



Australian
Competition &
Consumer
Commission

Issues Paper

Viterra Operations Limited proposed Port Terminal Services Access Undertaking

20 January 2011



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1 Introduction

Under Part IIIA of the *Competition and Consumer Act 2010* (Cth) (**the CCA**, 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.

Viterra Operations Limited (**Viterra**) has submitted a proposed access undertaking (**Proposed Undertaking**) to the Australian Competition and Consumer Commission (**ACCC**) for assessment under Part IIIA of the CCA. Viterra's Proposed Undertaking relates to the provision of access to services for bulk wheat export at six grain terminals operated by Viterra in South Australia. These terminals are:

- Port Adelaide, Inner Harbour;
- Port Adelaide, Outer Harbour;
- Port Giles;
- Wallaroo;
- Port Lincoln; and
- Thevenard.

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

The Proposed Undertaking is intended to replace the existing undertaking, which was accepted by the ACCC, pursuant to Division 6 of Part IIIA of the *Trade Practices Act 1974* (now the CCA), on 29 September 2009 (**2009 Undertaking**).

Viterra has submitted the Proposed Undertaking in accordance with legislative requirements under the *Wheat Export Marketing Act 2008* (Cth) (**the WEM Act**).

1.1 Viterra's Proposed Undertaking

Viterra provided the Proposed Undertaking to the ACCC on 23 December 2010. The Proposed Undertaking and associated documents, including a version with changes from the existing undertaking marked-up and a supporting submission from Viterra, are available on the ACCC's website at:

<http://www.accc.gov.au/wheat>

Alternatively, go to the ACCC's homepage at www.accc.gov.au and follow the links to 'For regulated industries' and 'Wheat Export: Port Terminal Services Undertakings' and 'Viterra.'

Viterra, in its supporting submission, states that the Proposed Undertaking will have the following features:

- Publication of price and non-price terms for standard services: Viterra must publish price and non-price terms for standard Port Terminal Services.
- Negotiate access in good faith: Viterra is obliged to negotiate with access seekers in good faith in accordance with a detailed negotiation procedure and timeframes set out in the Proposed Undertaking.
- Non-discriminatory access: Viterra must provide access in accordance with price and non-price terms that include efficiency, fairness and transparency as central elements and must not discriminate between access seekers, or unreasonably in favour of its own operations.
- Dispute resolution: There is a detailed dispute resolution mechanism, which will provide access seekers who are dissatisfied with the terms and conditions on which they can obtain access (including price), with the ability to have those terms and conditions reviewed by an independent arbitrator and overseen by the Commission.
- Publication of key port information: Viterra is obliged to publish key port information including stocks held at each Port Terminal, cargo nominations and nominated monthly export capacity on a monthly basis.

Viterra's Proposed Undertaking largely mirrors the 2009 Undertaking. Viterra submits that the 2009 Undertaking worked well and therefore minimal changes are required.

Viterra summarised the key differences between the 2009 Undertaking and the Proposed Undertaking as follows:

- Provisions to facilitate the transition from the 2009 Undertaking to the Proposed Undertaking;
- Changes to accommodate potential changes to the regulatory framework for bulk wheat exports. Specifically, Viterra has planned for the possible removal of an accreditation requirement by Wheat Exports Australia;
- Greater clarity regarding the process for issuing notices and other communications to customers;
- Changes reflecting Viterra's recent variation process to the Port Loading Protocols;
- Additional information in the Port Schedules regarding the specific Port Terminal Services provided at each port; and
- An update of the Standard Terms to better align with the Proposed Undertaking.

The Proposed Undertaking would commence on 1 October 2011 and expire on 30 September 2014. Viterra's 2009 Undertaking will expire on 30 September 2011. Viterra has included in the Proposed Undertaking transitional provisions to ensure continuous coverage of the Undertakings to access agreements.

