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SUBMISSION

Proposed variations to Port Terminal Services Access Undertaking

NOVEMBER 2013

GrainCorp

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1. SUMMARY

1.1 INTRODUCTION AND BACKGROUND

GrainCorp makes this submission in support of its application to vary its 2011 Port Terminal Services Undertaking. The proposed variations aim to reduce the regulatory obligations for GrainCorp's Newcastle Port Terminal in light of the high level of competition it faces from the two neighbouring unregulated bulk wheat export terminals, the Louis Dreyfus Commodity Terminal and the Newcastle Agri Terminal (NAT).

GrainCorp is proud of its track record as a commercial and open access provider to grain exporters wishing to use its port infrastructure, before and after wheat export access regulation was implemented in 2009. GrainCorp remains strongly committed to this approach and has strong commercial incentives to continue operating in this manner, 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.

The competitive environment in eastern Australia has been confirmed by the ACCC in its numerous findings. For example, in its Final Decision accepting GrainCorp's Port Terminal Services Undertaking determination in 2011, the ACCC stated:

> *The ACCC notes in particular that port terminal capacity is relatively unconstrained on the east coast and that the export of bulk wheat through GrainCorp's port terminals are subject to a number of competitive pressures, including from domestic users, up up-country supply chains, from other ports and the threat of customers by-passing GrainCorp facilities..... incentive for self-preferential treatment is moderated by countervailing competitive pressures in the case of GrainCorp.*

Given this competitive environment, and by working closely with the ACCC and our customers, GrainCorp has demonstrated it can commercially operate under more flexible access arrangements that included:

- A "first-in-first-served" system of elevation capacity allocation,
- Long Term Agreements, allowing us to reserve long term capacity for our own and customer's use, and
- Day to day flexibility in managing elevation capacity with our customers through out of protocol arrangements agreed to by our customers.

As the Australian Competition & Consumer Commission (**ACCC**) is aware, construction is underway of the new bulk grain port terminal at Newcastle near our port terminal, known as the Newcastle Agri Terminal (NAT), which is scheduled to receive bulk export wheat in early 2014.

GrainCorp has previously expressed our concern regarding the significant competitive disadvantage our export terminal at Newcastle will be subject to as NAT, along with another port terminal owned by Louis Dreyfus and Mountain

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Industries (LDA), will not be subject to the access test under the *Wheat Export Marketing Act 2010 (**WEMA**) (*as amended by the *Wheat Export Marking Amendment Act 2012)* and therefore not required to submit a Port Undertaking to the ACCC.

This two-tiered regulatory regime has been a source of considerable concern to GrainCorp for some time, subjecting the company to increasingly inequitable regulation of bulk grain terminals coupled with the growing unregulated container trade. This creates an unlevel playing field which in terms undermines fair and equitable competition for the export of bulk wheat and other grains, in particular at Newcastle.

1.2 LIMITATIONS OF THE CURRENT PORT UNDERTAKING

GrainCorp faces a very competitive market at Newcastle for the export of bulk wheat and other grain. In fact, Newcastle will be the most competitive port for bulk export grain in Australia with the 3 port terminals having a combined **4.3 million tonnes of annual elevation capacity** to service an average bulk export grain **demand of only 1.1 million tonnes** and peak demand of 1.8 million tonnes.

Based on our calculations (see section 3 below), the combined capacity of NAT and LDA can comfortably handle the total annual average and peak bulk grain export task at Newcastle.

GrainCorp's current Port Undertaking places our Newcastle port terminal at a competitive disadvantage against NAT and LDA, which are not subject to regulation, where we have:

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 minimise 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.

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'.*

In varying the Port Undertaking for the Newcastle Port Terminal we are seeking the following objectives:

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

1.3 PROPOSED VARIATIONS TO PORT UNDERTAKING

The combination of:

1. Strong competition;
2. Significant excess capacity; and
3. Unequal application of regulation

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

The proposed changes can be implemented under the current WEMA, as follows:

- 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.

