



# CBH Group

Submission in relation to application by  
GrainCorp Operations Limited to vary its Port  
Terminal Services Undertaking

September 2014

## 1. Introduction

The GrainCorp Undertaking that was accepted by the Australian Competition & Consumer Commission ("**ACCC**") on 22 June 2011 and then the variation lodged on 12 November 2013 that was accepted by the ACCC on 19 June 2014, included three year, long term agreements ("**LTAs**"). These LTA arrangements are put into place at the beginning of each year by GrainCorp in accordance with the GrainCorp Port Terminal Services Protocols ("**PTSPs**") set out (so far as is relevant to LTAs) in Annexure A of this submission.

In its application to the ACCC dated 28 July 2014, GrainCorp in not choosing to seek a longer extension of its 2011 undertaking, but a variation involving a one year extension. However, the application does not appear to recognise that the roll over for one year extends the operation of the LTA's under the Undertaking for a further three year period.

In addition, the ACCC's recent reviews of GrainCorp's access undertakings did not consider the operation of GrainCorp's LTA arrangements. In these circumstance, there should, in CBHs view, be a more detailed analysis by the ACCC of the operation of GrainCorp's access undertaking and in particular the operation of the LTA arrangements pursuant to section 44ZZBB of the Competition & Consumer Act (Cth) 2010 ("**CCA**").

We have now set out the reasoning for our view in more detail.

## 2. The Statutory Test

The test the ACCC is to apply in deciding whether to extend an access 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 believes that it is appropriate to do so, having regard to the matters set out in subsection 44ZZA(3). These provisions include, but are not limited to, the following:

- (a) 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;
- (b) the legitimate business interests of the provider of the service;
- (c) the public interest, including the public interest in having competition in markets;
- (d) the interests of persons who might want access to the service; and
- (e) any other matters that the ACCC thinks are appropriate.

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In this circumstance, CBH as a grain exporter on the East Coast of Australia, is a party which might want access to GrainCorp's grain export terminals which remain subject to the Undertaking.

CBH has previously sought to make an application for access to GrainCorp's terminals under the LTA arrangements. However, CBH's experience has been problematic. CBH believes that the process for considering LTA applications and the manner in which GrainCorp seeks to accommodate those interests can be improved and is currently unsatisfactory. In the PTSA, GrainCorp has "full discretion" as to how it will accept an LTA application and to move tonnage to "ensure shippable parcels in each month at each Port Terminal". Under the GrainCorp Undertaking, an LTA applicant must also seek tonnages at each port terminal.

Accordingly, CBH has serious concerns both with the allocation process and terms of the PTSA. CBH is willing to discuss these matters in detail with the ACCC.

In these circumstances, CBH as a person who might want access to GrainCorp's terminals has a legitimate interest in the ACCC's consideration of this matter and on the basis of CBH's views on the operation of the Undertaking, believes it should not be approved in its current form.

### **3. The Undertaking Review**

The ACCC in reviewing this matter has not sought market feedback, presumably on the basis that GrainCorp had only recently sought a variation of its Undertaking. However, that most recent review did not consider the application of GrainCorp's long term access arrangements and their operation on the East Coast of Australia. CBH believes that it is incumbent upon the ACCC to conduct a more detailed analysis of the operation of GrainCorp's Undertaking in order to satisfy itself under the statutory test and in particular to consider the operation of the LTA arrangements.

### **4. GrainCorp LTA Arrangements**

In the ACCC's consultation on CBH's proposed additional clause in relation to its proposed LTA arrangements, the ACCC sought views on CBH's clause based on the following (in general terms):

- Does it provide sufficient certainty and transparency;
- Whether the proposed allocation method was appropriate and balanced the interests of industry participants and the efficient operation of the facility;
- The impact on newer and smaller exporters;
- Do the acceptance thresholds provide sufficient protection from potential issues of discrimination or hindering.

