



**ACCC Port Access Code of Conduct:
Port Kembla Draft Decision**

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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 draft decisions it has released seeking the views of industry on the applications made by GrainCorp and Quattro for relief from the obligations contained within Parts 3-6 of the Port Terminal Access (Bulk Wheat) Industry Code (the 'code') for their port facilities located within the Port Kembla zone (the 'Port Kembla facilities').

NSW Farmers continues in its concern that it is too premature to exempt the port facilities from the requirements of Part 3-6 of the code. Specifically, NSW Farmers is concerned at the impact of removing the duty to not discriminate against an access seeker in preference of their own operations. In taking this position, NSW Farmers points to the vertical integration between GrainCorp's marketing arm and the operation of its ports, as well as the likelihood that Quattro's grain exporting shareholders are in positions in which they exercise either control or significant influence on its Port Kembla operations.

In bringing forward this continued concern NSW Farmers welcomes the ACCC's competition analysis that recognises the limitation of competition within the market for upcountry storage and handling within the Port Kembla port zone; and invites it to reconsider the proposed impact that this limitation will have on competition at the commencement of Quattro's Port Kembla facility.

Additionally, NSW Farmers also invites the ACCC to reconsider its draft position with regard to the proposal put forward by NSW Farmers as an alternative to exempting the Port Kembla facilities. This position is that it is open to the ACCC to not exempt the facilities and instead utilise its discretion in the approval of capacity allocation processes to reduce the regulatory burden of the code.

NSW Farmers further welcomes the ACCC's commitment to undertake ongoing monitoring of the services offered by the Port Kembla facilities; however, proposes that in light of the imperative to see lower supply chain costs recommends that this monitoring should include price monitoring.

General comments

One of the key public interest outcomes that should be pursued as a result of the code's operation should be the facilitation of competitive outcomes in the upstream markets that farmers participate in. As outlined in NSW Farmers' submission in response to the Issues Paper, the code is a key policy driver to assist the development of a market signal to Australian grain growers to increase production in line with other government initiatives to improve the competitiveness of Australian agriculture.

Key to the development of this market signal is the reduction of the cost borne by Australian farmers through the supply chain; of which port costs are not only a major

component, but also the major comparative disadvantage compared to international competitors such as Canada.¹ NSW Farmers welcomes efficient capital investment in grain supply chains that develop the competitive tension necessary to drive down the costs borne by farmers, both directly through reduction in FOB deductions and through higher port prices. However, without sufficient levels of horizontal competition at port, NSW Farmers remains concerned that the benefits of any efficiencies realised within the grain supply chain will not be distributed through the market back to the farm gate. Instead, they are likely to be captured by the port terminal operators with the market likely to operate in a fashion similar to non-competitive duopoly with regard to pricing.

Therefore it is imperative that the code facilitates the distribution of value through the supply chain back to the farm gate unencumbered by excessive value extraction by other supply chain participants.

In considering the importance of the above, NSW Farmers disagrees with the draft decisions' assessment that the level of competition will protect farmers from increased port costs; particularly where those costs have arisen as a result of inefficient capital investment.² Further, NSW Farmers is concerned that the commencement of Quattro's port facility, by itself, will not result in the competitive tension that creates downward movement in these port costs.

With regard to this matter, NSW Farmers brings to the attention of the ACCC the comments made by Alex Kyriakoulis, a partner of Holman Fenwick Willan's International Infrastructure Group to the recent Australian Grains Industry Conference, on the operation of the code. Specifically Mr Kyriakoulis commented on the inability of the code to enforce reasonable costs of access. Referring to the ability of the ACCC to exempt facilities Mr Kyriakoulis further posed the question on how the ability of port terminal to exploit their market power will be constrained.

Likewise, as outlined below, NSW Farmers is sceptical that the unregulated export of containerised grain provides significant downward pressure on port costs due to the higher marginal cost associated with execution of these trades.

