About this submission

GrainGrowers is Australia's only national, independent, member-based, grain producer organisation representing over 19,000 grain producers. This submission is to the Government review of competition policy including the *Competition and Consumer Act 2010 (CCA).*

The Australian economy has changed significantly since the last review of Competition Policy ('Hilmer Review') and it now important to consider whether the competition policies and laws are 'fit for purpose' for Australia's current and emerging global economy. Competition is an important driver of productivity and efficiency in markets as it can drive more competitive prices, create choice for consumers, create a level playing field for small and medium sized operators, and raise living standards for all Australians.

This submission has focused on five main components of the competition policy review:

1. Use of the Code of Conduct mechanism
2. Productivity Commission recommendations on the National Access Regime
3. Domestic Competition Policy in an International Context

Key Points

- The government-regulated code of conduct process for grain export terminals (ports) is needed in the interim but should seek to be repealed over a five year time-frame to reduce the regulatory burden on operators, encourage greater investment in port terminal operation (a nationally significant function) and greater overall competition in the grains industry.

- Competition analysis conducted by the regulator as part of the implemented code of conduct process (which nominates some port operators as 'Tier 1' and others as 'Tier 2') needs to be transparent to industry. That is, industry should know why one operator is subject to regulation, and another is not.

- We support the draft findings within the Productivity Commission report on the National Access Regime. State and Federal governments a comprehensive overhaul of processes in the assessment and development of public infrastructure projects to assist the export freight task.

- Through the NAR the Government will also need to prioritise innovative funding and financing models (such as models for user-pays-pricing) that will allow private investment to extract grater returns and encourage direct infrastructure ownership and provision.

- The substitution (and therefore cross-subsidisation) between rail and road freight options necessitates a coordinated approach from a federal level. , Government needs to maintain a position to facilitate joint investment (PPPs) in natural monopoly assets from the stakeholders in the infrastructure.

- A competitive, globally-orientated, agriculture industry is reliant on a regulatory environment which aligns domestic competition rules, such as the 'net public benefit' test, and foreign investment rules to allow Australian companies to grow to create scale.

1. Codes of Conduct – setting behavioral standards and providing for dispute resolution.

Under the CCA an industry code is defined as 'a code regulating the conduct of participants in an industry towards other participants in the industry or towards consumers in the industry'. The Issues Paper asks: *Is the code of conduct framework leading to a better market place, having regard to both the aims of the rules and the regulatory burden they could create?*

As noted in the Issues Paper, to be effective a code must be: well designed, effectively implemented and properly enforced. The port access code of conduct exposure draft has been released in June 2014 to regulate the conduct of port terminal service providers and ensure that exporters of bulk wheat have fair and transparent access to port terminal services. Alongside this paper, government also released accompanying documents: a Regulatory Impact Statement (RIS); and a consultation paper. Currently eight port terminal operators facilitate the export of bulk wheat through 22 ports across Australia. Four of these ports are regulated by industry-specific legislation that requires them to pass an access test with the Australian Competition and Consumer Commission (ACCC). Government enquiry has established that the access test has made access 'easier, less costly and timelier' than it would have been if traders were only able to use provisions under the *CCA.*[1]

To comment conclusively on whether the code of conduct will improve the competitiveness of the grains industry, GrainGrowers will need to know which of the four options presented in the RIS will be agreed as the final code of conduct – this is dependent on industry consensus, and final ratification by the Federal Government no later than September 2014.

