



Australian  
Competition &  
Consumer  
Commission

**Australian Bulk Alliance Pty Ltd**  
**Port Terminal Services Access Undertaking**  
**Decision to accept**

**28 September 2011**



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# Glossary

ABA	Australian Bulk Alliance Proprietary Limited
ABARES	Australian Bureau of Agricultural and Resource Economics and Sciences
ACCC	Australian Competition and Consumer Commission
the Act	<i>Competition and Consumer Act 2010</i> (Cth) (previously the <i>Trade Practices Act 1974</i> (Cth))
AQIS	Australian Quarantine and Inspection Service
BHC	Vertically integrated bulk handling company
CBH	Cooperative Bulk Handling Limited
Client	as defined in ABA's Indicative Access Agreement
draft revision	Draft revised version of the Proposed Undertaking provided by ABA on 28 July 2011
ESC	Essential Services Commission
FCFS	'First come, first served' system of capacity allocation
GrainCorp	GrainCorp Operations Limited
IAA	The Indicative Access Agreement attached to the Revised Undertaking at Schedule 1
Loading Protocol	The Loading Protocol attached to the Revised Undertaking at Schedule 5
MPT	Melbourne Port Terminal
PC	Productivity Commission
POAGS	P&O Automotive and General Stevedoring, a supplier of stevedoring logistics and port management services in Australia.
Proposed Undertaking	The access undertaking received from Australian Bulk Alliance Proprietary Limited on 23 December 2010
Revised Undertaking	Revised version of the Proposed Undertaking provided by ABA on 21 September 2011 in response to the Amendment Notice issued by the ACCC on 7 September 2011
SHA	ABA's Storage and Handling Agreement, which has been submitted as the Indicative Access Agreement to the Revised Undertaking at Schedule 1

Shipping Stem	as defined in section 2.1.2
Trading Business	as defined in clause 1.1 of the Revised Undertaking
VFF	Victorian Farmers Federation Grains Group
Viterra	Viterra Operations Limited
WEA	Wheat Exports Australia
WEAS	Wheat Export Accreditation Scheme 2008
WEMA	<i>Wheat Export Marketing Act 2008</i> (Cth)
2009 Undertakings	Access undertakings for GrainCorp Operations Limited, AusBulk Ltd (now Viterra Operations Limited) and Co-Operative Bulk Handling Limited accepted by the ACCC on 29 September 2009

## Summary

On 28 September 2011, the Australian Competition and Consumer Commission (ACCC) made a decision pursuant to section 44ZZA(3) of the *Competition and Consumer Act 2010* (Cth) (**the Act**) to accept an access undertaking lodged by Australian Bulk Alliance Pty Ltd (**ABA**) on 21 September 2011 (**Revised Undertaking**). The reasons for the ACCC's decision are set out in this document.

The Revised Undertaking relates to the provision of access to services for the export of bulk wheat at Melbourne Port Terminal (**MPT**), which is operated by ABA in Victoria.

ABA has submitted the Revised Undertaking to meet the access test provisions of the *Wheat Export Marketing Act 2008* (Cth) (**WEMA**), required for it or an associated entity to be accredited as a bulk wheat exporter.

The ACCC is also issuing final decisions on proposed undertakings from Viterra Operations Limited (**Viterra**) regarding its operations in South Australia and Co-operative Bulk Handling Limited (**CBH**) regarding its operations in Western Australia. On 22 June 2011, the ACCC accepted an undertaking from GrainCorp Operations Limited (**GrainCorp**) regarding its operations on the east coast of Australia.

The ACCC has considered each undertaking on its own merits and notes that while the undertakings accepted by the ACCC from each port terminal operator will reflect the particular circumstances of that company, there are certain aspects of the undertakings which the ACCC has sought a consistent approach across the bulk wheat industry. In this Final Decision the ACCC has set out issues which are particular to ABA as well as issues for which a consistent approach across the industry is considered appropriate.

GrainCorp, Viterra and CBH each have in place an access undertaking accepted by the ACCC in 2009 (**2009 Undertakings**), while ABA is providing an undertaking to the ACCC for the first time. The ACCC considers that the 2009 Undertakings are a relevant matter in the assessment of ABA's Proposed Undertaking, in accordance with s. 44ZZA(3)(e) of the *Competition and Consumer Act 2010* (Cth) (**Act**). This is discussed further in section 2.1.1.1.

ABA initially submitted a proposed undertaking on 23 December 2010 (**Proposed Undertaking**) pursuant to Division 6 of Part IIIA of the Act (then the *Trade Practices Act 1974* (Cth)). In accordance with s. 44ZZAAA(7) of the CCA, the Proposed Undertaking was superseded by the Revised Undertaking which was submitted by ABA in response to the Amendment Notice issued by the ACCC on 7 September 2011.

## ACCC view on key issues

In forming the view that the Revised Undertaking provided by ABA is appropriate, the ACCC has considered a number of issues which are discussed in detail in

Chapter 3. This section provides a summary of the ACCC's view on particular key issues.

### **Overall approach**

The overall approach of the Proposed Undertaking has been retained in the Revised Undertaking. This approach includes the following mechanisms for the provision of access:

- a publish-negotiate-arbitrate model for price and non-price terms of access
- obligations to provide non-discriminatory access and not to engage in conduct with the purpose of hindering access
- obligations to negotiate access in good faith
- provisions for arbitration of access disputes
- a 'first come, first served' system of capacity allocation, and
- requirements to publish key port information.

In the Draft Decision, the ACCC took the preliminary view that this overall approach was likely to be appropriate having regard to the matters in s. 44ZZA(3), given the specific circumstances of ABA. In particular, the ACCC has had regard to the circumstances of ABA as a relatively small operator subject to competition from the Geelong port terminal and that existing access arrangements at MPT appear to be working well. Further, grain port terminal capacity on the east coast is less constrained, compared with Western Australia and South Australia, partly due to higher levels of domestic demand for wheat. These circumstances are considered further in Appendix A of this Decision. The ACCC has therefore taken the view that a relatively light-handed approach in the case of ABA's undertaking is appropriate.

However, the ACCC also identified a number of specific aspects of ABA's Proposed Undertaking where changes were required, which are discussed in the sections below.

### **Term and expiry provisions**

ABA has proposed an undertaking end date of 30 September 2013 in its Revised Undertaking, which makes the Revised Undertaking consistent with the initial two-year term of each of the 2009 Undertakings. It has also removed the provisions for early expiry of the undertaking that were contained in the Proposed Undertaking.

The ACCC considers that the proposed expiry date balances the interests of ABA in having a shorter initial term and the interests of access seekers in having sufficient certainty, having regard to ss. 44ZZA(3)(a) and (c) of the Act. Importantly, the expiry date ensures that the Undertaking, once in place, will not expire mid-season. The ACCC considers that the expiry date of 30 September 2013 is appropriate.

### **Unilateral variation of an executed access agreement**

Clause 18.2 of the Indicative Access Agreement (IAA) submitted as part of the Proposed Undertaking allowed ABA to unilaterally vary the terms of an executed

access agreement. As set out in the Draft Decision, this clause was not considered appropriate, as an executed agreement should only be varied with the consent of both parties to the agreement.

ABA has removed the unilateral variation provision in its Revised Undertaking. The ACCC considers the amendments to clause 18 adequately address its concerns and those raised by stakeholders. The amended clause 18 is appropriate having regard to the interests of access seekers in accordance with s. 44ZZA(3)(c) of the Act.

### **Lack of detail in the Loading Protocol**

In the Draft Decision, the ACCC took the view that the Loading Protocol did not provide sufficient transparency and certainty to access seekers, but that in practice arrangements at Melbourne Port Terminal appear to be working well. The ACCC considered that in most cases it may simply be necessary for ABA to document in more detail its actual arrangements in the Loading Protocol.

In response to this view, ABA has made a number of amendments to the Loading Protocol in its Revised Undertaking, particularly in the following areas:

- time periods for bookings
- calculation of loading dates
- processes for removal of residual grain
- vessel surveys and authority to load
- flexible arrangements for splitting and deferring bookings
- vessel substitutions and delays.

Chapter 3 of this Decision to Accept considers each element of the Loading Protocol and expresses the view that the changes to the Loading Protocol address the concerns expressed in the Draft Decision. The ACCC considers that the Loading Protocol attached to the Revised Undertaking is likely to provide greater clarity and certainty to both access seekers and ABA, particularly regarding rights and responsibilities of parties at the port terminal, and is therefore appropriate having regard to s. 44ZZA(3)(c) of the Act.

### **Industry-wide uniform requirements for wheat undertakings**

During its assessment of the bulk wheat port terminal access undertakings submitted by the four port terminal operators, the ACCC has developed a number of industry-wide minimum standards for bulk wheat port terminal access undertakings. These standards have been developed having regard to the matters in s. 44ZZA(3), including the interests of access seekers and the public interest in having competition in markets, and relate to the following key areas:

- the Loading Protocol variation process
- an ACCC objection notice provision for variation of the Loading Protocol



- a provision allowing the ACCC to approve RAPM or a member of the Commission to carry out its functions under the undertaking
- a requirement for ABA to provide the ACCC with a copy of an access agreement executed with its trading business or that of a related body corporate
- publication of key port information and performance indicators
- an information gathering provision.

