



Australian  
Competition &  
Consumer  
Commission

**GrainCorp Operations  
Limited's Application to  
extend and vary its 2011 Port  
Terminal Services Access  
Undertaking**

**Decision to accept**

**25 September 2014**

Australian Competition and Consumer Commission  
23 Marcus Clarke Street, Canberra, Australian Capital Territory, 2601  
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# 1. Summary

The Australian Competition and Consumer Commission (ACCC) has made a decision to extend the period for which GrainCorp Operations Limited's (GrainCorp) current 2011 Port Terminal Services Access Undertaking (2011 Undertaking) is in operation and to consent to GrainCorp's request for a variation of the 2011 Undertaking.

The 2011 Undertaking, which governs access to port terminal services at GrainCorp's East Coast bulk grain ports, is due to expire on 30 September 2014. A mandatory code of conduct (the Code) is anticipated to commence on 30 September 2014. If the Code is approved and declared by 30 September 2014, it will trigger the repeal of the *Wheat Export Marketing Act 2008* (Cth) (WEMA) on 1 October 2014 and remove GrainCorp's requirement to have an access undertaking accepted by the ACCC.

On 28 July 2014 GrainCorp submitted an application to extend and vary its 2011 Undertaking to the ACCC. On 13 September 2014, GrainCorp withdrew that application and submitted a varied application (the Application) to include reporting obligations for 2015. The Application seeks to ensure GrainCorp's compliance with the access test in the WEMA and provide certainty over access arrangements at its seven East Coast bulk grain ports in the event that the Code does not commence on 30 September 2014.

The Application seeks to achieve these aims through extending the operation of the 2011 Undertaking by one year, until 30 September 2015 with an early expiry clause that would allow it to expire prior to 30 September 2015 if GrainCorp is no longer required to have an access undertaking in place.

The Application also proposes amendments to clarify the definition of the Code and provisions for publishing key service performance indicators for the extended period of the 2011 Undertaking

The ACCC considers that GrainCorp's proposed extension and variations are appropriate, having regard to the appropriate matters in Part IIIA of the *Competition and Consumer Act 2010* (Cth) (the CCA). Its final decision is to consent to the Application.

## 2. Background to the Application

### 2.1 Access undertakings

Division 6 of Part IIIA of the CCA provides that the ACCC may accept an undertaking from a person who is, or expects to be, the provider of a service, in connection with the provision of access to that service.

On 22 June 2011, the ACCC accepted the 2011 Undertaking which covers the port terminal services GrainCorp provides at its seven bulk grain exporting facilities on the East Coast of Australia – Mackay, Gladstone and Fisherman Island (Brisbane) in Queensland, Carrington (Newcastle) and Port Kembla in New South Wales, and Geelong and Portland in Victoria. The 2011 Undertaking is currently set to expire on 30 September 2014. GrainCorp provided the 2011 Undertaking in order to meet the access test, a requirement of the WEMA. The access test, in part, can be met if port terminal operators that also export bulk wheat, have an access undertaking accepted by the ACCC.

On 26 November 2012 GrainCorp published varied Port Terminal Service Protocols (PTSPs) for its 2011 Undertaking to allow it to offer long term agreements (LTAs) to users of its bulk grain export facilities. The ACCC did not object to these variations, which came into effect on 27 December 2012. GrainCorp published further variations to the PTSPs in March 2013, primarily to introduce transferability of port terminal capacity.

GrainCorp also applied to vary its 2011 Undertaking on 12 November 2013 to exclude its Newcastle port from most of the obligations of the undertaking and PTSPs. The ACCC consented to this application on 18 June 2014 having considered the relevant matters in Part IIIA of the CCA, including the degree of competitive constraint faced by GrainCorp at its Newcastle port.

## 2.2 Mandatory Code

In December 2012, the WEMA was amended to provide that the access test will be repealed if the Code is approved and declared before 30 September 2014. If the Code does commence on 30 September 2014, access to port terminal services at GrainCorp's bulk grain ports will be governed by the Code from 1 October 2014.

GrainCorp submitted that the Application was made to provide regulatory certainty in the event that the Code does not commence on 30 September 2014.<sup>1</sup> If the Code does not commence on 30 September 2014 and the 2011 Undertaking expires on 30 September 2014, from 1 October 2014 GrainCorp would fail to meet the access test of the WEMA and would not be entitled to export bulk wheat.

