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

Email: [transport@acc.gov.au](mailto:transport@acc.gov.au)

Dear Mr Salisbury

**RE: Graincorp application to vary undertaking – Newcastle port terminal**

**Introduction**

Thank you for the opportunity to comment on Graincorp's application to effectively remove from the obligations of its port access Undertaking the operations of its Newcastle port terminal.

Emerald is Australia's fifth largest grain accumulator and exporter, by volume, and it is important to our business that fair and reasonable access to export facilities is available. We do not own any interest in the Newcastle port facilities and offer an independent perspective on Graincorp's application for variation.

The proposed variation, if accepted, could, potentially, have a significant impact on Emerald, particularly in that it would allow Graincorp to allocate stem at its own discretion, and would remove the mechanism for ACCC arbitration which we believe has in the past made possible a genuine negotiation of reasonable access terms.

At the same time, we recognise that the framework for the regulation of Australian wheat exports should be dynamic, and Graincorp has, through its application for variation, asked a very reasonable question of government and the industry, given the recent development of alternative terminal capacity at Newcastle.

**Emerald Grain Pty Ltd**  
Level 4, 600 Victoria Street  
Richmond VIC 3121

**T** +61 3 9274 8888 **F** +61 3 9274 8889  
**emeraldgrain.com**

## **Regulation of individual facilities**

It is evident that Graincorp now faces competition at the port of Newcastle; however this is not a unique situation. Emerald's grain terminal at the port of Melbourne faces competition from Graincorp's Geelong terminal, in the same way that Graincorp's Brisbane terminal faces competition from QBT. CBH is starting to face competition at its WA ports.

When the ACCC issued its draft decision on Graincorp's original Undertaking, on 6 August, 2009, it made this observation:

*In having regard to the WEMA, the ACCC has not conducted a comprehensive market analysis in relation to each of the ports that will be subject to the proposed Undertaking to assess whether they should be subject to access regulation. Rather, the role of the ACCC in this context is to decide whether the Undertaking proposed by GrainCorp is appropriate. The ACCC considers that parliament has expressed a clear intention to require port terminal operators to provide access undertakings to mitigate the potential for anti-competitive harm, and it is in this context that the ACCC must consider the appropriateness of those undertakings as provided.*

For the ACCC to accept Graincorp's variation would be to reverse its previous position, and, presumably open the way for other port operators to make similar applications for relief from regulation.

On the other hand it should be acknowledged that Graincorp's application is consistent with the views of the Productivity Commission that the regulatory regime for wheat should be better aligned with competition principles following an orderly transition period to the end of 2014:

*"...the current access test arrangements fail to recognise that the benefits and costs of regulating access to port terminals varies across facilities. Each facility is likely to have varying degrees of market power, for example, and will differ in terms of its national significance.....This means the regulatory arrangements under the access test are unlikely to be optimal, and the test would be better targeted if it was based on assessments of individual facilities (as occurs under Part IIIA) rather than ownership structures alone.*

**Productivity Commission Report on Wheat Marketing Arrangements 28 October 2010 Ch 5 pp237,238**

## Competition and excess capacity at Newcastle

Graincorp has submitted that there is excess elevation capacity at Newcastle based on the following assumptions:

<b>Terminal</b>	<b>Operator</b>	<b>Elevation capacity (tonnes)</b>	<b>Loading speed (tonnes per hour)</b>
<b>Graincorp</b>	Graincorp	2,500,000	3,000
<b>NAT</b>	Glencore Olam CBH	1,500,000	2,500
<b>Louis Dreyfus</b>	Louis Dreyfus	300,000	?

This analysis leads Graincorp to conclude that annual grain export capacity exceeds average annual export volumes by a factor of more than 4 times. However theoretical capacity is cold comfort for exporters if it is not, in practice, accessible.

The Louis Dreyfus facility has been used, as far as we are aware, exclusively by Louis Dreyfus. Moreover, the LD facility has a relatively inefficient load rate making it sub-optimal for a long term export strategy out of Newcastle.

