



Australian
Competition &
Consumer
Commission

Co-operative Bulk Handling Limited's proposed 2014-17 Port Terminal Services Access Undertaking

Draft Decision to accept

25 June 2014

Australian Competition and Consumer Commission
23 Marcus Clarke Street, Canberra, Australian Capital Territory, 2601
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Glossary of terms and abbreviations

2009 Undertaking	The port terminal services access undertaking submitted by Co-operative Bulk Handling Limited on 24 September 2009 and accepted by the Australian Competition and Consumer Commission pursuant to Part IIIA of the CCA on 29 September 2009 and which expired on 30 September 2011
2011 Undertaking	The port terminal services access undertaking submitted by Co-operative Bulk Handling Limited on 20 September 2011 and accepted by the Australian Competition and Consumer Commission pursuant to Part IIIA of the CCA on 28 September 2009 and expiring on 30 September 2014
ACCC	Australian Competition and Consumer Commission
BLC	CBH's 'Base Load Capacity' long-term capacity allocation system initially proposed as part of the 2011 Undertaking
CBH	Co-operative Bulk Handling Limited
FCFS	The first-come first served method of allocating Spare Capacity (capacity not allocated via LTAs or the auction mechanism)
Loading Statement	A statement, updated daily and displayed on CBH's website, setting out, amongst other things, the name of each ship scheduled to load grain using port terminal services, the name of the exporter of the grain, the estimated date on which grain will be loaded into the ship (if known), and the date on which the ship was nominated.
LTAs	Long term capacity agreements, defined at clause 17.1 of CBH's proposed Port Terminal Rules as 'an agreement between CBH and any Customer who is allocated Long Term Capacity after submitting a Long Term Capacity Offer as described in clause 3.3(k)'
Mandatory Code	The mandatory code of conduct, prescribed under the CCA, anticipated to govern port access in the bulk wheat export industry from 1 October 2014.
PTRs	CBH's proposed Port Terminal Rules detail CBH's policies and procedures (published on CBH's website) for managing demand for port terminal services - a schedule to the

	Proposed Undertaking
Proposed Undertaking	The proposed Part IIIA port terminal services access undertaking provided to the ACCC by CBH on 14 March 2014
Standard Terms	CBH's Standard Port Terminal Services Agreement 2014/2017 – a schedule to the Proposed Undertaking
WEMA	<i>Wheat Export Marketing Act 2008 (Cth) (as amended by the <i>Wheat Export Marketing Amendment Act 2012</i>)</i>

Capitalised terms used in this draft decision and not defined in this glossary or the body of this document are terms defined in clause 2 of CBH's Port Terminal Services Agreement or clause 17.1 of CBH's Port Terminal Rules.

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1. Summary

On 14 March 2014, CBH lodged a Proposed Undertaking for its port terminal services with the ACCC for assessment under section 44ZZA of the Competition and Consumer Act 2010 (CCA).

The Proposed Undertaking is intended to cover the period from when CBH's current access undertaking accepted in 2011 (the 2011 Undertaking) expires on 30 September 2014 until 30 September 2017 or such a time as it is no longer required to have an access undertaking accepted by the ACCC (for instance, upon the anticipated commencement of a mandatory code of conduct (Mandatory Code)).

The Proposed Undertaking is largely similar to CBH's 2011 Undertaking. The major difference between the Proposed Undertaking and CBH's existing 2011 Undertaking is that it seeks to allow three-year long term agreements (LTAs) for port capacity. CBH has proposed LTAs to allocate 'long term' capacity, and an auction and subsequent first-come first served system (FCFS) to allocate 'near term' capacity.

The key features of the proposed LTAs are:

- At least 34 per cent of capacity will be reserved for near term acquisition.
- LTA capacity will be tradable in a secondary market and able to be re-positioned during the year.
- Customers with LTAs will be required to spread their bookings over at least three quarters of the year.
- Parties must book a minimum qualifying tonnage of 600,000 tonnes per annum for the three-year term of the LTA.

In addition, CBH has proposed several other changes in its Proposed Undertaking, such as an early expiry provision affecting the term of the Undertaking, several changes to the Standard Terms such as provisions for co-mingling grain, and a clause addressing the option of removing one or more of its port terminals from the full set of requirements in the provisions of the undertaking.

The ACCC released an Issues Paper on 4 April 2014 that invited public submissions from stakeholders on the key issues relevant to CBH's Proposed Undertaking. In response, the ACCC received five public submissions from industry participants, all of which supported CBH's proposal to introduce LTAs.

This draft decision sets out the ACCC's preliminary views and a draft decision to (subject to certain drafting amendments) accept CBH's Proposed Undertaking.

ACCC's preliminary view

Long term agreements

The ACCC has assessed the proposed LTAs, having regard to the matters set out in subs. 44ZZA(3) of the CCA. Overall, the ACCC's draft view is that the LTA arrangements are appropriate, subject to one drafting change.

The ACCC also notes that the arrangements received significant support from industry, in contrast to CBH's previous Base Load Capacity (BLC) proposal in 2011. The LTAs in the Proposed Undertaking differ in a number of ways to CBH's 2011 BLC proposal.

In summary, the ACCC's draft views are that:

- the three-year term of CBH's LTAs is appropriate given the three year term of the Undertaking
- LTAs can have significant benefits for the port operator, access seekers and the public, and are likely to encourage investment in infrastructure
- the requirement that customers commit to an annual minimum 600,000 tonnes to be booked as LTA capacity appears appropriate and would allow a range of customers to potentially take up an LTA
- the split of capacity available for long term allocation - up to 66 per cent of total capacity – and near term capacity – at least 34 per cent of total capacity - appears appropriate and, based on recent industry trends, appears likely to reserve sufficient available capacity for customers who do not take up an LTA
- the ability of customers to trade and reposition all forms of capacity will likely reduce the likelihood of capacity going unused, leading to a more efficient use of port terminal services, and will provide non-LTA customers with additional flexibility to obtain capacity
- the requirement on customers to allocate their LTA bookings over at least three quarters of the year will promote increased port utilisation throughout the year
- the LTA capacity restrictions, where no customer would be able to acquire more than 50 per cent of total LTA capacity, both in aggregate and in any given month at a particular port, provides a safeguard against exporters hoarding capacity and facilitates competition
- the allocation of near term capacity in accordance with the current auction and FCFS processes is appropriate. A number of factors such as reduced demand for auctioned capacity and revisions in 2013 to the auction mechanism, suggest that auction premiums are unlikely to be significantly higher than at present, and that the risk of larger customers significantly bidding up prices is likely to be low
- it is appropriate that pricing remain the same for all customers, regardless of the capacity allocation method, although this may limit the extent of negotiation by exporters.

- While LTA customers would be able to access certain benefits from taking up an LTA relative to non-LTA customers, this benefit is appropriate compensation for making an LTA commitment.
- There are benefits to CBH of obtaining a Long Term Annual Shipment Schedule (LTASS) from its LTA customers to assist in logistics planning and targeting infrastructure spending. CBH should be able to exercise a level of discretion to manage long term capacity, including where LTA capacity is oversubscribed in a shipping window and where customers make changes to their LTASS.

In relation to this last point, the ACCC considered that there was a potential lack of clarity in CBH's proposed drafting. In particular, CBH's proposal failed to expressly address what the implications were for customers after changes are proposed to the LTASS. In response to the ACCC's concerns, CBH has proposed a new clause to be inserted into the Port Terminal Rules to clarify implications for customers. While the ACCC is of the preliminary view that the amended LTASS process may be appropriate, stakeholder feedback is invited on this clause before the ACCC reaches a final conclusion on this provision.

Term of the Undertaking

The ACCC considers that the three-year term and early expiration clauses of the Proposed Undertaking are appropriate.

The Proposed Undertaking is intended to commence on 1 October 2014, in the event that the Mandatory Code is not approved and declared by 30 September 2014, and to expire on 30 September 2017. However, the early expiry clause provides that the undertaking may expire on one of several events, including the commencement of the Mandatory Code.

The ACCC considers that the operational certainty provided by the proposed expiration clause promotes the operation of an efficient and profitable bulk wheat export marketing industry, and is consistent with the objects of the WEMA. Further, it considers that the early expiry clauses provide the appropriate flexibility to avoid duplicative regulation (for instance, in the event of the commencement of the Mandatory Code).

Exclusion of particular CBH port from coverage under the undertaking

Subsection 44ZZA(7)(b) of the CCA provides CBH with the ability to vary its 2011 Undertaking, but only with the consent of the ACCC.

The current drafting of clause 4.3(a) of the Proposed Undertaking provides that CBH may seek the approval of the ACCC to vary the undertaking under subs. 44ZZA(7) of the CCA to remove Port Terminal Services provided at a particular Port from coverage under the Undertaking (except in relation to the Continuous Disclosure Rules) *'if the ACCC accepts that the relevant Port is subject to sufficient competitive constraint'*.

The ACCC considers that amendments to clause 4.3(a) are required to clarify that the ACCC's acceptance of an application by CBH to remove a port from regulation will be according to the legislation, specifically in consideration of the matters listed in subs.44ZZA(3) of the CCA.

CBH has since proposed a revised clause 4.3(a) that addresses these issues and will be implemented into a revised version of the Proposed Undertaking prior to a final decision being made.

