Australian
Competition &
Consumer
Commission

Emerald Logistics Services Pty Ltd

Port Terminal Services Access Undertaking

Draft Decision

14 AUGUST 2013

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

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www.accc.gov.au

Contents

List of abbreviations and terms

2011 Undertaking	The Part IIIA port terminal service undertaking submitted by Australian Bulk Alliance Pty Ltd on 21 September 2011, accepted by the ACCC on 28 September 2011 and expiring on 30 September 2013.
2009 and 2011 Undertakings	Access undertakings accepted by the ACCC from Co-operative Bulk Handling Limited, GrainCorp Operations Limited and Viterra Operations Limited in 2009 and 2011. Undertakings accepted in 2011 are currently in operation and are due to expire on 30 September 2014.
ABA	Australian Bulk Alliance Pty Ltd
ACCC	Australian Competition and Consumer Commission
CBH	Co-operative Bulk Handling Limited
CCA	*Competition and Consumer Act 2010* (Cth)
Client	As defined in Emerald's proposed Indicative Access Agreement
draft revision	Draft revised version of the Proposed Undertaking provided by Emerald on 31 July 2013
Emerald	Emerald Logistics Services Pty Ltd
FCFS	'First come, first served' system of capacity allocation
GrainCorp	GrainCorp Operations Limited
IAA	Emerald's Indicative Access Agreement (Schedule 1 to the Proposed Undertaking) sets out the standard terms of access to port terminal services at Melbourne Port Terminal.
MPT	Melbourne Port Terminal
Reference Prices	The standard prices charged by Emerald for port terminal services provided between 1 October 2013 and September 2014, as published by Emerald no later than 30 September 2013 and as may be varied from time to time in accordance with the Proposed Undertaking.
Proposed Undertaking	The Proposed Part IIIA port terminal service access undertaking provided to the ACCC by Emerald on 26 March 2013.
SHA	Emerald's Storage and Handling Agreement is the product of a negotiated agreement between a client and Emerald for access to port terminal services, which has different terms and conditions to the IAA.
WEMA	*Wheat Export Marketing Act 2008* (Cth) (as amended by the *Wheat Export Marketing Amendment Bill 2012*)

1 Summary

Emerald Logistics Services Pty Ltd (**Emerald**) is proposing a new 2013 Port Terminal Services Access Undertaking (**Proposed Undertaking**), which governs how competing exporters can access its port terminal services at Melbourne Port Terminal (**MPT**).

The undertaking rolls forward many of the provisions of Emerald's 2011 Undertaking but also includes a number of changes. Key changes relate to the introduction of stock swap arrangements between clients of Emerald and the requirement for customers to demonstrate access to rail and commit to a significant proportion of accumulation by rail.

The Australian Competition and Consumer Commission's (**ACCC**) preliminary view is that it should not accept the Proposed Undertaking in its current form. The reasons for this view are set out in this Draft Decision.

In response to concerns raised by interested parties and the ACCC, on 31 July 2013, Emerald provided a draft revised version of its Proposed Undertaking (**draft revision**). The ACCC's preliminary view is that it considers that an undertaking that is consistent with the draft revision would be appropriate, having regard to the factors set out in ss. 44ZZA(3) of the CCA.

The ACCC is seeking industry views on the draft revision in order to inform its final decision on whether it should accept an undertaking that is consistent with the draft revision. Subject to the views of interested parties, Emerald proposes to formally resubmit an undertaking that is consistent with the draft revision and the ACCC proposes to accept such an undertaking without further consultation.

This Draft Decision details the ACCC's preliminary view of the proposed access undertaking lodged by Emerald (formerly Australian Bulk Alliance Pty Ltd (**ABA**)) on 26 March 2013 (**Proposed Undertaking**) for consideration under Division 6 of Part IIIA of the *Competition and Consumer Act 2010* (Cth) (the **CCA**).

The Proposed Undertaking was originally lodged under Emerald's previous name, ABA. On 2 May 2013 ABA changed its name to Emerald and commenced trading as Emerald Grain from July 2013. Before the ACCC is to accept any undertaking from Emerald, Emerald will submit a Revised Undertaking that replaces all references to ABA with references to Emerald. To avoid confusion, all references to Emerald in this Draft Decision include references to ABA (i.e. ABA's 2011 Undertaking will be referred to as Emerald's 2011 Undertaking).

The Proposed Undertaking relates to the provision of access to services for the export of bulk wheat at MPT, which is operated by Emerald.

Emerald has submitted the Proposed Undertaking to meet the access test provisions of the *Wheat Export Marketing Act 2008* (Cth) (**WEMA**), which must be met for it or an associated entity to export bulk wheat. The ACCC previously accepted an undertaking from Emerald in 2011. That undertaking expires on 30 September 2013.

In considering whether to accept an undertaking under Part IIIA, the ACCC has regard to the matters set out in section 44ZZA(3) of the CCA.

In addition to Emerald, three other port terminal operators – Co-operative Bulk Handling Limited (**CBH**) which has operations in Western Australia, GrainCorp Operations Limited (**GrainCorp**) which has operations on the east coast of Australia and Viterra Operations Limited (**Viterra**) which has operations in South Australia – each have in place an access undertaking accepted by the ACCC in 2011. The undertakings put forward by CBH, GrainCorp and Viterra all expire in September 2014. As such, Emerald's proposed undertaking is the only new undertaking being considered by the ACCC at this time.

The ACCC considers each undertaking on its own merits and the undertakings accepted by the ACCC from each port terminal operator will reflect the particular circumstances of that operator. That said, there are certain aspects of the undertakings for which the ACCC is seeking a consistent approach across the bulk wheat export industry.

In this Draft Decision, the ACCC has set out issues which are unique to Emerald's Proposed Undertaking as well as issues for which a consistent approach across the industry is considered appropriate. The ACCC considers that the 2011 Undertakings are a relevant matter in the assessment of Emerald's Proposed Undertaking, in accordance with section 44ZZA(3)(e). This is discussed further in Appendix 2: Legislative Framework.

The ACCC's draft decision is that Emerald's Proposed Undertaking, as presently drafted, is not appropriate, having regard to the matters in ss. 44ZZA(3) of the Act. The ACCC has identified a number of issues in this Draft Decision which it considers will require amendment by Emerald before the ACCC would be able to accept the Proposed Undertaking.

The ACCC notes however that Emerald has provided the ACCC with proposed amendments in a draft revised Undertaking (**draft revision**) that are intended to address certain of the ACCC's or industry's concerns. Where relevant, these proposed amendments are discussed in this Draft Decision along with the ACCC's views. The draft revision, containing the proposed amendments, is published on the ACCC's website.

The ACCC's preliminary view is that it considers that an undertaking that is consistent with the draft revision would be appropriate, having regard to ss. 44ZZA(3) of the CCA.

For the provisions in the draft revision to be formally considered by the ACCC, Emerald will need to withdraw its Proposed Undertaking of 26 March 2013 and resubmit an amended undertaking with the ACCC.

The ACCC welcomes submissions on any of the preliminary views set out in this Draft Decision, Emerald's proposed amendments in the draft revision and any other clauses of Emerald's Proposed Undertaking relevant to the ACCC's assessment.

The ACCC seeks comments from interested parties on its Draft Decision by 5.00pm (Australian Eastern Standard Time) on **Wednesday 28 August 2013**, after which the ACCC will reach a final decision.

Issues for comment

Certainty and clarity of the IAA

- *Do Emerald's amendments in the draft revised IAA make it clear that the IAA is a standard terms document applicable to bulk wheat Port Terminal Services only? Do these amendments improve the clarity and certainty of the IAA so as to make it appropriate having regard to the interests of the port operator and of access seekers? Do the amendments make it clear that there will be separate agreements for port and non-port services?*

Stock swaps

- *Does the proposed amended clause 9.2(a) contained in Emerald's draft revised IAA make it clear that stock swap arrangements will only be entered into with the consent of both parties and on terms agreeable to both parties? Is the clause appropriate having regard to the interests of the port operator and of access seekers?*

Rail accumulation

- *Does the inclusion of the qualification 'target' minimum 50% provide greater clarity as to what represents 'a significant' proportion of cargo by rail? Is clause 29 of the Loading Protocol in Emerald's draft revision appropriate having regard to the interests of the port operator and of access seekers?*

1.1 The Proposed Undertaking

Emerald's Proposed Undertaking, along with the attached Indicative Access Agreement (**IAA**) and Port Loading Protocols, is based on the general approach of Emerald's 2011 Undertaking, with some differences. In particular, the ACCC notes the following changes in the IAA and the Port Loading Protocols attached to the Proposed Undertaking:

- a new requirement in the IAA and Protocols for customers to demonstrate access to rail and commit to a certain level of accumulation by rail
- a new requirement in the IAA and Protocols for customers to consent to stock swapping arrangements
- a new requirement in the Protocols to nominate half month shipping windows
- a new requirement in the IAA for customers to make provision for the outturn of grain in lieu of executing a new access agreement prior to 30 September 2014.

The ACCC released an Issues Paper on Emerald's Proposed Undertaking on 30 April 2013. The ACCC invited public submissions by 21 May 2013 and received two submissions.

1.2 Draft Decision

The ACCC has formed a preliminary view regarding the overall approach and specific provisions of the Proposed Undertaking. This preliminary view has been formed having regard to the matters specified in subsection 44ZZA(3) of the CCA (which are detailed in the Legislative Framework set out in Appendix A to this Draft Decision), taking into account the wider context within which Emerald has submitted the Proposed Undertaking.

The ACCC must have regard to the matters in subsection 44ZZA(3) of the CCA when deciding the appropriateness of an undertaking. These matters include the objects of Part IIIA of the Act which are, in summary, to promote the economically efficient operation of, use of and investment in the infrastructure by which services are provided and encourage a consistent approach to access regulation in each industry.

The ACCC has identified a number of issues with the provisions of the Proposed Undertaking. These issues are assessed in the Draft Decision, along with the ACCC's suggestions for changes. The majority of changes have been suggested in order to make Emerald's Proposed Undertaking (and attached documents) appropriately clear and certain in terms of operation and effect, and to ensure that the Proposed Undertaking places appropriate restrictions on Emerald as port operator.. Emerald has provided a draft revised version of the Undertaking (and attached documents) that seeks to address the concerns of the ACCC and industry.

Adopting the same approach that was taken in the ACCC's assessment of Emerald's 2011 Undertaking, in certain instances the ACCC has taken the view that it is appropriate that arrangements for Emerald are different to those that may be required for other port terminal operators, due to Emerald's particular circumstances. In this regard the ACCC considers that Emerald has a lesser degree of market power than other port terminal operators, due to the competition faced by Emerald in the provision of Port Terminal Services in Victoria, particularly between Emerald's MPT and GrainCorp's Geelong port terminal.

The ACCC considers that for smaller port operators facing competition from large competitors nearby it is generally not necessary to require significant changes to access arrangements that are already working well. In such circumstances the ACCC's key concern is to ensure that

arrangements provide for sufficient transparency and other basic elements for an effective undertaking.

The ACCC's preliminary views on key issues are summarised below.

1.2.1 Term and expiry

The ACCC's preliminary view is that the one year term of Emerald's Proposed Undertaking is appropriate. Emerald's Proposed Undertaking states that the undertaking will expire on the earlier of 30 September 2014 or the day the ACCC consents to Emerald withdrawing its undertaking.

Generally, the ACCC would consider a one year term for an undertaking to be too short. However, in the present case it notes that the arrangements under the Proposed Undertaking are largely consistent with those currently operating under Emerald's 2011 Undertaking and that the expiry date aligns with the Undertakings of the other port terminal operators in anticipation of the repeal of the WEMA and the commencement of a mandatory code of conduct on 1 October 2014. Emerald's proposed ability to withdraw its undertaking is consistent with the 2011 Undertakings.

1.2.2 Non-discriminatory access and the publish-negotiate-arbitrate Framework

The ACCC considers Emerald's proposed approach to non-discriminatory access and the publish-negotiate-arbitrate framework are substantively the same as those contained in Emerald's 2011 Undertaking. The ACCC has not been notified of any issues associated with the operation of these provisions. The ACCC considers these provisions to be appropriate and in the interests of access seekers and the legitimate business interests of Emerald.

1.2.3 The Indicative Access Agreement

The IAA (Schedule 1 to the Proposed Undertaking) sets out the standard terms of access to Port Terminal Services. Consistent with its previous approach, Emerald has used its Storage and Handling Agreement (**SHA**), which relates to both port terminal and up-country services, as its IAA. Emerald has submitted its intention to develop a separate SHA for up-country services.[1]

Emerald's proposed IAA rolls forward the majority of the clauses from its 2011 IAA but also incorporates a number of changes. The ACCC takes the preliminary view that certain provisions of the proposed IAA require amendments for clarity, having regard to the interests of access seekers and Emerald, and other criteria under Part IIIA. The ACCC's concerns with the IAA primarily relate to the distinction between port and non-port terms.

The ACCC informed Emerald of its concerns regarding the proposed IAA. Emerald has provided a draft revised IAA that seeks to address these issues about the distinction between port and non-port terms. The draft revised document is available on the ACCC's website. The ACCC is seeking comments on the revised IAA, but at this point has a preliminary view that Emerald's revised IAA addresses these issues of concern regarding the certainty and clarity of the IAA and its application to port and non-port services.

The ACCC has identified certain other terms of the IAA that it considers also require amendment to appropriately represent minimum terms. However, the ACCC generally does not take a view on the appropriateness of the remaining provisions of the IAA, but considers that the IAA's terms are negotiable between Emerald and an access seeker. Where an access seeker believes that negotiation of an agreement does not occur in accordance with clause 7 of the Proposed Undertaking, the access seeker may use the dispute resolution provisions in

[1] Australian Bulk Alliance, *Public Submission to the Australian Competition & Consumer Submission*, 26 March 2013, p. 4.

clause 8 of the Proposed Undertaking. The proposed dispute resolution regime provides for arbitration of disputes by the ACCC or a private arbitrator.

1.2.4 Performance Indicators

The ACCC considers Emerald's proposed approach to publication of performance indicators is substantively the same as that contained in Emerald's 2011 Undertaking. The ACCC has not been notified of any issues associated with the publication of Emerald's performance indicator information. The ACCC considers these provisions to be appropriate and in the interests of access seekers and the legitimate business interests of Emerald.

1.2.5 Capacity management and the Loading Protocol

The ACCC's preliminary view is that, having regard to ss. 44ZZA(3) of the CCA, a 'first come first served' (**FCFS**) approach to capacity allocation remains appropriate at MPT. This view may differ for other port operators and depends on Emerald's specific circumstances, including:

- strong domestic demand on the east coast which alleviates demand for export capacity at the port terminals
- competition in the provision of Port Terminal Services in Victoria, particularly between Emerald's MPT and GrainCorp's Geelong port terminal.

As a general approach, the FCFS system can provide a framework for capacity allocation that does not facilitate discrimination by Emerald in favour of its up-country supply chain or the trading interests of related entities.

Emerald's implementation of the approach is contained in its Loading Protocol. As set out in past decisions, the ACCC has previously stated that it considers two key market characteristics relevant to the view formed on the appropriateness of particular capacity management arrangements in specific market circumstances:

- the relationship between total port elevation capacity and average annual and seasonal demand
- the extent to which the incentive and ability exists for vertically integrated port operators to pursue self-preferential treatment – including blocking other exporters from accessing port services.[2]

The ACCC has identified aspects of the Loading Protocol, as set out below, where amendments should be made, having regard to the factors set out in ss. 44ZZA(3)(c).

The ACCC considers that clauses 3 and 4 of Emerald's proposed Loading Protocol should more clearly define whether reference is being made to Emerald's IAA or a SHA. Emerald has provided a revised clause 4 that seeks to address this point.

As discussed in Chapter 5, the ACCC also has concerns about:

- the new requirements in relation to cargo accumulation plans and Emerald's discretion where such plans are not provided
- uncertainty about the requirements in relation to cargo accumulation by rail
- the requirements in relation to stock swaps
- procedures in relation to vessel substitution and delay.

[2] ACCC, *GrainCorp Operations Limited Port Terminal Services Access Undertaking, Decision to Accept*, 22 June 2011, p. 23.

1.2.6 Conclusion

The ACCC's Draft Decision is that it should not accept the Proposed Undertaking given to the ACCC on 26 March 2013 in its current form. The ACCC has provided its preliminary views throughout the Draft Decision on provisions that would not be appropriate, and also set out Emerald's proposed amendments in response to certain of the ACCC's concerns.

The ACCC considers that the Proposed Undertaking is likely to be appropriate if amended to reflect Emerald's amendments in its draft revision.

1.3 Stakeholder views

The ACCC welcomes comments on the preliminary views in this Draft Decision regarding the Proposed Undertaking lodged by Emerald on 26 March 2013, and Emerald's proposed amendments in its draft revision. The ACCC also welcomes comments on any other aspect of the Proposed Undertaking.

Submissions must be forwarded by 5:00pm (Australian Eastern Standard Time) on **Wednesday 28 August 2013** to:

Mr David Salisbury
Deputy General Manager
Transport and General Prices Oversight
ACCC
GPO Box 520
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2 Procedural Overview

2.1 Emerald's Proposed Undertaking

Under Division 6 of Part IIIA of the *Competition and Consumer Act 2010* (**the CCA**), the Australian Competition and Consumer Commission (**ACCC**) may accept an undertaking from a person who is, or expects to be, the provider of a service, in connection with the provision of access to that service.

The ACCC received an access undertaking (**Proposed Undertaking**) from Emerald on 26 March 2013 for consideration under Division 6 of Part IIIA of the Act. The Proposed Undertaking relates to the provision of access to services for the export of bulk wheat at the MPT operated by Emerald in Victoria.

Emerald has submitted the Proposed Undertaking in accordance with legislative requirements under the *Wheat Export Marketing Act 2008* (**WEMA**), further details of which are set out below in the Legislative Framework: Appendix 2.

2.2 Submissions from Emerald

Emerald has provided the following information in respect of the Proposed Undertaking:

- initial supporting submission provided on 26 March 2013
- submission in response to third party submissions on 3 July 2013.

2.3 Draft revision

The ACCC has conveyed the preliminary views set out in this Draft Decision to Emerald. In response to these preliminary views, and the concerns of stakeholders, Emerald has responded by providing a draft revision of the Proposed Undertaking. The draft revision addresses a number of the aspects of the Proposed Undertaking which the ACCC considers are not appropriate in their current form. Where relevant, the ACCC discusses the changes in the draft revision in this Draft Decision.