1.4 STRUCTURE OF THIS SUBMISSION

The remainder of this document provides:

- An overview of the competitive grain market in Northern NSW
- Competitive bulk elevation at Newcastle
- Impact of inequitable regulation on GrainCorp's port terminal at Newcastle
- Details of the additional proposed variation of the Port Undertaking

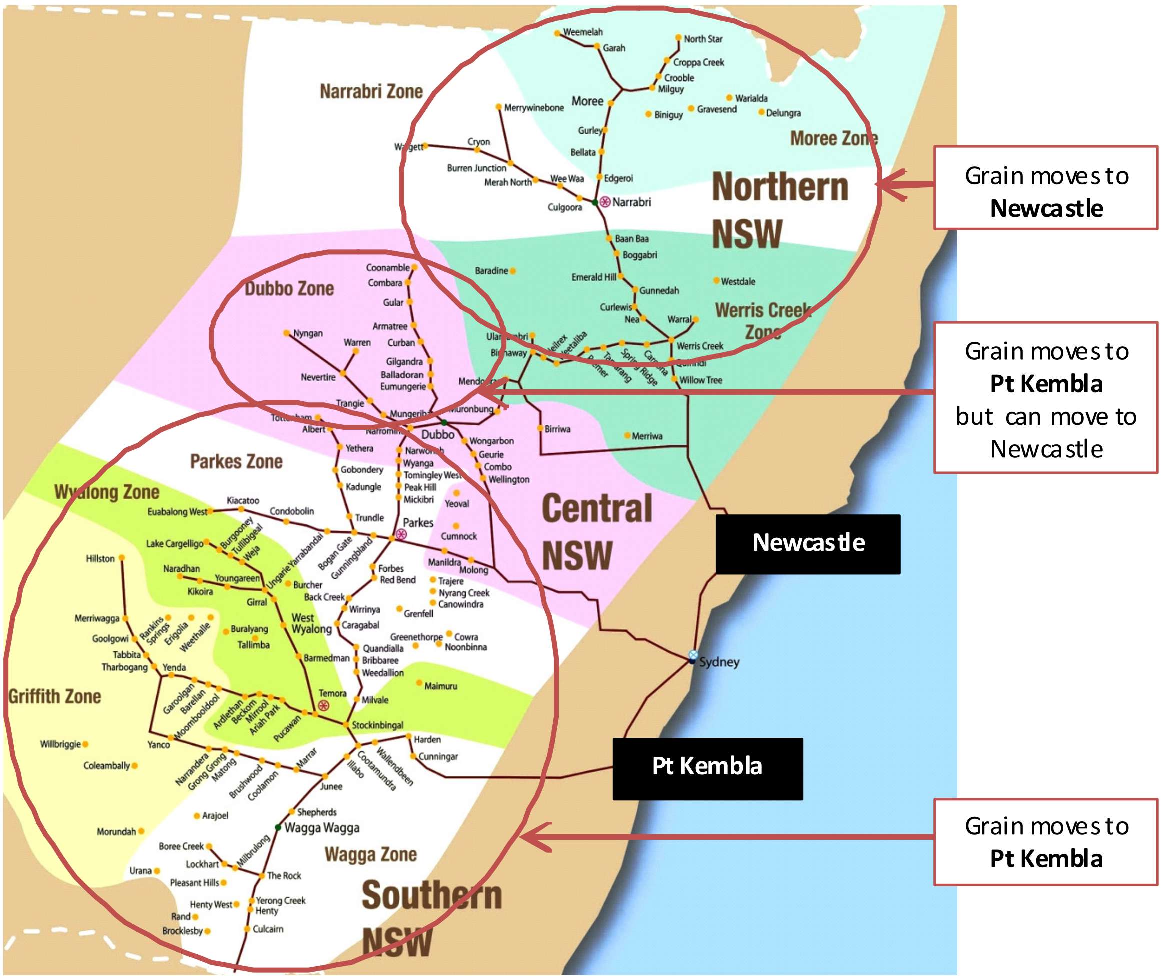
2. INDUSTRY CHARACTERISISTICS

2.1 THE NEWCASTLE PORT ZONE IN NORTHERN NSW

As shown in the map below, the Newcastle port services bulk export grain from Northern NSW from the country silos on the Narrabri to Moree rail line and from country silos on the branch lines to Weemelah, North Star and Walgett.

Rail plays an important role in bulk export grain from Northern NSW due to the longer hauls, of 400 to 550km, to Newcastle. However grain grown closer to Newcastle on the Liverpool Plains, of 250-350km, tends to move by road into the large local domestic market.

Bulk export grain from the country silos on the Coonamble and Nyngan rail lines in Central NSW are usually consigned to Port Kembla but can be consigned to Newcastle by rail for a small additional cost via the longer rail route via Binnaway, (due to restricted access via the shorter rail line via Ulan).



