

26 March 2013

Mr Michael Eady
Director, Fuel, Transport and Prices Oversight
Australian Competition & Consumer Commission
Level 35 360 Elizabeth Street
Melbourne VIC 3000

Dear Mr Eady

ABA Proposed Port Access Undertaking 2013

Australian Bulk Alliance Pty Ltd ACN [] ("ABA") is an associated entity of wheat exporter Emerald Grain Pty Ltd (formerly Emerald Group Australia Pty Ltd) and operates a port terminal at the port of Melbourne. ABA is currently the subject of a Port Terminal Services Access Undertaking which was accepted by the Australian Competition and Consumer Commission ("ACCC") on 28 September 2011 (the Current Undertaking). This Current Undertaking expires on 30 September 2013.

Pursuant to Division 6 of Part IIIA of the *Competition and Consumer Act 2010 (Cth)* ABA hereby submits its proposed Port Terminal Services Access Undertaking ("Proposed Undertaking") for acceptance by the ACCC. The Proposed Undertaking is intended to commence on 1 October 2013 and expire on 30 September 2014, at which time it is expected that port access will be regulated by a mandatory industry code of conduct, as anticipated in the *Wheat Export Marketing Amendment Act 2012 (Cth)*.

Accompany this letter and Proposed Undertaking is a Public Submission in support of the ACCC accepting the Proposed Undertaking.

ABA would also like to foreshadow that it is likely that the business of ABA (including the provision of port terminal services) will in the future be conducted under the trading name "Emerald Logistics". This will not involve any change of the entity that is the port operator.

Should you require any further information, please contact the writer in the first instance. We look forward to the Commissions timely consideration of ABA's Proposed Undertaking.

Yours sincerely



Ashley Roff
Company Secretary



Australian Bulk Alliance

Australian Bulk Alliance Pty Ltd

ACN 087 280 260

**Public Submission to the Australian
Competition & Consumer Commission**

**Proposed ABA Port Terminal Services
Undertaking 2013-2014**

Dated: 26 March 2013

1. Introduction

- 1.1 Australian Bulk Alliance (ABA) makes this submission in support of its Port Terminal Services Undertaking (Proposed Undertaking) submitted to the Australian Competition and Consumer Commission (ACCC) under section 44ZZA of the Competition and Consumer Act 2010 (Cth) (CCA).
- 1.2 The Proposed Undertaking is intended to replace ABA's existing undertaking for Port Terminal Services, which expires this year (Current Undertaking). The Proposed Undertaking retains substantially all the structure and content of the Current Undertaking.
- 1.3 The Proposed Undertaking, and attached Indicative Access Agreement and Loading Protocol incorporate a number of changes to:
 - (i) improve the clarity and utility of the document;
 - (ii) update the references to the legislation to reflect the changes made by the *Wheat Exports Marketing Amendment Act 2012* (Cth);
 - (iii) introduce operational requirements aimed at improving the throughput efficiency of the port terminal;
 - (iii) address concerns or implement suggestions of market participants; and
 - (iii) enable the Proposed Undertaking to replace the Current Undertaking without undue uncertainty or disruption to business.
- 1.4 ABA does not propose to repeat its original submission in relation to many aspects of the Proposed Undertaking that remain unchanged. Rather, this submission:
 - (i) reviews the basic structure and principles underlying the Proposed Undertaking;
 - (ii) explains any substantial changes to the Proposed Undertaking (refer **Schedule 1**), the Indicative Access Agreement and the Loading Protocol;
 - (iii) explains why the Proposed Access Undertaking satisfies the criteria for acceptance by the ACCC set out in section 44ZZA of the CCA.

2 Report on access and operations under the Current Undertaking

ABA considers that a review of the operation of the Current Undertaking shows:

- (i) that exporters were able to obtain access to ABA's Port Terminal Services on acceptable terms for the 20011/2012 and 2012/2013 seasons without formal

disputes or complaints of breaches of the Undertaking or the Loading Protocol;

- (ii) ABA has sought with the cooperation of exporters to improve the efficiency of the port by increasing the monthly average number of vessels loaded from three vessels to four vessels.
- (iii) ABA has consulted widely with its port users and has negotiated in good faith with its major customers for terms of access other than those in the Indicative Access Agreement.

