



Australian
Competition &
Consumer
Commission

Emerald Logistics Pty Ltd Port Terminal Services Access Undertaking

Decision to accept

26 September 2013



Australian Competition and Consumer Commission
23 Marcus Clarke Street, Canberra, Australian Capital Territory, 2601

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List of abbreviations and terms

2011 Undertaking	The Part IIIA port terminal service undertaking submitted by Australian Bulk Alliance Pty Ltd on 21 September 2011, accepted by the ACCC on 28 September 2011.
2009 and 2011 Undertakings	Access undertakings accepted by the ACCC from Co-operative Bulk Handling Limited, GrainCorp Operations Limited and Viterra Operations Limited in 2009 and 2011. Undertakings accepted in 2011 are currently in operation and are due to expire on 30 September 2014.
ABA	Australian Bulk Alliance Pty Ltd
ACCC	Australian Competition and Consumer Commission
Cargill	Cargill Australia Limited
CBH	Co-operative Bulk Handling Limited
CCA	<i>Competition and Consumer Act 2010 (Cth)</i>
Client	As defined in Emerald's proposed Indicative Access Agreement
draft revision	Draft revised version of the Proposed Undertaking provided by Emerald on 31 July 2013
Emerald	Emerald Logistics Services Pty Ltd
FCFS	'First come, first served' system for allocating port terminal capacity
GrainCorp	GrainCorp Operations Limited
IAA	Emerald's Indicative Access Agreement (Schedule 1 to the Revised Undertaking) sets out the standard terms of access to port terminal services at Melbourne Port Terminal.
MPT	Melbourne Port Terminal
Reference Prices	The standard prices charged by Emerald for port terminal services provided between 1 October 2013 and September 2014, as published by Emerald no later than 30 September 2013 and as may be varied from time to time in accordance with the Revised Undertaking.
Proposed Undertaking	The Part IIIA port terminal service access undertaking that Emerald provided to the ACCC for consideration on 26 March 2013.
Revised Undertaking	The Part IIIA port terminal service access undertaking that Emerald provided to the ACCC for consideration on 9 September 2013
SHA	Emerald's Storage and Handling Agreement is the product of a negotiated agreement between a client and Emerald for access to port terminal services, which has different terms and conditions to the IAA.
Standard Terms	The terms contained in the Indicative Access Agreement, which provide a starting point for commercial negotiation of access to port terminal services at Melbourne Port Terminal.
Viterra	Viterra Operations Limited
WEMA	<i>Wheat Export Marketing Act 2008 (Cth) (as amended by the Wheat Export Marketing Amendment Act 2012)</i>

Summary

The Australian Competition and Consumer Commission (**ACCC**) accepts an access undertaking from Emerald Logistics Pty Ltd (**Emerald**), governing access to its port terminal services at its bulk grain export facility in Melbourne. The undertaking was submitted on 9 September 2013, following consultation on an original application submitted in March (which Emerald subsequently withdrew).

The undertaking, attached Indicative Access Agreement (**IAA**) and Port Loading Protocols (**Loading Protocol**) are largely similar to Emerald's 2011 Undertaking, with some notable differences:

- a new requirement for customers to demonstrate access to rail and a new expectation that a significant proportion (target minimum of 50%) of cargo will be accumulated by rail;
- a new expectation that customers will explore in good faith stock swap opportunities on terms agreeable to the customer; and
- amendments to make clear the IAA applies to port terminal services, not up country services.

The ACCC considers the undertaking provided on 9 September 2013 (the **Revised Undertaking**) sufficiently addresses concerns raised during consultation on Emerald's March undertaking. Accordingly, the ACCC considers that the Revised Undertaking is appropriate.

Summary of the ACCC's views

The ACCC considers that the Revised Undertaking is appropriate having regard to the matters set out in subsection 44ZZA(3) of the CCA. In making its decision, the ACCC has had regard to submissions received after inviting public submissions in accordance with section 44ZZBD. In particular, the ACCC considers that:

- a one-year term is appropriate in the context of the anticipated commencement of a mandatory wheat port code of conduct on 1 October 2014
- the publish-negotiate-arbitrate framework, given the inclusion of the non-discrimination, no hindering and dispute resolution provisions, is likely to ensure fair access to port terminal services supplied by Emerald to access seekers
- the IAA represents an appropriate minimum standard for access to port terminal services and a reasonable starting point for commercial negotiations, and:
 - provides sufficient certainty for access seekers about its application being limited to port terminal services for bulk wheat
 - makes it sufficiently clear that it is the standard minimum terms for access, and agreements negotiated on different terms will be described as Storage and Handling Agreements
 - is consistent with the interests of access seekers in setting out an expectation that access seekers will explore stock swaps in good faith and on terms agreeable to them
- the provisions in the Revised Undertaking relating to publication of terms, non-discriminatory access, negotiating for access, dispute resolution, confidentiality,

publication of performance indicators and information gathering are substantively similar to Emerald's 2011 Undertaking and are consistent with the interests of access seekers

- a 'first come, first served' approach to capacity management is appropriate, given Emerald's particular circumstances, market conditions and the effectiveness of Emerald's previous 'first come, first served' capacity allocation arrangements
- the information Emerald is required to provide to access seekers about available capacity (being a 12 month forecast of available capacity upon the opening of its shipping stem and rolling monthly six-month forecasts) is sufficient to allow access seekers to assess the availability of capacity against their export needs and make bookings
- the Loading Protocol provides:
 - sufficient clarity for access seekers about whether references are to the standard terms in the IAA or negotiated and agreed Storage and Handling Agreements
 - sufficient certainty for access seekers and reasonable discretion for Emerald in relation to the implementation of 'first come, first served' capacity allocation, specifically in the treatment of Intent to Ship Advices
 - reasonable discretion, subject to conditions, for Emerald to respond when a client fails to provide a complying cargo assembly plan
 - sufficient certainty for access seekers about the proportion of cargo that Emerald expects will be accumulated by rail
 - reasonable discretion for Emerald to determine the order of cargo accumulation and vessel loading
 - sufficient certainty for access seekers about the circumstances in which Emerald is entitled not to fully accumulate a cargo
 - reasonable limitations on Emerald's discretion to forfeit a client's booking fee in the event of vessel substitution or delay
 - timely dispute resolution
- the process for varying the Loading Protocol meets certain minimum standards for ensuring an efficient, meaningful and transparent consultation process and provides for the ACCC to have an objection role.

Overall, the ACCC has decided to accept Emerald's Revised Undertaking, as submitted on 9 September 2013, as it considers that the Revised Undertaking is appropriate having regard to the matters set out in subsection 44ZZA(3) of the CCA.

1 Background

Under Division 6 of Part IIIA of the *Competition and Consumer Act 2010* (the **CCA**), 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.

Emerald (formerly ABA) operates a port terminal at the port of Melbourne and is currently subject to the 2011 Port Terminal Services Access Undertaking, which governs how competing exporters can access its port terminal services at its Melbourne Port Terminal (**MPT**).

On 26 March 2013, Emerald submitted to the ACCC a new undertaking to replace the 2011 Undertaking when it expires (**Proposed Undertaking**). In response to concerns raised by interested parties and the ACCC, on 9 September 2013 Emerald withdrew its Proposed Undertaking and submitted a revised undertaking for ACCC consideration (**Revised Undertaking**).

Pursuant to subsection 44ZZBE(1) of the CCA, the purpose of this document is to set out the ACCC's decision to accept the undertaking, including the ACCC's reasons for that decision.

1.1 Process leading to the Revised Undertaking

In its Draft Decision, the ACCC expressed the preliminary view that it would not accept the Proposed Undertaking, stating that:

- certain provisions of the IAA required amendments for clarity and certainty, particularly the distinction between port and non-port terms
- the Loading Protocol required amendment to more clearly define whether reference was being made to Emerald's IAA or a Storage and Handling Agreement (**SHA**) (which is negotiated and agreed on different terms between Emerald and an access seeker).

The ACCC also expressed concerns about:

- the new requirements in relation to cargo accumulation plans and Emerald's discretion where such plans were not provided
- the uncertainty created by the requirements in relation to cargo accumulation by rail
- the new requirements in relation to stock swaps
- procedures in relation to vessel substitution and delay.

