



Australian
Competition &
Consumer
Commission

Issues Paper

Australian Bulk Alliance Proprietary Limited proposed Port Terminal Services Access Undertaking

20 January 2011



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List of abbreviations and terms

2009 Undertakings	The port terminal access undertakings submitted by GrainCorp Operations Limited, AusBulk Limited (now Viterra Operations Limited) and Cooperative Bulk Handling Limited and accepted by the ACCC in 2009
ABA	Australian Bulk Alliance Proprietary Limited
ACCC	Australian Competition and Consumer Commission
Act	The <i>Competition and Consumer Act 2010</i> (Cth), (known as the <i>Trade Practices Act 1974</i> (Cth) prior to 1 January 2011)
NCC	National Competition Council
Loading Protocols	Policies and procedures (published on ABA's internet site) for managing demand for port terminal services
Shipping Stem	A statement (published on ABA's internet site) setting out, amongst other things, the name of each ship scheduled to load grain using port terminal services and the estimated date on which grain will be loaded into the ship.
Undertaking	The Undertaking provided by ABA
WEA	Wheat Exports Australia
WEM Act	<i>Wheat Export Marketing Act 2008</i> (Cth)

1 Introduction

Under Part IIIA of the *Competition and Consumer Act 2010* (Cth) (**the Act**, known as the *Trade Practices Act 1974* (Cth) prior to 1 January 2011), the Australian Competition and Consumer Commission (ACCC) may accept an undertaking from a person who is, or expects to be, the provider of a service, in connection with the provision of access to that service.

Australian Bulk Alliance Proprietary Limited (**ABA**) has submitted a proposed access undertaking (**the Undertaking**) to the ACCC for assessment under Part IIIA of the Act. ABA's proposed 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.

The Undertaking has been submitted by ABA in accordance with the legislative requirements under the *Wheat Export Marketing Act 2008* (Cth) (**the WEM Act**). Further detail about the relevant provisions of the WEM Act are set out in the appendix at section 3 of this paper.

The ACCC is conducting a public consultation as part of its assessment of the Undertaking and seeks submissions from interested parties by 4 March 2011.

1.1 ABA's proposed Undertaking

ABA provided the proposed Undertaking to the ACCC on 23 December. The Undertaking and a supporting submission from ABA are available on the ACCC's website at:

<http://www.accc.gov.au/content/index.phtml/itemId/964331>

Alternatively, go to the ACCC's homepage relating to wheat at www.accc.gov.au/wheat and follow the link to 'Australian Bulk Alliance (ABA)'. Public submissions made during the current process will also be posted at this location.

ABA is proposing that the Undertaking commence on the date of acceptance by the ACCC, and expire after a term of one year.

1.2 ACCC assessment

The test the ACCC applies in deciding whether to accept an access undertaking is set out in subsection 44ZZA(3) of the Act. Essentially, the ACCC may accept the undertaking if it thinks it appropriate to do so, having regard to various matters. The full test is set out in section 3 of this Paper.

1.3 Indicative timeline for assessment

The ACCC received the proposed Undertaking from ABA on 23 December 2010. Under section 44ZZBC(1) of the Act, the ACCC must make a decision in relation to the application within the period of 180 days starting at the start of the day the application was received (referred to as 'the expected period').

The Act also provides for ‘stopping the clock’ mechanisms, meaning that some days will not count towards the 180 days of the expected period in certain circumstances. In particular, the clock is stopped where the ACCC publishes a notice inviting public submissions in relation to an undertaking application, or where the ACCC gives a notice requesting information in relation to an application.¹ The consultation period on this Issues Paper will be disregarded in accordance with the ‘stopping the clock’ provisions.

For the purposes of the assessment of the Undertaking, the ACCC has developed the following indicative timeline:

- receipt of submissions on ACCC Issues Paper by 4 March 2011;
- ACCC draft decision in May 2011
- ACCC final decision in July 2011.

However, as stated above, this indicative timeline is subject to the operation of ‘stopping the clock’, and is therefore dependent on parties providing complete information in a timely manner in response to any requests for information the ACCC may make.

1.4 Consultation

The ACCC, pursuant to section 44ZZBD of the Act, is inviting submissions on the proposed Undertaking. That is, this Issues Paper constitutes a notice under section 44ZZBD of the Act which invites submissions on the proposed Undertaking and stops the clock for the purpose of calculating the ‘expected period’ within which a decision on the proposed Undertaking must be made by the ACCC.

Section 2 of this Paper outlines a range of matters to which the ACCC wishes to draw your attention. The matters in section 2 do not represent a comprehensive summary of all aspects of the Undertaking, nor do you need to comment on each of those matters. You are welcome to provide submissions on any relevant aspect of the Undertaking.