With reference to these inadequacies, NSW Farmers proposes that in addition to the industry monitoring already proposed in the draft decisions the ACCC should commence price monitoring of port terminal services. This will provide greater transparency to industry as to the impact of competition on reducing the port costs borne by farmers and monitor behaviour to determine if discriminatory practices can be observed in the behaviour of port terminal operators to the detriment of operation of upstream market's ability to distribute value back to the farm gate.

¹ See NSW Farmers submission to the ACCC Issues Paper 'Exempt service provider status assessments under the Port Terminal Access (Bulk Wheat) Code of Conduct: GrainCorp Operations Limited at Port Kembla and Quattro Ports at Port Kembla (June 2015), 7-8; ('Issues Paper').

² See ACCC 'ACCC draft decisions GrainCorp Operations Limited and Quattro Ports at Port Kembla; Exemption assessments of bulk wheat terminals under the Port Terminal Access (Bulk Wheat) Code of Conduct' (30 July 2015) 56. ('Draft Decisions').

NSW Farmers proposed alternatives

It is the view of NSW Farmers that the code offers two separate measures to the ACCC to impose the appropriate level of regulation in response to risks of behaviour that impedes the market's proper operation. The first of these is through the exemption process the second of these is in the approval of the capacity allocation process to be utilised by a non-exempt facility

NSW Farmers agrees with the ACCC that *ex ante* provisions proscribing discriminatory behaviour in the allocation of port terminal capacity are preferable to *ex post* enforcement of this form of discriminatory behaviour. However, allegations of a range of other discriminatory behaviour linked to the provision of port terminal services other than capacity allocation has been referred to by a number of Senate inquiries that looked at the impact of the operations of port terminals on competition in the upstream market for farmers' grain.⁶ Additionally, NSW Farmers presented a number of further concerns that had been raised in discussions with members of the grain trade to the ACCC as part of its market inquiry into GrainCorp's application to vary its 2011 Port Access Undertaking. Primarily these have dealt with the impact of interlinking upcountry networks in the concentrated markets for storage and handling.⁷

Specifically, the discriminatory behaviour referred to above is enabled by the ability to use the network effect of upcountry and port infrastructure to favour related trading arms over third party exporters in a discriminatory manner. The impact of this behaviour is to increase the cost and risk associated with the execution of assembled cargoes to export vessel.

Even if NSW Farmers was of the view that the competitive landscape for the provision of port terminal services was of a magnitude that it was not necessary to pre-approve an allocation system to maintain a fair and transparent allocation of available capacity; we remain concerned that this may not translate to adequate protection for the less discrete discriminatory behaviour referred to above. On this basis, NSW Farmers believes it would have been preferable for the duty of non-discrimination to have been applied as a duty within Part 2 of the Code.

In specifically applying this concern to the ACCC's consideration of the proposal, NSW Farmers makes the following comments.

Firstly, the competition analysis undertaken by the ACCC in the draft determination has highlighted the lack of a sufficient level of competition in the market for upcountry storage and handling.⁸ In making this observation NSW Farmers acknowledges, however disagrees, with the ACCC's qualifying remark on this statement linking this assessment to GrainCorp's privileged position as the sole port terminal service provider in the port zone.

Noting that the types of anti-competitive behaviour referred to above are enabled by the interlinking of the control of upcountry storage and handling networks to the access of

⁶ See Senate Rural and Regional Affairs and Transport Committee, Parliament of Australia, Inquiry into operational issues in export grain networks (2012) 26-28.

⁷ See NSW Farmers Submission in response to ACCC Issues Paper: GrainCorp's Newcastle Port Undertaking

⁸ Draft Decisions, 62.

cargoes for execution at port; NSW Farmers believes that misuse of the dominance held upcountry by GrainCorp is not adequately restrained by the presence of an alternative port terminal facility in the commencement of Quattro.

Likewise, NSW Farmers is concerned that the ACCC's competition analysis with regard to Quattro's shareholders fails to consider the implication of their balance sheet strength on the incentives to operate closed loop marketing arrangements and to use its shareholding influence in Quattro to facilitate such behaviour. The operation of BFB Temora as a single buyer site shows the commencement of these types of marketing arrangements.