Prior to release of the Draft Decision, Emerald provided the ACCC with a draft revision to its Proposed Undertaking which was intended to address the concerns raised by industry. In its Draft Decision, the ACCC expressed the preliminary view that an undertaking consistent with the draft revision would be appropriate, having regard to the factors set out in subsection 44ZZA(3) of the CCA, as it sufficiently addressed the issues outlined above.

On 9 September 2013, Emerald formally withdrew the Proposed Undertaking and submitted the Revised Undertaking (consistent with the draft revision provided earlier).

Emerald has provided the following information in respect of the Proposed Undertaking and Revised Undertaking:

- initial supporting submission (26 March 2013)

- submission in response to third party submissions (3 July 2013)
- letter explaining the changes it proposed to make to the Proposed Undertaking, which accompanied the draft revision of the Proposed Undertaking (31 July 2013).

1.1.1 Public consultation undertaken

The CCA provides that the ACCC may invite public submissions on an access undertaking application.¹ Accordingly, the ACCC published an Issues Paper on 30 April 2013 and a Draft Decision on 14 August 2013 inviting submissions on Emerald's Proposed Undertaking and draft revision respectively. The ACCC also published Emerald's supporting submissions, its Proposed Undertaking and its draft revision on the ACCC website and directly emailed copies of the Issues Paper and Draft Decision to relevant parties including wheat exporters, grain growers, farming organisations and state regulatory bodies.

In response to its Issues Paper, the ACCC received public submissions from Cargill Australia Limited (**Cargill**), Co-operative Bulk Handling Limited (**CBH**), and Emerald (in response to submissions).

The ACCC did not receive any submissions in response to its Draft Decision.

All of the above mentioned documents are available on the ACCC's website at www.accc.gov.au/wheat.

1.1.2 Timeline: ACCC assessment

Date	Action
26 March 2013	Emerald lodged the Proposed Undertaking for ACCC assessment.
9 April 2013	ACCC published Emerald's supporting submission and the Proposed Undertaking on the ACCC website.
30 April 2013	ACCC published the Issues Paper and invited public submissions by 21 May 2013.
22 May 2013	ACCC published submissions received from interested parties.
8 July 2013	ACCC published Emerald's submission in response to the views of interested parties.
31 July 2013	Emerald provided the ACCC with a draft revision to the Proposed Undertaking, intended to address concerns raised by interested parties and the ACCC
14 August 2013	ACCC published the Draft Decision and invited public submissions, particularly on its preliminary views and Emerald's draft revision to the Proposed Undertaking, by 28 August 2013.
9 September 2013	Emerald formally withdrew its Proposed Undertaking and lodged the Revised Undertaking, which is consistent with the draft revision, for ACCC assessment.
25 September 2013	ACCC decided to accept the Revised Undertaking
26 September 2013	ACCC published its decision and reasons for its decision (this document).

¹ *Competition and Consumer Act 2010* (Cth) ss. 44ZZBD(1).

1.2 The Revised Undertaking

Emerald's Revised Undertaking, along with the attached IAA and Loading Protocol, is based on the general approach of Emerald's 2011 Undertaking. Specifically, the Revised Undertaking continues to provide for the following in a substantively similar manner to the 2011 Undertaking:

- a publish-negotiate-arbitrate model of access provision
- non-discriminatory access, including a prohibition on hindering access
- publication of performance indicators
- negotiation of terms of access
- dispute resolution
- information gathering
- publication of price and non-price terms
- confidentiality of certain information
- specified circumstances in which Emerald is entitled not to fully accumulate a cargo
- management of vessel substitution or delay
- variation of the Loading Protocol
- liability and indemnity

The Revised Undertaking is somewhat different from the 2011 Undertaking in that it introduces:

- a new requirement in the IAA and Loading Protocol for customers to demonstrate access to rail and a new expectation that a significant proportion (target minimum of 50%) of cargo will be accumulated by rail
- a new provision in the IAA and Loading Protocol setting out an expectation that customers will explore in good faith stock swap opportunities on terms agreeable to the customer
- amendments to make clear that the IAA applies to port terminal services and not up country services
- a requirement that Emerald must reasonably hold the opinion that a vessel delay would cause significant disruption to the shipping stem before a Client's booking fee may be forfeited.

In addition, Emerald's Revised Undertaking is different from its 2011 Undertaking in a number of minor ways, including updated references to legislation and changes intended to express matters more clearly. The ACCC has addressed minor changes in the Draft Decision and this document, where relevant to the appropriateness of the Revised Undertaking, having regard to the matters in subsection 44ZZA(3) of the CCA.

1.3 Where to find further information

Emerald's accepted Revised Undertaking and other relevant materials, including Emerald's supporting submissions and non-confidential submissions provided by stakeholders are available on the ACCC's website at www.accc.gov.au/wheat.

Please direct any queries about this document to:

Mr David Salisbury
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2 Decision making framework

The *Wheat Export Marketing Act 2008* (Cth) (the **WEMA**) came into effect on 1 July 2008, introducing an accreditation scheme for bulk wheat exports, including a requirement that vertically integrated parties seeking to export bulk wheat pass the 'access test'.

Amendments to the WEMA in December 2012 abolished the accreditation scheme for bulk wheat exports but retained the 'access test' unless and until a mandatory code of conduct is established. Accordingly, parties seeking to export bulk wheat are still required to pass the access test. 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.² Appendix A contains further information regarding the WEMA.

2.1 Legal test for accepting an access undertaking

Part IIIA of the CCA establishes a regime to assist third parties to obtain access to services provided through certain facilities in order to promote competition in upstream or downstream markets.

In assessing a proposed access undertaking under Part IIIA of the CCA, the ACCC must apply the test set out in subsection 44ZZA(3), which provides that the ACCC may accept the undertaking if it thinks it appropriate to do so, having regard to the following matters:

- the objects of Part IIIA of the CCA, which are to:
 - promote 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
 - provide a framework and guiding principles to encourage a consistent approach to access regulation in each industry
- the 'pricing principles' specified in section 44ZZCA of the CCA (see further below)
- the legitimate business interests of the provider of the service
- the public interest, including the public interest in having competition in markets (whether or not in Australia)
- the interests of persons who might want access to the service
- whether the undertaking is in accordance with an access code that applies to the service
- any other matters that the ACCC thinks are relevant (see **Appendix A**).

In relation to the pricing principles, section 44ZZCA of the CCA provides that regulated access prices should:

² Section 9 of the WEMA sets out the ways in which the 'access test' may be met.

- be set so as to generate expected revenue for a regulated service that is at least sufficient to meet the efficient costs of providing access to the regulated service or services
- include a return on investment commensurate with the regulatory and commercial risks involved
- In addition, access price structures should:
 - allow multi-part pricing and price discrimination when it aids efficiency
 - not allow a vertically integrated access provider to set terms and conditions that discriminate in favour of its downstream operations, except to the extent that the cost of providing access to other operators is higher
 - access pricing regimes should provide incentives to reduce costs or otherwise improve productivity.

If the ACCC publishes a notice inviting public submissions then the ACCC must specify how submissions may be made and the day by which submissions may be made (subsection 44ZZBD(2)). In making its decision, the ACCC must have regard to any submission made on or before the day specified in the notice in accordance with subsection 44ZZBD(3).

If the ACCC accepts the undertaking, the provider is required to offer a third party access in accordance with the undertaking. An access undertaking is binding on the access provider and the ACCC may apply to the Federal Court to enforce it. An undertaking may be withdrawn or varied at any time, but only with the ACCC's consent.

2.1.1 Timeframe for ACCC to decide whether to accept an undertaking

Under subsection 44ZZBC(1) of the CCA, the ACCC must make a decision in relation to an access undertaking within 180 days of the application being received (referred to as 'the expected period'). Further detail regarding timeframes is provided in **Appendix A**.

On 26 March 2013, Emerald lodged the Proposed Undertaking for ACCC consideration. The ACCC sought feedback from interested parties on the Proposed Undertaking by inviting public submissions in response to its Issues Paper (30 April 2013) and Draft Decision (14 August 2013). In response to feedback from industry and the ACCC, on 9 September 2013 Emerald withdrew its Proposed Undertaking and provided the Revised Undertaking.

