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LAWYERS

Our Ref: SZM:ASJ:309823

2 May 2014

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

Dear Sir

GrainCorp's application to vary its 2011 Port Terminal Services Undertaking

We represent the New South Wales Farmers' Association and we refer to the ACCC's draft decision dated 10 April 2014 approving the application by GrainCorp Operations Limited (**GrainCorp**) to vary its 2011 Port Terminal Services Undertaking in connection with its port terminal services facility at the Port of Newcastle.

We request that the ACCC withdraws its draft decision and rejects GrainCorp's application to vary its 2011 Port Terminal Services Undertaking on the basis that:

(a) the information presented to the ACCC by GrainCorp and others, on which the ACCC's draft decision is based, contains untested and unfounded assumptions that the NAT is not an associated entity of any one or more of CBH, Olam and Glencore and, therefore, not subject to the same regulatory treatment as GrainCorp. There is no indication that the ACCC has conducted any investigation as to whether the NAT is an associated entity for the purposes of the Wheat Export Marketing Act 2008 (Cth) (**WEMA**) and until such time as such an investigation has been conducted, any decision to vary GrainCorp's 2011 Port Terminal Services Undertaking is unjustifiable;

(b) the analysis of the likely state of competition in the Port of Newcastle is assessed against the wrong legal yardstick. The access test under the WEMA must be assessed against the object and purpose of the WEMA; a straight application of Part IIIA of the Competition and Consumer Act 2010 (Cth) to GrainCorp's application, as has been done in the draft decision, leads to incorrect conclusions; and

(c) the conclusions regarding the likely state of competition at the Port of Newcastle and the Newcastle port zone should the draft decision become final appear to have been made based on standard economic assumptions of behaviour by the NAT without a proper consideration of whether any one or more of CBH, Olam and Glencore are capable of affecting the operation of the NAT to prefer their own interests, facilitating a change of behaviour in the NAT or altering the incentives of the NAT to compete as an independent entity in the Port of Newcastle.

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This submission highlights our concerns in relation to the methodology adopted by the ACCC in assessing GrainCorp's application. If the draft decision, based as it is on incomplete information and untested assumptions, is finalised the underlying methodology sets a precedent for GrainCorp to seek variations to its other access undertakings as a result of the developments at Port Kembla (joint venture between Qube, Noble, Cargill and Emerald) and, likewise, CBH as a result of Bunge's facility at Bunbury.

Application of the WEMA to the NAT port terminal

1. The argument advanced by GrainCorp is that its port terminal is placed at a disadvantage because the NAT port terminal is not the subject of regulation under the WEMA.

2. However, GrainCorp's contention that it is occasioned some inequity by reason of the disparate regulatory treatment proceeds entirely on the assumption that the NAT port terminal is not and, importantly, ought not be, subject to the access test under the WEMA.

3. That assumption is untested and unfounded.

4. The general rule governing who must pass the access test is found in section 7 of the WEMA, which relevantly provides that "[a] provider of a port terminal service must pass the access test in relation to the port terminal service if the provider is an associated entity of a person who exports wheat using the port terminal service."

5. The term associated entity has the same meaning as in the Corporations Act 2001 (Cth).

6. Section 50AAA of the Corporations Act provides that "[o]ne entity (the associate) is an associated entity of another entity (the principal)" if, relevantly, either of the following are satisfied:

   (a) the principal (the person who exports wheat using the port terminal service) controls the associate (the provider of a port terminal service): section 50AAA(3) (**Control Test**); and

   (b) the principal has a qualifying investment in the associate, the principal has significant influence over the associate and the interest is material to the principal: section 50AAA(6) (**Significant Influence Test**).

7. The NAT, therefore, is an associated entity of an exporter if either one of the Control Test or Significant Influence Test is satisfied in respect of one or more of CBH, Olam and Glencore. As an adjunct, the NAT will also be an associated entity where a third entity (such as a holding company) controls both the exporter and the NAT and the operations of the exporter and the NAT are both material to the third entity: section 50AAA(7).

8. We presume the regulatory analysis determining that the NAT should not be subject to the access test adopts the definition of control found in section 50AA of the Corporations Act, which provides that "an entity controls a second entity if the first entity has the capacity to determine the outcome of decisions about the second entity's

financial and operating policies" or is based on a prima facie observation that one or more of CBH, Olam and Glencore have but minority interests in the NAT.

