Australian
Competition &
Consumer
Commission

GrainCorp Operations Limited

Port Terminal Services Access Undertaking

Decision to Accept

29 September 2009

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measures would require GrainCorp to publish a single set of prices for port terminal services, which may include differentiated prices for different circumstances (i.e. for different processes for testing of grain depending on where it has been stored – but only where these processes are justifiable with regard to hygiene, quality or associated factors), provided those circumstances are transparently stated and the pricing differences are justified on the basis of different costs.

The ACCC is of the view that these underpinning measures will allow access seekers to commercially negotiate with GrainCorp in a framework where both parties know that prices, terms and conditions may be subject to arbitration by the ACCC or a private arbitrator, applying the pricing principles in section 44ZZCA of the TPA and general non-discrimination requirements.

It is also relevant to note that GrainCorp's September Undertaking is for a limited duration, and should the publish-negotiate-arbitrate framework prove not to be effective, the ACCC may adopt a more prescriptive method in any future access undertaking assessments.

The ACCC also notes the Port Terminal Services Protocols, which are not terms of access but rather general procedures for operational management of the ports, including how capacity allocation/nomination of shipping slots occurs. The ACCC is of the view that it is in the legitimate business interests of GrainCorp, and indeed in the interests of efficiency in the overall supply chain, that GrainCorp has sufficient flexibility to run its day-to-day operations without unduly prescriptive interference. The ACCC also notes that it is in the interests of the access seekers, and of competition in downstream markets, that these operations are conducted on a non-discriminatory basis, in a manner that is clear and transparent, and with recourse to adequate and swift dispute resolution procedures in the event of dispute between GrainCorp and access seekers. It is therefore the ACCC's view that it is appropriate that any changes to the Port Terminal Services Protocols occur with adequate notice and consultation – but not be subject to the variation procedures in section 44ZZA(7) of the TPA. The ACCC notes that should such processes prove unsatisfactory, the port terminal protocols may in future need to be the subject of more prescriptive processes.

In relation to ring-fencing, the ACCC's view is that the weak ring-fencing rules in GrainCorp's April Undertaking would not have served as an effective safeguard against anti-competitive discrimination in the provision of port terminal services.

However, ring-fencing is just one tool that can be used to ensure against anti-competitive discrimination.

Given that GrainCorp's September Undertaking contains robust non-discrimination and no hindering access clauses, fair and transparent port terminal protocols and indicative access agreements (as well as measures to deal with the potential for information about port terminal services to be used to the advantage of GrainCorp's wheat exporting arm), then, in the circumstances, it is not necessary for ring-fencing measures to be included at this particular point in time.

In forming this view, the ACCC has taken into account the transitional nature of the industry and the possibility that any ring-fencing measures that were implemented at

The ACCC considers that the clauses in GrainCorp's September Undertaking relating to the term and variation of the undertaking have addressed the ACCC's concerns with the clauses relating to the term and variation of GrainCorp's April Undertaking set out in the ACCC's Further Draft Decision.

Therefore, the ACCC considers that the clauses in relation to the term and variation of GrainCorp's September Undertaking are appropriate.

the pricing principles in s.44ZZCA of the TPA and general non-discrimination requirements.

Third, the April Undertaking is for a limited duration. GrainCorp is subject to the threat of more prescriptive regulatory requirements in any future undertaking should the publish-negotiate-arbitrate framework not be effective. GrainCorp will have a strong incentive to ensure that prices are commercially reasonable and non-discriminatory to avoid more costly and intrusive regulation in future (such as cost modelling for all its port terminals, ex ante pricing and prescriptive ring-fencing).

Finally, the April Undertaking covers six port terminals, and the April Undertakings of all three bulk handlers cover 17 port terminals altogether. Given the transitional state of the industry, it would be a significant cost burden on the industry to require ex ante cost modelling of 17 port terminals if only a few may prove the subject of an arbitration that would warrant cost modelling.

Therefore the ACCC considers it is likely to be appropriate for the April Undertaking to adopt a publish-negotiate-arbitrate approach rather than an ex ante regulated price approach, provided that the mechanisms giving effect to the publish-negotiate-arbitrate approach are robust. In this regard the ACCC reiterates its previous comments regarding the need for the April Undertaking to be certain and clear, and to provide for 'fair and transparent access' to access seekers. The ACCC considers that it is in the interests of access seekers, and consistent with the WEMA, for the publish-negotiate-arbitrate mechanism to be robust.

