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Dear David

ABA Proposed Port Access Undertaking 2013

I refer to the issues paper provided by the ACCC in relation to ABA's proposed port access undertaking for 1 October 2013 onwards. CBH Grain would like to make the following comments in relation the ABA Undertaking, Indicative Access Agreement and Port Loading Protocols.

Proposed Undertaking

Clause 4.5(c)
It is unclear why ABA requires an ability to force a User to negotiate a variation to an Access Agreement in accordance with clause 7 if there is already an Access Agreement in place?

Clause 6.2(a)
The provision of reference pricing no later than 30 September each year would appear anomalous if ABA was permitted to allocate capacity prior to the publication of pricing. This provision should require that prior to allocating capacity ABA should publish reference pricing and details of the capacity that is intended to be made available for booking.

Clause 9.1(v)
CBH Grain notes that the operation of the Confidentiality clause in the ABA Undertaking is limited to information provided as part of the negotiation, dispute resolution and arbitration processes under this Undertaking. This clause would appear to allow ABA to disclose Confidential Information to its marketing division, Emerald Grain, thereby providing potential for arbitrage against ABA's customer in certain circumstances. When this is considered in light of the absence of any requirement in the Indicative Access Agreement to keep a customer's information confidential, there is considerable opportunity for ABA and its related body corporate, Emerald Grain, to act against the interests of its customers. This is unacceptable to CBH Grain and it is not clear why the ability to pass information to related body corporates is required.

Clause 11
It is inappropriate and unacceptable that ABA is not required to publish stocks of grain at its port terminal. Each week during the term ABA should be obliged to publish:

- The total amount of Bulk Wheat;
- The total amount of grain other than Bulk Wheat by type; and
- The three grades of Bulk Wheat contributing the largest tonnage at its Port Terminal.

The smaller storage capacity of the Port Terminal means that it is critical to the efficient operation of the Port Terminal and transparent application of Port Loading Protocols to understand the stock position on a weekly basis.

Clause 12
Key performance indicators should be published in line with those of other Port Terminal Operators on at least a quarterly basis and there should not be any need for a delay of 2 months in the publication of the key performance indicator.

12(a)(iii) – this should reference total available capacity that has been offered to all exporters

Indicative Access Agreement
1.1 – The definition of "Facilities" leads to confusion in the document as to where this Agreement is intended to apply. If it only applies to the Port Terminal, then it would be appropriate to amend the definition to state this. Otherwise the Agreement may permit movement of stock entitlement between the Port Terminal and other ABA sites.

1.1 – The definition of "Receival Standards" is inappropriate as it allows ABA to change its obligations to outturn grain by merely changing the published receival standards between the time of receival and outloading.

1.1 – The definition of "Sampling Methods" is such that it may allow ABA to publish a non-standard sampling method that is not accepted in industry and use that method as opposed to statistically reliable and industry accepted methods.

4.4 – This indemnity is too broad and relieves ABA from liability in relation to matters which are within its control. For instance, the presence of a nil tolerance contaminant (say glass) is excused under this clause. It is also unclear how this clause interacts with the stock swaps clauses that allow ABA to force a customer to accept stock swaps. CBH Grain does not consider that such a broad indemnity in relation to receival standards is required for the legitimate business interests of ABA.

5.8 – The usage of tolerance is acceptable provided it is there to reflect the ability to repeat results based on the same sample. Accordingly, it must be clear that ABA's initial result is within the Receival Standard and that a repeat that is within the tolerance is acceptable. It would not be appropriate merely for ABA's result to be within the tolerance of complying with the receival standard otherwise the insertion of these tolerances may permit ABA to arbitrage grain held in store by blending. In addition in this clause, the use of the undefined term "Outturn Standards" causes confusion and should be deleted at the same time as the definition of "Receival Standard" is tightened.

