no longer be subject to a requirement in the Undertaking not to engage in conduct for the purpose of preventing or hindering access seekers in the exercise of a right of access.

Further discussion of the amended GrainCorp Port Terminal Services Protocol and the GrainCorp Newcastle Port Terminal Service Protocol is discussed below at section 2.4.

Issues for comment

- *Do the current undertaking arrangements for approval of capacity management and the provisions of the Port Terminal Services Protocol limit GrainCorp in competing with NAT and LD at port?*
- *Is it appropriate that the GrainCorp Newcastle Port Terminal Services Protocol be excluded from the remit of the Undertaking and therefore not subject to oversight by the ACCC?*
- *Is it appropriate that GrainCorp's operations at Carrington would not be subject to the no-hindering access provision in the Undertaking?*
- *Will the NAT and LD facilities constrain GrainCorp from exploiting the removal of the obligations listed at Clause 9 in an anti-competitive way? If not, why not?*

2.3.5 Publication of Information

GrainCorp proposes to exclude the application of Clause 10.1 'Information on stock at the port' at Carrington from its Undertaking. Clause 10.2 'Publication of vessel booking applications' will remain, as it is consistent with the CDRs. GrainCorp also proposes to exclude the application of clause 11 'Report on Performance Indicators' at Carrington.

These changes have the effect of removing those reporting obligations not required by the CDRs.

Issues for comment

- *Do the current arrangements for the publication of information limit GrainCorp in competing with NAT and LD at port?*
- *Is it appropriate that publication obligations for the Carrington facility are removed?*
- *Do these data reporting requirements provide an important resource for customers of GrainCorp?*

2.3.6 Other variations

In addition to the variations specified above, GrainCorp proposes a number of other amendments to reflect the amendments to the WEMA, including that:

- The WEMA no longer refers to 'accredited wheat exporters'.
- The Wheat Export Authority has been closed.

Interested parties are welcome to provide comments on these or any other aspect of GrainCorp's application to vary.

2.4 Port Terminal Services Protocols.

GrainCorp has also submitted a revised *GrainCorp Bulk Wheat and Bulk Grain Port Terminal Services Protocols* (covering GrainCorp ports except Carrington) and a new *GrainCorp Newcastle Port Terminal Services Protocols* (covering only Carrington).

GrainCorp proposes that the *GrainCorp Newcastle Port Terminal Services Protocols* will not be attached to the Undertaking. It will not be subject to the variation procedure contained in the current Undertaking, or any other provisions contained in the GrainCorp Undertaking including the non-discrimination or no hindering access provisions.

GrainCorp submits that the Newcastle Port Terminal Services Protocol would be simpler than the Protocol applying to other ports. It lists the major changes in content between the current Port Terminal Services Protocols in operation at Newcastle and the new arrangements as:

- a) Changes to provide greater operating freedom in accepting vessels and to accommodate direct arrangements for our own grain and for grain with other contracted customers:
 - Removal of clauses 4 to 7 involving the criteria for accepting vessels
- b) Changes to provide operating freedom in managing vessels and to accommodate direct arrangements for our own grain and for grain with other contracted customers:
 - Changes to clauses 11, 12 and 21 involving the change in booked capacity
 - Changes to clauses 17,22 and 40 involving the management of booked vessels
 - Removal of clauses 39 involving dispute resolution

The proposed amendments, as reflected in the new protocol document and described above, would provide GrainCorp largely unfettered rights concerning all decisions concerning capacity management at Carrington. Access Seekers would have no recourse under the Undertaking, as all capacity management at Carrington would be at GrainCorp's sole discretion.

GrainCorp submits that its Long Term Protocol will not apply at Carrington as no external customer contracted long term capacity at the port.