In making your submissions please include detailed reasons to support your views. If you consider that an aspect of the proposed Undertaking is *not* appropriate, please provide suggestions of changes that could be made to address the relevant concerns, including to the level of drafting amendments where possible.

The appendix at section 3 of this Paper sets out background information on the legislative criteria, including an overview of recent amendments to Part IIIA of the Act. To assist the ACCC in its assessment of this proposed Undertaking, submissions should, as far as practicable, refer to the legislative criteria.

¹ See section 3 of this Paper for further information on these provisions of the Act.

1.5 Making a submission

Submissions should be addressed to:

Mr Anthony Wing
General Manager
Transport and General Prices Oversight Branch
ACCC
GPO Box 520
MELBOURNE VIC 3001
Email: transport@accc.gov.au

Submissions are to be sent preferably by email, in Microsoft Word or other text readable document form. Please also provide in your submission background information relevant to your organisation.

1.5.1 Due date for submissions

The ACCC recognises that the January 2011 floods occurring in Queensland and Victoria have impacted stakeholders who may wish to make a submission. In light of this disruption, the ACCC has allowed a six week consultation period.

Submissions **must** be received by **4 March 2011**. It is in your interest that the submission be lodged by this date, as section 44ZZBD of the Act allows the ACCC to disregard any submission made after this date.

1.5.2 Confidentiality of information provided to the ACCC

The ACCC strongly encourages public submissions. Unless a submission, or part of a submission, is marked confidential, it will be published on the ACCC's website and may be made available to any person or organisation upon request.

Sections of submissions that are claimed to be confidential should be clearly identified. The ACCC will consider each claim of confidentiality on a case by case basis. If the ACCC refuses a request for confidentiality, the submitting party will be given the opportunity to withdraw the submission in whole or in part. The ACCC will then assess the Undertaking in the absence of that information.

For further information about the collection, use and disclosure of information provided to the ACCC, please refer to the ACCC publication *Australian Competition and Consumer Commission / Australian Energy Regulator Information Policy—the collection, use and disclosure of information*, available on the ACCC website.

1.6 Further information

If you have any queries about any matter in relation to the ACCC's process, or to any matters raised in this Issues Paper, please contact:

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Transport & General Prices Oversight Branch
ACCC
GPO Box 520
MELBOURNE VIC 3001
Ph: +61 3 9290 1973
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Fax: +61 3 9663 3699

2 Matters for Comment

2.1 Introduction

ABA has submitted a proposed Undertaking and supporting submission to the ACCC. This section of the Issues Paper describes the key features of the Undertaking, and is set out to correspond with the relevant sections of the Undertaking.

This section also sets out questions that may assist interested parties in making submissions, and seeks to highlight for comment issues that may be of interest to the ACCC. For the convenience of interested parties, these questions have been highlighted and placed in boxes throughout the section. To assist the ACCC in its assessment of an undertaking, submissions from interested parties should, as far as practicable, refer to the legislative criteria (outlined in the Appendix).

The ACCC notes that since 2009 the bulk wheat export industry has had experience with three port terminal access undertakings (the **2009 Undertakings**) covering port terminal facilities in Western Australia, South Australia and the east coast of Australia. While the ACCC assesses every access undertaking in light of the particular circumstances of the relevant infrastructure, industry knowledge is an important factor in assessing whether an undertaking is appropriate. Feedback from industry participants on the operation of the 2009 Undertakings will inform, in a general sense, the ACCC's assessment of any new undertakings.

Subsection 44ZZA(3) sets out the matters which the ACCC must have regard to in deciding whether to accept or reject an undertaking. Those matters include the objects of Part IIIA of the Act which refer to the object of providing 'a framework and guiding principles to encourage a consistent approach to access regulation in each industry.'²

The three 2009 Undertakings are due to expire on 30 September 2011 and GrainCorp and Viterro have submitted proposed undertakings to replace the existing undertakings from 1 October 2011. In its assessment of ABA's proposed undertaking the ACCC will be required to form views regarding what constitutes an appropriate access undertaking in the bulk wheat export industry from 2011. Where appropriate given ABA's circumstances, the ACCC will consider industry-wide issues in its assessment of ABA's proposed Undertaking.

ABA's general approach is similar in many respects to the approach in the 2009 Undertakings, particularly that of GrainCorp. This approach includes:

- a 'publish, negotiate, arbitrate' approach to pricing
- a requirement to provide non-discriminatory access
- flexibility to vary the Loading Protocols governing access to port terminal services

² Section 44AA sets out the objects of Part IIIA.

- the inclusion of an indicative access agreement to be offered to access seekers
- dispute resolution provisions including processes for mediation and arbitration of disputes
- a ‘first in, first served’ capacity allocation system
- publication of a shipping stem and key port terminal information.