The mark up of the draft revision, showing Emerald's proposed revisions to the Proposed Undertaking, is available on the ACCC's website.

The draft revision is not a formal Proposed Undertaking at this time. Emerald will need to withdraw its 26 March Proposed Undertaking and formally resubmit a revised Proposed Undertaking to allow the ACCC to make a final decision.

2.4 Public consultation process to date

The Act provides that the ACCC may invite public submissions on an access undertaking application.[3]

The ACCC published an Issues Paper on 30 April 2013 inviting submissions on the Proposed Undertaking. The ACCC also sent the paper directly to a mailing list of relevant parties, including wheat exporters, grain growers, farming organisations and state regulatory bodies.

[3] *Competition and Consumer Act 2010* (Cth) s. 44ZZBD(1).

2.4.1 Submissions received

The ACCC received public submissions from the following parties in relation to the Proposed Undertaking:

- Cargill Australia Limited (**Cargill**)
- Co-operative Bulk Handling Limited (**CBH**)
- Emerald (in response to submissions).

These submissions are published on the ACCC's website.[4] The ACCC has not received any confidential submissions regarding Emerald's Proposed Undertaking.

2.5 Indicative timeline

Under the Act, the ACCC must make a decision on an access undertaking application within 180 days of the day it received the application. Stop-the-clock provisions apply for the calculation of the 180 days including when:

- a notice is given under ss. 44ZZBCA(1) requesting information in relation to the application
- a notice is published under ss. 44ZZBD(1) inviting public submissions in relation to the application
- an agreement in writing between the ACCC and the provider of the service is made in relation to the application.

The clock has previously stopped once and the statutory time limit for the ACCC decision extended by 21 days for consultation on the ACCC Issues Paper.

Consultation on this Draft Decision stops the clock again for 14 days.

The statutory time limit for the ACCC decision currently expires on 13 October 2013. After considering submissions received on this Draft Decision, the ACCC proposes to issue a final decision on Emerald's undertaking. Unless substantial changes are required to the Undertaking, or if significant submissions are received in relation to the Draft Decision, the ACCC does not propose to consult further prior to the final decision.

The ACCC expects that, after considering submissions on this Draft Decision, the ACCC will release a final decision in late September 2013. The ACCC expects that Emerald will formally withdraw its 26 March Proposed Undertaking and resubmit a revised version for consideration by the ACCC in that final decision.

2.6 Consultation on the Draft Decision

The ACCC invites submissions from interested parties on its Draft Decision regarding Emerald's Proposed Undertaking. Submissions must be forwarded by 5:00pm (Australian Eastern Standard Time) on **Wednesday 28 August 2013** to:

[4] Available at http://transition.accc.gov.au/content/index.phtml?itemId=964331.

Mr David Salisbury
Deputy General Manager
Fuel, Transport and Prices Oversight
ACCC
GPO Box 520
MELBOURNE VIC 3001
Email: **transport@accc.gov.au**

Submissions are to be sent preferably by email, in Microsoft Word or other text readable document form.

2.6.1 Confidentiality of submissions

The ACCC acknowledges the need for a balance between permitting the provision to a regulator of relevant information on a confidential basis, where that information is commercially sensitive or otherwise confidential, and the need to allow parties whose legitimate interests are likely to be affected by an administrative decision the opportunity to respond to relevant material. In this regard, the ACCC notes that a party may request that the ACCC not make the whole or part of a submission available for confidentiality reasons.[5]

In the current context, the ACCC considers that this balance is adequately found by giving weight to comments made in public submissions, and considering comments made in confidential submissions only where such comments are relevant, determinative of a particular issue and contribute considerations not already dealt with in a public submission.

The ACCC strongly encourages parties who intend to provide submissions on the ACCC's Draft Decision to make public submissions. Unless a submission is marked confidential, it will be made available to any person or organisation on request. The sections of submissions that are confidential should be clearly identified with reasons as to why they are confidential.

2.7 Further information

The Proposed Undertaking and other relevant materials, including supporting submissions from Emerald and submissions by interested parties, are available on the ACCC's website.[6]

If you have any queries in relation to the ACCC's process, or to any matters raised in this Draft Decision, please contact:

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[5] *Competition and Consumer Act 2010* (Cth) s. 44ZZBD.
[6] Available at http://transition.accc.gov.au/content/index.phtml?itemId=964331.

3 Term

3.1 Emerald's Proposed Undertaking

The Proposed Undertaking is intended to commence on 1 October 2013, following the expiration of Emerald's 2011 Undertaking on 30 September 2013.

The Proposed Undertaking is intended to expire on the earlier on 30 September 2014 or the day the ACCC consents to Emerald withdrawing the Undertaking in accordance with Part IIIA of the CCA.

3.2 Emerald and third-party submissions

Emerald submits that the one year term is appropriate given the anticipated commencement of a mandatory wheat port code of conduct on 1 October 2014. No submissions were received from interested parties regarding the appropriateness of the Proposed Undertaking's one year term.

3.3 ACCC view

The ACCC has said previously that it considers that a one year term for an undertaking is not generally appropriate because it does not provide sufficient certainty for access seekers. However, the ACCC considers that the one year term in this case needs to be considered in context. The ACCC accepted Part IIIA access undertakings from port terminal operators CBH, GrainCorp and Viterra in 2011. All three undertakings are due to expire on 30 September 2014. Emerald's Proposed Undertaking will align in expiry with those three other port terminal services access undertakings and the anticipated repeal of the WEMA.[7] The ACCC also notes that the arrangements in Emerald's 2013 Proposed Undertaking do not, in most respects, differ significantly from the Emerald 2011 Undertaking.

Having regard to the anticipated commencement of the mandatory code of conduct on 1 October 2014, the ACCC considers the one year term of Emerald's Proposed Undertaking to be appropriate.

[7] The repeal of the WEMA (and the associated 'access test' requirement) is contingent upon the Minister declaring a mandatory code of conduct under section 51AE of the CCA. The WEMA as amended by the Wheat Export Marketing Bill 2012 can be found at: http://www.comlaw.gov.au/Details/C2012A00170.

4 The Publish-Negotiate-Arbitrate Framework

This chapter considers the fundamental framework in place in Emerald's Proposed Undertaking for parties to negotiate and obtain access to its port terminal services at MPT.

4.1 Emerald's Proposed Undertaking

Emerald's Proposed Undertaking maintains the publish-negotiate-arbitrate approach of Emerald's 2011 Undertaking. In summary, this approach provides that:

- Emerald will publish the standard price and non-price terms on which it will provide access. Clause 6 outlines the standard price and non-price terms and requires Emerald to provided non-discriminatory access. Schedule 1 of the Proposed Undertaking contains the Indicative Access Agreement (**IAA**) (the Standard Terms). Clause 6.2 requires Emerald to publish Reference Prices by no later than 30 September each year.

- Emerald and an access seeker may negotiate price and non-price terms other than the Standard Terms contained in the IAA. Clause 7 outlines the process for negotiation.

- Where there is a dispute between Emerald and an access seeker relating to the negotiation of a new access agreement or access to additional Port Terminal Services in addition to Port Terminal Services already the subject of an access agreement, or a dispute is raised by an access seeker regarding a decision by Emerald to unilaterally vary the Reference Prices, the dispute will be resolved through the Dispute Resolution process outlined in clause 8 of the Proposed Undertaking.

- The Dispute Resolution process includes a negotiation period between parties, provision for both formal and informal mediation, and referral to arbitration by the ACCC or an independent arbitrator.

- Emerald will publish information on the stock at port, vessel booking applications, and performance indicators to assist access seekers in their negotiations and increase the transparency of Emerald's operations, as outlined in clauses 11 and 12.

4.1.1 Publication of price and non-price terms and non-discriminatory access

4.1.1.1 Price and non-price terms

Emerald's Proposed Undertaking rolls over the majority of provisions of the 2011 Undertaking relating to price and non-price terms. Emerald has removed reference to Reference Prices being required to be included in the IAA (although they may be attached to agreements on a case by case basis).

Clause 6.1 of the Proposed Undertaking provides that Emerald will offer to supply Port Terminal Services to an Applicant at the published Reference Prices and in accordance with the Standard Terms. The clause also provides that an Applicant may negotiate for prices other than the Reference Prices and non-standard terms.

Port Terminal Services are defined in clause 5.2 of the Proposed Undertaking.

The Reference Prices are to be published each year in accordance with clause 6.2 of the Proposed Undertaking, which requires the prices to be published by no later than 30 September each year, and will apply until at least 31 October of the following year unless varied in accordance with clause 6.5. Where Emerald varies the Reference Prices it must provide copies of variation to the ACCC within three Business Days of publication.

The Standard Terms are set out in the IAA in Schedule 1 to the Undertaking. Unless Emerald receives approval from the ACCC to vary the Standard Terms in accordance with clause 6.5(b), the Standard Terms will apply for the term of the Proposed Undertaking. Clause 6.3(c) specifies that the Standard Terms must include the Loading Protocol as varied from time to time.

4.1.1.2 Non-discriminatory access

Emerald's approach to non-discriminatory access is the same in the Proposed Undertaking as it is in the 2011 Undertaking.

Clause 6.4 provides that Emerald must not discriminate between different applicants or users in favour of its own trading business, except to the extent that the cost of providing access to other applicants or users is higher. Trading business is defined in the Proposed Undertaking as 'a business unit or division of the Port Operator or its Related Bodies Corporate which has responsibility for the trading and marketing of Bulk Wheat.' Related body corporate has the meaning given in the *Corporations Act 2001*. The ACCC may require Emerald to appoint an independent auditor to report on Emerald's compliance with the non-discrimination requirement up to twice in every 12 month period in accordance with the provisions in Schedule 3.

4.1.2 Negotiating for access

The Negotiating for access provisions of the Proposed Undertaking are substantively the same as those contained in Emerald's 2011 Undertaking.

Clause 7 sets out how applicants and Emerald are to negotiate access to the Port Terminal Services. The framework includes:

- Preliminary inquiry – exchanges of information and meetings to enable an Access Application to be lodged.
- Access Application – a formal request for access by the Applicant, which must include the information specified in Schedule 2 of the Proposed Undertaking.
- Standard Access Agreements – the procedure through which the Applicant seeks access in accordance with the Standard Terms and published Reference Prices.
- Negotiation and Acceptance – negotiation, acceptance and execution of an Access Agreement.

Clause 7.7 provides that if an applicant lodges an access application and requests access to the Port Terminal Services prior to executing an access agreement, Emerald may offer to provide the Applicant with access on the Reference Prices and standard terms, prior to finalising an access agreement. This arrangement involves executing an 'Interim Agreement' to apply until it is replaced by a negotiated access agreement.

Emerald's obligation to negotiate with an applicant is subject to the applicant satisfying eligibility requirements outlined in clause 7.4. The requirements include that the applicant must:

- be solvent

- not be in material default of any agreement, or have been in the previous two years (this requirement also applies to related bodies corporate)

- either have a legal ownership structure with a sufficient capital base and assets of value to meet the actual or potential liabilities under an access agreement or provide credit support

- be entitled to export Bulk Wheat under the laws of Australia.

Clause 4.5 sets out how Emerald and its Clients may seek the variation of an Access Agreement.

Clause 4.5(b) provides that a User's request for an access agreement variation will be dealt with as a new application for access to the Port Terminal Services, to which the process in the Proposed Undertaking will apply.

Clause 4.5(c) provides that Emerald's request for an access agreement variation will be dealt with as a request for negotiation of an access agreement under clause 7.

4.1.3 The Indicative Access Agreement

In summary, Emerald's Proposed IAA includes provisions relating to the following matters concerning the supply of port terminal services by Emerald to access seekers:

- definition of terms and interpretation[8]

- term and application of the agreement, including provisions in relation to commencement, termination, and continued application of the agreement[9]

- reference to the purchase options available[10]

- receival standards and testing conducted on incoming grain[11]

- terms of outturn, including entitlements, provisions for in-store transfer, and Client warranties of ownership[12]

- transport and freight (rail or road) outturn conditions[13]

- a requirement that the client comply with Emerald's published Port Terminal Operating Protocols (**Loading Protocol**) and acknowledgements that Emerald may require clients to accumulate via rail and enter into commercially reasonable stock swaps[14]

- grain storage[15]

[8] Emerald, '2011 Indicative Access Agreement', clause 1.
[9] ibid., clause 2.
[10] ibid., clause 3.
[11] ibid., clauses 4-5.
[12] ibid., clause 7.
[13] ibid., clause 8.
[14] Ibid., clause 9.
[15] ibid., clause 10.

- charges and invoices, including provisions in relation to invoices, payment facilities, liability for Port Authority and AQIS charges, goods and services tax, reimbursements, and interest on overdue accounts[16]

- books and records to be kept by Emerald relating to transactions in stored grain[17]

- lien on Client Grain held by Emerald[18]

- security requirements[19]

- risk and insurance provisions[20]

- exclusions of Emerald liability, and indemnity of Emerald liability against certain losses, costs, damages, expenses, charges and surcharges in relation to the provision of services to the Client[21]

- variations to and termination of the agreement[22]

- provisions for force majeure events, including definition, suspension of obligations, minimisation of impact, obligation to mitigate, payments, and exclusion of labour disputes[23]

- dispute resolution process for disputes arising under the executed agreement, including provisions in relation to independent arbitration and continuation of the pre-dispute status quo[24]

- miscellaneous other matters, including provisions in relation to notices, assignment, costs, compliance with laws, governing law, endorsement severability, waivers, and no partnership clause[25]

Emerald's proposed IAA seeks to roll over the majority of the provisions contained in Emerald's 2011 Undertaking. Changes to Emerald's 2011 Undertaking were described and discussed in the ACCC Issues Paper on Emerald's Proposed Undertaking. These changes are outlined below. Provisions of the IAA that are not described in this section are considered by the ACCC as a preliminary view to be substantively unchanged. However the ACCC has considered all of the relevant clauses, including those that are unchanged, as part of its assessment of the IAA later in this draft decision.

4.1.3.1 Stock swaps

Emerald's proposed IAA seeks to introduce an expectation that clients of Emerald will enter into stock swaps with other clients of Emerald in certain circumstances.

[16] ibid., clause 11.
[17] ibid., clause 12.
[18] ibid., clause 13.
[19] ibid., clause 14.
[20] ibid., clause 15.
[21] ibid., clauses 16-17.
[22] ibid., clauses 18-19.
[23] ibid., clause 20.
[24] ibid., clause 21.
[25] ibid., clauses 22-30.

A new clause 9.2(b) introduces a client acknowledgement that 'where necessary to facilitate efficient loading of the Client's ships and the ships of others, the Client will be expected to enter into commercially reasonable stock swaps'.

Emerald's draft revision to the proposed IAA amends clause 9.2(b) to 'where necessary to facilitate efficient loading of the Client's ships and the ships of others, the Client will be expected to explore in good faith stock swap opportunities with other clients of Emerald on terms agreeable to the Client'.

Further, a new clause 9.2(c) introduces a client acknowledgment that by entering an access agreement it gives its consent to Emerald to swap a grade of the client's grain with the same grade of grain between Emerald facilities.[26]

Emerald's draft revision removes the new clause 9.2(c).

4.1.3.2 Rail accumulation

Emerald's proposed IAA introduces a new requirement for access seekers to demonstrate an ability to accumulate by rail and commit to a certain level of accumulation by rail.

A new clause 9.2(a) in the proposed IAA states that a client 'may not be able to book a shipping slot if it is not able to demonstrate access to rail resources for the movement of grain to port.'

4.1.3.3 Outturn of client grain

A new clause 2.4 in Emerald's proposed IAA states that the client's Access Agreement will terminate on 30 September 2014, and, 'in the absence of having agreed and signed a new 2014/15 access agreement, the Client must ensure that arrangements are made to outturn all the Client's Grain prior to this date.'

Clause 2.4 in Emerald's Proposed Undertaking is moved to a new clause 2.5 in the draft revision.

The proposed amendment to clause 6.9(b) states that if a client's grain is not outturned on or prior to 30 September 2014, Emerald may decide that the provisions of Emerald's current IAA for the coming season will apply to the storage and handling of client grain, whether the client has signed it or not.[27]

4.1.3.4 Other changes

Changes to defined terms

Emerald's proposed IAA contains a number of changes to the defined terms in Clause 1. The majority of these changes replace the term 'ABA' with 'Port Terminal Operator, with other changes amending or deleting terms that have changed as a result of amendments to the WEMA.

Grain testing procedures

Emerald's proposed IAA makes the following changes to the grain testing procedures in the 2011 Undertaking:

[26] The ACCC notes that Emerald has proposed removing this clause from its IAA on the basis that it only relates to up-country facilities., as discussed below.

[27] Clause 2.4 in the Emerald's 2011 IAA did not require Clients to outturn grain. This clause provided that if Emerald continued to provide services to the Client after the end of an agreement's term that the terms and conditions of the IAA would apply until a new agreement was executed or the agreement was terminated under clause 19 of Emerald's 2011 IAA.

- addition of test weight testing (Clause 5.4)

- addition of the stipulation that test results falling within the 'margin of error for the sample size are acceptable as meeting the grade specifications' and a definition of "NIL" as meaning less than or equal to 0.05% by weight (Clause 5.6)

- addition of tolerance in variation to moisture results and a +/- 2% variation in test weight results (Clause 5.8)

- increasing the allowance for bin burnt / storage mould affected grains from up to 1 to up to 2 grains per litre averaged over the entire delivery (Clause 5.9)

- addition of a requirement on the Client to 'use best endeavours' to ensure that delivered grain meets quality specifications for the respective GMO and indemnify Emerald against all losses, costs and claims made against Emerald as a result of grain delivered by a client that is subsequently found not to comply fully with the grade standards (Clause 6.2).

Clauses 5.8 and 5.9 have been removed in the draft revision.

Dust mitigation

A new clause 9.4 of Emerald's proposed IAA introduces a new right of Emerald to mitigate dust emissions at MPT by methods including the moisture conditioning of grain paths.

Liability

An amended clause 16.3 of Emerald's proposed IAA seeks to increase Emerald's liability to $250,000 in aggregate and $100,000 per event. Emerald's 2011 Undertaking limited Emerald's liability to $100,000 in aggregate and $30,000 per event.

4.1.4 Dispute resolution

The Dispute resolution provisions of the Proposed Undertaking are substantively the same as those contained in Emerald's 2011 Undertaking.

The Dispute resolution provisions are set out in clause 8 of the Proposed Undertaking. Clause 8 applies to disputes arising in relation to:

- the negotiation of new access agreements
- the negotiation of access to Port Terminal Services in addition to Port Terminal Services already the subject of an executed access agreement
- a decision by Emerald to unilaterally vary the prices at which Port Terminal Services are provided, provided the Client raises a dispute within 30 days of publication of the new prices.