1.2 ACCC assessment

The ACCC must apply the test set out in section 44ZZA(3) of the CCA in deciding whether to accept the access undertaking application. 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 the Issues Paper.

The ACCC is also currently assessing Proposed Undertakings lodged by GrainCorp Operations Limited and Australian Bulk Alliance. Co-Operative Bulk Handling is expected to also lodge a proposed undertaking in the near future.

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. These objects include ‘to provide a framework and guiding principles to encourage a consistent approach to access regulation in each industry.’¹

In its assessment of Viterra’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 Viterra’s circumstances, the ACCC will consider industry-wide issues in its assessment of this proposed Undertaking.

1.3 Indicative timeline for assessment

Under section 44ZZBC(1) of the CCA, the ACCC must make a decision on the access undertaking application within 180 days, starting on the day that the application was received, in this case 23 December 2010 (referred to as ‘the expected period’).

The CCA also provides for ‘clock-stoppers’, meaning that some days will not count towards the 180 day expected period. Specifically, the clock is stopped where the ACCC either publishes a notice inviting public submissions on an undertaking application, or gives a notice requesting information about an application.² The consultation period on this Issues Paper will be disregarded in accordance with the ‘stopping the clock’ provisions.

The ACCC has developed the following indicative timeline for its assessment of the Proposed Undertaking:

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

Note that the indicative timeline is subject to the operation of clock-stoppers, which may extend the timeframes.

¹ Section 44AA sets out the objects of Part IIIA.

² See section 3 of the Issues Paper for further information on these provisions of the CCA.

1.4 Consultation

The ACCC, pursuant to section 44ZZBD of the CCA, now invites submissions on the Proposed Undertaking.

Section 2 of the Issues Paper sets out certain matters on which the ACCC is seeking views. Note that section 2 is not a comprehensive outline of all the matters able to be considered and you are not required to provide views on each or any of the matters listed in that section. Further, you are invited to comment on any aspect of the Proposed Undertaking that you consider relevant.

Background information on the legislative criteria by which the Proposed Undertaking will be assessed is set out in section 3 of the Issues Paper. Section 3 also includes an overview of recent amendments to Part IIIA of the CCA. If practicable, submissions should refer to the legislative criteria, as this will assist the ACCC in assessing the Proposed Undertaking.

Please include detailed reasons to support the views put forward in your submissions. If you consider that an aspect of the Proposed Undertaking is *not* appropriate, please suggest changes that may address your concerns, including drafted amendments where possible.

1.5 Making a submission

Submissions should be addressed to:

Mr Anthony Wing
General Manager
Transport and General Prices Oversight
ACCC
GPO Box 520
MELBOURNE VIC 3001

Email: transport@acc.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. The ACCC may disregard any submissions made after this date, as prescribed by section 44ZZBD of the CCA. Therefore it is in your interest to make submissions within the timeframe.

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 matters raised in this document, please contact:

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2 Matters for comment

This section outlines matters on which the ACCC is seeking comment from stakeholders, to assess whether the Proposed Undertaking is likely to be appropriate.

2.1 Capacity allocation

2.1.1 Definition of ‘Capacity’

‘Capacity’ is not a defined term in the Proposed Undertaking. At a high level, the ACCC understands that Capacity relates to Viterra’s ability to accept bookings onto the stem. Capacity includes, inter alia, storage capacity, ship loading capacity and in-load capacity (maximum and average).

Issues for Comment

- *Would inclusion of a definition of ‘Capacity’ in the Proposed Undertaking, increase clarity and certainty for access seekers?*
- *What do industry participants understand is meant by the term ‘Capacity’?*

2.1.2 Capacity table

The ACCC understands that at the commencement of the 2009/10 shipping season a number of transitional problems arose with respect to the operation of the Port Loading Protocols. In response, Viterra commenced publishing a Capacity table on its website in order to provide greater clarity to access seekers in relation to available Export Standard and Export Select capacity. The ACCC notes that the Capacity table has been modified since its inception based on feedback to Viterra from access seekers.