Changes to Standard Terms

The ACCC has not formed a specific view on individual clauses in the Standard Terms. This view is in consideration of the commercial nature of the Standard Terms and the ability of access seekers to negotiate different terms (with recourse to dispute resolution). The ACCC notes that stakeholders did not comment on any specific clauses.

The ACCC's preliminary view therefore is that the Standard Terms contained in the Proposed Undertaking are appropriate.

Carried over arrangements

Other than the introduction of LTAs and the other changes to provisions discussed, CBH's Proposed Undertaking contains the same provisions as those accepted in the 2011 Undertaking.

Overall

Overall, the ACCC's draft decision is that, having regard to the matters listed in subs. 44ZZA(3) of the CCA, having considered the submissions received in response to the ACCC's Issues Paper, and subject to amendments to clause 4.3 of the undertaking and clause 3.4 of the Port Terminal Rules, it would be appropriate to accept the Proposed Undertaking.

Invitation for comment

The ACCC is seeking views from interested parties on its draft decision. These views will inform the ACCC's final decision on the Proposed Undertaking.

The ACCC welcomes specific comments on the changes proposed to be made by CBH to the original drafting of CBH's Proposed Undertaking. These include the requirement on exporters seeking long term capacity to provide CBH with details of its proposed capacity and supply chain arrangements, and the process that follows.

2. Background

Under Division 6 of Part IIIA of the CCA, 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.

CBH operates four port terminals at Albany, Esperance, Geraldton and Kwinana, all of which are currently subject to the 2011 Undertaking. The 2011 Undertaking governs how competing exporters can access port terminal services at CBH's four port terminals in Western Australia.

On 14 March 2014, CBH submitted the Proposed Undertaking to replace the 2011 Undertaking when it expires on 30 September 2014.

The purpose of this document is to set out the ACCC's preliminary views on CBH's Proposed Undertaking. The ACCC's preliminary views have been formed after considering CBH's supporting submissions, submissions by interested parties, and the matters set out in subs. 44ZZA(3) of the CCA.

This draft decision constitutes a notice inviting public submissions for the purposes of subs. 44ZZBD(1) of the CCA. Responses to the draft decision will inform the ACCC's final decision on the Proposed Undertaking.

2.1. CBH's proposed 2014 undertaking

The Proposed Undertaking is similar to CBH's 2011 Undertaking, with the key difference being the proposed introduction of LTAs. CBH has proposed to incorporate both LTAs for 'long term' allocation and a combination of auction and FCFS processes to allocate 'near term' capacity.

CBH proposes to enter into LTAs with qualifying customers for a period of three years. The key features of the proposed LTA arrangements are:

- at least 34 per cent of total capacity will be reserved for 'near term' acquisition via the existing capacity allocation system (auction then FCFS)
- to qualify for LTA capacity, parties must book a minimum qualifying tonnage of 600,000 tonnes per annum for the three year term of the LTA
- LTA capacity will be tradable and able to be re-positioned during the year, consistent with near term capacity and in accordance with the current rules
- LTA customers will be required to spread their bookings over at least three quarters of the year, and no customer will be able to acquire more than 50 per cent of total LTA capacity, both in aggregate and in any given month at a particular port
- if total LTA capacity is oversubscribed in a half-month shipping window at a particular port, then CBH will have full discretion to either:
 - refuse to allocate LTA capacity in that window and instead offer that capacity via the auction

- consult with LTA applicants to reduce or reposition their capacity volumes, or
- accept the applications after varying the amount of long term capacity offered.

There are some other differences between the 2011 Undertaking and the Proposed Undertaking, including:

- the proposed early expiry of the undertaking upon the commencement of the Mandatory Code of conduct (anticipated to govern access to bulk wheat ports from 1 October 2014) or the removal of CBH's obligation to have an access undertaking accepted by the ACCC
- clauses addressing the potential scenario where CBH applies to the ACCC to remove one or more of its port terminals from coverage under the Proposed Undertaking through the use of an addendum
- clauses that allow CBH to co-mingle a customer's grain pursuant to its 'Common Stack Segregation' system and the obligations and standards associated with that grain
- several changes to CBH's Standard Terms.

CBH submits that:

the Proposed Undertaking will promote increased certainty for exporters... and will provide CBH with increased certainty in investing in its export wheat terminals and expansions. This will be to the benefit of Western Australian growers and to the Western Australian economy as a whole.¹

2.2. CBH's 2011 Base Load Capacity proposal

CBH has previously approached the ACCC with a system to allocate long term port capacity. CBH proposed to include a form of LTAs in its 2011 Undertaking under a BLC allocation system. That proposal differed in several ways from CBH's current proposal.

Seven of the nine submissions received in response to the ACCC's Draft Decision on the 2011 Undertaking did not consider the BLC proposal to be appropriate. Key concerns with the proposal included:

- that the minimum amount of near term capacity could fall as low as 28 per cent of total capacity during peak periods
- the possibility of 'wasted' or lost capacity resulting from the non-transferability of BLC
- that the 800,000 tonne per year requirement would exclude some exporters from participating and represent a barrier to entry to others
- the potential for BLC customers to bid up the prices for auction capacity given the lower price exporters would pay for BLC.²

¹ Co-operative Bulk Handling Limited, *Submission in support of a proposed access undertaking under Part IIIA of the Competition and Consumer Act 2010*, 2014, p. 4.

² Australian Competition and Consumer Commission, *Co-operative Bulk Handling Limited Port Terminal Services Access Undertaking – Draft Decision*, 2011, p. 6.

In response to feedback CBH did not include the BLC proposal in the revised version of the 2011 Undertaking submitted to the ACCC for assessment. However, in the ACCC's decision to accept the 2011 Undertaking, the ACCC noted that it:

considers there is in-principle merit in BLC allocation arrangements and that it is open to considering a future proposal.³

The LTA arrangements in the Proposed Undertaking differ in a number of ways to CBH's 2011 BLC proposal. The key differences, some of which address concerns with the BLC proposal, include:

- eliminating the concern over 'wasted' capacity by allowing transferability of LTA capacity
- raising the minimum proportion of available near term capacity from 28% to 34%, and
- lowering the annual tonnage requirement of LTA customers from 800,000 tonnes per year to 600,000 tonnes per year.

The specifics of CBH's LTA proposal are discussed at chapter 3.4.

2.3. ACCC assessment

2.3.1. Legal test for accepting an access undertaking

The ACCC must have regard to the matters set out in subs. 44ZZA(3) of the CCA in deciding whether to accept an access undertaking. Essentially, the ACCC may accept the undertaking if it thinks it appropriate to do so having regard to various matters, including but not limited to:

- the objects of Part IIIA of the CCA (including promoting 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)
- the legitimate business interests of the provider of the service
- the public interest, including the public interest in having competition in markets
- the interests of persons who might want access to the service.

The full list of matters is set out in Appendix A of this document.

2.3.2. Timeline: ACCC assessment

Under subs. 44ZZBC(1) of the CCA, the ACCC must make a decision in relation to an access undertaking within 180 days of the application being received (referred to as 'the expected period'). Further detail regarding legislative timeframes is provided in Appendix A.

³ ACCC, *Co-operative Bulk Handling Limited Port Terminal Services Access Undertaking – Decision to accept*, 2011, p. 24.

Table 1: ACCC assessment to date

Date	Action
14 March 2014	CBH lodged the Proposed Undertaking for ACCC assessment.
24 March 2014	ACCC published CBH's supporting submission and the Proposed Undertaking on the ACCC website.
4 April 2014	ACCC published its Issues Paper and invited public submissions by 30 April 2014.
6 & 8 May 2014	ACCC published four submissions received from interested parties.
22 May 2014	ACCC published CBH's submission in response to the views of interested parties.
17 June 2014	ACCC published one additional submission from an interested party.
26 June 2014	ACCC published the draft decision and invited public submissions on its preliminary views by 11 July 2014.

The ACCC is seeking to finalise its assessment of the Proposed Undertaking by early August 2014, although the actual timeframe may depend on the nature of comments received from industry and any potential developments in relation to the Mandatory Code.

The ACCC notes that it considers two drafting changes are required by CBH in order for the ACCC to accept the Proposed Undertaking. The ACCC expects that CBH will provide a revised undertaking, incorporating those changes, prior to the ACCC's final decision.

2.3.3. Public consultation undertaken to date

The CCA provides that the ACCC may invite public submissions on an access undertaking application.⁴ Accordingly, the ACCC published an Issues Paper on 4 April 2014 inviting submissions on CBH's Proposed Undertaking. The ACCC published documents related to the application on the ACCC website and emailed the Issues Paper to relevant parties including wheat exporters, grain growers, farming organisations and state regulatory bodies.

In response to its Issues Paper the ACCC received public submissions from:

- Glencore Grain Pty Ltd
- Cargill Australia Limited
- GrainCorp Operations Limited
- Plum Grove Pty Ltd
- Vitol Asia Pte Ltd
- Co-operative Bulk Handling Ltd (responding to interested party submissions on the ACCC Issues Paper).

Documents relating to CBH's application are available on the ACCC's website at www.accc.gov.au/wheat.

⁴ *Competition and Consumer Act 2010* (Cth), subs. 44ZZBD(1).