Within five business days of a party giving the other a 'Dispute Notice', the dispute resolution process commences with a negotiation period, where the parties will meet and attempt to resolve the dispute. If the parties fail to resolve the dispute within the negotiation period, they may attempt to resolve the dispute by mediation. This involves referral of the dispute to the Chief Executive Officers (**CEOs**) of both parties to attempt to resolve, including by informal mediation. Where the dispute is not resolved within five business days following referral to the CEOs, it will be referred to formal mediation by a single mediator appointed in accordance with clause 8.3(d).

Either party may also refer a dispute to arbitration by the ACCC or an independent arbitrator at any time following the issue of a 'Dispute Notice'. The process for referring a dispute, and the arbitration procedure, is outlined in clauses 8.4 to 8.7.

4.1.5 Confidentiality

The confidentiality provisions of Emerald's Proposed Undertaking set out the conditions under which a party provides confidential information to another party as part of the negotiation, dispute resolution or arbitration processes under this Undertaking, and the circumstances in which a party is permitted to disclose confidential information.

Emerald has made one substantive change to the confidentiality provisions when compared to the 2011 Undertaking. Clause 9.1(b) outlines the circumstances in which a party is permitted to disclose confidential information. A new clause 9.1(b)(v) specifies that a party is permitted to disclose confidential information to a related body corporate of the party.

4.1.6 Publication of Information and Performance Indicators

The Publication of Information and Performance Indicators provisions of the Proposed Undertaking are substantively the same as those contained in Emerald's 2011 Undertaking.

Clauses 11 and 12 of the Proposed Undertaking require Emerald to publish certain information relating to the Port Terminal Services. This information is designed to assist access seekers in their negotiation of the terms of access, and increase the transparency of Emerald's operation of the port.

4.1.6.1 Publication of information

Clause 11 requires Emerald to publish and update monthly:

- total stocks of bulk wheat held at port terminal facilities
- total stocks of all other grain held at port terminal facilities on an aggregated basis
- cargo nominations
- nominated monthly export baseline capacity.

For any booking it receives, Emerald is required to include on its shipping stem the name of the exporter, the volume of grain to be exported and the shipment period.

In its draft revision, Emerald has replaced the obligation to report 'nominated monthly export Baseline Capacity' with 'Available Capacity for the following six months on a month by month basis'. The definition of 'Baseline Capacity' has also been replaced with 'Available Capacity', defined as 'the Port Operator's estimate of loading capacity available for a Bulk Wheat Booking after taking into account, amongst other things, the shipping stem and any known constraints or limitations on labour, machinery, infrastructure or supply chain logistics for the period in question.

4.1.6.2 Performance indicators

Clause 12 requires Emerald to publish, within three months of the end of the relevant period:

- total capacity
- Bookings received (tonnage)
- spare available capacity
- monthly tonnes shipped
- capacity utilisation (percentage)

- stock on hand at the end of month
- average daily receivals by road and rail.

Emerald will publish the performance information for a six-month period on its website, and the information will be provided to the ACCC.

4.1.7 Information gathering

The information gathering provisions of the Proposed Undertaking are substantively the same as those contained in Emerald's 2011 Undertaking.

Clause 6.4(b) provides that the ACCC may require Emerald to appoint an independent auditor to assess Emerald's compliance with its obligation to provide non-discriminatory access to Port Terminal Services. The ACCC may require an audit up to twice per year. Schedule 3 of the Proposed Undertaking sets out how an auditor is to be appointed.

During the operation of a Part IIIA access undertaking, the ACCC can request information from the undertaking provider at any time, but the provision of information is voluntary.

4.2 Emerald's and third-party submissions

4.2.1 Emerald's submission in support of the Proposed Undertaking (26 March 2013)

Publish-negotiate-arbitrate framework – Emerald submits that it has maintained the publish-negotiate arbitrate structure of its 2011 Undertaking.[28]

Publication of price and non-price terms – Emerald submits that the Proposed Undertaking requires the publication of standard access terms (including Reference Prices), and enables an eligible access seeker to gain access on those terms unless the parties otherwise agree. Emerald submits that this provides certainty for access seekers, while preserving the flexibility for the parties to negotiate according to their needs if they so choose.[29]

Non-discrimination – Emerald submits that the Proposed Undertaking maintains the robust non-discrimination provisions which prohibit self-preferential dealing and empower the ACCC to require the appointment of an auditor to examine compliance with that obligation.[30]

Indicative Access Agreement – Emerald submits that changes to its Undertaking (including the IAA) have been incorporated to:

- improve the clarity and utility of the document
- update the references to the legislation to reflect the changes made by the *Wheat Export Marketing Act* 2008 (Cth)
- introduce operational requirements aimed at improving the throughput efficiency of the port terminal
- address concerns or implement suggestions of market participants; and
- enable the Proposed Undertaking to replace the Current Undertaking without undue uncertainty or disruption to business.[31]

[28] ABA, 'Public Submission to the Australian Competition & Consumer Commission – Proposed ABA Port Terminal Services Undertaking 2013-2014, 26 March 2013, 3.1.
[29] ABA, 29 November 2010, 3.3.
[30] ABA, 29 November 2010, 3.5.

Negotiating for access – Emerald submits that the framework for access negotiations are unchanged in the Proposed Undertaking.[32]

Dispute resolution – Emerald submits that the dispute resolution provisions are unchanged in the Proposed Undertaking.[33]

4.2.2 Cargill Australia Limited submission

Stock swaps – Cargill submits that its only issue regarding Emerald's Proposed Undertaking relates to the proposed stock swapping arrangements. Cargill submits that stock swaps need to be specified as 'time based' swaps with the same grade and quality and should only occur if agreed to by both parties, with agreement from clients not to be unreasonably withheld. Cargill recommends that an industry standard clause for time-based swaps be used that protects the party whose stock has been swapped forward.[34]

4.2.3 CBH Grain submission

Publication of price and non-price terms – In respect of clause 6.2(a) CBH submits that the provision of reference pricing no later than 30 September each year would appear anomalous if Emerald was permitted to allocate capacity prior to the publication of pricing. CBH submits that this provision should require that prior to allocating capacity Emerald should publish reference pricing and details of the capacity that is intended to be made available for booking.[35]

Indicative Access Agreement – CBH's concerns in relation to the IAA are summarised below. A complete summary of CBH's submission regarding Emerald's proposed IAA is available at Appendix B, along with the ACCC's analysis of these concerns.

Stock swaps

CBH submits in respect of clause 9.2(b) that it is unclear what this expectation to enter into commercially reasonable stock swaps requires of the Customer and that it may not be appropriate to include an obligation which effectively forces CBH Grain to contract with other exporters or not be provided access. CBH submits that such a requirement constitutes a vague third line forcing obligation.

CBH submits in respect of clause 9.2 (c) that a bare discretion allowing Emerald to swap grain of the same grade may permit Emerald to arbitrage against its Customer in relation to transport differentials without true regard for the impact on the Customer. CBH submits that such discretion should not be included in the Agreement.[36]

Rail accumulation

CBH submits in respect of clause 9.2(a) that the discretion permitting Emerald to require demonstrable access to rail in order to book shipping slots should be deleted, as it is inappropriate to discriminate in this fashion. CBH submits that this clause is effectively designed to guarantee that Emerald can book slots at will as the sole grain accumulator with a

[31] ABA, 29 November 2010, 1.3.
[32] ABA, 29 November 2012, 3.2
[33] ABA, 29 November 2012, 3.4.
[34] Cargill Australia Limited, 'CBH – proposed variation to 2011 Port Terminal Services Access Undertaking 30 April 2013 & ABA Pty Ltd proposed Port Terminal Services Access Undertaking 30 April 2013, 21 May 2013, p. 1.
[35] CBH Grain, ABA Proposed Port Access Undertaking 2013, 21 May 2013, p.1.
[36] CBH, 21 May 2013, p. 4.

train dedicated to the Port Terminal whilst other exporters need to disclose rail transportation arrangements.[37]

Outturn of grain

CBH submits in respect of clause 6.9 that it is not clear how this clause concerning outturn relates to the port terminal as opposed to the up-country storage. CBH submits that Emerald could regrade grain held at the port terminal over 30 September and then use the re-graded grain to justify changing the order of shipping or the subsequent movement out of the terminal. CBH submits that it is not clear how this is relevant to the operation of the port terminal. CBH submits that 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 Emerald's system.[38]

Changes to defined terms

CBH submits that the definition of "Facilities" leads to confusion in the document as to where the IAA is intended to apply. CBH submits that if it only applies to the port terminal, then it would be appropriate to amend the definition to state this. CBH submits that otherwise the IAA may permit movement of stock entitlement between the port terminal and other Emerald sites.[39]

CBH submits that the definition of "Receival Standards" is inappropriate as it allows Emerald to change its obligations to outturn grain by merely changing the published receival standards between the time of receival and outloading.[40]

Negotiating for access, confidentiality and dispute resolution – CBH submits with respect to clause 9.1(v) that this clause would appear to allow Emerald to disclose confidential information to its marketing division, Emerald Grain, thereby providing potential for arbitrage against Emerald's customer in certain circumstances. CBH submits that when this is considered in light of the absence of any requirement in the IAA to keep a customer's information confidential, there is considerable opportunity for Emerald and its related body corporate, Emerald Grain, to act against the interests of its customers. CBH submits that this is unacceptable and that it is unclear why the ability to pass information to related body corporates is required.[41]

Publication of Information – CBH submits that it is inappropriate and unacceptable that Emerald is not required to publish stocks of grain at its port terminal. CBH submits that each week during the term Emerald 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.

CBH submits that 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 the Loading Protocol to understand the stock position on a weekly basis.[42]

Performance Indicators - CBH submits that key performance indicators should be published in line with those of other Port Terminal Operators on at least a quarterly basis and that there

[37] CBH, 21 May 2013, p. 4.
[38] CBH, 21 May 2013, p. 3.
[39] CBH Grain, 21 May 2013, p. 2.
[40] CBH Grain, 21 May 2013, p, 2.
[41] CBH Grain, 21 May 2013, p. 1.
[42] CBH Grain, 21 May 2013, p. 1.

should not be any need for a delay of two months in the publication of the key performance indicators.[43]

4.2.4 Emerald's response to third party submissions (3 July 2013)

Publication of price and non-price terms: in response to CBH's submission, Emerald submits that its proposed approach to reference pricing is in line with the structure of pricing within the east coast grain industry. Emerald submits that bulk handling companies set their pricing prior to the upcoming harvest.[44]

Stock swaps: In response to Cargill's submission, Emerald submits its acknowledgment of the need for swaps in certain circumstances to be time-based and that it looks forward to working with Cargill, initially to adopt these concepts in the Emerald/Cargill SHA and, beyond that, to contribute to an industry standard approach.[45]

Other provisions of the Indicative Access Agreement: in response to CBH Grain's submission, Emerald submits its proposal not to address issues raised by CBH in respect of the IAA for two reasons. The first reason is that for the most part Emerald considers the matters raised represent CBH's preference for the commercial terms of a SHA. Emerald states that it would be pleased to engage in such negotiations with CBH, but that Emerald does not believe it to be appropriate to conduct such negotiations in a public forum.[46] The second reason as submitted by Emerald is that the proposed terms of the IAA are not significantly different to the existing term, upon which CBH had opportunity to comment in the past. Emerald submits that CBH's comments are not comments on changes to the IAA, but rather on well-established terms.[47]

Emerald submits its acknowledgement of CBH's suggestions regarding clarifying the distinction between port access agreements and up-country access agreements and states its intention to work with the ACCC to bring more precision to this aspect.[48]

Negotiating for access, confidentiality and dispute resolution: Emerald submits that for reasons of efficiency the logistics personnel working on Emerald matters are employed by Emerald Grain Pty Ltd, not Emerald, and that there are a number of shared services within the Emerald Group. Emerald submits that it is therefore necessary that there be a carve out to allow confidential information to be shared with related bodies corporate.[49]

Publication of information: Emerald submits that it provides an update of the stocks at port each month as at the end of the month. Emerald submits that providing this information on a weekly basis would not provide the industry with any greater transparency of port operations and would represent an administrative burden to the terminal without adding to the efficiency of the port. Emerald further submits that given Emerald's small volumes such information would prejudice client confidentiality.[50]

Performance indicators: Emerald submits that it is not proposing to change the current reporting requirement at MPT. Emerald submits that CBH has not provided any explanation of the benefits of such a change. Emerald submits that it does not have the administration services available to the other port terminal operators and believes that the two month delay is

[43] CBH Grain, 21 May 2013, p. 1.
[44] Emerald Grain, 3 July 2013, p. 2.
[45] Emerald Grain, 'ABA Proposed Port Access Undertaking 2013/14 Response to Submissions', 3 July 2013, p. 1.
[46] Emerald, 3 July 2013, p. 1.
[47] Emerald, 3 July 2013, p. 1.
[48] Emerald, 3 July 2013, p. 1.
[49] Emerald, 3 July 2013, p. 2.
[50] Emerald, 3 July 2013, p. 2.

appropriate to allow for the necessary analysis. Emerald further submits that it is obliged to comply with the Continuous Disclosure Rules set out in the WEMA.[51]

4.3 ACCC view

It is the preliminary view of the ACCC that the publish-negotiate-arbitrate model of access provision proposed by Emerald, inclusive of the non-discrimination, no hindering access and dispute resolution provisions, remains appropriate to ensure fair access to port terminal services supplied by Emerald for access seekers. This overall approach is consistent with the approach taken in Emerald's 2011 Undertaking and for all other port terminal operators. The ACCC considers that, for the reasons in its previous assessments and further set out below, the broad publish-negotiate-arbitrate model remains appropriate having regard to the legislative criteria under Part IIIA, in particular ss. 44ZZA(3)(aa), (a) and (c).

4.3.1 Publication of price and non-price terms

Under clause 6.2 and 6.3 of the Proposed Undertaking, Emerald is required to publish the Reference Prices and standard terms which apply to Port Terminal Services. Emerald is also required to notify the ACCC of any changes in the References Prices, and may request ACCC approval for changes to the standard terms.

Provisions relating to the publication of price and non-price terms in Emerald's Proposed Undertaking are substantively the same as those contained in Emerald's 2011 Undertaking and the ACCC has not been notified of any issues associated with the operation of these provisions. The ACCC overall considers that the price and non-price term publication provisions of Emerald's Proposed Undertaking are appropriate, having regard to the interests of access seekers and the legitimate business interests of Emerald in accordance with ss. 44ZZA(3)(a) and (c) of the CCA.

Regarding CBH's submission, on clause 6.2(a) of the Proposed Undertaking, that Emerald should be required to publish its reference pricing before it opens capacity to be booked, the ACCC's preliminary view is that it does not consider that this is necessary, having regard to the matters in ss. 44ZZA(3).

While the timely publication of this information is relevant to the interests of access seekers (having regard to ss. 44ZZA(3)(c) of the CCA), the ACCC notes that clause 6.2(a) is substantively the same as contained in Emerald's 2011 Undertaking, and the ACCC has not been notified of any concerns regarding the publication of reference pricing information. The ACCC also notes that the timing of Emerald's publication is similar to other Port Terminal Operators (GrainCorp by no later than 31 August each year,[52] Viterra by no later than 1 September each year[53]) and that Emerald may vary its reference prices at any time pursuant to clause 6.5(a) of the Proposed Undertaking. The ACCC also notes that prices are able to be negotiated between parties.

The ACCC overall considers clause 6.2(a) specifically and the reference price publication provisions of the Proposed Undertaking generally provide Emerald with a reasonable level of commercial flexibility and are appropriate, having regard to ss. 44ZZA(3)(a) of the CCA. The ACCC does not consider that it would be appropriate to require the prices to be locked in before Emerald opens its stem for bookings.

[51] Emerald, 3 July 2013, p. 2.
[52] GrainCorp, 2011 Indicative Access Agreement, 1.2).
[53] Viterra, 2011 Undertaking 5.2(a).

The ACCC discusses the issues in relation to the publication of capacity by Emerald in Chapter 5 of this Draft Decision.

4.3.2 Non-discriminatory access

Clause 6.4(a) of the Proposed Undertaking provides that Emerald must not discriminate against access seekers in favour of its own trading arm, except to the extent that the cost of providing access to other applicants or users is higher.

Provisions relating to non-discriminatory access in Emerald's Proposed Undertaking are substantively the same as those contained in Emerald's 2011 Undertaking and the ACCC has not been notified of any issues associated with the operation of these provisions. The clauses are also consistent with those included for other port operators. The ACCC considers that the non-discriminatory access provisions of Emerald's Proposed Undertaking to be appropriate, having regard to the interests of access seekers and the legitimate business interests of Emerald, in accordance with ss. 44ZZA(3)(a) and (c) of the CCA.

4.3.3 Negotiating for access

The ACCC notes that the provisions relating to negotiating for access are substantively the same as those contained in Emerald's 2011 Undertaking. It considers that the terms appropriately balance the interests of access seekers and Emerald, and provide a certain and clear process for the negotiation of an access agreement.

The ACCC notes the submitted concern of CBH regarding clause 4.5(c), that the clause gives Emerald the ability to force a Client to negotiate a variation to an Access Agreement in accordance with clause 7 when there is already an Access Agreement in place.[54]

The ACCC considers that clauses 4.5(b) and 4.5(c) of Emerald's proposed IAA provide commercial flexibility for both Emerald and Clients throughout the term of an access agreement and establishes a clear and defined process for negotiating variations to an existing access agreement. The ACCC notes that it has not been notified of any issues regarding requests for access agreement variations, or the negotiating for access provisions in general, throughout the term of Emerald's 2011 Undertaking. The ACCC therefore considers these provisions to be appropriate and in the interests of Emerald and access seekers, having regard to ss. 44ZZA(3)(a) and 44ZZA(3)(c) of the CCA.

4.3.4 The Indicative Access Agreement

4.3.4.1 Certainty and clarity of the IAA's terms

In assessing the IAA submitted by Emerald, the ACCC considers that a consistent regulatory approach is appropriate, having regard to ss. 44ZZA(3)(aa) and (e) of the CCA. Accordingly, the ACCC has taken the same approach to the IAA in Emerald's Proposed Undertaking as was taken in assessing the 2009 and 2011 Undertakings.