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In CBH's view, the expiry of GrainCorp's existing undertaking should have provided an opportunity for industry participants to review GrainCorp's LTA arrangements and make comments – in particular as to the port allocation, pro rata and transparency perspectives that apply to GrainCorp's LTA arrangements. GrainCorp having "full discretion" to move tonnages with no transparency on allocation is clearly untenable in relation to a transparent allocation system. Further, allocating based on pro-rata scale backs is clearly inappropriate with full discretion given to GrainCorp.

CBH believes that the manner in which GrainCorp requires a spread of capacity among ports has limited if any justification on the basis of efficiency. Each port terminal operates on its own terms, as the ACCC has acknowledged in its assessment of GrainCorp's Newcastle port terminal on a standalone basis. Further, CBH believes that this requirement creates practical issues that CBH would like to discuss on a confidential basis.

### **5. Conclusion**

CBH is prepared to discuss these concerns with the ACCC and in particular the requirement of LTA capacity to be allocated among specific GrainCorp ports as well as the overall LTA process..

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## Annexure A

Schedule 3 – Initial Port Terminal Services Protocols

GRAINCORP OPERATIONS LIMITED

(ABN: 52 003 875 401)

BULK WHEAT and BULK GRAIN PORT TERMINAL SERVICES PROTOCOLS

Document Date: Effective from JUNE 2014

Season: 2013 / 14

Appended as Annexure B to: 2011 / 14 Bulk Wheat Port Terminal Services Agreement

2013 / 14 Bulk Grain Port Terminal Services Agreement (Non-wheat)

2013 / 16 Long Term Port Terminal Services Agreement

These Port Terminal Services Protocols apply to the provision of access to Port Terminals owned by GrainCorp, and the handling of regulated grain (bulk wheat) and other non-regulated grains through the Port Terminals.

These Port Terminal Services Protocols are structured as follows:

### **Part A – Terms and Acronyms**

Part A sets out terms and acronyms used in the Port Terminal Services Protocol.

### **Part B – Long Term Elevator Access Protocols**

Part B sets out the methodology by which GrainCorp will provide Customers with access to Long Term Capacity at Port Terminals operated by GrainCorp.

### **Part C – Terminal Operating Protocols**

Part C applies to the handling of regulated grain (bulk wheat) and other non-regulated grains handled through Port Terminals owned by GrainCorp.

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### **2. ANNOUNCEMENT AND VARIATION OF CAPACITY**

2.1 GrainCorp will set the Indicative Elevation Capacity for each Port Terminal by 31 December in each year prior to the Long Term Nomination Year, for the next three (3) Shipping Years. For example, GrainCorp will set the Indicative Elevation Capacity for the three (3) Shipping Years commencing on 1 October 2013 by 31 December 2012.

2.2 The Indicative Elevation Capacity of Port Terminals:

(a) will at all times be set at a level where no more than 60% of the Indicative Elevation Capacity and Nominated Elevation Capacity for each Port Terminal is allocated to Customers under Long Term Port Terminal Service Agreements. Port Terminal Services Access Undertaking

(b) may be varied from time to time by GrainCorp, provided that no more than 60% of the Indicative Elevation Capacity and Nominated Elevation Capacity for each Port Terminal is allocated to Customers under Long Term Port Terminal Service Agreements.

2.3 GrainCorp will publish the Indicative Elevation Capacity and any variations to the Indicative Elevation Capacity on its website.

### **3. NOMINATION AND ALLOCATION PROCEDURE**

#### ***Invitation of Indicative Long Term Nominations***

3.1 In each Long Term Nomination Year immediately after the announcement of Indicative Elevation Capacity in Part B clause 2.12.1, GrainCorp will invite Indicative Long Term Nominations from all grain exporters who have exported from Port Terminals in the previous year, as well as other grain exporters who make themselves known to GrainCorp.

3.2 An Indicative Long Term Nomination must be submitted to GrainCorp no later than ten (10) business days following the invitation.

