

Our reference                      Michael Bradley 09707  
Phone                                +61 2 8216 3006  
Email                                 michaelb@marquelawyers.com.au

17 March 2011

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

By email: [lyn.camilleri@accc.gov.au](mailto:lyn.camilleri@accc.gov.au)

Dear Ms Camilleri

## **Port Terminal Services Access Undertaking - Australian Bulk Alliance Pty Ltd**

We refer to the public submissions lodged with the Commission in relation to our client's proposed Access Undertaking. We are instructed to provide the Commission with some comments in response to the issues raised in the submissions, which we will keep as brief as possible.

### **1. Victorian Farmers Federation**

- 1.1 The VFF submits that the undertaking should remain in place until 30 September 2014. There is no compelling reason why this should be so. We have previously explained why ABA has elected for a relatively short duration for the undertaking, relating to the present uncertainty as to whether the maintenance of an undertaking will be necessary in the longer term. This should properly be a matter for ABA to elect.
- 1.2 All of the other matters raised by the VFF fall entirely outside the scope of the access undertaking regime. The VFF is entitled to its view as to whether port operators ought to voluntarily maintain undertakings, or what should happen if the WEMA loses its regulatory role, but that is not relevant to consideration of this draft undertaking. The VFF's submission should therefore be disregarded in our view.

### **2. Asciano**

- 2.1 Asciano submits that ABA should be obliged to publish information as to its costs, so as to place access seekers on a more even basis when negotiating access prices. This is not required by and falls outside the spirit and intent of Division 6. What it is designed to ensure is that pricing is non-discriminatory as a fundamental aspect of equal access provision, and the draft

undertaking embodies this requirement. The provider's costs and profits are not sought to be regulated by Division 6. If they were to be regulated, the provider's service would need first to be declared.

- 2.2 Asciano also submits that there is a conceptual inconsistency between clause 10.3 of the draft undertaking which enables ABA to vary the terms of its Loading Protocol, and clause 8.1(b) which precludes Applicants from raising a dispute in relation to the terms of the Loading Protocol. There is no inconsistency in this. The purpose of clause 8 is to provide an effective binding dispute resolution process for access disputes. The Loading Protocol applies equally to all access seekers. Any variation to its terms can only be made after a lengthy consultation process and is subject to strict conditions ensuring that it does not conflict with the underlying principles of the undertaking. Access seekers are afforded very adequate protection by clause 10.3.

3. **CBH Grain**

- 3.1 The submissions by CBH Grain raise a number of questions of detail in relation to the terms of the Loading Protocol and Storage and Handling Agreement. ABA does not agree with the proposed changes. In its view the documents as drafted are transparent and even-handed as between access seekers, and adequately meet the requirements of the access undertaking. Access seekers are free to choose whether or not to use the port based on these terms.
- 3.2 In relation to the publication of information and performance indicators, ABA has already submitted that additional obligations in this respect would be onerous and largely relate to matters outside its own control. There is no utility in adding additional burdens to the already substantial reporting undertaken by ABA.

Our client is grateful to the Commission for taking these matters into account.

Yours sincerely



Michael Bradley  
Managing Partner