In the final decisions on the 2009 and 2011 Undertakings, the ACCC took the view that the terms in the IAAs are intended to represent a minimum standard and that access seekers have the ability to negotiate or arbitrate based on their own particular considerations and circumstances.[55] Accordingly, in 2009 and 2011 the ACCC did not form views on whether the terms and conditions of the IAAs would be acceptable to particular parties. However, as a minimum standard the ACCC considered it was necessary for the IAA's attached to the 2009 Undertakings to ensure the following:

- the inclusion of a robust dispute resolution process that balances the legitimate business interests of the port terminal operator with the interests of access seekers

[54] CBH, 21 May, p. 1.
[55] ACCC, *GrainCorp Decision to Accept*, 29 September 2009, pp. 176-177.

- any ability of the port operator to unilaterally vary the terms of an executed IAA is only to be exercised in appropriate circumstances
- the terms and conditions of the IAA must provide for sufficient certainty and clarity in their terms, effect and operation.

The ACCC considers that the assessment framework set out above remains relevant to the assessment of the proposed IAA attached to the Proposed Undertaking, having regard to the legislative criteria in s.44ZZA(3). It has accordingly applied a consistent approach in its assessment of the Proposed Undertaking and focused on the three issues identified above, and on whether any of the terms in the IAA no longer represent an appropriate minimum standard and reasonable starting points for commercial negotiations. While not determinative, the ACCC has had regard to whether the clauses in the IAA have been successfully used over the period of the 2011 Undertaking.

Regarding the three dot points above, clause 8 of the Proposed Undertaking contains provisions regarding dispute resolution. Clause 8 remains substantively unchanged from Emerald's 2011 Undertaking and the ACCC considers that these provisions remain appropriate having regard to the factors in ss. 44ZZA(3). Clause 6.5 contains the provisions that allow Emerald to vary its Standard Terms. Therefore, the ACCC's assessment of the proposed IAA is primarily focused on whether the IAA is sufficiently certain and clear.

In the Issues Paper, the ACCC set out what the ACCC considered to be major and minor changes to the Proposed Undertaking (when compared to the IAA accepted as part of Emerald's 2011 Undertaking) and sought views from stakeholders as to their appropriateness.

After considering the submissions given to the ACCC, it is the ACCC's preliminary view that the following aspects of the proposed IAA require refinement so as to provide the level of clarity and certainty that is necessary to constitute a reasonable starting point for commercial negotiations.

The ACCC has also addressed in detail another substantive issue, regarding the accumulation of grain by rail, that has some corresponding clauses in the IAA, in Chapter 5.

Clarification that the IAA relates only to Port Terminal Services for Bulk Wheat

The IAA accepted as part of Emerald's 2011 Undertaking was Emerald's then-current SHA which related to both port terminal and up-country services.[56] In response to the ACCC's initial concerns regarding the coupling of the IAA and SHA, Emerald inserted clause 6.3(a) into the 2011 Undertaking. That clause provided that the standard terms are the terms and conditions set out in the IAA to the extent that those terms and conditions relate to the provision of Port Terminal Services. At that time the ACCC considered that amended clause to be appropriate, but noted that it remained the ACCC's view that, generally, the preferred approach is for the port operator to offer separate agreements for port and non-port services.

In the course of the assessment of the Proposed Undertaking, Emerald has flagged its intention that the proposed IAA will only apply to the provision of Port Terminal Services and to develop a separate SHA for up-country services.[57] Emerald has also acknowledged CBH's suggestions regarding clarifying the distinction between port access agreements and up-country access agreements.[58] However those comments are not reflected in the proposed IAA provided to the ACCC on 26 March 2013.

The ACCC considers that it would be appropriate for Emerald to make clear that the IAA relates only to Port Terminal Services for bulk wheat, having regard to the interests of access seekers, in accordance with ss. 44ZZA(3)(c) of the CCA. It notes that clause 6.3(a) remains in

[56] ACCC, 'Australian Bulk Alliance Pty Ltd Port Terminal Services Access Undertaking Decision to accept, 28 September 2011, p. 14.
[57] Emerald, 26 March 2013, 6.3, Emerald, 3 July 2013, p. 3.
[58] Emerald, 3 July 2013, p.1.

effect to provide that standard terms in the IAA are relevant only to the extent that they relate to provision of Port Terminal Services. However, the ACCC notes that there does remain some uncertainty in the current clauses about how this works in practice, as noted by CBH, and considers that greater clarity would be desirable. It notes Emerald's stated intention to develop separate agreements, but considers that such an intention is not relevant if it is not actually reflected in the documents provided to the ACCC or access seekers. The ACCC also considers that, if separate agreements are going to be developed, it would provide greater certainty for access seekers if the undertaking reflected this explicitly, rather than through some subsequent change in the future.

Proposed amendments by Emerald

In response to ACCC and stakeholder concerns about the clarity of application of the IAA, Emerald has proposed in the draft revision to make changes that it submits would, amongst other things:[59]

- make it clear that the IAA relates only to Port Terminal Services for bulk wheat
- clarify that the IAA is the standard minimum terms for access and that an agreement negotiated on different terms will be a SHA
- remove provisions that relate to up-country issues
- amend provisions to clarify that they relate to port terminal services.

Emerald's proposed revised IAA is available on the ACCC's website in mark-up form.[60] The changes include the removal of several clauses that relate only to up-country facilities, the amendment of other clauses to specifically refer to 'Port Terminal' rather than facilities generically, and an expanded background section.

It is the ACCC's preliminary view that the revisions made by Emerald go some way towards dealing with the issues concerning the distinction between port and non-port facilities. However, the ACCC has not had the opportunity yet to consider these changes in light of the views of interested parties, and so welcomes further stakeholder views regarding Emerald's proposed amendments.

Issues for comment

- *Do Emerald's amendments in the draft revised IAA make it clear that the IAA is a standard terms document applicable to bulk wheat Port Terminal Services only? Do these amendments improve the clarity and certainty of the IAA so as to make it appropriate having regard to the interests of the port operator and of access seekers? Do the amendments make it clear that there will be separate agreements for port and non-port services?*

4.3.4.2 Stock swaps

Clause 9.2(b) of Emerald's proposed IAA introduces a new clause that, where necessary to facilitate efficient loading of the Client's ships and the ships of others, the Client will be expected to enter into commercially reasonable stock swaps with other clients of Emerald. In the ACCC Issues Paper on Emerald's Proposed Undertaking the ACCC sought stakeholders views as to whether the proposed clause 9.2(b) was appropriate, and provided a sufficient level of clarity as to how Emerald would be able to exercise this discretion.

[59] Emerald, letter of 31 July 2013, p.1.
[60] Available at http://transition.accc.gov.au/content/index.phtml?itemId=964331.

The ACCC notes Cargill's concern that stock swaps should be time-based and entered into only with the consent of both parties (with consent not to be unreasonably withheld by the Client),[61] and CBH's concern that the proposed clause lacked clarity and could effectively force CBH to contract with other exporters or not be provided access.[62]

The ACCC has concerns that the clause as proposed by Emerald may not be in the interests of access seekers, having regard to ss. 44ZZA(3)(c), as it may require their participation in transactions against their wishes.

Proposed amendments by Emerald

The ACCC raised its concern with Emerald regarding the proposed clause 9.2(b). In response Emerald has proposed an amendment to clause 9.2(b) that requires the expected stock swap agreement to be 'provided on terms acceptable to the Client'. Emerald's draft revised IAA, including the amended clause 9.2(b), is available on the ACCC's website.[63]

The ACCC's preliminary view is that these amendments would go some way towards addressing the issues raised by Cargill and better ensuring that the interests of access seekers are protected. The ACCC however has not had the opportunity to consider the changes in light of the views of interested parties. These views will inform the ACCC's final view on whether the clause is appropriate having regard to ss. 44ZZA(3)(c) and to whether an expectation 'to explore in good faith stock swap opportunities with other clients of the Company on terms agreeable to the Client' is sufficiently clear in its effect. Accordingly, the ACCC seeks further stakeholder views regarding Emerald's proposed amendments.

Issues for comment

- *Does the proposed amended clause 9.2(a) contained in Emerald's draft revised IAA make it clear that stock swap arrangements will only be entered into with the consent of both parties and on terms agreeable to both parties? Is the clause appropriate having regard to the interests of the port operator and of access seekers?*

4.3.4.3 Remaining provisions of the IAA

In Appendix B, the ACCC has considered the other submissions of CBH relating to the specific clauses of the IAA, to consider if the clauses discussed represent an appropriate starting point for commercial negotiations. The ACCC has, in that appendix, noted certain clauses that it considers require amendment to ensure that they are appropriate minimum terms.

Other than the specific points discussed above and in Appendix B, which the ACCC considers may give rise to issues of clarity and certainty of terms, and/or not set an appropriate starting point for commercial negotiations, the ACCC considers that the IAA is appropriate insofar as it provides a starting point for commercial negotiations. However, the ACCC has not formed a view on the appropriateness of the provisions of the IAA for particular parties. The appropriateness of specific provisions of the IAA may vary between access seekers depending on their particular commercial considerations and circumstances.

In accordance with the negotiate/arbitrate model in the Proposed Undertaking, the terms of the IAA are negotiable between Emerald and access seekers, and access seekers can seek arbitration under clause 8 of the Revised Undertaking for disputes relating to the negotiation of access agreements.

In forming this view, the ACCC has had regard to the interests of access seekers and the legitimate business interests of Emerald, in accordance with ss. 44ZZA(3)(a) and (c).

[61] Cargill, 30 April, p. 1.
[62] CBH, 21 May, p. 4.
[63] Available at http://transition.accc.gov.au/content/index.phtml?itemId=964331.

The ACCC notes that the provisions of the proposed IAA are in many cases either unchanged or substantively unchanged from Emerald's 2011 IAA and that the ACCC has not been notified of any issues or concerns regarding the appropriateness of these terms as a starting point for commercial negotiations. The ACCC considers that these terms appear to have provided an effective basis for access by exporters, and that they remain appropriate and in the interests of access seekers and Emerald, having regard to ss. 44ZZA(3)(a) and 44ZZA(3)(c) of the CCA.

4.3.5 Dispute Resolution

The ACCC notes that the dispute resolution process in Emerald's Proposed Undertaking is substantively the same as that contained in Emerald's 2011 Undertaking. The ACCC notes that it has not been notified of any issues regarding the dispute resolution procedure in Emerald's undertaking. The ACCC considers the dispute resolution provisions in Emerald's 2011 Undertaking are appropriate and in the interests of Emerald and access seekers, having regard to ss. 44ZZA(3)(a) and (c) of the CCA.

4.3.6 Confidentiality

The confidentiality provisions of Emerald's Proposed Undertaking are substantively the same as those contained in Emerald's 2011 Undertaking, with the exception of a new clause 9.1(b)(v), permitting a party to disclose confidential information to a related body corporate of the party. The ACCC notes CBH's concern that the proposed clause 9.1(b)(v) would allow Emerald to disclose confidential information to its trading arm, Emerald Grain, and use this information to act against the interests of its customers. Emerald has responded that the clause is necessary because of the particular corporate structure and use of staff employed by Emerald Grain.

The ACCC notes and recognises the concern about the use of information to favour the trading division of a port operator, and has considered whether there is a need to require amendments to clause 9.1(b) or for the sharing of confidential information to be otherwise limited in scope or use.

The ACCC notes that, while Emerald's Proposed Undertaking contains no formal ring-fencing mechanisms to prevent the sharing of information between Emerald and its trading arm, there are non-discrimination provisions that prohibit Emerald from using this information against the interests of a customer.

The non-discrimination provisions require that Emerald must not discriminate between different access seekers in favour of its trading arm. Using information it obtains by virtue of being a vertically integrated port terminal operator to provide its trading arm with preferential treatment would be a breach of Emerald's Proposed Undertaking.

The requirement to publish stock information under clause 11 and performance indicators under clause 12 also provide additional levels of transparency to potential access seekers.

The ACCC notes that it has not been notified of any disputes in relation to the potential sharing of information between Emerald and its own trading arm. Having regard to Emerald's legitimate business interests, as required under ss. 44ZZA(3)(a), the ACCC also acknowledges the substantial costs involved in implementing ring-fencing arrangements.

In its assessment of the Proposed Undertaking, the ACCC considers that a consistent regulatory approach is appropriate, having regard to ss. 44ZZA(3)(aa) and (e) of the CCA. To this end the ACCC notes its previous assessments in relation to the 2009 and 2011 Access Undertakings, where ring-fencing measures were not considered to be a necessary component of the port terminal access undertakings. This was also in light of the existence of non-discrimination provisions. It accordingly does not consider that there is a need to limit the provision of information to related bodies corporate, noting that it reflects the commercial structure in use by Emerald.

Accordingly, the ACCC considers clause 9.1(b)(v) to be appropriate and in the interests of Emerald and access seekers, having regard to ss. 44ZZA(3)(a) and (c) of the CCA.

4.3.7 Publication of performance indicators

Clause 12 of Emerald's Proposed Undertaking provides that Emerald must publish details on certain key service standards and capacity indicators in respect of the provision of Port Terminal Services for Bulk Wheat and MPT at six-monthly intervals.

The ACCC notes CBH's submission that Emerald should be required to publish performance indicator information on a quarterly basis.[64]

The ACCC considers that it is important to have regard to the 2009 and 2011 Undertakings in assessing Emerald's Proposed Undertaking and that this is consistent with ss. 44ZZA(3)(e), where the ACCC considers the 2009 and 2011 Undertakings to be a relevant matter.

For instance, the six-monthly reporting schedule proposed by Emerald is equivalent to that in GrainCorp's accepted 2011 Undertaking. The ACCC considers that the frequency of reporting proposed by Emerald is likely to continue to be appropriate given that access agreements are generally negotiated on an annual basis.

The ACCC notes that, as a general rule, the availability of additional information to access seekers is beneficial. Regarding clause 12 however, the ACCC does not consider there to be a clear case for Emerald increasing the frequency with which it publishes performance indicator information having regard to the size and scale of operations relative to the other port terminal operators and the competitive constraint Emerald's MPT faces from GrainCorp's Geelong facility.

Provisions relating to the publication of performance indicators in Emerald's Proposed Undertaking are substantively the same as those contained in Emerald's accepted 2011 Undertaking and the ACCC has not been notified of any issues associated with the operation of these provisions. The ACCC overall considers that the provisions relating to the publication of performance indicators in Emerald's Proposed Undertaking are appropriate.

4.3.8 Information gathering

Clause 6.4(b) of the Proposed Undertaking provides that the ACCC may require Emerald to appoint an independent auditor to report on Emerald's compliance with its obligation to provide non-discriminatory access in accordance with clause 6.4(a).

Provisions relating to information gathering in Emerald's Proposed Undertaking are substantively the same as those contained in Emerald's 2011 Undertaking and the ACCC has not been notified of any issues associated with the operation of these provisions. The ACCC therefore considers that the information gathering provisions in Emerald's Proposed Undertaking to be appropriate.

[64] CBH, 21 May 2013, p.2.

5 Capacity Management

5.1 Emerald's Proposed Undertaking

Clause 10 of Emerald's Proposed Undertaking sets out the capacity management provisions of Emerald's Proposed Undertaking. Clause 10 details the requirement on Emerald to comply with the Continuous Disclosure Rules under the WEMA and provisions relating to Emerald's Loading Protocol, the Loading Protocol variation process and Emerald's no hindering access obligations.

Consistent with the approach taken in relation to Emerald's 2011 Undertaking and the undertakings that apply to other port terminal operators, the Loading Protocol provides the detail concerning how capacity at MPT is managed.

5.1.1 Continuous Disclosure Rules

Clause 10.1 sets out Emerald's requirement to comply with the Continuous Disclosure Rules under the WEMA from time to time as they relate to Port Terminal Services.[65]

5.1.2 The Substance of the Loading Protocol[66]

The proposed Loading Protocol maintains the structure of Emerald's 2011 Protocol. Emerald's proposed Loading Protocol is discussed below, with specific reference made to changes made to Emerald's 2011 Protocol.

Introduction: Clause 2 of the Loading Protocol notes the limited storage at the MPT and provides that Emerald's overriding objectives are to maximise terminal export throughput and operational efficiencies.

An addition to clause 4 provides the clarification that if Emerald provides services to an exporter without a signed SHA, the terms and conditions contained in the Port Operator's then current Indicative Access Agreement as published on its website shall apply.

Shipping stem: Clause 6 provides that, by notice on Emerald's website, Emerald will provide at least 10 business days' notice of the opening of its shipping stem for each year. The draft revision provides that this notice will be accompanied by a statement of projected available capacity by month for the relevant year. Clause 7 provides that Emerald will update the shipping stem on its website each business day.

Intent to ship: Clause 10 provides that to request elevation and shipping capacity, a Client must complete an Intent to Ship Advice (Annexure 1) and pay the Booking Fee.

Clause 11 provides that, by close of business on the next day after receiving a valid Intent to Ship Advice, Emerald will make a record on the shipping stem as "pending". Emerald must accept or reject the Intent to Ship Advice within 5 days of receipt of the Intent to Ship advice.

Clause 12 sets out that in deciding whether to accept or reject the Intent to Ship Advice, Emerald may consider existing shipping nominations, unallocated capacity at the port terminal, whether the Client has executed a SHA with Emerald and other matters which Emerald reasonably considers relevant.

[65] In summary, the continuous disclosure rules require port terminal operators to publish on their website their policies and procedures for managing demand for port terminal services; a statement, updated daily, setting out, amongst other things, the name of each ship scheduled to load grain using port terminal services, the estimated date on which grain will be loaded into the ship (if known), the date on which the ship was nominated and the date on which the nomination was accepted (this statement is termed the 'Loading Statement').

[66] Note that all clause references in section 5.1.2 are to the Loading Protocol.

Subject to clause 12, Clause 13 provides that Intent to Ship Advices will be dealt with in the order they are received by Emerald, thus giving effect to a FCFS capacity management approach.

Also regarding the intent to ship process, a booking is made when Emerald accepts the 'Intent to Ship Advice' (clause 15). However the booking will lapse if the booking fee is not paid in time (clause 16). Additional booking fees will be payable, or tonnages can be moved to another time slot, if the actual tonnage is higher or lower than initially nominated (clauses 18 and 19).

Clause 20 provides that Emerald may, at its discretion, defer or split a booking if requested. Three months' notice prior to the vessel's ETA is required to be given, although Emerald may also at its discretion consider requests where less than three months' notice is provided.

A new clause 21 provides that a client must make a written request for a 'Shipping Window' (being the period between the 1st and 15th or the 16th and the last day of a given month) when completing an 'Intent to Ship Advice'. Clause 21 provides that the final allocation of Shipping Windows remains at the sole discretion of Emerald.

