Submission in response to ACCC Issues Paper: GrainCorp's Newcastle Port Undertaking

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NSW Farmers' Association

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NSW Farmers' Association Background

The NSW Farmers' Association (the Association) is Australia's largest State farmer organisation representing the interests of its farmer members – ranging from broad acre, Livestock, wool and grain producers, to more specialised producers in the horticulture, dairy, egg, poultry, pork, oyster and goat industries.

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Introduction

NSW Farmers is Australia's largest state farming organisation representing the interests of the majority of commercial farm operations throughout the farming community in NSW. Through its commercial, policy and apolitical lobbying activities it provides a powerful and positive link between farmers, the Government and the general public.

As the peak representative body of grain farmers in NSW, NSW Farmers welcomes the opportunity to make a submission to the ACCC in response to the issues paper it has released seeking the views of industry on GrainCorp's application to vary its port access undertaking in relation to its Carrington port terminal.

Background

Australia's wheat export marketing arrangements and port access

Since the liberalisation of Australia's wheat export marketing arrangements with the removal of AWB International's single desk export licence, the *Wheat Export Marketing Act 2008* (Cth) ('WEM Act') has regulated the arrangements for the export of bulk wheat.

During the development of the WEM Act, careful attention was given to the concern that the three regional bulk handling companies, GrainCorp, ABB (now Viterra) and CBH, would be able to exploit their dominance in the market for the storage and handling of grain to the benefit of their integrated grain marketing segments.

This concern was succinctly put by the Minister in his second reading speech:

> One of the concerns identified during consultation was the risk of a single wheat export monopoly being replaced by three regional monopolies.[1]

As a result the WEM Act included the requirement for an accredited exporter who operated, or was an associated entity of a provider of port terminal services, to pass the port access test. Despite the abolition of the wheat accreditation scheme and its regulator, Wheat Exports Australia, as a result of the passing of the *Wheat Export Marketing Amendment Act 2012* (Cth), the port access test remains a legal obligation of a provider of port terminal services if they export bulk wheat, or is an associated entity of such an exporter.

The (amended) WEM Act outlines that in order for a port terminal service provider to pass the port access test they must hold an access undertaking in relation to the port terminal services made under Part IIIA of the *Competition and Consumer Act 2010* (Cth) ('CCA'); which inter alia, must require compliance with the continuous disclosure rules.[2]

The continuous disclosure rules contain the following obligations:

- the disclosure of a statement setting out the policies and procedures for managing demand (commonly referred to in the access undertakings as the "port terminal service protocols"); and
- the disclosure of a loading statement detailing the loading schedule of the port terminal services.

[1] Commonwealth, *Parliamentary Debates*, House of Representatives, 29 May 2008, 3860 (Tony Burke, Minister for Agriculture, Fisheries and Forestry).
[2] *Wheat Export Marketing Act 2008* (Cth) s 9.

Initially the former Gillard Government had the intention to remove regulation from the delivery of port terminal services for bulk wheat in its response to the Productivity Commission report into the wheat export arrangements. However concerns arose during the parliamentary process over the levels of competition in the Australian grains market, the reliance of farmers upon the export parity to set the floor price in the market, and the necessity of port access to maintain competitive pressure.

In response to these concerns the Government and the legislature accepted amendments to ensure that the regulation of port access continues after the repeal of the WEM Act in accordance with the provisions of the *Wheat Export Marketing Amendment Act 2012* (Cth). This regulation will take place in the form of a port access code that will be mandated under s 51AE of the CCA. It is the intention that this code will apply to all providers of port terminal services, regardless of whether they are, or are an associated entity of, a bulk wheat exporter.

GrainCorp – natural monopoly in Eastern Australia

GrainCorp's network

GrainCorp is a vertically integrated agribusiness focused on grain commodities. Its business model has been founded on its ownership of the major infrastructure servicing the grain supply chain in eastern Australia. This infrastructure network was developed as state based monopoly grain handling and storage systems under the policies of successive state governments in NSW, Victoria and Queensland during the era in which the marketing of grains was heavily regulated. It is the view of NSW Farmers that the operation of this monopoly infrastructure in the eastern Australian grains supply chain, and more specifically in NSW, already acts to distort the market for farmers' grain.