The ACCC considers that a consistent approach to the application of these minimum standards across the industry is appropriate having regard to ss. 44ZZAA(3)(aa) and (e). ABA has made amendments which address all of the relevant minimum standards in its Revised Undertaking. These issues are discussed in more detail in Chapter 3.

## **Decision**

As set out in chapter 4, on 28 September 2011 the ACCC decided to accept the Revised Undertaking provided by ABA on 21 September 2011 in response to the Amendment Notice given in relation to the Proposed Undertaking. The ACCC is of the view that ABA has responded to concerns raised adequately for the Revised Undertaking to be appropriate.

In reaching its decision the ACCC has had regard to all matters listed in s. 44ZZA(3), and is of the view that the Revised Undertaking is appropriate to accept, having regard to each of those matters.

The ACCC has considered the views of stakeholders in reaching its decision to accept the Revised Undertaking.

# 1 Background

Under Division 6 of Part IIIA of the Act, the 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 the Revised Undertaking from ABA on 21 September 2011. The Revised Undertaking relates to the provision of access to services for the export of bulk wheat at the Melbourne Port Terminal operated by ABA in Victoria.

ABA submitted the Revised Undertaking in accordance with legislative requirements under the WEMA, as set out in Chapter 2.

## 1.1 Process leading to the Revised Undertaking

In the Draft Decision released on 11 August 2011 (**Draft Decision**), the ACCC took the view that the Proposed Undertaking submitted by ABA on 23 December 2010 was not likely to be appropriate. However, the ACCC took the view that if ABA were to amend the Proposed Undertaking in line with changes suggested in the draft amendment notice released the same day, the Proposed Undertaking may be appropriate.

In the lead up to the ACCC releasing a Draft Decision on ABA's Proposed Undertaking, and accompanying draft amendment notice, the ACCC engaged in discussions with ABA. Based on these discussions, ABA submitted a draft revision of its Proposed Undertaking (**draft revision**) with a view to addressing the ACCC's concerns.<sup>1</sup> The draft revision was provided to the ACCC on 28 July 2011, and while it largely addressed the ACCC's concerns, a number of minor issues remained outstanding. The draft revision was not submitted as a formal 'replacement' of the Proposed Undertaking. The draft amendment notice was based on drafting amendments proposed by ABA in its draft revision, with a small number of additional changes.

Following the release of the Draft Decision and draft amendment notice, and the period for consultation with industry, the ACCC gave ABA an Amendment Notice in relation to its Proposed Undertaking, pursuant to s. 44ZZAAA(1) of the Act (**Amendment Notice**). ABA had 14 days to respond to the Amendment Notice.

On 21 September 2011, ABA submitted its Revised Undertaking, in response to the Amendment Notice, which the ACCC is accepting.

### 1.1.1 Proposed Undertaking – 23 December 2010

ABA's Proposed Undertaking was based on the general approach of the 2009 Undertakings and provided for access to the Melbourne Port Terminal via:

- a publish-negotiate-arbitrate model for price and non-price terms of access
- obligations to provide non-discriminatory access and not to engage in conduct with the purpose of hindering access

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<sup>1</sup> The draft revision is available on the ACCC website at <http://www.accc.gov.au/wheat>

- obligations to negotiate access in good faith
- provisions for arbitration of access disputes
- a ‘first come, first served’ system of capacity allocation, and
- requirements to publish key port information.

However, ABA’s Proposed Undertaking contained provisions which were weaker than the equivalent provisions in the 2009 Undertakings:

- a one-year term, as opposed to the two-year term of the 2009 Undertakings and the three-year term proposed by the other port operators for their 2011 Undertakings
- the Indicative Access Agreement (**IAA**) (Schedule 1 to the Proposed Undertaking), which set out the standard terms of access to Port Terminal Services, is ABA’s Storage and Handling Agreement (**SHA**). The result was that certain provisions of the IAA related to matters outside the scope of the Proposed Undertaking. The other port operators have separate IAAs, which are part of the respective 2009 Undertakings, and SHAs, which are not part of the 2009 Undertakings
- a less detailed Loading Protocol, being the document that governs the operation of the port, than those in the 2009 Undertakings
- fewer performance indicators than provided under the 2009 Undertakings.

In its Draft Decision, the ACCC found that the Proposed Undertaking was not appropriate, but that it would be likely to be appropriate if certain changes were made.

### **1.1.2 Amendment notice**

On 7 September 2011 the ACCC gave ABA an Amendment Notice in relation to its Proposed Undertaking under s. 44ZZAAA(1) of the Act. The Amendment Notice is published on the ACCC website. This followed consultation on the ACCC’s Draft Decision released on 11 August 2011.

The Amendment Notice related to a number of matters discussed in the ACCC Draft Decision and the draft amendment notice published at the same time as the Draft Decision. ABA responded to the Amendment Notice on 21 September 2011 by giving the ACCC the Revised Undertaking under s. 44ZZAAA(5) of the Act.

The Revised Undertaking incorporates amendments that are of the nature proposed in the Amendment Notice and is available on the ACCC website.

The ACCC decided on 28 September 2011 to accept the Revised Undertaking.

### **1.1.3 Revised Undertaking – 21 September 2011**

Significant changes from the Proposed Undertaking to the Revised Undertaking include:

- a specified expiry date of 30 September 2013
- removal of the automatic expiry provisions
- additions to the variation process of the Loading Protocol including the addition of an ACCC objection notice provision
- additional detail in the Loading Protocol to reflect actual arrangements at MPT
- removal of the unilateral variation provisions of the Indicative Access Agreement
- amendments to the dispute resolution provisions of the Indicative Access Agreement
- publication of six performance and capacity indicators.

## **1.2 Public consultation process**

The Act provides that the ACCC may invite public submissions on an access undertaking application.<sup>2</sup>

The ACCC published an Issues Paper on 20 January 2011 inviting submissions on the Proposed Undertaking. The ACCC directly advised approximately 80 stakeholders, including accredited wheat exporters, grain growers, farming organisations and state regulatory bodies of the public consultation process.

The ACCC published a Draft Decision on 11 August 2011 in which it considered that ABA's Proposed Undertaking would be likely to be appropriate if amended in accordance with the ACCC's draft amendment notice. The draft amendment notice was also published on 11 August 2011. Submissions on the ACCC's Draft Decision and draft amendment notice were invited.

The draft amendment notice related to aspects of ABA's Proposed Undertaking that the ACCC considered inappropriate having regard to s. 44ZZA(3) of the Act. The draft amendment notice included the ACCC's reasons for the proposed amendments.

### **1.2.1 Submissions received**

The ACCC received submissions from ABA and third parties on its Issues Paper. ABA also provided submissions in support of its Proposed Undertaking. The ACCC did not receive any submissions in relation to its Draft Decision and the draft amendment notice.

#### **1.2.1.1 Submissions from ABA**

ABA has provided the following information in respect of the Proposed Undertaking and Revised Undertaking:

- initial supporting information provided on 23 December 2010

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<sup>2</sup> *Competition and Consumer Act 2010* s. 44ZZBD(1).

- submission in response to third party submissions on the issues paper on 17 March 2011
- response to the ACCC's request for information on 29 April 2011
- submission accompanying the draft revision on 28 July 2011.

#### **1.2.1.2 Submissions received from interested parties**

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

- Victorian Farmers Federation (VFF) – 4 March 2011
- Asciano – 4 March 2011
- CBH Grain – 4 March 2011.

### **1.3 Timeline**

The following timeline sets out the key stages in the ACCC's assessment of ABA's Proposed and Revised Undertakings. All relevant documents are available on the ACCC website, [www.accc.gov.au](http://www.accc.gov.au).

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#### **Timeline – ABA Proposed and Revised Undertakings**

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23 December 2010	Proposed Undertaking submitted to the ACCC for assessment under Part IIIA of the Act
20 January 2011	Release of ACCC Issues Paper
20 January – 4 March 2011	Public consultation on the Proposed Undertaking
13 April 2011	ACCC sent request for information to ABA under s. 44ZZBCA of the Act
13 – 29 April 2011	Due to request for information, the clock is stopped on 180-day statutory deadline for ACCC assessment of the Proposed Undertaking
7 – 24 June 2011	Clock is stopped by agreement under s. 44ZZBC(4) at the request of ABA.
11 August 2011	ACCC issues Draft Decision and Draft Amendment Notice on ABA's Proposed Undertaking. The preliminary view was to reject the Proposed Undertaking.
11 – 31 August 2011	Public consultation on Draft Decision and the draft amendment notice
7 September 2011	ACCC gives ABA an Amendment Notice under the Act
21 September 2011	ABA provides Revised Undertaking in line with the changes proposed in the Amendment Notice
28 September 2011	ACCC issues Final Decision to accept ABA's Revised Undertaking

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## 1.4 Further information

ABA's accepted Revised Undertaking and other relevant materials, including supporting submissions from ABA and public submissions by interested parties, are available on the ACCC's website at [www.accc.gov.au](http://www.accc.gov.au) by following the links to 'For regulated industries' and 'Wheat Export,' or via the following link: [Wheat Exports: Port Terminal Services Access Undertakings](#).

If you have any queries about any matters raised in this document, please contact:

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## 2 Decision making framework

This chapter details the following:

- the legal test the ACCC must apply in assessing an access undertaking application under Part IIIA of the Act
- the regime for regulation of bulk wheat exports established under the WEMA.