Secondly, the draft decisions drew attention to the ACCC's belief that the origin of the compliance costs that may be avoided as a result of the proposed exemption arise from improved flexibility that:

- facilitates the trading of slots;⁹
- enables the re-ordering of slot priority;¹⁰
- reduces notification timeframes;¹¹
- enables the negotiation of long term arrangements for the purchase of capacity.¹²

These are matters directly related to the obligations imposed through the requirements that the ACCC may require of a port terminal operator in approving a capacity allocation system. It is the view of NSW Farmers' that the ACCC has sufficient flexibility within the confines of cl 25(3) to approve a capacity allocation system that reduces the costs where the level of competition warrants these flexibilities; while at the same time maintain other provisions that protect competition in the upstream market for farmers' grain.

While under a different regulatory framework, utilising such a mechanism would continue the ACCC historical approach to utilise its discretion to graduate the requirements a port terminal access based on the differences in the competitive landscape faced by a port terminal operator. This can be seen in the decisions of the ACCC with regard to GrainCorp's operation in eastern Australia which was able to maintain a first in first served approach to capacity allocation; whereas the more measured approach of auctioning off capacity was required in South Australia and Western Australia due to lower by-pass opportunities created by weaker domestic demand.¹³

Competition across the bulk wheat supply chain, container exports and domestic demand

Upcountry storage and handling

The draft decision cites the Productivity Commission's comment that upcountry storage facilities 'do not exhibit natural monopoly characteristics'; however NSW Farmers believes that this understates the magnitude of the barriers to entry into this market.

⁹ Ibid 48.

¹⁰ Ibid.

¹¹ Ibid.

¹² Ibid 60.

¹³ ACCC, 'Decision to accept GrainCorp Operations Limited's Application to Vary the 2011 Port Terminal Services Access Undertaking' (18 June 2014) 24-25.

This belief arises as a result concerns over the commerciality of adding capacity to the market for upcountry storage given the existing receival and storage capacity available through the dominant receival network of GrainCorp. The impact of this network is identified by GrainCorp itself in a investor presentation provided in 2012, in which it states the network ‘cannot be easily replicated’.¹⁴ This footprint in-turn inhibits the ability of potential competitors to develop a commercial business case to establish substantial competition through the development of the infrastructure necessary to deliver these upcountry services.

For example NSW Farmers draws attention to the ACCC’s use of CBH’s investigation into establishing upcountry supply chain infrastructure as a persuasive factor in its decision to relieve GrainCorp’s Carrington port facility from the obligations of its 2011 port access undertaking. However, subsequent to the ACCC’s decision CBH put a halt its plans to progress these investments.¹⁵

Containerised exports

The draft decision proposed that competition from containerised exports are ‘directly relevant’ to consideration of the applications to exempt the Port Kembla facilities.

Even if this proposition is to be accepted, NSW Farmers continues to hold that it should be given a lower weight than proposed in the draft decisions. In support of this view, NSW Farmers refers the ACCC to the arguments made in its submission to the Issues Paper and by the VFF in response to the ACCC’s assessment of the Victorian Ports.

Specifically, NSW Farmers re-emphasises its concern that due to the higher marginal cost associated with the export of containerised grain that its longer term competitive constraint is likely to be weaker than assumed by the ACCC. In support of this argument NSW Farmers is aware that there are a number of container packing entities that are likely to reconsider their operations at the conclusion of existing take or pay agreements with rail providers.

Additionally, this higher marginal cost means that the export of containerised grain is unlikely to provide competitive downward pressure on the bulk grain export supply chain which, as accepted by the ACCC, is the driver of farm gate returns.

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¹⁴ GrainCorp ‘2012 Results Release and Strategy Update: Investor Presentation’ (15 November 2012) [29].

¹⁵ See ACCC, ‘Decision to accept GrainCorp Operations Limited’s Application to Vary the 2011 Port Terminal Services Access Undertaking’ (18 June 2014) 53, 59.