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Anthony Wing
General Manager
Transport & General Prices Oversight Branch
Australian Competition & Consumer Commission

Dear Mr Wing

Australian Bulk Alliance Port Terminal Services Access Undertaking

We refer to our discussions with the Commission.

Our client has reconsidered the terms of the draft Access Undertaking lodged by it in December 2010, in view of the Commission's concerns. We have prepared a substantially revised version of the Undertaking, which is attached in marked-up form to show the changes. Our client is happy for this letter to be placed on the public record along with the revised form of the Undertaking.

We suggest that the best course would be to proceed pursuant to section 44ZZAAA of the *Competition and Consumer Act* by the issue of an amendment notice.

The substantive changes are as follows.

Access Undertaking (main document)

1. Clause 3.2 – clarifies that the terms of the Undertaking take priority over the Schedules, including the Loading Protocols and Indicative Access Agreement.

2. Clause 4.2 – term and expiry date provisions have been amended as per the Commission's preference. The Undertaking will now run until 30 September 2013.

3. Clause 6.2 – all references to "Reference Prices" have been changed to "Charges" for consistency with the Indicative Access Agreement.

4. Clause 6.3 – confirms that the provisions of the Undertaking apply to the Indicative Access Agreement only so far as the latter relates to Port Terminal Services. We consider that this was already clear from the terms of the latter agreement.

5. Clause 6.4(c) – ABA will provide the ACCC with a copy of any Access Agreement entered into with a Trading Business related to ABA.

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6. Clause 7.4(b) – provides that, if the *Wheat Export Marketing Act* is amended to remove the requirement that wheat exporters be accredited, then accreditation will cease to be an eligibility requirement, however, if some other regulatory approval is created for wheat exporters, then that will become an eligibility requirement instead.

7. Clause 8.2 – amended to conform with the deletion of clause 18.2 of the Indicative Access Agreement.

8. Clause 10.2(b) – confirms that the Loading Protocol will at all times be comprehensive in terms of ABA's policies and procedures.

9. Clause 10.3(a)(iii)(E) and 10.3(b) – deals with publication and consideration of submissions received from third parties where a variation to the Loading Protocol is being considered.

10. Clause 10.4 – provides for objection by the ACCC to a proposed variation, as suggested by the Commission.

11. Clause 11.1 – we note that the Commission has expressed a preference for the list of published information to include a monthly statement of remaining available export capacity. ABA submits that the express inclusion of this additional information is unnecessary and has no utility. ABA is already obliged to publish both the total available capacity and the current nominations, from which two pieces of information the remaining available capacity can readily be calculated as at the date of publication. ABA notes that this information will rapidly be superseded by subsequent nominations, compounding the lack of utility from the point of view of access seekers.

12. Clause 12 – ABA has elected to combine the Performance and Capacity Indicators into a single reporting mechanism. In relation to the performance indicators, ABA has given close consideration to the additional indicators suggested by the Commission but does not think that they are likely to be of practical use to access seekers. ABA has also deleted "number of ships loaded" as a performance indicator because it does not consider this to be a relevant or practical indicator of facility performance. Instead, we have added some other indicators which in ABA's opinion are likely to be useful and relevant, having regard also to ABA's capability of compiling and providing the data.

13. Clause 13 – provides for informal requests for information by the ACCC and delegation of the ACCC's powers, as requested by the Commission.

Indicative Access Agreement

14. Clause 18.2 – has been deleted. It provided for unilateral variation of the Charges by ABA on notice. ABA has accepted the Commission's preference for this to be removed.

15. Clause 21.2 – now requires the parties to resolve their dispute within 30 days before it can be referred to arbitration.

16. Schedule A (details of the Charges) – has been deleted.

Loading Protocol

17. Clause 2 – the purpose of this clause is to more clearly express the principal objectives that will govern access decisions.

18. Clause 6 – ABA will publish 10 business days' notice of the opening of its shipping stem each year.

19. Clause 7 – the shipping stem will be updated each business day as required by the WEMA.

20. Clause 10 – we note that the "Booking Fee" in the Protocol is the same as the Nomination Fee in the schedule of charges previously annexed to the Indicative Access Agreement. The schedule is being amended to refer to this fee as the Booking Fee so that it is consistent with the Protocol, however this change is not shown in the marked up revision as the schedule itself will not appear in the final version of the Access Undertaking.

21. Clause 19 – this clause previously provided that, in the event that the or actual tonnage loaded is lower than that initially nominated, then ABA would rebate up to 10% of the Booking Fee. It now provides instead that ABA will allocate the unused nominated capacity to the nearest month with spare capacity. ABA explains this amendment on the basis that the Booking Fee represents its capital cost of providing the terminal facilities regardless of throughput volume. If an exporter in the event loads less than the volume nominated, ABA will generally have no opportunity to fill in the remaining capacity and therefore it is not economically viable to refund any part of the Booking Fee.

22. Clause 32 – this is a new clause which gives ABA the right not to fully accumulate a cargo. The discretion is drafted deliberately widely in view of the relatively small capacity of the port terminal facility, so as to give ABA optimum ability to ensure maximum throughput by managing cargoes where it needs to. We note that the Protocol itself provides for maximum efficiency as the driving principle of the terminal operation, and this is also the most economically rational behaviour for ABA to undertake. It should be expected that ABA will conduct its operation in observance of this principle.

23. Remaining clauses – we have substantially redrafted the provisions dealing with timing, the notices to be provided to ABA by access seekers and how the whole process works. We have endeavoured to provide much more certainty as to the process and how decisions will be made by ABA, corresponding to what currently happens in practice (and will continue under the Undertaking).

Yours sincerely

Michael Bradley
Managing Partner