The ACCC decided to accept the Revised Undertaking on 25 September 2013, within the time period stipulated in subsection 44ZZBC(1) of the CCA.

3 ACCC reasons for decision

3.1 Term

The Revised Undertaking will commence operation following the expiration of Emerald's 2011 Undertaking. The Revised Undertaking will expire on the earlier on 30 September 2014, or the day the ACCC consents to Emerald withdrawing the Undertaking in accordance with Part IIIA of the CCA.

Emerald submits that the one year term is appropriate given the anticipated commencement of a mandatory wheat port code of conduct on 1 October 2014. No submissions were received from interested parties regarding the appropriateness of the Revised Undertaking's one year term.

The ACCC has said previously that it considers a one year term for an undertaking is not generally appropriate because it does not provide sufficient certainty for access seekers. However, the ACCC considers a one year term in this case needs to be considered in context. The ACCC accepted Part IIIA access undertakings from port terminal operators CBH, GrainCorp and Viterra in 2011. All three undertakings are currently due to expire on 30 September 2014.³ Emerald's Revised Undertaking will align in expiry with those three other port terminal services access undertakings and the anticipated repeal of the WEMA.⁴ The ACCC also notes that the arrangements in Emerald's 2013 Revised Undertaking do not, in most respects, differ significantly from its 2011 Undertaking.

Given the anticipated commencement of the mandatory code of conduct on 1 October 2014, the ACCC considers the one year term of Emerald's Revised Undertaking to be appropriate, having regard to the matters in subsection 44ZZA(3) of the CCA.

3.2 The publish-negotiate-arbitrate framework

As noted above, Emerald's Revised Undertaking maintains the publish-negotiate-arbitrate approach of Emerald's 2011 Undertaking. The approach involves, among other things:

- Emerald publishing standard price and non-price terms
- Emerald and access seekers being able to negotiate terms other than these standard terms
- a formal dispute resolution procedure, with provision for mediation and recourse to arbitration by the ACCC or an independent arbitrator
- publishing requirements on Emerald for information about its port operations.

Emerald's Standard Terms (set out in the IAA) are intended to represent a minimum standard, from which access seekers may negotiate, based on their particular circumstances, to obtain access to port terminal services at MPT. The majority of the provisions in Emerald's revised IAA are rolled over from Emerald's 2011 Undertaking. However there are some key differences. In particular, Emerald's revised IAA seeks to introduce:

³ The ACCC is currently considering an application from Viterra to extend the term of its 2011 Undertaking until 30 September 2015, subject to expiry upon the commencement of a mandatory code of conduct.

⁴ The repeal of the WEMA (and the associated 'access test' requirement) is contingent upon the Minister declaring a mandatory code of conduct under section 51AE of the CCA. The WEMA as amended by the Wheat Export Marketing Bill 2012 can be found at: <http://www.comlaw.gov.au/Details/C2012A00170>.

- an expectation that, where necessary, access seekers will explore stock swap opportunities, on terms agreeable to the access seeker
- a new requirement for access seekers to demonstrate an ability to accumulate stock at port by rail, and commit to completing a minimum target of 50% of accumulation by rail
- a new requirement that clients make arrangements to outturn all of their grain prior to 30 September 2014 if they have not agreed and signed a new 2014/15 access agreement prior to that date.

In addition, Emerald's revised IAA is different from its 2011 Undertaking in a number of minor or technical ways, including changes to some defined terms, changes to grain testing procedures, mitigation of dust emissions and Emerald's liability cap.⁵

In its Draft Decision the ACCC expressed the preliminary view that the publish-negotiate-arbitrate model of access provision proposed by Emerald, including the non-discrimination, no hindering access and dispute resolution provisions, remains appropriate to ensure fair access to port terminal services supplied by Emerald for access seekers. The overall approach is consistent with the approach taken in Emerald's 2011 Undertaking and undertakings of other port terminal operators. However, the ACCC expressed the preliminary view that some aspects of the publish-negotiate-arbitrate framework in Emeralds Proposed Undertaking would not be appropriate.

Firstly, the ACCC expressed the preliminary view that the proposed IAA required refinement to provide the clarity and certainty necessary to provide a reasonable starting point for commercial negotiations. In particular, the ACCC expressed the preliminary view that Emerald should make amendments for the purpose of clarifying that the IAA relates only to port terminal services for bulk wheat. The ACCC considered that Emerald's draft revised undertaking (provided before the ACCC issued its Draft Decision) went some way towards dealing with this issue.

The ACCC also expressed the preliminary view that Emerald's proposed approach to stock swaps may not be appropriate having regard to the interests of access seekers, noting industry concerns that it could potentially force access seekers to enter stock swaps and was not time limited. The ACCC considered that Emerald's draft revised IAA went some way towards addressing the issues raised by access seekers, and sought further industry views on whether the draft revision would be appropriate and sufficiently clear.

3.2.1 Emerald's supporting submissions

Emerald submitted that the Revised Undertaking maintains the 2011 Undertaking's publish-negotiate-arbitrate structure and robust non-discrimination provisions and has not changed the framework for access negotiations nor the dispute resolution provisions. Emerald also submitted that the requirement for Emerald to publish standard terms of access provides certainty for access seekers, while preserving the flexibility for the parties to negotiate according to their needs if they so choose.⁶

3.2.2 ACCC's reasons

The ACCC considers that the publish-negotiate-arbitrate model in the Revised Undertaking is appropriate having regard to the matters in subsection 44ZZA(3). The ACCC considers that the inclusion of the non-discrimination, no hindering access and dispute resolution provisions is likely to ensure fair access to port terminal services supplied by Emerald to access seekers. This overall approach is consistent with the approach taken in Emerald's 2011 Undertaking and in other port access undertakings.

⁵ Differences between Emerald's 2011 Undertaking and its earlier Proposed Undertaking are described and discussed in the ACCC Issues Paper.

⁶ ABA, 'Public Submission to the Australian Competition & Consumer Commission – Proposed ABA Port Terminal Services Undertaking 2013-2014', 26 March 2013, 3.1-3.5.

3.2.2.1 The Indicative Access Agreement

In assessing the IAA submitted by Emerald, the ACCC considers that a consistent regulatory approach is appropriate, having regard to subsection 44ZZA(3)(aa) and (e) of the CCA. Accordingly, the ACCC has taken the same approach to the IAA in Emerald's Revised Undertaking as was taken in assessing the 2009 and 2011 Undertakings.

In the final decisions on the 2009 and 2011 Undertakings, the ACCC took the view that the terms in the IAAs are intended to represent a minimum standard and that access seekers have the ability to negotiate or arbitrate based on their own particular considerations and circumstances.⁷ Accordingly, in 2009 and 2011 the ACCC did not form views on whether the terms and conditions of the IAAs would be acceptable to particular parties. However, as a minimum standard the ACCC considered it was necessary for the IAA's attached to the 2009 Undertakings to ensure the following:

- the inclusion of a robust dispute resolution process that balances the legitimate business interests of the port terminal operator with the interests of access seekers
- any ability of the port operator to unilaterally vary the terms of an executed IAA is only to be exercised in appropriate circumstances
- the terms and conditions of the IAA must provide for sufficient certainty and clarity in their terms, effect and operation.

The ACCC considers that the assessment framework set out above remains relevant to the assessment of the IAA attached to the Revised Undertaking, having regard to the matters in subsection 44ZZA(3). It has accordingly applied a consistent approach in its assessment of the Revised Undertaking and focused on the three issues identified above, and on whether any of the terms in the IAA no longer represent an appropriate minimum standard and reasonable starting point for commercial negotiations. While not determinative, the ACCC has had regard to whether the clauses in the IAA have been successfully used over the period of the 2011 Undertaking.

Regarding the three dot points above, clause 8 of the Revised Undertaking contains provisions regarding dispute resolution. Clause 8 remains substantively unchanged from Emerald's 2011 Undertaking and the ACCC considers that these provisions remain appropriate having regard to the factors in subsection 44ZZA(3). Clause 6.5 allows Emerald to vary its Standard Terms, subject to ACCC approval and certain publishing requirements. The ACCC also notes that approved variations to the Standard Terms do not automatically override existing access agreements. Therefore, the ACCC's assessment of the revised IAA is primarily focused on whether the IAA is sufficiently certain and clear.