The ACCC notes that Viterra publishes this information in addition to the requirements contained in either the 2009 Undertaking or the Continuous Disclosure Rules, as prescribed by the WEM Act.

Issues for Comment

- *Have access seekers found that the information published in the capacity table helpful? Is there additional information that Viterra could include that would improve transparency for access seekers as to the available ‘capacity’?*
- *Would inclusion of quantities of available Export Select and Export Standard capacity in the capacity table be helpful?*

Issues for Comment

- *Is there benefit in providing figures as to the available capacity of storage at port, ship loading capacity and in-loading capacity in the capacity table?*
- *Should the undertaking require Viterro to publish the Capacity table as it is currently published; or alternatively, with numerical representations of available Export Select and Export Standard capacity or other components of capacity such as storage, ship-loading or in-load capacity included?*

2.1.3 Additional Capacity

The ACCC understands that at present, Viterro sends email notification to its clients when additional capacity becomes available and that the email specifies the type of capacity, for example Export Select or Export Standard, which has become available.

Issues for Comment

- *Should additional capacity that is made available be included as a notice with the Capacity table published on Viterro's website, in addition to the email notification sent to clients?*
- *In the event that the Capacity table is modified to specify quantities and type of available capacity, is it appropriate that the Capacity table be adjusted to show the additional capacity available in conjunction with sending an all client email?*

2.1.4 Port loading protocols

The Port Loading Protocols provide information in relation to the pathway for the export of grain commodities out of Viterro's port terminals and set out the processes and procedures which Viterro apply to order and manage vessels for loading.

Issues for comment

- *Have access seekers found that Viterro's Port Loading Protocols have efficiently allocated port loading capacity?*
- *Could the 'first come, first served' approach to capacity allocation in the Port Loading Protocols efficiently allocate resources in a high-yield year where demand exceeds supply?*

The Port Loading Protocols contain a Performance Risk / Anti Hoarding provision that allows Viterra to not accept a booking if it believes that an access seeker is attempting to block access to port terminals.³

Issue for Comment

- *Are the provisions in the port loading protocols effective in preventing overbooking of the shipping stem?*

On 30 November 2010, Wheat Exports Australia and Viterra issued a joint media release announcing the outcome of an external audit of Viterra's compliance with its obligations under the *Wheat Export Marketing Act 2008*. The media release announced that the audit had identified a number of areas for improvement including tighter administration of excess vessel bookings, more timely cancellation of bookings that are not going to be used and immediate updating of the shipping stem when slots become available.

The media release also announced that Viterra had agreed to a process of internal review of policies and procedures relating to Viterra's administration of the shipping stem and compliance with continuous disclosure rules.

Issues for Comment

- *How effective are the current port loading protocols in managing excess vessel bookings and cancellation of bookings?*
- *Are stakeholders satisfied with Viterra's response to the findings of the external audit and any subsequent actions it has carried out?*

2.2 Publication of key port information

The ACCC notes that Viterra has added information to the Port Schedules of the Proposed Undertaking. The additional information includes nominal quantities of practical in-load capacity (maximum and average) and the ship loading capacity for each particular port terminal. Viterra has also included operational information specific to each port that may affect the capacity available to access seekers.

Issue for Comment

- *Will the additional information included in Viterra's Proposed Undertaking meet access seekers' information requirements?*

³ Port Loading Protocols, Clause 12

2.3 Approved Third Party Store

Approved Third Party Store is defined in the Port Terminal Services Agreement for Standard Port Terminal Services (attached to the Proposed Undertaking), as a grain storage and handling facility owned by a person other than Viterra, which has been approved by Viterra. The Port Loading Protocols attached to the Proposed Undertaking state that such approval is not to be unreasonably withheld having regard to appropriate industry standards (e.g. hygiene and quality).