2.3.4. Consultation on this Draft Decision

The ACCC seeks comment on its preliminary views regarding the Proposed Undertaking. These preliminary views are set out at chapter 3 of this draft decision. The matters listed in chapter 3 do not represent a comprehensive summary of all aspects of the Proposed Undertaking. Interested parties are invited to comment on any aspect of the Proposed Undertaking that is of interest or concern to them, and relevant to the ACCC's assessment.

The legislative framework by which the Proposed Undertaking will be assessed is summarised at chapter 2.3.1 and set out in full at Appendix A. If possible, submissions should refer to the legislative framework, as this will assist the ACCC in assessing the Proposed Undertaking. Interested parties are asked to include detailed reasons to support the views put forward in submissions.

Invitation to make a submission

The ACCC, pursuant to subs. 44ZZBD of the CCA, invites public submissions on this draft decision on the Proposed Undertaking.

Submissions should be addressed to:

Ms Lyn Camilleri
Acting Deputy General Manager
Fuel, Transport and Prices Oversight
ACCC
GPO Box 520
MELBOURNE VIC 3001
Email: transport@acc.gov.au

The ACCC prefers that submissions be sent via email in Microsoft Word format (although other text readable document formats will be accepted).

Submissions must be received on or before 11 July 2014. The ACCC may disregard any submissions made after this date, as prescribed by subs. 44ZZBD(3) of the CCA. Therefore it is in interested parties' interest to make submissions within this timeframe.

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 its entirety or in part. The ACCC will then assess the undertaking without 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.*⁵

⁵ Available at www.acc.gov.au.

2.4. Further information

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

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Director
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3. Preliminary views on CBH's Proposed Undertaking

This chapter sets out the ACCC's preliminary views regarding the Proposed Undertaking. The ACCC invites comments from interested parties on these views.

3.1. Term

The Proposed Undertaking would operate for three years, or a shorter period of time if CBH is no longer required to have an access undertaking accepted by the ACCC. CBH's 2011 Undertaking is due to expire on 30 September 2014 and the Mandatory Code is anticipated to commence on 1 October 2014. The Proposed Undertaking sets out the access undertaking arrangements that will apply following the expiry of CBH's 2011 Undertaking.

Clause 4.2 of the Proposed Undertaking states that the undertaking will expire on the earlier of:

- (a) 30 September 2017; or
- (b) the date on which the WEMA (including the "access test") is repealed, the Code having been declared by regulations under section 51AE of the CCA as a mandatory industry code; or
- (c) the date on which the WEMA is repealed or amended such that there is no longer any requirement for the Port Operator to have in place any access undertaking under Part IIIA of the CCA in order for the Port Operator to export Bulk Wheat (and there is no requirement for the Port Operator to have in place an access undertaking for this purpose under any other legislation); or
- (d) the date this Undertaking is replaced in accordance with Part IIIA of the CCA; or
- (e) the day the ACCC consents to the Port Operator withdrawing this Undertaking in accordance with Part IIIA of the CCA.

CBH's supporting submissions

CBH submits:

...it is sensible for the ACCC to consider the Proposed Undertaking given the considerable uncertainty about whether a Code will be brought in, what the Code will contain and what the timing may be in the future implementation of any Code.⁶

Stakeholders' views

Glencore submits that:

...the early expiry of the proposed undertaking is appropriate and sensible in the event that a mandatory code of conduct is introduced.⁷

ACCC's preliminary view

The ACCC considers that the circumstances in which CBH has submitted its Proposed Undertaking need to be taken into account in assessing the appropriateness of its term and early expiry clauses. In the absence of clauses 4.2(b) and 4.2(c), if there was a significant

⁶ CBH, *Submission in response*, p. 3.

⁷ Glencore Grain Pty Ltd, *Co-operative Bulk Handling Limited – Proposed 2014-2017 Port Terminal Services Access Undertaking*, 2014, p.2.

legislative change CBH would be required to apply to the ACCC for consent to withdraw the 2011 Undertaking pursuant to subs. 44ZZA(7) of the CCA.

The Mandatory Code will come into effect on 1 October 2014 if it has been approved by the Minister of Agriculture and declared under the CCA. Clause 4.2 of the Proposed Undertaking provides regulatory certainty for both CBH and access seekers in the event that a Code is not approved and declared by 30 September 2014.

The ACCC considers that regulatory certainty enables CBH and access seekers to more confidently make long-term commercial decisions, including decisions on infrastructure investment and export programs. The ACCC therefore considers that regulatory certainty is in the interests of CBH and access seekers, having regard to subss. 44ZZA(3)(a) and 44ZZA(3)(c) of the CCA. The ACCC also considers that the operational certainty provided by the proposed expiration clause promotes the operation of an efficient and profitable bulk wheat export marketing industry, and is consistent with the objects of the WEMA.

If the Mandatory Code is not introduced and CBH's obligation to have an access undertaking accepted by the ACCC remains, the Proposed Undertaking would expire on 30 September 2017, a three-year term. The ACCC considers that a potential three-year term would allow sufficient time for access seekers to negotiate the terms of an agreement (either an LTA or an annual agreement) and for that agreement to apply for a reasonable period before the expiry of the undertaking.

If the Code has been introduced, or for some other reason the WEMA and the access test requirements are removed, the ACCC considers it appropriate that the Proposed Undertaking should expire. The ACCC's preliminary view is that such expiration would be appropriate to avoid double regulation, is in the interests of the public, and reflects the legislative intent of parliament, having regard to subss. 44ZZA(3)(b) and 44ZZA(3)(e) of the CCA.

Accordingly, having regard to the matters listed in subs. 44ZZA(3) of the CCA, the ACCC considers that the term and early expiration clauses of the Proposed Undertaking are appropriate.

3.2. Exclusion of particular CBH port from coverage under the undertaking

CBH has amended the definition of 'Port' in the Proposed Undertaking to include CBH's ports at Albany, Esperance, Geraldton and Kwinana:

... unless the ACCC allows in writing the removal of any of those Ports from the coverage of this Undertaking by a Variation to this Undertaking.⁸

CBH has included a clause (clause 4.3) that notes that CBH may seek the approval of the ACCC to vary the undertaking to remove Port Terminal Services provided at a particular Port from coverage under the Proposed Undertaking (except in relation to the Continuous Disclosure Rules):

4.3 Variation

During the term of this Undertaking, the Port Operator may seek the approval of the ACCC to vary this Undertaking under section 44ZZA(7) of the CCA to:

⁸ CBH, *Port Terminal Services Access Undertaking*, 2014, p. 4.

- (a) Remove Port Terminal Services provided at a particular Port from coverage under this Undertaking (except in relation to the Continuous Disclosure Rules) if the ACCC accepts that the relevant Port is subject to sufficient competitive constraint, such that the access arrangements at the relevant Port would no longer be required and the access provisions for that Port would no longer apply or could be otherwise varied by an addendum to this Undertaking limiting the extent of rights and obligations that would otherwise apply under this Undertaking to that Port; or
- (b) Take into account any other legislative or regulatory changes that occur which affect the operation of this Undertaking.

If the ACCC consents to any variation to this Undertaking, those variations will come into operation at the time specified in section 44ZZBA(4) of the CCA.

CBH's supporting submissions

CBH submits:

The intention behind this is to provide CBH with greater certainty in addressing regulatory change, reduce the extent of regulatory costs arising from such change, retain for the ACCC an appropriate oversight in relation to those proposed changes, and to give CBH the opportunity to avoid duplicative regulation.⁹

In response to interested parties' submissions, CBH further submits:

... some of the major grain export terminal operators are seeing significant new investment in competing terminals which are imposing competitive constraints. Therefore, there needs to be scope for removing port terminals from regulation where there are competitive constraints.¹⁰

Stakeholders' views

Glencore submits:

In relation to the provision to remove a port from the undertaking, the Company considers that all ports in Australia should be subject to the same level of regulation, including all new port operations regardless of geographical location. Any disparity in regulation between ports will lead to a market distortion and ultimately inefficiency in the market, particularly at those areas where ports with different regulatory regimes compete for the same grain. Ultimately this means growers will be paid less for their product and the cost to executed grain will be inflated. This also reflects our comments in relation to Graincorp's proposed amendments to its access undertaking.¹¹

ACCC's preliminary view

The ACCC supports a fit-for-purpose approach to the regulation of port terminals. The ACCC considers that where there is a sufficient level of competition, minimal or no regulation is required. The ACCC also considers that where a port holds significant market power or monopoly power, and is owned by a wheat marketer, regulation is required.

The assessment of whether it is appropriate that a port or ports be removed from coverage under the Proposed Undertaking would involve a case-by-case analysis.

Subsection 44ZZA(7)(b) of the CCA states that the provider of an access undertaking (such as CBH) may withdraw or vary the undertaking at any time after it has been accepted by the

⁹ CBH, *Submission in support*, p. 18.

¹⁰ CBH, *Submission in response*, p. 5.

ACCC, but only with the consent of the ACCC.¹² The ACCC may consent to a variation of CBH's undertaking if it thinks it appropriate to do so, having regard to the matters specified in subs. 44ZZA(3) of the CCA. Accordingly, the ability to seek a variation to the undertaking (which may include a variation to remove a port from coverage under the Proposed Undertaking) is already inherent in the CCA, and available to CBH in all circumstances.

The ACCC appreciates that the proposed clause provides an indication to exporters about a potential future CBH application to have one or more its ports removed from coverage under the Proposed Undertaking.