### 2.1 Overview of the ACCC's assessment

#### 2.1.1 Legal test for assessment

The test the ACCC applies in deciding whether to accept an access undertaking is set out in s. 44ZZA(3) of the Act. If the ACCC accepts the undertaking, the provider is required to offer third party access in accordance with the undertaking. An access undertaking is binding on the access provider and can be enforced in the Federal Court upon application by the ACCC. The ACCC may accept an access undertaking if it thinks it appropriate to do so, having regard to the following matters:

- the objects of Part IIIA of the Act, 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 s. 44ZZCA of the Act (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.

The ACCC has considered each port terminal services access undertaking on its own merits, but within the broader context of the Australian wheat export industry (having regard to ss. 44ZZA(3)(aa) and (e) of the Act). There are some aspects of the undertakings where consistency is achieved by adopting the same approach for all undertakings and other aspects for which it is appropriate that the undertakings contain different provisions. Where consistency in the provisions contained in the undertakings is considered appropriate, the ACCC has noted this in the Final Decision.

In relation to the pricing principles, s. 44ZZCA of the Act 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
- 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.

#### **2.1.1.1 Other matters**

##### **WEMA**

The ACCC considers that the regulatory scheme established by the WEMA, and the rationale for the inclusion of the access test in the statute are, under s. 44ZZA(3)(e), matters relevant to the current decision.

In particular, the ACCC acknowledges Parliament's intention in introducing the access test, which was to ensure that accredited exporters provide fair and transparent access to their facilities to other accredited exporters. As the Explanatory Memorandum states, the WEMA access test is:

...intended to ensure that accredited exporters that own or operate port terminal facilities provide fair and transparent access to their facilities to other accredited exporters. The test aims to avoid regional monopolies unfairly controlling infrastructure necessary to export wheat in bulk quantities, to the detriment of other accredited exporters.<sup>3</sup>

Further, in the second reading speech, 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.'<sup>4</sup>

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<sup>3</sup> Explanatory Memorandum, Wheat Export Marketing Bill 2008, p. 31.

<sup>4</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 29 May 2008, 3860 (Tony Burke, Minister for Agriculture).



The ACCC acknowledges that Parliament's intention to promote competition in the export of bulk wheat 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 acknowledges Parliament's recognition 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.

WEMA and the accreditation scheme are discussed further in section 2.1.2.

### ***2009 Undertakings***

The ACCC also considers that the 2009 Undertakings are a relevant matter under s. 44ZZA(3)(e) in the assessment of ABA's Proposed Undertaking. Through the operation of the 2009 Undertakings the ACCC has gained insight as to the effect of Part IIIA access undertakings across the wheat export industry in practice. The ACCC considers that this experience is relevant to the assessment of ABA's Proposed Undertaking and the Proposed 2011 Undertakings of the other port terminal operators.

#### **2.1.2 Access test**

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 (WEA), which has 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.<sup>5</sup>

Under the WEMA, parties without WEA accreditation are prohibited from exporting wheat in bulk from Australia. Parties seeking accreditation as bulk wheat exporters must be deemed by the WEA to be 'fit and proper' having regard to certain criteria. The WEMA further provides that parties seeking bulk wheat export accreditation that also provide 'port terminal services' (Port Terminal Operators) must satisfy an additional 'access test'.

Part of the 'access test' is linked to Part IIIA of the Act. The relevant part of the access test 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 Act, and that undertaking relates to the provision to

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<sup>5</sup> The relevant transitional legislation is the *Wheat Export Marketing (Repeal and Consequential Amendments) Act 2008* (Cth).

accredited wheat exporters of access to the port terminal service for purposes relating to the export of wheat; or

- there is in force a decision under Part IIIA of the Act that a State or Territory regime is an ‘effective access regime’ and that regime provides for access to the port terminal service for purposes relating to the export of wheat.

Under the ‘access test’ providers of port terminal services must also comply with ‘continuous disclosure rules’ set out in s. 24(4) of the WEMA. In summary, the continuous disclosure rules require the Port Terminal Operators to publish on their websites:

- their policies and procedures for managing demand for port terminal services (generally known as Protocols)
- a statement, updated each business day, 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, the date on which the ship was nominated and the date on which the nomination was accepted (this statement is commonly termed the **Shipping Stem**).<sup>6</sup>

ABA submitted its Proposed Undertaking, and subsequent Revised Undertaking, to the ACCC pursuant to Part IIIA of the Act for the purpose of satisfying the access test.

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<sup>6</sup> See s. 24(4) of the WEMA for detail about the continuous disclosure rules.

## 3 ACCC view on ABA's Revised Undertaking

### 3.1 The overall approach

The overall approach of the Proposed Undertaking has been retained in the Revised Undertaking. This approach includes the following mechanisms for the provision of access:

- a publish-negotiate-arbitrate model for price and non-price terms of access to port terminal services
- obligations to negotiate access in good faith
- provisions for arbitration of access disputes
- a 'first come, first served' system of capacity allocation
- a requirement that ABA not discriminate in favour of its own trading arm or that of a related body corporate in providing access to the port terminal services
- a requirement that ABA not engage in conduct with the purpose of hindering access to the port terminal services, and
- requirements to publish key port information.

In the Draft Decision, the ACCC took the preliminary view that this overall approach was likely to be appropriate having regard to the matters in s. 44ZZA(3), including the interests of access seekers in obtaining access to the port terminal services.

The ACCC noted calls for ring-fencing arrangements from a number of interested parties in its assessment of the 2009 Undertakings and emphasised that, should the 2009 Undertakings not prove effective, the ACCC may impose ring-fencing in future regulatory arrangements. In the case of ABA's Revised Undertaking, the ACCC is of the view that ring-fencing is not necessary and that there are mechanisms in the undertaking which provide sufficient safeguards against incentives ABA may have to favour its own operations or those of a related body corporate. These mechanisms include clauses preventing discrimination in favour of ABA's trading arm and conduct for the purpose of hindering access, and requiring publication of information on stocks-at-port and other performance and capacity indicators.

In forming this view the ACCC considered the specific circumstances of ABA. The ACCC notes, in particular, that port terminal capacity is less constrained on the east coast, compared with West Australia and South Australia, partly due to higher demand for wheat from domestic users. The export of bulk wheat through MPT is also subject to competitive pressures from GrainCorp's nearby Geelong port terminal. ABA's circumstances relative to those of the other port terminal operators are discussed further in Appendix A.

However, the ACCC identified a number of specific aspects of ABA's Proposed Undertaking where changes were required in order for it to be appropriate having

regard to the matters in s. 44ZZA(3). These changes are discussed in sections 3.2 to 3.4 below.

## **3.2 Term and continuity arrangements**

### **3.2.1 Term**

ABA has proposed an undertaking end date of 30 September 2013 in its Revised Undertaking, which makes the Revised Undertaking consistent with the initial two-year term of each of the 2009 Undertakings. It has also removed the provisions for early expiry of the undertaking that were contained in the Proposed Undertaking.

The ACCC considers that the term of an access undertaking should allow sufficient time for access seekers to negotiate the terms of an agreement and for that agreement to apply for a reasonable period, such as at least one full season, prior to the expiry of the undertaking. This position was supported by stakeholders in submissions on the Issues Paper, which expressed concern with the term and expiry provisions proposed by ABA in its Proposed Undertaking.<sup>7</sup>

The ACCC considers that the proposed expiry date balances the interests of ABA in having a shorter initial term and the interests of access seekers in having sufficient certainty, having regard to ss. 44ZZA(3)(a) and (c) of the Act. Importantly, the expiry date ensures that the Revised Undertaking, once in place, will not expire mid-season. The ACCC considers that the expiry date of 30 September 2013 is appropriate.

### **3.2.2 Continuity arrangements**

The PC report on wheat export marketing arrangements has recommended that current port terminal services access arrangements should continue until 2014 but that the accreditation provisions of the WEMA should be abolished from 1 October 2011.<sup>8</sup> Therefore, in response to the PC report the government may make legislative changes adopting the PC recommendations.

The ACCC considers that it is appropriate for ABA's accepted undertaking to provide certainty to access seekers regarding the operation of the undertaking under potential future legislative arrangements, in accordance with s. 44ZZA(3)(c).

ABA has inserted the following drafting in the Revised Undertaking to address the ACCC's concerns regarding continuity of the access arrangements where there is potential for regulatory change during the term of the Undertaking:

7.4 (a)(vi)

*subject to clause 7.4(b), the Applicant is an Accredited Wheat Exporter and fully complies with the relevant legal requirements for wheat export as set out in WEMA and WEAS.*

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<sup>7</sup> Victorian Farmers Federation, Submission to the ACCC Issues Paper on ABA's Proposed Undertaking, 4 March 2011, p. 6; Asciano Limited (Asciano), 'Submission to the ACCC Issues Paper on ABA's Proposed Undertaking', 4 March 2011, pp. 1-2; CBH Grain Pty Ltd (CBH Grain), 'Submission to the ACCC Issues Paper on ABA's Proposed Undertaking', 4 March 2011, p. 1.

<sup>8</sup> Productivity Commission 2010, Wheat Export Marketing Arrangements, Report no. 51, p. 191.