## 2.3 Application

The CCA allows the provider of an access undertaking to apply to the ACCC for an extension of the term of that undertaking.<sup>2</sup> The CCA also allows the provider of an access undertaking to vary that undertaking at any time after it has been accepted by the ACCC, but only with the ACCC's consent.<sup>3</sup>

On 13 September 2014 GrainCorp submitted the Application, pursuant to subs. 44ZZBB(1) and 44ZZA(7) of the CCA. The Application and associated documents including GrainCorp's supporting submission are available on the ACCC's website at [www.accc.gov.au/wheat](http://www.accc.gov.au/wheat). This replaced an earlier application provided on 28 July 2014.

GrainCorp's supporting submission that accompanied its original application on 28 July 2014 states that the Application was seeking to provide GrainCorp with certainty. GrainCorp submitted:

There is currently no visibility as to exactly when the Code will be finalised.

GrainCorp is seeking to vary its Undertaking by extending its term by up to 1 year as a prudent measure in case the Mandatory Code is not prescribed by 1 October 2014. It is proposed that the Undertaking will come to an end as soon as the Mandatory Code comes into effect.

No other changes are proposed to the Undertaking at this time, from the ACCC's most recently approved variation to the Undertaking on 18 June 2014.

The Application also includes a variation to clarify the definition of the Code.

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<sup>1</sup> GrainCorp Operations Limited, *variation to Port Terminal Services Access Undertaking – Submission to the Australian Competition and Consumer Commission, 28 July 2014*, p. 1.

<sup>2</sup> Subs. 44ZZBB(1).

<sup>3</sup> Subs. 44ZZA(7).

This final decision provides the ACCC's reasons for consenting to the Application. The ACCC's reasons have been formed in consideration of the matters listed in subs. 44ZZA(3) of the CCA.

## 3. ACCC's views on the Application

### 3.1 ACCC's views on the application to extend

The ACCC considers that the one-year term of the extension with an early expiry provision and the continuation of the provisions of the 2011 Undertaking for an additional year is appropriate.

#### 3.1.1 Term of the extension

The ACCC considers that the uncertainty surrounding the commencement of the Code at the time GrainCorp submitted the Application needs to be taken into account in assessing the appropriateness of a one-year extension.

Viterra and Emerald responded to the uncertainty by extending the operation of their access undertaking arrangements by one-year until 1 October 2015. CBH has proposed a similar extension of its undertaking. Each of these include 'early expiry' provisions that will allow for the respective undertakings to expire upon one of a number of events, including the commencement of the Code.

GrainCorp's application mirrors this approach by proposing to extend the operation of its 2011 Undertaking until 1 October 2015 and including an equivalent 'early expiry' provision. GrainCorp submits that the Application seeks to provide regulatory certainty for its own commercial operations, as well as the commercial operations of its customers in the event that the Code does not commence on 30 September 2014.

The ACCC considers that the extension of the 2011 Undertaking for one year provides this certainty.

The ACCC considers that the certainty provided by the proposed one-year extension is in the interests of both GrainCorp and access seekers, having regard to subss. 44ZZA(3)(a) and 44ZZA(3)(c) of the CCA. The ACCC also considers that the operational certainty provided by the proposed extension promotes the operation of an efficient and profitable bulk wheat export marketing industry, and is consistent with the objects of the WEMA.<sup>4</sup>

#### 3.1.2 Early expiry

An early expiry provision at clause 3.2(b) of the undertaking specifies that the 2011 Undertaking may expire prior to the undertaking's proposed extended expiry date of 30 September 2015 if GrainCorp is no longer required by law to have an access undertaking accepted by the ACCC, including upon the commencement of the Code.

The ACCC notes that it has endorsed the inclusion of equivalent early expiry provisions as part of its analysis of Viterra and CBH's applications to extend and vary their respective 2011 undertakings and Emerald Grain's application to extend and vary its 2013 undertaking.

The ACCC considers that the inclusion of an early expiry provision is appropriate. The ACCC considers that incorporating the ability for the 2011 Undertaking to continue its operation until such a time that GrainCorp is no longer required to meet the access test

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<sup>4</sup> s.3(a) of the WEMA.

provides certainty to access seekers regarding access arrangements at GrainCorp's ports, ensures GrainCorp's compliance with the access test, and removes the possibility of double regulation.

