



Australian
Competition &
Consumer
Commission

**Emerald Logistics Pty Ltd's
Application to extend and
vary its 2013 Port Terminal
Services Access Undertaking
Draft Decision to accept**

7 August 2014

Australian Competition and Consumer Commission
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1. Summary

The Australian Competition and Consumer Commission (ACCC) has made a draft decision proposing to consent to an application by Emerald Logistics Pty Ltd (Emerald) to extend and vary its 2013 Port Terminal Services Access Undertaking (2013 Undertaking).

The 2013 Undertaking governs access to port terminal services at Melbourne Port Terminal (MPT), and is currently set to expire on 30 September 2014. A mandatory code of conduct (the Code) is anticipated to commence on 1 October 2014. If the Code does commence on 1 October 2014, it will trigger the repeal of the *Wheat Export Marketing Act 2008* (Cth) (WEMA) and remove Emerald's requirement to have an access undertaking.

Emerald submitted the application to extend and vary (the Application) to the ACCC on 15 July 2014. The Application seeks to ensure Emerald's compliance with the access test and provide certainty over access arrangements at MPT in the event that the Code does not commence, as anticipated, on 1 October 2014. The Application seeks to achieve these aims by proposing to:

- extend the operation of the 2013 Undertaking for one year until 30 September 2015
- vary the 2013 Undertaking to include 'early expiry' clauses that would allow the undertaking to expire prior to 30 September 2015 if Emerald is no longer required to have an access undertaking accepted by the ACCC, including upon the commencement of the Code.

The Application also proposes a number of other minor variations. These include the amendment of dates to reflect that the undertaking will apply to the 2014/15 season and a small number of amendments and additions to defined terms.

The ACCC considers that Emerald's proposed extension and variations are appropriate, having regard to the appropriate matters in Part IIIA of the *Competition and Consumer Act 2010* (Cth) (the CCA). Its draft decision is to consent to the Application.

The draft decision seeks the views of interested parties on the appropriateness of the proposed extension and variations. The ACCC seeks these views by **22 August 2014**. Submissions received in response to the draft decision will be considered by the ACCC prior to making its final decision.

Question for interested parties

- *Is it appropriate that the ACCC consent to Emerald's application to extend and vary its 2013 Undertaking?*

2. Background to the Application

Undertakings

Division 6 of Part IIIA of the CCA provides that the ACCC may accept an undertaking from a person who is, or expects to be, the provider of a service, in connection with the provision of access to that service. On 25 September 2013, the ACCC accepted Emerald's 2013 Undertaking. The Undertaking is currently set to expire on 30 September 2014.

Emerald provided the 2013 Undertaking in order to meet the access test, a requirement of the WEMA. The access test, in part, can be met if port terminal operators that also export bulk wheat, have an access undertaking accepted by the ACCC.

Code

In December 2012, the WEMA was amended to provide that the access test will be repealed on 1 October 2014 if the Code commences on that day. If the Code does commence on 1 October 2014, access to port terminal services at MPT will be governed by the 2013 Undertaking until 30 September 2014 and the Code from 1 October 2014.

Emerald submits that the Application is seeking to provide regulatory certainty in the event that the Code does not commence on 1 October 2014.¹ If the Code does not commence on 1 October 2014 and the 2013 Undertaking expired on 30 September 2014, from 1 October 2014 Emerald would fail to meet the access test of the WEMA and would not be entitled to export bulk wheat.

This application

Emerald has submitted the Application to ensure continuity of compliance with the WEMA and access arrangements at MPT in the event that the Code does not commence as anticipated.

The CCA allows the provider of an access undertaking to apply to the ACCC for an extension of the term of that undertaking.² The CCA also allows the provider of an access undertaking to vary that undertaking at any time after it has been accepted by the ACCC, but only with the ACCC's consent.³

On 15 July 2014 Emerald applied to extend and vary the operation of its 2013 Undertaking pursuant to s. 44ZZBB and subs. 44ZZA(7) of the CCA. The Application and associated documents including Emerald's supporting submission are available on the ACCC's website at www.accc.gov.au/wheat.