However, the ACCC considers that the proposed clause 4.3(a) gave rise to potential uncertainty in relation to the test the ACCC would apply in assessing an application by CBH to have a port removed from coverage under the Proposed Undertaking.

The ACCC discussed this concern with CBH. In response, CBH submitted a revised clause 4.3(a), amended as follows:

4.3 Variation

During the term of this Undertaking, the Port Operator may seek the approval of the ACCC to vary this Undertaking under section 44ZZA(7) of the CCA to:

- (a) Remove Port Terminal Services provided at a particular Port from coverage under this Undertaking (except in relation to the Continuous Disclosure Rules) ~~if the ACCC accepts that the relevant Port is subject to sufficient competitive constraint, such that the access arrangements at the relevant Port would no longer be required and the access provisions for that Port would no longer apply or could be otherwise varied by an addendum to this Undertaking limiting the extent of rights and obligations that would otherwise apply under this Undertaking to that Port; or~~

The ACCC considers that amending the clause in this fashion confirms that if the ACCC decides to consent to the removal of a port from coverage under the Proposed Undertaking, it will be after consideration of the factors listed in subs. 44ZZA(3) of the CCA.

CBH's revision to clause 4.3(a) of the Proposed Undertaking is to be implemented into a revised version of the Proposed Undertaking prior to a final decision being made.

The ACCC notes that to the extent that an application to remove a port from coverage under the undertaking through the use of an addendum is more efficient for CBH, the ACCC considers that to be in the interests of CBH and appropriate, having regard to subs. 44ZZA(3)(a) of the CCA.

3.3. Carried-over arrangements

Other than the introduction of LTAs and clauses discussed in this chapter, the Proposed Undertaking contains the same clauses as the 2011 Undertaking. Key features of both the 2011 Undertaking and Proposed Undertaking include:

- a 'publish, negotiate, arbitrate' framework

- obligations on CBH not to discriminate in favour of its own trading division when providing port terminal services
- obligations on CBH not to hinder access to port terminal services
- flexibility to vary CBH's PTRs, which govern access to port terminal services (subject to a process where CBH publishes the variations, conducts public consultation and allows a notification period in which the ACCC can object to the variations)
- the inclusion of the Standard Terms to be offered to access seekers
- dispute resolution provisions including processes for mediation and arbitration of disputes
- a requirement to publish a Loading Statement and key port terminal information.

CBH's supporting submissions

CBH submits that its Proposed Undertaking is largely consistent with its 2011 Undertaking:

CBH has essentially retained the provisions of the previous access undertaking for a period of 3 years to 30 September 2017. CBH has however, introduced a proposal to offer long term agreements (LTAs) for a period of three years.¹³

CBH also submits that:

The Proposed Undertaking maintains the same robust non-discrimination clauses that the ACCC has approved in the two prior undertakings. Under this provision contained in clause 6.2 CBH is not permitted to discriminate between customers in favour of its Trading Business...

The Proposed Undertaking also maintains the same requirement on CBH not to hinder access outlined in clause 10.8 that has been in the previous two undertakings.¹⁴

The Proposed Undertaking does not propose major changes to CBH's current auction process but proposes to schedule auctions later so that participants will have a clearer picture of grain availability. CBH submits:

This would then allow a flexible response to global grain market dynamics for participants in the auction process.¹⁵

In response to stakeholder submissions, CBH submits:

No parties have put forward any negative submissions in relation to the term or carried over arrangements in the Proposed Undertaking from the previous Undertaking.¹⁶

ACCC's preliminary view

The ACCC considers that the publish-negotiate-arbitrate framework continues to balance the legitimate business interests of CBH with the interests of access seekers, having regard to subss. 44ZZA(3)(a) and 44ZZA(3)(c) of the CCA. The ACCC considers that the framework enables CBH to negotiate terms and conditions that allow for the efficient operation of its business in providing port terminal services, while also promoting fair access to port terminal

¹⁴ *ibid.* p. 53.

¹⁵ *ibid.*, p. 12.

¹⁶ CBH, *Submission in response*, p. 3.

services for access seekers. The publish-negotiate-arbitrate model achieves this balance by providing a framework within which:

- an appropriate level of information is provided via publication to enable access seekers to negotiate from a sufficiently informed position
- a defined process is set out for the conduct of negotiations
- parties can seek mediation or arbitration should any disputes arise during the negotiation process.

For these reasons, the ACCC considers that the publish-negotiate-arbitrate approach remains appropriate.

Non-discrimination and no hindering obligations

The ACCC considers that non-discrimination and no hindering provisions act to deter CBH from engaging in self-preferential treatment to the detriment of non-affiliated exporters. The ACCC therefore considers these provisions to be in the interests of access seekers and the public interest in having competition in markets, having regard to subs. 44ZZA(3)(c) and 44ZZA(3)(b) of the CCA.

Flexibility to vary Port Terminal Rules

In assessing the PTR variation process the ACCC has had regard to the matters listed in subs. 44ZZA(3) of the CCA. Particularly relevant are CBH's legitimate business interests in having its port terminals operating efficiently, the public interest in having competition in markets, and access seekers' interest in understanding the rules and processes affecting the export of their bulk wheat, having regard to subss. 44ZZA(3)(a), 44ZZA(3)(b), and 44ZZA(3)(c) of the CCA.

As is the case with the 2011 Undertaking, CBH would be able to vary its PTRs without a formal variation of the Proposed Undertaking in accordance with subs. 44ZZBC(7) of the CCA. The ACCC considers that the process provides CBH with the flexibility to make changes to its procedures efficiently, but builds in mechanisms that mitigate against inappropriate variations (i.e. clause 10.4 requires that industry is consulted prior to changes coming into effect; and that the ACCC may object to PTR variations if it considers they breach the non-discrimination and no hindering provisions).

The ACCC considers that the variation process remains clear, understandable and appropriate. The ACCC therefore considers that the PTR variation process remains in the interests of CBH and access seekers, having regard to subss. 44ZZA(3)(a) and 44ZZA(3)(c) of the CCA.

Inclusion of Standard Access Terms

The ACCC has previously acknowledged that the Standard Terms should provide a clear starting point for negotiations between access seekers and the port terminal operator. The Standard Terms act as a default access agreement if parties are unable to reach a negotiated access agreement.

The ACCC considers that while all elements of the Standard Terms are subject to negotiation between CBH and access seekers, the Standard Terms represent an important starting point for those negotiations.

The ACCC considers that the obligation to publish Standard Terms provides clarity and certainty to access seekers who want access to port terminal services at CBH's ports. The ACCC therefore considers that the obligation is in the interests of access seekers and the public interest (including the public interest in having competition in markets) having regard to subss. 44ZZA(3)(c) and 44ZZA(3)(b) of the CCA.

Dispute resolution procedures

Dispute resolution procedures in the Proposed Undertaking are the same as the dispute resolution procedures in the 2011 Undertaking.

The ACCC considers that the dispute resolution mechanism continues to provide a sufficient level of clarity and certainty for access seekers. The ACCC considers that the threat of arbitration by an independent arbitrator such as the ACCC appears to be effective in encouraging parties to reach commercially negotiated outcomes. Accordingly, the ACCC considers that the dispute resolution mechanism remains in the interests of CBH and access seekers, having regard to subss. 44ZZA(3)(a) and 44ZZA(3)(c) of the CCA. The ACCC therefore considers that the mechanism remains appropriate.

Publication of loading statement and key port terminal information

The access test in the WEMA requires port terminal operators to comply with 'Continuous Disclosure Rules' (CDRs). The CDRs require port terminal operators to publish a current set of PTRs and a 'Loading Statement' (containing specified information about each ship scheduled to load grain, updated and published (and provided to the ACCC) each business day).

As such, the ACCC considers that compliance with the CDRs is consistent with the legislative intent of Parliament (through the WEMA, as amended) to ensure that exporters continue to provide fair and transparent access to their facilities to other exporters. The ACCC considers the intent behind the WEMA to be a relevant consideration and therefore obligations to comply with the CDRs to be appropriate, having regard to subs. 44ZZA(4)(e) of the CCA. The ACCC also considers that the obligation to comply with the CDRs in the Proposed Undertaking is in the interests of access seekers, having regard to subs. 44ZZA(3)(c) of the CCA, and in the public interest in promoting competition in the bulk wheat export market, having regard to subs. 44ZZA(3)(b) of the CCA.

3.4. Long Term Arrangements

3.4.1. Benefits of LTAs

CBH submission

CBH submits that the introduction of LTAs will lead to greater investment in infrastructure to the benefit of customers:

The proposed changes will provide CBH with a greater long term understanding of demand signals and industry participants certainty of likely access requirements. This provides CBH with improved incentives to make further investments to increase capacity at its ports.¹⁷

CBH submits that the investment incentive will extend beyond port infrastructure:

In addition to the impact on port facilities, allowing this discussion and long term commitment to occur, provides incentives to CBH to make additional commitments in related markets

¹⁷ *ibid.* p. 19.

including the provision of grain transport from CBH sites to CBH ports and investments in CBH up-country sites that will facilitate increased grain outloading capabilities to meet the increased port capacity offered.¹⁸

Regarding certainty for customers, CBH submits:

Exporters will also benefit from LTA's as their increased certainty of access will allow longer term marketing plans for key customers through the ability to provide consistent exports at specific ports and months. Consistent access may, for instance, encourage marketers, shippers or end users to implement a regular cargo service to take grain from Western Australia to its destination.