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2.2 NORTHERN NSW GRAIN FLOWS

Northern NSW produces on average 3 million tonnes of grain per annum. While total grain production is less variable than other regions, given the two planting seasons for winter and summer crops, bulk grain exports remains variable.

The variability of bulk exports is due to:

- Fluctuating annual crop size, combined with
- The 'first claim' domestic and container markets have for grain (in particular sorghum) from Northern NSW.

The movement of grain from Northern NSW is shaped by the interplay of the export and domestic markets – which changes from year to year. Grain from Northern NSW can move east into the export and domestic markets (by rail and road) but also can move north and south into the large domestic markets. As a broad illustration:

GRAIN SOURCE	DESTINATION
Liverpool Plains	Predominately sold to the local feedlots or to 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

Accordingly growers in Northern NSW enjoy a very competitive grain market with ready access to a large number of buyers for their grain. An overview of the characteristics of the Northern NSW grain market are summarised in the table over the page:

- Around 75% of the 3 million tonne average grain production comprises winter crops, predominately mid to high protein wheat. Around 25% of grain production is summer crops, predominately sorghum.
- GrainCorp receives 66% of this grain production from Northern NSW, around 2 million tonnes, into its country silos. The volume of grain bypassing GrainCorp country silos ranges from 850,000 tonnes to 1.2 million tonnes. GrainCorp's share of country grain has trended down from 70-80% and is expected to decrease with the growth of competing country silos. A large portion of the grain that is received into GrainCorp silos is consigned to the major flour millers.

- The majority of the grain from Northern NSW, (63% of grain production and around 2 million tonnes), is consigned into the domestic and container markets. GrainCorp does not have access to statistics for the domestic and container split, but estimates that in excess of 0.5 million tonnes would be handled by the local container packers.

- Based on past GrainCorp bulk exports statistics, around 37% of grain production is exported in bulk through Newcastle, approximately 1.1 million tonnes annually of which:

  - Currently ~15% of this grain is received from third-party country silos, and

  - ~90% of grain is received by rail from GrainCorp and third-party country silos.

Volume Metrics - Northern NSW

Million tonnes				Drought							
	FY04	**FY05**	**FY06**	**FY07**	**FY08**	**FY09**	**FY10**	**FY11**	**FY12**	**FY13**	**AVG**
Grain Production											2.94
Winter share											77%
GNC Receivals											**1.95**
Est non GNC receivals											0.98
GNC Country Share					**Redacted**						66%
GNC Bulk Exports											**1.08**
Rail Share											92%
Est Domestic & Containers											1.85
Est Bulk Export Share											37%

2.3 COMPETITIVE GRAIN MARKET IN NORTHERN NSW

The large range of marketing options in northern NSW has supported the construction and operation of a range of grain storage and container packing options that have the capacity to handle most of the grain production. The major competing country silos and container packers are shown in the below tables, where:

- GrainCorp operates 25 country silos in Northern NSW and faces competition from 10 major country silos. These country silos are owned by major grain exporters; Cargill, Glencore and Louis Dreyfus.

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

  - Most of these competing independent country silos have access to bulk or containerised grain trains, contracted by the owner of the facility or the exporter.

  - The 4 competing Narrabri country silos, located on a major rail and road transport hub, have the potential to service a larger catchment area, including grain from the western branch lines.

- GrainCorp also faces significant competition from on farm storage. Growers in Northern NSW are larger and more sophisticated and have access to large on-farm storage with fumigation capability.

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Major independent country silos

Competitor	Rail Access	Site	Capacity	Nearest GNC Silo	GNC Avg Recivals
Redacted					
Northern NSW Competition Capacity			**795,000**	**GNC Receivals**	**1,217,361**
				Total GNC Receivals	2,033,808
				Silos with competition	60%

- GrainCorp also faces competition from 8 local container packers with an estimated capacity of 1 million tonnes. This includes packers owned by major grain exporters; Glencore and Louis Dreyfus.

Major container packers

Competitor	Location	Est Packing Capacity
Redacted		
Total		**1,100,000**

2.4 COMPETITIVE RAIL ARRANGEMENTS IN NORTHERN NSW

Northern NSW is part of the NSW standard gauge rail network and is serviced by a number of competing train services contracted by grain exporters from a range of rail providers. Around 90% of bulk export grain is moved by rail transport into Newcastle, from both GrainCorp and third-party country silos.

