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Australian
Competition &
Consumer
Commission

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By email: vishal.ahuja@mallesons.com

Dear Mr Ahuja

Re: GrainCorp Port Terminal Service Access Undertaking

I refer to the proposed access undertaking from GrainCorp Operations Limited (GrainCorp) for its port terminal services at Carrington, Fisherman Island, Geelong, Gladstone, Mackay, Port Kembla and Portland terminals (the Undertaking) submitted to the ACCC on 15 April 2009 for consideration under Part IIIA of the *Trade Practices Act 1974* (the Act).

In order to facilitate the ACCC's assessment of the proposed Undertaking, the ACCC seeks the further information from GrainCorp requested at **Attachment A**. Responses by GrainCorp in relation to the questions at Attachment A are relevant to the ACCC's ability to assess whether to accept or reject the Undertaking having regard to the matters set out in section 44ZZA(3) of the Act.

There are two parts to the information request at Attachment A. The first part relates to various statements made by GrainCorp in its supporting submission to the Undertaking relating to issues such as the competition provided by other grain terminals, the possibility of new port entry and the countervailing power of customers. The ACCC notes that a number of these assertions have not been backed up by detailed supporting submissions and would like to give GrainCorp the opportunity to substantiate the claims. In addition, the ACCC considers that this information will assist the ACCC to form a view about whether it would be appropriate to accept the Undertaking, having regard to the matters set out in section 44ZZA(3), in particular, the objects of Part IIIA of the Act, the legitimate business interests of the provider, the public interest, including the public interest in having competition in markets and the interests of persons who might want access to the service.

The second part of the information request relates to the ACCC gaining an understanding of the rationale for, workability and appropriateness of specific clauses of the Undertaking. The ACCC requires this information in order to assess whether the Undertaking, as provided by GrainCorp, will operate to provide access to the port terminal services in a manner considered by the ACCC to be appropriate pursuant to section 44ZZA(3).

The ACCC therefore seeks GrainCorp's co-operation in responding to the questions at Attachment A in a timely fashion.

The ACCC understands that GrainCorp intends to provide a submission to the ACCC responding to the ACCC's issues paper dated 29 April 2009 (Issues Paper) as well as to submissions provided by interested parties. The ACCC is amenable to GrainCorp providing its response to the Issues Paper and to submissions by interested parties in conjunction with its response to this information request. It is recognised that GrainCorp may have intended that some of the information requested in this information request would be provided in its response to the Issues Paper – and accordingly, the ACCC is open to an approach that minimises duplication.

GrainCorp's response to this information request, as well any submissions it proposes to make in response to the Issues Paper and submissions from interested parties, are requested to be provided to the ACCC no later than close of business on **23 June 2009**.

Under section 44ZZBC of the Act, the ACCC must use its best endeavours to complete its assessment of the Undertaking within six months from the date it was submitted. However, as noted in my letter of 17 April 2009, this is likely to be dependent on GrainCorp providing complete information in response to ACCC information requests. A prompt response to this request will assist the ACCC in its timely assessment of the Undertaking.

Please also note that the attached questions should not be interpreted as indicative of all the matters the ACCC may wish to have regard to in its assessment of the Undertaking, and the ACCC may make further information requests at a later stage.

Please contact me on (03) 9290 1804, or Sarah Sheppard on (03) 9290 1992, if you have any questions in relation to the above.

Yours sincerely,



Anthony Wing
General Manager
Transport & General Prices Oversight

Attachment A

Part A – Matters raised in GrainCorp’s supporting submission

‘Competition from other grain terminals’

1. Paragraph 5.5 of GrainCorp’s supporting submission to its proposed undertaking dated 15 April 2009 (**GrainCorp’s submission**) states that grain exporters in Victoria and southern NSW are able to ship grain through port terminals owned by three different companies (GrainCorp, ABB and Australian Bulk Alliance (**ABA**)). In this regard, please elaborate on the following:
 - a. What impact, if any, has this had upon terms and conditions of access to GrainCorp’s port terminals that in GrainCorp’s opinion compete with ABB and ABA port terminals? Please provide any relevant documents/ materials to support your response.
 - b. Is there any difference between the price and non-price terms offered to marketers exporting out of different GrainCorp terminals?
2. What factors influence the ability of bulk wheat exporters to switch between terminals (either located in different port zones or owned by different bulk handlers) for the export of bulk wheat? What is the effect of transport costs, infrastructure constraints, availability of transport providers, terminal capacity and terminal availability?