The dominance its integrated storage, logistics, marketing and processing network offers GrainCorp is evident in the disclosure that it makes to the market that that it receives as much as 60 percent of the east coast crop at its upcountry network and 75 percent when direct to port receivals are included; transports 60 percent of the east coast crop by rail; and handles 75 percent of all grain exported from the east coast, including 90 percent of all bulk grain exports. GrainCorp's dominance is not limited to the storage and handling sector, with its marketing division also responsible for 35 percent of grain exports from eastern Australia, as well as holding a 25 percent share of all domestic grain sales in the region.[3]

When specifically considering bulk exports from the Newcastle port zone, shipping stem data shows that in the period commencing of the marketing year 2010/11 to date GrainCorp has been the dominant exporter, accounting for 43 percent of all grain exports and 45 percent of all exports of bulk wheat.[4]

These are extremely high market shares by any definition and the ACCC would be highly unlikely to allow mergers that would result in such high market shares. The high market share of GrainCorp across the East Coast is often more extreme when considered at the

[3] For example GrainCorp, 'Conditional agreement with Archer Daniels Midland Company ("ADM") that may lead to a takeover offer resulting in total value to shareholders of $13.20 per share (inclusive of dividends totalling $1.00)' (News Release, 26 April 2013) 3.
[4] Australian Crop Forecasters (2014).

local level, as a result of the freight costs faced by farmers in delivering into the bulk handling system.

The true value and importance of GrainCorp's grain storage and logistics infrastructure to the supply chain is easily seen in the assertion by GrainCorp that its network 'cannot be easily replicated'; a clear acknowledgement that, in the long run, across the breadth of its network there is little opportunity for competitors to completely bypass its system.[5]

Newcastle Port Zone

The Newcastle port zone is considered to include the grain origination areas located between Dubbo and the Queensland border; however trains from Narromine to Nyngan can be diverted to either port dependent on freight costs and the export cargo assembly needs.[6] This is reflected in Grain Trade Australia's location differentials where these grain receival and storage locations are listed as having Newcastle as their Natural Terminal Port.

The behaviour of farmers in the planning of harvest logistics should be considered as that of rational economic actors; that is all things being equal, they will coordinate where they will deliver grain based on what will deliver the highest return. Factors included in this are:

- price received;
- cost of delivery to silo/domestic user;
- FOB costs; and
- other transaction costs such as the speed of turnaround at receival point and the impact this has on the progression of harvest.

These factors will often result in a farmer selecting the nearest silo as the preferred destination for their grain. On this basis NSW Farmers concludes that in considering grain storage and handling within the port zone, a sole focus on volume capacity is not an adequate measure of the ability of alternative storage and handling providers to directly compete with GrainCorp's network. Rather, it must also include proximity to the where the crop is grown within the consideration.[7] Figure 1 (see below) which outlines the placement of major grain receival sites in the Newcastle port zone demonstrates the advantage that GrainCorp's upcountry network has against its competitors.

Given the distances between upcountry storage in production zones and the Newcastle port, use of rail is the most cost efficient means for an exporter to move accumulated grain stocks to port.[8] GrainCorp is presently licenced by the NSW Government to provide open access above rail services on the NSW country rail network, which it undertakes in partnership with Pacific National.[9] The majority of those storage and handling providers

[5] GrainCorp '2012 Results Release and Strategy Update: Investor Presentation' (15 November 2012) [29].
[6] Strategic design and Development 'Grain supply chain pilot study' (Stage One Final Report, National Transport Commission, December 2006) 48.
[7] See Malcolm Bartholomaeus, Submission No. 21 to Senate Rural and Regional Affairs and Transport References Committee, Parliament of Australia, *Inquiry into operational issues in export grain networks*, (30 August 2011), 2.
[8] An illustration of this is obtained by comparing the rail and road freight differentials that GrainCorp has attached to its storage and handling agreement.
[9] Independent Pricing and Regulatory Tribunal 'Review of access pricing on the NSW grain line network' (Transport Final Report, April 2012) 18. See also Senate Rural and Regional Affairs and

outlined as competitors to GrainCorp's network in the issues paper are located on the ARTC track, limiting the ability to provide viable competition to much of the port zone. This reinforces the view that NSW Farmers has taken with regard to the natural monopoly network operated by GrainCorp.