Emerald's supporting submission states that the Application seeks to provide Emerald with certainty. Emerald submits:

Emerald Grain wishes to:

- (a) obtain and provide, for exporters, certainty about the processes that will apply to the allocation of capacity at its Port Melbourne Terminal for the period 1 October 2014 to 30 September 2015; and
- (b) obtain certainty that its associated entity, Emerald Grain Australia Pty Ltd, will be able to export Bulk Wheat using MPT if the Code is not in force by 1 October 2014 (and as a result, Emerald Grain needs to have in place an access undertaking to satisfy the 'access test' under WEMA).

As noted above, a mandatory industry code of conduct will come into effect if, as at 30 September 2014, that code has been approved by the Minister for Agriculture and declared under the CCA. Emerald Grain's Application to extend and vary its Undertaking seeks to provide regulatory certainty for its own commercial operations, as well as the commercial operations of access seekers, in the event that a code is not approved and declared by 30 September 2014.⁴

¹ Emerald Logistics Pty Ltd, *Proposed Variations to Emerald Grain's Port Terminal Services Access Undertaking – Submission to the Australian Competition and Consumer Commission*, 2014, p. 3.

² Subs. 44ZZBB(1).

³ Subs. 44ZZA(7).

⁴ Emerald, *Submission*, p. 3.

The purpose of this draft decision is to provide the ACCC's preliminary views on the Application and its reasons for those views. The draft decision also seeks comments from interested parties on the ACCC's preliminary views and the Application generally. The ACCC's preliminary views have been formed after consideration of the matters listed in subs. 44ZZA(3) of the CCA.

This draft decision constitutes notice inviting public submissions for the purposes of subs. 44ZZBD(1) of the CCA.

3. ACCC's preliminary views on the Application

The ACCC's preliminary view is that it is appropriate to consent to the Application.

This chapter summarises the ACCC's preliminary views on the Application.

3.1 ACCC's preliminary views on the application to extend

The ACCC's preliminary view is that the one-year term of the extension, and the continuation of the provisions of the 2013 Undertaking for an additional year, is appropriate.

3.1.1 Term of the extension

The ACCC is generally of the view that a one-year term for an access undertaking does not provide for the appropriate level of certainty for access seekers. The ACCC considers however that the specific circumstances in which Emerald has submitted its Application make the one-year extension to the term of the undertaking appropriate.

The 2013 Undertaking is currently set to expire on 30 September 2014 and the Code is anticipated to commence from 1 October 2014. As noted, Emerald's Application is seeking to provide regulatory certainty in the event that the Code does not commence.⁵ The ACCC therefore considers that the extension of the 2013 Undertaking for one year, in conjunction with the inclusion of 'early' expiry provisions (discussed at chapter 3.2) that would provide for the undertaking to expire if the Code does commence, provides this certainty. The extension would ensure that Emerald continues to comply with its regulatory obligations, and that access arrangements relating to MPT are in place, if the Code does not commence on 1 October 2014.

The ACCC considers that, by ensuring Emerald's compliance with the access test and providing certainty over access arrangements at MPT, the extension is in the legitimate business interests of Emerald as the service provider, having regard to subs.44ZZA(3)(a) of the CCA. The ACCC also considers that certainty over access arrangements from 1 October 2014 is in the interests of access seekers, and therefore in the interests of Emerald Grain and third party exporters having regard to subs.44ZZA(3)(c) of the CCA.

Accordingly, it is the ACCC's preliminary view that the one-year term of the proposed extension is appropriate.

3.1.2 Continuation of the 2013 Undertaking for the period of the proposed extension

The ACCC's preliminary view is that the continuation of Emerald's existing arrangements in the 2013 undertaking is appropriate.