This is in the legitimate business interests of GrainCorp and consistent with the policy objectives of the WEMA, having regard to subs. 44ZZA(3)(a) and 44ZZA(3)(e) of the CCA.

### **3.1.3 Continuation of the 2011 Undertaking for the period of the proposed extension**

The Application maintains and rolls forward features of the 2011 Undertaking that were accepted by the ACCC on 22 June 2011, as subsequently amended. These include:

- a publish-negotiate-arbitrate model for price and non-price terms of access
- obligations not to discriminate in favour of its trading division in providing access to port terminal services or engage in conduct with the purpose of hindering access
- obligations to negotiate access in good faith
- arbitration of access disputes
- requirements to publish a loading statement and key port information.

These features are common across all four wheat Port Terminal Access Undertakings currently accepted by the ACCC.<sup>5</sup>

The Application also maintains and rolls forward the varied features of its 2011 Undertaking. These include GrainCorp's LTAs that the ACCC did not object to and were incorporated into the undertaking at the end of 2012. It also includes the exclusion of GrainCorp's Newcastle port terminal from most of the obligations of the undertaking, which was accepted by the ACCC in June 2014. The ACCC notes that in its assessment of each of those proposals the ACCC considered the nature of the East Coast wheat market, including the level of competitive constraint.

#### Submissions

CBH submits that the Application represents an appropriate time to conduct a review of GrainCorp's LTAs:

In its application to the ACCC dated 28 July 2014, GrainCorp i[s] not choosing to seek a longer extension of its 2011 undertaking, but a variation involving a one year extension. However, the application does not appear to recognise that the roll over for one year extends the operation of the LTA's under the Undertaking for a further three year period.

In addition, the ACCC's recent reviews of GrainCorp's access undertakings did not consider the operation of GrainCorp's LTA arrangements. In these circumstance, there should, in CBH's view, be a more detailed analysis by the ACCC of the operation of GrainCorp's access undertaking and in particular the operation of the LTA arrangements pursuant to section 44ZZBB of the Competition & Consumer Act (Cth) 2010 ("CCA").<sup>6</sup>

CBH further submits specific concerns in relation to how GrainCorp allocates LTAs:

CBH has previously sought to make an application for access to GrainCorp's terminals under the LTA arrangements. However, CBH's experience has been problematic. CBH believes that the process for considering LTA applications and the manner in which GrainCorp seeks to

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<sup>5</sup> The ACCC has also accepted wheat Port Terminal Access Undertakings from CBH, Viterro and Emerald Grain.

<sup>6</sup> CBH Group, *Submission in relation to application by GrainCorp Operations Limited to vary its Port Terminal Services Undertaking*, September 2014, p. 1.

accommodate those interests can be improved and is currently unsatisfactory. In the PTSA, GrainCorp has "full discretion" as to how it will accept an LTA application and to move tonnage to "ensure shippable parcels in each month at each Port Terminal". Under the GrainCorp Undertaking, an LTA applicant must also seek tonnages at each port terminal.<sup>7</sup>

CBH adds, regarding GrainCorp's discretion, that:

GrainCorp having "full discretion" to move tonnages with no transparency on allocation is clearly untenable in relation to a transparent allocation system. Further, allocating based on pro-rata scale backs is clearly inappropriate with full discretion given to GrainCorp.<sup>8</sup>

On the long term capacity spread requirements of GrainCorp's LTAs, CBH submits:

CBH believes that the manner in which GrainCorp requires a spread of capacity among ports has limited if any justification on the basis of efficiency. Each port terminal operates on its own terms, as the ACCC has acknowledged in its assessment of GrainCorp's Newcastle port terminal on a standalone basis. Further, CBH believes that this requirement creates practical issues that CBH would like to discuss on a confidential basis.<sup>9</sup>

### ACCC views

The ACCC's assessment of the Application required the ACCC to consider whether it was appropriate to extend the operation of the 2011 Undertaking, as varied, until 1 October 2015.