Further, some global customers may not wish to contract to receive supplies on a long term basis from exporters operating out of Western Australia as they may be aware that those exporters have no certainty that they can acquire port capacity. In this case if the Proposed Undertaking is accepted longer term contracts for the supply of wheat and other grains out of Western Australia can be entered into with a significantly lower execution risk.¹⁹

Regarding auction premium payments, CBH submits:

A key benefit of the LTA process is that CBH envisages a lower quantum of auction premiums will need to be retained by CBH. In prior years the scale of the auction premium retained by CBH has been significant. Although CBH does accrue interest on the funds retained, customers have commented that this is a significant issue and that they would like CBH to address this issue.

Whilst CBH has made some changes to try and reduce this impost of the auctions, further reductions in total quantum of auction premium retained, at least initially following auctions, is only possible by reducing the number of tonnes on which auction premium is paid.²⁰

Regarding the anticipated commencement of the Code, CBH submits:

Progressing towards LTA agreements will be a further step in creating additional certainty in the wheat export industry in current times with the uncertain timing of the proposed Code. It is helped that the LTA agreements will facilitate future commercial investments based on additional commercial certainty and, in particular, potentially leading to bi-lateral agreements between the port operator and customers being consistent with more usual practice.²¹

Stakeholders' views

Glencore submits that the certainty associated with LTAs is beneficial:

LTAs offer significant benefits to both the infrastructure owner in assuring continued use of existing assets and to exporter customers in ensuring security of execution beyond the immediate demand period.²²

Vitol also cites the value of additional certainty provided by LTAs, submitting:

As a commodity trader of differentiated products, and with many of these lying outside of the Agricultural sphere, Vitol has experienced a greater certainty of business when able to participate in LTA's and this factor alone would encourage the company to continue its support of the Agricultural trade in Western Australia.²³

¹⁸ *ibid.*

¹⁹ *ibid.*, p. 20.

²⁰ *ibid.*

²¹ *ibid.*, p. 24.

²² *ibid.*

²³ Vitol Asia Pte Ltd, *CBH proposed 2014-17 Port Terminal Services Access Undertaking*, 2014, p. 1.

Cargill submits:

Cargill Australia supports Co-operative Bulk Handling Limited proposed 2014-17 Port Terminal Services Access Undertaking as we are of the firm view that this is a welcome step towards direct commercial negotiations between port owners and its customers as the proposed undertaking is a more efficient arrangement than the current auction system.²⁴

ACCC's preliminary view

The ACCC considers that the certainty associated with LTAs has the potential to create a commercial environment in which investment in infrastructure is encouraged.

In its draft decision on CBH's proposed BLC system in 2011, the ACCC acknowledged the potential for LTAs to promote investment in infrastructure. The ACCC considers that, to the extent longer-term port access arrangements provide CBH with greater certainty regarding utilisation of its port terminal infrastructure, CBH is more likely to invest in that infrastructure than in the absence of that certainty.

CBH has stated that, with the improved commercial certainty that LTAs will provide, it is 'investigating its ability to make further investments and increase capacity to 18 million metric tonnes per annum'.²⁵ While the timing and extent of any future investment by CBH is uncertain, the ACCC's preliminary view is that the commercial certainty associated with longer term contractual commitments facilitated by LTAs increases the likelihood of investment in infrastructure.

The ACCC considers that investments in port terminal infrastructure may improve the efficiency of the port facility and allow CBH to offer additional port terminal capacity. To the extent that CBH does decide to invest in infrastructure, any additional capacity provided may result in greater utilisation of the port facilities (particularly in peak-demand periods) and would improve the efficiency of the port facility. The ACCC considers that improvements in utilisation and efficiency at port is in the interests of CBH as port terminal operator, the public interest in competition and the interests of access seekers, having regard to subss. 44ZZA(3)(a), 44ZZA(3)(b), and 44ZZA(3)(c) of the CCA.

The ACCC considers that the contractual certainty provided by LTAs benefits CBH and access seekers in the running of their businesses.

LTA arrangements under the Proposed Undertaking would allow CBH to allocate port capacity bookings for a three-year period. While the commercial certainty of longer-term contracts may create a confidence to invest in and improve its services, it may also mitigate CBH's commercial risk. Specifically, securing bookings for the majority of its capacity over a three-year period allows CBH to reduce the potential impact of the historically volatile wheat crop, as illustrated in table 2.

²⁴ Cargill Australia Limited, *Submission in response to Issues Paper*, p. 1.

²⁵ CBH, *Submission in support*, p 3.

Table 2: Western Australia harvest size, 2009-10 to 2013-14

Season	Harvest size (tonnes)
2009-10	11,076,526
2010-11	6,551,272
2011-12	15,065,183
2012-13	9,116,807
2013-14	15,853,812

Source: CBH, *Submission in support of a proposed access undertaking under Part IIIA of the Competition and Consumer Act 2010: Public version*, 2014, p. 30.

In its supporting submission, CBH notes that ‘new entry into the provision of Port Terminal Services has occurred at various locations throughout Australia.’²⁶ With potential new entrants into the WA market, the ACCC considers that it is likely to be in the legitimate business interests of CBH to secure long-term commitments from customers. The ACCC therefore considers the LTA arrangements to be in the interests of CBH, having regard to subs. 44ZZA(3)(a) of the CCA.

Regarding the interest of access seekers, the ACCC considers that LTAs provide a number of potential benefits. These benefits include:

- greater certainty in planning longer-term export programs
- a greater ability to build long term relationships with overseas customers
- a greater ability to more closely align booked port capacity with supply chain planning.

The ACCC considers these benefits are in the interests of all exporters but that access to these benefits will depend on an exporter’s willingness or ability to enter into an LTA. Accordingly, the ACCC considers that LTAs are in the interests of access seekers who become LTA customers, having regard to subs. 44ZZA(3)(c) of the CCA. The appropriateness of the LTA arrangements for non-LTA customers is discussed in chapter 3.4.5.

3.4.2. Eligibility requirements

CBH submits that LTAs would be available to all customers as long as they can commit to certain eligibility provisions.²⁷ The key eligibility requirement is the commitment to acquiring a minimum of 600,000 tonnes of capacity each year for the three-year term of the agreement.

Other stipulations contained in the proposed Port Terminal Rules include customers:

- setting out the amount of capacity required per quarter and month at each port and the minimum shippable quantity that they would accept
- not requesting more than 50 per cent of total annual long term capacity demand in any one quarter of the year; and not requesting more than 30 per cent of total annual long term capacity demand in any of the other quarters in the year

²⁶ CBH, *Submission in support*, p. 28.

²⁷ CBH, *Port Terminal Rules 2014-17*, p. 3.

- not requesting more long term capacity in any year than an amount representing 50 per cent of available long term capacity; or more than 50 per cent of the long term capacity offered by CBH in any month at any port.

CBH submission

CBH submits the following in support of its proposed LTA eligibility criteria:

There are no increased barriers to entry posed by the LTA capacity allocation process or the requirement for a minimum commitment of 600,000 metric tonnes. The LTA process merely provides a shipper the potential to export a cargo that is equivalent to a single panamax vessel (50,000 tonnes) per month at one port.

... the Proposed Undertaking permits customers to acquire capacity off both other LTA customers and off auction participants. Therefore there is potential for the secondary market to re-adjust if a subsequent party requires additional capacity and would utilize that capacity more efficiently or productively than the LTA customer.²⁸

...the LTA minimum standard has a 600,000 tonne annual requirement which is the equivalent of one panamax vessel per month. On this basis the LTA minimum standard would appear to be reasonable on its face and not a barrier to take up by prospective customers. In any event, there is no prescription on the parcel size to acquire capacity in the LTA process, capacity can be shipped in smaller parcels if required or split and partially sold off.²⁹

...CBH expects exporters to utilise more than one port when acquiring capacity in a long term agreement. For this reason CBH does not expect that the minimum shipment volume will be problematic for customers as they are able to split it across CBH's four ports as they see fit, subject the spread over the quarters.³⁰

At the time CBH provided its Proposed Undertaking to the ACCC, 11 bulk wheat customers were using CBH's port terminal services.³¹ CBH submits that a number of its current export customers would be likely to take up an LTA.³²

Since the customers that are likely to take up long term capacity are those that acquire the majority of the wheat crop in each of the last five seasons, the proposed arrangements are in the interests of the majority of the current users of CBH's port terminal services and services by way of the port terminal facility.

The rules do not preclude others from applying for long term capacity, nor are those customers who are less likely to take up long term capacity prejudiced in any way as they would still have access to capacity being auctioned, or alternatively, could acquire capacity from customers with long term capacity. As a result of the ability to trade long term capacity, the overall allocative efficiency of the capacity allocation system will not be adversely affected by the Proposed Undertaking.³³

Stakeholder submissions

All formal submissions received in response to the ACCC issues paper considered that the minimum 600,000 tonne per year requirement is appropriate:

²⁸ CBH, *Submission in support*, p. 26

²⁹ *ibid*, p. 30.

³⁰ *ibid*, p. 31.

³¹ *ibid*, p. 30.

³² *ibid*, p. 11.

³³ *ibid*, pp. 10-11.