GrainCorp submits that customers will be able to transfer capacity between Carrington and other GrainCorp ports under consistent processes and systems. GrainCorp have proposed the following amendments to the *GrainCorp Bulk Wheat and Bulk Port Terminal Services Protocols* concerning the interaction between Carrington and other GrainCorp facilities:

- At Clause 12 'Request for a change to Load Port and/or Confirmed Elevation Period' of the *GrainCorp Bulk Wheat and Bulk Grain Port Terminal Services Protocols*, GrainCorp seeks to clarify how decisions concerning port loading at Carrington are managed. Specifically at Clause 12.4 GrainCorp stipulate that requests to change the Port Load to the Newcastle Port Terminal are governed by the *GrainCorp Newcastle Port Terminal Services Protocols*.
- Clause 21 'Changing a Load Port' will exclude activities at Carrington.

- Clause 40 ‘Supply Chain Disruption’ sets out in given circumstances when GrainCorp may offer to load a Customer’s vessel at an alternative Port Terminal including the Newcastle Port Terminal. As noted at Clause 40.3 if a loading is moved to Newcastle the *GrainCorp Newcastle Port Terminal Services Protocols* will apply.

Issues for Comment

- *Do the current GrainCorp Port Terminal Services Protocol arrangements limit GrainCorp in competing with NAT and LD at port?*
- *Is it appropriate that the GrainCorp Newcastle Port Terminal Services Protocols will not be attached to the Undertaking?*
- *Is there sufficient information in the GrainCorp Newcastle Port Terminal Services Protocols about how GrainCorp will manage capacity at the Newcastle port?*
- *Do the amendments establish adequately how GrainCorp will manage bookings which involve both Carrington and the other GrainCorp ports?*
- *Will the NAT and LD facilities constrain GrainCorp from exploiting in an anti-competitive way the removal of the obligations at Carrington as currently provided by the GrainCorp Bulk Wheat and Bulk Grain Port Terminal Services Protocols in place? If not, why not?*

2.5 State of Competition in the Newcastle Port Zone

A significant input into the ACCC’s assessment of GrainCorp’s application to vary will be the ACCC’s view on the level of competition in the Newcastle port zone. In the ACCC’s view, it will be important to assess the level of competitive constraint on GrainCorp’s Newcastle port operations.

The ACCC has previously acknowledged the greater extent of competition present in the East Coast wheat export market, compared with South Australia or Western Australia. On the East Coast, new ports and export arrangements have developed in areas of NSW and Queensland. Alternative pathways and rail arrangements to port have also been made available. A range of providers offer up-country storage and handling have emerged and there has been an increase in on-farm storage.

However, given the nature of the present application, the ACCC is now seeking further information concerning the Newcastle port zone specifically to inform its assessment of the appropriate Undertaking obligations at Carrington.

The GrainCorp Undertaking extends to only port terminal services. Accordingly, the ACCC will only be making a decision on the obligations in relation to the Carrington port. However, the ACCC considers that it is relevant for this issues paper to seek information on broader aspects of the Newcastle Port Zone, in so far as these matters affect or influence an exporter’s ability to export bulk wheat from Newcastle. This is because the bulk wheat export market more broadly interacts with a range of

industries and services including the export container market, the domestic wheat market, upcountry storage and access to road and rail services across the region.

The paper identifies these elements of the supply chain for further consideration:

- Northern NSW Grain Flows and Markets
- Newcastle Bulk Wheat Export Facilities
- Container Market for Wheat in NSW
- Domestic Markets for Wheat in NSW and Queensland
- Northern NSW Up-country Storage and Handling Facilities
- Wheat Transportation Services in NSW

2.5.1 Northern NSW Grain Flows and Markets

GrainCorp has included a map in its submission illustrating the towns and regions which make up its Newcastle Port Zone in Northern NSW. The map also illustrates the location of the state's relevant rail lines. Major towns in the zone include Narrabri and Moree. A range of storage and handling providers operate in the region, though not all handle wheat. Bulk grain originating from the zone is used by a number of industries both domestically (e.g. mills and feedlots) and for export (e.g. bulk and containers).

GrainCorp submits the bulk wheat export task is variable due to:

- a) Fluctuating annual crop size, combined with
- b) The 'first claim' domestic and container markets for grain from Northern NSW.

GrainCorp indicates that grain from Northern NSW can also move east into the export and domestic markets, but can also move north and south into the domestic market.

