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**Australian  
Competition &  
Consumer  
Commission**

30 September 2013

Mr Ashley Roff  
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Dear Mr Roff

### **ACCC extends operation of Emerald Logistics Pty Ltd's 2011 Port Terminal Services Undertaking**

This letter is to notify you that the ACCC has extended, pursuant to section 44ZZBB of the *Competition and Consumer Act 2010 (CCA)*, the period of operation of Emerald Logistics Pty Ltd's (**Emerald's**) Port Terminal Services Undertaking accepted by the ACCC by on 28 September 2011. The undertaking will now expire on the earlier of:

- 30 November 2013; or
- the date Emerald's 2013 Undertaking (accepted by the ACCC on 25 September 2013) commences operation as per the CCA.

The ACCC will publish the attached notice and decision (including reasons for its decision) on its website ([www.accc.gov.au/wheat](http://www.accc.gov.au/wheat)) today.

In accordance with section 44ZZC of the CCA, the ACCC maintains a public register of all undertakings it has accepted, as well as any variations or extensions to those undertakings. This letter will be placed on this public register.

Please contact Michael Eady on (03) 9290 1945 if you have any queries.

Yours sincerely

A handwritten signature in black ink, appearing to read 'David Salisbury', written over a light blue horizontal line.

David Salisbury  
Deputy General Manager  
Fuel, Transport & Prices Oversight Branch



Australian  
Competition &  
Consumer  
Commission

## **Emerald Logistics Pty Ltd**

# Notice and decision to extend 2011 Port Terminal Services Access Undertaking

30 September 2013



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

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# 1. Background

Emerald Logistics Pty Ltd (**Emerald**) provides port terminal services for bulk wheat export from its facilities at Melbourne Port Terminal (**MPT**). Emerald's associated entity, Emerald Grain Pty Ltd, exports bulk wheat. As such, Emerald is required to have in operation a Part IIIA access undertaking with the ACCC in order to meet the 'access test' requirements under the *Wheat Export Marketing Act 2008* (Cth) (**WEMA**).

On 28 September 2011, the ACCC accepted an undertaking provided by Australian Bulk Alliance (**ABA**), which is now Emerald Logistics Pty Ltd. The undertaking governs access to port terminal services for bulk wheat export at MPT, and is due to expire on 30 September 2013 (the **2011 Undertaking**).

On 26 September 2013, the ACCC released a decision accepting a new access undertaking which Emerald provided on 9 September 2013 (the **2013 Undertaking**). As per s44ZZBA(1) of the *Competition and Consumer Act 2010* (Cth) (**CCA**), an undertaking will commence operation 21 days after the ACCC publishes its decision if no person has applied to the Australian Competition Tribunal for review of the decision.<sup>1</sup> Therefore, Emerald's 2013 Undertaking will not commence operation until 18 October 2013 (subject to there being no application for review).

# 2. Application to Extend

On 25 September 2013, Emerald applied in writing pursuant to s44ZZBB of the CCA to extend the period of operation of its 2011 Undertaking. In its application, Emerald notes that it expects the ACCC to issue a decision accepting its 2013 Undertaking shortly; and that the undertaking will not come into force until at minimum 21 days after the ACCC publishes its decision. Emerald submits that it will not be able to meet the WEMA access test during the hiatus between the 2011 Undertaking expiring and the commencement of operation of the new 2013 Undertaking.

Emerald submits that exporters may not be able temporarily to export bulk wheat from the MPT, and this will cause economic harm to its clients and loss of revenue to Emerald (although the ACCC understands that the only exporter affected by Emerald failing to pass the access test would be Emerald Grain).<sup>2</sup>

Accordingly, Emerald applies to extend the period of its 2011 Undertaking from expiration on 30 September 2013 to expiration on the earlier of:

- a) 30 November 2013; and
- b) the date that the new 2013 Undertaking comes into operation, if the ACCC accepts it.