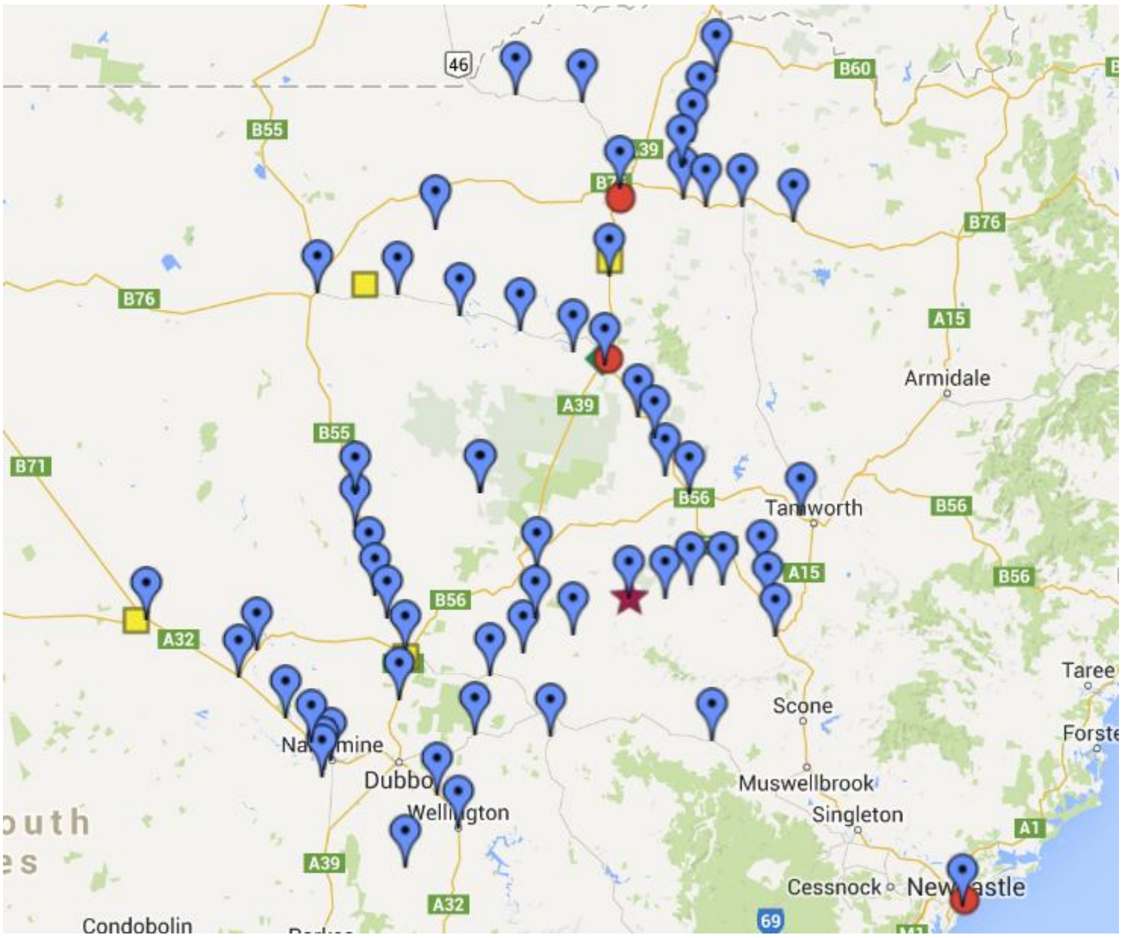

Figure 1 Grain Receival in the Newcastle Port Zone

Legend: Blue Pins — GrainCorp
Yellow Square — Grainflow
Red Circle — Louis Dreyfus
Green Diamond — Viterra
Purple star — AMPS

Transport Committee, Parliament of Australia, *Inquiry into operational issues in export grain networks* (2012) 74.

Figure 2 Country Rail Network and ARTC network in the Newcastle Port Zone
Amended from Transport for NSW 'Railways of New South Wales'.

Alternative markets to the use of bulk handling

The NSW Grain Freight Review commissioned modelling to consider the impact of domestic markets and the use of containerised exports to assist in its deliberation.

In respect of the east coast grains market, the Review concluded that the domestic market would have first call on this grain. However, this conclusion must be put into the context of the inter-related nature of the domestic and international markets which sets the floor price at export parity.[10] That is, domestic users are required to match bids that a grower would alternatively receive for grain acquired for export based on supply and demand within global markets. Fair and non-discriminatory access to port terminal services is required to maintain the market efficiency and competitive tension that the export sector provides a price for farmers' grain.

With regard to the latter, based on the modelling commissioned from Australian Crop Forecasters, the Grain Freight Review Taskforce concluded that 'containerised sector is unlikely to have a significant impact on the bulk export sector'.[11]

Is on farm storage in competition to GrainCorp?