GrainCorp submits that:

Growers in Northern NSW enjoy a very competitive grain market with ready access (to) a large number of buyers to sell their grain.

Issues for Comment

- *Is the Newcastle Port Zone, as depicted by GrainCorp, an accurate representation of the relevant markets to be considered in relation to wheat export activity at the Port of Newcastle? If not, what other market definition should be used?*
- *How do producers in Northern NSW decide into which market/s to sell their wheat?*
- *Is GrainCorp's characterisation of the crop size and bulk wheat export task in the Newcastle port zone consistent with your understanding?*

2.5.2 Newcastle Bulk Wheat Export Facilities

As discussed above, GrainCorp submits that it faces a very competitive market at the Port of Newcastle for the export of bulk wheat and other grain. GrainCorp submits that in addition to its Carrington facility, there are a further two bulk wheat export facilities located at the Port of Newcastle:

- Newcastle Agri Terminal (NAT) (owned by its management as well as CBH, Olam and Glencore) and;
- Louis Dreyfus (in joint venture with Mountain Industries).

GrainCorp submits that the Port of Newcastle will be the most competitive port for bulk export grain in Australia. GrainCorp suggests the three export facilities will have a combined 4.3 million tonnes of annual elevation capacity (450,000 tonnes per month) to service an average bulk export grain demand of only 1.1 million tonnes and a peak demand of 1.8 million tonnes.⁹

GrainCorp submits the following estimate concerning the shipping from Newcastle based on a 42 week shipping year, comprising:

- 2.5 million tonnes at GrainCorp Newcastle Terminal Elevator, compared to peak exports of 1.8 million tonnes (achieved in 2005) and in line with the stated maximum nominated capacity,
- Say 1.5 million tonnes at NAT, which is their maximum capacity in their public development application and communications, and
- Say 0.3 million tonnes at LDA, compared to 200,000 tonnes of grain exported in recent years.

2.5.2.1 GrainCorp's Carrington Port Facility

A number of third party exporters currently use GrainCorp's port facilities for shipping bulk wheat. These include Bunge, Cargill, CBH, Emerald, Glencore, Noble Resources, Pentag Nidera, Queensland Cotton, Riverina, Toepfer and Touton. A subset of this list will export bulk wheat at Carrington in any given year. A more limited subset again may use GrainCorp's facilities once competing ports come into operation.

GrainCorp submits that, over the last ten years, it has exported in bulk from Carrington an average of around 1.1 million tonnes annually and 1.3 million tonnes if the two drought years are excluded. This amounts to around 37% of grain produced in the Newcastle Port Zone in Northern NSW. Exports from the port have ranged from nil to 1.8 million tonnes.

2.5.2.2 Newcastle Agri Terminal (NAT)

NAT is an independent logistics company, with backing from several grain marketers. In addition to its management team, Cooperative Bulk Handling (CBH), Glencore (which operates Viterra) and Olam (which operates Queensland Cotton) are key

⁹ See GrainCorp Submission: Proposed changes to Port Terminal Services Access Undertaking, p.13. GrainCorp have referenced total grain elevation capacity vs. GrainCorp exports at Newcastle – annually over the FY2004 TO FY2014 period.

investors in the NAT facility. A brief overview of each investor's interests in the Australian grain export industry is detailed below:

- *CBH*
In Western Australia, CBH operates in all levels of the bulk wheat supply chain. CBH is the largest grain exporter in WA and a medium size exporter in the SA market. Its East Coast exports have been relatively small to date.

At its WA ports, CBH provides access to third party exporters through the operation of its access undertaking. CBH's ports exported 8.4 million tonnes of bulk wheat in 2012/13.¹⁰

- *Olam International*
Olam International Ltd (Olam) is a global supply chain manager and processor of agricultural products (including wheat). In 2007 Olam acquired Queensland Cotton, a medium sized grain exporter on the East Coast with a smaller export profile in SA and WA. Following the acquisition, Olam started marketing grain in 2008. The business continues to trade as Queensland Cotton.