3.3 In order to be valid, an Indicative Long Term Nomination submitted under Part B clause 3.23.2 by each Customer must be in the form determined by GrainCorp and must comply with the following:

(a) Port Terminals sought for Long Term Capacity: The Long Term Capacity sought must be at a minimum of one (1) Port Terminals;

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- (b) Distribution of Long Term Capacity sought: The Long Term Capacity sought must be for a minimum of 30,000 tonnes per nominated Port Terminal on an even monthly spread basis for a:
- minimum of ten (10) months per Shipping Year over three (3) Shipping Years, being a
  - minimum of 0.3 Mtpa per nominated Category A Port Terminals;
  - minimum of five (5) months per Shipping Year over three (3) Shipping Years, being a
  - minimum of 0.15 Mtpa per nominated Category B Port Terminals;
  - minimum of three (3) months per Shipping Year over three (3) Shipping Years, being a minimum of 0.09 Mtpa per nominated Category C Port Terminal;
- (c) Maximum monthly volume of Long Term Capacity sought: The Long Term Capacity sought at each Port Terminal must be for a maximum of 50,000 tonnes per nominated Port Terminal, being a maximum of 0.5 Mtpa tonnes per nominated Port Terminal; and
- (d) Total volume of Long Term Capacity sought. The total volume of Long Term Capacity sought must be for a minimum volume of 0.30 Mtpa (if the capacity includes a Category A or Category B Port Terminal) or 0.09 Mtpa (if the capacity does not include a Category A or B Port Terminal) and a maximum volume of 2 Mtpa.

### ***Assessment of Indicative Long Term Nominations***

- 3.4 GrainCorp will complete an assessment of Indicative Long Term Nominations by no later than forty (40) business days following the last day for submission under Part B clause 3.23.2.
- 3.5 Following receipt of an Indicative Long Term Nomination under Part B clause 3.43.4, if there is Sufficient Capacity, GrainCorp will accept the Indicative Long Term Nomination.
- 3.6 Following receipt of an Indicative Long Term Nomination under Part B clause 3.43.4, if there is Insufficient Capacity, GrainCorp has full discretion to either:
- (a) consult with the Customer, and the Customer may re-submit its Indicative Long Term Nomination with a reduced monthly tonnage at a Port Terminal(s) or move its tonnage to another Port Terminal(s), subject to Part B clause 3.33.3, which GrainCorp will

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assess within forty (40) business days from the last day for submission of the original Indicative Long Term Nomination under Part B clause 3.2;

- (b) accept the Indicative Long Term Nomination following a variation in the Indicative Elevation Capacity in accordance with Part B clause 2.22.2; or
  - (c) following consultation with the customer, accept the Indicative Long Term Nomination following the pro rata reduction of each Customer's Indicative Long Term Nomination on a Port Terminal by Port Terminal basis and on a non-discriminatory basis. To ensure capacity for shippable parcels in each month at each Port Terminal, the reduction may be applied by regularly spacing the provided capacity, such as every second month.
- 3.7 GrainCorp will notify each Customer of the result of GrainCorp's assessment of their Indicative Long Term Nomination and any pro rata reduction under Part B clause 3.6(c) and the Customer's Long Term Allocated Capacity on the date of completion of the assessment in accordance with Part C clause 3.4 or the following business day.
- 3.8 The Customer will be required to confirm the Long Term Allocated Capacity and enter into a Long Term Port Terminal Services Agreement within two (2) business days of GrainCorp accepting the Indicative Long Term Nomination.
- 3.9 If a Customer does not confirm the Long Term Allocated Capacity and enter into a Long Term Port Terminal Services Agreement within two (2) business days of GrainCorp accepting the Indicative Long Term Nomination, the Customer will forfeit their Long Term Capacity Allocation. This capacity will be made available to any Customers whose Indicative Long Term Nomination was reduced under Part B clause 3.6(c)3.6(c), up to the tonnage in their original Indicative Long Term Nomination.
- 3.10 GrainCorp will publish each Customer's Long Term Allocated Capacity on its website within five (5) business days of GrainCorp accepting the Indicative Long Term Nomination.