3 Key features of the Undertaking

- 3.1 The Proposed Undertaking maintains the publish-negotiate-arbitrate structure of the Current Undertaking.
- 3.2 The framework for access negotiations is unchanged in the Proposed Undertaking.
- 3.3 The Proposed Undertaking requires the publication of Standard Access Terms (including reference prices), and enables an eligible access seeker to gain access on those terms unless the parties agree otherwise. This provides certainty for access seekers, while preserving the flexibility for the parties to negotiate according to their needs if they so choose. The Port Operator is required to negotiate in good faith.
- 3.4 The dispute resolution provisions are unchanged.
- 3.5 The Proposed Undertaking maintains the robust non-discrimination provisions which prohibit preferential self-dealing and empower the ACCC to require the appointment of an auditor to examine compliance with that obligation.
- 3.6 ABA proposes that the Proposed Undertaking will commence on 1 October 2013 and will continue for 1 year, after which it is expected that access to ABA's port terminal will be regulated by a mandatory enforceable industry Code of Conduct being developed under the auspices of the *Wheat Exports Marketing Amendment Act 2012*.

4 Pricing

- 4.1 The Proposed Undertaking requires that access to Port Terminal Services be provided on non-discriminatory terms. It has provisions specifically prohibiting ABA from discriminating in favour of its associated entity's business. This, together with a binding dispute resolution process, ensures that ABA provides access at prices that are consistent with section 44ZZCA.
- 4.2 Under the Proposed Undertaking, ABA must continue to publish a single set of reference prices by 30 September of each year.

- 4.3 There is no change in the Proposed Undertaking to the mechanism for amending reference prices.
- 4.4 A party which is not satisfied with the price may negotiate with ABA and then submit to a binding dispute resolution process if it is unsatisfied with the negotiated outcome.

5 Capacity Allocation

- 5.1 The Proposed Undertaking maintains the First Come First Served (“FCFS”) system of capacity allocation.
- 5.2 ABA submits that FCFS is more appropriate for ABA and its clients, compared to the auction system, for the following reasons:
- (i) the throughput at ABA’s grain terminal is relatively constrained and the complexity and cost of an auction system would not be appropriate to the scale of ABA’s operation;
 - (ii) ABA operates in a competitive environment on the East coast;
 - (iii) ABA’s main competitor, Graincorp Geelong, operates on a FCFS basis;
 - (iv) to ABA’s knowledge there have not been any formal complaints about the operation of ABA’s FCFS system; and
 - (v) there have been flaws exhibited in the auction systems of CBH and Viterra, apparently caused by bidding behaviour, which have resulted in questions from exporters about the efficiency of the auction system.

6 Key Changes to Indicative Access Agreement (“IAA”)

- 6.1 The IAA (Schedule 1 of the Proposed Undertaking) incorporates the following changes:
- (i) Inclusion of a market mechanism to settle any claims for over –outturn or under – outturn.
 - (ii) Inclusion of an acknowledgement by the client that single commodity handling (wheat), rail transport and stock swaps are important factors in optimising ABA’s throughput.
 - (iii) ABA has the right to mitigate dust emissions by moisture conditioning. Dust is a serious issue at Port of Melbourne.
 - (iv) ABA will now insure clients’ grain stored at the port terminal against accidental loss. This will provide protection to exporters against accidental

loss of grain and will facilitate stock swaps and stock movements to aid efficiency.

- (v) ABA has increased its limits of liability to \$250K in aggregate and \$100K per event, to respond to the feedback from clients.

6.2 Other changes that are not considered material go to drafting improvements, clarifications, and other technical changes.

6.3 Unlike the IAA attached to the Current Undertaking, it is ABA's intention that the IAA will only apply to the provision of Port Services and a separate Storage & Handling Agreement will be developed for up-country services.

7. Key Changes to Loading Protocol

7.1 The Loading Protocol incorporates the following changes:

- (i) Clarification around the application of Booking fees.
- (ii) Introduction of the right for ABA to allocate slots ("windows") on the basis of first half or second half of the month based on client nominations, to aid efficiency.
- (iii) The factors which will influence the award of stem, the ordering of accumulation at port and loading priority will include the ability of clients to enter into stock swaps where necessary for efficient marshalling, and the availability and efficiency of their rail transport arrangements.

7.2 Other changes that are not considered material go to drafting improvements, clarifications, and other technical changes.

Schedule 1

This Schedule sets out an explanation of the main changes to the terms of the Proposed Undertaking compared to the existing Undertaking.

It does not explain every minor change. For example, where the change is to express the clause in a clearer manner or where, from the context, the reason is apparent.

If the ACCC requires a further explanation of any change, we would be pleased to provide that information.

Explanation of substantive changes to the Access Undertaking

Clause	Explanation
Clause 6.2(c) deleted. This clause referred to Reference Prices set out in the IAA attached in Schedule 1.	The reference Prices for the 2013/14 year have not yet been set by ABA. They are required to be published under the Current Undertaking by 30 September 2013 and there would be no utility in attaching the historical 2012/13 Reference Prices to the Indicative Access Agreement (Schedule 1 of the Proposed Undertaking). ABA's Reference Prices are published on www.bulkalliance.com.au

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