#### 7.4 (b)

*The eligibility requirement in clause 7.4(a)(vi) will cease to apply if the WEMA is amended to remove the requirement that wheat exporters be accredited. However, the Applicant must otherwise be entitled to export Bulk Wheat, and it is the Applicant's responsibility to ensure that it complies with the relevant legal requirements for that purpose.*

The ACCC considers that ABA's Revised Undertaking has adequately addressed the continuity concerns and is appropriate.

### 3.3 Publish-negotiate-arbitrate framework

#### 3.3.1 Publication of price and non-price terms

Clause 6.2 of the Revised Undertaking includes a requirement on ABA to publish the Reference Prices on its website each year. The Charges, referred to in the Indicative Access Agreement (IAA) at Schedule 1 to the Revised Undertaking, are representative of the Reference Prices described in the Revised Undertaking. ABA will have the ability to vary the Reference Prices under clause 6 of the Revised Undertaking.

Given ABA's power to vary its Reference Prices throughout the term of the undertaking, the ACCC considers that it would not be appropriate for the actual Reference Prices applying at a particular time to be included in the undertaking. Including particular prices may create uncertainty for access seekers if ABA subsequently varies its prices in accordance with clause 6 of the Undertaking. The ACCC considers that the Reference Prices should instead be published on ABA's website following the commencement of the Undertaking, as prescribed by clause 6.2.

ABA has deleted the Charges in Schedule A of the IAA in its Revised Undertaking. The ACCC considers this to be appropriate, having regard to the interests of access seekers in accordance with s. 44ZZA(3)(c).

#### 3.3.2 Non-discriminatory access

Clause 6.4(a) of the Revised Undertaking provides that ABA must not discriminate against access seekers in favour of its own Trading Business, except to the extent that the cost of providing access to other applicants or users is higher. While the ACCC can require an audit of ABA to ensure its compliance with the non-discriminatory access clause, the ACCC considers that ABA's undertaking should also include a provision specifying that it will provide the ACCC with a copy of the access agreement it executes with its Trading Business. The ACCC considers that this would aid its assessment of ABA's compliance with non-discrimination requirements imposed by the undertaking.

ABA has included the following clause 6.4(c) in its Revised Undertaking:

*Within 5 Business Days of executing an Access Agreement with a Trading Business, ABA must provide to the ACCC a copy of that Access Agreement.*

The ACCC notes that a similar clause was included in GrainCorp's accepted 2011 Undertaking. The ACCC takes the view that this is a common issue across industry and considers a consistent regulatory approach to be appropriate, given the ACCC's role in monitoring compliance with the port terminal services access undertakings. Therefore the ACCC considers that ABA's Revised Undertaking is appropriate in this regard.

### **3.3.3 The Indicative Access Agreement**

In assessing the Indicative Access Agreement (IAA) submitted by ABA, the ACCC considers that a consistent regulatory approach is appropriate, having regard to ss. 44ZZA(3)(aa) and(e) of the Act. Accordingly, the ACCC has taken the same approach as was taken in assessing the 2009 Undertakings.

In the Final Decisions on the 2009 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 on the terms based on their own particular commercial considerations and circumstances.<sup>9</sup> Accordingly, in 2009 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 indicative access agreements 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
- any ability of the port terminal operator to unilaterally vary the terms of an executed indicative access agreement is only to be exercised in appropriate circumstances
- the terms and conditions of the indicative access agreement must provide for sufficient certainty and clarity in their terms, effect and operation.

With regard to the IAA submitted by ABA as part of the Revised Undertaking, the ACCC has considered each issue in turn.

#### **3.3.3.1 Dispute resolution**

In the Draft Decision on ABA's Proposed Undertaking, the ACCC expressed a two-fold concern with ABA's dispute resolution approach. First, the dispute resolution provisions did not adequately set out a formal process by which disputes could be raised. Second, the time period for a dispute to be escalated to arbitration was too long and therefore might not provide for timely resolution of disputes under the IAA, which is critical to ongoing certainty of access.

ABA, in its Revised Undertaking, has shortened the timeframe for a dispute, under the IAA, to proceed to arbitration from 60 to 30 days. The ACCC considers the proposed 30 day time period is appropriate and that ABA's Revised Undertaking has addressed this concern.

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<sup>9</sup> ACCC, *GrainCorp Decision to Accept*, 29 September 2009, pp. 176-77.

ABA has not proposed amendments to clarify the stages of the dispute resolution process. However, the ACCC acknowledges that the document submitted as the IAA is the agreement by which ABA currently provides access to Clients. The ACCC received no submissions on the issue and has not been made aware of problems that have arisen as a result of the current drafting of the dispute resolution provisions. Therefore, the ACCC considers that this aspect of the IAA it is not inappropriate in its current form.

### **3.3.3.2 Unilateral variation of an executed access agreement**

Clause 18.2 of the IAA submitted as part of the Proposed Undertaking allowed ABA to unilaterally vary the terms of an executed access agreement. Clause 6.5(b) of the Proposed Undertaking allowed ABA to vary the standard terms of the IAA through the formal variation process to a Part IIIA access undertaking, set out in s. 44ZZA(7)(b) of the Act, which requires ACCC approval. The ACCC agreed with the submission of CBH Grain that unilateral variation of an executed access agreement should not be allowed,<sup>10</sup> and further considered that clause 18.2 of the IAA was not appropriate as it conflicted with clause 6.5(b) of the Proposed Undertaking

In the Draft Decision, the ACCC expressed the view that while it important that the Standard Terms of access are certain, there should also be flexibility for parties to negotiate an agreement different to the Standard Terms. The ACCC notes that, while the ability to vary a contract post-execution allows for the terms to continue to reflect changing circumstances, the terms of executed contracts are typically only varied with the consent of both parties. In forming this view the ACCC had regard to the submission by CBH Grain on the Issues Paper, which expressed the view that the variation provisions in the original Indicative Access Agreement attached to the Proposed Undertaking were not appropriate, as they allowed ABA to unilaterally vary the terms of the agreement.<sup>11</sup>

ABA has removed the unilateral variation provision in its Revised Undertaking. The ACCC considers the amendments to clause 18 adequately address its concerns and those raised by stakeholders. The amended clause 18 is appropriate having regard to the interests of access seekers in accordance with s. 44ZZA(3)(c) of the Act. It is also appropriate having regard to the public interest in having competition in markets, in accordance with s. 44ZZA(3), as increased certainty around the terms of access to Port Terminal Services may encourage investment in upstream and downstream markets by alternative providers that wish to use ABA's port terminal services.

### **3.3.3.3 Clarity and certainty in the IAA's terms**

#### ***Coupling of Indicative Access Agreement with Storage and Handling Agreement***

The IAA submitted as part of the Revised Undertaking is ABA's Storage and Handling Agreement (**SHA**), which relates to both port terminal and up-country services, the latter of which do not form part of the Revised Undertaking.

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<sup>10</sup> CBH Grain, 4 March 2011, p. 3.

<sup>11</sup> CBH Grain, 4 March 2011, p. 3.

In response to the ACCC's concerns regarding the coupling of the IAA and SHA, ABA has amended clause 6.3(a) in the Revised Undertaking, which now provides that:

*The Standard Terms are the terms and conditions set out in the Indicative Access Agreement to the extent that those terms and conditions relate to the provision of Port Terminal Services (**Standard Terms**).*

The ACCC remains of the view that, generally, the preferred approach is for the port operator to offer a separate SHA and IAA. However, the ACCC understands that the agreement submitted as Schedule 1 of the Proposed Undertaking and subsequent Revised Undertaking is currently in use by ABA as the agreement by which it offers port access. No submissions received to date have made comment on the coupling of the SHA and IAA and the ACCC has not been made aware of any problems arising from ABA's use of the agreement to date in providing access to the port. The ACCC considers that in ABA's case, separating the SHA and IAA would represent an administrative and financial burden, which is unnecessary. This may not be the case for other port operators.

The ACCC takes the view that the amended clause 6.3(a) in ABA's Revised Undertaking has provided additional clarity regarding the relationship between the undertaking and the terms of the IAA and is therefore appropriate.

#### ***Proposed Undertaking to take precedence over IAA***

The ACCC considers that for clarity and certainty, an undertaking should specify the priority of the general terms of the undertaking and the Schedules.

ABA, in its Revised Undertaking, has sought to address the ACCC's concerns regarding the priority of the Undertaking and Schedules by inserting a new clause 3.2 to the Revised Undertaking, which provides that:

*To the extent of any inconsistency between them, the terms outside of the Schedules take priority over the terms in the Schedules.*

The ACCC considers that the inclusion clause 3.2 is appropriate and that ABA's Revised Undertaking sufficiently distinguishes between the terms of the Undertaking that are outside the Schedules and those that are in the Schedules.

#### **3.3.3.4 Remaining provisions of the IAA**

With the exception of the provisions discussed above, where the ACCC has determined that the IAA attached to the Revised Undertaking sets an appropriate minimum standard for negotiation, the ACCC does not take 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 Revised Undertaking, the terms of the IAA are negotiable between ABA 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.



The ACCC notes that in response to the Issues Paper CBH Grain expressed concern regarding the liability provisions in ABA's IAA.<sup>12</sup> In the Draft Decision, the ACCC noted that no parties had expressed concerns with the functioning of the liability regime in practice at MPT and took the preliminary view that liability is a commercial issue for negotiation between parties. The ACCC remains of this view following consultation on the Draft Decision, and reiterates that parties may avail themselves of the negotiation and dispute resolution procedures in the Revised Undertaking should they require alternative liability arrangements. The ACCC has not received submissions raising concerns with any of the remaining terms of the IAA.