Vessel Nomination: Clause 22 of the Protocol provides that Emerald must receive written nomination of a vessel name at least 30 business days prior to the vessel's ETA in the form of the Vessel Nomination (at least 15 business days' notice was required under the 2011 Loading Protocol). Emerald has discretion to consider vessel nominations received with less than 30 business days' notice.

The Protocol also introduces into clause 22 a new requirement on clients to provide a cargo assembly plan at the same time that they submit a vessel nomination form. The cargo assembly plan must detail the supply chain arrangements to be used to deliver the relevant grain to the port terminal facility, including load gauge, quality specifications and associated tonnages. Clause 22 also stipulates that, in the absence of a complying cargo assembly plan Emerald has the discretion to arrange for transport of client grain from any of its upcountry storage sites to the terminal to complete the cargo, by either road or rail, with the full cost to be paid by the client, or reject the nomination and retain the client's booking fee.

The draft revision provides that this discretion can only be used in circumstances where Emerald has consulted with the client regarding the absence of a complying assembly plan, the client does not redress the situation in a timely manner and there are reasonable grounds that the noncompliance is likely to impact adversely on the efficiency and timeliness of loading at MPT.

Estimated Load Dates: Clause 26 provides that upon Emerald's acceptance of a vessel nomination, the Client will be notified of any vessel queuing and an estimate of load dates. Estimated load dates are not fixed or final (clause 28).

Cargo Accumulation and Vessel Loading: A new clause 29 provides that the accumulation of a significant proportion of cargo by rail will be expected by Emerald to be an important component of the execution of the cargo assembly plan.

The draft revision provides further clarification that a 'target minimum 50%' of accumulation by rail will be expected.

Clause 30 provides cargo accumulation will not commence prior to payment of the booking fee or vessel nomination. Clause 31 provides that generally cargo accumulation will commence not more than two weeks before vessel ETA. Clause 32 provides that, due to limited storage capacity at the port terminal, Emerald will determine the order of cargo accumulation taking into account, amongst other factors, vessel ETA, date of accepted vessel nomination, grain availability, ownership of stock and agreed stock swaps between clients.

Clause 34 provides that Emerald reserves the right not to fully accumulate a cargo in order to maximise all client vessel turnarounds where multiple vessels are arriving in a short time frame.

Clause 35 provides that grain accumulated at the port terminal will be co-mingled with grain of the same grade regardless of ownership.

A new clause 39 provides that, where necessary to facilitate the efficient loading of clients' ships, the Client agrees to the use of stored grain for efficient port loading.

Vessel Substitution or Delay: Clause 47 provides that in the event that a vessel is substituted or delayed, and the substituted Vessel ETA or revised ETA is greater than 5 days from the original ETA, the booking fee will be forfeited to Emerald.

The draft revision provides that the booking fee will only be forfeited by issue of a notice in circumstances where, in Emerald's reasonably held opinion, the delay would cause significant disruption to the shipping stem.

Clause 48 provides that Emerald reserves the right to seek costs from the Client regarding the cancellation of a vessel within 14 days of the original ETA, or if a substituted vessel ETA varies by more than five days.

Dispute Resolution: Clause 50 specifies the dispute resolution procedures to be followed in the event that the Client disputes Emerald's adherence to the Loading Protocol. If the dispute is not resolved in discussions between the parties, Emerald's General Manager will make a final decision on the dispute. The General Manager's decision must be made acting reasonably, in good faith and consistent with the wording or intent of the Loading Protocol.

5.1.3 Variation of the Loading Protocol

Clause 10.3 of Emerald's Proposed Undertaking sets out the requirements for varying the Loading Protocol during the term of the Undertaking.

Clause 10.3(a)(i) provides that any variation to the Loading Protocol must be consistent with:

- the objectives of the Undertaking, as set out in clause 2.2 of the Undertaking; and
- Emerald's obligations to provide non-discriminatory access under clause 6.4 of the Undertaking.

Clause 10.3(a)(ii) provides that the Loading Protocol must include an expeditious dispute resolution mechanism for dealing with disputes relating to decisions made by Emerald under the Loading Protocol (but need not include independent binding dispute resolution).

The elements of the variation process are set out in clause 10.3(a)(iii). Before Emerald can vary the Loading Protocol, it must conduct a consultation process which involves:

- preparing and circulating proposed changes to interested parties and the ACCC, along with an explanation of the amendment (all to be published on Emerald's website);
- allowing users, applicants and interested parties at least 10 business days to review and respond in writing to the proposed changes; and
- Emerald collating, reviewing and actively considering in good faith the responses received from interested parties.

Clause 10.3(a)(iv) provides that any variation must be published on Emerald's website at least 30 days prior to the date on which it is to become effective in the same locations as Emerald publishes its Loading Protocol.

Clause 10.3(c) provides that Emerald must provide the ACCC with copies of the variations to the Loading Protocol promptly following publication.

Clause 10.4 provides for the ACCC to issue an objection notice to a proposed variation that, if not withdrawn, prevents the changes from taking place.

5.1.4 No hindering access

Clause 10.5(a) provides that Emerald, or a related body corporate, must not engage in conduct for the purpose of preventing or hindering access to the port terminal services by any other access seekers.

Clause 10.5(b) provides that the existence of the purpose of hindering access can be established by inference from the conduct of Emerald or a related body corporate.

5.2 Emerald and third-party submissions

5.2.1 Emerald's submission in support of the Proposed Undertaking (26 March 2013)

As in relation to the proposed IAA, Emerald submits that the Loading Protocol incorporates a number of changes to:

- improve the clarity and utility of the document
- update the references to legislation to reflect the changes made by the *Wheat Export Marketing Act* 2008 (Cth)
- introduce operational requirements aimed at improving the throughput efficiency of the port terminal
- address concerns or implement suggestions of market participants; and
- enable the Proposed Undertaking to replace the 2011 Undertaking without undue uncertainty or disruption to business.[67]

Specifically, Emerald submits that the Loading Protocol incorporates the following main changes to Emerald's 2011 Protocol:

- clarification around the application of booking fees
- introduction of the right for Emerald to allocate slots ("windows") on the basis of first half or second half of the month based on client nominations, to aid efficiency and
- the factors which will influence the award of stem capacity, the ordering of accumulation at port and loading priority will include the ability of clients to enter into stock swaps where necessary for efficient marshalling, and the availability and efficiency of their rail transport arrangements.

Capacity allocation: Emerald submits that the Proposed Undertaking maintains the FCFS system of capacity allocation.[68]

Emerald submits that FCFS remains more appropriate for Emerald and its clients, compared to the auction system, for the following reasons:

[67] Emerald, 26 March 2013, p. 1.
[68] Emerald, 26 March 2013, p. 3.

- the throughput at Emerald's grain terminal is relatively constrained and the complexity and cost of an auction system would not be appropriate to the scale of Emerald's operation

- Emerald operates in a competitive environment on the east coast

- Emerald's main competitor, GrainCorp Geelong, operates on a FCFS basis

- to Emerald's knowledge there have not been any formal complaints about the operation of Emerald's FCFS system and

- there have been flaws exhibited in the auction systems of CBH and Viterra, apparently caused by bidding behaviour, which have resulted in questions from exporters about the efficiency of the auction system.[69]

5.2.2 Submissions of interested parties

The ACCC received a submission from CBH that made a number of comments in relation to the treatment of capacity allocation under Emerald's undertaking and Loading Protocol. The following comments relate to the Emerald Loading Protocol.

Introduction: CBH submits regarding clause 3 that it is unclear whether the SHA referred to is the IAA or a SHA for Emerald's up-country sites. CBH submits that, for clarity, this should be changed to IAA.[70]

CBH submits that references to the SHA in clause 4 should also be changed to Indicative Access Agreement. CBH submits that absent this change Emerald could use the uncertainty to ensure that the port is tied to Emerald's storages which would prevent competition in up-country storage and handling services.[71]

Shipping stem: CBH submits regarding clause 6 that there is no obligation on Emerald in the Loading Protocol or in the Undertaking to require Emerald to publish the amount of capacity that is offered at the Port Terminal, or to provide clarity around the operation of the non-discrimination provisions. CBH submits that 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).[72]

Intent to ship: CBH submits regarding clause 12 that the reference to SHA in the third bullet point should be changed to Indicative Access Agreement and that the fourth bullet point is unnecessarily vague, permitting Emerald 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.[73]

CBH submits regarding clause 13 that by making the dealing of Intent to Ship Advices in the order they are received subject to clause 12, it would appear to effectively give Emerald the discretion to accept a later shipping intention on unspecified matters that Emerald considers relevant. CBH submits that this qualification should be deleted.[74]

[69] Emerald, 26 March 2013, p. 3.
[70] CBH, 21 May 2013, p. 5.
[71] CBH, 21 May 2013, p. 5.
[72] CBH, 21 May 2013, p. 5
[73] CBH, 21 May 2013, p. 5.
[74] CBH, 21 May 2013, p. 5.

Vessel Nomination: CBH submits that the last paragraph in clause 22 contains an unacceptably broad discretion for Emerald 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.[75]

Cargo accumulation: CBH submits that the expectation for clients to accumulate a significant proportion of cargo by rail would appear to allow Emerald to discriminate between up-country supply chains to the advantage of Emerald. CBH submits that it is not clear why this should be permitted in a standard form agreement.[76]

CBH submits that clause 32 provides Emerald with a very broad discretion to discriminate between Customers and to favour its related trading division on grounds which will never be clear to customers.[77]

CBH submits that clause 34 appears to allow Emerald to effectively short ship a customer by not fully accumulating a cargo. CBH submits that if Emerald 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 Emerald as a result of unused capacity.[78]

Vessel loading: CBH submits regarding clause 37 that since Emerald 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.[79]

Vessel Substitution or Delay: CBH submits regarding clause 48 (although the ACCC considers that the concern is meant to relate to clause 47) that the forfeiture of the booking fee when a vessel is delayed by more than 5 days would appear inappropriate in some circumstances. CBH notes that such delay may not impact adversely on the port or that the forfeiture may impact on the port through the cancellation of the vessel. CBH submits that Emerald allocates out a 2 week shipping window at its own discretion.[80]

Dispute resolution: CBH submits regarding clause 50 that the last bullet point provides that Emerald can deliver its reasons and potentially notice of its decision ten business days following the meeting of the Client and Emerald's General Manager. CBH submits that this would appear to be an unacceptably long period in a clause relating to finalising disputes in an expeditious manner.[81]

5.2.3 Emerald's response to third party submissions

Introduction: Emerald acknowledges that clauses 3 and 4 need greater precision. Emerald submits that an Indicative Access Agreement provides Emerald's standard terms and that a SHA is the outcome of negotiations with a client. Emerald submits its intention is for there to be a port SHA and an up-country SHA.[82]

Shipping Stem: Emerald submits regarding clause 6 that the Proposed Undertaking requires Emerald to comply with the Continuous Disclosure Rules under the WEMA.[83]

[75] CBH, 21 May 2013, p. 5.
[76] CBH, 21 May 2013, p. 5.
[77] CBH, 21 May 2013, p. 5.
[78] CBH, 21 May 2013, p. 5.
[79] CBH, 21 May 2013, p. 5.
[80] CBH, 21 May 2013, p. 5.
[81] CBH, 21 May 2013, p. 6
[82] Emerald, 3 July 2013, p. 3.
[83] Emerald, 3 July 2013, p. 3.

Intent to Ship: Emerald submits regarding the third bullet point of clause 12, that like clauses 3 and 4, the distinction between the standard terms and final negotiated terms needs greater precision. Emerald submits regarding the fourth bullet point of clause 12 that the clause remains unchanged from the previous Loading Protocol and has not resulted in any disputes.[84]

Emerald submits regarding clause 13 that making it subject to clause 12 is necessary to allow for the possibility than an earlier received Intent to Ship will be rejected.[85]

Vessel nomination: Emerald submits regarding clause 22 that it is important to Emerald's 'just-in-time' operating model that clients that nominate vessels can perform their obligations to move grain to the terminal. Emerald submits that there is a significant economic cost to the system of non-performance and that Emerald must reserve the right to top up grain movements where the client has fallen down on its commitments. Emerald further submits that it would consult with clients in this process to achieve the most cost effective outcome for both parties and that ultimately if a client cannot perform and does not want assistance with freight, that it has the option to cancel its nomination.[86]

Cargo accumulation: Emerald submits regarding clause 29 that it is clear that rail is a much more efficient mode for achieving maximum throughput. Emerald submits that road delivery will not be excluded but that it is a legitimate economic concern of Emerald that rail must play an important part in the marshalling of stocks.[87]

Emerald submits regarding clause 32 that Emerald is prevented from discriminating in favour of its own trading division by the terms of the Undertaking. Emerald further submits that this clause is substantially unchanged from the 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.[88]

Emerald submits regarding clause 34 that the clause is unchanged from the existing Loading Protocol. Emerald further submits that it cannot recall the clause having been invoked and would only be invoked in exceptional circumstances. Emerald submits that it is a necessary clause to provide Emerald with the ability to mitigate loss.[89]

Vessel loading: Emerald submits regarding clause 37 that this clause is substantially unchanged from the existing Loading Protocol. Emerald submits that the clause adequately lists the factors which will influence loading priority.[90]

Vessel Substitution or Delay: Emerald submits regarding clause 48 that this clause is unchanged from the existing Loading Protocol. Emerald submits that this clause does not deal with the booking fee but rather costs associated with non-performance by the exporter.[91]

Dispute Resolution: Emerald submits that this clause is substantially unchanged from the existing Loading Protocol. Emerald submits its belief that the time allowance is appropriate for an appeal process and the scale of Emerald's operations, particularly given the need to set out the reasons in writing.

5.3 ACCC view

In forming a preliminary view regarding Emerald's proposed management of its port terminal capacity, the ACCC has considered both the appropriateness of the FCFS approach to

[84] Emerald, 3 July 2013, p. 3.
[85] Emerald, 3 July 2013, p. 3.
[86] Emerald, 3 July 2013, p. 3.
[87] Emerald, 3 July 2013, p. 3.
[88] Emerald, 3 July 2013, p. 3.
[89] Emerald, 3 July 2013, p. 4.
[90] Emerald, 3 July 2013, p. 4.
[91] Emerald, 3 July 2013, p. 4.

allocation of capacity and the likely effectiveness of the arrangements set out in Emerald's Loading Protocol. In making its assessment, the ACCC has had regard to the ACCC's previous assessment of Emerald's 2011 undertaking, and Emerald's previous conduct in carrying out capacity management operations.

5.3.1 Overall approach to capacity management

Under the Proposed Undertaking, Emerald proposes to allocate capacity on a FCFS basis, subject to Emerald having the discretion to consider other matters when prioritising booking and changing vessel loading priority for operational reasons. Clients book capacity by lodging an 'Intent to Ship Advice' and paying a non-refundable booking fee.

The FCFS approach to capacity management formed part of Emerald's 2011 Undertaking.

5.3.1.1 Consistent approach to assessing port terminal capacity management

The ACCC is required to form a view regarding capacity management arrangements proposed in the undertakings offered by the four port operators. As the ACCC has previously noted in its assessment of the 2009 and 2011 Undertakings, the ACCC considers that it is desirable that it apply a consistent approach to assessing the proposed approaches put forward to it by port operators.

However, a consistent approach to assessment does not require that all port operators must have identical capacity management systems. The ACCC considers that capacity management arrangements should be assessed for each port operator on the basis of its circumstances. In this context, the ACCC has approved auctions, long term agreements and FCFS approaches to managing bulk wheat port capacity for different port terminal operators.

As such, it is necessary for the ACCC to consider the similarities and differences between the four port operators and the markets in which they operate. Consistent with its previous assessments, the ACCC considers that the relationship between total port elevation capacity and demand, as well as the incentive and ability of vertically integrated port terminal operators to pursue self-preferential treatment, remain important considerations.[92]

5.3.1.2 Emerald port capacity and the east coast wheat export market

In determining whether FCFS is an appropriate capacity management system in the case of Emerald, the ACCC has had regard to Emerald's particular circumstances and the market in which it operates.

The east coast of Australia has a strong domestic market for wheat, in contrast to other markets where exports are dominant, which reduces demand for export capacity at the port terminals. As noted in a 2010 Productivity Commission report into Wheat Export Marketing Arrangements, the bulk wheat export market in the east coast of Australia, and particularly in Victoria, is subject to more competition than other markets.[93]

The ACCC notes that there have been some changes in relation to the circumstances of MPT since the ACCC's decision on Emerald's 2011 undertaking, where it considered that a FCFS system was appropriate in Emerald's case. These include the fact that Emerald has increased the amount of grain that it exports, in a number of cases exceeding its nominal baseline capacity for given months, which may indicate that it is closer to its maximum monthly throughput capacity. However, on an annual basis MPT has not operated at full capacity over the entire year. The ACCC also notes that Emerald's port and trading businesses are now

[92] See, e.g. the discussion in ACCC, *Australian Bulk Alliance Proprietary Limited – Port Terminal Services Access Undertaking – Draft decision*, 11 August 2011.

[93] Productivity Commission 2010, Wheat Export Marketing Arrangements, Report no. 51, p. 68.

more tightly integrated since the former ABA became a fully-owned subsidiary of Emerald Grain.

5.3.1.3 ACCC view on capacity management of Emerald's port terminal services capacity

In addition to an analysis of the factors outlined in the preceding section, the ACCC recognises that the appropriateness, or otherwise, of a particular proposed capacity allocation arrangement depends on, among other things, the effectiveness of existing or past arrangements for the port facilities under consideration. The practice by other operators or in other markets may provide useful intelligence in forming a view as to what is appropriate. However, the ACCC considers that it is the individual circumstances of a particular port operator, including market characteristics, which are of most relevance.

In considering the capacity allocation methodology proposed by Emerald, the ACCC must have regard to the matters listed in ss. 44ZZA(3) of the Act. Subsection 44ZZA(3)(aa) requires the ACCC to have regard to the objects of Part IIIA which include promoting the economically efficient operation of, use of and investment in the infrastructure by which services are provided. Other matters include the legitimate business interests of the provider (ss. 44ZZA(3)(a)) and the interests of persons who might want access to the service (ss. 44ZZA(3)(c)).

The ACCC notes that, as discussed above, some considerations have changed in relation to the market conditions faced by Emerald since its 2011 Undertaking was accepted by the ACCC. These include the increased throughput of the terminal and a greater integration between Emerald's port operations and trading arm. However, the ACCC notes that significant competitive constraint continues to be applied to Emerald through GrainCorp's two Victorian ports, in particular Geelong.

