Emerald GRAIN

3 July 2013

Mr David Salisbury
Deputy General Manager
Fuel Transport and Prices Oversight
Australian Competition and Consumer Commission
GPO Box 520
Melbourne VIC 3001

transport@accc.gov.au

Dear Mr Salisbury

Re: ABA Proposed Port Access Undertaking 2013/14
Response to Submissions

ABA (now Emerald Logistics Pty Ltd trading as Emerald Grain) would like to take the opportunity to respond to the submissions made to ACCC regarding ABA's proposed Port Access Undertaking 2013/14.

Cargill Submission dated 21 May 2013
ABA acknowledges the need for swaps in certain circumstances to be time-based and looks forward to working with Cargill, initially to adopt these concepts in the ABA/Cargill Storage& Handling Agreement and, beyond that, to contribute to an industry standard approach.

CBH Submission dated 21 May 2013
We have addressed the issues raised by CBH in respect of both the proposed Undertaking and the proposed Loading Protocol in the Attachment to this letter.

We do not propose to address the issues raised by CBH in respect of the Indicative Access Agreement for the following reasons:

- For the most part the matters raised represent CBH's preference for the commercial terms of a storage & handling agreement. ABA would be pleased to engage in such negotiations with CBH but does not believe it to be appropriate to conduct such negotiations in this public forum.
- The proposed terms of the Indicative Access Agreement are not significantly different to the existing terms, upon which CBH had opportunity to comment in the past. That is to say that CBH's comments are not comments on changes to the IAA, but rather on well-established terms.

ABA acknowledges CBH's suggestions regarding clarifying the distinction between port access agreements and up-country access agreements and intends to work with ACCC to bring more precision to this aspect.

Yours sincerely

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CBH Comment	ABA Response
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?	This amendment provides ABA with the ability to provide tailored services to clients within the Agreement framework.
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.	This is the structure of pricing within the East coast Grain industry. All BHCs set their pricing prior to the upcoming harvest.
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.	For reasons of efficiency, the logistics personnel working on ABA matters are employed by Emerald Grain Pty Ltd, not ABA and there are a number of shared services within the Emerald Group. It is therefore necessary that there be a carve out to allow confidential information to be shared with related bodies corporate.
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.	ABA provides an update of the stocks at Port each month as at the end of the month. Providing it on a more timely basis, weekly, would not provide the industry with any greater transparency of port operations, just become an administration burden to the terminal, and not add to the efficiency. Moreover given ABA's small volumes such information would prejudice client confidentiality.
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	ABA is not proposing to change the current reporting requirement at Melbourne Port Terminal. CBH has not provided any explanation of benefits for such a change. ABA does not have the administration services available to the other PTOs and believes that the 2 month delay is appropriate to allow for the necessary analysis. ABA is obliged to comply with the Continuous Disclosure Rules set out in WEMA.

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.	Agreed this needs greater precision. An Indicative Access Agreement provides the standard terms. A Storage &Handling Agreement will be the outcome of negotiations with a client and as previously indicated it is ABA's intention that there will be a port S&H agreement and an up-country S&H 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.	Agreed this needs greater precision. See above.
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).	Under the Undertaking ABA is required to comply with the Continuous Disclosure Rules under WEMA (refer clause 10.1 Undertaking).
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.	See above re terminology. The fourth bullet point is unchanged from the previous Loading Protocol and has not resulted in any disputes.
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.	The qualification is clearly necessary to allow for the possibility that an early received Intent to Ship will be rejected.
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.	It is important to ABA's 'just-in-time' operating model that clients that nominate vessels can perform their obligations to move grain to the terminal. There is a significant economic cost to the system of non-performance and ABA must reserve the right to top up grain movements where the client has fallen down on its commitments. ABA would of course consult with clients in this process to achieve the most cost effective outcome for both parties. Ultimately if a client cannot perform and does not want assistance with freight it has the option to cancel its nomination.
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.	In ABA's case it is clear that rail is a much more efficient mode for achieving maximum throughput. Road will not be excluded it is a legitimate economic concern of ABA that rail must play an important part in the marshalling of stocks.
4 32- This clause of the protocol allows ABA a very broad discretion to discriminate between	ABA is prevented from discriminating in favour of its own trading division by the terms of the Undertaking. This clause is substantially unchanged from the

Customers and to favour its related trading division on grounds which will never be clear to Customers.	existing Loading Protocols and is consistent with industry practice that the PTO must have a reasonable amount of discretion regarding stock accumulation in order to achieve the best efficiency outcomes.
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.	This clause is unchanged from the exiting Loading Protocol. ABA cannot recall the clause having been invoked and would only be invoked in exceptional circumstances. However it is a necessary clause to provide ABA with the ability to mitigate loss.
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.	Again this clause is substantially unchanged from the existing Loading Protocol. The clause adequately lists the factors which will influence loading priority.
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.	Again this clause is unchanged from the existing Loading Protocol. The clause does not deal with the booking fee but rather costs associated with non-performance by the exporter.
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.	Again this clause is substantially unchanged from the existing Loading Protocol. ABA believes that the time allowance is appropriate for an appeal process and the scale of ABA's operations, particularly given the need to set out the reasons in writing.

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