GrainCorp has sought to argue that the expansion of on-farm storage provides competitive tension to its storage and handling business.[12] While the following will not be the case for every farmer, NSW Farmers puts forward that this argument should be rejected in the main for the following three reasons.

Firstly, access to the export market and domestic processing generally occurs through receival into the bulk handling system. As such, even in instances in which a farmer may utilise on farm storage to take advantage of counter seasonal price spikes or the capacity to blend grain to increase a premium, delivery will often occur through the bulk handling system.[13] For the majority of farmers across the east coast, including within the Newcastle Port Zone, this will be a GrainCorp site.[14]

Secondly, often the purpose for the establishment of on-farm storage is a strategic decision related to production, not marketing. That is to ensure fewer delays at harvest caused by backlogs at local receival sites, keeping harvesters (particularly contract harvesters) operational and managing quality risks caused by in-harvest rainfall events. Silos used for this purpose do not need to be manufactured to handle the issues of preserving grain quality that are accompanied with longer term storage of grain.[15]

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[10] Productivity Commission, *Wheat Export Marketing Arrangements*, (Final Inquiry Report, No 51 1 July 2010 Canberra) 94-95.

[11] Department of Infrastructure, Transport, Regional Development and Local Government, 'New South Wales Grain Freight Review (September 2009) 26.

[12] The most recent example: GrainCorp, Submission No. 9 to Senate Rural and Regional Affairs and Transport References Committee, Parliament of Australia, *Inquiry into the ownership arrangements of grain handling* (June 2013) 3-5

[13] Malcolm Bartholomaeus, Submission No. 21 to Senate Rural and Regional Affairs and Transport References Committee, Parliament of Australia, *Inquiry into operational issues in export grain networks*, (30 August 2011), 2.

[14] See Figure 1.

[15] See Chris Warrick, 'On-farm storage – do the sums first', *Ground Cover* (Issue 104: May – June 2013) < http://www.grdc.com.au/Media-Centre/Ground-Cover/Ground-Cover-Issue-104-May-June-2013/On-farm-storage-do-the-sums-first>.

Lastly, for most farmers the market signal to invest in the establishment and ongoing management of the type of on farm storage required for longer storage periods does not exist.[16]

Concerns over the lack of a competitive market

It is NSW Farmers' policy to seek a competitive market for our members' grain. On this basis NSW Farmers welcomes the incipient competition that the Newcastle AgriTerminal (NAT) will bring when it commences operation in February 2014.

However, the presence of NAT by itself is not enough to enable the development of greater competition for farmers' grain. This is because of the broad dominance that GrainCorp retains in the market for storage and handling of grain, both up country and at the major bulk export ports across the east coast. It is the view of NSW Farmers that further efforts are still needed to ensure that other grain marketing companies are able to compete on a level playing field with GrainCorp's marketing business.

While NSW Farmers acknowledges that GrainCorp has an incentive to optimise throughput of grain through its storage and logistics assets; this is not mutually exclusive to behaviour that can impede competition for farmers' grain by increasing the costs and the risks faced by third party competitors. These type of behaviour have been noted by the Senate's Rural and Regional Affairs and Transport Committee.[17]

Further to the evidence that the Senate Committee has documented, discussions that NSW Farmers has had with members of the grain trade continues to raise concerns about the exercise of market power in ways that inhibits the ability of other grain traders to fairly compete for farmers' grain. These behaviours include:

- GrainCorp's use of a one sided storage and port terminal services agreements on a take it or leave it basis. This includes:
    - the imposition of unreasonable indemnifications and liability caps.
    - unreasonable deduction for grain shrinkage at up country and port terminal operations.
    - exploitation of clauses that enable GrainCorp to relieve itself of obligations to execute storage and handling services required by other marketers on operational reasons.
    - Swaps:
        - the use of its capacity to unilaterally undertake swaps to its advantage and a perception that often this results in grain being swapped to an unfavourable location for execution.
        - the indemnification of GrainCorp's responsibility to pay freight differential costs when the cost is less than $0.50 per tonne when the indemnification is not reciprocated to the owner of the grain.
        - the lack of any reconciliation for quality differences that occur between the stack of origin and destination as a result of a forced swap.

[16] Ibid.
[17] See Senate Rural and Regional Affairs and Transport Committee, Parliament of Australia, *Inquiry into operational issues in export grain networks* (2012) 26-28.

