



**Proposed Variations to Emerald Grain's Port Terminal Services Access
Undertaking**

Submission to the Australian Competition and Consumer Commission

Emerald Logistics Pty Ltd ("**Emerald Grain**")

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Introduction

Emerald Grain makes this submission in support of:

- (a) an extension to 30 September 2015 of its existing Port Terminal Access Undertaking (“Undertaking”) pursuant to section 44ZZBA of the *Competition and Consumer Act 2010* (Cth) (“CCA”); and
- (b) proposed variations to the Undertaking, pursuant to section 44ZZA(7) of the CCA.

Background

The Australian Competition and Consumer Commission (“ACCC”) may accept an undertaking under Part IIIA of the CCA, 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 CCA allows a provider of an access undertaking to apply to the ACCC for an extension of the period in which it is in operation. The CCA also allows the provider of an access undertaking to vary that undertaking at any time after it has been accepted by the ACCC, but only with the ACCC’s consent.

On 25 September 2013 ACCC accepted from Emerald Grain an undertaking for the period 1 October 2013 to 30 September 2014.

Emerald Grain provided its Undertaking in order to allow an associated company to meet the access test prescribed by the *Wheat Export Marketing Act 2008* (WEMA). The access test, in part, can be met if port terminal operators that also export bulk wheat or their associated entities have an access undertaking accepted by the ACCC.

In November 2012, amendments to the WEMA were introduced which stipulate that the access test will be repealed on 1 October 2014, subject to there being in place a mandatory code of conduct.¹ The code must (among other things):

- deal with the fair and transparent provision to wheat exporters of access to port terminal services by the providers of port terminal services
- 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.

Emerald Grain’s proposed extension of its Undertaking

Emerald Grain proposes to extend the term of the Undertaking from 30 September 2014 to 30 September 2015, pursuant to section 44ZZBB of the CCA.

In addition, Emerald Grain proposes to vary the Undertaking pursuant to s44ZZA(7) by inserting a provision into the Undertaking specifying that the Undertaking will expire if, in accordance with the WEMA, the mandatory port access code of conduct is implemented. The variations of the Undertaking relating to the expiration of the Undertaking are specified in variations to clause 4.2 of the Undertaking.

Emerald Grain's other proposed variations to its Undertaking

Emerald Grain is also seeking to amend the Port Loading Protocols ("PLPs") (Schedule 5 of the Undertaking) and Standard terms (Schedule 1 of the Undertaking) to:

- update those documents to reflect that they will be operative for the 2014/15 season; and
- update the change of AQIS to DAFF Biosecurity Australia.

It is not proposed to make any *substantive* change to the terms of the PLPs or Indicative Access Agreement, as they applied for 2013/14.

Relevant matters for consideration of variation and extension of an access undertaking

The test the ACCC applies in deciding whether to consent to the variation of an undertaking is set out in subsection 44ZZA(7) of the CCA. This section provides that the ACCC may consent to a variation of an undertaking if it thinks it appropriate to do so having regard to the matters set out in subsection 44ZZA(3). In practice the ACCC has regard to the same matters when considering an application for the ACCC's consent to an extension of the Undertaking.

Submission

Emerald Grain wishes to:

- (a) obtain and provide, for exporters, certainty about the processes that will apply to the allocation of capacity at its Port Melbourne Terminal for the period 1 October 2014 to 30 September 2015; and
- (b) obtain certainty that its associated entity, Emerald Grain Australia Pty Ltd, will be able to export Bulk Wheat using MPT if the Code is not in force by 1 October 2014 (and as a result, Emerald Grain needs to have in place an access undertaking to satisfy the 'access test' under WEMA).

As noted above, a mandatory industry code of conduct will come into effect if, as at 30 September 2014, that code has been approved by the Minister for Agriculture and declared under the CCA. Emerald Grain's Application to extend and vary its Undertaking seeks to provide regulatory certainty for its own commercial operations, as well as the commercial operations of access seekers, in the event that a code is not approved and declared by 30 September 2014.

In addition, in the absence of an automatic expiry, as provided by clauses 4.2 (b) and (c) of the proposed variations to the Undertaking, Emerald Grain would be required to apply to the ACCC for consent to withdraw the 2013 Undertaking pursuant to section 44ZZA(7)(b).

Emerald Grain considers operational certainty to be a key factor in a port owner's or access seeker's ability to make commercially profitable decisions. The continuation of Emerald Grain's current access arrangements in the potential gap between the expiration of Emerald Grain's 2013 Undertaking on 30 September 2014, and the potential commencement of a mandatory code, provides this certainty. The proposed variations will allow Emerald Grain to

allocate loading capacity for the 2015/16 season in early 2015, whether or not the Code is introduced from 1 October 2014.

The other variations proposed by Emerald are either amendments consequential on extension of the Undertaking or update change of the body providing Australia's quarantine services. In particular the substantive provisions of the Indicative Access Agreement (Schedule1) and the Port Loading Protocols (Schedule5) remain unchanged from those applicable to the 2013/14 year.

Further Information

If the Commission requires any further information in relation to the proposed variations, please contact:

Ashley Roff, Legal Counsel, Emerald group.

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