IAA relates only to port terminal services for bulk wheat

In its Draft Decision, the ACCC expressed the preliminary view that it would be appropriate for Emerald to make clear that the IAA relates only to port terminal services for bulk wheat, having regard to the interests of access seekers, in accordance with subsection 44ZZA(3)(c) of the CCA.⁸ The ACCC also noted Emerald's intention to develop separate standard terms for up-country services and expressed the view that greater clarity about the scope and application of the IAA and standard terms relating to non-port services would be desirable. Emerald also stated that it would be desirable to clarify that the IAA represented standard terms and an SHA (Storage and Handling Agreement) was an individually negotiated agreement. The ACCC expressed the view that Emerald's draft revision went some way towards dealing with the distinction between port and non-port facilities in the IAA.

⁷ ACCC, *GrainCorp Decision to Accept*, 29 September 2009, pp. 176-177.

⁸ Historically, Emerald had a 'Storage and Handling Agreement' that applied to both up country and port terminal services and this was used as the basis for the IAA in the 2011 Undertaking.

The ACCC did not receive any submissions in response to its Draft Decision or Emerald's draft revision.

As foreshadowed in its draft revision, Emerald has removed several clauses that related only to up-country facilities, expanded the background section and amended other clauses to specifically refer to 'Port Terminal' rather than facilities generally in the Revised Undertaking. Emerald submitted that these changes:

- make it clear that the IAA relates only to port terminal services for bulk wheat
- clarify that the IAA is the standard minimum terms for access and that an agreement negotiated on different terms will be a "Port Terminal Storage & Handing Agreement" (**SHA**)
- remove provisions that relate to up-country issues
- amend provisions to clarify that they relate to port terminal services.

The ACCC considers that Emerald's Revised Undertaking makes it sufficiently clear that the IAA relates only to port terminal services for bulk wheat; and that the IAA is the standard minimum terms for port terminal access, and an agreement negotiated on different terms will be a SHA.

Accordingly, the ACCC considers that the IAA provides sufficient certainty to the port operator and access seekers and is appropriate having regard to the matters in subsection 44ZZA(3).

New provision in the IAA about stock swaps

Clause 9.2(b) of Emerald's IAA introduces a new expectation that, where necessary, access seekers will explore stock swap opportunities, on terms agreeable to the access seeker. Emerald revised clause 9.2(b) to make clear that stock swaps may only occur with customers' consent.

The ACCC did not receive any submissions in response to its Draft Decision and Emerald's draft revision.

The ACCC considers that the clause arguably does not impose any new obligation on access seekers. Indeed, its drafting does not appear to confer any rights or impose any obligations on either access seekers or the port operator. It merely recites that clients 'will be expected' to explore opportunities for stock swaps. It does not require customers to execute any such agreements, even if the terms are agreeable. Further, access seekers may negotiate the terms of the IAA to remove the clause, should it be unacceptable to particular access seekers' circumstances. Accordingly, the ACCC considers the effect of the clause is likely to be minimal and is appropriate having regard to the matters in subsection 44ZZA(3)(a) and (c).

Remaining provisions of the IAA (including outturn of client grain)

As per the ACCC's Draft Decision, the ACCC considers that the IAA is appropriate insofar as it provides a reasonable starting point for commercial negotiations. However, the ACCC has not formed a view on the appropriateness of the provisions of the IAA for particular parties. The appropriateness of specific provisions of the IAA may vary between access seekers depending on their particular commercial considerations and circumstances.

In accordance with the negotiate-arbitrate model in the Revised Undertaking, the terms of the IAA are negotiable between Emerald and access seekers, and access seekers can seek arbitration under clause 8 of the Revised Undertaking for disputes relating to the negotiation of access agreements.

In addition to the issues discussed elsewhere in this Final Decision, the ACCC expressed the preliminary view in its Draft Decision that some provisions in the IAA would require amendment

before it would consider them to be appropriate.⁹ These provisions related to the threshold for requiring financial guarantees from access seekers, consistency of certain standards in the IAA, receival standards and outturn protocol and ensuring a clear distinction between up country and port facilities. Emerald's Revised Undertaking has amended these clauses in response to the ACCC's Draft Decision, and the ACCC considers the amended clauses are appropriate having regard to the matters in subsection 44ZZA(3).

In relation to the other provisions of the IAA not discussed elsewhere in this Final Decision (including the new requirement regarding outturn of client grain), the ACCC maintains the view from the Draft Decision that those provisions are appropriate having regard to the matters in subsection 44ZZA(3). The ACCC adopts the reasoning set out in detail in Appendix B of its Draft Decision on those provisions.

The ACCC notes that the provisions of the IAA are in many cases either unchanged or substantively unchanged from Emerald's 2011 IAA. The ACCC has not been notified of any issues or concerns regarding the appropriateness of these terms as a starting point for commercial negotiations. The ACCC considers that these terms appear to have provided an effective basis for access by exporters, and that they remain appropriate, having regard to the matters in subsection 44ZZA(3). In forming its view, the ACCC has had particular regard to the interests of access seekers and the legitimate business interests of Emerald, in accordance with subsections 44ZZA(3)(a) and (c).

3.2.2.2 Other matters in the Revised Undertaking are substantively similar to the 2011 Undertaking

The ACCC considers that the following matters in the Revised Undertaking are appropriate having regard to the matters in subsection 44ZZA(3) of the CCA.

Publication of terms

Provisions relating to the publication of price and non-price terms in Emerald's Revised Undertaking are substantively the same as those contained in Emerald's 2011 Undertaking and the ACCC has not been notified of any issues associated with the operation of these provisions. The ACCC overall considers that the price and non-price term publication provisions of Emerald's Revised Undertaking are appropriate, having regard to the interests of access seekers and the legitimate business interests of Emerald in accordance with subsections 44ZZA(3)(a) and (c) of the CCA. In particular, the ACCC considers that the provisions provide Emerald with a reasonable level of commercial flexibility and does not consider it would be appropriate to require reference prices to be locked in before Emerald's stem is open for bookings.

Non-discriminatory access

Provisions relating to non-discriminatory access in Emerald's Revised Undertaking are substantively the same as those contained in Emerald's 2011 Undertaking. The ACCC is not aware of any previous issues associated with the operation of these provisions. The clauses are also consistent with those included in the undertaking of other port operators. The ACCC considers that the non-discriminatory access provisions of Emerald's Revised Undertaking are appropriate, having regard to the interests of access seekers and the legitimate business interests of Emerald, in accordance with subsections 44ZZA(3)(a) and (c) of the CCA.

Negotiating for access

The ACCC notes that the provisions relating to negotiating for access are substantively the same as those contained in Emerald's 2011 Undertaking. It considers that the terms appropriately balance the interests of access seekers and Emerald, and provide a certain and clear process for the negotiation of an access agreement.

⁹ Appendix B of the ACCC's Draft Decision, 14 August 2013.

In addition, the ACCC considers that clauses 4.5(b) and 4.5(c) of Emerald's IAA provide commercial flexibility for both Emerald and access seekers throughout the term of an access agreement, and establish a clear and defined process for negotiating variations to an existing access agreement. The ACCC is not aware of any issues that arose regarding requests for access agreement variations or the negotiating provisions in general throughout the term of Emerald's 2011 Undertaking. The ACCC considers these provisions to be appropriate and in the interests of Emerald and access seekers, having regard to subsections 44ZZA(3)(a) and (c) of the CCA.

Dispute Resolution

The ACCC notes that the dispute resolution process in Emerald's Revised Undertaking is substantively the same as that contained in Emerald's 2011 Undertaking. The ACCC is not aware of any issues regarding the dispute resolution procedure in Emerald's 2011 Undertaking. The ACCC considers the dispute resolution provisions in Emerald's 2011 Undertaking remain appropriate in the Revised Undertaking, and are in the interests of Emerald and access seekers, having regard to subsection 44ZZA(3)(a) and (c) of the CCA.