- Execution difficulties created by GrainCorp that require marketers to increase risk premiums when bidding for grain. For example, CBH's 2011 Annual Report informed its members that in the marketing year of 2010/11 its marketing arm, CBH Grain incurred losses of $23.4 million, primarily accredited by CBH to logistical challenges in eastern Australia. This loss was posted is despite making over $1.5 billion of export sales in that year.[18]
- Inflexibilities created by GrainCorp's port capacity management, including the:
  - magnitude of the port nomination fee and the capital constraint caused due to the time frame between payment and elevation.
  - lack of a secondary market for shipping slots to enable marketers to manage risks associated with booking a slot, with concerns that the present limitations that GrainCorp has placed on reallocation of booked capacity.[19]
- Use of grain stocks when title is held by other parties provides GrainCorp with the capacity to unfairly tender for exports within the early period of the marketing window with confidence.

NSW Farmers sees a parallel in the grain market to the ongoing debate over anti-competitive behaviour in the supermarket sector with regard to the willingness of parties impacted by anti-competitive behaviour to bring their concerns to the competition regulator. As such NSW Farmers recommends that the ACCC consider utilising similar patterns of investigation used in the supermarket in the grain market to obtain a deeper understanding of the competition issues impacting upon farmers.[20]

Newcastle Port

The bulk wheat export facilities that are presently operational at the Newcastle Port include GrainCorp's Carrington facility and the 'accumulation and storage facility' established at Kooragang as part of a joint venture between Louis Dreyfus and Mountain Industries.[21] The newly built NAT port terminal, which is expected to be commissioned in February 2014, will soon add to the bulk wheat export capacity of the Newcastle Port.

The following table compares the capacities of GrainCorp's Carrington terminal against NAT.

[18] CBH *Annual Report 2011*, 21.
[19] See Tamara Stretch, Chris Carter and Ross Kingwell 'The cost of Australia's bulk grain export supply chains' (Information Paper, Australian Export Grains Innovation Centre, January 2014) 26.
[20] See Alan Kohler 'ACCC readies big guns against supermarkets' *Inside Business*, ABC (17 February 2013) <http://www.abc.net.au/insidebusiness/content/2011/s3692067.htm>. See also Evidence to Senate Economics Legislation Committee, Parliament of Australia, Canberra, 13 February 2013 (Mr Rod Sims, Chairman Australian Competition and Consumer Commission).
[21] Wheat Exports Australia, *Annual Report 2012 – 13* (2013) 17.

	GrainCorp Carrington[22]	*Newcastle AgriTerminal*[23]
Storage *Fumigated*	164,400 tonnes *40,000 tonnes*	60,340 tonnes *Approx 60,000 tonnes*
Rail Receival Capacity	16 hoppers – 1,500 - 2,700 tonnes per hour (TPH)[24]	Balloon loop – 2,000 – 2,400 TPH[25]
Road Receival	3 hoppers – up to 600 TPH	No road receivals sought in development consent
Ship Loaders	4 – up to 4000 TPH	1 - up to 2,500 TPH

With regard to the purpose of providing further background with regard to application of the regulatory framework for port access under the WEM Act to the Newcastle Port, NSW Farmers makes the following observations:

Newcastle Agriterminal (NAT)

NAT states that they are an 'independent grain logistics company providing grain marketers and growers with an innovative new export pathway in Eastern Australia'.[26] As outlined in the issues paper, NAT is subject to equity interests by established grain exporters CBH, Olam International and Glencore;[27] however it is the understanding of NSW Farmers that none of these entities is able to exert the requisite control over NAT for it to be classified as an associated entity of an exporter. Thus on a prima facie analysis it would appear that NAT functions solely as a provider of port terminal services and not required to meet the port access test.

NSW Farmers however would encourage NAT to voluntarily adopt some capacity management in a similar fashion to that undertaken by Queensland Bulk Terminals.[28]

Louis Dreyfus Commodities (LDC)

As noted within both the Issues Paper and GrainCorp's submission to the ACCC, the presence of LDC is primarily that of a joint venture in the storage facility. In addition to the storage facility, LDC has entered into a 'non-exclusive arrangement' with the operator of a ship loader, Qube to provide it with port terminal services.[29] As a result of the 'nature of facility and the non-exclusive agreement', LDC was determined by Wheat Exports

[22] GrainCorp 'GrainCorp Ports 2012' (Brochure) <http://www.graincorp.com.au/LiteratureRetrieve.aspx?ID=87428>.
[23] Newcastle Port Corporation 'Activity Determination Report: application PA 11/003' <http://www.newportcorp.com.au/site/index.cfm?display=306322>.
[24] Capacity range sourced from the Issues Paper and from GrainCorp above n.14.
[25] Capacity range determined by maximum grain wagon payload for class 1 (69 tonne) and class 5 rail line (53 tonne) and information placed within its development application stating that it will be able to unload a 54 wagon train in an hour and a half.
[26] Newcastle Agri Terminal (2014) <http://www.naterminal.com.au/>.
[27] Issues Paper.
[28] Wheat Exports Australia, above n 13, 16
[29] Ibid.