- *Glencore*
Glencore operates grain storage, handling, port operations and marketing activities in Australia. In 2012 it wholly acquired Viterra and is now the sole bulk wheat port terminal operator in South Australia. In South Australia the Viterra branding has been retained for its infrastructure operations. It provides access to third party exporters through the operation of an access undertaking. Viterra's ports exported 3.2 million tonnes of wheat in the ten months to 30 July 2013.¹¹

The NAT facility will have approximately 60,000 tonnes of storage and offer weighing and testing of grain for classification on receipt. The terminal will also provide fumigation services. The ship loading facilities will be able to load up to Panamax size¹² vessels at a rate of 2000 tonnes per hour.¹³ Initially the terminal will not have truck receipt facilities.

NAT management has also indicated that NAT will have container packing facilities on site. Bulk wheat delivered to the terminal for packing will either be exported direct from NAT or put on rail to the container terminal at Port Botany.¹⁴

¹⁰ See CBH Group website, *WA Shipping Statistics*, <https://www.cbh.com.au/our-business/operations/port-services.aspx>

¹¹ See Viterra website, *Shipping statistics - by port zone/commodity/month - OCT 2012 - SEP 2013* <http://www.viterra.com.au/ports-shipping/ports-shipping-2>

¹² Panamax size represents the largest acceptable size to transit the Panama Canal; lengths are restricted to a maximum of 275 m, and widths to slightly more than 32 m. The average size of such a ship is about 65,000 deadweight tonnage.

¹³ Newcastle Agri Terminal, *Media Release – Independent agricultural export terminal approved for Newcastle and regional New South Wales*, 30 March 2012. <http://www.naterminal.com.au/index.php/latest-news/32-exciting-new-agricultural-development-approved-for-newcastle-and-regional-new-south-wales>

¹⁴ Foley, M, 2013, *Newcastle Agri-terminal at Newcastle*, *The Land*, 15 August, p.8

NAT is not yet exporting bulk wheat. However, it has been publicly quoted as saying that it is scheduled to receive grain in December 2013 and ship in January 2014.¹⁵

GrainCorp submits the following information comparing Carrington and NAT:

Capability	Newcastle Agri Terminal (NAT)	GrainCorp
Rail receipt	Trains tip at ~2,000 TPH with trains tipped in motion on a balloon loop	Trains tip at ~1,500 TPH with trains shunted into 4 segments
Ship loading	Vessels loaded at ~2,500 TPH with 1 ship loader	Vessels loaded at ~3,000 TPH with 4 manned ship loaders
Berth draft	12.8 metres, service vessels of up to 70,000t	11.6 metres, service vessels up to 55-60,000t
Total storage capacity	56,000 tonnes	140,000 tonnes (excluding small bins)
Fumigated capacity	56,000 tonnes	40,000 tonnes

Source: GrainCorp Submission November 2013

2.5.2.3 Louis Dreyfus joint venture with Mountain Industries

Louis Dreyfus has a joint venture with Mountain Industries that provides storage and handling services for Louis Dreyfus at Kooragang Newcastle.

Louis Dreyfus Commodities Australia Pty Ltd is a grain trader and a subsidiary to Louis Dreyfus Commodities Group (LD Group). LD Group is a French conglomerate operating in over 50 countries in many industries including oil, energy, commodities and agriculture (including wheat trading).

Mountain Industries is a storage and logistics company, managing bulk products including minerals, grain and fertiliser. It also provides services to containerise grain at its regional intermodal depots and dispatched by road or rail. Mountain Industries was recently acquired by Asciano.

The storage facility was opened in November 2011 and primarily handles wheat (a separate part of the facility handles fertiliser). The site has approximately 25,000 tonnes of grain storage. GrainCorp submits that the LD facility annually handles 200,000 tonnes of wheat.

Louis Dreyfus brings grain into Newcastle by rail from up-country and can deliver by road to the facility. It uses containers which can move between rail and road. These dual purpose containers are more efficient than manually transferring grain between rail wagons and trucks. Louis Dreyfus is the facility's only user for grain. Qube Ports and Bulk provide the joint venture with a port terminal elevator service.