Glencore Grain submits:

The Company considers that the minimum 600,000 tonnes per annum LTA commitment is appropriate, given the shipping profile (i.e. panamax vessels) out of Western Australia.³⁴

Plum Grove submits:

...the minimum 600,000 mt of capacity is an acceptable level of commitment.

We believe there will be strong interest and take up by industry in the LTA's as proposed by CBH.³⁵

ACCC's preliminary view

In assessing the appropriateness of CBH's proposed LTA eligibility criteria, the ACCC must consider a number of matters. These include the interests of CBH and access seekers, including any potential barriers to entry for new entrants.

Industry submissions suggest that a number of exporters could be interested in taking up an LTA, including exporters who are not considered large exporters in WA.³⁶ The ACCC notes that, while a small number of exporters have exported over 600,000 tonnes on multiple occasions in the last four years,³⁷ there are other exporters who may be able to increase their exports if provided with greater certainty by a LTA.

Stakeholder comments indicate that customers' interest in moving to an LTA is partly due to dissatisfaction with capacity allocation under the current auction system, with one submission suggesting the system leads to capacity access determining demand, rather than the demand itself.³⁸

The ACCC considers that the positive response to CBH's proposed LTAs is partly attributable to the flexibility built into the proposal. Customers who acquire LTA capacity may choose to trade their long term capacity to any other customer in the secondary market. CBH also proposes to allow booked capacity to be spread across multiple ports – that is, CBH does not require customers to ship minimum amounts from different ports.

On the basis of the ACCC's industry consultation, the ACCC considers that the majority of CBH's customers, both in terms of number as well as tonnes shipped in the WA market, are accepting of CBH's eligibility requirements. The ACCC recognises that a few smaller customers may choose not to enter into LTAs because it may not be commercially viable for those customers to commit to the minimum tonnage requirement.

CBH has identified the need to cater for smaller, non-LTA customers in its proposal, and has proposed allowing non-LTA customers access to at least 34 per cent of total capacity through the near term capacity allocation processes (auction/s followed by FCFS allocation). The appropriateness of the amount of near term capacity proposed to be offered is considered in further detail in 3.4.5.

Overall, given the ACCC's analysis of the historic pattern of shipping from WA, the strong stakeholder acceptance of CBH's proposed LTA arrangements, and the flexibility provided

³⁴ Glencore, *Submission in response to Issues Paper*, p. 2.

³⁵ Plum Grove, *Submission in response to Issues Paper*, p. 1.

³⁶ The historic size of the capacity used by exporters can be seen in Wheat Exports Australia, *Report for Growers 2011-12*, p. 22.

³⁷ Based on Continuous Disclosure Rules data provided to the ACCC.

³⁸ Plum Grove Pty Ltd, *Submission in response*, p. 1

by transferability and the extent of access to near term capacity, the ACCC's preliminary view is that the LTA eligibility arrangements are appropriate.

The ACCC's preliminary view is that the flexibility provided by transferability and quarterly spread requirements is in the interests of access seekers, having regard to subs. 44ZZA(3) of the CCA. The ACCC also considers that the transferability clauses and proposed reservation of 34 per cent of annual capacity for near term allocation make it likely that non-LTA customers' capacity requirements will be met.

Additionally, some exporters who may otherwise not have participated in LTAs due to concerns over the threshold of 600,000 tonnes may be more likely to participate given the ability to transfer capacity on the secondary market.

The ACCC also considers that the eligibility requirements provide benefits to CBH as the port terminal operator by way of greater certainty and efficiency in its port operations encouraging suitable expansion and investment.

Although non-LTA customers may not have access to the full suite of benefits that may be available to a customer taking up an LTA, and having regard to differences in the process of acquiring capacity for LTA and non-LTA customers, the ACCC's preliminary view is that CBH's eligibility requirements are appropriate.

3.4.3. LTA capacity restrictions

CBH proposes that LTA customers, when applying for long term capacity, must not request more than 50 per cent of their aggregate long term capacity tonnage in one quarter of the year; and no more than 30 per cent in any other quarter. CBH submits that this provision, which requires LTA customers to spread their demand over at least three quarters of the year, will act as a dampener on the volatility of exports across the year. Without these restrictions, CBH claims it would potentially face very large swings in utilisation from month to month and quarter to quarter.

In addition, CBH has proposed that no single exporter may request more than 50 per cent of available LTA capacity, both on an aggregate annual basis and on a per month and port basis. CBH submits that this will prevent an LTA customer from blocking out a shipping window/month. CBH submits that if it set a lower percentage cap, CBH's trading division would be forced to acquire a higher percentage of its capacity in the auction process, thereby potentially 'overheating' the auction.

ACCC's preliminary view

The ACCC considers that the proposed requirement to spread LTA capacity over at least three quarters of the year may promote the efficient utilisation of CBH's ports throughout the year, and would help avoid significant variation in the use of the base level of LTA capacity across months. The ACCC considers that spreading utilisation is in the interests of the port terminal operator and may also aid the economically efficient operation and use of the infrastructure. The ACCC's preliminary view is that these per-quarter restrictions will encourage LTA customers to spread their demand throughout the year, decreasing the likelihood that particular shipping windows will be oversubscribed in the LTA capacity allocation process. The ACCC considers that the proposed spread of capacity is in the interests of access seekers wanting to secure capacity via an LTA rather than the auction mechanism.

The ACCC notes CBH's submission that the 50 per cent cap for one exporter is likely to affect only one exporter, CBH's trading division, and that to have the limit any lower would

likely discriminate against CBH Grain.³⁹ The ACCC is of the preliminary view that allowing exporters to only take up to 50 per cent of available LTA capacity is in the interests of access seekers as it will prevent any one exporter from securing all LTA capacity. It will also be in the public interest, as it will allow for competition between wheat exporters for growers' grain throughout the year. The ACCC also considers that a smaller percentage limit could see CBH Grain seeking to acquire a larger proportion of its capacity through the auction. The ACCC is of the view that this may make it difficult for non-LTA customers to access sufficient capacity.

The ACCC considers that the 50 per cent cap provides an appropriate safeguard against exporters hoarding capacity and preventing others, both LTA and non-LTA customers, from accessing export capacity. The ACCC's preliminary view is that the limitation on any one exporter taking up more than 50 per cent of LTA capacity will appropriately balance the interests of access seekers, including CBH's related trading division. The ACCC also considers this limitation will facilitate competition in the wheat export market, and will therefore be in the public interest.

3.4.4. Process for allocating LTAs

In summary, the process proposed by CBH for allocating long term capacity involves customers submitting their forecast 'Long Term Annual Shipment Schedule' (LTASS), including the amount the customer considers a minimum acceptable shippable quantity. The LTASS must also detail:

- the indicative commodity nomination
- the expected tonnage of wheat and of other grains to be delivered to port pursuant to a GSA⁴⁰ (i.e. a storage and handling agreement with CBH)
- the expected tonnage to be delivered pursuant to storage and handling or supply chain arrangements other than those supplied by CBH.

CBH will then consider whether it can meet all of the long term capacity requested, or make a provisional allocation having regard to, where practicable, the minimum shippable quantities submitted by customers. In the event aggregate long term capacity demanded exceeds that offered in a particular month or quarter, CBH will have full discretion to either:

- refuse to allocate long term capacity in the 'oversubscribed' month or quarter and auction that capacity annually in accordance with the process for allocating near term capacity (that is, via the auction then FCFS allocation mechanisms)
- consult with each customer and invite them to re-submit their LTASS with reduced tonnage in the oversubscribed windows, or with tonnages moved from the oversubscribed windows into other windows. In the process of submitting revised shipment schedules, CBH will not require customers to adhere strictly to the restrictions applicable when they first submit the shipment schedule (that is, the 600,000 tonne annual minimum; the requirement to split LTA capacity across three quarters with no more than 50 per cent in one quarter and 30 per cent in the next; and restriction on a single exporter requesting more than 50 per cent of total long term capacity in a specific month)

³⁹ CBH, *Submission in support*, pp. 11, 47.

⁴⁰ 'GSA' is defined in the PTRs as 'an agreement between an exporter, trader or marketer of Grain and the Port Operator that includes provisions for the supply of storage and handling services in relation to any Grain.'

- accept the applications by varying the amount of long term capacity offered (which will involve revising total capacity, including near term capacity).

Once offered long term capacity by CBH, customers must then confirm their allocation or it will be auctioned with near term capacity. Once allocations have been confirmed and accepted by LTA customers, CBH will publish long term capacity allocated by customer, port and month. LTA customers will then become liable to pay the 'Long Term Capacity Charge' (which reflects the 'Upfront Marketer Fee' at the time of agreeing to an LTA) each year for the next three years. The proposed PTRs stipulate that CBH must supply long term capacity at the same price to all customers. CBH's approach to pricing is discussed at chapter 3.4.8.

During the course of the LTA, customers must send a revised LTASS to CBH on a monthly basis detailing the commodity type and tonnages to be delivered via CBH's or other supply chains for the following three months. CBH can propose changes to this LTASS if:

- it anticipates detrimental impacts on the operation of the port terminal facilities
- it would incur additional operational costs to comply
- there is an undue impact on a previously nominated vessel or capacity of another customer.⁴¹

CBH submission

CBH submits that it wishes to adopt the proposed rules for allocation of long term capacity (specifically, the consultation process following oversubscription and the option to revert to the auction mechanism) to:

...avoid detrimental consequences of inefficient and uneconomical small parcels of capacity, additional industry costs in determining pro-rated capacity acceptability and trading capacity and to reduce incentives for customers to overestimate the quantum of demand for capacity⁴²

CBH submits that the potential to revert to the auction where demand for LTA capacity exceeds supply will incentivize LTA participants to spread their capacity in both a geographic and a timing sense. CBH considers it will encourage more conservative and rational behaviour by those seeking LTA capacity.