Australia to not be a provider of port terminal services as defined by the WEM Act. As such LDC has not been required to meet the requirements of the port access test.[30]

It is not known if any other exporter has sought access to the Qube's port terminal services, although it is expected that the unusual logistical nature of the rail transport and terminal services would make execution difficult for a third party.

Matters for comment

Is GrainCorp's application consistent with the regulatory framework?

A purposive approach to interpreting the port access test

In considering the application made by GrainCorp, NSW Farmers believes the first threshold question to be asked is if the application can be approved by the ACCC, will GrainCorp continue to meet the criteria required to pass the WEM Act's port access test? In considering this question, NSW Farmers believes that such an outcome would be inconsistent with a purposive interpretation of the criteria s 9 of the WEM Act establishes for passing the port access test.

Section 9 mandates that the provider of a port terminal service, who is an exporter of bulk wheat or alternatively an associated entity of one, must enter into an access undertaking under Part IIIA of the *Competition and Consumer Act 2010*; and the undertaking must oblige the compliance with the continuous disclosure rules. In turn, the continuous disclosure rules require the development of the policies and procedures for managing demand for capacity at the port.

In considering the correct interpretation of this provision, NSW Farmers has referred to the following passage from the Minister's second reading speech:

> So we have decided to impose specific requirements on accredited exporters that operate bulk grain terminals at ports, as these are the facilities with natural monopoly characteristics and are the infrastructure bottleneck in the export supply chain.
>
> Unless all exporters can obtain access to these critical facilities [ports] on fair and reasonable terms then one of the major objectives of the policy could be frustrated.[31]

With this in mind, NSW Farmers argues that an interpretation of s 9 that leads to a result in which GrainCorp has the right to deny access to a seeker fair and reasonable terms of access cannot be a purposive interpretation. As detailed further below, this is the very type of behaviour that GrainCorp is seeking to legitimise under the proposed application.

Likewise, NSW Farmers questions whether it would be appropriate for the ACCC to vary the undertaking and port terminal services protocol as requested when considering the terms of s 44ZZA of the CCA. For example, the application is contrary to the pricing principles in that it would allow GrainCorp, as a vertically integrated provider of terminal services to 'set terms and conditions that discriminate in favour of its downstream operation'.[32]

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[30] Ibid.
[31] Commonwealth, *Parliamentary Debates*, House of Representatives, 29 May 2008, 3860 (Tony Burke, Minister for Agriculture, Fisheries and Forestry).
[32] *Competition and Consumer Act 2010* (Cth) s 44ZZCA.

<u>Open access to Carrington on fair and reasonable grounds remains important to achieving competition</u>

As outlined above, the port access test was initially legislated with the purpose of ensuring that the dominant positions of established bulk handling companies with integrated marketing businesses did not enable them to take advantage of their natural monopoly position to the detriment of competition. However, as the ACCC is aware, in the period since the commencement of the WEM Act there has been lingering concerns across the grain market that the major protection of competition in the system was limited to the port terminal.[33] These concerns have been based on the rationale that to ensure that there is fair competition at the port, there needs to be fair, equitable and reliable access into the grain origination network enabling third party exporters to accumulate the grain required for an export transaction in a manner that enables them to compete with the incumbent bulk handling company.

Given the specific limitation of the port access test to port terminal services and therefore port terminal facilities,[34] NSW Farmers understands that it is not within the scope of the ACCC to apply obligations within the undertaking up country. However, NSW Farmers continues to believe that the maintenance of the access undertaking to be an appropriate response to both GrainCorp's market dominance through Carrington's linkage to its upcountry network.

With regard to this point, NSW Farmers retains the view that most marketers seeking to operate an export program out of the Newcastle port zone will still need to accumulate out of GrainCorp's upcountry network. The reasons behind this view are articulated above in the sub-section titled "GrainCorp's Network". This is not the case for NAT, whose management has no formal links to up country storage providers or marketing businesses.