The ACCC also seeks the view of industry participants on whether the various aspects of this approach are appropriate for the context of the Melbourne Port Terminal. The following questions are general matters on which the ACCC would appreciate the views of industry participants. Subsequent questions relate to particular clauses of the Undertaking.

General Issues for Comment

- *Is the general approach proposed by ABA as outlined above appropriate in the context of the Melbourne Port Terminal? If not, please specify which aspects are not appropriate for this context and give reasons. Outline any factors that differentiate the Melbourne Port Terminal context from that of other bulk grain port terminals.*
- *ABA has proposed a publish, negotiate, arbitrate approach to pricing. Is this appropriate? (Specific aspects of ABA’s approach are dealt with in more detail in sections 2.7 –2.9 below.)*

While the broad approach proposed by ABA is similar to that in the 2009 Undertakings, there are areas in which ABA has varied the provisions of the 2009 Undertakings. Key differences relate to:

- definitions of Capacity
- structure of the Undertaking
- the term of the proposed Undertaking (commencement and expiry)
- the level of detail in the Loading Protocols
- key performance indicators
- the Storage and Handling (indicative access) agreement

These differences are outlined in more detail below and the ACCC seeks the view of industry participants on whether they are appropriate. The questions outlined below are not, however, intended to limit discussion of the Undertaking – parties are welcome to comment on any aspect of the Undertaking they believe relevant to the ACCC’s assessment. In answering the questions please provide reasons to support your comments.

2.2 Interpretation

The 'Interpretation' section defines particular terms used in the Undertaking (subsection 1.1) and sets out principles to be used in the interpretation of the Undertaking (subsection 1.2). ABA has included a definition of 'Baseline Capacity' as being 'total capacity of the Port Terminal for the export of Bulk Wheat or any other commodity'. Other terms are defined as they arise in particular clauses of the Undertaking.

Issues for Comment

- *Consider how the definition of 'Baseline Capacity' in the 'Interpretation' section interacts with other clauses of the Undertaking.*
- *Is 'Baseline Capacity' defined with sufficient clarity and certainty?*

2.3 Background

2.3.1 Introduction

The Undertaking contains a 'Background' section similar to that in the GrainCorp undertaking, acknowledging the requirements in the WEM Act that a person seeking bulk wheat accreditation who also provides port terminal services must satisfy the 'access test' under the WEM Act. The section notes that ABA is not an Accredited Wheat Exporter under the WEM Act, but that ABA operates the 'Port Terminal Facility' and wishes to satisfy the 'access test'.

2.3.2 Objectives

Clause 2.2 states that the Undertaking has several objectives, including, amongst others, providing for a 'consistent approach to access to the Port Terminal Services at the different port terminals to the extent practicable', in accordance with subsection 44AA(b) of the Act. The 2009 Undertakings contain a similar clause which refers to a 'uniform' approach to access.

ABA is required to have regard to these objectives when seeking to vary the Loading Protocols (see clause 10.3). ABA may also seek to vary the Undertaking where it is no longer consistent with the objectives.

Issues for Comment

- *Do the objectives accord with the terms of the Undertaking set out in subsequent clauses?*

2.4 Structure

Clause 3 relates to the structure of ABA's proposed Undertaking. The 2009 Undertakings list various components of the undertakings, such as the schedules and general terms, and specify

an order of priority to apply where there is any inconsistency between the different components. ABA's proposed Undertaking does not list any components or specify whether the terms of a Schedule or the terms contained in the Undertaking itself will prevail to the extent of any inconsistency.

The Undertaking specifies that ABA must use reasonable endeavours to procure any relevant 'Related Body Corporate' to perform obligations pursuant to the Undertaking where appropriate.

Issues for Comment

- *Does the Undertaking provide sufficient clarity and certainty around the different components of the Undertaking, such as general terms and Schedules?*
- *Should there be an order of priority for the different components of the Undertaking to the extent that there is any inconsistency between them, and if so, what should that be?*

2.5 Term and Variation

2.5.1 Term of the Undertaking

The Undertaking is proposed to commence on the date of acceptance by the ACCC, in accordance with section 24(3) of the WEM Act. The 2009 Undertakings were accepted on 29 September 2009 and commenced on 1 October 2009 in order for the bulk handling companies to maintain their export accreditation under the WEM Act.

Clause 4.2 provides that ABA's proposed Undertaking will apply for a maximum of one year. The 2009 Undertakings were for a term of two years, which was considered appropriate given the transitional state of the industry.