The incumbent rail provider, Pacific National, supplies rail to a number of grain exporters and can readily relocate trains within NSW (and to some extent to the standard gauge network in Victoria).

Rail services are increasingly being supplied by new rail providers such as Qube, Aurizon (from QLD) and G&W (from SA). While most export bulk grain is moved in bulk wagons, Louis Dreyfus use flat wagons with specially built 'container' to handle bulk grain.

It is also estimated that over 50% of domestic and containerised grain is moved by rail. Containerised grain is moved on flat wagons that are used for containers.

It is estimated that there are 17 standard gauge export trains in NSW which can service northern NSW, of which GrainCorp currently own or contract eight of these trains. In addition to export trains, domestic customers also operate 7 trains in NSW which also service grain from Northern NSW.

The number of trains can vary up and down or be moved within NSW or to Victorian standard gauge depending on seasonal conditions. However most contracts with rail providers include a 'take or pay' component regardless of volume moved.

In the forthcoming harvest it is estimated that only 2-3 export trains would be located in Northern NSW, due to poor seasonal conditions.

NSW Standard Gauge Export & Domestic Trains

Exporter	NSW Trains	Rail Provider	Domestic	NSW Domestic
		Redacted		
Total Trains	**17**		**Total Trains**	**7**
GrainCorp Shai	**47%**		**GrainCorp Share**	**0%**

3. COMPETITIVE BULK EXPORT GRAIN ELEVATION AT NEWCASTLE

3.1 HISTORICAL GRAIN EXPORTS THROUGH NEWCASTLE

Bulk grain exports through Newcastle, based on GrainCorp's historical information, range from nil to 1.8 million tonnes. Average bulk grain export is 1.1 million tonnes and 1.3 million tonnes if the two drought years are excluded.

- Over 90% of the bulk grain export is wheat, predominately destined to North Africa and Middle East and North Asia that seek mid to high protein wheat grades. Newcastle handles some sorghum, barley and canola on an opportunistic basis.

- The largest exporter serviced at Newcastle port since export deregulation is GrainCorp, with 46% share of exports. The other major grain exporters are Cargill and Glencore. GrainCorp attracted this share of the export wheat market following the AWB's "Oil for food" scandal as many customers moved away from AWB.

We expect increasing competition in the supply of wheat from Newcastle to overseas customers with:

- CBH, and other grain exporters, seeking to supply wheat to GrainCorp customers,

- Cargill making inroads in the quality conscious North African markets, and

- Glencore making inroads in the price conscious Middle East markets such as Iraq.

Customer Metrics - GrainCorp Newcastle Terminal Exports

Million tonnes				Drought								
Customer	**FY04**	**FY05**	**FY06**	**FY07**	**FY08**	**FY09**	**FY10**	**FY11**	**FY12**	**FY13**	**5 Yr Avg**	**Share**
											0.60	46%
											0.43	33%
											0.10	8%
Redacted											0.06	4%
											0.04	3%
											0.01	1%
											0.00	0%
											0.06	5%
Total	**1.05**	**1.84**	**1.24**	**0.22**	**0.02**	**1.26**	**0.97**	**1.38**	**1.64**	**1.25**	**1.30**	**100%**

Commodity Metrics - GrainCorp Newcastle Terminal Exports

Million tonnes				Drought								
Customer	**FY04**	**FY05**	**FY06**	**FY07**	**FY08**	**FY09**	**FY10**	**FY11**	**FY12**	**FY13**	**10 Yr Avg**	**Share**
											1.01	93.6%
											0.04	3.6%
Redacted											0.01	1.3%
											0.01	1.2%
											0.00	0.2%
Grand Total	**1.05**	**1.84**	**1.24**	**0.22**	**0.02**	**1.26**	**0.97**	**1.34**	**1.63**	**1.25**	**1.08**	**100%**

3.2 COMPETITOR BULK FACILITIES AT NEWCASTLE

With the commissioning of the new Newcastle Agri-Terminal (NAT) Newcastle, will be serviced by three competing bulk grain facilities. This will make Newcastle the most competitive bulk grain port in Australia.