While the ACCC has not formed a view on the appropriateness of the provisions of the IAA for particular parties, the ACCC considers that the IAA is appropriate insofar as it provides a starting point for commercial negotiations under the Revised Undertaking. In forming this view, the ACCC has had regard to the interests of access seekers and the legitimate business interests of ABA, in accordance with ss. 44ZZA(3)(a) and (c).

### **3.3.4 Publication of performance indicators**

The ACCC considers that performance indicators provide useful information to potential access seekers comparing the overall operations at each port in their decisions and negotiations over access. Insofar as it provides greater information to access seekers around the services available to them, the publication of performance indicators may also facilitate competition between port terminal operators. In the Draft Decision, the ACCC expressed concern that ABA proposed to publish only two performance indicators, thereby providing less information than that published by other port terminal operators. CBH Grain also submitted in response to the Issues Paper that additional performance indicators should be published by ABA.<sup>13</sup>

In its Revised Undertaking, ABA has sought to address the ACCC's concerns regarding transparency and the publication of information by proposing to publish the following indicators:

- total capacity
- bookings received (tonnage)
- spare capacity available
- monthly tonnes shipped
- capacity utilisation (percentage)
- stock on hand at the end of month
- average daily receivals by road and rail.

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<sup>12</sup> CBH Grain, 4 March 2011, p. 3.

<sup>13</sup> CBH Grain, 4 March 2011, p. 3.

Having regard to the interests of access seekers and the public interest in having competition in markets, the ACCC considers that the publication of additional indicators proposed by ABA is appropriate.

### **3.3.5 Information gathering**

As set out in the ACCC's Decision on GrainCorp's Proposed 2011 Undertaking, the ACCC considers that it is necessary for it to have a general information gathering provision in the port terminal services access undertakings.<sup>14</sup> In particular, the ACCC considers it necessary to be in a position to obtain relevant information, in a timely manner. The ACCC acknowledges that during the operation of a Part IIIA access undertaking, it can request information from the undertaking provider at any time, but the provision of information is voluntary.

To address the ACCC's concerns regarding the ability to obtain relevant information from the port operator during the term of the Undertaking, ABA has proposed the insertion of the following provision in its Revised Undertaking:

#### **13 Cooperation with the ACCC**

- (a) The ACCC may, by written notice, request ABA to provide information or documents that are required by the ACCC for the reasons specified in the written notice to enable it to exercise its powers or functions specified in this Undertaking.*
- (b) ABA will provide any information properly requested by the ACCC under clause 13(a) in the form and within the timeframe (being not less than 14 days) specified in the notice.*

The ACCC considers that clause 13 addresses its concerns and is therefore appropriate.

## **3.4 Capacity management**

### **3.4.1 Continuous Disclosure Rules**

ABA's Revised Undertaking requires it to comply with the Continuous Disclosure Rules under the WEMA, including the publication of its shipping stem, which will be available on ABA's website. In the Draft Decision, the ACCC expressed concerns regarding clause 10.1(b), as it was then set out in the Proposed Undertaking, which required ABA to update its shipping stem within 24 hours of any change. The ACCC expressed the view that this was inconsistent with the requirements in the WEMA, which require the port operator to publish the shipping stem daily.

To address the ACCC's concern regarding inconsistency between the Proposed Undertaking and the WEMA requirements, ABA has amended clause 10.1(b) in its Revised Undertaking to provide that the shipping stem will be updated each business day, as prescribed by the WEMA. The ACCC considers the Revised Undertaking to be appropriate in this regard.

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<sup>14</sup> ACCC, GrainCorp Operations Limited Port Terminal Services Access Undertaking, Decision to Accept, 22 June 2011, pp. 19-20.

### 3.4.2 Overall approach to capacity management

Under the Revised Undertaking, ABA allocates capacity on a first come, first served basis (FCFS), subject to ABA having discretion to consider other matters when prioritising bookings and to change vessel loading priority for operational reasons. Clients book capacity by lodging an 'Intent to Ship Advice' and paying a \$5 per tonne non refundable booking fee.

The ACCC has assessed the capacity management arrangements for each port operator on the basis of its circumstances and notes that these circumstances differ between the four port operators (ABA, GrainCorp, Viterra and CBH) and the markets in which they operate.

As set out in Appendix A, the ACCC considers that two key market characteristics are relevant to the view formed on the appropriateness of particular capacity management arrangements in the port terminal services access undertakings:

- the relationship between total port elevation capacity and average annual and seasonal demand for it
- the extent to which the incentive exists for vertically integrated port operators to pursue self preferential treatment—including hindering access by other exporters from accessing port services.

In determining whether FCFS is an appropriate capacity management system in the case of ABA, the ACCC has had regard to ABA'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 the PC report, the bulk wheat export market in the east coast of Australia, and particularly in Victoria, is subject to more competition than other markets.<sup>15</sup> MPT is the smallest of the three bulk wheat port terminals in Victoria and competes directly with GrainCorp's Geelong port terminal. As with other ports on the east coast, MPT has peak periods when capacity is fully utilised. However, on an annual basis MPT has not been and is not expected to operate at full capacity—even during the 2010/11 season when grain crops have been large compared with previous years. The circumstances of ABA relative to those of the other port terminal operators are discussed further in Appendix A.

Having regard to the particular circumstances of ABA, and that no users of ABA's facilities expressed a view to the ACCC that ABA's use of a FCFS system was inappropriate, the ACCC considers that this overall approach, as contained in the Revised Undertaking, is appropriate.

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<sup>15</sup> Productivity Commission 2010, Wheat Export Marketing Arrangements, Report no. 51, p. 68.

### 3.4.3 Conditions for effective FCFS capacity management

With regard to ABA's implementation of the FCFS system, the ACCC has considered the appropriateness of the Loading Protocol submitted as part of the Revised Undertaking. In its decision on the 2009 Undertakings, the ACCC stated 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].<sup>16</sup>

The ACCC also considered 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. The ACCC recognised that a flexible and pragmatic approach was required to maintain the overall efficiency of the system.<sup>17</sup> The ACCC is of the view that the same considerations taken by the ACCC in the 2009 Undertakings assessment process are relevant in assessing ABA's Proposed Undertaking, having regard to s. 44ZZA(3).

The ACCC took the view that the Loading Protocol submitted as part of the Proposed Undertaking was not appropriate, as while the ACCC understood arrangements at MPT to be operating well in practice, the Loading Protocol, in part, did not properly articulate its intended application. The ACCC, in considering the interests of access seekers as required under s. 44ZZA(3)(c), took the view that the Loading Protocol should be reworded to better express its intended application. In forming this view the ACCC had regard to the submission from CBH Grain on the Issues Paper which expressed the view that additional transparency was required around ABA's capacity allocation and booking prioritisation processes in the Loading Protocol and shipping stem attached to the Proposed Undertaking.<sup>18</sup>

In the Revised Undertaking, ABA has redrafted its Loading Protocol to more accurately reflect the arrangements in place at MPT. The ACCC considers that the revised Loading Protocol provides greater clarity and certainty to access seekers regarding the terms of access and is appropriate. No submissions have been received regarding the revised Loading Protocol. The ACCC has considered specific aspects of the Loading Protocol in section 3.4.5 below.

### 3.4.4 Information regarding available capacity

Clause 11.1 of ABA's Revised 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, but it also promotes the efficient use of the infrastructure, having regard to s. 44AA(a) of the Act.

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<sup>16</sup> ACCC, GrainCorp Decision to Accept, 29 September 2009, pp. 289-90.

<sup>17</sup> ACCC, GrainCorp Decision to Accept, 29 September 2009, p. 290.

<sup>18</sup> CBH Grain, 4 March 2011, pp. 1-3.

Clause 11.1 of the Revised Undertaking also requires ABA to publish information regarding stocks at port. The ACCC considers that providing the same level of information regarding capacity and stocks at port at the same time, to all exporters seeking to export bulk wheat, is in the interests of access seekers and in the interests of having competition in markets in accordance with ss. 44ZZA(3)(c) and 44ZZA(3)(b) of the Act.

### **3.4.5 The substance of the Loading Protocol**

In respect of the following discussion, the ACCC notes that the clause numbering in the Loading Protocol in some instances has changed between the Proposed Undertaking and the subsequent Revised Undertaking.

#### **3.4.5.1 Initial capacity allocation (bookings)**

##### ***Opening date for the shipping stem***

In its Revised Undertaking, ABA has inserted a new requirement in clause 6 of the Loading Protocol, which requires it to provide at least 10 business days notice of the opening of the shipping stem for each year. The ACCC considers this to be appropriate and in the interests of access seekers and in the interests of having competition in markets in accordance with ss. 44ZZA(3)(c) and 44ZZA(3)(b) of the Act.

##### ***Implementation of FCFS***

Clause 13 of the Loading Protocol submitted as part of the Revised Undertaking provides that subject to clause 12, Intent to Ship Advices will be dealt with in the order that they are received. Clause 12 provides that ABA may consider other matters it considers to be relevant in deciding to accept or reject an Intent to Ship Advice.

The ACCC considers that clauses 12 and 13 appropriately set out that a FCFS system is in operation.