The Mountain Industries' website outlines rail and road intermodal options for moving commodities to and from ships at Newcastle..¹⁶

¹⁵ *ibid.*

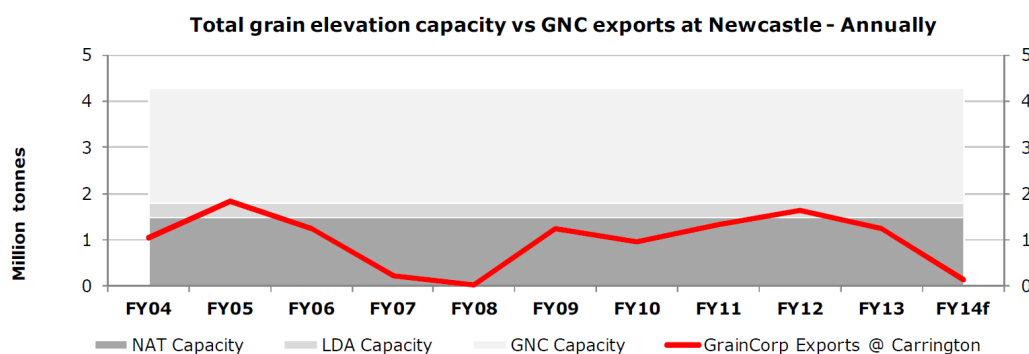
As well as the facility at Kooragang, Louis Dreyfus has grain handling and grower receival sites at Moree and Narrabri in NSW.

2.5.2.4 Bulk wheat port capacity in Newcastle

GrainCorp submits that:

Based on our calculations... the combined capacity of NAT and LDA can comfortably handle the total annual and peak bulk grain export task at Newcastle.

In support, it provides the following chart of the historical export task from Newcastle compared to the capacity of the three bulk wheat facilities:



Source: GrainCorp Submission November 2013

Issues for Comment

- *Are GrainCorp's observations and data concerning NAT and Louis Dreyfus' export operations at the Port of Newcastle consistent with your understanding of the port?*
- *Have or will LD and NAT constrain GrainCorp's activities at Carrington, along the supply chain to port?*
- *How important are the size, nature and efficiency of the facilities of each of the Port of Newcastle wheat export operations to exporter's decisions on which facility to use? How will each operator's facilities affect the services and prices they can offer to the market?*
- *Will NAT provide a competitive constraint on GrainCorp's facilities? If not, why not?*
- *When it commences exporting, will NAT provide open access port terminal services? Have any exporters already established a commercial relationship with NAT for exporting from its facilities once operational?*
- *What constraint does the Louis Dreyfus facility place on Carrington's operations, noting it does not provide services to external parties?*
- *Are there any further wheat export operations planned for the Port of Newcastle?*

¹⁶ See Mountain Industries website, *Storage*, <http://www.mountainindustries.com.au/storage.htm>

2.5.3 Container Market for Wheat in NSW

GrainCorp cites the container market as a growing constraint on sourcing bulk wheat for export across Eastern Australia. Major container packers in the Newcastle Port Zone include Glencore (Narrabri) and Louis Dreyfus (Narrabri and Moree). There are a number of smaller operators located in the Newcastle Port Zone, including Namoi Cotton at Wee Waa.

At Newcastle, both NAT and Louis Dreyfus can offer container packing services.

GrainCorp does not operate container packing facilities in the Newcastle Port Zone. Its container facilities are located at Sunshine (Melbourne), Geelong and Fisherman Islands (Brisbane).

Issues for Comment

- *What time of year is wheat supplied to the container market?*
- *Which producers supply the container market?*
- *To what extent do the demands of the container market affect the supply of wheat for the bulk wheat export market?*
- *Will LD and NAT's involvement in the container market constrain GrainCorp's bulk wheat operations at Carrington?*

2.5.4 Domestic Markets for Wheat in NSW and Queensland

As noted above, GrainCorp submits that the domestic market has the 'first claim' on wheat from Northern NSW and provides a further constraint on GrainCorp's export out of Newcastle. GrainCorp suggest that 63% of grain production (around 2 million tonnes) is used in the domestic and container markets.

