Port Terminal Services Access Undertaking

by

Australian Bulk Alliance Pty Ltd (ABN 39 087 280 260) of 18-20 Enterprize Road, Appleton Dock Berth F, West Melbourne, Victoria 3003 ("**ABA**")

in favour of

Australian Competition and Consumer Commission
being a body corporate established under **section 6A** of the CCA ("**ACCC**")

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1. Interpretation

1.1 Definitions

In this Undertaking unless the context otherwise requires:

Access Agreement means an agreement between a User and ABA for the provision of Port Terminal Services;

Access Application means an application for Port Terminal Services as described in clause 7;

Accredited Wheat Exporter means a person having accreditation as an accredited wheat exporter under the WEAS;

Applicant means a person seeking access to the Port Terminal Services under clause 7;

Baseline Capacity means total capacity of the Port Terminal for the export of Bulk Wheat or any other commodity;

Booking has the same meaning as in the Loading Protocol;

Bulk Wheat means wheat for export from Australia other than wheat that is exported in a bag or a container that is capable of holding not more than 50 tonnes of wheat;

Business Day means a day which is not a Saturday, Sunday or public or bank holiday in Victoria;

CCA means the *Competition and Consumer Act 2010* (Cth);

Confidential Information means information exchanged between ABA and an Applicant or User in relation to the business of those persons that:

(a) is by its nature confidential;

(b) is specified to be confidential by the person who supplied it; or

(c) is known, or ought to be known, by a person using or supplying it to be confidential or commercially valuable;

but excludes information that:

(d) is comprised solely of the name, address and contact details of a person; or

(e) was in the public domain at the time when it was supplied; or

(f) subsequently becomes available other than through a breach of confidence or breach of this provision; or

(g) was in lawful possession of the a party prior to being provided by the party; or

(h) must be disclosed under the Continuous Disclosure Rules under the WEMA; or

(i) ceases to be confidential in nature by any other lawful means.

Continuous Disclosure Rules means the continuous disclosure rules as defined in subsection 24(4) of WEMA;

Country Facilities means the facilities in New South Wales and Victoria other than the Port Terminal at which ABA receives and stores Bulk Wheat and other commodities.

Credit Support means either:

(a) a Parent Guarantee; or

(b) Security;

Dispute means a bona fide dispute between an Applicant or User and ABA arising under this Undertaking;

Dispute Notice means a written notice provided by an Applicant or User to ABA or by ABA to an Applicant or User specifying the Dispute and requiring the Dispute to be dealt with under clause 8;

Eligibility Requirements are as set out in clause 7.4(a);

Indicative Access Agreement means the indicative access agreement in Schedule 1;

Loading Protocol means the policies and procedures published by ABA from time to time in accordance with the Continuous Disclosure Rules and clause 10.2. The Loading Protocol as at the commencement date of this Undertaking is set out in Schedule 5;

Material Default means any breach of a fundamental or essential term or repeated breaches of any of the terms of an Access Agreement or any agreement for the provision of services by ABA;

Negotiation Period means the period during which negotiation in relation to a final Access Agreement is undertaken as specified in clause 7.8(b);

Parent Guarantee means a guarantee given by a Related Body Corporate of the Applicant or User who has an investment grade credit rating or is otherwise acceptable to ABA (acting reasonably);

Performance Indicators means the performance indicators set out in clause 12;

Port Terminal means the seaboard terminal at Appleton Dock Port Melbourne.

Port Terminal Facility has the meaning given in clause 5.3;

Port Terminal Services has the meaning given in clause 5.2;

Reference Prices has the meaning given in clause 6.2;

Related Body Corporate has the meaning given in the *Corporations Act 2001 (Cth);*

Security means an unconditional and irrevocable bank guarantee, letter of credit, performance or insurance bond issued by a bank holding an Australian banking licence or such other reputable person or institution accepted by ABA and which is in a form reasonably satisfactory to ABA;

Shipping Stem has the meaning given in clause 10.1(b);

Solvent means that, in the last five years:

(a) the Applicant has been able to pay all its debts as and when they become due and has not failed to comply with a statutory demand under section 459F(1) of the *Corporations Act 2001* (Cth);

(b) a meeting has not been convened to place it in voluntary liquidation or to appoint an administrator;