5.9 – I would expect that this would not be acceptable unless it was clearly included in the Receival Standards. The level of bin burnt grain is also inconsistent with the Outturn Protocol that ABA publishes.

6.2(c) – It is not readily apparent why this clause is required in the form it is in. In addition, the addition of a broad indemnity in favour of ABA is inappropriate where it unclear how ABA will prove that the grain was subsequently found not to comply yet was accepted for storage following receival testing. If ABA test the grain and put it into a cell, then ABA should be liable for the results not its customer. If ABA don't test then how will it prove that it was the Customer that has contaminated the grain stack? The indemnity also appears to operate where ABA brings grain to the Port Terminal from ABA's own sites whether on behalf of the Customer or not. CBH Grain does not consider that such a broad indemnity is warranted or appropriate in this case.

6.4(c) and (d) – It is not readily apparent what this information provision requirement is intended to require a customer to do? What is "stock tonnages" and "availability" intended to mean? If CBH Grain is saying that it is bringing in 15000 tonnes of X grade why are these factors relevant and how would ABA make any relevant assessment on these matters in any case.

6.6 –There is great potential for this clause to be used to disadvantage non Emerald customers in ABA storages and it is not clear that that it is appropriate to include the clause when this Agreement is intended to apply to the Port Terminal only. In so far as it applies to the Port Terminal, a person would expect that the port storage is expected to fill (and empty) many times in a season. Subclause (c) has no qualifier that the movement is economically appropriate and

when combined with clause 6.7 may represent a contractual tie forcing CBH Grain to use ABA transport resources.

6.8 –It is not clear how this is directly relevant to the operation of the port terminal when grain is only permitted to be delivered in response to a vessel nomination.

6.9 – Again it is not clear how this relates to the port terminal as opposed to the up-country storage. ABA could regrade grain held at the port terminal over 30 September and then use the regraded grain to justify changing the order of shipping or the subsequent movement out of the terminal. It is not clear how this is relevant to the operation of the port terminal. In any event, such a re-grade would have to be performed in a non-discriminatory fashion across all owners of the same grade of grain in the ABA's system.

6.11 – It is unclear from the drafting of this clause whether the ability to regrade malting barley arises where it has a germination quality of less than 95% or if at 1 September 2014 it can be regraded to feed barley regardless of the germination quality. In addition, it is also unclear what the purpose of this clause is when related to the operation of a port terminal.

7.3 – It is unclear how this clause relates to the proper operation of the Port Terminal. In so far as it does operate, CBH Grain considers that it is inappropriate to compensate on the basis of ABA's proposed market value calculation. CBH Grain would not agree to a season average price nor the discretion of ABA to use estimated pool returns which may include the Emerald Pool values. Prices should be calculated at the time of the shortfall as that is when additional grain is needed to be acquired. In addition, the provision of additional grain at a Port Terminal after the vessel has sailed is inappropriate and may result in additional charges to the Customer.

7.5 – CBH Grain will not indemnify ABA against any loss or cost that ABA sustains as a result of a claim made by a person in relation to a security interest. Such a clause is onerous and is not related to the operation of the port terminal facility.

7.7 – It is inappropriate for ABA to require in Store Transfers to take place at the individual weigh note level. The buyer and seller can determine the value of their grain transaction without this prescriptive requirement of ABA. It is unclear how this is relevant to the operation of the port terminal facility.

7.11 – it is unclear how this clause interacts with the operation of the Port Terminal, given that the Port Terminal is only accumulating grain for vessel loading.

7.12 – This requirement arguably does not relate to the port terminal and should not be included in standard terms. In addition, the requirement is inappropriate as it allows ABA to use any grain in their system without being required to properly compensate the customer for changes in location which can have significant impacts on transport costs and logistical efficiency. GTA location differentials are not freight rates and therefore it is possible for ABA to arbitrage in so far as there are differences in the location differentials and ABA's freight rates.