9. The analysis presumably then relies on the carve out in section 50AA(3), namely that "the first entity does not control the second entity merely because the first entity and a third entity jointly have the capacity to determine the outcome of decisions about the second entity's financial and operating policies". It seizes on the fact the NAT is a joint venture between its management, CBH, Olam and Glencore and because section 50AA(3) excludes joint control, it does not regard the NAT to be an associated entity of any one exporter as it does not consider that any one exporter controls the NAT.

10. If so, the analysis proceeds on an incorrect legal footing.

11. While the Corporations Act may define the compass of the term control for the purposes of that legislation, it does not so limit the meaning of the term for the purposes of interpreting the WEMA. "A statutory definition exists for the purposes of the particular statute in which it was contained": Yager v R (1977) 139 CLR 28 at 43 per Mason J. That is so because the attachment of a meaning to a word in the definition or interpretation section of a statute very commonly involves some artificial extension or limitation of the natural meaning of the word for the purposes of that statute: M Collins & Son Pty Ltd v Bankstown Municipal Council (1958) 3 LGRA 216 per Sugerman J.

12. Control in the Corporations Act is cast more narrowly than its general law counterpart because the provisions in which it appears in the Corporations Act form part of a scheme regulating takeovers, financial reporting and corporate finance and organisation. The basis of control in the Corporations Act is essentially drawn from accounting principles.

13. This is a very different legislative setting to that under the WEMA, which is concerned with "promot[ing] the operation of an efficient and profitable bulk wheat export marketing industry that supports the competitiveness of all sectors through the supply chain": section 3 of the WEMA. More particularly, the WEMA seeks to ensure "that owners, operators or controllers of port terminal facilities that also export bulk wheat, or have associated entities that do, provide fair and transparent access to their facilities to other exporters": Explanatory Memorandum to the Wheat Export Marketing Amendment Bill 2012. The access test, specifically, "aims to avoid regional monopolies unfairly controlling infrastructure necessary to export wheat in bulk quantities, to the detriment of other bulk wheat exporters."

14. In this context, the concept of control is modelled to accommodate features of the competition law landscape such as cartel conduct and restrictive trade practices. That is not to say there is no conceptual overlap with the meaning of control under the Corporations Act; to be sure, there is, for even under the Corporations Act there are circumstances where the control inquiry is directed to understanding whether parties are, for instance, acting in concert in a takeover. Nevertheless, the difference in legislative context between the WEMA and Corporations Act is significant and material for present purposes.

15. Thus, although the WEMA expressly incorporates the Corporations Act meaning of associated entity, the Corporations Act and the WEMA are not in pari materia and so the wholesale incorporation of successive references is inappropriate. As Latham CJ observed in the course of considering the meaning of a provision of a taxation statute

that incorporated a term defined in the Co-operation Act 1923-1941, " ... in my opinion there should be no further investigation of the Co-operation Act for the purpose of determining the meaning of 'agricultural products'. It is only the definition of that term (ascertained in the manner stated) and not other provisions of the Co-operation Act, which is transferred to the later Act ...": Producers' Co-operative Distributing Society Ltd v Commissioner of Taxation (NSW) (1944) 69 CLR 523 at 531.

16. The incorporation of terms from the Corporations Act into the WEMA is, therefore, limited to the bare definition of associated entity and where notions of control arise, they are determined by reference to the ordinary and natural meaning of the word.

17. At general law, control looks to whether an entity, either by itself or acting in concert with others, is capable, directly or indirectly, of doing a thing or restricting the doing of a thing. Control (and likewise, significant influence) matters in the context of the WEMA because the economics which underpins the competition objectives of the legislation requires the existence of independent entities. In other words, without a conclusive determination that the NAT is an independent entity, the ACCC's competition analysis in the draft decision can never be correct as the ACCC may have relied on standard economic models of behaviour based on untested assumptions of the NAT's independence.

18. Against that background, the question whether the NAT is an associated entity of CBH, Olam or Glencore assumes a vastly different complexion and calls for consideration of issues such as:

    (a) whether any one of CBH, Olam or Glencore is capable, directly or indirectly, of determining the outcome of decisions about the NAT's financial and operating policies, including by virtue of negative control;

    (b) whether two or more of CBH, Olam or Glencore are jointly capable, directly or indirectly, of determining the outcome of decisions about the NAT's financial and operating policies, including by virtue of negative control;

    (c) whether there is any practice or established pattern of voting among CBH, Olam and Glencore in relation to certain decisions about the NAT's financial and operating policies;

    (d) whether any agreement or arrangement between CBH, Olam and Glencore in respect of their rights and obligations as joint venturers in the NAT bears, directly or indirectly, on the decision-making about the NAT's financial and operating policies; and

    (e) whether any agreement or arrangement between CBH, Olam or Glencore or between any of them and any third parties in respect of the broader supply chain (including in relation to the operation of up-country facilities) bears, directly or indirectly, on the decision-making about the NAT's financial and operating policies.