The ACCC wishes to emphasise that in reaching this view it is not suggesting that the absence of ex ante regulation of prices for port terminal services is likely to be appropriate in all circumstances. The ACCC is instead acknowledging that it is appropriate for the April Undertaking not to provide for ex ante pricing regulation given the circumstances at this particular time. The ACCC wishes to expressly recognise the possibility that ex ante price regulation may be appropriate for port terminal services in certain circumstances, and takes no view on what may be appropriate in relation to any subsequent undertaking proposed by GrainCorp following the expiry of the current April Undertaking.

The ACCC notes as a general comment that the publish-negotiate-arbitrate clauses in the April Undertaking are to a large extent modelled on clauses contained in the access undertaking submitted by the Australian Rail Track Corporation (**ARTC**), and accepted by the ACCC on 30 July 2008. The ACCC considers the fact that it accepted as appropriate particular clauses in the ARTC access undertaking provides little support for a conclusion that similar clauses in the current context are appropriate, as the circumstances of the current April Undertaking and the ARTC access undertaking are clearly distinguishable. Significantly, the ACCC notes that the ARTC access undertaking included a regulated access price. The ACCC therefore considers that, as a general matter, it is appropriate for the publish-negotiate-arbitrate mechanism in the current context to be, in a sense, more 'prescriptive' than that in the ARTC access undertaking.

Therefore, the ACCC considers that the clauses in relation to the publish, negotiate, arbitrate model of GrainCorp's September Undertaking are appropriate.

justifiable taking into account the matters set out in clause 5.5 and offered on an arms length basis), which are as follows:

1.2 Objectives

The Undertaking has the following objectives:

(a) providing a framework to manage negotiations with Applicants for access to services provided by certain facilities at the Port Terminals in relation to export of Bulk Wheat;

(b) establishing a workable, open, non-discriminatory and efficient process for lodging and processing Access Applications;

(c) providing a non-discriminatory approach to pricing under which GrainCorp publishes reference prices and terms and conditions for the provision of certain standard services annually;

(d) operating consistently with the objectives and principles in Part IIIA of the TPA and the Competition Principles Agreement;

(e) reaching an appropriate balance between:

(i) the legitimate business interests of GrainCorp, including:

(A) the recovery of all reasonable costs associated with the granting of access to the Port Terminal Services;

(B) a fair and reasonable return on GrainCorp's investment in the Port Terminal Facility commensurate with its commercial risk;

(C) GrainCorp's business interests relating to the export of grain other than Bulk Wheat and to the export of non-grain commodities using the Port Terminal Facilities;

(D) GrainCorp's ability to meet its own or its Trading Divisions' reasonably anticipated requirements for Port Terminal Services; and

(ii) the interest of the public, including:

(A) ensuring efficient use of resources; and

(B) the promotion of economically efficient investment, use and operation of the Port Terminals; and

(iii) the interests of Applicants wanting access to the Port Terminal Services, including providing access to the Port Terminal Services:

(A) on non-discriminatory price and non-price terms; and

(B) in a transparent, open, efficient and non-discriminatory manner;

(f) providing an efficient, effective and binding dispute resolution process in the event that GrainCorp and the Applicant are unable to negotiate a mutually acceptable Access Agreement; and

(g) in accordance with the objective in s44AA(b) of the TPA, providing for a uniform approach to access to the Port Terminal Services at the different

Therefore, the ACCC considers that the clauses in relation to non-discrimination, no hindering access and the ability of the ACCC to audit compliance with the non-discrimination clause of GrainCorp's September Undertaking are appropriate.

For the reasons set out above, given that GrainCorp's September Undertaking contains robust non-discrimination and no hindering access clauses, fair and transparent port terminal protocols and an indicative access agreement (as well as measures to deal with the potential for information about port terminal services to be used to the advantage of GrainCorp's wheat exporting arm), then, in the circumstances, it is not necessary for ring-fencing measures to be included in GrainCorp's September Undertaking at this particular point in time.