The following table from GrainCorp's submission illustrates likely destinations of Northern NSW wheat.

Grain Source	Destination
Liverpool Plains	Predominately sold to the local feedlots or the large poultry consumers in Newcastle.
Golden Triangle Moree to North Star	Can be sold for export via Newcastle or Brisbane or sold to large feedlots in Southern QLD.
Main lines Narrabri to Moree & Narrabri to Walgett	Given its higher protein profile, supplies a large portion of the wheat to the flour mills; Manildra (Gunnedah and Nowra mills), Allied (Tamworth and Sydney) and Westons (Sydney).
Residual Narrabri to Moree & Narrabri to Walgett	Sold for export in bulk via Newcastle or in containers from the large number of local country packers.

Issues for Comment

- *What time of year is wheat supplied to the domestic market?*
- *To what extent do the demands of the domestic market affect the supply of wheat for the bulk wheat export market? Does the domestic market have 'first claim' on wheat in northern NSW?*
- *Does the above table as submitted by GrainCorp reflect your understanding of the demands on and likely destination of wheat produced in the Newcastle Port Zone?*
- *In periods when limited wheat is available for export what is the likely consequence for the three Port of Newcastle export facilities?*

2.5.5 Northern NSW Up-country Storage and Handling Facilities

The level of competition in upcountry storage and handling may be relevant to a consideration of the level of competition that competing port facilities provide to GrainCorp's Carrington port.

Grain Corp submits that there are many grain storage, handling and container packing facilities present in the Newcastle Port Zone.

GrainCorp operates 25 country silos in Northern NSW. It receives 66% of grain production from Northern NSW, around 2 million tonnes into its silos, of which a large portion is consigned to the major flour millers. GrainCorp stores and handles wheat, barley, canola, sorghum and pulses and its country network handles approximately 55-60% of the annual eastern Australia grain harvest. GrainCorp provides services to over 10,000 grain growers and over 100 grain traders (including domestic customers).¹⁷

Louis Dreyfus has up-country storage and handling operations in the Newcastle Port Zone, including grain handling and grower receival sites at Moree, Narrabri and also at Newcastle.

Other operators and facilities in the Newcastle Port Zone include:

- Cargill via its wholly owned subsidiary Grain Flow at Beanbri and Bellata.
- Manildra Grain is Australia's largest domestic user of wheat for industrial purposes and has a range of facilities (storage and processing) across NSW,¹⁸ and
- a number of SMEs, including storage and grain packing firm AgriPark at Moree and AMPS Storage and Handling at Premer.

¹⁷ Or 75% if including direct receivals at port terminals. See GrainCorp 2012 Shareholder Review.

¹⁸ See Manildra Group website, <http://www.manildra.com.au/home/article/>

GrainCorp submits that competing independent country silos have an estimated capacity of 800,000 tonnes and directly compete against 60% of GrainCorp's average receivals.

GrainCorp in its submission also identifies up-country competition in the Newcastle Port Zone from on-farm storage.

Issues for Comment

- *Does GrainCorp's position in up-country storage deliver any benefit to its port operations at Carrington?*
- *What level of competition is there in up-country storage facilities in the Newcastle Port Zone?*
- *Will the decisions of producers and/or exporters, when seeking to obtain access to port terminal services at Newcastle, be influenced by their ability to access up-country storage and handling services?*
- *Will LD and NAT's activities and interests along the supply chain or those of other competing firms in the Newcastle Port Zone constrain GrainCorp's activities at Carrington? If not, why not?*
- *What constraint does on-farm storage place on GrainCorp's operation in the Newcastle Port Zone?*

2.5.6 Wheat Transportation Services in NSW

As with upcountry storage, the competitive situation in transportation services may be relevant to a consideration of the level of competition in port facilities at Newcastle.

GrainCorp submits that rail plays an important role in moving bulk grain from locations approximately 400 to 550km from Newcastle. Grain grown closer to Newcastle on the Liverpool Plains (250 -350km from Newcastle) tends to move by road into the domestic market.

