GLENCORE
GRAIN PTY LTD
ABN 29 106 378 885
Level 8, 484 St Kilda Rd Melbourne, Vic, 3004

For public register

6 February 2014

Mr David Salisbury
Deputy General Manager
Fuel, Transport and Prices Oversight
Australian Competition and Consumer Commission
GPO Box 520
Melbourne VIC 3000
transport@accc.gov.au

Dear Mr Salisbury

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

Introduction

This letter sets out Glencore Grain Pty Ltd's comments in relation to the matters raised in the ACCC's Issues Paper dated 12 December 2013 concerning GrainCorp's proposal to vary its 2011 Port Terminal Services Access Undertaking.

The purpose of the proposed variation is to reduce the level of access regulation that applies to the Carrington terminal operated by GrainCorp at the Port of Newcastle.

Glencore's Views

Glencore agrees with a number of matters set out in GrainCorp's application. In particular, Glencore considers that:

- the unequal application of access regulation can create potential risks to, and place unwarranted limits on, effective competition; and

- access regulation should not be applied in a way that limits the ability of infrastructure owners to engage commercially with customers, and enter into flexible and efficient commercial agreements to meet the evolving (and often different) requirements of customers. Glencore agrees both with the importance of developing genuinely commercial arrangements with customers, and with GrainCorp's observation that there are some obstacles to this within the current regulatory regime (in particular the broadly drafted non-discrimination provision).

Addressing this issue will be critical in any discussions concerning the proposed new Code of Conduct.

GLENCORE
GRAIN PTY LTD
ABN 29 106 378 885
Level 8, 484 St Kilda Rd Melbourne, Vic, 3004

However, Glencore's strong view is that the regulation of port terminal services should apply equally across all export grain terminals, and not just across the grain export terminals at the Port of Newcastle. The application of different levels of regulation to export port terminals in Australia gives rise to significant potential for competitive distortions across the export grain industry, the costs of which may ultimately be borne by growers. For this reason, Glencore has consistently advocated that any proposed Code of Conduct should apply equally to all port terminal operators in Australia.

There is a real risk that our concerns in relation to the existing application of the "access test" to some port terminal operators and not others would be further exacerbated if a lower standard of regulation was applied to GrainCorp's Carrington terminal.

Glencore also questions whether it is appropriate for the ACCC to accept a variation to an access undertaking, the effect of which would be to remove all rights of access to the port terminal service provided by means of GrainCorp's Carrington terminal. In Glencore's view, the key feature of any access undertaking should be that it provides some rights of access to the relevant service.

However, the effect of GrainCorp's proposed variation is that:

- "GrainCorp would no longer be required to provide access to any customer at Carrington (including according to standard terms) and will have discretion who it contracts with" (Issues Paper, page 15);

- GrainCorp would not be required to offer services at Carrington at the Reference Prices and would not be subject to any restrictions on its ability to change its prices (Issues Paper, pages 15 and 17);

- access seekers would have no recourse to independent arbitration if they cannot agree on the availability or terms of access; and

- "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" (Issues Paper, page 15).

In these circumstances it appears that, following the proposed variation, access seekers would not have any substantive rights to use, or to negotiate access to, GrainCorp's Carrington terminal.

GrainCorp would have complete discretion in determining which (if any) exporters can use its terminal, and the terms on which that access might or might not be available. Put simply, the access undertaking would not provide any rights of access at all in relation to the Carrington terminal.

GLENCORE
GRAIN PTY LTD
ABN 29 106 378 885
Level 8, 484 St Kilda Rd Melbourne, Vic, 3004

In assessing GrainCorp's application, the ACCC will therefore need to consider whether:

- this approach is consistent with the general objects of an ACCC access undertaking under Part IIIA of the Competition and Consumer Act 2010 ("CCA");

- this approach is consistent with the requirement in section 44ZZA(1) of the CCA that a written access undertaking accepted by the ACCC must be "in connection with the provision of access to the service" (in this case, the port terminal service at Carrington terminal); and

- having regard to section 44ZZA(3)(c) of the CCA, the granting of no access rights to access seekers in respect of access to the Carrington terminal gives appropriate weight (or indeed any weight) to "the interests of persons who might want access to the service".

GrainCorp and the ACCC may also wish to consider whether an access undertaking that provides no rights of access to the Carrington terminal is capable of satisfying (or instead effectively seeks to circumvent), the "access test" in the Wheat Export Marketing Act which provides that:

- "A person passes the access test in relation to a port terminal service [i.e. a service provided by means of the "port terminal facility" at Carrington] at a particular time if ... at that time, there is in operation, under Division 6 of Part IIIA of the Competition and Consumer Act 2010, an access undertaking relating to the provision to wheat exporters of access to the port terminal service for purposes relating to the export of wheat" (emphasis added).

If the ACCC has any questions in relation to the matters raised in this letter, Glencore would be pleased to assist.

Yours sincerely

Damian Fitzgerald
Director Legal

PO Box 7656, St Kilda Road, VIC, 8004. Phone: 1300 453626 Fax: +61 3 9864 2002