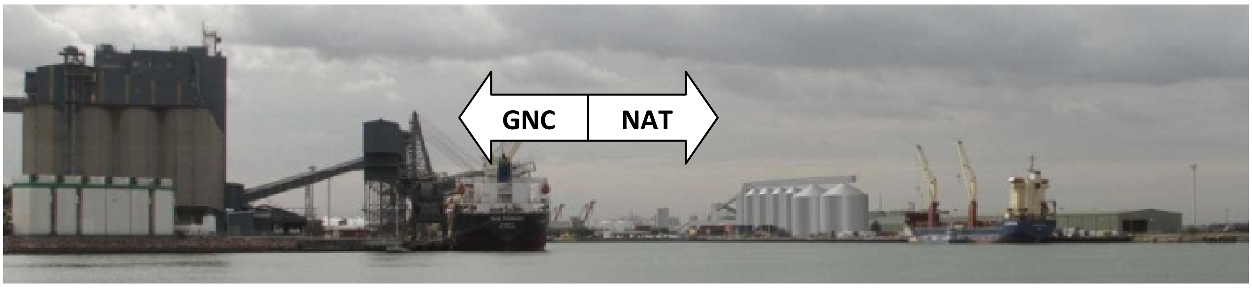
a) Louis Dreyfus Commodity Terminal was opened in 2011 and is owned by a joint venture between Louis Dreyfus and Mountain Industries. This shed facility is located at Kooragang Island with access to:

- Rail using specialised containers on a train where the containers with bulk grain are transhipped to the shed, and
- Ship loader, using road to a nearby common user bulk ship loader owned by Qube.

GrainCorp believes this facility has shipped 200,000 tonnes per annum of bulk grain.

b) Newcastle Agri Terminal (NAT) is owned by a joint venture between Glencore, Olam and CBH. This facility is located on Dyke 2 at Newcastle and is expected to be commissioned in the next year. This new facility, as shown in the artist's impression below, will have comparable capability to our Newcastle Terminal Elevator as outlined in the table below. NAT in their public disclosures has stated that this facility can ship up to 1,500,000 tonnes annum of bulk grain.

Artist's impression of new NAT port terminal **(Source NAT Development Application)**



CAPABILITY	NEWCASTLE AGRI TERMINAL (NAT)	GRAINCORP
Rail receival	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

3.3 BULK GRAIN EXPORT CAPACITY AT NEWCASTLE

Newcastle will have significant excess bulk export grain capacity, as estimated in the table below that takes into account the (combined rail and road) inbound and loading capabilities at the 3 port terminals.

GrainCorp estimates that Newcastle, based on a 42 week shipping year, will have a combined elevation capacity of 4.3 million tonnes per annum and 450,000 tonnes per month, 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.

Estimated total bulk export capacity at Newcastle

Estimated Elevator capabilities -->

	Ship elevation	Rail elevation	Road Elevation	Storage (T)
GrainCorp	**Redacted**			
NAT (1)				
LDA (1)				

Estimated elevator capacity based on capabilities -->

	Ship elevation	Rail elevation	Road Elevation	Storage
GrainCorp	**Redacted**			
NAT (1)				
LDA (1)				
Total Capacity				
Notes	*(2)*	*(3)*	*(4)*	*(5)*

Estimated total handling capacity -->

	Annual Capacity	Turns / pa	Monthly Capacity
GrainCorp	**2,500,000**	18 X	**257,937**
NAT (1)	**1,500,000**	27 X	**154,762**
LDA (1)	**300,000**	8 X	**30,952**
Total Capacity	**4,300,000**	18 X	**443,651**
Notes	*(6)*		*(7)*

(1) NAT and LDA are GrainCorp estimates
(2) Assumes 16 hours per day for 125 days per year
(3) Assumes trains for 6 days a week for 42 weeks
(4) Assumes 8 hours per day for 6 days a week for 42 weeks
(5) Assumes storage turns every week for 42 times per year
(6) Capacity is rounded based on inbound or shipping constraint
(7) Annual capacity over 42 weeks converted to monthly