Stakeholders' views

GrainCorp believes that it is important that CBH has the flexibility to fairly negotiate reductions or the repositioning of slots with customers in the event of oversubscription.⁴³ Similarly, Plum Grove notes the necessity of CBH having the ability to exercise some discretion as to the allocation of port capacity, particularly for peak demand periods.⁴⁴ Glencore submits:

Due to the demand profile for shipping slots at different times of the year, we believe that the port operator should have a level of discretion as to the mode and method of allocating of shipping slots...

⁴¹ Clause 3.4 of the proposed PTRs.

⁴² CBH, *Submission in support*, p. 9.

⁴³ Glencore, *Submission in response*, p. 2.

⁴⁴ Plum Grove, *Submission in response*, p. 1.

We recognise that individual port terminal operations have a legitimate interest in ensuring that LTAs serve their specific business and operational requirements. It is very important that this is given appropriate weight in assessing the proposed new access undertaking.⁴⁵

ACCC's preliminary view

The ACCC's preliminary view is that a level of discretion offered to CBH in dealing with oversubscribed shipping windows in the long term capacity allocation process is appropriate. The ACCC considers that having flexibility to manage demand for LTA demand is in the interests of CBH as the port terminal operator, having regard to subs. 44ZZA(3)(c).

The ACCC considers that the consultation process proposed by CBH (in dealing with oversubscribed windows) may give access seekers the opportunity to achieve an outcome suited to their needs. The ACCC acknowledges CBH's submission that this process will avoid the allocation of undesirable parcels of capacity, which may occur under an alternative pro-rata reduction mechanism.

The ACCC notes that during the course of negotiating long term capacity allocations with customers, CBH will be required to comply with its obligations in the Proposed Undertaking. These obligations include the obligation not to discriminate in favour of its own trading arm and the obligation not to hinder access to its port terminal services. The Proposed Undertaking provides the ACCC with an ability to require CBH to appoint an independent auditor to report on its compliance with the non-discrimination obligation. The ACCC's preliminary view is that the Proposed Undertaking provides sufficient safeguards to protect the interests of access seekers in obtaining access to long term capacity. By the same manner, these safeguards will assist in ensuring competition in the market for bulk wheat export.

While the ACCC accepts that CBH as operator of the port terminal facilities would benefit from understanding how grain is going to be delivered in the coming months, in terms of logistics planning and investing, the ACCC has concerns that requiring this information from port terminal users at the time of applying for an LTA (up to three and a half years in advance of shipping) is not necessarily going to be of material benefit to CBH in its port terminal operations. The ACCC notes that Viterra requires customers not using its transport services to notify of their accumulation plans 18 days prior to the slot in which they have a booking.⁴⁶

The ACCC noted the appropriateness of the LTASS in its issues paper and invited stakeholder comments on the process. However, given stakeholders have not raised concern that they will be disadvantaged by providing this information to CBH at the time of applying for an LTA, the ACCC's preliminary view is that the initial LTASS requirements are likely to be appropriate having regard to the interests of the port terminal operator and access seekers.

The ACCC considers it likely that elements of customers' LTASS will change over the term of the three year agreements, including commodity nominations and the expected tonnage to be delivered to port pursuant to CBH or other supply chain arrangements. The ACCC considers that clause 3.4, as currently drafted, provides CBH with discretion as to whether to accept revised LTASS's during the course of an LTA. However, that discretion is limited. For

⁴⁵ Glencore, *Submission in response*, p. 2.

⁴⁶ Clause 11 of Viterra's Port Loading Protocols states that clients using 'Export Select' for the accumulation of a commodity must provide: by no later than 18 days prior to the opening of the first day of the slot, a 'Site Assembly Plan' that is complete for the purposes of delivery of stock; and, by no later than 14 days prior to the vessel ETA, a 'Transport Plan' that is complete for the purposes of delivery of stock. Failing to do so may result in Viterra 're-prioritising' the loading of the client's vessel.

instance, CBH would need to establish that 'it would incur additional operational costs to comply' in order for it to propose changes to a customer's LTASS.

The ACCC notes that the clause as currently drafted does not then expressly address what is then required of customers once CBH proposes changes to the LTASS. The ACCC considers that this may lead to some uncertainty for industry participants.

The ACCC discussed these concerns with CBH. Following these discussions, CBH provided drafting changes to clause 3.4 to clarify the implications if CBH proposes changes to a customer's LTASS. Specifically, CBH has proposed a new clause 3.4(e) to be inserted into the Port Terminal Rules, with the current 3.4(e) and 3.4(f) renumbered accordingly.

- 3.4(e) A Long Term Customer is not obliged to accept proposed changes put forward by CBH to the LTASS but in doing so acknowledges that a failure to accept such changes may result in operational impacts to the time of Outloading onto a nominated vessel as determined in accordance with clauses 11 to 14 (inclusive) of these Port Terminal Rules.

Based on the proposed new clause 3.4(e), a disagreement over the LTASS would have a practical effect at the time that the vessel nomination process takes place, and in accordance with the procedures for both near term and long term capacity.

No submissions have raised any concern regarding the process, as currently drafted, for CBH to propose changes to a customer's revised LTASS. While stakeholders have not addressed the degree of discretion afforded to CBH in proposing changes to LTASS's during the course of the LTA, they have acknowledged that it is appropriate for the port operator to have discretion in the allocation of LTA capacity.

The ACCC would be concerned if CBH were to use its discretion to unreasonably discourage or prevent LTA customers from utilising third-party storage, logistics and transport services. The ACCC notes that such conduct may raise concerns under the competition provisions of the CCA.

The ACCC considers that the revised clause provides sufficient clarity about the process for the LTASS, and makes it clear that a Long Term Customer may accept or not accept changes proposed by CBH. Furthermore, CBH must treat the vessel in accordance with the existing procedures.

The ACCC's preliminary view is that the LTASS process, and the discretion for CBH to propose changes to a revised LTASS, is likely to be appropriate. In coming to a final view of the appropriateness of the LTASS process, the ACCC seeks stakeholder views on the new clause 3.4(e) proposed by CBH which outlines what would happen should customers not accept LTASS changes proposed by CBH.

3.4.5. Availability of near term capacity

The primary method of port terminal capacity allocation under the 2011 Undertaking is the auction system, where it is offered to the highest bidder/s for a given shipping window at a port. Following the auction process, which can include several auctions, any remaining capacity is offered to customers on a FCFS basis.

CBH's proposed introduction of LTAs alters the current process of allocating capacity. Under the Proposed Undertaking, up to 66 per cent of capacity is to be offered through LTAs. Any of this capacity that is not taken up, in addition to the minimum 34 per cent of capacity, is then offered annually as near term capacity via auction and then subsequently through a FCFS basis. The 34 per cent applies annually and on a shipping window by port basis.

CBH submission

CBH has outlined its justification for its proposal to reserve a minimum of 34 per cent of capacity for allocation in the near term:

Since the customers that are likely to take up long term capacity are those that acquire the majority of the wheat crop in each of the last five seasons, the proposed arrangements are in the interests of the majority of the current users of CBH's port terminal services and services by way of the port terminal facility.⁴⁷

CBH also submits:

The minimum near term capacity represents 34% of total capacity whilst [estimated] average non LTA customer demand constitutes only 7% of actual exports or under 5% of total capacity offered. This means there is nearly a 7 times coverage of the current average annual demand by non LTA customers.⁴⁸

and that:

In each of the four seasons the top four exporters have acquired between 80 and 88 per cent of all capacity acquired (notwithstanding that in some years there was still capacity that had not been acquired) and shipped between 79 and 96 per cent of all grain passing through CBH port facilities.⁴⁹

CBH also notes that any additional port capacity that CBH is able to provide as a result of additional investments will be made available through the near term allocation process.⁵⁰

Table 3 details the potential spread of LTA and non-LTA capacity at each CBH port, as submitted by CBH. Table 3 also provides an estimate of the average non-LTA capacity available per shipping window across the four ports.

⁴⁷ CBH, *Submission in support*, p. 10.

⁴⁸ *ibid*, p. 26.

⁴⁹ *ibid*, p. 31.

⁵⁰ *ibid*, p. 9.