The ACCC notes that approval is a commercial process run by Viterra on a seasonal basis. The conditions for approval for the 2009/10 season are outlined in the 'Approved Operator Conditions and Deed of Access' available on the Viterra website.⁴ The ACCC notes that the approval process does not fall within the scope of the 2009 Undertaking, nor is it covered in the Proposed Undertaking.

Issues for Comment

- *Is the approval process for third party store sufficiently transparent to access seekers, or other parties seeking approval from Viterra in relation to storage facilities?*
- *Should the approval process be incorporated into the Proposed Undertaking and be subject to the dispute resolution mechanisms?*

The ACCC notes that there is benefit to access seekers using approved third party store in terms of receival fees at port. Viterra's storage and handling charges for 2010/11 provide for an at port receival fee of \$2.50 per tonne for bulk wheat received from approved third party storage. Non-approved receival at port is charged at \$13.30 per tonne.⁵

Issues for Comment

- *Is it appropriate for Viterra to explain the difference in charges between approved and non-approved third party storage, by ensuring that the charge difference is explained by reference to the cost of providing the receival service?*
- *Does the price differential accurately represent the different treatment of bulk wheat from approved or non-approved third party sites on receival at port?*
- *Is the price differential reflective of the costs of managing risks associated with receiving bulk wheat from non-approved third party sites?*

⁴ <http://viterra.com.au/Documents?file=3837&type=pdf>

⁵ See <http://viterra.com.au/grain/australia/storage-handling/charges> - at 22 December 2010.

2.4 Flexibility to vary the Port Loading Protocols

2.4.1 Port Loading Protocols variation process

The ACCC notes that since the commencement of the 2009 Undertaking, Viterra has twice varied the Port Loading Protocols.

The first variation process, conducted in 2009, led to Viterra breaching clause 9 of the 2009 Undertaking for its conduct during the consultation process. The letter sent from the ACCC to Viterra detailing the breach is available here:

<http://www.accc.gov.au/content/index.phtml?itemId=868800>

Viterra completed a second variation process in 2010, prior to lodging the Proposed Undertaking. The ACCC understands that Viterra lodged its proposed variation on 25 October 2010. The proposed variation was consulted on with stakeholders and Viterra revised the proposed variation based on the consultations. The revised (final) variation took effect on 12 November 2010.

The ACCC views this as a two stage process incorporating a proposed variation with consultation, followed by final variation notice incorporating amendments arising out of consultation.

Viterra has proposed minimal changes to the Port Loading Protocols variation process in the Proposed Undertaking from the 2009 Undertaking. The variation process is set out in clause 9.3.

Issues for Comment

- *Was Viterra's approach to consultation in its 2010 variation process satisfactory?*
- *Is the flexible approach to the Port Loading Protocols (i.e. allowing Viterra to vary the Port Loading Protocols without seeking formal approval from the ACCC) appropriate in terms of fairness and transparency?*
- *Does the flexibility afforded to Viterra appropriately balance the interests of Viterra to run its operations effectively with the interests of access seekers in seeking access to Viterra's port terminal services?*

2.5 Approach to pricing

Issues for Comment

- *How has the approach to pricing in the 2009 Undertaking (i.e. publish, negotiate, arbitrate approach) worked in practice?*
- *Did the measures allow access seekers to commercially negotiate with Viterra in a framework where both parties knew that prices, terms and conditions may be subject to arbitration by the ACCC or a private arbitrator, applying the pricing principles in section 44ZZCA of the CCA and general non-discrimination requirements?*

2.6 Substance of the Indicative Access Agreement

Issues for Comment

- *How has the approach to the provision of standard terms in the form of the indicative access agreement worked in practice?*
- *Does the indicative access agreement in the Proposed Undertaking appropriately balance the interests of Viterra and access seekers as a starting point to commence commercial negotiations?*

2.7 Dispute resolution

Issue for Comment

- *How have the dispute resolution provisions in the 2009 Undertaking worked in practice?*

2.8 Term of the undertaking

Issues for Comment

- *Is the three year term of the Proposed Undertaking appropriate?*
- *Is the Proposed Undertaking drafted in a way to ensure a smooth transition from the 2009 Undertaking to the Proposed Undertaking?*

Apart from the specific questions posed in this Issues Paper, the ACCC welcomes any other comments you wish to make relevant to the assessment of the Proposed Undertaking.