Submissions in response to the ACCC Issues Paper on Emerald's Proposed Undertaking do not raise concerns about Emerald maintaining a FCFS approach to capacity allocation, or suggest that Emerald should be required to introduce an alternative approach. The ACCC has also not received complaints about the operation of the FCFS system over the period of operation of the 2011 Undertaking. The ACCC notes that the costs of introducing an auction system could be high, particularly in the absence of strong industry desire for such a change.

The ACCC is of the preliminary view, having regard to ss. 44ZZA(3) of the CCA, that a FCFS approach to capacity allocation at MPT is likely to remain appropriate. However submissions did raise some concerns regarding the specifics of Emerald's Loading Protocol, which are discussed in section 5.3.4 below.

5.3.2 Conditions for effective FCFS management

This section addresses the capacity allocation system proposed by Emerald as outlined in its Loading Protocol. In its decision on the 2011 Undertakings, the ACCC referred to and repeated its position from decisions on the 2009 Undertakings that it would consider whether the protocols proposed by the bulk handlers provided for:

> … sufficient certainty and clarity in its terms, effect and operation in order to enable the access provider and access seekers to be adequately aware of their respective rights and obligations, and thereby avoid unnecessary costs, monetary or otherwise, when utilising the processes set by the [protocols and undertaking].[94]

The ACCC also repeated its consideration of whether the protocols represented an appropriate balance between providing access seekers with sufficient certainty and clarity and the bulk handlers with sufficient flexibility in their management of Port Terminal Services, and its

[94] ACCC, GrainCorp Decision to Accept, 29 September 2009, pp. 289-90.

recognition that a flexible and pragmatic approach was required to maintain the overall efficiency of the system.[95]

The ACCC is of the view that the same considerations taken by the ACCC in assessing the 2009 and 2011 Undertakings are relevant in assessing Emerald's Proposed Undertaking, having regard to ss. 44ZZA(3) of the CCA.

The ACCC considers that a consistent regulatory approach to the provision of sufficient certainty in the Loading Protocol is appropriate having regard to ss. 44AA(b) of the CCA, and that, while the actual provisions may be different, a similar level of certainty should be required for the protocols of all port terminal services access undertakings.

In its assessment of Emerald's 2011 undertaking, the ACCC was of the view that the FCFS system proposed by Emerald was a broad framework that could apply in an efficient and non-discriminatory way. During the 2011 assessment process, the ACCC required Emerald to make a number of changes to the Undertaking and Loading Protocol in order to ensure that the system put forward by Emerald was appropriate having regard to the matters in ss. 44ZZA(3) of the CCA.

While Emerald's Proposed Undertaking and Loading Protocol maintains the same broad approach as accepted by the ACCC in Emerald's 2011 Undertaking and Protocol, there are a number of changes. In the Issues Paper on Emerald's Proposed Undertaking the ACCC described and sought stakeholder views on the appropriateness of a number of these changes.

The ACCC has further considered and provides its preliminary views on Emerald's proposed IAA regarding the certainty, clarity and appropriateness of its terms, in section 4.3.3.

5.3.3 Information regarding available capacity

A fundamental requirement of the efficient use of port infrastructure is the timely provision of information to access seekers about capacity at the port terminal and the remaining capacity available. Relevantly, clause 11.1 of Emerald's Proposed Undertaking requires it to publish information regarding available capacity.

Information provided on available capacity allows access seekers to assess the availability of capacity against their export needs and to make bookings in required months before all slots are booked. This information is clearly in the interests of access seekers, having regard to ss. 44ZZA(3)(c) of the CCA, and also promotes the efficient use of the port terminal infrastructure, having regard to ss. 44ZZA(3)(aa) of the CCA.

Clause 6 of Emerald's proposed Loading Protocol requires Emerald to provide at least 10 business days notice of the opening of the shipping stem for each year. The ACCC notes CBH's submitted concerns regarding clause 6 that there is no obligation in the Loading Protocol or Undertaking requiring Emerald to publish the amount of capacity being offered at MPT, or clarity around the operation of the non-discrimination and no hindering clauses.

In relation to the second of these points, the ACCC notes that the non-discrimination provisions of the Proposed Undertaking prohibit Emerald from discriminating between different applicants or users in favour of Emerald's own trading arm, except as to costs. In addition, the no hindering provisions prohibit Emerald from engaging in conduct that has the purpose of preventing or hindering access to port terminal services. The ACCC is unclear what further clarification is being suggested by CBH.

In relation to the publication of the amount of capacity available at MPT, the ACCC considers that the provisions requiring Emerald to publish information about capacity and stocks at port to all exporters are in the interests of access seekers and in the public interest of having competition in markets, having regard to ss. 44ZZA(3)(c) and (b) of the CCA.

[95] ACCC, GrainCorp Decision to Accept, 29 September 2009, pp. 289-90.

The ACCC notes that Emerald is required to publish on its website the nominated monthly export 'Baseline Capacity' pursuant to clause 11.1(a) of Emerald's Undertaking. The ACCC notes that clause 6 is substantively the same as in Emerald's 2011 Undertaking. The ACCC has not been notified of any issues associated with the operation of clause 6 throughout the term of the 2011 Undertaking. This suggests that, to date, the clause has provided exporters with sufficient information about available capacity at MPT to allow them to participate in the FCFS mechanism.

That said, in considering the submission made by CBH, the ACCC notes that Emerald has consistently reported a shipping capacity of 90,000 tonnes of capacity a month in its reporting against the requirements in clause 11 of the Undertaking. However, the amounts shipped through MPT have been as high as 184,392 tonnes (in March 2013), and during more than half of the months completed to date the amount shipped has exceeded the nominal capacity. The ACCC also notes that Emerald has signalled an intention to increase its shipping volumes further. Accordingly the ACCC has concerns about the accuracy of the information currently provided by Emerald to the market, and as to whether access seekers are receiving sufficient information about the available capacity at MPT to allow them to accurately assess whether to participate in the FCFS process. As such the current obligations may not have been working as expected.

The ACCC considers that the reporting by Emerald will only usefully provide information to access seekers if it accurately represents the available capacity at MPT, as such reporting may affect the decisions made by access seekers. Accordingly, the ACCC considers that there may need to be amendments made to ensure that available future capacity is conveyed to the market to allow them to participate equally in the FCFS process. This will better ensure that all exporters have the same level of information regarding capacity at port at the same time.

Emerald has proposed amendments in the Draft revision to address this concern. The ACCC considers that the two changes in the draft revision:

- to publish a statement of projected available capacity by month with its notice of the opening of its shipping stem for each year (clause 6 of the Loading Protocol) and

- the monthly publication of available capacity for the following six months on a month by month basis (clause 11.1(a)(iv) of the Undertaking)

would be appropriate and in the interests of access seekers having regard to ss. 44ZZA(3)(c) of the CCA. The ACCC does not consider that publishing this information would be against the legitimate business interests of Emerald.

The ACCC also notes the submitted concern of CBH that Emerald should be required to publish, on a weekly basis, 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 to the largest tonnage at its port terminal. Emerald current reports monthly on its stocks and does not report on the top three types of grain.

Regarding the frequency with which Emerald is required to publish stock at port information, the ACCC considers the monthly reporting obligation that was accepted as part of Emerald's 2011 Undertaking, and rolled over into its Proposed Undertaking, remains appropriate, having regard to the criteria under ss. 44ZZA(3). The ACCC does not consider that there is a clear case for Emerald to report stock information on a weekly basis given MPT's comparatively small storage size and throughput.

Regarding the publication of the top three grades of wheat at MPT the ACCC considers that its assessment as part of the 2011 Undertaking that the publication of this information was not

necessary, given Emerald operates a 'just-in-time' port and has only a small number of up-country storage facilities, remains appropriate.[96]

Further, the ACCC has not been notified of any issues associated with the operation of these provisions throughout the term of the 2011 Undertaking. The ACCC overall considers the publication of information regarding capacity provisions of Emerald's Proposed Undertaking to be appropriate and in the interests of access seekers and the legitimate business interests of Emerald, having regard to ss. 44ZZA(3)(c) and (a) of the CCA.

5.3.4 The substance of the Loading Protocol

Emerald has made a number of changes to the 2011 Protocol. These changes, any submitted concerns on changed and unchanged clauses, and the ACCC's preliminary view as to the appropriateness of the proposed Loading Protocol are set out below.

The ACCC considers that it is appropriate to have regard to its analysis of Emerald's 2011 Undertaking in assessing the proposed terms put forward by Emerald in its Proposed Undertaking. In that assessment, the ACCC considered a range of specific issues about the port loading protocols, including:

- the time of the opening of the stem, the order of handling of intent to ship advices, and the timing of advices by access seekers
- the accumulation of cargo and whether it is fully accumulated
- arrangements for splitting or deferring bookings, and whether bookings should be transferable.

The ACCC required changes to be made to address concerns on these points. The ACCC notes however that such considerations are merely relevant to the ACCC's consideration of the Proposed Undertaking, and that a judgement must be made against the relevant legislative criteria.

5.3.4.1 Introduction

Clarification of terms in the Loading Protocol

The introduction section of Emerald's proposed Loading Protocol makes reference to both SHAs and IAAs.

The ACCC notes CBH's concerns that clauses 3 and 4 (as well as 12) of Emerald's proposed Loading Protocol lack certainty. Specifically, CBH is concerned that it is uncertain whether:

- the documents being referenced are the standard terms or final accepted terms
- these documents are intended to cover port or non-port services.

The ACCC notes that these clauses have appeared to have operated successfully at MPT during the course of Emerald's 2011 Undertaking. However, the ACCC agrees that clauses 3 and 4 as drafted in Emerald's Proposed Undertaking do not clearly identify which document is being referenced and whether that document only applies to port or applies to port and non-port terms. The ACCC considers this lack of certainty to be against the interests of access seekers and therefore considers that these clauses are not appropriate, having regard to ss. 44ZZA(3)(c) of the CCA.

The ACCC notes that Emerald submitted its intention to provide more clarity and certainty about application of the IAA as compared to the SHA in both its supporting submission and

[96] ACCC, ABA Draft Decision, 11 August 2011, p. 52.

response to submissions. Emerald has submitted that the IAA sets out the standard terms, while the SHA is an agreed set of terms.[97]

In its draft revision, Emerald has provided a revised port loading protocol that provides greater clarity in clause 3 around the application of the IAA as opposed to the SHA, as well as making the changes to the IAA discussed in chapter 4. In the ACCC's draft view, the uncertainty raised by CBH appears to have been addressed by the revision to the protocol. At this stage, the ACCC's draft view is that it would accept the revised clause 3 in the protocol.

The ACCC has discussed the application of the IAA to port and non-port terms in Chapter 4 and Appendix B of this Draft Decision.

5.3.4.2 Intent to ship advices and implementation of FCFS

Clauses 12 and 13 of Emerald's proposed Loading Protocol set out Emerald's FCFS approach to booking arrangements and capacity allocation. Clause 13 provides that, subject to clause 12, 'Intent to Ship Advices' will be dealt with in the order that they are received. Clause 12 sets out the matters that Emerald may consider in deciding to accept or reject an 'Intent to Ship Advice'.

The ACCC notes CBH's submitted concern as to level of discretion Emerald has under clauses 12 and 13 to accept an 'Intent to Ship Advice' and the order in which they are dealt with. The ACCC considers clauses 12 and 13 strike an appropriate balance between providing certainty to the access seeker (by specifically setting out the factors that Emerald may consider when deciding whether or not to accept an Intent to Ship Advice) while reserving some discretion for Emerald to consider other relevant factors. The ACCC considers that the clauses clearly set out that a FCFS approach is in place.

The ACCC notes that the level of discretion afforded to Emerald under clauses 12 and 13 is substantively the same as that which was deemed appropriate by the ACCC in its assessment of the 2011 Undertaking. However, the ACCC notes that the 'other matters' criteria now specifically reference matters about efficiency and timeliness of cargo accumulation at port and of loading. While this provides more detail, the ACCC notes that Emerald had such discretion under the previously operating protocols. The ACCC has not been notified of any issues with respect to the unreasonable exercise of this discretion by Emerald over the term of the 2011 Undertaking. Overall, the ACCC remains of the view that clauses 12 and 13 remain appropriate and balance the interests of access seekers and the legitimate business interests of Emerald in managing its port, having regard to ss. 44ZZA(3)(c) and (a) of the CCA.

5.3.4.3 Vessel nomination

Clause 22 of Emerald's proposed Loading Protocol (clause 21 in Emerald's 2011 Undertaking) provides that written nomination of a vessel name must be received at least 30 business days prior to the vessel's ETA. In Emerald's 2011 Undertaking, written nominations needed to be received at least 15 days prior to loading., Under clause 23, Emerald does have discretion to accept vessel nominations received with less than 30 days notice.

Emerald's proposed Loading Protocol makes further changes to clause 22, firstly requiring vessel nominations to be accompanied by an complying cargo assembly plan (detailing the supply chain arrangements to be used to deliver grain to MPT) as well as a discretion in favour of Emerald to, in the absence of a complying cargo assembly plan, arrange for transport of client grain from an Emerald upcountry site (at the cost of the client) or reject the nomination (in which case the client's booking fee will be forfeited).

The ACCC considers the requirement that vessel nomination be at least 30 days prior to the vessel's ETA provides certainty to access seekers and promotes the efficient use of the MPT infrastructure. The ACCC therefore considers the requirement to be appropriate having regarding to ss. 44ZZA(3)(c) and 44ZZA(3)(aa) of the CCA. Emerald's discretion to accept a

[97] Emerald, 3 Jult 2013, p. 3.

vessel nomination provided with less notice will also help to promote both the interests of access seekers and efficient use of the infrastructure.

Regarding the new cargo assembly plan, the ACCC notes that Emerald operates a 'just-in-time' port with relatively limited storage, where grain is only brought to the port when it is ready to be loaded onto a vessel. Certainty over how and when bulk wheat is to be delivered to the MPT is therefore an important aspect of overall capacity management. In that context, the ACCC considers the use of cargo assembly plans to be appropriate, in the legitimate business interests of Emerald and likely to promote the efficient use of the MPT infrastructure having regard to ss. 44ZZA(3)(c) and 44ZZA(3)(aa) of the CCA. The ACCC notes that no stakeholders have raised any concerns about the requirements for a cargo assembly plan, and other port operators similarly require information to be provided about accumulation.

However, the ACCC notes CBH's concern about the breadth of the new discretion that Emerald may exercise if a client does not provide a complying cargo assembly plan. Emerald has stated in response that it would consult with access seekers before exercising this discretion, but the ACCC notes that that this is not contained in the clause.

The ACCC recognises the need for Emerald to have the ability to manage port operations to achieve supply chain efficiencies, providing that a booking on the Emerald stem provides shippers with a reasonable degree of certainty regarding the booked services. The ACCC considers that it is reasonable to require clients to provide a cargo assembly plan. It also considers that it is appropriate for Emerald to have reasonable discretion to make alternative arrangements in the event of non-performance in order to mitigate economic loss. The ACCC is concerned however that this new discretion, as presently drafted, does not require prior consultation with a client about potential alternative arrangements and the associated costs. The ACCC is concerned that the clause therefore does not provide access seekers with an appropriate degree of certainty. In particular the ACCC is concerned about the ability of Emerald to reject the nomination and require the forfeit of the booking fee, which may be a significant financial cost to the access seeker. In its response to submissions, Emerald noted that it would consult with clients to achieve the most cost effective outcome for both parties. The ACCC considers it appropriate that this obligation to consult be expressly included in clause 22 in the interest of access seekers, having regard to ss. 44ZZA(3)(c) of the CCA. The ACCC also considers that there should be some limit on the discretion given to Emerald such that the discretion may only be exercised if necessary, having given reasonable consideration to the efficiency and timeliness of cargo accumulation at port and of loading.

Emerald has proposed changes in the draft revision in response to this view. The clause states that Emerald will consult with the client and that the client will have an opportunity to redress its failure to provide a complying cargo assembly plan. It also states that Emerald's ability to arrange for the transport of grain from up-country or reject the nomination would only arise if the non-compliance will impact on port operations. The ACCC considers that the draft revision places an appropriate limit on the discretion. Therefore the ACCC considers clause 22 of the Loading Protocol, as amended in the draft revision, would be appropriate and in the interests of Emerald and access seekers having regard to ss. 44ZZA(3)(a) and (c) of the CCA.

5.3.4.4 Cargo accumulation

The ACCC considers that the protocols concerning cargo accumulation need to be relatively certain and precise, as well as allowing only a reasonable amount of discretion to Emerald as port operator.

Rail accumulation

A new clause 29 in Emerald's proposed Loading Protocol provides that the accumulation of a significant proportion of cargo by rail will be expected to be an important component of the execution of the cargo assembly plan. The clause does not specify a particular percentage of cargo that needs to be accumulated by rail. Other provisions in relation to cargo accumulation are not changed substantively (other than as discussed below).

The ACCC notes CBH's submitted concern that clause 29 would appear to allow Emerald to discriminate between up-country supply chains to the advantage of Emerald Group.

The ACCC considers that there are two related issues for consideration. Firstly, whether the clause is sufficiently precise to provide certainty to access seekers as to their requirements. Secondly, whether it is appropriate to allow an access provider to require certain logistics approaches to be used.

In relation to the first point, the ACCC notes that there is some uncertainty about the obligation to accumulate a 'significant proportion' of cargo by rail, as the meaning of significant proportion is not defined. Essentially this affords Emerald with a broad discretion, which may be exercised against the interests of access seekers. While the ACCC understands that more precise obligations could be negotiated within access agreements, the ACCC considers that it may be appropriate for Emerald to also specify the requirement more precisely in the protocols, or for the protocols to explicitly state that the significant proportion will be agreed between the parties.

The draft revision provides that the significant proportion involves a target minimum of 50%. The ACCC considers that this provides a greater degree of certainty to access seekers than exists in the Proposed Undertaking. However the ACCC seeks stakeholder views as to the appropriateness of the amended clause 29.

In relation to the second point, in assessing the appropriateness of a capacity management system, the ACCC must have regard to, among other things, the interests of individual access seekers, the access provider and the interest of the public, which includes the interest of competition more generally. This assessment includes the interests of all exporters, of all sizes, with varying reliance on rail and road accumulation. The ACCC understands that Emerald have similar requirements about the use of rail in place with access seekers at present. The ACCC is not aware that there is difficulty faced by access seekers in accumulating grain at MPT by rail. The ACCC as such considers that it is unclear that having a rail requirement would be detrimental to competition generally (although it may cause some difficulties or be different to the normal approach of particular access seekers). However this view could be different if the clause required a particularly onerous level of rail accumulation to take place.