Confidentiality

The confidentiality provisions of Emerald's Revised Undertaking are substantively the same as those contained in Emerald's 2011 Undertaking, with the exception of a new clause 9.1(b)(v), permitting a party to disclose confidential information to a related body corporate. The ACCC has considered the potential for Emerald to disclose confidential information to its trading arm, Emerald Grain, and use this information to act against the interests of its customers; and Emerald's submission that the clause is necessary because of the particular corporate structure and use of staff employed by Emerald Grain.

The ACCC considers that risks to the interests of access seekers arising from clause 9.1(b)(v) are mitigated by the non-discrimination provisions. The ACCC considers that if Emerald used information it obtains by virtue of being a vertically integrated port terminal operator to provide its trading arm with preferential treatment, it would be in breach of the Revised Undertaking. Further, the Revised Undertaking requires Emerald to publish stock information and performance indicators, providing additional levels of transparency to potential access seekers.

The ACCC notes that it has not been notified of any disputes in relation to the potential sharing of information between Emerald and its own trading arm. Having regard to Emerald's legitimate business interests, as required under subsection 44ZZA(3)(a), the ACCC also acknowledges the substantial costs involved in implementing ring-fencing arrangements.

In its assessment of the Revised Undertaking, the ACCC considers that a consistent regulatory approach is appropriate, having regard to subsections 44ZZA(3)(aa) and (e) of the CCA. To this end the ACCC notes its previous assessments in relation to the 2009 and 2011 Access Undertakings, where ring-fencing measures were not considered to be a necessary component of the port terminal access undertakings. This was in light of the existence of non-discrimination provisions. It accordingly does not consider that there is a need to limit the provision of information to related bodies corporate, noting that it reflects the commercial structure in use by Emerald.

Accordingly, the ACCC considers clause 9.1(b)(v) and the other confidentiality provisions to be appropriate and in the interests of Emerald and access seekers, having regard to the matters in subsection 44ZZA(3) of the CCA.

Publication of performance indicators

Provisions relating to the publication of performance indicators in Emerald's Revised Undertaking are substantively the same as those contained in Emerald's 2011 Undertaking, and the ACCC is not aware of any issues associated with the operation of these provisions. The ACCC considers, overall, that the provisions relating to the publication of performance indicators in Emerald's Revised Undertaking are appropriate.

Clause 12 of Emerald's Revised Undertaking provides that Emerald must publish details on certain key service standards and capacity indicators in respect of the provision of port terminal services for bulk wheat and MPT at six-monthly intervals.

The ACCC has considered whether Emerald should be required to publish performance indicator information on a quarterly basis and notes that, as a general rule, the availability of additional information is beneficial to access seekers. However, the ACCC does not consider there to be a clear case for Emerald increasing the frequency with which it publishes the information given the size and scale of Emerald's operations, including its smaller port storage capacity and 'just in time' cargo accumulation system. Having regard to a consistent regulatory approach (pursuant to subsections 44ZZA(3)(aa) and (e) of the CCA), the ACCC notes that Emerald's six-monthly reporting scheme is equivalent to that in GrainCorp's 2011 Undertaking. In the context of the competitive constraint imposed by GrainCorp's Geelong facility, the ACCC does not consider that quarterly publication of performance indicators is necessary. Accordingly, the ACCC considers that the provisions relating to the publication of performance indicators in Emerald's Revised Undertaking are appropriate, having regard to the matters in subsection 44ZZA(3) of the CCA.

Information gathering

Clause 6.4(b) of the Revised Undertaking provides that the ACCC may require Emerald to appoint an independent auditor to report on Emerald's compliance with its obligation to provide non-discriminatory access. Provisions relating to information gathering in Emerald's Revised Undertaking are substantively the same as those contained in Emerald's 2011 Undertaking and the ACCC is not aware of any issues associated with the operation of these provisions. The ACCC considers that the information gathering provisions in Emerald's Revised Undertaking are appropriate, having regard to the matters in subsection 44ZZA(3) of the CCA.

3.3 Capacity management

Emerald's first come, first served (**FCFS**) approach to capacity management is substantially the same as the approach taken in Emerald's 2011 Undertaking. The ACCC has taken into account its previous assessment of the 2011 Undertaking, as well as Emerald's previous conduct, in forming its final view that the FCFS capacity management approach taken in the Revised Undertaking is appropriate, having regard to the matters in subsection 44ZZA(3).

In its Draft Decision the ACCC stated that the majority of the provisions concerning capacity management remained substantively unchanged and had not been the subject of formal complaints to the ACCC. The ACCC also stated its position that for smaller port operators facing competition from larger competitors nearby it is generally not necessary to require significant changes to access arrangements that are already working well. Further, the ACCC stated that in such circumstances the ACCC's key concern is to ensure that arrangements provide for sufficient transparency and other basic elements for an effective undertaking.

In its Draft Decision the ACCC provided the preliminary view that a number of clauses concerning Emerald's approach to capacity management were not appropriate, but would be appropriate if amended in accordance with the draft revision. The draft revision:

- included an obligation on Emerald to provide a statement of available capacity upon the opening of its shipping stem (clause 6 of the Loading Protocol) each year along with rolling monthly six-month forecast¹⁰
- limited the circumstances in which Emerald would be able to arrange for the transportation of a Client's grain at the Client's cost. To exercise this right Emerald would need to consult with the Client regarding the lack of a cargo assembly plan, allow for 'timely' redress, and then have reasonable grounds to suggest that

¹⁰ clause 11.1(iv) of the Revised Undertaking

noncompliance would be likely to impact adversely on the efficiency and timeliness of loading at MPT¹¹

- clarified that the new expectation on Clients to accumulate a 'significant' proportion of cargo by rail would involve a "target minimum 50%"¹²
- clarified that where a delayed or substituted vessel's estimated time of arrival (ETA) is greater than 5 days outside the original ETA, the Client's booking fee would not be forfeited unless Emerald reasonably held the opinion that the delay would cause significant disruption to the shipping stem.¹³

3.3.1 Emerald's Revised Undertaking

Emerald's Revised Undertaking reflects the draft revision and maintains the same general approach to capacity management as in the 2011 Undertaking. Emerald allocates capacity on a FCFS basis, subject to Emerald having discretion to consider other matters when prioritising bookings and to change vessel loading priority for operational reasons. In addition to the changes to the Loading Protocol outlined below, clause 11.1(iv) of the Revised Undertaking has been amended from the Proposed Undertaking to require Emerald to publish available capacity for the following six months on a month by month basis.

Emerald has revised its Loading Protocol to address the ACCC's concerns in the Draft Decision. The ACCC did not raise any concerns about the clauses relating to vessel loading and dispute resolution and as such, the ACCC's assessment of the clauses remains the same as in the Draft Decision. A complete overview of Emerald's Proposed Undertaking can be found in the ACCC Draft Decision at section 5.1.

Introduction: Clause 3 has been revised to provide that the Loading Protocol must be read in conjunction with the current IAA or the SHA to which the Client is a party or otherwise bound.

Shipping stem: Clause 6 has been revised to provide that in the event a vessel is substituted or delayed, and the substituted or revised ETA is greater than 5 days from the original ETA, a Client's booking fee may, by the issue of a notice, be forfeited to Emerald if, in the reasonably held opinion of Emerald, the delay would cause significant disruption to the shipping stem.

Vessel nomination: Clause 22 provides that vessel nominations must be accompanied by a complying cargo assembly plan detailing the supply chain arrangements to be used to deliver wheat to MPT. In the absence of a complying cargo assembly plan, Emerald has discretion to arrange for the transport of client grain at the client's cost or reject the vessel nomination. Emerald has revised this clause in the Revised Undertaking to introduce conditions on the exercise of its discretion. Where a vessel nomination is not accompanied by a complying cargo assembly plan, Emerald will consult with the Client (giving the client an opportunity to redress the non-complying cargo assembly plan in a timely manner) and may not exercise its discretion unless it has reasonable grounds to believe that the client's non-compliance is likely to adversely impact on the efficiency and timeliness of loading at MPT.

Cargo accumulation: Clause 29 has been revised to provide that the accumulation of a significant proportion (target minimum 50%) of cargo by rail will be expected to be an important component of the cargo assembly plan.