The Undertaking provides that ABA may seek the approval of the ACCC for the withdrawal of the Undertaking (clause 4.3):

- (a) when ABA or a Related Body Corporate ceases to be an Accredited Wheat Exporter under the WEM Act, or
- (b) where there are changes to the requirements under the WEM Act such that an Accredited Wheat Exporter is no longer required to have an access undertaking for the purposes of maintaining accreditation

These circumstances are consistent with those in the 2009 Undertakings.

However, ABA has also provided in clause 4.2 for early expiry of the Undertaking under the following circumstances:

- (b) when ABA or a Related Body Corporate ceases to be an Accredited Wheat Exporter under the WEM Act

- (c) where there are changes to the requirements under the WEM Act such that an Accredited Wheat Exporter is no longer required to have an undertaking.

Subsection 44ZZA(7)(b) of the Act provides that a provider may withdraw or vary an undertaking at any time after it has been accepted by the ACCC, but only with the consent of the ACCC.

Issues for Comment

- *Is the proposed one year term of the Undertaking appropriate? Does it provide sufficient certainty about access arrangements for access seekers, noting for example that the Undertaking may expire during the wheat export season?*
- *Is it appropriate that the Undertaking will expire under the circumstances listed in subclause 4.2(b)-(c) without the approval of the ACCC, as provided for in subsection 44ZZA(7)(b) of the Act?*

2.5.2 Variation of the Undertaking

The Undertaking provides for circumstances where ABA may seek the approval of the ACCC to vary the Undertaking (clause 4.4). ABA is also required to consult with counterparties to Access Agreements and Applicants regarding the proposed changes. These circumstances are consistent with the approach of the 2009 Undertakings.

2.6 Scope

‘Scope’ – the services to which the Undertaking does and does not apply – is set out in clause 5. The definition of ‘Port Terminal Facilities’ reflects the definition of that term in the WEM Act, and the specific facilities at the Melbourne Port Terminal are described in Schedule 4. This approach is consistent with the 2009 Undertakings.

Issues for Comment

- *How are issues of bundling of port terminal services with freight and up-country storage and handling relevant in the context of ABA, if at all?*
- *Are the provisions of clause 5 consistent with the definition of ‘Baseline Capacity’ in clause 1.1?*

2.7 Standard Terms and Reference Prices

2.7.1 Access to Standard Port Terminal Services

ABA will offer to supply the Port Terminal Services to the applicant at the Reference Prices under clause 6.2 and on the Standard Terms under clause 6.3. If an Applicant seeks access to non-standard Port Terminal Services, ABA and the Applicant may negotiate different prices and terms other than the Standard Terms.

ABA's obligation to provide access is limited to the term of the Undertaking.

2.7.2 Reference Prices

The Undertaking stipulates that ABA must publish Reference Prices on its website by no later than 30 September of each year, (or within three Business Days of the commencement of the Undertaking if not already published). ABA must give the ACCC copies of Reference Prices within three Business Days of publication.

Unless varied, the Reference Prices must apply for a period not ending before 31 October of the following year. This timeframe is consistent with that proposed in the 2009 Undertakings. However, the proposed one year term outlined in section 2.5 may mean that the Undertaking is no longer in effect at this time.

2.7.3 Standard Terms

The Standard Terms are the terms and conditions set out in the Indicative Port Terminal Services Agreement in Schedule 1 of the Undertaking and, unless varied, will apply for the term of the Undertaking. The Undertaking provides that the Standard Terms must include the Loading Protocols. The substance of the Standard Terms is addressed in more detail in section 2.13.

The Undertaking provides that parties may agree to include terms applying to other services provided by ABA in an agreement, but that the Undertaking only applies to the terms relating to the provision of Port Terminal Services.

ABA's approach is consistent with that in the 2009 Undertakings.

Issues for comment

- *To what extent are the upstream activities of ABA (i.e. up-country storage and handling) clearly separated from the Port Terminal Services, given that the Undertaking applies only to the Port Terminal Services?*

2.7.4 Non-discriminatory access

Clause 6.4 of the Undertaking provides that when providing access to Port Terminal Services, ABA must not discriminate between different Applicants or Users in favour of its own Trading Business, except to the extent that the cost of providing access to those Applicants or Users is higher. ABA has defined 'Trading Business' to include a 'business unit or division of ABA or its Related Bodies Corporate which have responsibility for the trading and marketing of Bulk Wheat'.

The Undertaking provides for the ACCC to require an independent audit of ABA's compliance with the non-discrimination clauses.

ABA's approach is consistent with the approach of the 2009 Undertakings.

2.7.5 Variation to Reference Prices and Standard Terms

The Undertaking allows ABA to vary the Reference Prices once published. ABA may also vary the Standard terms with approval from the ACCC. Any variations do not automatically override the terms of existing Access Agreements.

