

14 May 2014

Mr Michael Eady
Director, Fuel, Transport and Prices Oversight
Australian Competition & Consumer Commission
Level 35 360 Elizabeth Street
Melbourne VIC 3000

By email: michael.eady@accc.gov.au

Dear Mr Eady

GRAINCORP – PROPOSED VARIATION TO THE PORT TERMINAL SERVICES UNDERTAKING IN RESPECT OF THE NEWCASTLE TERMINAL- RESPONSE TO INTERESTED PARTIES’ SUBMISSIONS ON THE ACCC’S DRAFT DECISION

1. INTRODUCTION AND PURPOSE

The purpose of this submission is to respond to the submission made by the New South Wales Farmers Association (**NSW Farmers**) in relation to the Draft Decision issued by the ACCC on 10 April 2014 in respect of GrainCorp’s application dated 12 November 2013 to vary its Port Terminal Services Undertaking (**Undertaking**). The proposed variations to the Undertaking (**Variation**) relate to the provision of Port Terminal Services at GrainCorp’s Newcastle Port Terminal.

GrainCorp notes that CBH was the only other interested party to make a submission in respect of the Draft Decision. The CBH submission supported the Draft Decision. Accordingly, GrainCorp does not propose to address the CBH submission further.

NSW Farmers raised two main issues which are addressed in the following sections. These are:

- Whether the ACCC has made a proper assessment of the Variation in noting that the NAT is not subject to the access test contained in the Wheat Export Marketing Act 2010 (**WEMA**);
- Whether the ACCC has made a proper assessment of the Variation when considering the likely state of competition in the Port of Newcastle.

2. APPLICATION OF THE WEMA TO THE NAT PORT TERMINAL

The ACCC’s Draft Decision was correctly based on the fact that there is inconsistent regulatory treatment of GrainCorp’s Newcastle terminal, which is subject to the access test, and the neighbouring Louis Dreyfus and NAT facilities, which are not.

GrainCorp Limited

Level 26, 175 Liverpool Street
Sydney NSW 2000

PO Box A268
Sydney South NSW 1235

T 02 9325 9100
F 02 9325 9180

NSW Farmers has speculated that there could potentially be circumstances or a combination of circumstances now or at some unspecified time in the future that might ultimately lead to the NAT becoming subject to the access test under the WEMA.

The simple fact is that the NAT facilities and the Louis Dreyfus facilities are not required to meet the access test. Speculation about the possibility of events that appear unlikely is not helpful to the decision-making process.

We further note that it is not within the ACCC's power to determine whether the NAT facilities ought to be subject to the access test. This power lies with the Department of Agriculture, Fisheries and Forestry. For the purposes of Section 7 of the WEMA (which specifies who must pass the access test), the Explanatory Memorandum to the Wheat Export Marketing Amendment Bill 2012 states '*decisions on whether a bulk wheat exporter is required to satisfy the access test (currently made by WEA) will be made by the Department of Agriculture, Fisheries and Forestry*'. The Department of Agriculture, Fisheries and Forestry has made no such decision and we are not aware of any actual or proposed process to reconsider this issue.

In short, the ACCC has made its assessment of the Variation having regard to the actual circumstances at the Port of Newcastle, including the regulatory status of each of the three terminal facilities, and has therefore properly exercised its powers in making the Draft Decision.

3. COMPETITION IN THE NEWCASTLE PORT ZONE

NSW Farmers contends that the competition analysis included in the draft decision does not provide the ACCC with enough detail to make a proper assessment. No factual material has been provided to cast doubt on the analysis the ACCC has undertaken. In the absence of such material, there is no basis for accepting the contention. It is not necessary or desirable for the ACCC to engage in an exhaustive comparative analysis or to project future outcomes using behavioural economics if an accurate and reasonably comprehensive assessment of the industry facts and likely state of competition supports the proposed decision.

Further, it is contended that the ACCC has erroneously assessed the Variation by reference to the objects of Part IIIA rather than by reference to the objects of the WEMA.

The argument that '*the ACCC must assess GrainCorp's application not by reference to the objects of Part IIIA...but by reference to the objects of the WEMA*' is not correct.

The WEMA has been structured so that its objects, namely to '*provide fair and transparent access ... to other exporters*' and to '*avoid regional monopolies unfairly controlling infrastructure necessary to export wheat in bulk quantities, to the detriment of other bulk wheat exporters ...*' are to be achieved by requiring the ACCC to assess and approve an undertaking having regard to the requirements of Part IIIA of the CCA.

In relation to the requirements of Part IIIA, section 44ZZA of the CCA sets out that the matters to which the ACCC shall have regard when considering whether to accept an undertaking include '*the objects of [Part IIIA]*'.

The Draft Decision has had proper regard to achieving the objects of the WEMA via the application by the ACCC of Part IIIA of the CCA (as it must).

As a general principle, we also note there is no inherent inconsistency in saying that objectives such as fair access and avoidance of monopolies can be achieved through improved market-based competition and the removal of unnecessary regulation.

4. ALTERNATIVES FOR SMALL TO MEDIUM EXPORTERS

NSW Farmers has highlighted the ACCC's consideration of the position of small to medium exporters, claiming that this has been the subject of incorrect analysis in the Draft Decision and that these exporters will be driven out of the Newcastle port zone.

Such an argument cannot be sustained. The paragraphs cited (page 6 of NSW Farmers' submission) highlight that the ACCC has properly considered the impact of the Variation on this group of customers when balancing the statutory criteria to which it is required to have regard; in particular, criteria (b) *the public interest, including the public interest in having competition in markets*, and (c) *the interests of persons who might want access to the service*.

As the ACCC highlights, in 2012-13 and 2013-14 only small amounts of primarily non-wheat (and therefore unregulated) grain were shipped by the smaller exporters Noble, Toepfer, Marubeni, Origin, and PentAG in the form of small, single shipments. The Variation will not unduly impair the ability of these exporters to compete in the grain trade market, as they still have a number of options for the sale of their grain including the domestic market, containers and, as the ACCC notes *'given the excess capacity available across NAT and Carrington, such exporters should be able to obtain capacity at Newcastle.'*

5. CONCLUSION

GrainCorp considers that the ACCC's Draft Decision in respect of the Variation is appropriate and does not believe that the NSW Farmers submission has raised relevant or substantive new material.

We would be pleased to meet with the ACCC to discuss these matters further, or should you require any additional information please contact myself on (02) 9325 9117 or Angus Trigg, Director, Government & Media Relations on (02) 9325 9132.

Yours sincerely



NEIL JOHNS
Group General Manager S&L