Vessel substitution or delay: Clause 47 has been revised to define the circumstances under which a Client's booking fee may, by the issue of a notice, be forfeited to Emerald by including the words '*if, in the reasonably held opinion of [Emerald] the delay would cause significant disruption to the shipping stem.*'

¹¹ clause 22 of the Loading Protocol

¹² clause 29 of the Loading Protocol

¹³ clause 47 of the Loading Protocol

3.3.1.1 Variation to the Loading Protocol

Clause 10.3 of Emerald's Proposed Undertaking sets out the requirements for varying the Loading Protocol during the term of the Undertaking.

Variations must be consistent with the objectives of the Undertaking and Emerald's obligation to provide non-discriminatory access. In addition, the Loading Protocol must always include an expeditious dispute resolution mechanism. Clause 10.3 also provides that variations must be published on Emerald's website at least 30 days prior to coming into effect and that Emerald must provide the ACCC with copies of the variations promptly following publication.

Clause 10.4 provides for the ACCC to issue an objection notice to a proposed variation. If not withdrawn, the notice prevents the changes from taking place.

3.3.2 Emerald's supporting submissions

Emerald submitted that, compared to an auction system, FCFS is an appropriate capacity management approach for Emerald because:

- the throughput at Emerald's grain terminal is relatively constrained and the complexity and cost of an auction system would not be appropriate having regard to the scale of Emerald's operation
- Emerald operates in a competitive environment on the east coast
- Emerald's main competitor, Graincorp's port at Geelong, operates on a FCFS basis
- to Emerald's knowledge there have not been any formal complaints about the operation of Emerald's FCFS system
- 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 an auction system.¹⁴

In addition, Emerald submitted that the Revised Undertaking has responded to ACCC and stakeholder concerns in relation to capacity management by making the following changes (compared to the earlier submitted Proposed Undertaking):

- a change to clarify that stock swaps will require client agreement, on terms acceptable to the client (including, for example, time-based swap terms)
- a change to specify target rail usage of 50% in the cargo assembly plan
- changes to require publication of useful pre-allocation and updated monthly information on available capacity at MPT.¹⁵

3.3.3 ACCC's reasons

The ACCC considers that Emerald's approach to capacity management in its Revised Undertaking is appropriate, having regard to the matters in subsection 44ZZA(3). As per its Draft Decision, the ACCC considers that the revised Loading Protocol provides greater clarity and certainty to access seekers regarding the terms of access and is appropriate, having regard to subsections 44ZZA(3)(a) and (c) of the CCA.

¹⁴ Emerald, *Public submission to the Australian Competition & Consumer Commission*, 26 March 2013, paragraph 5.2

¹⁵ Emerald, *Letter to ACCC re draft revised Undertaking*, 31 July 2013.

In forming its view, the ACCC has considered both the appropriateness of the FCFS approach to allocation of capacity and the likely effectiveness of the arrangements set out in Emerald's Loading Protocol. The ACCC's reasons for its view in relation to Emerald's general approach to capacity management, as well as specific clauses relating to capacity management, are set out in this section.

3.3.3.1 Market conditions and consistency across the industry

In considering whether FCFS is an appropriate capacity management system for Emerald's port terminal services, the ACCC has had regard to its previous assessments, the effectiveness of existing arrangements and market conditions.

While the ACCC considers it desirable to apply a consistent approach to assessing the proposed arrangements put forward by port operators, a consistent approach does not require that all port operators must have identical capacity management systems. The ACCC considers that capacity management arrangements should be assessed for each port operator on the basis of its circumstances.

In relation to Emerald, the east coast of Australia has a strong domestic market for wheat, which limits demand for export capacity at east coast port terminals. This is in contrast to other areas of Australia where exports are dominant. As the Productivity Commission noted in its 2010 inquiry into Wheat Export Marketing Arrangements, the bulk wheat export market in the east coast of Australia, and particularly in Victoria, is subject to more competition than other markets.¹⁶

The ACCC notes that there have been some changes in relation to the circumstances of MPT since the ACCC's decision on Emerald's 2011 undertaking, where it considered that a FCFS system was appropriate. These changes include the fact that Emerald has increased the amount of grain that it exports, in a number of cases exceeding nominated capacity for given months, which may indicate that it is operating closer to its maximum monthly throughput capacity. However, on an annual basis MPT has not operated at full capacity over the entire year. The ACCC also notes that Emerald's port and trading businesses are now more integrated since the former ABA became a fully-owned subsidiary of Emerald Grain.

The ACCC recognises that the appropriateness, or otherwise, of a particular proposed capacity allocation arrangement depends on, among other things, the effectiveness of existing or past arrangements. Submissions in response to the ACCC Issues Paper on Emerald's Proposed Undertaking did not raise concerns about Emerald maintaining a FCFS approach to capacity allocation, or suggest that Emerald should be required to introduce an alternative approach. The ACCC has also not received complaints about the operation of the FCFS system over the period of operation of the 2011 Undertaking.

Having regard to the particular circumstances of Emerald, and that no stakeholders expressed a view to the ACCC that Emerald's use of a FCFS system was inappropriate, the ACCC considers that the Revised Undertaking's overall approach to capacity management is appropriate having regard to subsection 44ZZA(3)(a) of the CCA.

With regard to Emerald's implementation of the FCFS system, the ACCC has considered the appropriateness of the Loading Protocol submitted as part of the Revised Undertaking. In its decisions to accept the 2011 Undertakings, the ACCC referred to and repeated its position from decisions on the 2009 Undertakings that it would consider whether the protocols proposed by the bulk handlers provided for:

... sufficient certainty and clarity in its terms, effect and operation in order to enable the access provider and access seekers to be adequately aware of their respective rights and obligations,

¹⁶ Productivity Commission 2010, Wheat Export Marketing Arrangements, Inquiry Report no. 51, p. 68.

and thereby avoid unnecessary costs, monetary or otherwise, when utilising the processes set by the [protocols and undertaking].¹⁷

The ACCC also reconsidered whether the protocols represented an appropriate balance between providing access seekers with sufficient certainty and clarity and bulk handlers with sufficient flexibility in managing their port terminals. The ACCC also acknowledged that a flexible and pragmatic approach was required to maintain the overall efficiency of the system.¹⁸

The ACCC considers that such considerations remain relevant to its consideration of Emerald's 2013 Undertaking. The following sections examine specific aspects of Emerald's FCFS approach in more detail.

3.3.3.2 Information regarding available capacity

A fundamental requirement of the efficient use of port infrastructure is the timely provision of information to access seekers about capacity at the port terminal and the remaining capacity available. Relevantly, clause 11.1 of Emerald's Revised Undertaking requires Emerald to publish information regarding available capacity.

Information provided on available capacity allows access seekers to assess the availability of capacity against their export needs and to make bookings in required months before all slots are booked. This information is clearly in the interests of access seekers, having regard to subsection 44ZZA(3)(c) of the CCA, and also promotes the efficient use of the port terminal infrastructure, having regard to subsection 44ZZA(3)(aa).

In the Draft Decision the ACCC considered that reporting by Emerald will only be useful to access seekers if it accurately represents the available capacity at MPT, as it may affect the decisions made by access seekers. Accordingly, the ACCC provided its preliminary view that amendments might have been necessary to ensure that available future capacity is conveyed accurately to the market to allow them to participate equally in the FCFS process. The ACCC considered that this would better ensure that all exporters have the same level of information regarding capacity at port at the same time.

The Revised Undertaking requires Emerald to publish a projection of available capacity by month for the next 12 months upon giving notice of the opening of its shipping stem each year. It also requires Emerald to publish each month the available capacity for the following six months on a month by month basis.¹⁹ In combination, the ACCC considers that these requirements provide exporters with an appropriate level of information regarding available capacity and are appropriate in the interests of access seekers, having regard to subsection 44ZZA(3)(c) of the CCA.

3.3.3.3 Clarification of terms in the Loading Protocol

In the Draft Decision the ACCC noted the lack of certainty as to whether the Loading Protocol referred to the Standard Terms or agreements negotiated with access seekers on different terms (SHAs). In the Revised Undertaking, Emerald has amended clause 3 to explicitly state that references to the IAA are to the Standard Terms and that references to the SHA are to terms of an agreement that a Client has agreed to and signed.