#### *Review of GrainCorp's LTAs*

The ACCC notes that GrainCorp's first LTA allocations were made in 2013 for the period 1 October 2013 – 30 September 2016. The 2011 Undertaking provides that GrainCorp may only enter into LTAs in a 'Long Term Nomination Year', defined at Part A of GrainCorp's PTSPs as:

... a year in which GrainCorp enters into *Long Term Port Terminal Services Agreements and will occur every three (3) years commencing in 2013.*

GrainCorp's next 'Long Term Nomination Year' is therefore 2016. The Application seeks to extend the operation of the 2011 Undertaking until 1 October 2015. GrainCorp's next allocation of LTA capacity will therefore not take place during the term of the extended 2011 Undertaking.

The ACCC notes accordingly that any changes to GrainCorp's LTAs will not have any practical effect on any current LTA contracts, and that the next allocation of LTA capacity would take place under an extended or subsequent undertaking. The ACCC considers that the review of GrainCorp's LTAs would be most appropriately conducted as part of the assessment of the undertaking that will govern GrainCorp's next allocation of LTA capacity in 2016.

#### *CBH comments on GrainCorp's LTAs*

The ACCC also makes the following comments on CBH's submitted concerns regarding GrainCorp's LTA allocation procedures.

Regarding CBH's concern about the circumstances in which GrainCorp may accept an LTA nomination or move a booking, the ACCC notes that the process by which GrainCorp will deal with a customer's Indicative Long Term Nomination is set out at clause 3 of GrainCorp's Long Term Elevator Access Protocols (LTEAP) within its Port Terminal Services Protocols.

Clause 3.5 of the LTEAP provides that if there is Sufficient Capacity to accommodate a customer's request, GrainCorp will accept that customer's Indicative Long Term Nomination.

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<sup>7</sup> *ibid*, p. 2

<sup>8</sup> *ibid*, p. 3.

<sup>9</sup> *ibid*.

If long term capacity is oversubscribed and there is Insufficient Capacity to accommodate the Indicative Long Term Nomination, GrainCorp has the discretion to respond in one of three ways. Clause 3.6 of the LTEAP describes GrainCorp's options:

3.6 Following receipt of an Indicative Long Term Nomination under Part B clause 3.4, if there is Insufficient Capacity, GrainCorp has full discretion to either:

- (a) consult with the Customer, and the Customer may re-submit its Indicative Long Term Nomination with a reduced monthly tonnage at a Port Terminal(s) or move its tonnage to another Port Terminal(s), subject to Part B clause 3.3, which GrainCorp will assess within forty (40) business days from the last day for submission of the original Indicative Long Term Nomination under Part B clause 3.2;
- (b) accept the Indicative Long Term Nomination following a variation in the Indicative Elevation Capacity in accordance with Part B clause 2.2; or
- (c) following consultation with the customer, accept the Indicative Long Term Nomination following the pro rata reduction of each Customer's Indicative Long Term Nomination on a Port Terminal by Port Terminal basis and on a non-discriminatory basis. To ensure capacity for shippable parcels in each month at each Port Terminal, the reduction may be applied by regularly spacing the provided capacity, such as every second month.

GrainCorp has the discretion to take one of three courses of action in the event of oversubscription: negotiate with customers to reduce their nominations; increase available long term capacity; or pro rata reduce all customer's nominations.

The ACCC also notes that:

- any movement of a customer's capacity pursuant to clause 3.6(a) of the LTEAP must follow consultation with that customer and that customer's resubmission of its Indicative Long Term Nomination, and
- any pro rata reduction of a customer's capacity to ensure shippable parcels must be in compliance with GrainCorp's non-discrimination obligation.

Regarding CBH's concern about GrainCorp's spread requirements on LTA nominations, the ACCC notes that GrainCorp requires that long term capacity is sought at a minimum of one port terminal, spread over three, five or ten months depending on the port. In deciding not to object to GrainCorp's LTAs proposal the ACCC accepted that the minimum criteria would facilitate exporters spreading LTA bookings over the year and securing only a base-load portion of their total capacity needs. The ACCC notes that the criteria are designed to ensure that exporters securing LTA capacity are not able to 'cherry pick' high-demand months of the shipping year. The monthly spread requirements vary by the category of port, grouped by the size of the typical export task of the port.

#### *Other provisions of the 2011 Undertaking*

In relation to continuation of other aspects of the 2011 Undertaking, subsequent assessments of and variations to the undertaking since its initial acceptance have taken a wide variety of issues into account. In particular, when considering GrainCorp's LTAs the ACCC considered GrainCorp's capacity allocation system as a whole in the context of the degree of competitive constraint faced by GrainCorp on the East Coast of Australia.<sup>10</sup> GrainCorp also made a subsequent variation to its capacity allocation procedures to introduce transferability of capacity in April 2013, promoting a more efficient use of capacity by reducing the chance that capacity will go unused at peak times.