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3.4 EXCESS BULK GRAIN EXPORT CAPACITY AT NEWCASTLE

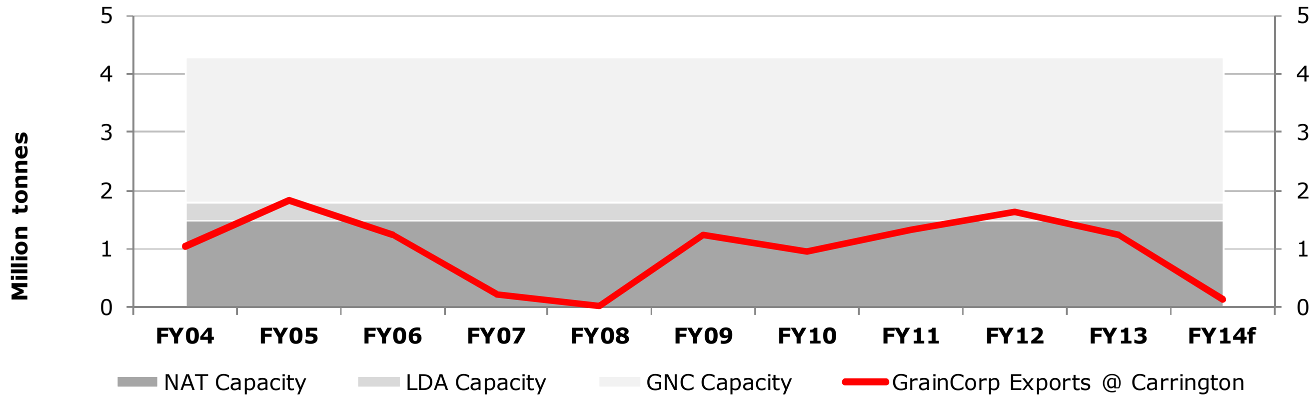
Newcastle will have significant excess bulk export grain capacity at Newcastle against an average bulk export grain task of 1.1 million tonnes currently handled at Newcastle and peak bulk grain exports, in terms of both annual and monthly elevation capacity.

As shown in the graphs below, the combined capacity of NAT and LDA can comfortably handle the annual average and peak bulk grain export task through Newcastle where:

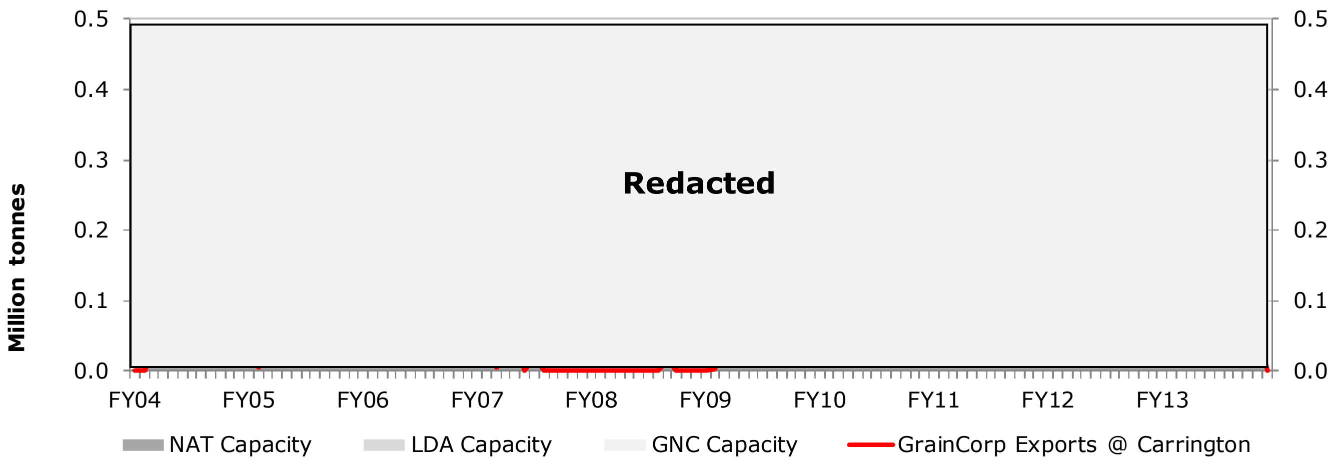
- Based on annual elevation capacity of 4.3 million tonnes: The average annual utilisation of capacity, based on past actual annual exports, is 23% with peak of 43% in 2005 then 38% in 2012. That is annual capacity exceeds average annual export volumes by a factor by more of 4x.

- Based on monthly elevation capacity of 450,000 tonnes: The average monthly utilisation of capacity, based on past actual annual exports, is 20% with peak of 62% in January 2005 then 54% in August 2006. That is monthly capacity exceeds average export volumes by a factor by more of 5x.

