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Ms Lyn Camilleri
Director – Transport & Infrastructure Access B Section
Transport & General Prices Oversight Branch
Australian Competition & Consumer Commission
Level 35
360 Elizabeth Street
Melbourne VIC 3001

Dear Ms Camilleri

Proposed Port Terminal Services Access Undertaking - Australian Bulk Alliance Pty Ltd ABN 39 087 280 260

This letter constitutes a submission in support of the Draft Access Undertaking lodged with the ACCC by our client, Australian Bulk Alliance Pty Ltd (**ABA**).

Background to the Undertaking

Emerald Group Australia Pty Ltd (**Emerald**) is an Accredited Wheat Exporter under the *Wheat Export Marketing Act 2008* (Cth) (**WEMA**).

ABA, through its subsidiary Melbourne Terminal Operations Pty Ltd (**MTO**), operates the Port Terminal Facility at Appleton Dock, Port Melbourne.

On the assumption that Emerald and ABA are associated entities as defined in the WEMA, ABA is required to pass the 'access test' under the WEMA. The 'access test' requires that:

- (a) the person to comply with the continuous disclosure rules in relation to the port terminal services; and
- (b) either there is:
 - (i) an access undertaking in operation (under Division 6, Part IIIA of the Trade Practices Act 1974 (**TPA**)) relating to the provision to Accredited Wheat Exporters of access to the port terminal services for purposes relating to the export of bulk wheat; or

- (ii) 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 TPA) and under that regime Accredited Wheat Exporters have access to the port terminal services for purposes relating to the export of bulk wheat.

ABA's position in the bulk wheat export market

ABA is the only independent provider of port terminal services in Australia. All other providers are part of an integrated export wheat supply chain. This means that, unlike other providers of port terminal services, ABA does not have the ability or incentive to leverage its control of the Melbourne port terminal to discriminate against and frustrate rivals wishing to utilise rail transport or up-country storage services. In contrast, ABA is incentivised to offer port terminal services to all possible customers on a transparent basis regardless of the origin of their bulk wheat.

ABA is the only port terminal services provider that operates in a competitive market. The MTO competes directly with the Geelong Port. Thus, ABA is essentially regulated by the market.

In comparison to the scale of the other bulk handlers, ABA is quite small. It is not in a position to bring to bear the economies of scale to reduce its overall cost base. The other bulk handlers are, due to their size, in a much better position than ABA to absorb the costs of regulation in a cost effective manner that does not significantly increase the cost of doing business on a proportionate basis. In contrast, as a small, non-integrated, port terminal services provider ABA does not have the size of business that allows it to easily absorb the costs of regulation.

The proposed access undertaking is drafted with the background that:

- ABA is not part of an integrated supply chain and therefore has significantly lower market power in comparison to the other bulk handlers,
- ABA operates in a competitive market and this is subject to natural market based regulation, and
- ABA does not have the financial resources of the other bulk handlers to absorb the costs of regulation.

Departures from earlier accepted access undertakings

ABA's Draft Undertaking contains a number of departures from the access undertakings that have previously been accepted by the ACCC in relation to other port facilities.

We set out ABA's reasons for the departures below.

1. Port Rules

The Port Loading Protocol sets out ABA's port rules.

The ACCC has requested information as to how the rules affect what happens in practice. We set out ABA's explanation below.

ABA's limited capacity means it can only accumulate cargo for the next arriving vessel. It is therefore critical that ABA and exporters liaise at least 2-3 weeks prior to a vessel's ETAs to ensure that the cargo being accumulated is for the next arriving vessel. If vessel ETAs change so that a vessel arrives later than originally advised, another vessel may arrive earlier and that was not known early enough, then ABA may have accumulated cargo for the now second vessel and this vessel will be loaded first.

2. Capacity management and variation of the Port Loading Protocol

Clause 10 of the Draft Undertaking sets out ABA's capacity management. Clause 10(b) (relating to ABA's shipping stem) differs from the published accepted undertakings in that it requires ABA to publish less information in its Shipping Stem than the parties that have published accepted undertakings.

ABA is small compared to its competitors and the parties that have published accepted undertakings. ABA's facility can only accumulate one vessel at a time and has no trains or trucks. As a result, ABA does not accumulate grain until it is certain that the vessel is coming to the port.

As a result of ABA's much smaller capacity, some of the items required to be published in previously accepted access undertakings are not relevant to ABA. ABA considers that it has included all relevant information in clause 10(b).

ABA has included provisions for variation of its loading protocol in clause 10.3. The clause is based on the published accepted undertakings.

ABA's proposed process for variation of the loading protocol contained in clause 10.3 involves a consultation process (which includes circulating the proposed changes to interested parties and the ACCC, as well as publication on ABA's website), a period for review and response from third parties and a requirement to consider responses from third parties.

3. Publication requirements – performance indicators and key information

As set out above, ABA is significantly smaller than its competitors and parties that have published accepted undertakings. It has considerably fewer employees and so detailed reporting requirements will add significant compliance costs for ABA.

It is also worth noting that ABA's berth is a common user berth and the Port of Melbourne can and does place vessels on the berth without seeking ABA's approval, although ABA has a 24 hour priority. This can lead to the situation where grain vessels have to wait to berth, for reasons outside of ABA's control.

As a result, ABA considers the publication requirements concerning key information and performance indicators in the published accepted undertakings would be too onerous if applied to ABA.

ABA considers that the publication requirements set out in clause 11 of the Draft Undertaking are appropriate, given ABA's size and capacity. ABA welcomes the ACCC's comments on clause 11.

In relation to performance indicators, ABA has reviewed the performance indicators set out in the published accepted undertakings, however it believes that many of those performance indicators are inappropriate to ABA's facility. Principally, this is because they are factors outside ABA's control, and ABA considers that published performance indicators should relate to matters within its control.

ABA considers that the performance indicators set out in clause 12 of the Draft Undertaking are appropriate, given ABA's size and capacity. ABA welcomes the ACCC's comments on clause 12.

4. Arbitration

The clauses of the Draft Undertaking that concern arbitration (clauses 8.4 to 8.7) are largely identical to the Graincorp published accepted undertaking.

There is one minor difference set out in subclause 8.7(xii), which clarifies that not only the determination of the arbitrator is to be confidential, but also any information received by the parties during the course of the arbitration and the content of the arbitration.

We believe that the arbitrator's powers are sufficiently clear.

Yours sincerely



Michael Bradley
Managing Partner