In its draft form, there are some overarching points which can be made about the impact of the code on competitiveness. It is important that industry implement a code that is able to adapt to the changing market place. *The requirements set out in the current exposure draft of the Ports Code of Conduct requires the ACCC to conduct a competition analysis on a port-by-port basis and consider specific, and agreed, matters before exempting a port from complying with sections of the code.*[2] While GrainGrowers supports this policy approach to the draft code where each export operator prices according to market signals, without exercising monopolistic behaviour the stated 'competition analysis'[3] within the code of conduct process (which is conducted by the ACCC and will result in some port operators classified as 'Tier 1' and others as 'Tier 2') needs to be transparent. *That is, industry should know why one operator is subject to regulation when another is not.*

As determined by the 2012 Rural and Regional Affairs and Transport Legislation Committee, the current arrangements place regulatory burden on port terminal operators that may inhibit investment in bulk wheat export facilities.[4] It follows then

[1] Rural and Regional Affairs and Transport References Committee, (April 2012), report on 'Operational issues in export grain networks'.
[2] Regulatory Impact Statement, (RIS), Mandatory Code of Conduct for Grain Export Terminals (Bulk Wheat Exports) June 2014.
[3] As above, RIS, Mandatory Code of Conduct, Grains, June 2014.
[4] Rural and Regional Affairs and Transport References Committee, report on 'Operational issues in export grain networks' April 2012.

that the Code should work towards a goal of a fully deregulated industry within a five year time-frame. International traders need to be able to ship grain from Australia to international markets with the minimum level of regulatory burden. This will improve the cost benefit equation for new investments and create an incentive for additional or improved services to be made available to the industry.[5]

In Summary

- *A code of conduct regulating the export of bulk wheat from Australia is leading to a more competitive market place in the long term.*
- *The process is needed in the interim but should seek to be repealed over a five year time-frame to reduce the regulatory burden on operators, encourage greater investment in port terminal operation (a nationally significant function) and greater overall competition in the grains industry.*
- *Competition analysis within the code of conduct process (which nominates some port operators as 'Tier 1' and others as 'Tier 2') needs to be transparent. That is, industry should know why one operator is subject to regulation when another is not.*

2. Infrastructure Access – National Access Regime

Access arrangements and the NAR

The National Access Regime (NAR) regime is a regulatory framework that provides an avenue for firms to access certain 'essential' infrastructure services owned and operated by others, when commercial negotiations on access are unsuccessful.

The Issues Paper asks whether the recommendations in the April 2014 Productivity Commission's draft report on the National Access Regime should be adopted.

GrainGrowers acknowledges and supports the Productivity Commission's finding that the NAR should develop access regulation aimed at *confining its application to where regulation is needed* to address an enduring lack of competition arising from a natural monopoly *rather than applying uniform regulation on national monopolies.*

Until the grains industry is sufficiently able to provide a competitive space for all operators, the grains supply chain is dominated by a small number of operators with vertically-integrated business structures which need to be monitored by an adequate level of regulation.

Facilitating Investment in Infrastructure

The NAR is intended to promote the use of, and investment in, infrastructure thereby promoting competition in upstream and downstream markets. In April

[5] Regulatory Impact Statement (RIS) Mandatory Port Access Code of Conduct for Grain Export Terminals 2014, DAFF, http://www.daff.gov.au/agriculture-food/crops/wheat/port-access.

2014, Juturna Infrastructure prepared a market briefing (the Juturna report) which used the Government-blocked take-over bid of Archer Daniel Midland (ADM) as the evidence-basis for a central recommendation that the Australian grains industry needs a credible and internally-consistent policy framework for least-economic-cost road, rail and port infrastructure in support of Australia's east coast grains industry.

The Juturna report concluded that without an infrastructure plan from the national policy leadership the grains sector will struggle to attract investment in infrastructure; capital costs will remain at market lows; and continued lack of progress will further damage Australia's reputation amongst patient capital investors, at a time when 'patient capital has never been cheaper or more willing to invest in Australian agriculture.'[6] The single desk, to a degree, covered the real effects of public sector grain planning failures. It therefore is necessary that Government takes a more active role in managing the coordination of the freight task, in a deregulated industry. More particularly, the substitution (and therefore cross-subsidisation) between rail and road freight options necessitates a coordinated approach from a federal level. Government needs to maintain a position to facilitate joint investment (PPP) in natural monopoly assets from the stakeholders in the infrastructure.