Emerald's application to extend the operation of its 2011 Undertaking is available on the ACCC's website at [www.accc.gov.au/wheat](http://www.accc.gov.au/wheat).

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<sup>1</sup> Subsection 44ZZBA(1) states that if the Commission accepts an access undertaking, it comes into operation at:  
(a) if, within 21 days after the Commission publishes its decision, no person has applied to the Australian Competition Tribunal for review of the decision—the end of that period; or  
(b) if a person applies to the Tribunal within that period for review of the decision and the Tribunal affirms the decision—the time of the Tribunal's decision.

<sup>2</sup> Section 8(1) of the WEMA, in summary, provides that a port terminal service provider or associated entity must not export wheat using its port terminal service if that person was required to pass the access test during the previous 12 months and did not.

### 3. Relevant legislation

Subsection 44ZZBB(3) of the CCA states the ACCC may, by notice in writing, extend the period for which an undertaking is in operation if it thinks it appropriate to do so having regard to the matters mentioned in s44ZZA(3). The matters in s44ZZA(3) are, in summary:

- (aa) the objects of Part IIIA;
- (ab) the pricing principles specified in section 44ZZCA;
- (a) the legitimate business interests of the provider;
- (b) the public interest, including the public interest in having competition in markets (whether or not in Australia);
- (c) the interests of persons who might want access to the service;
- (da) whether the undertaking is in accordance with an access code that applies to the service;
- (e) any other matters that the Commission thinks are relevant.

There is no requirement that the ACCC consult with interested parties in assessing an application to extend an undertaking. However the ACCC may invite public submissions if it considers it appropriate and practicable to do so (s44ZZBD(1)).

Section 44ZZBE of the CCA requires the ACCC to publish a decision to extend the period for which an undertaking is in operation, and its reasons for the decision.

### 4. ACCC reasons

The ACCC considers that extending the operation of Emerald's 2011 Undertaking by the earlier of two months or when Emerald's 2013 Undertaking commences operation will be in the legitimate business interests of Emerald as the port terminal service provider, as it will allow Emerald to continue to meet the WEMA access test.<sup>3</sup> As mentioned above, failing to meet the access test can result in the port terminal operator's associated trading division not being able to export bulk wheat from the port facility. The ACCC considers an outcome whereby Emerald is not able to export bulk wheat could cause material financial detriment to the company and potentially flow on detrimental effects to Emerald's overseas customers and to growers and traders that Emerald acquires bulk wheat from.<sup>4</sup>

In addition to potential negative consequences of not meeting the access test, the ACCC notes that, without an access undertaking in operation, Emerald would not be under formal obligations to comply with provisions of the undertaking. Key provisions of the 2011 Undertaking which have been carried over into the 2013 Undertaking include obligations on Emerald not to discriminate against other wheat exporters in favour of its own trading division, or hinder access to port terminal services. These provisions and other key elements of Emerald's 2011 Undertaking have been assessed by the ACCC and considered in the interests of the access seekers and the public, and also consistent with the objects of Part IIIA of the CCA. Therefore these interests are met by the 2011 Undertaking continuing to operate until the 2013 Undertaking commences operation.<sup>5</sup>

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<sup>3</sup> Relevant to s44ZZA(3)(a)

<sup>4</sup> Relevant to s44ZZA(3)(b)

<sup>5</sup> Relevant to s44ZZA(3)(aa), (b) and (c)

In the current circumstances the ACCC considers that it is neither appropriate nor practicable to invite public submissions on the application to extend the period of operation of the 2011 Undertaking.

## **5. ACCC Decision**

Pursuant to s44ZZBB(3) of the CCA, the ACCC extends the period of operation of Emerald's 2011 Undertaking from 30 September 2013 until the earlier of:

- 30 November 2013; or
- the date Emerald's 2013 Undertaking commences operation as per the CCA.

The ACCC considers it appropriate to do so having regard to the matters in s44ZZA(3).

This document is a notice under s44ZZBB(3), and an access undertaking decision including reasons for the decision under s44ZZBE.