⁵ *ibid.*

The ACCC's final decision on the 2013 Undertaking was released on 26 September 2013.⁶ The final decision contains a detailed assessment of the 2013 undertaking and a statement of the reasons why the ACCC considered it appropriate to accept. The ACCC is not aware of events over the short period of time since that assessment that would give it cause to change that view. Accordingly, the ACCC considers that its analysis of those provisions in the 2013 Undertaking that are not proposed to be varied by the Application remains relevant.

The Application proposes to maintain the key features of the 2013 Undertaking and roll forward the majority of the 2013 Undertaking's provisions unchanged. Key features of the 2013 Undertaking which remain unchanged include:

- a publish-negotiate-arbitrate model for price and non-price terms of access
- obligations not to discriminate in favour of Emerald's trading division in providing access to port terminal services or engage in conduct with the purpose of hindering access
- obligations to negotiate access in good faith
- arbitration of access disputes
- a 'first come, first served' system of capacity allocation
- requirements to publish a loading statement and key port information.

The ACCC's preliminary view is that its analysis of the general approach and specific provisions of the 2013 Undertaking in its draft and final decisions on that undertaking remain relevant.⁷ The ACCC therefore considers that Emerald's existing arrangements remain appropriate, having regard to the matters listed in subs. 44ZZA(3) of the CCA.

3.2 ACCC's preliminary views on the application to vary

The ACCC's preliminary view is that Emerald's proposed variations to its 2013 Undertaking are appropriate.

The ACCC considers that the only substantive proposed variation is to include 'early expiry' provisions at clauses 4.2(b) and 4.2(c) of the undertaking. These provisions provide that the 2013 Undertaking may expire, prior to the undertaking's proposed extended expiry date of 30 September 2015, if Emerald is no longer required by law to have in place an access undertaking accepted by the ACCC, including upon the commencement of the Code.

The ACCC notes that it has endorsed the inclusion of equivalent 'early expiry' provisions as part of its analysis of Viterra's 2013 application to extend and vary its 2011 undertaking, and of CBH's proposed 2014 undertaking.

The ACCC considers that the inclusion of 'early expiry' provisions is appropriate. The ACCC considers that the continued operation of the 2013 Undertaking until such a time that Emerald is no longer required to meet the access test provides certainty to access seekers regarding access arrangements at MPT, ensures Emerald's compliance with the access test, and removes the possibility of double regulation. The ACCC considers that these outcomes are in the legitimate business interests of Emerald and consistent with the policy objectives of the WEMA, having regard to subss. 44ZZA(3)(a) and 44ZZA(3)(e) of the CCA.

The ACCC considers that the majority of the other proposed variations are consequential to the extension of the term of the undertaking and that none change the rights and liabilities of Emerald and access seekers under the 2013 Undertaking.

These additional variations include:

- updating dates to reflect that the documents will operate during the 2014/15 season

⁶ ACCC, Emerald Logistics Pty Ltd – Port Terminal Services Access Undertaking – Decision to accept, 26 September 2013.

⁷ A comprehensive analysis of these provisions is available in the ACCC's draft and final decisions on the 2013 Undertaking, available at www.accc.gov.au/wheat.

- amended and new defined terms in clause 1.1 of the undertaking and clause 1.1 of the standard terms
- two new performance and capacity indicator reporting dates (clause 12 of the undertaking).

The ACCC considers that these changes are administrative in nature and clarify the operation of the 2013 Undertaking. The ACCC considers that these variations would provide clarity to the operation of the extended undertaking and accordingly, are in the legitimate business interests of Emerald and access seekers, having regard to subs. 44ZZA(3)(a) and 44ZZA(3)(c) of the CCA.

4. Draft decision to consent to the Application

The ACCC has considered the Application provided by Emerald to the ACCC on 15 July 2014, pursuant to s. 44ZZBB and subs. 44ZZA(7) of the CCA.