7.13 – ABA's obligations should not cease on outturn such that there is no obligation to deliver the right quality and quantity of grain to the Customer. This would appear to be an example of another inappropriate clause.

8.1 – CBH Grain questions why it would have to comply with an Outturn Protocol if it were to engage ABA to manage the transportation of grain. In addition, there are elements of the Outturn Protocol that conflict with the terms of the Agreement. As an example, the tolerance on bin burnt grains is different between the two documents and the compensation payable for quality variations is different between the two documents leading to confusion.

8.2 – When considered in relation with clause 8.1 – CBH Grain could be liable to compensate ABA for its losses where ABA has been late in turning up as it was the transport provider. In so far as this clause applies to receivals at the port terminal this clause purports to make the Customer responsible for delays on the road and in train scheduling outside of the customer's reasonable control.

8.3 – This clause would be inappropriate where ABA is the transport provider.

9.2 – This clause constitutes a vague requirement about the optimisation of Grain positioning which may allow ABA to discriminate against other terminal users. In addition, it also allows ABA to discriminate against other transport providers by giving preference to rail over road. It is not readily apparent why the ACCC should favour discrimination against road transport providers and smaller marketers that may not have access to rail resources.

9.2(a) – This discretion should be deleted as it is inappropriate to discriminate in this fashion. Effectively this clause is designed to guarantee that Emerald can book slots at will as the sole grain accumulator with a train dedicated to the Port Terminal whilst other exporters need to disclose rail transportation arrangements.

9.2(b) – It is unclear what this expectation requires of the Customer. It may not be appropriate to include an obligation which effectively forces CBH Grain to contract with other exporters or not be provided access. Such a requirement constitutes a vague third line forcing obligation.

9.2(c) – Such bare discretion may permit ABA to arbitrage against its Customer in relation to quality within a grade and in relation to transport differentials without true regard for the impact on the Customer. Such a discretion should not be included in the Agreement.

9.4 – Unfettered rights to moisture condition without any regard for the quality of grain delivered is unacceptable. In addition, any moisture conditioning must occur after weighing so that ABA is not shrinking the Client's Grain to an Outturn Entitlement and then substituting water weight, effectively creating an opportunity to double shrinkage.

10.3(c) – It is unclear why ABA should have the right to use a Customer's grain. As bailee the obligation should be to hold and store the grain not to use it.

11.6 – The right to invoice for unpaid charges in relation to grain is inappropriate where ABA under clause 7.8 makes the Customer liable for all charges up to the point of transfer of the grain. Such a requirement gives no transparency as to whether grain is being bought free of encumbrances. If ABA proposes to rely on clause 11.6 it should be forced to identify prior to the time of transfer that there are outstanding charges. Otherwise ABA can simply pass on bad debts to companies buying grain off others in the ABA system. In addition, ABA compelled stock swaps can pass along an obligation to pay for unpaid charges that may not be readily apparent.

12.3 – It is unclear whether this clause is intended to apply to the operation of the Port Terminal. To the extent that it is, ABA should be able to provide daily reports on acquisitions/deliveries as opposed to twice weekly or weekly reports which are not frequent enough.

13.2 – To the extent that this clause applies to upcountry storage sites this allows ABA to choose geographically attractive and quality specific parcels in order to utilise its lien. In the context of a Port Terminal that is a just in time cargo accumulation port this clause may allow ABA to prevent an exporter from shipping at the time of maximum leverage and commercial pressure.

14.1 – The opinion should be reasonably formed.

16.1 – CBH Grain considers that ABA's endeavour to completely avoid liability for breach of contract and negligence is unacceptable in so far as it excludes loss of grain entitlement and downgrading of grain. In this context the limitations of liability proposed are not adequate.

17 – This indemnity is inappropriately broad and un-necessary. CBH Grain should not be forced to indemnify ABA in relation to CBH Grain's breach of contract whilst ABA has no contractual liability at all.