‘Possibility of entry’

3. Paragraph 5.7 of GrainCorp’s submission states that GrainCorp is competitively constrained by the possibility of new entry by a competing port terminal services provider.

Please elaborate on this comment:

In relation to a new bulk wheat grain export terminal:

- a. What capacity (intake, storage and ship loading) would a new terminal need to be competitive?
- b. What is the likely cost of construction?
- c. What would be likely locations for a new terminal, and what would be required to obtain/utilise those locations?
- d. What would be the minimum level of volume required for the terminal to operate successfully?
- e. Would it be possible to obtain sufficient volumes for the terminal to operate successfully?
- f. Who would be likely to construct a new terminal?
- g. What regulatory or other approvals (such as approval from the port authority) would it be necessary to obtain in order to commence construction?

- h. Could an existing terminal be converted to export bulk wheat?
 - i. What would be the likely timeframe for constructing and commissioning a new port terminal?
4. What were the total upfront capital costs incurred for each of GrainCorp's grain terminals? (for terminals that were purchased rather than built, please provide the purchase price for that terminal).
5. For each of GrainCorp's grain terminals, what were the annual total operating costs for the grain terminal for financial years 2005/06, 2006/07 and 2007/08?

'Power of customers'

6. Paragraph 5.4 of GrainCorp's submission states that many of the grain exporters seeking access to the port terminal services have a substantial degree of bargaining power and the ability to shift their supply sources to wheat produced in other countries.

Please elaborate on this comment:

- a. If a port terminal customer was dissatisfied with proposed access terms, what alternatives for equivalent services are currently available in Australia, and what would be the typical costs (monetary and otherwise) to the customer in switching to such alternatives? Further, what would be the costs (monetary and otherwise) to the access provider of losing the customer to such alternatives?
- b. Please provide examples of the ways in which a bulk wheat exporter could use bargaining power in negotiating with GrainCorp in relation to the provision of port terminal services at a particular terminal.
- c. Currently, what options are available to a bulk wheat exporter in the event it believes that GrainCorp had engaged in discriminatory conduct in relation to the provision of port terminal services? In particular, would the exporter have any recourse under contractual arrangements with GrainCorp?

'Incentive to maximise throughput'

7. Paragraph 5.2 of GrainCorp's submission states that GrainCorp's incentive is to maximise throughput at its port terminals.

Please elaborate on this comment:

What significance, if any, does the vertical integration of GrainCorp as a provider of port terminal services and as a bulk wheat exporter have for the incentives of GrainCorp in relation to the port terminal services it provides to itself and other users of those services? Would GrainCorp's incentives change if it was not vertically integrated as a bulk wheat exporter?

Other

8. Since the removal of the 'single desk' for bulk wheat exports, what are the market shares of each accredited exporter of bulk wheat exported from each of GrainCorp's ports (by percentage and tonne)?

Part B – Matters related to the operation of the proposed undertaking

The clause references in the following questions are to clauses in GrainCorp's proposed undertaking. Words capitalised as proper nouns (e.g., Trading Division, Access Agreement) are as defined in the proposed undertaking, unless otherwise stated.

General

9. How, if at all, will the proposed undertaking impact on the export of grains other than bulk wheat at GrainCorp's terminals? How will areas of potential overlap between wheat and non-wheat areas be dealt with (for example, will the shipping stem include vessels for wheat and other grains)?
10. To the extent that GrainCorp proposes to offer bundled services (i.e. port terminal services plus up-country services), does GrainCorp envisage that the Undertaking (both in general, and specifically in relation to the negotiate/arbitrate process) will apply to those bundled offers?
11. Please outline the basis on which GrainCorp will provide access to port terminal services to its Trading Business. That is, will it be at 'arms length'? If so, how will this be effected? Will it be on the same terms of access as offered to other bulk wheat exporters?
12. On 18 May 2009 GrainCorp's legal advisors provided the ACCC with a public version of the draft Wheat Port Terminal Services Agreement. The covering letter stated that:

The terms and conditions of access proposed to be offered to wheat exporters under the Wheat Port Terminal Services Agreement do not differ significantly from the existing Storage and Handling Agreement under which market participants are currently operating.