GrainCorp submits that the Newcastle Port Zone is serviced by a number of competing train services contracted by grain companies from a range of rail providers including Pacific National, Qube and Aurizon. A number of exporters contract rail services directly from a number of operators in the state and from across the East Coast. GrainCorp submits that over 50% of domestic and containerised grain is also moved by rail.

GrainCorp owns or contracts eight of approximately 17 standard gauge export trains servicing NSW. Domestic customers operate an additional seven trains in NSW which service grain from Northern NSW. However due to the poor seasonal conditions GrainCorp estimates only two to three export trains will be located in Northern NSW for the current harvest.

GrainCorp's Carrington facility has rail and road receipt facilities on site.

The NAT terminal will have rail receival facilities on site. Initially the terminal will not have truck receival facilities. NAT is exploring opportunities for truck receival through nearby facilities in the Port of Newcastle. In addition to providing port terminal services, NAT states that it will provide supply chain services:

We exist to provide better grain supply chain solutions for exporters and to increase farm gate returns for growers. NAT has a clear focus on facilitating efficient supply chain operations and is not involved in grain marketing¹⁹.

The Louis Dreyfus operation utilises rail facilities. It employs specialised containers which can transfer between train and truck. Louis Dreyfus website and the Mountain Industries website outline the receival facilities; for shipping it can then move wheat by road to the Qube elevator:

Louis Dreyfus operate rail assets direct to port facilities in Newcastle from up country sites to maximise efficiencies and directly supply quality high protein grains to international markets and end users.²⁰

Issues for Comment

- *Does GrainCorp's position in the upcountry transport market, or its rail access arrangements, affect producers' or exporters' ability to access different port terminal services at the Port of Newcastle?*
- *How important are the road and rail receival facilities for each of the Port of Newcastle wheat export operations to exporters when they are making shipping decisions?*
- *How will each operator's receival facilities affect the services and rates they can offer to the market?*

2.6 Relevance of the mandatory Wheat Ports Code of Conduct

As discussed in chapter 1, the WEMA was amended in 2012. The amendments allow for the development of a Wheat Ports Code of Conduct that replaces the current undertaking regime in October 2014, provided certain conditions are met. Over the course of 2012-2013 industry stakeholders participated in a consultative process to contribute to the development of the Code.

GrainCorp's undertaking currently expires on 30 September 2014 (although its operation could be extended should GrainCorp apply to the ACCC to vary its undertaking).

All bulk wheat exporters will be subject to the Code, including the currently unregulated export operations at the Port of Newcastle. It is envisaged that the Code will establish a set of mandatory obligations pertaining to port terminal access. Upon

¹⁹ See NAT website, *About*, <http://www.natterminal.com.au/index.php/about>

²⁰ See Louis Dreyfus Australia website <http://www.louisdreyfus.com.au/index.php?id=1541> and Mountain Industries website, *Storage*, <http://www.mountainindustries.com.au/storage.htm>

the commencement of the Code it is envisaged the current port terminal access undertakings will cease.

GrainCorp submits that such arrangements could make for a fairer playing field in the industry and could remove the competitive disadvantage that it submits it is suffering from at the Port of Newcastle.

However, the arrangements for the Code are yet to be finalised. In the interim GrainCorp submits that:

'we cannot place our businesses 'on hold' in anticipation of these new arrangements given:

- a) The new Mandatory Code will not be introduced until 1 October 2014 at the earliest;
- b) There is no certainty that the new Mandatory Code will be introduced; and
- c) There is no certainty that a new Mandatory Code will be applied evenly to all port operators.

GrainCorp proposes its amendments provide a way:

for the objectives of the WEMA to be met without the burden of unnecessary and inequitable regulation being imposed on a terminal operator in circumstances where there is effective competition and no market failure to address.

Issues for Comment

- *Do you consider that GrainCorp's proposed variations should be implemented for the remainder of the term of its Undertaking?*

3 Legal framework

3.1 Variation of an access undertaking

Subsection 44ZZA(7) of the CCA 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).