(c) an application has not been made to a court for the Applicant to be wound up without that application being dismissed within one month;

(d) a controller (as defined in the *Corporations Act 2001 (Cth))* of any of the Applicant's assets has not been appointed; and

(e) the Applicant has not proposed to enter into or enters into any form of arrangement with its creditors or any of them, including a deed of company arrangement;

Standard Terms means the standard terms and conditions described in clause 6.3, or as varied in accordance with clause 6.5;

Trading Business means a business unit or division of ABA or its Related Bodies Corporate which has responsibility for the trading and marketing of Bulk Wheat;

User means a person who has entered into an Access Agreement with ABA in relation to Bulk Wheat;

WEAS means the Wheat Export Accreditation Scheme 2008;

WEMA means the *Wheat Export Marketing Act 2008* (Cth).

1.2 Interpretation

In this undertaking, unless the context otherwise requires:

(a) Singular words will also have their plural meaning and vice versa;

(b) a reference to a person includes companies and associates;

(c) a reference to a consent of a party means the prior written consent of that party;

(d) headings are for convenient reference only and do not affect the interpretation of this Undertaking;

(e) a reference to a, clause, Part or a Schedule is a reference to a clause, Part of Schedule of this Undertaking;

(f) a reference to a party includes its successors and permitted assigns;

(g) a reference to any act includes all statutes, regulations, codes, by-laws or ordinances and any notice, demand, order, direction, requirement or obligation under that Act (and vice versa) and unless otherwise provided in that Act includes all consolidations, amendments, re-enactments or replacements from time to time of that Act and a reference to "law" includes a reference to any Act and the common law;

(h) the words "including", "for example" or "such as" when introducing an example, does not limit the meaning of the words to which the example relates to that example or examples of a similar kind;

(i) a reference to $ and dollars is to Australian currency; and

(j) a requirement to provide notification or information in writing can be satisfied by email communication.

2. Background

2.1 Introduction

(a) ABA operates the Port Terminal Facility at the Port Terminal.

(b) The Port Terminal Facility provides services relating to the export of Bulk Wheat and other commodities.

(c) ABA has historically provided access to services provided by the Port Terminal to third parties under fair access policies.

(d) ABA is not an Accredited Wheat Exporter under the *Wheat Export Marketing Act 2008* (Cth).

(e) ABA wishes to satisfy the 'access test'.

(f) The 'access test' under the WEMA requires:

(i) the person to comply with the continuous disclosure rules in relation to a port terminal service; and

(ii) there is, either:

(A) an access undertaking in operation (under Division 6 Part IIIA of the CCA) relating to the provision to Accredited Wheat Exporters of access to the port terminal service for purposes relating to export of Bulk Wheat; or

(B) a decision in force that a regime established by a State or Territory for access to the port terminal service is an effective access regime (under Division 2A Part IIIA of the CCA) and under that regime Accredited Wheat Exporters have access to the port terminal service for purposes relating to the export of Bulk Wheat.

(g) ABA has submitted this Undertaking to the ACCC for approval under Part IIIA of the CCA for the purpose of satisfying the 'access test'.

2.2 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 Terminal in relation to the export of Bulk Wheat;

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

(c) providing a non-discriminatory approach to pricing and the provision of Port Terminal Services under which ABA publishes reference prices annually and offers access to standard services on the terms and conditions contained in Schedule 1;

(d) operating consistently with the objectives and principles in Part IIIA of the CCA and the Competition Principles Agreement between the Commonwealth and States and Territories of Australia dated 11 April 1995;

(e) reaching an appropriate balance between:

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

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

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

(C) the export of grain (other than Bulk Wheat) and non-grain commodities using the Port Terminal Facility; and

(ii) the public interest, including:

(A) the efficient use of resources; and

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

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

(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 ABA and an Applicant are unable to negotiate a mutually acceptable Access Agreement; and

(g) in accordance with the objective in s44AA(b) of the CCA, providing for a consistent approach to access to the Port Terminal Services at the different port terminals to the extent practicable.

3. Structure

3.1 Components

This Undertaking applies in relation to access to Port Terminal Services provided by means of the Port Terminal Facility at the Port Terminal.

3.2 Priority

To the extent of any inconsistency between them, the terms outside of the Schedules take priority over the terms in the Schedules.