In addition to this point, it is likely that the presence of a second major bulk export terminal at Newcastle will lead to the development of a market characterised by duopoly behaviour. In this circumstance it is likely that the levels of fees and charges for both ports will reach a stable equilibrium on price determined by strategies of GrainCorp and NAT.

However, given GrainCorp's marketing business' large share of the export market in the Newcastle port zone, without a form of non-discriminatory capacity management, it would have the capacity to exclude other exporters from obtaining capacity during the immediate post harvest period. This would enable GrainCorp to exploit the 'marketing window' at Carrington to the exclusion of other access seekers. This period is the time in the early part of the Australian marketing year (commencing 1 October) in which

[33] See Evidence to Senate Rural and Regional Affairs and Transport References Committee, Parliament of Australia, Canberra, 16 November 2011 (Mr Anthony Wing, General Manager, Transport and General Prices Oversight, Australian Competition and Consumer Commission) 4-5.

[34] *Wheat Export Marketing Act 2008* (Cth) ss 5; 9 (1) (a). Section 5 defines port terminal services as the services provided at a port terminal facility, which is in turn defined as being at the port and associated with a bulk wheat ship loader.

Australian grain exporters are able to take advantage of the off seasonal nature of the Australian harvest due to 'diminishing supply from the northern hemisphere'.[35]

Will the undertaking inhibit GrainCorp's ability to compete with NAT and LDC

Since the commencement of the *Wheat Export Marketing Act 2008*, GrainCorp has had the capacity to respond to competitive forces in the storage and handling sector in a number of ways that are consistent with the requirement that it meet the port access test. This can be evidenced in the way it has varied its port fees and charges across the different port zones of its network. The following provides an example of this observation:

- charges in Queensland, where it faces little competition of note, have been consistently higher than for its Victorian and NSW ports;
- since the 2012-13 export season, GrainCorp has not charged an additional amount for grain originating outside its upcountry network that is delivered to its Victorian ports, where it faces competition from Emerald's (formerly AWB and Sumitomo joint venture) Melbourne Port Terminal.
- for the 2013-14 grain marketing year (commencing 1 October 2013) GrainCorp removed the additional charge for the delivery of grain to Carrington, presumably in anticipation of competition from NAT, yet chose to continue to levy it at Port Kembla.
- raising the nomination fee for a shipping slot from $5 to $8 per tonne.

In addition to the ability to amend fees and charges, GrainCorp has been able to implement other flexibilities to its operations despite the operation of the undertaking. For example at the end of 2012 it was able to amend the port terminal services protocol to include long term agreements.

Ultimately the ability of GrainCorp to operate its ports, while subject to the requirements of the port access test, in a way that enables it to achieve a commercial return is evident in GrainCorp's Annual Reports for the years 2006 – 2011; over which the ports were reported as a single business segment. These results show that since the application of the port access test requirements in 2008, GrainCorp reported an earnings ratio of above 50 percent for all but one of the years since deregulation.

[35] Tamara Stretch, Chris Carter and Ross Kingwell 'The cost of Australia's bulk grain export supply chains' (Information Paper, Australian Export Grains Innovation Centre, January 2014) 23.