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<sup>10</sup> ACCC media release, *ACCC allows GrainCorp to introduce long-term port access agreements*, 30 November 2012.



Additionally, the ACCC's recent acceptance of GrainCorp's variation to reduce the level of regulation at its Newcastle port terminal noted that the 2011 Undertaking would continue to apply at GrainCorp's six other port terminals.

The ACCC considers that its previous analyses as to the appropriateness of these features remains relevant.<sup>11</sup> The ACCC also considers that a one-year extension of the 2011 Undertaking is most appropriately accompanied by a continuation of the existing features of the 2011 Undertaking. The ACCC considers that this is in the interests of GrainCorp and access seekers by way of providing certainty.

As such the ACCC considers that the continuation of the features of GrainCorp's existing undertaking for a further year until 30 September 2015 is appropriate and in accordance with the matters listed in subs. 44ZZA(3) of the CCA.

### **3.2 ACCC's views on the application to vary**

The ACCC considers that GrainCorp's proposed variations to its 2011 Undertaking are appropriate.

#### **3.2.1 Variation**

The Application includes an amendment to clarify the definition of the Code in clause 13.1 of the undertaking.

The ACCC considers this change to be administrative in nature and provide clarity to the operation of the extended undertaking and accordingly, is in the legitimate business interests of GrainCorp and access seekers, having regard to subss. 44ZZA(3)(a) and 44ZZA(3)(c) of the CCA.

The ACCC notes that the Application was withdrawn and resubmitted to include provisions for publishing key service performance indicators for the one-year period of the proposed extension. These indicators detail service performance on a range of measures including the number of vessels failing survey, the number of cargo nomination applications rejected and the average assessment times for nominations, volumes of tonnes shipped each month and the daily average road receipt rate.

The ACCC considers that the inclusion of these additional key performance indicator reporting dates is appropriate. These provisions are consistent with those in the 2011 Undertaking and provide transparency about the operation of GrainCorp's ports. As such the ACCC considers the publication of these indicators to be in the interests of access seekers, having regard to subs. 44ZZA(3)(c) of the CCA, and also in the public interest in promoting competition in the bulk wheat export market, having regard to subs. 44ZZA(3)(b) of the CCA.

## **4. Decision to consent to the Application**

The ACCC has considered the Application provided by GrainCorp to the ACCC on 13 September 2014, pursuant to s. 44ZZBB and subs. 44ZZA(7) of the CCA.

The ACCC's final decision is that, having regard to the matters listed in subs. 44ZZA(3) of the CCA, it consents to the Application.

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<sup>11</sup> Analysis of the 2011 Undertaking and its subsequent variations are available at [www.accc.gov.au/wheat](http://www.accc.gov.au/wheat).

# Appendix A: The ACCC's assessment process

## Legislative tests applied in assessing the Application

The ACCC's assessment of the Application is guided by s. 44ZZBB and subs. 44ZZA(7) of the CCA.

### Legal test for accepting an application to extend an access undertaking

The test the ACCC applies in deciding whether to extend an undertaking is set out in s. 44ZZBB of the CCA. This section provides that the ACCC may extend the period for which the undertaking is in operation if it thinks it appropriate to do so having regard to the matters in subs. 44ZZA(3) including, but not limited to:

- the objects of Part IIIA of the CCA (including promoting the economically efficient operation of, use of and investment in the infrastructure by which services are provided, thereby promoting effective competition in upstream and downstream markets)
- the legitimate business interests of the provider of the service
- the public interest, including the public interest in having competition in markets
- the interests of persons who might want access to the service.

### Legal test for accepting an application to vary an access undertaking

The test the ACCC applies in deciding whether to consent to the variation of an undertaking is set out in subs. 44ZZA(7) of the CCA. This section provides that the ACCC may consent to a variation of an undertaking if it thinks it appropriate to do so having regard to the matters set out in subs. 44ZZA(3), listed above.

In practice, in assessing a dual application to extend and vary, the ACCC considers whether it is appropriate for the undertaking, including the variations, to continue for the period specified.

## Further information

If you have any queries about any matters raised in this document, please contact:

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