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**). WEA 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.⁶

Under the WEM Act, parties without WEA accreditation are prohibited from exporting bulk wheat from Australia. Parties seeking accreditation as bulk wheat exporters must be deemed by WEA to be ‘fit and proper’ having regard to certain criteria. The WEM Act further provides that parties seeking bulk wheat export accreditation, which also provide ‘port terminal services’, must satisfy an additional ‘access test.’

Part of the ‘access test’ is linked to Part IIIA of the *Competition and Consumer Act 2010* (**CCA**) (previously the *Trade Practices Act 1974*). 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 CCA. The undertaking must relate to providing access to the port terminal service, for purposes relating to wheat export, to accredited wheat exporters; or
- a decision is in force under Part IIIA of the CCA 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 wheat export.

Under the ‘access test’ providers of port terminal services must also comply with ‘continuous disclosure rules’ set out in section 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
- 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).

Under Division 6 of Part IIIA of the *Trade Practices Act 1974* (**TPA**) (now CCA), the ACCC accepted Viterro’s 2009 Undertaking on 29 September 2009. The 2009 Undertaking was submitted to the ACCC on 24 September 2009. The 2009 Undertaking related to the provision of access to port terminal services, for the purposes relating to bulk wheat export, to accredited wheat exporters. The ACCC’s

⁶ The relevant transitional legislation is the *Wheat Export Marketing (Repeal and Consequential Amendments) Act 2008* (Cth).

acceptance of the 2009 Undertaking followed a lengthy process of consultation on an earlier version of Viterra's 2009 Undertaking.

Viterra's 2009 Undertaking expires on 30 September 2011.

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

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

- the objects of Part IIIA of the CCA, which are to:
 - promote the economically efficient operation of, use of and investment in the infrastructure by which services are provided, thereby promoting effective competition in upstream and downstream markets; and
 - provide a framework and guiding principles to encourage a consistent approach to access regulation in each industry;
- the 'pricing principles' specified in section 44ZZCA of the CCA (see further below);
- the legitimate business interests of the provider of the service;
- the public interest, including the public interest in having competition in markets (whether or not in Australia);
- the interests of persons who might want access to the service;
- whether the undertaking is in accordance with an access code that applies to the service; and
- any other matters that the ACCC thinks are relevant.
- In relation to the pricing principles, section 44ZZCA of the CCA provides that regulated access prices should:
 - be set so as to generate expected revenue for a regulated service that is at least sufficient to meet the efficient costs of providing access to the regulated service or services; and
 - include a return on investment commensurate with the regulatory and commercial risks involved; and
- and that access price structures should:

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

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 TPA (now the CCA), including to the procedures set out in Part IIIA for the assessment of access undertakings.

3.4.1 Timeframes for ACCC decisions and clock-stoppers

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

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

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

The changes to the TPA (now CCA) also introduce ‘clock-stoppers’ which mean that certain time periods are not taken into account when determining the expected period (see section 44ZZBC(2)). In particular, the clock may be stopped:

- by written agreement between the ACCC and the access provider (in this case, Viterra), and such agreement must be published: section 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

3.4.2.1 Changes to the TPA (now CCA)

Section 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 section 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 sections 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: section 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: section 44ZZAAA(6).

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

3.4.3 Other changes

3.4.3.1 Information requests

Section 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.

3.4.3.2 Fixed principles

Section 44ZZAAB of the CCA 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: section 44ZZAAB(3).