The ACCC also considers that a discretionary requirement for a significant proportion of cargo to be accumulated by rail provides Emerald with the commercial flexibility to prioritise its most efficient accumulation method and the optimisation of the MPT throughput. This will help to meet Emerald's legitimate business interests and help with the efficiency of the port terminal.

The ACCC notes generally that Emerald would be including this proposed clause in the context of competitive constraint from GrainCorp's Geelong facility, a constraint that would require Emerald to balance throughput efficiency with the competitiveness of the MPT facility to both rail- and road-using access seekers. Such a discretionary requirement may not be appropriate in markets absent such a competitive constraint.

The ACCC must also have regard to the objects of Part IIIA, which includes the economically efficient operation and use of the port facilities. The ACCC considers that an approach to cargo accumulation that helps maximise the throughput of a port facility is likely to help achieve the economically efficient operation and use of the port facilities. The ACCC overall considers Emerald's discretion under clause 29 promotes the objects of Part IIIA, in accordance with ss.44ZZA(3)(aa).

Overall, in Emerald's particular circumstances, the ACCC considers a requirement to accumulate by rail to be appropriate having regard to ss. 44ZZA(3)(c) of the CCA, as long as that requirement is adequately defined and is not onerous. The ACCC notes the potential uncertainty or discretion that is afforded to Emerald by the current wording, and considers that more information in the clause is desirable. However, on the whole the ACCC considers a rail requirement to be appropriate.

The ACCC further notes that Emerald is prohibited from discriminating between different applicants or users in favour of its own trading business, except as to costs, by clause 6.4(a) of Emerald's Proposed Undertaking.

Issues for comment

- *Does the inclusion of the qualification 'target minimum 50% provide greater clarity as to what represents 'a significant' proportion of cargo by rail? Is clause 29 of the Loading Protocol in Emerald's draft revision appropriate having regard to the interests of the port operator and of access seekers?*

Presence of stock swaps as a factor Emerald may consider in determining the order of cargo accumulation and vessel loading

Clause 32 of Emerald's proposed Loading Protocol adds agreed stock swaps between clients as a factor that Emerald may take into account in determining the order of cargo accumulation at MPT. Similarly, clause 37 of Emerald's proposed Loading Protocol introduces the presence of agreed stock swaps between clients as a factor that Emerald may take into account in determining the order of cargo accumulation at MPT.

The ACCC notes CBH's submitted concern that clause 32 allows Emerald a very broad discretion to discriminate between customers and to favour its related trading division on grounds that will never be clear to customers. CBH also submits that, given MPT has limited storage, the order of cargo accumulation and then vessel loading should primarily be determined by 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 subsequent vessels.

Regarding the introduction of stock swap agreements as a factor, the ACCC notes the presence of the term 'agreed stock swaps'. The ACCC repeats its preliminary view, as stated in Chapter 4, that it would be appropriate that the stock swapping arrangements in Emerald's proposed IAA require the agreement of both parties, and notes the further amendments proposed by Emerald to the IAA in that regard.

Regarding CBH's concern, the ACCC notes that the addition of stock swaps as a factor is the only substantive change to the equivalent clause in Emerald's 2011 Undertaking.[98] The ACCC has not been notified of any concerns with respect to the unreasonable exercise of this discretion by Emerald. The ACCC considers that the list of factors that Emerald may consider in determining the order of cargo accumulation and vessel loading appropriately balances the interests of Emerald in having sufficient discretion to efficiently manage the port terminal, and the interests of access seekers in having sufficient transparency regarding the terms of access, in accordance with ss. 44ZZ(3)(b) and (c). The ACCC further notes that Emerald is prohibited from discriminating between different applicants or users in favour of its own trading arm, except as to costs, by clause 6.4(a) of Emerald's Proposed Undertaking.

Circumstances in which Emerald is entitled not to fully accumulate a cargo

Clause 34 of Emerald's proposed Loading Protocol states that Emerald reserves the right not to fully accumulate a cargo in order to maximise all client vessel turnarounds where multiple vessels are arriving in a short time frame.

The ACCC notes CBH's submission that clause 34 would allow Emerald to effectively short ship a customer and in doing so potentially render a customer to be in default of its contract.

The ACCC considers that it is appropriate for Emerald to have reasonable discretion not to fully accumulate a cargo where the client fails to accumulate grain within agreed timeframes.

[98] ABA, 2011 Undertaking, Port Loading Protocol, Clause 28.

Clause 2 of Emerald's Loading Protocol states that Emerald has limited port storage, operates on a 'just-in-time' basis and that at all times operates with the overriding objective to maximise export throughput and operational efficiencies. Consistent with its views in relation to Emerald's 2011 Undertaking, the ACCC considers that clause 2, in conjunction with the non-discrimination and no hindering access clauses in the Proposed Undertaking, should provide sufficient certainty to access seekers and prevent unreasonable exercise of this discretion by Emerald.

Clause 34 of the proposed Loading Protocol is substantively the same as the equivalent provision in Emerald's 2011 Undertaking.[99] Further, the ACCC has not been notified of any issues associated with the unreasonable exercise of this discretion by Emerald. The ACCC overall considers clause 34 to be appropriate and in the interests of access seekers and the legitimate interests of Emerald, having regard to ss. 44ZZA(3)(c) and (a) of the CCA.

5.3.4.5 Vessel Substitution or Delay

Clause 47 of Emerald's proposed Loading Protocol provides that a client's booking fee will be forfeited in the event that a vessel is substituted or delayed and the substituted vessel ETA or revised ETA is greater than 5 days from the original ETA.

The ACCC notes the concern submitted by CBH regarding clause 47 (although expressed as concerning clause 48) that it may not be appropriate that the booking fee is forfeited for late arrival when such a delay may not impact adversely on the port or where the forfeiture itself may have a greater impact on the port.

Clause 47 of the proposed Loading Protocol is substantively the same as the equivalent provision in Emerald's 2011 Undertaking,[100] and the ACCC has not been notified of any issues associated with the exercising of the discretion in this clause. That said, the ACCC notes that there is no discretion or limits contained in the clause – that is, the booking fee will be forfeited if the substituted or revised ETA is more than five days away from the original ETA, without any assessment of the impact of that change. The ACCC considers that this may not be in the interests of access seekers. On the other hand, the ACCC considers that there should be a reasonable discretion in clause 47 for Emerald to manage its port operations and that the clause should provide access seekers with certainty as to the terms of access. The ACCC accordingly considers that, while the clause is broadly appropriate, it should contain a requirement that the relevant change from the ETA will have an impact on the efficient operation of the port, and/or that Emerald may elect to not require the booking fee to be forfeited in certain circumstances. If such a change was made, the ACCC would be minded to consider clause 47 to be appropriate and in the legitimate business interests of Emerald and the interests of access seekers in accordance with ss. 44ZZA(3)(a) and (c) of the CCA.

The draft revision provides that Emerald may exercise the discretion if it has a reasonably held opinion that the delay would cause significant disruption to the shipping stem. The ACCC therefore considers clause 47 in the draft revision to be appropriate.

5.3.4.6 Dispute resolution

Clause 50 of Emerald's proposed Loading Protocol sets out the procedures that will apply in the event that a client disputes Emerald's adherence to the Protocol.

The ACCC notes CBH's submitted concern that clause 50 allows Emerald to deliver reasons and potentially notice of its decision in what CBH submits is an unreasonably long 10 business days following the meeting of the Client and Emerald's General Manager.

[99] ABA, 2011 Protocol, clause 34.
[100] ABA, 2011 Protocol, 46.

Clause 50 of the proposed Loading Protocol is substantively the same as the equivalent provision in Emerald's 2011 Undertaking.[101] The ACCC considers the 10 business day decision making period provides access seekers with certainty regarding the operation of the dispute resolution process, and does not consider that there is evidence that the length of time is inappropriate or would lead to problems. That said, the ACCC notes that other time periods in the clause are all either one or two business days. The ACCC has not been notified of any issues associated with the timeliness of dispute resolution in practice under this clause, and notes that the 10 days is a maximum period. The ACCC overall has a preliminary view that it considers clause 50 to be appropriate in ensuring that the dispute resolution process reflects the interests of access seekers in achieving a timely response to disputes, having regarding to ss. 44ZZA(3)(c) of the CCA.

5.3.5 Variation of the Loading Protocol

In its assessment of Emerald's 2011 Undertaking, and in the 2011 Undertakings more generally, the ACCC set out certain minimum standards for the process by which a port terminal operator may vary its protocols. The ACCC considered these standards were necessary to ensure an efficient, meaningful and transparent consultation process for access seekers in accordance with ss. 44ZZA(3)(c). The ACCC took the view that these standards should apply consistently to the four port terminal operators' undertakings (having regard to ss. 44ZZA(3)(aa) and (e) which promotes consistency in access regulation across industry).[102] The ACCC required that the port loading protocols be a comprehensive statement of the relevant port loading procedures at the port, that there be a clear process for varying the protocols, and that the ACCC have an objection role in the variation process.

The provisions relating to the variation of Emerald's Loading Protocol in clause 10.3 of Emerald's Proposed Undertaking are substantively the same as those contained in Emerald's 2011 Undertaking. Further, the ACCC has not been notified of any issues associated with the operation of these provisions, and understands that the protocols have not needed to be amended since the ACCC accepted the 2011 Undertaking. The ACCC's draft view is that the Loading Protocol variation provisions of Emerald's Proposed Undertaking continue to be appropriate, having regard to the interests of access seekers and the legitimate business interests of Emerald having regard to ss. 44ZZA(3)(c) and (a) of the CCA.

[101] ABA, 2011 Protocol, 48

[102] For full discussion of these standards, see ABA, Decision to Accept, 2011, pp. 25-27.

6 Conclusion

In relation to the Proposed Undertaking given to the ACCC by Emerald on 26 March 2013, the ACCC's preliminary view is that, having regard to the matters listed in ss. 44ZZA(3) of the Act, it would not be appropriate to accept the Proposed Undertaking.

As a result, the ACCC's Draft Decision is that it should not accept the Proposed Undertaking in its current form. The ACCC has provided its draft views throughout this document on provisions that would not be appropriate.

However, the ACCC considers that the Proposed Undertaking is likely to be appropriate if it was amended in accordance with the draft revision. The amendments are based on concerns raised by the ACCC and stakeholders.

The ACCC seeks views on its Draft Decision. The ACCC also seeks views on Emerald's draft revision of its Proposed Undertaking (including the revised IAA and Port Loading Protocol).

Appendices

A Appendix : Legislative Framework

The *Wheat Export Marketing Act 2008* (Cth) (**the WEMA**) came into effect on 1 July 2008. The WEMA and associated transitional legislation replaced the Export Wheat Commission with a new statutory body, Wheat Exports Australia, which was given the power to develop, administer and enforce an accreditation scheme for bulk wheat exports, including the power to grant, vary, suspend or cancel an accreditation.[103]

Recent amendments to the WEMA saw the Wheat Export Accreditation Scheme and the Wheat Export Charge abolished on 10 December 2012, and Wheat Export Australia wound up on 31 December 2012. As per these recent amendments, the WEMA will be repealed on 1 October 2014 on condition that a mandatory code of conduct has been declared under section 51AE of the CCA by this date.

Parties seeking to export bulk wheat from Australia are required to pass the 'access test' in the WEMA until 30 September 2014. The access test, set out in section 9 of the WEMA, will be satisfied if either:

- the ACCC has accepted from a person who owns or operates a port terminal facility used to provide a port terminal service an access undertaking under Division 6 of Part IIIA of the CCA, and that undertaking relates to the provision to wheat exporters of access to the port terminal service for purposes relating to the export of wheat; and the access undertaking obliges the person to comply, at that time, with the continuous disclosure rules[104] in relation to the port terminal service; and at that time, the person complies with the continuous disclosure rules in relation to the port terminal service; or
- there is in force a decision under Division 2A of Part IIIA of the CCA that a regime established by a State or Territory for access to the port terminal service is an 'effective access regime'; and under that regime, wheat exporters have access to the port terminal service for the purposes relating to the export of wheat; and at that time, the person complies with the continuous disclose rules in relation to the port terminal service.

A.1 Legal test for accepting an access undertaking

Part IIIA of the CCA establishes a regime to assist third parties to obtain access to services provided through certain facilities in order to promote competition in upstream or downstream markets.

Part IIIA provides three main mechanisms by which access can be obtained to infrastructure:

- declaration of a service (under section 44H) and arbitration (under section 44V);
- access undertakings and access codes (under sections 44ZZA and 44ZZAA respectively); and
- decision that a State or Territory access regime is effective (under section 44N).

[103] The relevant transitional legislation is the *Wheat Export Marketing (Repeal and Consequential Amendments) Act 2008* (Cth).

[104] In summary, the continuous disclosure rules require port terminal operators to publish on their website their policies and procedures for managing demand for port terminal services; a statement, updated daily, setting out, amongst other things, the name of each ship scheduled to load grain using port terminal services, the estimated date on which grain will be loaded into the ship (if known), the date on which the ship was nominated and the date on which the nomination was accepted (this statement is termed the 'Loading Statement').

In relation to access undertakings, a provider of a service (or a person who expects to be the provider of a service) may give an undertaking to the ACCC in connection with the provision of access to the service. An undertaking may specify the terms and conditions on which access will be made available to third parties. The ACCC may accept the undertaking if it thinks appropriate to do so after considering the matters set out in subsection 44ZZA(3).

If the ACCC accepts the undertaking, the provider is required to offer a third party access in accordance with the undertaking. An access undertaking is binding on the access provider and is able to be enforced in the Federal Court upon application by the ACCC.

An undertaking may be withdrawn or varied at any time, but only with the ACCC's consent.

In assessing a proposed access undertaking under Part IIIA of the CCA, the ACCC must apply the test set out in subsection 44ZZA(3), which provides that the ACCC may accept the undertaking if it thinks it appropriate to do so, having regard to the following matters:

- the objects of Part IIIA of the CCA, which are to:
    - promote the economically efficient operation of, use of and investment in the infrastructure by which services are provided, thereby promoting effective competition in upstream and downstream markets; and
    - provide a framework and guiding principles to encourage a consistent approach to access regulation in each industry;
- the 'pricing principles' specified in section 44ZZCA of the CCA (see further below);
- the legitimate business interests of the provider of the service;
- the public interest, including the public interest in having competition in markets (whether or not in Australia);
- the interests of persons who might want access to the service;
- whether the undertaking is in accordance with an access code that applies to the service; and
- any other matters that the ACCC thinks are relevant.

In relation to the pricing principles, section 44ZZCA of the CCA provides that regulated access prices should:

- be set so as to generate expected revenue for a regulated service that is at least sufficient to meet the efficient costs of providing access to the regulated service or services; and
- include a return on investment commensurate with the regulatory and commercial risks involved; and

and that access price structures should:

- allow multi-part pricing and price discrimination when it aids efficiency; and
- not allow a vertically integrated access provider to set terms and conditions that discriminate in favour of its downstream operations, except to the extent that the cost of providing access to other operators is higher; and
- access pricing regimes should provide incentives to reduce costs or otherwise improve productivity.

Other matters the ACCC thinks are relevant – the WEMA

In accepting Emerald's 2011 Undertaking, the ACCC considered that the regulatory scheme established by the *Wheat Export Marketing Act 2008* (Cth) (**WEMA**), and the rationale for the inclusion of the access test in the statute were, under subsection 44ZZA(3)(e) of the CCA, matters relevant to the decision. The ACCC considers that government policy, as reflected in the regulatory scheme established by the WEMA and the rationale for the access test are matters that are relevant to the current decision on whether to accept Emerald's Proposed Undertaking.

In particular, the ACCC acknowledges the government's objectives in introducing the access test in 2008, and in deciding to continue the access test when it amended the WEMA in December 2012. Specifically, the WEMA access test is:

> ...intended to ensure that owners, operators or controllers of port terminal facilities that also export bulk wheat, or have associated entities that do, provide fair and transparent access to their facilities to other exporters. The access test aims to avoid regional monopolies unfairly controlling infrastructure necessary to export wheat in bulk quantities, to the detriment of other bulk wheat exporters. All bulk wheat exporters should have access to these facilities while allowing the operators of the facility to function in a commercial environment.[105]

Further, in the second reading speech regarding the introduction of the WEMA, the Minister stated that "unless all exporters can obtain access to these critical facilities on fair and reasonable terms then one of the major objectives of the policy could be frustrated."[106]

In accepting undertakings from wheat port terminal service operators in 2009 and 2011, the ACCC acknowledged the WEMA was introduced to promote competition in the export of bulk wheat, which has various dimensions including:

- the promotion of competition between marketers for the acquisition of bulk wheat from growers;
- the promotion of competition between exporters for the export of wheat from Australia; and
- the concomitant promotion of competition for associated products and services, such as supply chain services and grower services.

The ACCC also acknowledged that the promotion of competition in the form described may potentially be limited by anti-competitive conduct associated with port terminal facilities, and that the inclusion of the access test demonstrates a clear intention to legislate measures to mitigate the possibility of such conduct undermining the broader intent of the legislation.

The ACCC notes that since accepting Emerald's 2011 Undertaking, amendments to the WEMA have been introduced which stipulate that the access test will be removed on 1 October 2014, subject to there being in place a mandatory code of conduct covering grain export port terminal operators. The code must:

- deal with the fair and transparent provision to wheat exporters of access to port terminal services; and
- be consistent with the operation of an efficient and profitable wheat export marketing industry that supports the competitiveness of all sectors through the supply chain.[107]

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105 Commonwealth, *Revised Explanatory Memorandum - Wheat Export Marketing Amendment Bill 2012*, Senate, p. 6.

106 Commonwealth, *Parliamentary Debates,* House of Representatives, 29 May 2008, 3860 (Tony Burke, Minister for Agriculture).

The intent of the code reinforces that the promotion of competition may potentially be limited by anti-competitive conduct associated with port terminal facilities.

The ACCC considers that the policy intentions as reflected in the WEMA remain relevant to Emerald's 2011 Undertaking and are relevant factors for the ACCC to consider in deciding whether to accept the Proposed Undertaking, pursuant to subsection 44ZZA(3)(e) of the CCA.

A.2 Timeframes for ACCC decisions and stopping the clock

Subsection 44ZZBC(1) of the CCA provides that the ACCC must make a decision on an access undertaking application within the period of 180 days starting at the start of the day the application is received (referred to as 'the expected period').

