

Sheppard, Sarah

From: Leach, Wayne [Wayne.Leach@mallesons.com]
Sent: Thursday, 17 September 2009 8:59 AM
To: Sheppard, Sarah
Cc: Wing, Anthony; Mallesons - dave.poddar@mallesons.com; Marshall, James; Ashley Roff; Tim Krause
Subject: ABB - Response to issues raised in AGEA's submission
Attachments: ABB / AusBulk

Mallesons Stephen Jaques
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Confidential communication

Dear Ms Sheppard

We refer to the submission by AGEA dated 15 September 2009 in relation to the proposed provision of the Access Undertaking by AusBulk Limited.

We are instructed to respond as follows.

1. The Port Terminal Services are provided by AusBulk

ABB has already confirmed to the Commission that all Port Terminal Services (as defined in the Access Undertaking) are provided by AusBulk, and that the sole reason the Access Undertaking is now provided by AusBulk is to comply with the requirements of the WEMA (see attached).

<<ABB / AusBulk>>

2. Legislative framework

In terms of the relevant legislative framework, section 13(1)(e) of the WEMA provides that:

"The wheat export accreditation scheme must provide that a company is not eligible for accreditation unless ... if the company, or an associated entity, is the provider of one or more port terminal services - WEA is satisfied that the company or associated entity, as the case may be, passes the access test in relation to each of those services" (emphasis added)

This means that ABB Grain Limited is not eligible for accreditation as a bulk wheat exporter unless:

- if ABB Grain Limited is the provider of any port terminal services (which it is not), ABB Grain Limited passes the access test in relation to each of those services; or
- if any associated entity of ABB Grain Limited is the provider of any port terminal services, that associated entity passes the access test in relation to each of those services.

As AusBulk is the only associated entity of ABB Grain Limited that provides any (i.e. one or more) port terminal services, the WEMA therefore requires that AusBulk passes the access test.

Section 24(2)(c) of the WEMA further states that post-1 October 2009 "a person" (i.e. the person required to pass the access test under section 13(1)) passes the access test in relation to a port terminal service if "there is in operation ... an access undertaking relating to the provision to accredited wheat exporters of access to the port terminal service for purposes relating to the export of wheat". That is, the person that is required to satisfy the access test (i.e. AusBulk) can do so by having in operation an access undertaking under the TPA.

Section 44ZZA(1) of the TPA also provides that "**a person who is, or expects to be, the provider of a service** may give a written undertaking to the Commission in connection with the provision of access to the service" (emphasis added). As set out above, AusBulk is the provider of the service.

If it were the case that ABB Grain Limited or an associated entity other than AusBulk were to provide **one or more** port terminal services (which they do not), ABB Grain Limited (or that associated entity) would need to have an access undertaking in place in relation to each of those services in order for ABB Grain Limited to be eligible for accreditation under the WEMA.

In ABB's view, the legislative framework is therefore clear on the question of which company is required -- under both the WEMA and the TPA -- to provide the access undertaking.

3. Issues raised by AGEA

ABB notes that AGEA has confirmed that its members have always previously acquired port terminal services from AusBulk (para 3). This supports ABB's submission. In terms of other issues:

- paragraph 4.2 - ABB has explained why the access undertaking will be provided by AusBulk and has provided confirmation that AusBulk is able to perform the access undertaking. There is no requirement under either the TPA or the WEMA for the provider of an undertaking to provide information about financial position and number of employees. In relation to the identification of AusBulk staff, AGEA itself acknowledges in paragraph 3 that AusBulk trades as "ABB Grain Storage and Handling". In addition, as the Port Facilities are owned and operated by AusBulk, and the Port Terminal Services are provided by AusBulk, any staff involved in the provision of Port Terminal Services necessarily do so on behalf of AusBulk.
- paragraph 4.5 - AGEA asserts that "*unless ABB is also a party to the undertaking, there is little or no incentive for ABB to use its control to ensure the access undertaking is adhered to*". In view of the consequences of ABB Grain Limited not being eligible for accreditation (see above), and the potential consequences of AusBulk breaching an access undertaking, this is plainly incorrect.
- paragraph 5 - ABB has some difficulty understanding the issues raised by AGEA. However, ABB's view as to the operation of the WEMA and TPA are set out in paragraph 2 above.

4. Further questions

ABB is prepared for this email to be provided to AGEA and WEA, so that they can better understand the reasons for ABB's position in relation to these issues.

Please let us know if you have any further questions in relation to the matters raised in this email.

Regards

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Sheppard, Sarah

From: Leach, Wayne [Wayne.Leach@mallesons.com]
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Subject: ABB / AusBulk

Sarah

ABB is comfortable with you providing this explanation to AGEA and its lawyers:

- all Port Terminal Facilities are owned by (and therefore all Port Terminal Services are provided by) AusBulk;
- AusBulk is a wholly-owned subsidiary of ABB;
- this structure arises because ABB acquired AusBulk, the owner of the Port Terminals. The new Outer Harbor terminal is also in the name of AusBulk;
- all Storage & Handling Agreements are with AusBulk;
- the reason that ABB changed the party providing the Access Undertaking is because it wants to ensure, as required by the WEMA, that the Access Undertaking is provided by the Port Terminal Operator; and
- any moving of the Port Terminal Facilities into a different (but related) entity would involve potentially significant stamp duty costs, and would also risk losing accreditation under the WEMA if the transferee entity does not have an Access Undertaking in place.

Regards

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