19. While each evaluation turns on its own facts and circumstances, factors such as board representation, financial interest and financial contribution, management agreements, shareholders' agreements and negative control rights all need to be considered before

determining whether the NAT is controlled by one or more of CBH, Olam and Glencore or whether they have significant influence over the NAT.

20. Importantly, the existence of minority shareholdings – being less than what is required in the circumstances for negative control – in the NAT is no bar to a determination that the minority shareholder significantly influences the NAT under the Significant Influence Test. As a matter of statutory interpretation, the term significant influence is used in contradistinction to the term control (which includes negative control).

21. Though the term significant influence is not defined in the Corporations Act, it is commonly interpreted by reference to Accounting Standard AASB 128 where it is defined as the power to participate in the financial and operating policy decisions of an entity but is not control or joint control over those policies. The standard indicates that if an entity holds, directly or indirectly (for example, through subsidiaries), 20% or more of the voting power of another entity, it is presumed to have significant influence, unless it can be clearly demonstrated that this is not the case. The standard identifies matters that may indicate significant influence including representation on the board of directors or equivalent governing body of the other entity, participation in policy-making processes, material transactions between the entities, interchange of management personnel or provision of essential technical information.

22. This interpretation finds support in the Corporations Act, where a threshold of 20% of the total voting rights in a public company is specified as the appropriate shareholding at which a mandatory full takeover bid is required. The rationale for the 20% threshold is that a shareholding of 20% or more suggests significant influence. In the competition context, the assessment by the UK Competition Commission held that the acquisition by British Sky Broadcasting Group of 17.9% of the shares in ITV constituted material influence and was, as a consequence, prohibited for the purposes of the UK merger control rules.

23. The Significant Influence Test, therefore, introduces a lower threshold than the Control Test for determining whether the NAT is an associated entity of one or more of CBH, Olam and Glencore. However, the ACCC's draft decision is entirely silent as to whether CBH, Olam or Glencore, separately or together, are capable of exercising significant influence over the NAT. Likewise, the draft decision does not disclose any real consideration of whether any one or more of CBH, Olam or Glencore are capable of affecting the operation of the NAT to prefer their own interests, facilitating a change of behaviour in the NAT or altering the incentives of the NAT to compete as an independent entity in the Port of Newcastle.

24. We draw to attention the fact that in the last four years, 3,777,136 tonnes of wheat have been exported from GrainCorp's facilities at Port Carrington, of which Glencore exported in aggregate 282,526 tonnes and Queensland Cotton (now Olam) exported in aggregate 191,600 tonnes. CBH exported 52,000 tonnes in 2010/2011 and nil for the remaining three years. What is the incentive, then, for commodity grain traders with natural monopolies (CBH in Western Australia and Glencore in South Australia) and little or no presence in the Port of Newcastle catchment zone, having now funded the construction of a new port terminal in the Port of Newcastle, to operate the NAT fairly and independently, rather than in a manner that optimises their own interests to the exclusion of others?

25. The only consideration we are able to identify in the draft decision of the potential for independent operation of the NAT is found in the following statement:

> *Anecdotally, the ACCC has been told that NAT will operate on open access principles, although the exact nature of such operation is not yet clear.*

26. In view of the matters raised in this submission, it is altogether unclear how the ACCC can approve GrainCorp's application to vary its 2011 Port Terminal Services Undertaking in circumstances where one of GrainCorp's key contentions – disadvantage by reason of disparate regulatory treatment – is met not with appropriate scrutiny but instead taken on faith and, even then, supported by anecdote only.

27. A proper exercise of the ACCC's powers would have the ACCC investigate the key assumptions and probe and confirm the incentives of the NAT's shareholders to influence the behaviour of the NAT and any constraints placed on the NAT by those shareholders.

Likely state of competition at the Port of Newcastle and the Newcastle port zone

28. The competition analysis included in the draft decision, which requires a comparison of the status quo against the likely future state of competition, omits consideration of a number of relevant factors and, consequently, cannot provide the ACCC with nearly enough detail to make a proper assessment, and whatever facts are considered have been measured against the wrong legal yardstick resulting in incorrect conclusions.