If the ACCC does not publish a decision on an access undertaking under section 44ZZBE of the CCA within the expected period, it is taken, immediately after the end of the expected period, to have:

- made a decision to not accept the application; and
- published its decision under section 44ZZBE and its reasons for that decision: see subsection 44ZZBC(6).

Subsection 44ZZBC(2) of the CCA provides for 'clock-stoppers', which means that certain time periods are not taken into account when determining the expected period. In particular, the ACCC may disregard a period:

- by written agreement between the ACCC and the access provider (in this case Emerald), and such agreement must be published: subsections 44ZZBC(4) & (5);
- if the ACCC gives a notice under subsection 44ZZBCA(1) requesting information in relation to the application;
- if a notice is published under subsection 44ZZBD(1) inviting public submissions in relation to the application;
- a decision is published under subsection 44ZZCB(4) deferring consideration of whether to accept the access undertaking, in whole or in part, while the ACCC arbitrates an access dispute.

A.3 Amendment notices

Subsection 44ZZAAA(1) provides that the ACCC may give an 'amendment notice' in relation to an undertaking before deciding whether to accept the undertaking.

An 'amendment notice' is a notice in writing to the access provider that specifies:

- the nature of the amendment or amendments (the 'proposed amendment or amendments') that the ACCC proposes be made to the undertaking; and

[107] These are the two of the criteria that the Minister for Agriculture, Fisheries and Forestry must be satisfied that the code of conduct meets before approving the code, as set out in section 12 of the *Wheat Export Marketing Act 2008*, p. 14.

- the ACCC's reasons for the proposed amendment or amendments; and the period (the 'response period') within which the person may respond to the notice,

- which must be at least 14 days after the day the notice was given to the person: see subsection 44ZZAAA(2).

An access provider may give a revised undertaking in response to the notice (within the response period), incorporating amendments suggested in the notice, and provided that undertaking is not returned to the provider by the ACCC, that revised undertaking is taken to be the undertaking the ACCC is assessing under Part IIIA: see subsections 44ZZAAA(5) & (7). In other words, the access provider may 'swap over' the revised undertaking for the original undertaking if it agrees to the amendments suggested by the ACCC in the notice.

If the access provider does not respond to the notice within the response period, it is taken to have not agreed to the proposed amendment: subsection 44ZZAAA(8). If the access provider provides a revised undertaking that incorporates one or more amendments that the ACCC considers are not of the nature proposed in the amendment notice, and which do not address the reasons for the proposed amendments given in the amendment notice, the ACCC must not accept the revised undertaking and must return it to the provider within 21 days of receiving it: subsection 44ZZAAA(6).

The ACCC is not required to accept the revised undertaking under section 44ZZA even when it incorporates amendments (see subsection 44ZZAAA(9)) and does not have a duty to propose amendments when considering whether to accept the undertaking (see subsection 44ZZAAA(10).

B Appendix: CBH's submission regarding the proposed IAA

This appendix contains the ACCC's analysis in relation to comments raised by CBH on the proposed indicative access agreement put forward by Emerald.

As noted in Chapter 4 of this report, the ACCC generally considers in relation to IAAs that the terms in the agreements are intended to represent a minimum standard and that access seekers have the ability to negotiate or arbitrate based on their own particular considerations and circumstances. Accordingly, the ACCC has not formed a view on whether the terms and conditions of the IAAs would be acceptable to particular parties. As a minimum standard, the ACCC does consider that it is necessary for IAAs to ensure:

- the inclusion of a robust dispute resolution process that balances the legitimate business interests of the port terminal operator with the interests of access seekers
- any ability of the port operator to unilaterally vary the terms of an executed IAA is only to be exercised in appropriate circumstances
- the terms and conditions of the IAA must provide for sufficient certainty and clarity in their terms, effect and operation.

As noted in chapter 4, the IAA includes a robust dispute resolution process and appropriately limits the ability of the port operator to unilaterally vary the terms of an executed IAA.

As such, the ACCC has focused on the terms and conditions of the IAA for certainty and clarity, and to see if they represent an appropriate minimum standard. The following analysis examines the 38 submissions made by CBH in relation to the clauses of the IAA. The ACCC has grouped CBH's submissions together below where the ACCC considers that the considerations are broadly similar.

In making an assessment of the issues raised by CBH, the ACCC has been mindful that access seekers have recourse to arbitration on their terms of access if they cannot agree with the port operator.

The ACCC notes that Emerald has provided a revised proposed IAA that it submits would address certain of the concerns expressed by CBH. Where relevant, the ACCC has noted the changes in the below discussion.

B.1 Clarity of port v non-port

Several concerns raised by CBH relate to uncertainty about whether the IAA only deals with port facilities. These include concerns about:

- 1.1 – the definition of facilities

The ACCC notes the concerns about the clarity of the application of the IAA to port and non-port facilities in Chapter 4 of this decision. The ACCC agrees that there would be benefit to greater clarity in that regard. The ACCC has discussed this issue in Chapter 4 of this document and notes that Emerald has provided revised terms concerning this issue.

B.2 Liability and indemnity

A number of the concerns raised by CBH relate to clauses where Emerald seeks to limits its liability for certain actions, or to receive an indemnity from access seekers for potential liabilities.

This includes the following clauses:

- 4.4 – indemnity in relation to receival standards
- 6.2(c) – indemnity in relation to grain movement orders and quality specifications
- 7.5 – indemnity in relation to claims made by parties with security holdings over access seeker grain
- 8.2 – indemnity for late transport arrivals
- 8.3 – client accepts risk of transport used
- 10.3 – Emerald's right to use grain as bailee
- 11.6 – right to invoice for unpaid charges
- 13.2 – liens over grain
- 14.1 – security requirements
- 16.1 – outturn obligations
- 17 – indemnity for losses caused by breach by client

The above clauses all variously limit the liability of Emerald, require the access seeker to indemnify Emerald against certain types of loss, provide Emerald with some intangible right over the access seeker's grain or allow for the invoicing of charges. CBH raises concerns about whether these terms are appropriate or may give Emerald too broad a right, or too much discretion in exercising that right, over the access seeker.

The ACCC notes that, generally, the above clauses will protect the legitimate business interests of Emerald as the access provider, as set out in s.44ZZA(3)(a), but tend to act against the interests of access seekers, as set out in ss. 44ZZA(3)(c). Accordingly the ACCC must consider these matters in deciding whether the clauses are appropriate minimum standards for the IAA.

The ACCC has taken the view in its decision on Emerald's 2011 undertaking, and in relation to undertakings accepted from other PTOs, that certain aspects of IAAs are commercial issues to be negotiated between parties to the agreement.[108] This reflects the fact that the standard terms, as set out in the IAA, represent the starting point for negotiations only, and that all elements of the IAA are subject to negotiation.

While noting that CBH raises several concerns about the clauses in the IAA, the ACCC notes that, with the exception of clause 6.2(c), 14.1 and 17, these clauses are all in substance the same as the clauses in the IAA that currently operates at Emerald's port. The ACCC has not received any submissions expressing concern in relation to how the equivalent clauses in existing access agreements have operated in practice. As such, the ACCC does not have reason to believe that the current arrangements are causing difficulty for access seekers. Certain changes also seem to be in favour of the access seeker. For example, Emerald has also increased its liability limits from $100,000 in total and $30,000 per event to $250,000 and $100,000 in clause 16.3(c), and has removed one of the areas of indemnity in clause 17.

In relation to the changed clause 14.1, the ACCC notes CBH's submission that the opinion of Emerald should be required to be reasonably formed in order to require guarantees from the access seeker. The ACCC agrees with this view and considers that Emerald's clause should be amended in this regard, to better reflect the interests of access seekers, as it would better

[108] See, e.g. ACCC, Australian Bulk Alliance Proprietary Limited Port Terminal Services Access Undertaking – Draft decision, 11 August 2011, p. 37.

reflect an appropriate minimum standard. Emerald has made a change to that effect in its draft revision.

Overall, the ACCC continues to be of the view that liability and indemnity are commercial issues that are suited to commercial negotiation between the port terminal operator and access seeker. As such, the ACCC has not formed a view as to whether the above clauses are appropriate in all cases and whether the clauses will be appropriate to all parties. The ACCC's view on this is informed by the fact that the IAA terms are negotiable, and that access seekers may make use of the dispute resolution procedures in the Undertaking, or of the recourse to arbitration by the ACCC.

B.3 Technical operations

Several of the concerns raised by CBH relate to clauses dealing with technical issues such as the testing or measuring of grain:

- 1.1 – the definition of receival standards and sampling methods, and Emerald's ability to change the standards or methods used
- 5.8 – the tolerances used in testing
- 5.9 – allowances for mould and gas levels
- 6.11 – the quality standards and grades of barley
- 7.7 – use of individual weighnote level for calculating grain value for in-store transfers
- 9.4 – moisture conditioning
- 12.3 – record-keeping
- 25.1 – assisting with licences

The ACCC notes that the above clauses relate to a variety of issues, largely relating to the way that grain is tested and measured within Emerald's facility. The ACCC is of the view that the appropriate consideration of such clauses is largely related to whether the above clauses appropriately account for the interests of access seekers and of Emerald.

The ACCC notes that CBH's submissions are by and large in relation to clauses that have operated under the existing IAA, with only clause 9.4, regarding the use of moisture conditioning, being a substantive change. The ACCC is not aware of any concerns with the way that these provisions have operated to date in relation to exporters obtaining access to MPT. The ACCC notes again that that the standard terms, as set out in the IAA, represent the starting point for negotiations only, and that all elements of the IAA are subject to negotiation.

In relation to such clauses, the ACCC is generally of the view that conditions about testing and receival standards are issues of a commercial and technical nature. The ACCC does not propose to reach a view as to whether the particular approach used by Emerald is an appropriate one for particular access seekers. The ACCC is of the view that such issues may be subject to negotiation. The ACCC is also of the view that, to the extent such provisions may reflect practice across all access seekers, Emerald possesses a lower degree of market power in a more competitive marketplace. Specifically, access seekers may elect not to use Emerald's port facility given the competition provided by GrainCorp in Geelong.

However, the ACCC notes the concerns of CBH in relation to clauses 5.9 (and 8.1, discussed below) that certain standards may not be consistent between the IAA, receival standards and outturn protocol. The ACCC is of the view that standards for testing should be consistent between different protocols, for the certainty and clarity of the IAA. As such, the ACCC is of the view that Emerald will need to ensure that its standards are consistent with each other. The ACCC notes that Emerald has made a change in its draft revision to remove the specific allowances mentioned in clauses 5.8 and 5.9 and replace them with a reference to the Outturn protocols.

To the extent that the concerns in relation to clause 1.1 relate to an ability by Emerald to alter standards at strategic times or employ non-standard testing procedures, the ACCC notes that it has not received any complaints about such behaviour to date and that Emerald is restricted by its non-discrimination obligations. In relation to the new clause about moisture conditioning, the ACCC notes that CBH's concerns largely relate to the possible effect on grain and weighing procedures. The ACCC considers that these are issues best dealt with by commercial negotiation.

Overall, the ACCC proposes to accept the terms currently employed in the IAA as appropriately representing a starting point for negotiations. It notes the clauses 7.7 and 12.3 are not retained in Emerald's proposed revised IAA as part of the draft revision.

B.4 Logistics / Outturn / Movements

Certain of CBH's concerns relate to the way that grain is moved within Emerald's network or outturned from Emerald's facilities.

- 6.4 – communication of information about grain being delivered to Emerald storages
- 6.6 – movement of grain between Emerald facilities
- 6.8 and 6.9 – outturn of grain at the end of the period of the IAA
- 7.3 – outturn of grain from non-port facilities
- 7.11 – outturn of grain from facilities
- 7.12 – swapping of grain entitlement between non-port facilities
- 7.13 – the ending of Emerald's responsibilities on out-turn
- 8.1 – outturn protocols where Emerald is the logistics provider

This set of issues raised by CBH relate to the movement of grain and logistics arrangements, and the prices and costs that are related to such movements. The ACCC notes that the way that a particular access seeker's grain is handled by Emerald, and the respective obligations of each party to such an agreement, could be of significant concern to an access seeker, and may act against their interests. Equally, a greater ability for Emerald to require a particular approach to moving of grain may be in the legitimate business interests of Emerald, and may contribute to the efficient running of the port terminal. The ACCC notes that it will be necessary for a port terminal operator and access seeker to have established certain procedures about how grain is stored and moved within and to the port.

The ACCC notes that many of CBH's concerns relate to the potential lack of clarity in relation to the application of these clauses to port facilities vs up-country facilities. As noted above and in Chapter 4, the ACCC agrees that it is desirable that the IAA clearly separate out its application to up country and port facilities. Many of the requirements that are raised by CBH would appear to apply largely to up country facilities. The ACCC notes that Emerald's revised proposed IAA in its draft revision deletes clause 6.4, 6.6, 6.8, 7.11, 7.12 and 8.1 from the IAA.

More generally, and in relation to those terms that are remaining, the ACCC notes that these terms with which CBH raises concerns are all those that have not changed substantively since the 2011 undertaking. The ACCC has not received any complaints in relation to the application of these procedures in practice during the period of operation of the 2011 undertaking. As such, the ACCC does not have reason to believe that the current arrangements are causing difficulty for access seekers.

The ACCC continues to be of the view that certain aspects of IAAs are commercial issues to be negotiated between parties to the agreement, It considers that this applies to the above clauses. As such, the ACCC has not formed a view as to whether the above clauses are appropriate in all cases and whether the clauses will be appropriate to all parties. The ACCC's view on this is informed by the fact that the IAA terms are negotiable, and that access seekers may make use of the dispute resolution procedures in the Undertaking, or of recourse to arbitration by the ACCC.

B.5 Rail accumulation to port and stock swaps

Several clauses questioned by CBH relate to the new obligations on access seekers to acknowledge that the efficiency of the port terminal relies largely on use of rail movements:

- 9.2, including its sub-clauses, which requires clients to demonstrate access to rail resources, requirement to enter into stock swaps, and swapping of grain by Emerald

The ACCC notes that it also discusses the rail requirement in Chapter 5 of this Draft Decision.

In relation to clause 9.2 and 9.2(a), the ACCC notes that considering whether these clauses represent an appropriate minimum standard for negotiations requires regard to be had to the efficiency of the port terminal, the legitimate business interests of Emerald and the interest of access seekers. The ACCC notes that a clause that requires access seekers to acknowledge that the efficient operation of the Port relies on rail movements and optimisation of grain positioning does not of itself impose any obligations on the access seeker. However, the ACCC has closely considered the obligation in clause 9.2(a), which states that an access seeker may not be able to book a shipping slot if it is not able to demonstrate access to rail resources for movement of rail to port.

Such a requirement has the potential to limit the ability of access seekers to use MPT. Access seekers that do not have the ability to access rail infrastructure, or for whom such infrastructure is not available due to being booked out, may not be able to accumulate by rail. Accordingly, such a requirement may have the potential to 'discriminate' against those access seekers. The requirement could limit access seekers who export smaller grain quantities through MPT and who may have elected to accumulate by road. However, the requirement could be in the legitimate business interests of Emerald as the access provider, and may also improve the efficiency of MPT. In this regard, the ACCC notes that Emerald is operating a port with smaller storages that uses a just in time business model, where greater efficiency may be more crucial.

The ACCC has had regard to the particular wording of the clause. It notes that the clause does not require a particular level of rail resources to be used by the access seeker. Equally, the clause only notes that the client may not be able to book a shipping slot – that is, there is not a definite bar to access seekers being able to access the port terminal if they have limited access to rail. Overall, the ACCC is of the view that the requirement is not itself discriminatory and notes also that access seekers with particular accumulation needs could negotiate specific arrangements with Emerald in regard to the rail requirement. On a related point, the draft revision provided by Emerald contains a clause in the Port Loading Protocols that specifies a target minimum of 50% accumulation, but not a hard minimum. The ACCC also understands that parties currently using the Emerald port have all agreed to accumulate a certain percentage of their grain by rail. The ACCC has not received any complaints in relation to current arrangements for port access. In this context, the ACCC has taken into account the more limited market power that Emerald possesses in the market for port access.

In relation to clause 9.2(b) and (c), the ACCC notes that in considering whether these clauses are appropriate or not, it is necessary to have regard to the interests of the access provider and access seekers. The ACCC is of the view that it is generally not desirable that an access provider should be able to unilaterally require dealings between access seekers, or to force stock swaps without consent. The ACCC is generally of the view that it is desirable that consent is required for stock swaps to ensure balance between the interests of Emerald and access seekers, and has discussed these clauses in chapter 4. The ACCC notes that Emerald has removed clause 9.2(c) from its revised proposed IAA in its draft revision.

B.6 Ending of contract

Several of CBH's concerns relate to when the terms of the agreement apply:

- 19.1 - Termination

- 20.1(c) and 20.1(f) – force majeure

In relation to the termination of the contract, and the application of the force majeure clauses, the ACCC notes again its view that, as noted above in relation to other clauses, certain aspects of IAAs are commercial issues to be negotiated between parties to the agreement. This reflects the fact that the standard terms, as set out in the IAA, represent the starting point for negotiations only, and that all elements of the IAA are subject to negotiation. The ACCC also notes that these clauses have operated under Emerald's existing 2011 undertaking and that the ACCC has not received any complaint about those clauses. As such, the ACCC does not have reason to believe that the current arrangements are causing difficulty for access seekers. It also notes, for example, the similar termination clause in Viterra's equivalent agreement.

The ACCC considers that termination and the application of force majeure are clearly in a class of clause that are suited to commercial negotiation between the port terminal operator and access seeker. As such, the ACCC has not formed a view as to whether the particular clauses are appropriate in all cases or whether the clauses will be appropriate to all parties. The ACCC's view on this is informed by the fact that the IAA terms are negotiable, and that access seekers may make use of the dispute resolution procedures in the Undertaking, or of recourse to arbitration by the ACCC.

B.7 No endorsement

Finally, the ACCC notes CBH's concern in relation to an obligation of 'no endorsement' in clause 27. Specifically, CBH raises a concern that clause 27.1(b) may constitute a restriction on an access seeker from providing any comment about Emerald's port terminal business. While noting that the intention of the clause appears to relate to endorsement of an access seeker's business by Emerald, the ACCC considers that the clause is to some extent unclear due to its term 'in any publication'. The ACCC would be concerned if parties were not allowed to put in submissions to regulatory processes or similar, although it notes that it has not received any complaints in this regard.

Overall, the ACCC is of the view that the clause represents a reasonable starting point for negotiations. For access seekers who do not wish to be limited in their ability to make submissions, this clause could readily be negotiated.