The ACCC considers that the amended clause 3 provides the document with greater certainty and clarity and is in the interests of access seekers having regard to subsection 44ZZA(3)(c) of the CCA.

¹⁷ ACCC, GrainCorp Decision to Accept, 29 September 2009, pp. 289-90.

¹⁸ ACCC, GrainCorp Decision to Accept, 29 September 2009, pp. 289-90.

¹⁹ See clause 6 of the Loading Protocol and clause 11.1(a)(iv) of the Revised Undertaking.

3.3.3.4 Intent to ship advices and implementation of FCFS

Clauses 12 and 13 of Emerald's revised Loading Protocol set out the booking arrangements, which facilitate the FCFS approach to capacity allocation. Specifically, Clause 13 requires Emerald to deal with 'Intent to Ship Advices' in the order that they are received. Clause 12 sets out the matters that Emerald may consider in deciding to accept or reject an 'Intent to Ship Advice'.

No submissions were received in response to the Draft Decision. However, the ACCC notes concerns submitted in response to the Issues Paper about the level of discretion Emerald has to accept or reject an 'Intent to Ship Advice' and therefore change the order in which 'Intent to Ship Advices' are processed. As per its Draft Decision, the ACCC considers clauses 12 and 13 strike an appropriate balance between providing certainty to the access seeker (by specifically setting out the factors that Emerald may consider when deciding whether or not to accept an Intent to Ship Advice) while reserving some discretion for Emerald to consider other relevant factors. The ACCC considers that the clauses clearly set out that a FCFS approach is in place.

The ACCC notes that the level of discretion afforded to Emerald under clauses 12 and 13 is substantively the same as that which was deemed appropriate by the ACCC in its assessment of the 2011 Undertaking. However, the ACCC notes that the criteria now specifically references matters about efficiency and timeliness of cargo accumulation at port and of loading. While this provides more detail, the ACCC notes that Emerald had such discretion under the current port protocols. The ACCC is not aware of any issues with respect to the unreasonable exercise of this discretion by Emerald over the term of the 2011 Undertaking.

Overall, the ACCC remains of the view that clauses 12 and 13 remain appropriate and balance the interests of access seekers and the legitimate business interests of Emerald in managing its port, having regard to subsections 44ZZA(3)(c) and (a) of the CCA.

3.3.3.5 Vessel nomination

In comparison to the 2011 Undertaking, Emerald's revised Loading Protocol introduces a new requirement that, in order to nominate a vessel, clients must provide a complying cargo assembly plan that details the supply chain arrangements they will use to deliver grain to port.²⁰ Where a client fails to provide a complying cargo assembly plan, Emerald has discretion to arrange for the transport of the client's grain at the client's cost or reject the vessel nomination.

The ACCC notes that Emerald operates a port with relatively limited storage, where grain is brought to the port 'just in time' to be loaded onto a vessel. In that context, the ACCC considers the use of cargo assembly plans is appropriate, in the legitimate business interests of Emerald, and is likely to promote the efficient use of the MPT infrastructure having regard to subsections 44ZZA(3)(c) and 44ZZA(3)(aa) of the CCA. The ACCC also understands that the use of cargo assembly plans is widespread in the industry.

However, the ACCC notes concerns submitted in response to its Issues Paper, regarding the broad discretion that Emerald may exercise if a client does not provide a complying cargo assembly plan and the costs that access seekers may incur as a result. In the Draft Decision the ACCC considered that there should be some limit on the discretion so that it may only be exercised if necessary, having given reasonable consideration to the impact of the Client's omission on efficiency and timeliness of cargo accumulation at port and of loading.

Emerald has amended clause 22 in the Revised Undertaking to stipulate that Emerald will consult with the client and that the client will have an opportunity to redress its failure to provide a complying cargo assembly plan prior to exercising the discretion. It also states that Emerald's ability to arrange for the transport of grain from up-country sites, or reject the nomination, would only arise if the non-compliance will impact on port operations.

²⁰ Emerald, Loading Protocol, clause 22.

The ACCC considers that clause 22 of the Loading Protocol as amended in the Revised Undertaking is appropriate and in the interests of Emerald and access seekers, having regard to subsections 44ZZA(3)(a) and (c) of the CCA.

3.3.3.6 Cargo accumulation

Accumulation by rail

In the Draft Decision the ACCC noted its concern regarding a new expectation that a Client will accumulate a 'significant proportion' of cargo by rail. The ACCC considered that the definition of the expected proportion as 'significant' afforded Emerald with a broad discretion that could potentially be exercised against the interests of access seekers. The ACCC considered that it would be appropriate for Emerald to specify the expectation more precisely in the Loading Protocol, or for the Loading Protocol to explicitly state that the parties will agree on the meaning of 'significant proportion'.

Emerald has amended clause 29 in the Revised Undertaking to specify that the significant proportion of accumulation by rail involves a target minimum of 50%. In the Draft Decision the ACCC sought stakeholder views on the appropriateness of the amended clause 29 and no concerns were raised.

The ACCC considers that the amended clause 29 of Emerald's Revised Undertaking provides a greater degree of certainty to access seekers. The ACCC therefore considers the rail requirement on clause 29 to be appropriate and in the interests of Emerald having regard to subsection 44ZZA(3)(a) of the CCA.

Stock swaps as a factor in determining order of cargo accumulation and vessel loading

Clause 32 of the revised Loading Protocol allows Emerald to take into account agreed stock swaps between clients in determining the order of cargo accumulation at MPT. Similarly, clause 37 allows Emerald to take into account agreed stock swaps between clients in determining the order of vessel loading.

The ACCC notes concerns submitted at the Issues Paper stage that clause 32 allows Emerald a very broad discretion to discriminate between customers and to favour its related trading division on grounds that not clear to customers. Further, it was also submitted that, given MPT has limited storage, the order of cargo accumulation and vessel loading should primarily be determined by stock at port; and priority in delivery spots should be afforded to the next vessel in the queue so that the port can be emptied for subsequent vessels.

The ACCC notes that the addition of stock swaps as a factor is the only substantive change to the equivalent clause in Emerald's 2011 Undertaking.²¹ The ACCC is not aware of any concerns about the unreasonable exercise of this discretion by Emerald in the past. The ACCC considers that the list of factors that Emerald may consider in determining the order of cargo accumulation and vessel loading appropriately balances the interests of Emerald (in having sufficient discretion to efficiently manage the port terminal) and the interests of access seekers (in having sufficient transparency regarding the terms of access), in accordance with subsections 44ZZ(3)(b) and (c).

The ACCC further notes that Emerald is prohibited from discriminating between port terminal users in favour of its own trading arm, except as to costs, as per clause 6.4(a) of Emerald's Revised Undertaking.

Circumstances in which Emerald is entitled not to fully accumulate a cargo

Clause 34 of Emerald's revised Loading Protocol states that Emerald reserves the right not to fully accumulate cargo in order to maximise all client vessel turnarounds where multiple vessels are arriving in a short time frame. Concerns were submitted in response to the Issues Paper

²¹ ABA, 2011 Undertaking, Port Loading Protocol, Clause 28.

that clause 34 would allow Emerald to effectively 'short ship' a customer and in doing so potentially render a customer to default on other contracts.

The ACCC considers that it is appropriate for Emerald to have reasonable discretion not to fully accumulate a cargo where the client fails to accumulate grain within agreed timeframes. Clause 2 of Emerald's Loading Protocol states that Emerald has limited port storage, operates on a 'just-in-time' basis, and at all times operates with the overriding objective to maximise port throughput and operational efficiencies. Consistent with its views in relation to Emerald's 2011 Undertaking, the ACCC considers that clause 2, in conjunction with the non-discrimination and no hindering access clauses in the Revised Undertaking, should provide sufficient certainty to access seekers and prevent unreasonable exercise of this discretion by Emerald.

Clause 34 of the revised Loading Protocol is substantively the same as the equivalent provision in Emerald's 2011 Undertaking.²² Further, the ACCC is not aware of any issues associated with the unreasonable exercise of this discretion by Emerald in the past. Overall, the ACCC considers clause 34 to be appropriate and in the interests of access seekers and the legitimate interests of Emerald, having regard to subsections 44ZZA(3)(c) and (a) of the CCA.