##### ***Certainty for access seekers***

In the Draft Decision, the ACCC expressed concerns regarding the lack of certainty in the Loading Protocol submitted as part of the Proposed Undertaking. Specifically the ACCC noted that the Loading Protocol was unclear with regard to the following:

- the time period for when a booking is made
- when a client is required to specify the vessel for a booking and whether ABA will accept bookings with a vessel listed as ‘TBA’
- The due dates for the Intent to Ship Advice and the Vessel Nomination forms were both calculated from the ‘loading’ date. However, the loading date was determined by ABA following acceptance of a Vessel Nomination and would be unknown to the exporter at the time they would be submitting the Intent to Ship Advice and Vessel Nomination forms.
- The Loading Protocol did not specify what action ABA must take if it wishes to reject an Intent to Ship Advice.

- The Loading Protocol did not specify the time period within which ABA must advise the access seeker of its decision to accept or reject a booking.

ABA has amended the Loading Protocol submitted as part of the Revised Undertaking to address the ACCC's concerns:

- Clause 10 no longer links the completion of the Intent to Ship Advice and payment of the booking fee to a 30 day period prior to loading.
- Clause 9 of the Loading Protocol submitted as part of the Proposed Undertaking, and which provided that 'TBA' vessel notifications will not be accepted' has been removed.
- Clause 21 provides that written nomination of a vessel name must be received at least 15 business days prior to the vessel's ETA. Previously the Vessel Nomination was required 21 days prior to loading. Further, clause 22 now provides that ABA, at its discretion, may consider Vessel Nominations in a shorter period.

The ACCC considers that reworked clauses in the Loading Protocol submitted as part of the Revised Undertaking are appropriate, as ABA has clarified the interaction between lodging an Intent to Ship Advice and the loading date, and has improved the process regarding Vessel Nomination. These changes are in the interests of access seekers and in the interests of efficient use of the infrastructure in accordance with s. 44ZZA(3)(c) and s. 44AA(a) of the Act.

#### **3.4.5.2 Capacity management and cargo accumulation**

Clause 32 of the Loading Protocol submitted as part of the Revised Undertaking states that ABA reserves the right not to fully accumulate a cargo in order to maximise client vessel turnarounds where multiple vessels are arriving in a short time frame. ABA has informed the ACCC that:

The most likely circumstances whereby a cargo will not be fully accumulated will be a customer's inability to access sufficient land transport to deliver the grain to the terminal in a timely way, causing potential delays to the shipping stem. The result may be that the cargo loaded is less than the quantity booked, or that loading is interrupted, depending on the circumstances. ABA's goal is to balance maximum efficiency of the terminal operation against fulfilling all customers' requirements, in an operating context that has many necessarily variable factors.<sup>19</sup>

The ACCC considers that it is appropriate for ABA to have reasonable discretion not to fully accumulate a cargo where the client fails to accumulate grain within agreed timeframes. Further, ABA has inserted the following clause 2 in the Loading Protocol:

At all times the overriding objectives are to maximise terminal export throughput and operational efficiencies.

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<sup>19</sup> ABA, Response to ACCC Request for Information, 29 April 2011, pp. 3-4.

The ACCC considers that clause 2 provides additional certainty to access seekers regarding ABA's practices and how it will apply the Loading Protocol.

In the Draft Decision, the ACCC expressed the following concerns with the Loading Protocol submitted as part of the Proposed Undertaking:

- The Loading Protocol did not provide sufficient information regarding the respective rights and obligations of ABA and exporters regarding vessel surveys and authority to load.
- The Loading Protocol did not specify clients' obligations with respect to storage and removal of residual grain following the execution of a booking.
- The Loading Protocol did not provide sufficient information around how ABA will determine vessel loading priority.

In the Revised Undertaking, ABA has inserted the following provisions in the Loading Protocol to address the ACCC's concerns:

- detail of the requirement on the client to ensure the nominated vessel has passed the surveys required by law and the consequences for the client, regarding its booking with ABA, where the client's vessel fails survey (clauses 39-43)
- a clause requiring a client to remove residual grain from MPT, at the client's cost (clause 34)
- more detail around the factors ABA will consider in determining the order and priority of vessel loading (clauses 35-6).

The ACCC considers that, having regard to the efficient use of infrastructure as set out in s. 44AA(a), as well as ABA's legitimate business interests and the interests of access seekers set out in ss. 44ZZA(3)(a) and (c), that ABA's redrafted clauses are appropriate. The Revised Undertaking provides clarity regarding client obligations and greater certainty for wheat exporters regarding provision of port terminal services in accordance with bookings made.

#### **3.4.5.3 Flexible arrangements**

In the Draft Decision, the ACCC expressed concern with the lack of flexibility for exporters in adjusting bookings in the Loading Protocol attached to ABA's Proposed Undertaking. In particular, the ACCC had concerns about the requirement in clause 19 that shippers must provide three months notice to defer or split a booking.

The ACCC notes that there are many factors that can impact exporter plans. These include disruption to the supply chain—from weather conditions that impact harvest timing and grain quality through up-country storage and transport to port, as well as events at port.

Flexible arrangements, such as the ability to change the elevation period or split a cargo, are important in ensuring an effective capacity allocation system. Flexibility in the use of booked capacity enables bulk wheat exporters to make changes to shipping arrangements in light of supply chain developments not in accord with expectations at

the time a booking was made and supports efficiency in the utilisation of port capacity. However, this benefit is likely to be limited to periods when ports are operating with spare capacity and ABA is therefore able to accommodate requests from shippers to move shipping dates into later elevation periods or to split cargos between elevation periods.

Information provided by ABA indicates that flexibility to split and defer bookings inside the three-month window does operate in practice. ABA had accepted several requests by clients to defer and split bookings which were not received three months in advance.

ABA has updated the Loading Protocol attached to the Revised Undertaking to:

provide much more certainty as to the process and how decisions will be made by ABA, corresponding to what currently happens in practice (and will continue under the Undertaking).<sup>20</sup>

Clause 20 provides that three months written notice prior to the vessel's ETA is required to defer or split a booking, but that ABA may consider requests of less than three months notice at its discretion.

Clause 19, which relates to actual loaded tonnage which is lower than that initially nominated, now provides that:

*ABA will allocate the unused nominated capacity to the nearest month with spare capacity but no later than 30 September of that calendar year.*

Under the originally submitted Loading Protocol, such circumstances would have prompted a partial refund of the booking fee. However, under the Revised Undertaking, ABA will not provide a partial refund in these circumstances. The ACCC considers that it is not inappropriate for the booking fee to be non-refundable, as it thereby acts as a stronger disincentive against speculation and hoarding of capacity, thereby promoting competition in markets and the efficient use of infrastructure.

The ACCC considers that the Loading Protocol attached to the Revised Undertaking is appropriate, as it more accurately reflects how flexible arrangements function in practice and appears to represent a sufficient level of flexibility for users of MPT.

#### **3.4.5.4 Capacity management during peak periods**

In the Draft Decision the ACCC considered whether it was necessary for capacity management at the MPT to include arrangements that would facilitate more efficient outcomes at times of peak demand. In particular, the ACCC considered whether transferability of capacity bookings was an appropriate approach for the MPT. In doing so the ACCC considered the extent to which potentially adverse outcomes may outweigh the benefits of allowing transfers.

Allowing transfer of slots may result in more efficient use of capacity at peak times by reducing the likelihood of capacity going unutilised and facilitating the use of

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<sup>20</sup> ABA, 'Letter to ACCC regarding Australian Bulk Alliance Port Terminal Services Access Undertaking', 12 July 2011, p. 3.



capacity by those who value it most highly. However, some stakeholders have raised concerns regarding the design of a system for capacity transferability and perceived risks from anticipated speculative activity. The ACCC also recognises that the wheat export market is characterised by the trading and swapping of grain and that the effect of these transactions is to reduce any mismatch between supply and demand at different locations and times.

As discussed in section 3.4.2 in relation to the appropriateness of the FCFS approach, ABA's particular circumstances and the market in which it operates are characterised by a strong domestic market for wheat on the east coast and a lack of significant capacity constraint. The ACCC considers that the absence of significant capacity constraints indicates that requiring transferability is not necessary for ABA. Further, the benefits of requiring transferability at MPT would be limited given that:

- ABA operates a single port terminal with annual capacity significantly less than other port operators. As a consequence, the potential gains arising from transferability of capacity booked at MPT is not as significant as that arising if the arrangement was in place for larger port operators.
- MPT is one of three ports operating in Victoria. The benefits arising from transferability of capacity would be, in part, dependent on capacity at the other Victorian ports also being transferable as this would increase the substitutability between capacities at the three ports, thus promoting competition. Capacity at GrainCorp's ports at Geelong and Portland is not currently transferable.

In addition, the ACCC notes that ABA currently charges a \$5 per tonne non-refundable booking fee, which forms a disincentive against exporters overbooking capacity.

The ACCC considers that, due to ABA's particular circumstances, the FCFS system of capacity allocation need not be supplemented by capacity transferability.

#### **3.4.5.5 Dispute resolution in the Loading Protocol**

The ACCC considers that, having regard to the object of Part IIIA to encourage a consistent approach to access regulation across the industry, a consistent regulatory approach to dispute resolution in the protocols of bulk wheat port terminal operators is appropriate.