Government Review and Coordination of the National Freight Task

Despite government undertaking two major reviews of public infrastructure in 2013 (the Productivity Commission's review of the NAR which forms the focus of this section of the submission is one of these major reviews) the Federal Government is yet to take a comprehensive view of the national freight task for bulk wheat.

This is a costly oversight for government and the economy, given that wheat when benchmarked against other industries remains the only Australian agricultural product within Australia's top ten export commodities. The lack of concerted and coordinated effort from government also impacts on the productivity of the entire production section. Freight and storage costs represent 30% of the total production costs of a grower.[7] This is significant in the incredibly competitive global wheat market and increasingly has the potential to negatively impact on growers' ability to remain competitive.

Further, the quality and the certainty of the regulatory environment plays a key role in investment decisions in the broader Australian grains industry; this is because an efficient freight route and access to ports can be a critical consideration, for international or domestic companies, when choosing to invest in storage and handling grains infrastructure.

The regulatory requirements of the NAR can impact on investors, and the grains industry as a whole by extension, in two main ways:

1. investors are unable to forward-plan and schedule bulk wheat export for future years

[6] Good Instincts' Juturna Infrastructure P/L market briefing paper, April 2014.
[7] Tamara Stretch, Chris Carter, Ross Kingwell, (2014) The cost of Australia's bulk grain export supply chains, produced by Australian Export Grains and Innovation Centre (AEGIC).

2. the regulatory requirement may result in the cost of capital for the use of the infrastructure being lower (as a weighted average) than was in the original business case and therefore create additional capital losses.[8]

State and territory governments which have historically provided the main source of investment in public infrastructure are under increasing pressure from other areas of their budgets, from narrowing tax bases and increasing spending pressures (such as health and ageing expenditures, for example).[9] The federal government will need to increase its role to manage this growing gap in funding, but is facing its own structural budgetary pressures.[10] A growing risk for the overall profitability of the grains industry is the so-called, national 'infrastructure deficit' - despite increasing saving levels, increased investment at the macro level, and healthy federal balance sheets, the Australian economy has not seen an accompanying and essential infrastructure investment to support this overall growth.[11]

The consequence of uncertainty is that investors will be less likely to invest in capacity to meet immediate needs and less inclined to invest in spare capacity for future growth or increased asset quality, which is potentially at odds with the needs of a growing grains industry which needs to maximise future growth to capitalise on the opportunities available in neighbouring Asian countries. Uncertainty can raise hurdle rates of return, which impact on the decision to invest in Australian agriculture.

In summary

Productivity Commission report findings are supported. We believe State and Federal government will need to re-evaluate and improve the coordination of their roles in managing the national freight infrastructure task.

The overriding message of the Productivity Commission's draft report on the NAR is the need for a comprehensive overhaul of processes in the assessment and development of public infrastructure projects.

The substitution (and therefore cross-subsidisation) between rail and road freight options necessitates a coordinated approach from a federal level. Government needs to maintain a position to facilitate joint investment (PPPs) in natural monopoly assets from the stakeholders in the infrastructure.

3. Domestic competition policy and creating competitive, global scale in agriculture

The Issues Paper for this competition policy review lists as the first critical, and over-arching question of the terms of reference: *What should be the priorities for a*

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[8] Business Council of Australia, February 2013, submission to '*Productivity Commission Review of the National Access Regime and the Competition and Infrastructure Reform Agreement'.*
[9] 'Good Instincts' A Juturna Infrastructure P/L market briefing paper, April 2014.
[10] Budget 2014-15, http://www.budget.gov.au/2014-15/index.htm, 'Budget Paper 1: Budget Strategy & Outlook', Statement 2: Economic Outlook, accessed at 2 June 2014.
[10] 'Good Instincts' A Juturna Infrastructure P/L market briefing paper, April 2014.
[11] Infrastructure Deficit, http://www.charteredaccountants.com.au/futureinc/Business-Plan/Weaknesses/Infrastructure-deficit

competition policy reform agenda to ensure that efficient businesses, large or small, can compete effectively and drive growth in productivity and living standards?