Any variation to the Reference Prices or Standard Terms must be published at least 30 days prior to the date on which it is to become effective in the same locations as Reference Prices and Standard Terms. ABA must also provide the ACCC with copies of variations to the Reference Prices and Standard Terms promptly following publication.

ABA's approach is consistent with the approach of the 2009 Undertakings.

2.8 Negotiating for Access

This clause sets out the framework within which ABA undertakes to negotiate with bulk wheat exporters seeking to access its Port Terminal Services. It covers the preliminary negotiation processes and procedures, the framework under which Applicants may gain access to Port Terminal Services, the negotiations following the lodgement of an application and the finalisation of an access agreement.

2.8.1 Good faith negotiation and Framework

Clause 7.1 of the Undertaking provides that ABA will negotiate with an Applicant for the provision of Port Terminal Services in good faith. Clause 7.2 outlines the four aspects to the negotiation process:

- (a) Preliminary inquiry
- (b) Access application
- (c) Standard Access Agreements
- (d) Negotiation and Acceptance

The Undertaking specifies that at any stage in the process, either party may seek to resolve a Dispute in accordance with the Dispute resolution process in clause 8.

This overview is consistent with that provided in the 2009 Undertakings.

Issues for comment

- *Is the process outlined in clause 7.2 sufficiently clear and consistent with the other provisions of clause 7?*

2.8.2 Preliminary inquiry

Provision of information

If requested by the Applicant, ABA will provide the Applicant with information related to access to the Port Terminal Services that may be reasonably required by the Applicant in relation to the access application. ABA may refuse the request if it would breach a confidentiality obligation, requires information reasonably considered commercially sensitive by ABA, or is unduly onerous to ABA.

Eligibility to apply

The Undertaking provides that ABA is not obliged to negotiate or enter into an agreement with an Applicant if it does not meet or is unable to demonstrate that it meets certain Eligibility Requirements. The Eligibility Requirements are set out in clause 7.4 (a)(iii) – (vi) of the Undertaking, and include requirements such as that the Applicant be solvent, not in Material Default, and be an Accredited Wheat Exporter.

If ABA refuses or ceases to negotiate with an Applicant for any reason it will notify the Applicant in writing and provide reasons for the refusal. The Applicant may refer the matter to the arbitrator under clause 8 if it considers ABA's refusal is unreasonable.

2.8.3 Application Process for Access Application

The Undertaking provides that requests for access to Port Terminal Services are to be submitted in the form of an Access Application as outlined at Schedule 2. Prior to acknowledging the Access Application, ABA may seek additional information or clarification of information already provided. ABA will acknowledge receipt of the Application in writing or electronically to the Applicant within three business days of receipt, or longer period where additional information or clarification is required.

ABA's approach is generally consistent with that provided in the 2009 Undertakings. However, the 2009 Undertakings each contain clauses requiring the port terminal operator to meet with the Applicant if requested prior to submission of an application. ABA's undertaking does not contain similarly specific clauses, but describes the 'Preliminary Inquiry' in clause 7.2 (a)(i) as including 'exchanges of information and meeting to enable an access undertaking to be lodged'.

Issues for comment

- *Is the process by which an Applicant may submit an Access Application sufficiently clear?*
- *Are the provisions for negotiation and clarification of information prior to the submission of an Access Application appropriate?*

2.8.4 Standard Access Agreements

Clause 7.6 of the Undertaking specifies that where an eligible Applicant notifies ABA that it requires Port Terminal Services at Reference Prices on the Standard Terms, ABA will execute an Access Agreement to that effect within five Business Days.

If the Applicant requires access under terms other than the Standard Terms and Reference Prices, ABA and the Applicant must negotiate in accordance with the negotiation and arbitration procedures in clauses 7 and 8.

Access to Standard Port Terminal Services before an Access Agreement is executed

Clause 7.7 of the Undertaking provides for the Applicant to access Port Terminal Services on the Standard Terms at the Reference Prices through an Interim Agreement prior to finalising an Access Agreement. This Interim Agreement will terminate:

- (a) where an Access Agreement is entered into
- (b) where the parties agree to terminate
- (c) on a date determined by an arbitrator under clause 8, or
- (d) at the end of the Negotiation Period.

ABA's approach is generally consistent with that in the 2009 Undertakings, specifically with that of GrainCorp which also includes provision for an Interim Agreement on the standard terms.

Issues for comment

- *Is the distinction between Access Agreements on the standard terms under clause 7.6 and Interim Agreements under clause 7.7 sufficiently clear and appropriate?*

2.8.5 Negotiation of Access Agreement

Clause 7.8 of the Undertaking provides that both parties will commence negotiations as soon as reasonably possible to progress towards an Access Agreement. Negotiations for access will cease:

- (a) when an Access agreement is executed by ABA and the Applicant
- (b) where an Applicant notifies ABA in writing that it withdraws the Access Application
- (c) after three months if an extension is not agreed upon
- (d) if an arbitrator determines that the Applicant is not negotiating in good faith, or
- (e) where an Applicant does not comply with a determination or direction of the arbitrator (and the determination or direction is not subject to review).