In the Draft Decision, the ACCC considered that it was not appropriate that the Loading Protocol attached to the Proposed Undertaking did not specify a timeframe for the 'final decision' notice issued by ABA's Chief Executive Officer (or alternative).

Clause 47 of the Loading Protocol attached to the Revised Undertaking provides that ABA's Chief Executive Officer (or alternative) will make a decision on a dispute 10 business days after the meeting held between ABA's Chief Executive Officer (or alternative) and the client. The ACCC considers the inclusion of a 10 business day decision making period to be appropriate as it ensures that the dispute resolution process reflects the interests of access seekers in achieving a timely response to disputes relating to access to the service.

### **3.4.6 Variation of the Loading Protocol**

In the Draft Decision, the ACCC set out certain minimum standards for the process by which a port terminal operator may vary its protocols that it considered were necessary to ensure an efficient, meaningful and transparent consultation process for access seekers in accordance with s. 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.

In order to address these minimum standards ABA has made changes in its Revised Undertaking, which are discussed in the following sections.

#### **3.4.6.1 The comprehensive nature of the Loading Protocol**

To address the ACCC's concerns regarding the comprehensive nature of the Loading Protocol, ABA has inserted drafting in its Revised Undertaking specifying that the Loading Protocols is a comprehensive document. Specifically, ABA has inserted a new clause 10.2(b), which provides that:

*The Loading Protocol must be, and continue to be, a comprehensive statement of ABA's policies and procedures for managing demand for Port Terminal Services (including ABA's policies and procedures relating to the nomination and acceptance of ships to be loaded using the Port Terminal Services).*

The ACCC considers that ABA's insertion satisfies the minimum standards (which it has determined having regard to the criteria in s. 44ZZA(3)) and is appropriate.

#### **3.4.6.2 Process for varying the Loading Protocol**

To address the ACCC's concerns regarding minimum standards for the Loading Protocol variation process, ABA's Revised Undertaking amends the variation process set out in the Proposed Undertaking. Clause 10.3(a)(iii)(E) of the Revised Undertaking provides that ABA will publish written responses on the variation on its website within five business days of receiving the response. However ABA is not required to publish responses it reasonably considers to contain material which is offensive, confidential or otherwise inappropriate for publication.

Clause 10.3(b) of the Revised Undertaking provides that any time during the consultation process, ABA may prepare and circulate a further variation to take into account feedback from interested parties or the ACCC. ABA is not required to recommence consultation.

The ACCC considers that ABA's Revised Undertaking satisfies the minimum standards (which it has determined having regard to the criteria in s. 44ZZA(3)) and is appropriate.

#### **3.4.6.3 The ACCC's role in the process for varying the Loading Protocol**

To satisfy the minimum standards regarding the ACCC's role in the Loading Protocol variation process, ABA's Revised Undertaking includes a proposed new clause 10.4:

#### *10.4 Objection notice*

- (a) If ABA seeks to vary the Loading Protocol in accordance with clause 10.3, the ACCC may object to the proposed variation (or part thereof). If the ACCC objects to a proposed variation (or part thereof), it must issue a notice to ABA stating that it objects to the proposed variation and providing reasons for its objection. The ACCC will publish any notice issued under this clause 10.4(a) on the ACCC website;*
- (b) Any notice issued under clause 10.4(a) must be issued at least 10 business days prior to the date on which the variation is proposed to become effective.*
- (c) At least 5 business days before issuing a notice under clause 10.4(a), the ACCC must provide ABA with a draft notice stating that it objects to the proposed variation and providing reasons for its objection.*
- (d) In issuing a draft notice under clause 10.4(c) or a final notice under clause 10.4(a), the ACCC must have regard to whether the proposed variation:*
  - (i) is material; and/or*
  - (ii) amounts to a breach of the anti-discrimination provision in clause 6.4 and/or the no hindering access provision in clause 10.5.*
- (e) The ACCC may withdraw a draft notice issued under clause 10.4(c) or a notice issued under clause 10.4(a) if in all the circumstances it becomes aware that the reasons specified in the draft notice issued under clause 10.4(c) or the notice issued under clause 10.4(a) no longer exist.*
- (f) If the ACCC issues a notice under clause 10.4(a), ABA will, within three business days:*
  - (i) withdraw the proposed variation and commence a new variation process by placing a notice to that effect in a prominent place on the ABA website and notifying the ACCC in writing; or*
  - (ii) withdraw the proposed variation and confirm the status of the existing Loading Protocol by publishing a notice in a prominent place on the ABA website and notifying the ACCC in writing.*

The ACCC considers that ABA's proposed drafting adopts a consistent approach to the specification of timeframes within the variation process.

The ACCC is of the view that a requirement for it to issue a draft notice of objection prior to issuing a final notice is appropriate. The ACCC notes the time between publication of the variation notice, after the minimum 10 business day consultation period, and the issuing of a draft notice, is five business days. This is a very short time for the ACCC to respond, but the ACCC anticipates that it will be able to identify concerns and act if necessary within the timeframe.

For the reasons outlined above, the ACCC considers that the objection notice provision, as drafted in ABA's Revised Undertaking, is appropriate.

ABA has also broadened the approval provision previously found in clause 6.4(c) of the Proposed Undertaking. In clause 13(c) of the Revised Undertaking, ABA has inserted the following:

*The ACCC may approve the Regulated Access, Pricing and Monitoring Committee or a member of the ACCC to exercise a decision making function under this Undertaking on its behalf and that approval may be subject to any conditions which the ACCC may impose.*

The ACCC considers that ABA's proposed clause 13(c) satisfies the minimum standards (which it has determined having regard to the criteria in s. 44ZZA(3)) and is appropriate.

## **4 Decision**

The ACCC decided on 28 September 2011 to accept ABA's Revised Undertaking pursuant to s. 44ZZA(3) of the Act. The Revised Undertaking was provided by ABA on 21 September 2011 in response to the ACCC's Amendment Notice, dated 7 September 2011, in relation to the Proposed Undertaking.

The ACCC reached its decision following consultation on its Draft Decision and draft amendment notice and considering the matters to which it must have regard under s. 44ZZA(3) of the Act. The ACCC is of the view that ABA's response to the concerns raised and to the Amendment Notice is adequate, and that the Revised Undertaking is appropriate to accept.

# **Appendix A: Bulk wheat export markets analysis**

## **ABA in the wheat export industry**

In assessing the undertakings provided by each of the port terminal operators to commence in 2011, the ACCC has considered each on its own merits. While undertakings accepted by the ACCC from each port terminal operator reflect the particular circumstances of that operator, there are certain aspects of the undertakings for which the ACCC has sought a consistent approach across the bulk wheat export industry. Where consistency across the industry is considered appropriate, the ACCC has noted this in the Final Decision.

There are several instances in which the ACCC has taken the view that it is appropriate that arrangements for ABA are different to those that may be appropriate other port terminal operators, due to the particular circumstances of ABA. The ACCC considers that ABA has a lesser degree of market power than other port terminal operators. In this regard the ACCC notes that ABA provides a small proportion of total up-country storage in Victoria and New South Wales relative to that provided by up-country competitors GrainCorp and Grainflow. There is also competition in the provision of Port Terminal Services in Victoria, particularly between ABA's MPT and GrainCorp's Geelong port terminal.

The ACCC considers that for smaller players facing competition from larger 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 meet certain minimum standards around transparency and other basic requirements for an effective undertaking.

## **Capacity allocation arrangements**

The ACCC has assessed the differences across bulk handling companies (BHCs) and the markets in which they operate so that its views are made on a consistent basis across undertakings. The analysis is of particular relevance in the ACCC's consideration of the capacity allocation and management arrangements proposed in the undertakings it is considering.

Capacity allocation arrangements include two main components:

- Primary allocation arrangements by which capacity is rationed between competing users and which are broadly categorised as either price or non-price rationing. Primary allocation arrangements currently operated by the BHCs include both non-price administered allocation (as in the case of the first come, first served arrangements of GrainCorp, Viterra and ABA) and price rationing (as under the CBH auction system). Primary allocation systems of both types typically require exporters to make at least some capacity commitments before production outcomes, and hence export shipping requirements, are fully known.
- In-season arrangements that facilitate exporters adjusting to any divergence between actual outcomes and ex ante planning regarding demand for export

capacity. These adjustment mechanisms include flexibility for shippers to move booked capacity between geographic and/or temporal locations (such as exists under GrainCorp's Protocols) and the ability for shippers to transfer bookings in a secondary market (as occurs under CBH's arrangements in WA). In-season response to changed, unforeseen or unplanned needs may also occur through grain trading or swapping along the supply chain, including by use of free on board (FOB) purchases or sales.

Two key market characteristics relevant to the view formed on the appropriateness of particular capacity management arrangements in specific market circumstances are:

- the relationship between total port elevation capacity and average annual and seasonal demand for it
- the extent to which the incentive exists for vertically integrated BHCs to pursue self preferential treatment—including hindering access to port services by other exporters—as opposed to seeking to maximise returns from their terminals.

The following sections discuss the relevance of these factors to a decision regarding the appropriateness of capacity management arrangements proposed by a port operator. An assessment in particular cases will be informed also by the current arrangements the operator has in place and the effectiveness of those arrangements in achieving fair and efficient outcomes.