29. A proper assessment of the competition implications of approving GrainCorp's application to vary its 2011 Port Terminal Services Undertaking requires consideration of the following:

    (a) whether the NAT is subject to the WEMA access test and the resulting implications;

    (b) even if the NAT is not subject to the WEMA access test, the behavioural economics of the NAT given its shareholders' incentives and interests;

    (c) accurate figures regarding existing excess capacity in the Port of Newcastle unadjusted by normalisation and analysed taking into account the intervening impact of recent droughts in the Port of Newcastle catchment zone; and

    (d) proper comparisons between the Port of Newcastle catchment zone and other catchment areas, taking into account characteristics of the Port of Newcastle catchment zone and its effect on traffic and competition for port terminal services.

30. These issues have not been considered in the draft decision. Moreover, what has been considered in the draft decision has been the subject of incorrect analysis. In particular, the draft decision identifies a group of exporters that may be affected by the variation of GrainCorp's 2011 Port Terminal Services Undertaking, viz:

> *… [in the Port of Newcastle catchment zone]* ***small to medium exporters may not be best placed to compete against the larger grain exporters and handlers****. Managing an accumulation strategy in the NPZ would be more*

difficult for small to medium exporters in light of the variability of the weather, demands of the domestic market and competition from the container export market, in addition to making a commitment to ship via the first-in-first served capacity allocation model at Carrington. The recent shipping data from Carrington confirms that smaller exporters do not generally ship from this port.

...

Having regard to the interests of access seekers, the ACCC considers that given the excess capacity available across NAT and Carrington, such exporters should be able to obtain capacity at Newcastle. However this is not guaranteed. ***Such smaller exporters, or ones without existing infrastructure, would be most vulnerable to the removal of access at Carrington****.*

...

However, the ***ACCC also does not consider that it is necessary that every single exporter can and does export from a particular port****, and notes that this does not accord with the current situation out of Newcastle, where smaller exporters have typically not exported or exported only small amounts. Having regard to subsections 44ZZA(3)(b) and (c), the ACCC notes that the* ***public interest in having competition in markets does not necessarily mean that the interests of all access seekers must be protected****.*

...

Absent the access undertaking and given their limited countervailing market power, small to medium access seekers in particular may not be as able to secure capacity at the Carrington site, and potentially the whole of the Port of Newcastle*. However, the increase in capacity could provide GrainCorp and NAT greater incentives to increase throughput at Carrington, thereby providing smaller exporters further opportunities to ship.*

The ACCC notes that historically it has been more difficult for small to medium exporters to compete in the NPZ and to ship from Newcastle. *Generally such traders can participate when there is significant surplus wheat.*

(emphasis added)

31. In determining whether to approve the proposed variation of GrainCorp's 2011 Port Terminal Services Undertaking, the ACCC must assess GrainCorp's application not by reference to the objects of Part IIIA of the Competition and Consumer Act – as has been erroneously done in the draft decision – but instead by reference to the objects of the WEMA. Simply put, the WEMA provides the legislative foundation for regulatory intervention. Its objects are paramount. The Competition and Consumer Act merely offers the tools, such as access undertakings, by which the desired intervention is achieved.

32. Although in most cases the ACCC applies its competition laws to the relevant market as it finds it, the approach with respect to the WEMA is different. The WEMA is legislation

specifically intended to alter the structure of the market for port terminal services and up-country storage in order to:

(a) "provide fair and transparent access … to other exporters" – not just a particular group of them; and

(b) "avoid regional monopolies unfairly controlling infrastructure necessary to export wheat in bulk quantities, to the detriment of other bulk wheat exporters" – again, for all bulk wheat exporters regardless of size and whether or not they have participated in the market,

so that "[a]ll bulk wheat exporters should have access to these facilities while allowing the operators of the facility to function in a commercial environment".

33. The draft decision will not only fail to promote competition in the market for port terminal services in Newcastle but will also drive out the limited number of existing smaller exporters from the Newcastle port zone where they can provide a competitive dynamic in the market for origination of grain.

* * *

Given the fact the NAT is yet to commence operation in earnest and in light of the complexity of the issues raised in this submission, it would be reasonable for the ACCC to conclude that it is not in a position to fully understand the impact of varying GrainCorp's 2011 Port Terminal Services Undertaking at this stage, and certainly not on the basis of the information with which it has been furnished by GrainCorp and others.

The ACCC should withdraw its draft decision and reject GrainCorp's application to vary its 2011 Port Terminal Services Undertaking.

We would welcome the opportunity to discuss the above matters with you and we invite you to contact the undersigned.

Yours faithfully

HWL Ebsworth.

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