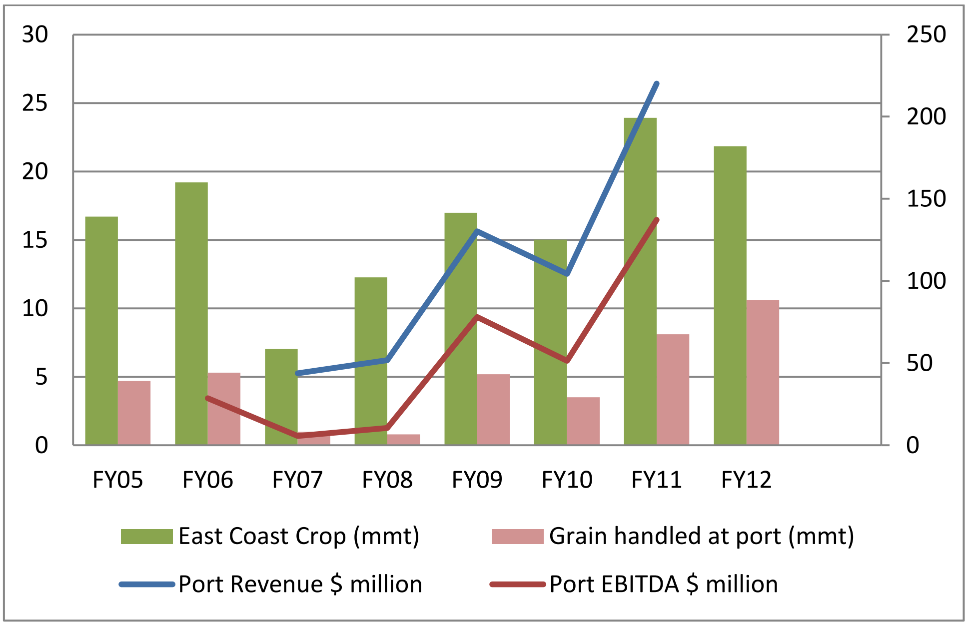

Figure 3 Ports Financial Performance 2006-2012

Should the undertaking continue to enable ACCC oversight of arbitration and dispute resolution

NSW Farmers believes that the capacity for ACCC to have the capacity to engage in the arbitration of disputes over the conditions of access and in dispute resolution between parties to be a useful mechanism in maintaining a process of fair and non-discriminatory access. GrainCorp has previously sought to argue that there are relevant provisions within the *Competition and Consumer Act 2010* (Part IV, Part V, ss 46 and 47) that provide access seekers with an avenue to seek a remedy if they believe they have been denied access on commercial terms.[36] The Productivity Commission's draft report reviewing the national access regime considered these mechanisms to be ill suited to this task and overly reliant upon courts. This outcome supported the findings of the Hilmer Review which were instrumental in the development of the regime.[37]

Likewise, NSW Farmers believes that the arbitration and dispute resolution processes of the ACCC provide a suitable and commercial means for the resolution of disputes over the establishment of conditions of access and over disputes over alleged breaches of these terms once established.

END

[36] GrainCorp, Submission number DR98 to Productivity Commission, *Wheat Export Marketing Arrangements* (10 June 2010).
[37] Productivity Commission, *National Access Regime*, Draft Inquiry Report (2013 Canberra) 71 – 72.

Appendix – Carrington Shipping Stem

Australian Crop Forecasters

Commodity: WHEAT

Sum of Tonnes	Port: Carrington, Season 2010/11	2011/12	2012/13	2013/14	Carrington Total	Market Share
Shipper	2010/11	2011/12	2012/13	2013/14		
AWB	191,952				191,952	5%
Bunge						0%
BUNGE/Emerald						0%
Cargill	232,170	439,850	367,112	40,000	1,079,131	29%
CBH	52,000				52,000	1%
Dreyfus	29,751				29,751	1%
ELDERS	5,100				5,100	0%
Emerald						0%
Glencore	31,000	174,526	60,000	20,000	285,526	8%
Graincorp	462,702	519,580	588,686	57,700	1,628,668	43%
GSPL		88,000			88,000	2%
Noble		33,000	30,000		63,000	2%
Pentag						0%
QCOT	45,100	129,000	17,500		191,600	5%
Riverina						0%
Toepfer	32,000				32,000	1%
TOUA						0%
TOUTAN	57,000				57,000	2%
Touton		840			840	0%
VITERRA		72,568			72,568	2%
Grand Total	**1,138,775**	**1,457,364**	**1,063,297**	**117,700**	**3,777,136**	100%

Commodity: BARLEY

Sum of Tonnes	Port: Carrington, Season 2010/11	2011/12	Carrington Total	Market Share
Shipper	2010/11	2011/12		
Glencore		8,420	8,420	15%
Graincorp	25,190	21,497	46,687	85%
Grand Total	**25,190**	**29,917**	**55,107**	100%

Commodity CANOLA

Sum of Tonnes	Port: Carrington, Season 2012/13	Carrington Total	Market Share
Shipper	2012/13		
Graincorp	70,000	70,000	53.8%
Toepfer	60,176	60,176	46.2%
Touton			0.0%
Grand Total	**130,176**	**130,176**	100.0%

Commodity OTHER

Shipper	Commodity	Port: Carrington, Season 2010/11	2011/12	2012/13	2013/14	Carrington Total	Market Share
Glencore	Sorghum			12,000		12,000	3.7%
Graincorp	Sorghum		89,150	87,912		177,062	55.0%
Marubeni	Sorghum		20,671	20,000		40,671	12.6%
	MAIZE			2,000		2,000	0.6%
Orig	MAIZE			10,000		10,000	3.1%
Pentag	Sorghum	23,612			34,000	57,612	17.9%
Toepfer	Sorghum		22,500			22,500	7.0%
Grand Total		**23,612**	**132,321**	**131,912**	**34,000**	**321,845**	100.0%