19.1 – It is inappropriate for ABA to be able to terminate without cause 3 months into the future when CBH Grain may be booking capacity twelve to eighteen months in advance.

20.1(c) – The force majeure exemption should be structured to more closely represent the industry standard exemption whereby Force Majeure does not include breakdowns related to the Gross Negligence of ABA.

20.1(f) – An act or omission of a third party subcontractor to ABA should not be a Force Majeure event unless the Affected Party has acted in a timely and appropriate manner to obtain the supply and the Affected Party is not in breach of any relevant obligations under its supply agreement.

25.1 – It is unclear why a Customer should be assisting ABA to obtain necessary licences etc to perform its tasks. Clarity on why this is required would be appropriate.

27.1(b) – This is unreasonable restriction on CBH Grain's right to make comment. It would appear that ABA is attempting to stifle comments about the operation of its port terminal business.

Port Loading Protocols

3 – It is unclear whether the Storage and Handling Agreement referred to in this rule is the Indicative Access Agreement or a Storage and Handling Agreement for ABA's up-country sites. For clarity, this should be changed to Indicative Access Agreement.

4 – Again the reference should be changed to the Indicative Access Agreement. If it is left as a Storage and Handling Agreement then ABA could use the uncertainty to ensure that the Port is tied to ABA's storages which would prevent competition in up-country storage and handling services.

6 – There is no obligation in the Port Protocol or in the Undertaking to require ABA to publish the amount of capacity that is offered at the Port Terminal, nor provide clarity around the operation of the non-discrimination and no hindering clauses. A clear requirement to publish the amount of capacity being offered at the Port Terminal prior to capacity allocation occurring is adhered to by all other wheat export terminal operators (save for Louis Dreyfus at its Newcastle Export Facility).

12 – This third bullet point in this rule includes the requirement to execute a Storage and Handling Agreement which should be changed to Indicative Access Agreement. The fourth bullet point is unnecessarily vague and permits ABA too much discretion as to whether or not to accept an Intent to Ship advice, including potentially foreclosing an exporter who relies on road transport.

13 – By making this clause subject to clause 12, it would appear to effectively give ABA the discretion to accept a later shipping intention merely because on unspecified matters that ABA considers relevant. The qualification at the start of this clause should be deleted.

22 – The last paragraph contains an unacceptably broad discretion for ABA to discriminate and force the Customer to forfeit its Booking Fee or alternatively authorise the transportation of the Client's grain to port at a cost that has not been agreed and has no apparent limit. This paragraph should be deleted.

29 –This would appear to allow ABA to discriminate between up-country supply chains to the advantage of the Emerald Group. It is not clear why this should be permitted in this standard form agreement.

32 – This clause of the protocol allows ABA a very broad discretion to discriminate between Customers and to favour its related trading division on grounds which will never be clear to Customers.

34 – This clause of the protocols appears to allow ABA to effectively short ship a Customer by not fully accumulating a cargo. If ABA were to exercise this discretion, the Customer would potentially be in default of its contract and liable to associated damages, dead freight on the shipment, wasted shipping capacity and any lost capacity charges to ABA as a result of unused Capacity.

37 – Given the fact that ABA operates a just in time cargo accumulation plan and has limited storage, the order of cargo accumulation and then vessel loading should primarily be determined by the 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 the subsequent vessels.

48 – Forfeiture of the booking fee when a vessel is delayed by more than 5 days when such delay may not impact adversely on the port or may impact on the port more through the cancellation of the vessel (due to no capacity) would appear inappropriate. It should be kept in mind that ABA

allocates out a 2 week shipping window at its own discretion. Thus the variation from the original ETA may not relate to or impact on the operation of the port.

50 – The second last bullet provides that ABA can deliver its reasons and potentially notice of its decision ten business days following the meeting of the Client and ABA's General Manager. This would appear to be an unacceptably long period in a clause relating to finalising disputes in an expeditious manner.

Yours sincerely

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CBH Group