Total grain elevation capacity vs GNC exports at Newcastle - Annually



Total grain elevation capacity vs GNC exports at Newcastle - Monthly



4. IMPACT OF INEQUITABLE REGULATION

4.1 INEQUITABLE REGULATION AT NEWCASTLE

GrainCorp is being disadvantaged by the unequal application of access regulation where its port terminal at Newcastle is regulated but the competing port terminals (whose shareholders are also vertically integrated) are not regulated.

The NAT and LTA port terminals, given their joint venture structure, are not required to meet the requirements of the Access Test under Section 9 of the WEMA*.*

This gives NAT and LDA port terminals, owned by four large export competitors, a major competitive advantage over GrainCorp's port terminal as they 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 a 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.

The ability for our major customers to secure access from NAT and LDA under non regulated and flexible terms has contributed to GrainCorp losing export volume at Newcastle, as demonstrated by the following facts:

- No third party grain exporter sought long term capacity at Newcastle under the new LTA Port Protocol in May 2013, and
- Only 1 third party grain exporter (Cargill) has sought (limited) short term capacity at Newcastle (with only 40,000 tonnes of short term capacity booked).

4.2 IMPACT OF THE INEQUITABLE REGULATION AT NEWCASTLE

GrainCorp's port terminal at Newcastle operates under the restrictive regulatory requirements contained in the *WEMA* along with a *Port Terminal Services Undertaking* and a *Port Services Protocol* that must be approved by the ACCC*.*

NAT and LDA are not bound by these restrictive regulatory requirements and operate their infrastructure under normal commercial terms, subject to normal contract and competition laws in line with most port terminal operators for other commodities in Australia.

The cost and burden in regulating only GrainCorp's Newcastle's port terminal is inequitable and unwarranted as:

- ACCC has recognised that GrainCorp in general is constrained by domestic and container export competition across eastern Australia, and

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- Newcastle in particular is constrained by two nearby unregulated vertically integrated port terminals.

These requirements work together in a way that places our Newcastle port terminal, and potentially 'border area' grain moving to our Port Kembla and Brisbane port terminals, at a competitive disadvantage against NAT and LDA in the following ways:

1. **Constraint on contract flexibility:** We have limited commercial freedom to enter into flexible and efficient contractual arrangements for our own grain and with other exporters to secure and retain export grain volume into our port. The following regulatory arrangements impede this commercial freedom given the obligation to:
    - Publish and offer to provide services to all customers on uniform standard terms;
    - Seek ACCC approval (including public consultation) to vary the standard terms;
    - Not discriminate in favour of our own export grain. While this obligation is caveated to the extent that the cost of providing access to other customers is higher, in practice this is very difficult for GrainCorp to determine without risking breaching the undertaking; and
    - Be subject to external dispute resolution procedures that include the ACCC.
2. **Operational constraints:** We have limited operating freedom to manage elevation capacity between conflicting customer requirements in a flexible manner to optimise our service offering and minimise operating costs. The following regulatory arrangements impede this operating freedom given the obligation to:
    - Publish a port protocol that had to be approved by the ACCC outlining how elevation capacity is allocated;
    - Follow a rigid procedure before varying the port protocols, with any variation subject to an objection right by the ACCC and an extensive consultation period with all customers, making rapid response to market or competitive pressures impossible;
    - Operate under prescriptive rules in the port protocols to manage capacity. As any breach of these rules is a breach of the Undertaking, GrainCorp has no flexibility to modify its operations where it would result in greater efficiency and benefit to customers; and
    - Not provide different access arrangements for our own grain and other parties' grain.
3. **Pricing:** GrainCorp has limited pricing freedom to apply flexibility and to enter into private pricing arrangements to allocate elevation in an efficient manner. The following regulatory arrangements impede this pricing freedom given the obligation to:
    - Publish and provide standard reference prices;
    - Follow a prescribed process to vary the reference prices; and

- Be subject to external dispute procedures by the ACCC if the fees change by more than CPI.

4. **Limited confidentiality:** GrainCorp has limited confidentiality in managing our commercial business and operations. The following regulatory arrangements impede this confidentiality freedom given the obligation to:

    - Publish information on capacity, vessels to be loaded and stock information;
    - Publish access terms and prices for GrainCorp owned grain; and
    - Provide extensive information to the ACCC and to be subject to audit by the ACCC.