The Undertaking provides that an Applicant may submit a new Access Application at any time following cessation of the Negotiation Period.

Once an Applicant notifies ABA it is satisfied with the terms and conditions of an Access Agreement, ABA will provide a final Access Agreement within two Business Days. Where accepted by the Applicant, ABA will execute the final Access Agreement within five Business Days, unless a longer period is agreed by the parties.

ABA's approach to the negotiation of access agreements is consistent with the approach of the 2009 Undertakings.

2.9 Dispute resolution

This section outlines the approach to Dispute Resolution as proposed in the Undertaking.

2.9.1 Disputes

The Undertaking provides for Disputes to be resolved in accordance with the Dispute Resolution clause unless expressly agreed otherwise. Either party to a Dispute may give the other party a 'Dispute Notice' specifying the Dispute and requiring it to be dealt with under the Dispute Resolution clause. The parties are required to use reasonable endeavours acting in good faith to settle the Dispute as soon as practicable.

Applicants are not entitled to raise a Dispute Notice regarding the terms of the Loading Protocols. Disputes in relation to an executed Access Agreement will be dealt with under the provisions of that Access Agreement.

The Undertaking states that by 31 July of each year ABA will report to the ACCC on any material Disputes in relation to an Access Agreement and any Disputes in the last 12 months, which will include the details of any resolution and the status of unresolved matters.

2.9.2 Mediation

The Undertaking provides that if a Dispute is not resolved by negotiation within five Business Days after the date of the Dispute Notice, if the parties agree they can attempt to resolve the Dispute by mediation, or if they do not agree the Dispute may be referred to arbitration. There is also provision for the Dispute to be referred to Chief Executive Officers of the parties involved and for a mediator to be appointed by the President of the Victorian Chapter of the Institute of Arbitrators and Mediators of Australia (IAMA).

2.9.3 Arbitration

Under the Undertaking, parties may refer the Dispute to arbitration.

The Undertaking provides that ABA must notify the ACCC of the details of any Dispute which has been referred to arbitration and also provide the ACCC with the arbitrator's final determination. The Undertaking includes provisions on indemnity in relation to claims made against the arbitrator.

The Undertaking outlines the process for selecting an arbitrator. The Undertaking provides for the ACCC to nominate itself as the arbitrator by notifying all parties to Dispute in writing. Should the ACCC not wish to arbitrate the Dispute, and the parties fail to agree on an alternative arbitrator, either party may request the President of the Victorian Chapter of the IAMA to appoint an arbitrator.

The Undertaking outlines arbitration procedures. Under this process, the ACCC will have the right to make submissions to the arbitrator on matters relevant to the Dispute. Matters which the arbitrator must take into account include the provisions of the Undertaking, the matters set out in subsection 44X(1) and the objectives and principles in Part IIIA of the Act, as well as any guidance published and any submissions provided by the ACCC. The Undertaking notes that the arbitrator must not make a decision which, among other things, has any of the effects described in section 44W of the Act.³

The Undertaking provides that the content of the arbitration and any determination will be confidential unless the parties to the Dispute agree otherwise. Clauses in the Undertaking outline the effect of the arbitrator's determination, which includes that ABA will not be obliged to negotiate with an Applicant should the Applicant not comply with an arbitrator's determination. The arbitrator's costs and the costs of the parties to the arbitration will be borne by the parties in such proportions as the arbitrator determines.

ABA's approach to dispute resolution is consistent with the approach of the 2009 Undertakings.

2.10 Confidentiality

The Undertaking provides for the treatment of confidential information provided by the parties as part of the negotiation or dispute resolution or arbitration processes. The Undertaking requires that the recipient of the information treat that information as confidential and use it solely for negotiating access to the Port Terminal Services or resolving a Dispute in accordance with the Undertaking.

ABA's approach to the treatment of confidential information is consistent with the approach of the 2009 Undertakings.

2.11 Capacity management

2.11.1 Continuous disclosure rules under the WEM Act

The Undertaking provides for the establishment of policies and procedures for managing demand for the Port Terminal Services.

The Undertaking commits to publishing a Shipping Stem (as a condition of the Undertaking), to be updated daily, and which will include the following information:

- (a) the name of the ship scheduled to load grain
- (b) the date when the ship was nominated

³ Section 44W incorporates a restriction upon the making of a determination which would, amongst other things, prevent an existing user obtaining a sufficient amount of the service to be able to meet the user's reasonably anticipated requirements, measured at the time when the dispute was notified.