GrainGrowers believes a competitive, globally-orientated, agriculture industry that ensures businesses are able to compete and drive up productivity, is reliant on a regulatory environment which aligns domestic competition rules, such as the 'net public benefit' test, and foreign investment rules to allow Australian companies to create scale and compete in a fiercely competitive global market.

The recent sale of Australian company, Warrnambool Cheese and Butter Factory Company Holdings Limited (WCB) involved a process where three bidders faced three different regulatory bodies with three different timelines.

Australian company, Murray Goulburn, placed a bid which faced a "net public benefit" test through the Australian Competition Tribunal (ACT). In reviewing the bid, the ACT examined three main issues:

- Would the bid impact on prices of milk and dairy products for consumers?
- Would the acquisition have a positive or negative impact on dairy farmers?
- Would the acquisition have an impact on the national economy?

The second bidder, Bega Cheese Limited, required (and received) approval from the ACCC based on the test of whether the proposed acquisition would 'substantially lessen competition' in any relevant market; lower prices offered to farmers for raw milk supply in these, or other dairy regions. In arriving at its decision the ACCC considered that a merged Bega and WCB would continue to face significant competitive constraint from: independent import competition; and existing domestic competitors, including Murray Goulburn and Fonterra.[12]

The third company, Canadian-based company Saputo, required consideration under Australia's foreign investment rules and received Foreign Investment Review Board (FIRB) approval without conditions.

While three different bidders (of which two were domestic bidders) faced three separate sets of competition-based regulation criteria in order to acquire WCB, the final outcome clearly showed that Saputo was quickly given a clear path to progress its offer while domestic competitor, Murray Goulburn, remained stalled in the ACT regulatory process.

Saputo has now developed a foothold in one of Australia's major agriculture industries, and further, Saputo may now capitalise on Australia's proximity to China – which is currently the fastest-growing market for dairy products in the world. Australia has been slow to take advantage of Asia's burgeoning demand for milk products; the main inhibiting factors, size, and efficient capacity, have capped Australian's share of the global dairy market at $2 billion.[13]

Interestingly, FIRB's decision on Saputo was followed shortly after the Federal Government announced the rejection of the Archer Daniels Midland (ADM)-GrainCorp merger on the grounds that the grains industry needs time for competition

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[12] ACCC Mergers register, (Closed Review: October 2013)'Bega Cheese Limited - proposed acquisition of Warrnambool Cheese and Butter Factory Company Holdings Limited' http://registers.accc.gov.au/content/index.phtml/itemId/1127625/fromItemId/751043

[13] 'Why everyone wants a slice of Warrnambool Cheese and Butter', November 2013, http://thenewdaily.com.au/money/2013/11/01/everyone-wants-slice-warrnambool-cheese-butter/

to take root that can rival monopoly infrastructure.[14] The potential injection of much needed capital and economies of scale that could have been offered by ADM was rejected on the basis of FIRB, yet the capacity of GrainCorp to make similar gains by domestic merger would be limited under the ACCC test. **This places GrainCorp in the unenviable position of not being able to get 'big enough in its own backyard' to enable deliver efficient internationally competitive freight or storage rates, but also not able to draw on international capital and economies of scale to deliver efficient internationally competitive freight or storage rates.**

Given that the storage and handling grains supply chain is dominated by a few operators which are vertically-integrated, decisions which constrict or impact on competitors further along the supply chain have an impact on the productivity and profitability of the grains industry as a whole.

In summary

- *A competitive, globally-orientated, agriculture industry is reliant on a regulatory environment which aligns domestic competition rules, such as the 'net public benefit' test, and foreign investment rules to allow Australian companies to grow to create scale.*

[14] Federal Treasurer, the Hon. Joe Hockey MP, 'GrainCorp Decision' (2013) http://www.joehockey.com/media/media-releases/details.aspx?r=371