The ACCC's preliminary view is that, having regard to the matters listed in subs. 44ZZA(3) of the CCA, it would be appropriate to consent to the Application.

The ACCC seeks views from interested parties on this draft decision and the Application. Submissions received in response to this draft decision will be considered by the ACCC prior to it making its final decision.

Appendix A: The ACCC's assessment process

Legislative tests applied in assessing the Application

The ACCC's assessment of the Application is guided by s. 44ZZBB and subs. 44ZZA(7) of the CCA.

Legal test for accepting an application to extend an access undertaking

The test the ACCC applies in deciding whether to extend an undertaking is set out in section 44ZZBB of the CCA. This section provides that the ACCC may extend the period for which the undertaking is in operation if it thinks it appropriate to do so having regard to the matters in subs. 44ZZA(3) including, but not limited to:

- the objects of Part IIIA of the CCA (including promoting the economically efficient operation of, use of and investment in the infrastructure by which services are provided, thereby promoting effective competition in upstream and downstream markets)
- the legitimate business interests of the provider of the service
- the public interest, including the public interest in having competition in markets
- the interests of persons who might want access to the service.

Legal test for accepting an application to vary an access undertaking

The test the ACCC applies in deciding whether to consent to the variation of an undertaking is set out in subs. 44ZZA(7) of the CCA. This section provides that the ACCC may consent to a variation of an undertaking if it thinks it appropriate to do so having regard to the matters set out in subs. 44ZZA(3).

In practice, in assessing a dual application to extend and vary, the ACCC considers whether it is appropriate for the undertaking, including the variations, to continue for the period specified.

Assessment timeline

Subsection 44ZZBC(1) of the CCA provides that the ACCC must make a decision on an access undertaking application within 180 days starting on the day the application is received.

Section 44B of the CCA defines an 'access undertaking application' to include a request made to the Commission to vary an access undertaking, and an application under subs. 44ZZBB(1) for an extension of the period for which an access undertaking is in operation.

The ACCC is seeking to complete its assessment of the Application as quickly as possible, although the timeline may depend on the nature of comments made by interested parties and potential developments in relation to the Code.

How to make a submission

The ACCC, pursuant to subs. 44ZZBD of the CCA, invites public submissions on this draft decision.

The legal tests that guided the ACCC's assessment of the Application are summarised above in this Appendix. They are set out in full at Appendix A of the ACCC's final decision on the 2013 Undertaking.⁸

If possible, submissions should refer to the legislative framework, as this will assist the ACCC in assessing the Application. Interested parties are asked to include detailed reasons to support the views put forward in submissions.

Submissions should be addressed to:

Ms Lyn Camilleri
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Email: transport@acc.gov.au

The ACCC prefers that submissions be sent via email in Microsoft Word format (although other text readable document formats will be accepted).

Submissions must be received on or before 22 August 2014. The ACCC may disregard any submissions made after this date, as prescribed by subs. 44ZZBD(3) of the CCA.

Confidentiality of information provided to the ACCC

The ACCC strongly encourages public submissions. Unless a submission, or part of a submission, is marked confidential, it will be published on the ACCC's website and may be made available to any person or organisation upon request.

Sections of submissions that are claimed to be confidential should be clearly identified. The ACCC will consider each claim of confidentiality on a case by case basis. If the ACCC refuses a request for confidentiality, the submitting party will be given the opportunity to withdraw the submission in its entirety or in part. The ACCC will then assess the undertaking without that information.

For further information about the collection, use and disclosure of information provided to the ACCC, please refer to the ACCC publication Australian Competition and Consumer Commission / Australian Energy Regulator Information Policy – the collection, use and disclosure of information, available on the ACCC website.⁹

Further information

If you have any queries about any matters raised in this document, please contact:

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⁸ Emerald Logistics Pty Ltd – Port Terminal Services Access Undertaking – Decision to accept, 26 September 2013, p. 25.

⁹ Available at www.acc.gov.au.