5. OVERVIEW OF PROPOSED CHANGES TO THE ACCESS UNDERTAKING

5.1 NEW ACCESS ARRANGEMENTS SOUGHT

GrainCorp is seeking regulatory equality at Newcastle, given the significant excess elevation capacity and competing elevation options for exporters at this port.

GrainCorp recognises that the proposed new Mandatory Code, if approved by the Minister under the *Wheat Marketing Amendment Act 2012*, could overcome the above regulatory inequalities outlined above.

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

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

GrainCorp is seeking a level regulatory playing field to support fair and equitable competition at Newcastle for this season and to provide a regulatory precedent for the following seasons if regulatory equality is not achieved by 1 October 2014 through the new Mandatory Code.

The solution proposed by GrainCorp provides a way for the objectives and requirements 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.

5.2 PROPOSED NEW PORT UNDERTAKING AND PORT PROTOCOL FOR NEWCASTLE

A move to more equitable regulation can be implemented under the current WEMA*,* based on the following approach:

a) ACCC approving a variation to our current Port Undertaking (that expires on 30 September 2014) that would still meet the required access test under the Act. The variation of the Port Undertaking, to support commercial and pricing flexibility, would exclude the application of certain obligations at GrainCorp's Newcastle port terminal.

b) GrainCorp will continue to be required to meet the Continuous Disclosure Rules as required under the Act, which includes the publication of the shipping stem and having a port protocol. This port protocol however, to support operating freedom, would be amended for Newcastle and only include the basic principles to receive and manage vessel nominations.

It should be noted that these amendments will still continue to place a higher regulatory burden at our port terminal at Newcastle, as our competitors are not required to meet the Continuous Disclosure Rules. NAT and LDA are **not** required to publish a shipping stem, **or** have a port protocol to receive and manage vessel nominations.

5.3 PROPOSED NEW PORT UNDERTAKING

The changes to the Port Undertaking proposed by GrainCorp, as attached to this submission, are as follows:

a) Changes to exclude certain provisions from applying at Newcastle

The Port Undertaking will continue to apply to the Newcastle Port Terminal, as required by the 'access test' in section 9(1)(a) of the *WEMA.*

However Clause 4.1 'Application of Undertaking' will be amended to exclude certain provisions of the Port Undertaking from applying in relation to Port Terminal Services provided by means of the Port Terminal Facility at Newcastle. The provisions of the Port Undertaking to be excluded are:

- 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 clauses 9.2(a), (b) and (d) 'Port Terminal Services Protocols'.)
- Clause 10.1 'Information on stock at the port'
- Clause 11 'Report on Performance Indicators'

Clause 8.1 'Treatment of Confidential Information' will remain but be clarified 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 that 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'*

Clause 10.2 'Publication of vessel booking applications' will also remain as it is consistent with the continuous disclosure requirements in the access test.

b) Changes to the Port Terminal Services Protocols

The current Port Terminal Services Protocols will be amended to exclude the Newcastle Port Terminal from their application. Minor changes will be made to clarify which protocols apply where there a change of Load Port involving Newcastle.

GrainCorp proposes to amend the Port Terminal Services Protocols by virtue of the amendment process for the Undertaking rather than through the specific Port Terminal Services Protocols amendment process contained in the Undertaking. This will provide a single consultation process with visibility for all parties and prevent parties having to monitor two separate consultation timetables.

c) Changes to reflect the amendments to the Wheat Export Marketing Act

   A small number of changes are proposed to reflect the amendments to the WEMA introduced by the *Wheat Export Marketing Amendment Act* 2012, including that:

   (a) The WEMA no longer refers to 'accredited wheat exporters'.

   (b) The Wheat Export Authority has been closed.

5.4 PROPOSED NEW PORT PROTOCOL

A separate and simpler Port Protocol would be introduced for Newcastle as required by the Continuous Disclosure Rules. The Long Term Port Protocol will not apply at Newcastle as no external customer contracted long term capacity at this port.

The Newcastle Port Protocol would be based on the existing Port Protocol to enable customers to transfer capacity with other GrainCorp port terminals under consistent processes and systems.

Major changes to the Port Protocol proposed by GrainCorp, as attached to this submission, are as follows:

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 Undertaking will state that the provision of Port Terminal Services at the Port of Newcastle will be governed by the Newcastle Port Terminal Services Protocols. However, these protocols will not be attached to the Undertaking and will not be subject to the variation procedure contained in the Undertaking.