- (c) the date when the ship was accepted
- (d) the volume of grain to be loaded, and
- (e) the date on which grain is to be loaded.

This approach is consistent with that in the 2009 Undertakings and the requirements of the WEM Act.

2.11.2 The Port Loading Protocols

Schedule 5 sets out the Loading Protocols with which ABA must comply. These Loading Protocols cover ABA's policies and procedures for managing demand for the Port Terminal Services, including processes for nomination and acceptance of ships to be loaded. The capacity management system proposed by ABA is that booking requests 'will be dealt with in the order they are received, and, all other matters being equal, the earlier Intent to Ship Advice will be given priority over later Intent to Ship Advices'. The ACCC notes that ABA's Loading Protocols are less detailed than the protocols in the 2009 Undertakings.

The Undertaking outlines the process through which ABA may vary the Loading Protocols. The Undertaking states that any variation must be consistent with the objectives of the Undertaking and the obligation to provide non-discriminatory access, and must include an expeditious dispute resolution mechanism.

The Undertaking also states that ABA must conduct a consultation process in relation to any proposed variation to the Loading Protocols. This process includes:

- notifying interested parties and the ACCC of proposed changes
- publishing a copy on the website, and
- allowing at least 10 Business Days for interested parties to provide written responses to the proposed changes.

ABA is required to actively consider the responses in good faith. Any variation must be published at least 30 days prior to the date on which it is to become effective. ABA must provide the ACCC with copies of variations to the Loading Protocols promptly following publication.

ABA's approach to variation of the Loading Protocols is consistent with that in the 2009 Undertaking provided by GrainCorp.

2.11.3 No Hindering Access

The Undertaking states that the ABA or a Related Body Corporate of ABA must not engage in conduct having a purpose of hindering access to the Port Terminal Services by any User in the exercise of a right of access under the Undertaking. This provision is consistent with the 2009 Undertakings.

Issues for Comment

- *Are the provisions in the Loading Protocols sufficient to provide transparency and certainty for access seekers? If not, what other information should be included and why?*
- *Do access seekers consider that ABA's proposed Loading Protocols will efficiently allocate port capacity, particularly in a high-yield year where demand exceeds supply?*
- *Is the operation of the 'first come, first served' approach sufficiently clear in the proposed Loading Protocols?*
- *Is the process for the ordering and queuing of ships, and the decision criteria determining the order and speed within which ships will be loaded, sufficiently certain and transparent?*
- *Are the dispute resolution provisions in the Loading Protocols appropriate? Are they sufficient to provide certainty and transparency to access seekers?*

2.12 Publication of other information and Performance Indicators

The Undertaking requires that ABA publish information on stock at port on a monthly basis on its website, as well as publishing vessel booking applications on the Shipping Stem as the Shipping Stem is updated. The 2009 Undertakings specify that the Shipping Stem is updated each business day; ABA's proposed Undertaking states only that the Stem is to be updated within 24 hours of any change.

The Undertaking also requires that ABA publish two key service performance indicators:

- (a) the monthly tonnes shipped, and
- (b) the number of ships loaded .

This information will be published for a six-month period, and will be provided to the ACCC and published on ABA's website.

The 2009 Undertakings each include at least four indicators, such as:

- Applications rejected
- Port blockouts
- Average application assessment times
- Vessels failing survey
- Average road receipt rate.

Issues for Comment

- *Does the information on vessel booking applications to be published by ABA meet the reasonable information requirements of access seekers?*
- *Do the key performance indicators proposed to be published by ABA provide a sufficient degree of transparency around the level of service being provided at the port terminal facility operated by ABA?*

2.13 Indicative Access Agreement

ABA has proposed to use the Storage and Handling Agreement contained in Schedule 1 as its Standard Terms for access. This agreement will form the starting point for negotiations between ABA and access seekers regarding the terms of access to Port Terminal Services. The Storage and Handling Agreement applies to ABA's entire operations, including up-country storage, and not just access to the Port Terminal Services.

The Storage and Handling Agreement includes liability and indemnity provisions (clauses 16 and 17), the process by which ABA may vary the agreement (clause 18), and a dispute resolution process (clause 21). The ACCC notes that the variation process in clause 18 of the Storage and Handling Agreement is not consistent with the variation process for standard terms in clause 6.5 of the Undertaking. Specifically, the process in the Storage and Handling Agreement does not require approval from the ACCC.