Please list and provide reasons for any difference between the terms and conditions offered in the two documents referred to above.

13. Clause 3.5 (b) contains the obligation to "consult" with various parties prior to seeking the ACCC's consent to vary the undertaking. What, specifically, does the obligation to "consult" on a proposed variation include?
14. In relation to the timeframes specified in clauses 5, 6 and 7 of the proposed undertaking, please provide an explanation as to why those timeframes are appropriate.

Non-discrimination

15. Clause 5.4 proposes a mechanism by which GrainCorp may provide access to Applicants or Users, including its own Trading Division¹, on differentiated terms, provided such terms are consistent with the objectives of the Undertaking, taking into account the 21 matters set out in clause 5.5, and offered on an arms length commercial basis.
- a. If in a given circumstance GrainCorp considered that one of the matters listed in clause 5.5 provided ‘commercial justification’ for providing access on differentiated terms, what information or evidence would GrainCorp rely upon to demonstrate that such ‘commercial justification’ existed and different terms were appropriate?
 - b. How would GrainCorp communicate the reason/s for such terms to the Applicant/User?
 - c. What measures does GrainCorp have in place to ensure that any differences in terms are developed and offered on an arms length commercial basis?
16. What conduct would be viewed as “substantially damaging a competitor” or “conferring ... any unfair competitive advantage over a competitor” for the purposes of clause 5.4(b)?

Variation to Reference Prices and Standard Terms (clause 5.6)

17. Under what circumstances, and how often, does GrainCorp envisage varying Standard Terms or Reference Prices? Are there limitations or restrictions on GrainCorp’s ability to do so?
18. What, if any, is the role of wheat exporters in the process proposed in the Undertaking to vary Standard Terms or Reference Prices? (such as consultation prior to publication of new prices, renegotiation of existing prices).

Negotiating for access

19. What capacity is there for wheat exporters to negotiate terms prior to the commencement of Reference Prices and Standard Terms, given that GrainCorp is not required to publish price and non-price terms prior to 30 September in each year?
20. In relation to the timeframes specified in the negotiate/arbitrate sections of the Undertaking, please provide an explanation as to why each timing requirement is appropriate.

¹ Defined as the business division/section of GrainCorp that holds a licence to export bulk wheat.

21. Clause 5.1 provides that GrainCorp must publish Reference Prices and Standard Terms by no later than 30 September of each year. Please elaborate on whether publication by this date allows sufficient time for an exporter to have an access agreement in place for the harvest season in a particular year.
22. Under what terms and conditions will GrainCorp provide access to its port terminal services to wheat exporters prior to execution of an Access Agreement?
23. In relation to clause 6.4(a)(ii)(B), what factors will GrainCorp take into account in deciding if a request is 'unduly onerous' or 'disproportionate'?
24. In relation to clause 6.4(b)(i), why is it necessary for GrainCorp to have discretion not to negotiate with the Applicant if GrainCorp considers that the Applicant has not followed the process in the proposed undertaking? What factors will inform GrainCorp's consideration that an Applicant has not followed the process?
25. In relation to clause 6.5 & Schedule 4 (on the proposed form requirements for an access application):
 - a. What is meant by 'Customer Application Type' and 'Business Category'?
 - b. Why is it necessary for the Applicant to have a website in order to seek access? If the Applicant does not have a website, will GrainCorp refuse access?
26. In relation to clause 6.4(b)(i), what factors will inform GrainCorp's consideration that an Applicant has not followed the process?
27. In relation to clause 6.6(b)(iv) what factors would GrainCorp take into account in deciding if the negotiations were not progressing in good faith towards the development of an Access Agreement within a reasonable time period?
28. If the Negotiation Period ceases, will the Applicant be entitled to make another application for access? How would any further application be dealt with?
29. What is meant by 'amended Standard Terms' in clause 6.7(b)(ii)? How does this clause interact with the ability of GrainCorp to offer different terms under clause 5.4? (That is, what, if any, is the difference between an 'amended Standard Term' and a 'different term'?)