3.3.3.7 Vessel substitution or delay

Clause 47 of Emerald's proposed Loading Protocol provided that a Client's booking fee would be forfeited in the event that a vessel was substituted or delayed, and the substituted or revised ETA was greater than 5 days from the original ETA.

In the Draft Decision the ACCC expressed concern that the proposed clause 47 contained no discretion or limit – specifically, that the booking fee would be forfeited if the substituted or revised ETA was more than five days away from the original ETA. The ACCC also expressed its concern that the fee would be forfeited without any requirement for an assessment of the impact of that change. While recognising that there should be a reasonable discretion in clause 47 for Emerald to manage its port operations, the ACCC considered that the clause should contain a requirement that the relevant change from the ETA would impact on the efficient operation of the port, and/or that Emerald may elect to not require the booking fee to be forfeited in certain circumstances.

Emerald's amended clause 47 in the Revised Undertaking provides that the booking fee would only be forfeited in circumstances where Emerald has issued a notice and has a reasonably held opinion that the relevant delay would cause significant disruption to the shipping stem.

The ACCC considers that the amended clause 47 appropriately retains discretion for Emerald to manage the efficiency of its port, while providing access seekers with an assurance that it will be only exercised where a delay will impact on port efficiency. The ACCC therefore considers clause 47 to be in the legitimate business interests of Emerald and the interests of access seekers, having regard to subsections 44ZZA(4)(a) and (c) of the CCA.

3.3.3.8 Dispute resolution

The ACCC notes that clause 50 of the Loading Protocol is substantively the same as the equivalent provision in Emerald's 2011 Undertaking.²³ The ACCC repeats its view from the assessment of this equivalent provision in the 2011 Undertaking that the inclusion of a 10 business day decision making period is appropriate. The ACCC considers the 10 business day period ensures that the dispute resolution process reflects the interests of access seekers in achieving a timely response to disputes relating to access, and is therefore appropriate having regard to subsection 44ZZA(3)(c) of the CCA.

²² ABA, 2011 Protocol, clause 34.

²³ ABA, 2011 Protocol, 48

3.3.3.9 Variation of the Loading Protocol

In its assessment of Emerald's 2011 Undertaking, and in the 2011 Undertakings more generally, the ACCC set out certain minimum standards for the process by which a port terminal operator may vary its protocols. The ACCC considered these standards were necessary to ensure an efficient, meaningful and transparent consultation process for access seekers in accordance with subsection 44ZZA(3)(c). The ACCC took the view that these standards should apply consistently to the four port terminal operators' undertakings (having regard to subsections 44ZZA(3)(aa) and (e) which promote consistency in access regulation across industry).²⁴ The ACCC required that the port loading protocol be a comprehensive statement of the relevant port loading procedures at the port; that there be a clear process for varying the protocols; and that the ACCC have an objection role in the variation process.

The ACCC notes that the provisions relating to the variation of Emerald's Loading Protocol in clause 10.3 of Emerald's Revised Undertaking are substantively the same as those contained in Emerald's 2011 Undertaking. Further, the ACCC is not aware of any issues associated with the operation of these provisions, and understands that the protocols have not needed to be amended since the ACCC accepted the 2011 Undertaking.

The ACCC considers that the Loading Protocol variation provisions in Emerald's Revised Undertaking continue to be appropriate and the interests of access seekers and Emerald, having regard to subsections 44ZZA(3)(c) and (a) of the CCA.

²⁴ For full discussion of these standards, see ABA, Decision to Accept, 2011, pp. 25-27.

A Appendix A

'Other matters the ACCC thinks are relevant' – the WEMA

In accepting Emerald's 2011 Undertaking, the ACCC considered that the regulatory scheme established by the *Wheat Export Marketing Act 2008* (Cth) (**WEMA**), and the rationale for the inclusion of the access test in the statute were, under subsection 44ZZA(3)(e) of the CCA, matters relevant to the decision. The ACCC considers that the policy, as reflected in the regulatory scheme established by the WEMA and the rationale for the access test, is a matter relevant to the current decision on whether accept Emerald's Revised Undertaking.

In particular, the ACCC acknowledges the policy objectives in introducing the access test in 2008, and in deciding to continue the access test when the WEMA was amended in December 2012. Specifically, the WEMA access test is:

...intended to ensure that owners, operators or controllers of port terminal facilities that also export bulk wheat, or have associated entities that do, provide fair and transparent access to their facilities to other exporters. The access test aims to avoid regional monopolies unfairly controlling infrastructure necessary to export wheat in bulk quantities, to the detriment of other bulk wheat exporters. All bulk wheat exporters should have access to these facilities while allowing the operators of the facility to function in a commercial environment.²⁵

Further, in the second reading speech regarding the introduction of the WEMA, the Minister stated that "unless all exporters can obtain access to these critical facilities on fair and reasonable terms then one of the major objectives of the policy could be frustrated."²⁶

In accepting undertakings from wheat port terminal service operators in 2009 and 2011, the ACCC acknowledged that the WEMA was introduced to promote competition in the export of bulk wheat, which has various dimensions including:

- the promotion of competition between marketers for the acquisition of bulk wheat from growers;
- the promotion of competition between exporters for the export of wheat from Australia; and
- the concomitant promotion of competition for associated products and services, such as supply chain services and grower services.

The ACCC also acknowledged that the promotion of competition in the form described may potentially be limited by anti-competitive conduct associated with port terminal facilities, and that the inclusion of the access test demonstrates a clear intention to legislate measures to mitigate the possibility of such conduct undermining the broader intent of the legislation.

The ACCC notes that since accepting Emerald's 2011 Undertaking, amendments to the WEMA have been introduced which stipulate that the access test will be removed on 1 October 2014, subject to there being in place a mandatory code of conduct covering grain export port terminal operators. The code must:

- deal with the fair and transparent provision to wheat exporters of access to port terminal services; and

²⁵ Commonwealth, *Revised Explanatory Memorandum - Wheat Export Marketing Amendment Bill 2012*, Senate, p. 6.

²⁶ Commonwealth, *Parliamentary Debates*, House of Representatives, 29 May 2008, 3860 (Tony Burke, Minister for Agriculture).

- be consistent with the operation of an efficient and profitable wheat export marketing industry that supports the competitiveness of all sectors through the supply chain.²⁷

The intent of the code reinforces that the promotion of competition may potentially be limited by anti-competitive conduct associated with port terminal facilities.

The ACCC considers that the policy intentions as reflected in the WEMA are relevant to Emerald's 2011 Undertaking and are relevant factors for the ACCC to consider in deciding whether to accept the Revised Undertaking, pursuant to subsection 44ZZA(3)(e) of the CCA.

Timeframe for ACCC decisions

Subsection 44ZZBC(1) of the CCA provides that the ACCC must make a decision on an access undertaking application within the period of 180 days starting at the start of the day the application is received (referred to as 'the expected period').

If the ACCC does not publish a decision on an access undertaking under section 44ZZBE of the CCA within the expected period, it is taken, immediately after the end of the expected period, to have:

- made a decision to not accept the application; and
- published its decision under section 44ZZBE and its reasons for that decision: see subsection 44ZZBC(6).

Subsection 44ZZBC(2) of the CCA provides for 'clock-stoppers', which means that certain time periods are not taken into account when determining the expected period. In particular, the clock may be stopped:

- by written agreement between the ACCC and the access provider, and such agreement must be published: subsections 44ZZBC(4) & (5);
- if the ACCC gives a notice under subsection 44ZZBCA(1) requesting information in relation to the application;
- if a notice is published under subsection 44ZZBD(1) inviting public submissions in relation to the application;
- a decision is published under subsection 44ZZCB(4) deferring consideration of whether to accept the access undertaking, in whole or in part, while the ACCC arbitrates an access dispute.

²⁷ These are the two criteria that the Minister for Agriculture, Fisheries and Forestry must be satisfied that the code of conduct meets before approving the code, as set out in section 12 of the *Wheat Export Marketing Act 2008*, p. 14.