Issues for Comment

- *Is there sufficient certainty on how its standard Storage and Handling Agreement, which applies to services outside the scope of the Undertaking, will work in the context of the Undertaking?*
- *Is the relationship between the variation procedures in the Undertaking and the variation provisions in the Storage and Handling Agreement sufficiently clear and certain?*
- *Does the indicative access agreement in the Undertaking appropriately balance the interests of ABA and the access seekers as a starting point to commence commercial negotiations?*
- *Do the liability and indemnity provisions in the Storage and Handling Agreement appropriately balance the level of risk faced by ABA and access seekers?*

3 Appendix: Background information

3.1 Current legislative arrangements

The *Wheat Export Marketing Act 2008* (Cth) (**the WEM Act**) came into effect on 1 July 2008. The WEM Act 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.⁴

Under the WEM Act, 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 WEM Act 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 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 subsection 24(4) of the WEM Act. In summary, the continuous disclosure rules require the Port Terminal Operators to publish on their website:

- their policies and procedures for managing demand for port terminal services (which ABA has titled its Loading Protocols)
- a statement, updated daily, setting out, amongst other things, the name of each ship scheduled to load grain using port terminal services, the estimated date on which grain will be loaded into the ship, 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).⁵

⁴ The relevant transitional legislation is the *Wheat Export Marketing (Repeal and Consequential Amendments) Act 2008* (Cth).

⁵ See subsection 24(4) of the WEM Act for detail about the continuous disclosure rules.

ABA has submitted its undertaking to the ACCC pursuant to Part IIIA of the Act for the purpose of satisfying the access test.

3.2 Productivity Commission inquiry

The Productivity Commission completed an inquiry into the wheat export marketing arrangements following the deregulation of the industry. The Productivity Commission has provided a final report to the government which was released on 1 July 2010. The report made several findings and recommendations, including:

- The accreditation scheme has facilitated a smooth transition but the benefits will rapidly diminish in the post-transitional phase. Accreditation and Wheat Exports Australia should be abolished on 30 September 2011.
- The access test has provided greater certainty for traders and made access easier, more timely, and less costly compared to reliance on Part IIIA of the Act. The access test should remain in place for a further three years until 30 September 2014.
- The benefits of the access test will diminish and could become costly in the long term. Therefore, from 1 October 2014 regulated access should rely on Part IIIA of the Act supported by mandatory disclosure and a voluntary code of conduct.

The full report is available on the Productivity Commission website at

<http://www.pc.gov.au/projects/inquiry/wheatexport/report>.

As at the date of release of this issues paper, the government has not yet responded to the Productivity Commission's report.

3.3 Legal test for accepting an access undertaking under Part IIIA

Part IIIA of the Act establishes a regime to assist third parties to obtain access to services provided through facilities with natural monopoly characteristics to promote competition in upstream or downstream markets.

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

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

In relation to access undertakings, a provider of a service (or a person who expects to be the provider of a service) may give an undertaking to the ACCC in connection with the provision of access to the service. An undertaking may specify the terms and conditions on which

access will be made available to third parties. The ACCC may accept the undertaking if it thinks appropriate to do so after considering the matters set out in subsection 44ZZA(3).

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

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

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

- the objects of Part IIIA of the 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 section 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.
- In relation to the pricing principles, section 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
- and that access price structures should:
 - allow multi-part pricing and price discrimination when it aids efficiency; and

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

3.4 Recent changes to Part IIIA

The *Trade Practices Amendment (Infrastructure Access) Act* 2010 (Cth) took effect on 14 July 2010 and introduced changes to Part IIIA of the Act, including to the procedures set out in Part IIIA for the assessment of access undertakings.

3.4.1 Timeframes for ACCC decisions and stopping the clock

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

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

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

The changes to the Act also introduce provisions for ‘stopping the clock’ that mean certain time periods are not taken into account when determining the expected period (see subsection 44ZZBC(2)). In particular, the ACCC may disregard a period:

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

3.4.2 Amendment notices

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

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

- the nature of the amendment or amendments (the ‘proposed amendment or amendments’) that the ACCC proposes be made to the undertaking; and
- the ACCC’s reasons for the proposed amendment or amendments; and
- the period (the ‘response period’) within which the person may respond to the notice, which must be at least 14 days after the day the notice was given to the person: see subsection 44ZZAAA(2).

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

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

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

3.4.3 Other changes

Information requests

Subsection 44ZZBCA(1) provides that the ACCC may give a person a written notice requesting the person give to the ACCC, within a specified period, information of a kind specified in the notice that the ACCC considers may be relevant to making a decision on an access undertaking application.

As noted above, the period within which the ACCC requests information constitutes a clock-stopper.

Fixed principles

Section 44ZZAAB of the Act now provides that an access undertaking given to the ACCC under subsection 44ZZA(1) may include one or more terms that, under the undertaking, are fixed for a specified period (known as ‘fixed principles’). Such principles must extend beyond the term of the undertaking: subsection 44ZZAAB(3).