The matters under this section are:

- the objects of Part IIIA of the CCA, 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
 - provide a framework and guiding principles to encourage a consistent approach to access regulation in each industry
- the pricing principles specified in section 44ZZCA
- 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
- any other matters that the ACCC thinks are relevant.

In relation to the pricing principles, section 44ZZCA of the CCA 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

and that 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.

3.2 Timeframes for ACCC decisions and clock-stoppers

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 (referred to as the ‘expected period’).

Section 44B of the CCA defines an ‘access undertaking application’ to include an application to vary an undertaking .

Pursuant to 44ZZBC(6), if the ACCC does not publish a decision on an access undertaking under section 44ZZBE of the CCA 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.

Subsection 44ZZBC(2) of the CCA provides for ‘clock-stoppers’, which mean that certain time periods are not taken into account when determining the expected period. In particular, the clock may be stopped:

- by written agreement between the ACCC and the access provider, and such agreement must be published: subsection 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; and
- 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 Current legislative arrangements

The *Wheat Export Marketing Act 2008* (Cth) (**the WEMA**) came into effect on 1 July 2008 and was amended by the *Wheat Export Marketing Amendment Act 2012* (Cth) in November 2012.

In 2008, the WEMA and associated transitional legislation replaced the Export Wheat Commission with a new statutory body, Wheat Exports Australia, which was given 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.²¹

²¹ The relevant transitional legislation is the *Wheat Export Marketing (Repeal and Consequential Amendments) Act 2008* (Cth).

Amendments to the WEMA in November 2012 saw the Wheat Export Accreditation Scheme and the Wheat Export Charge abolished on 10 December 2012, and Wheat Export Australia wound up on 31 December 2012. As per these amendments, the WEMA will be repealed on 1 October 2014 on condition that a mandatory code of conduct has been declared under section 51AE of the CCA by this date.

Until then, parties seeking to export bulk wheat from Australia are required to pass the ‘access test’ in the WEMA until 30 September 2014. The access test, set out in section 9 of the WEMA, 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 CCA, and that undertaking relates to the provision to wheat exporters of access to the port terminal service for purposes relating to the export of wheat; and the access undertaking obliges the person to comply, at that time, with the continuous disclosure rules²² in relation to the port terminal service; and at that time, the person complies with the continuous disclosure rules in relation to the port terminal service; or
- there is in force a decision under Division 2A of Part IIIA of the CCA that a regime established by a State or Territory for access to the port terminal service is an ‘effective access regime’; and under that regime, wheat exporters have access to the port terminal service for the purposes relating to the export of wheat; and at that time, the person complies with the continuous disclosure rules in relation to the port terminal service.

The *Wheat Export Marketing Act 2008* (Cth) will be repealed in its entirety on 1 October 2014 if the Minister for Agriculture has by notice published in the *Gazette* approved a code of conduct and the code has been declared by regulations under section 51AE of the CCA to be a mandatory industry code.²³

The Minister must not approve a code of conduct unless the Minister is satisfied that the code of conduct:²⁴

- deals with the fair and transparent provision to wheat exporters of access to port terminal services by the providers of port terminal services; and
- requires providers of port terminal services to comply with continuous disclosure rules; and
- is consistent with the operation of an efficient and profitable wheat export marketing industry that supports the competitiveness of all sectors through the supply chain; and

²² In summary, the continuous disclosure rules require port terminal operators to publish on their website their policies and procedures for managing demand for port terminal services; a statement, updated daily, setting out, amongst other things, the name of each ship scheduled to load grain using port terminal services, the estimated date on which grain will be loaded into the ship (if known), the date on which the ship was nominated and the date on which the nomination was accepted (this statement is termed the ‘Loading Statement’).

²³ Section 2 and Schedule 3 *Wheat Export Marketing Amendment Act 2012* (Cth)

²⁴ Clause 12 of Schedule 1 to the *Wheat Export Marketing Amendment Act 2012* (Cth)

- is consistent with any guidelines made by the ACCC relating to industry codes of conduct.

If a code of conduct is not approved and declared by 30 September 2014, the WEMA will not be repealed and the current arrangements, including the access test, will continue.