## **Extent of capacity constraint**

As the PC stated in its Inquiry Report on Wheat Export Marketing Arrangements, auctions can play a significant role in efficiently allocating limited port capacity.<sup>21</sup> This general economic principle, that allocative efficiency is best achieved through a price mechanism, has greatest application when supply is limited relative to demand. When no binding capacity constraint exists the demands of all users can be met and the means by which allocation occurs is not critical to achieving allocative efficiency.

In all Australian states from which wheat is exported there are periods when port capacity is more highly valued. These periods occur when new season grain is available to be shipped and differ depending on harvest times in the production zones. In all years, even those of poor harvest, demand for shipping slots during these peak periods exceeds capacity to some extent. However the frequency and extent to which demand exceeds capacity varies between the ports operated by the BHCs.

On this basis, it might be considered appropriate for all port operators to use auction systems to allocate port capacity as all (with the possible exception of ABA) have limited capacity at least at some ports for some periods. This was the view of the PC which noted 'that port operators [other than CBH] might also consider adopting a similar [auction] system where there is a likelihood of excess demand for port capacity at certain points in time (effectively, a shifting peak demand problem driven by movements in the supply and demand for wheat)'.<sup>22</sup>

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<sup>21</sup> Productivity Commission, *Wheat Export Marketing Arrangements*, 1 July 2010, p. 205.

<sup>22</sup> *ibid.*

However, the ACCC considers that the mere likelihood of excess demand at some points during the wheat export year is not sufficient to warrant the ACCC taking the view that access arrangements employing a non-price system of allocating capacity are inappropriate. The ACCC's view will take into account the degree of the capacity constraint evident and a judgement as to whether resultant inefficiencies warrant requiring the operator to employ an auction system for primary allocation arrangements. Also relevant is the extent to which allocative inefficiencies arising under the first come, first served arrangements are mitigated by other measures such as transferability or greater flexibility to move capacity bookings.

## **Incentive for self-preferential treatment**

A vertically integrated operator may have an incentive to utilise bottleneck infrastructure it controls to hinder access by competitors in upstream or downstream markets in order to gain market share at the expense of access seekers. The strength of such an incentive will be influenced by the existence or threat of competition to the operator's position. Where actual or potential competition exists, the incentive to hinder competitors is moderated by the threat that the hindering behaviour may instead result in loss of throughput to an alternative supply chain or use.

However, where competition to the operator is weak and the incentive to hoard capacity and so hinder others from accessing export capacity is strong, this will inform an assessment as to the appropriateness of proposed capacity allocation arrangements. Where this incentive is strong, so too is the argument that allocation arrangements should incorporate measures to prevent such behaviour. Auctions can provide such a mechanism as they are a fair, transparent and efficient means of allocating capacity under which the incumbent faces the same limits on its ability to acquire capacity as other users.

It is also possible to design non-price allocation systems in such a way as to prevent or reduce anti-competitive behaviours by the operator. Such measures include use of an independent body to manage the shipping stem and requiring that the access provider faces the same financial disincentive to hoard as do access seekers.

In the context of the Australian wheat export industry competition to the bulk shipment of wheat through an operator's ports comes from a number of sources:

- extent of vertical integration and alternative up-country supply chains
- domestic uses for wheat
- competition from ports in other regions
- threat of bypass by customers
- containerised exports.

The extent of competition varies significantly across the markets in which the BHCs operate. A high level summary of the key features of each region (including the differences that exist) in terms of their existing supply chain characteristics and competitive dynamics is outlined below.



## Up-country supply chains

The key up-country supply chain characteristics (and differences) that exist in each of the three regions is summarised in Table A.1 below:

**Table A.1: up-country supply chain characteristics by region**

Region	Characteristics
East Coast	<p>GrainCorp holds significant market share in the provision of wheat storage and handling services in New South Wales, Victoria and QLD. Two other bulk handling companies operating on the east coast, AWB GrainFlow and ABA, also operate a relatively small number of storage and handling facilities.</p> <p>Alternative options to storage and handling services provided by GrainCorp, GrainFlow and ABA are:</p> <ul style="list-style-type: none"> <li>▪ on-farm storage (which makes up a relatively greater proportion of total storage capacity than in other regions);<sup>23</sup></li> <li>▪ a wider choice of independent storage and transport providers compared to other regions</li> <li>▪ limited overlap of GrainCorp's and Viterra's up-country storage networks.</li> </ul>
South Australia	<p>Viterra holds a significant market share in the provision of wheat storage and handling services in South Australia, with some alternative options provided by:</p> <ul style="list-style-type: none"> <li>▪ on-farm storage</li> <li>▪ independent bulk handlers.</li> </ul>
Western Australia	<p>The provision of bulk wheat storage and handling services is dominated by CBH.</p> <p>There is some on-farm storage, a significant proportion of which is for on-farm use, but no competition from independent bulk handlers.</p> <p>Competition to CBH grain logistics and freight services is restrained by conduct that is the subject of Notification to the ACCC (N93439). The Notification relates to exclusive dealing conduct by CBH that requires growers that use CBH grain storage and handling services to also use transport services supplied by CBH to transport grain to port. The ACCC revoked the notification on 29 June 2011 from 1 May 2012 and CBH has sought a review of that decision by the Australian Competition Tribunal.</p>

Source: Productivity Commission *Inquiry Report No. 51: Wheat Export Marketing Arrangements*, 1 July 2010, pp. 67-68.

<sup>23</sup> The PC Report observed that the larger stock of on-farm storage in the East Coast may be attributable to the relative importance of the domestic market and longer history of choice in domestic marketing: Productivity Commission *Inquiry Report No. 51: Wheat Export Marketing Arrangements*, 1 July 2010, p. 68.

As Table A.1 illustrates, there appears to be greater use of alternatives to the up-country wheat storage and handling services supplied by the BHCs on the east coast as compared to both South Australia and Western Australia.

## Domestic and non-bulk export wheat

The proportion of wheat that is supplied into the Australian domestic market relative to the proportion that is exported overseas varies significantly between the three regions, as illustrated in Table A.2 below:

**Table A.2: domestic and export wheat supply characteristics by region**

Region	Characteristics
East Coast	<p>While a substantial volume of wheat is exported from the east coast, a significant proportion of wheat is also consumed domestically. The domestic market is therefore a significant alternative to bulk wheat export for grain growers on the east coast.</p> <p>Also, containerised export wheat volumes on the east coast have expanded in recent years. In particular, the Essential Services Commission (ESC) noted that containerised grain exports in Victoria and southern New South Wales expanded to represent a significant proportion of total exports from those areas.<sup>24</sup></p>
South Australia	<p>Almost all wheat in South Australia is exported, with only a relatively small proportion supplied into the domestic market.<sup>25</sup> The domestic market is therefore a less significant alternative to the export market for SA growers than is the case for growers on the east coast.</p> <p>Almost all wheat exports from South Australia is exported in bulk with only limited export of wheat in containers and bags.</p>
Western Australia	<p>Almost all wheat in Western Australia is exported in bulk (90 per cent), with only a relatively small proportion supplied into the domestic market (5 per cent) and the balance exported in containers.</p>

Source: Productivity Commission *Inquiry Report No. 51: Wheat Export Marketing Arrangements*, 1 July 2010, pp. 56 and 68; ACCC Notice, 29 June 2011 para. 2.5.1

As Table A.2 illustrates, there is greater use of alternatives to the bulk wheat supply chain by growers in the east coast region, as compared to both South Australia and Western Australia.

<sup>24</sup> Essential Services Commission, *Review of Victorian Grain Handling and Storage Access Regime Final Report*, May 2009, pp. 39-40.

<sup>25</sup> Productivity Commission *Inquiry Report No. 51: Wheat Export Marketing Arrangements*, 1 July 2010, p. 56.

## Port terminal facilities

The relative proximity of port terminals operated by different bulk handlers in particular regions is a key determinant of the extent to which those port terminals compete for the throughput of wheat. Table A.3 provides an overview of the proximity of grain elevation ports.

**Table A.3: Proximity of port terminals by region**

Region	Characteristics
East Coast	<p>Some port terminals in New South Wales, Victoria and the easternmost parts of South Australia operated by GrainCorp, ABA and Viterra are in relatively close proximity and may provide alternatives for some wheat throughput.</p> <p>The ESC, in its review of grain handling and storage arrangements in Victoria, noted that there is a ‘significant degree of competitive substitutability’ between the port terminals operated by ABA and GrainCorp.<sup>26</sup> Also, by-pass of GrainCorp’s Newcastle facilities has resulted from recent construction of a facility to be used for cargo accumulation in order to utilise port loading facilities operated by POAGS at the K2 berth on Kooragang Island.</p>
South Australia	<p>Viterra operates all wheat port terminals in South Australia and is not likely to face competition in the short to medium term from any alternative port terminal operator for wheat throughput, with the possible exception of weak competition from Port of Portland in far west Victoria.</p>
Western Australia	<p>CBH operates all wheat port terminals in Western Australia and the ACCC is unaware of any immediate alternative port terminal facility for use by grain exporters.</p>

Source: Productivity Commission *Inquiry Report No. 51: Wheat Export Marketing Arrangements*, 1 July 2010, p. 68.

<sup>26</sup> Essential Services Commission, *Review of Victorian Grain Handling and Storage Access Regime, Final Report*, May 2009, p. 48.