The new and more efficient NAT facility is owned by two multinational companies and the financially strong CBH. Graincorp points out that Glencore has invested in up-country storage in the Newcastle port zone, and it can be expected that CBH will also develop or joint venture up-country storage to justify its port terminal investment and as a focus for its move into accumulation on the Eastern seaboard. It is not unreasonable to assume that the NAT shareholders will in normal seasons expect or be bound to put close to 1m – 1.2m tonnes of their own grain purchases across the belt at the NAT terminal.

In our view, there is likely to be only 300K – 500K tonnes of available elevation capacity at NAT for independent exporters like Emerald, Cargill and others and the practical availability of stem in the more popular months post-harvest could be much tighter.

Graincorp's analysis of excess capacity is also predicated on its own capacity being available. However, if Graincorp is allowed to allocate its elevation capacity in a completely unregulated manner, it has to be assumed that Graincorp's capacity will be withdrawn, in part or in whole, from the industry.

Graincorp has consistently argued in the past that such a scenario is unrealistic given that capacity far exceeds usage, and that it is therefore in Graincorp's interest to provide open access. In the past, that may have been the case. More recently major multinational grain companies have acquired or sought to acquire infrastructure in Australia, and the potential for such companies to desire and implement closed loop supply chains for global business is now very much a reality. It is also likely in this counterfactual scenario that Graincorp would have greater incentive matched with opportunity to foreclose access to its dominant up-country storage and rail assets in the Newcastle zone.

With only 300K - 500K of NAT stem potentially available, on our view, it is unlikely that exporters like Emerald, without any significant investment in assets, would take the risk of accumulating grain in the Newcastle port zone, given the likely challenge in competing to accumulate grain up-country and obtaining freight, outside the Graincorp system.

### **Unequal application of regulation**

We do not believe that unequal application of regulation in the context of the wheat market is a bad thing. It should be remembered that the current regulatory scheme was introduced out of concern that the major BHCs would establish so-called 'regional monopolies', and it was not designed, as far as we are aware, to deter new investment, and therefore competition, at port. There is a danger that a "one size fits all" approach to regulation may be counter-productive to competition. New investors need, in particular, the ability to underwrite the risk of the investment in the form of take-or-pay arrangements.

We also observe that Graincorp does not demonstrate in its submission what the impacts are of the unequal application of regulation, apart from vague claims about constraints on flexibility and operational constraints. It is noted Graincorp already enjoys the ability to negotiate flexible long term contracts for 60% of its capacity at Newcastle, including making arrangements with its own trading arm. It is also noted that even prior to the introduction of long term capacity contracts, Graincorp's trading arm has been the largest exporter serviced at Newcastle since export deregulation,

with 46% share of exports. We conclude that the impacts on Graincorp of unequal application of regulation are not excessive.

### **Code of Conduct**

We understand that the work on a mandatory industry code of conduct for port operators, as prescribed in the Wheat Marketing Amendment Act 2012 is continuing. We acknowledge Graincorp's concern about uncertainty at this time; however if the Mandatory Code remains a realistic goal for the Government, then it would be far more preferable that Graincorp's Undertaking be rolled over temporarily than the proposed variation be accepted by ACCC, thus risking a future claim from Graincorp for relief from the Mandatory Code on the grounds of competition / excess capacity.

Even if this is not perceived as a risk, if ACCC accepts at this time that Graincorp should be exempt from the anti-discrimination provisions of its Undertaking as far as they pertain to its Newcastle terminal, it would then be illogical for the Government to propose a new Code which prohibited terminal operators favouring their own trading arms. Emerald is of the opinion that the anti-discrimination provision should be an important cornerstone of a new Code, and is concerned that variations to current Undertakings may erode this principle ahead of necessary debate on the shape and content of the Code.

### **Conclusion**

The Graincorp application raises some important questions about the basis of the regulation of wheat marketing arrangements in Australia. Emerald's sense is that Graincorp's case, though reasonable, is not compelling, and that the ACCC should not pre-empt the important discussions that need to be held around the next stage of regulation by accepting Graincorp's application at this time.

Yours sincerely



**Ashley Roff**

**Legal Counsel and Company Secretary**