Disputes

30. In the definition of 'Dispute', what does GrainCorp mean by a 'bona fide dispute'? Please provide examples of disputes that GrainCorp considers would be bona fide, and examples of disputes GrainCorp considers would not be

bona fide.

31. Clause 7.1(b) proposes that any disputes in relation to an Access Agreement once executed will be dealt with in accordance with the provisions of that Access Agreement. Does this include disputes regarding claims of discriminatory conduct?
32. In relation to clause 7.1(c) why should the report to the ACCC only deal with material disputes? What does GrainCorp mean by a *material* dispute? Are material disputes different to bona fide disputes? If so, how?
33. In relation to clause 7.3(c), has GrainCorp confirmed with the Institute of Arbitrators and Mediators of Australia (IAMA) that its involvement as a mediator, as contemplated by the proposed undertaking, is workable? Please provide copies of any correspondence between GrainCorp and the IAMA to this effect.

Arbitration

34. In relation to clause 7.4(b) how soon after referral to arbitration must GrainCorp notify the ACCC of the details of the dispute?
35. Who does GrainCorp envisage as likely candidates for Arbitrator, especially considering the matters set out in clauses 7.6 – 7.9?
36. What does GrainCorp estimate as the likely duration and cost of an arbitration process?
37. In relation to clause 7.9(b) who determines whether an Applicant does not comply with a determination or direction of the Arbitrator? What is the basis for reaching a conclusion that non-compliance has occurred?

Ring fencing

38. On page 6 of its supporting submission, GrainCorp states the information available from its up-country operations is of little competitive value. Please describe the information relating to bulk wheat exporters that GrainCorp has access to via its up-country operations that is not publically available, and expand on why it does not bestow any practical competitive advantage on GrainCorp.
39. Will the Compliance Auditor's report be required to identify potential breaches (if any) of the Ring Fencing Rules?
40. How does GrainCorp define 'Financial Records'? Please list the type of records and/or accounts which will be made available to the independent auditor.
41. Will the provision of Financial Records involve an accounting separation regime? If so, what would be the costs of implementing such a regime, and

what cost allocation methodology would GrainCorp propose to use in allocating costs to different business areas?

Service standards

42. Does GrainCorp currently report (internally or externally) on any key performance indicators/service standards in relation to its port operations? If so, please list and explain the measures.

Capacity management/ Port protocols

43. Why does clause 2.4 (b)(i) of schedule 2 refer only to 'vertical' storage at port?
44. GrainCorp's Port Terminal Services Protocols (schedule 3) sets out the differences between the services offered to access seekers pursuant the undertaking depending on whether wheat is delivered via a GrainCorp up-country site, another Approved Site, or an unapproved site. Please provide further information on how and why the port terminal services offered by GrainCorp differ depending on the source of the grain.
45. In relation to clause 3.1.2 of GrainCorp's Port Terminal Services Protocols, what evidence does GrainCorp require to be satisfied that the exporter has 'sufficient grain tonnage'?
46. Clause 1.2(e)(i)(D) refers to reaching an appropriate balance between the legitimate business interests of GrainCorp's ability to meet its "reasonably anticipated requirements" for Port Terminal Services with the interest of the public and access seekers.
- a. Does this objective mean that GrainCorp intends to reserve and set aside its Trading Division's 'reasonably anticipated requirements' and then provide access to third parties for the remaining capacity? If setting aside capacity for its Trading Division, what criteria will be used to assess what will be its 'reasonably anticipated requirements'?
 - b. If GrainCorp does intend to set aside capacity for its Trading Division, how does this interact with the relevant ring-fencing obligations?
 - c. How does GrainCorp otherwise propose to balance the port capacity requirements of itself or its own Trading Division with third party bulk wheat exporters?
47. In relation to clause 8.4(c) what are the "objective commercial criteria" that GrainCorp will use to make Operational Decisions that involve conflicts of interests between users of the Ports?