Table 3: Estimated LTA capacity spread (tonnes) by port by quarter, as submitted by CBH⁵¹

Port	Quarter	LTA capacity (66%)	Non-LTA capacity (34%)	Total capacity	Average non-LTA capacity per shipping window
<i>tonnes</i>					
Esperance	Nov-Jan	330,000	170,000	500,000	28,333
	Feb-Apr	693,000	357,000	1,050,000	59,500
	May-Jul	396,000	204,000	600,000	34,000
	Aug-Oct	330,000	170,000	500,000	28,333
	Total	1,749,000	901,000	2,650,000	150,167
Albany	Nov-Jan	396,000	204,000	600,000	34,000
	Feb-Apr	693,000	357,000	1,050,000	59,500
	May-Jul	495,000	255,000	750,000	42,500
	Aug-Oct	396,000	204,000	600,000	34,000
	Total	1,980,000	1,020,000	3,000,000	170,000
Geraldton	Nov-Jan	528,000	272,000	800,000	45,333
	Feb-Apr	792,000	408,000	1,200,000	68,000
	May-Jul	594,000	306,000	900,000	51,000
	Aug-Oct	528,000	272,000	800,000	45,333
	Total	2,442,000	1,258,000	3,700,000	209,667
Kwinana	Nov-Jan	792,000	408,000	1,200,000	68,000
	Feb-Apr	1,386,000	714,000	2,100,000	119,000
	May-Jul	1,188,000	612,000	1,800,000	102,000
	Aug-Oct	792,000	408,000	1,200,000	68,000
	Total	4,158,000	2,142,000	6,300,000	357,000

Source: CBH, *Submission in support of a proposed access undertaking under Part IIIA of the Competition and Consumer Act 2010: Public version*, p. 54

Stakeholder submissions

Stakeholder submissions support the reservation of at least 34 per cent of capacity for near term allocation via the auction system.

Glencore Grain submits:

We also consider that the 34 per cent of capacity reserved for ‘near term’ acquisition is more than adequate⁵²

Plum Grove submits:

The proposed split of allocation of capacity via LTAs and auctions is appropriate in the first instant...⁵³

⁵¹ *ibid*, p. 54.

⁵² Glencore, *Submission in response*, p. 2.

⁵³ Plum Grove, *Submission in response*, p. 1.

Cargill:

Cargill Australia is of the opinion that CBH's proposal to incorporate both LTAs for 'long term' capacity and an auction system to allocate 'near term' capacity (and any capacity not booked under LTAs or via the auction will be allocated on a first-come, first-served basis) will cater for all port customers, both large and small, to secure port access.⁵⁴

ACCC's preliminary view

The availability of near term capacity has been considered by the ACCC having regard to the matters under subs. 44ZZA(3) of the CCA. A key consideration in this assessment was whether non-LTA customers will be able to secure their capacity requirements through the near-term capacity allocation process.

In particular, it is important to consider the ability of non-LTA customers to secure port terminal capacity, especially if they are not able to make the commercial commitments required of the LTA.

The ACCC considers that in assessing the appropriateness of CBH's proposal to offer a guaranteed 34 per cent of near term capacity, it is necessary to take into account factors such as the number and size of bulk wheat exporters in the WA market and the likely take up of LTAs. The ACCC considers an appropriate starting point to assess the LTA proposal under the relevant subs. 44ZZA(3) matters is to consider a hypothetical scenario under which a minimum number of exporters take up LTAs, and do so to the full extent possible (that is, 66 per cent of total capacity in each shipping window).

CBH submits that the top four customers acquired between 80 and 88 per cent of capacity, and exported between 79 and 96 per cent of all grain over the past four years.⁵⁵

In the event that only the four largest customers took up an LTA, and utilized the full 66 per cent LTA capacity allocation, it is likely that at least some of them would require 'top up' near term capacity to service their total demand. This would likely be accentuated in a year with a larger harvest. These top four LTA customers would compete with non-LTA customers in the auction to attain additional 'top up' capacity from the 34 per cent of total capacity remaining.

On average, over the four year period, aside from CBH's top four customers, exporters have acquired around 17 per cent of total capacity and shipped about 14 per cent of total shipments. Overall, considering a minimal customer take up scenario based on recent trends, non-LTA customers would appear to have access to a sufficient level of near term capacity on an aggregate annual basis to service their likely demand.

Furthermore, the ACCC notes that CBH proposes to increase the amount of tonnes available per annum across all four ports to 15 million tonnes, leaving at least 5 million of that for allocation under the near term process. Other exporters (excluding the top four) have not exported in excess of 2.5 million tonnes per annum over the last four years, indicating that again, on aggregate, allowing them access to 5 million tonnes appears to be appropriate.⁵⁶

Industry submissions suggest that there is wide customer interest in LTAs. CBH envisages that likely non-LTA customer demand would constitute 5 per cent of total capacity, or 7 per cent of total exports.⁵⁷ In this regard, the ACCC's preliminary view is that 34 per cent of

⁵⁴ Cargill, *Submission in response*, p. 1.

⁵⁵ CBH, *Submission in support*, p. 31.

⁵⁶ Based on Continuous Disclosure Rules data provided to the ACCC.

⁵⁷ CBH, *Submission in support*, p. 26.

capacity appears to be sufficient for non-LTA customers to access capacity, and for LTA customers to additional capacity. Further, even if a smaller number of customers took up LTAs, there would still remain sufficient near term capacity available.

The Proposed Undertaking stipulates that, if there were full utilisation of LTAs, non-LTA customers would only be able to access 34 per cent of capacity at a port in a specific shipping window. In determining the appropriateness of this clause having regard to the matters listed in subs. 44ZZA(3) of the CCA, the ACCC has considered the minimum amount of capacity that would be available for a shipping window based on CBH's available capacity forecasts.⁵⁸

The ACCC notes that the quantities shown in table 3 were provided in CBH's supporting submission and do not form part of CBH's obligations under the Proposed Undertaking, and are based on forecasts provided by CBH in its submission in support of the Proposed Undertaking.

As a minimum, the estimates indicate that, on average, in the November to January quarter, non-LTA customers could acquire up to 28,333 tonnes of capacity per shipping window at Esperance. While this quantity does not allow for a 50,000 tonne panamax vessel to be fully loaded, it does provide sufficient capacity to fully load at least one average sized vessel of approximately 27,000 to 39,000 tonnes, as seen by CBH over the last five years.⁵⁹

Overall, the ACCC's preliminary view is that customers who opt not to take up an LTA appear able to access sufficient near term capacity for at least one shippable quantity, when considering CBH's smallest port when available capacity (and demand) is at its forecast lowest. The ACCC welcomes any further stakeholder feedback regarding the practical feasibility of shipping such quantities from WA ports.

In coming to the preliminary view that the amount of capacity available through the near term process is likely to be appropriate, the ACCC has also taken into account the ability of non-LTA customers to be able to access additional capacity outside of the near term allocation through the secondary market, where both capacity of LTA and non-LTA customers can be traded.

In summary, the ACCC's preliminary view, considering the likely take up of LTAs, historical export operations of CBH's customers, and the flexibility to trade/transfer capacity, is that the availability of near term capacity seems appropriate having regard to the efficient use of port infrastructure and interests of access seekers, as specified under subs. 44ZZA(3) of the CCA. Furthermore, the ACCC considers the capacity allocation process in the Proposed Undertaking is in the interest of the public as it is likely to facilitate competition in the bulk wheat export market.

3.4.6. Process for allocating near term capacity

Under the Proposed Undertaking, the process for allocating near term capacity largely follows existing practices via the auction system and the subsequent FCFS allocation.

CBH has outlined its proposal with regards to near term capacity allocation:

CBH does not propose any major changes to the auction process to how it was run during the 2013/14 season. The auction take place later in the year than current and would be closer to a period when reasonable demand certainty was available and hence booking capacity was

⁵⁸ *ibid*, p. 54

⁵⁹ *ibid*, p. 30.

not as speculative. This would then allow a flexible response to global grain market dynamics for participants in the auction process.⁶⁰

The ACCC raised concerns in its assessment of CBH's 2011 BLC proposal that BLC customers may have had a greater ability to bid up the price for sought-after auction capacity due to the fact that no auction premium was paid for their BLC.

In relation to these issues previously raised by the ACCC, and in regards to the current LTA proposal, CBH submits:

Following allocation of LTA capacity and due to the spread requirements imposed by the application process, LTA customers will face a more significant task to balance out their net auction premium, meaning that their ability to bid up premiums will most likely be lower than current demands.

In addition, there are likely to be fewer participants in the auction than currently, due to the fact that some customers will have acquired LTA capacity to meet their entire demand.⁶¹

CBH Submission

CBH also submits that larger customers (that is, likely LTA customers) already have the ability to balance higher and lower auction premiums through periods of differing demand, and that this ability will simply continue under the LTA process:

Larger customers who are likely to take up LTA capacity, would still have the ability to balance off high and low demand periods to achieve a lower net premium for capacity under the [current] auction. CBH submits that there is not a competitive disparity between LTA and non-LTA customers, it is between risk accepting and risk averse customers or between customers with deep pockets and those with limited resources.⁶²

Stakeholder submissions

Stakeholders provided limited feedback in their submissions about the auction process and the potential effect following the introduction of LTAs.

Glencore Grain submits that:

A further desirable outcome of LTAs should be to reduce the overall level of auction premiums risked by the exporter and reduce the capital tied up in premium pools.⁶³

Plum Grove submits:

We share the view that a move towards a combination of port allocation via LTA's and near term auction capacity should provide CBH and exporters with greater certainty over port utilisation and access and result in reduced port premiums.⁶⁴

Graincorp submits:

LTAs may reduce the impact of market distortions that have arisen from volatile auction premiums in prior years.⁶⁵

⁶⁰ *ibid*, p. 12.

⁶¹ *ibid*, p. 26.

⁶² *ibid*, p. 26

⁶³ Glencore, *Submission in response*, p. 2.

⁶⁴ Plum Grove, *Submission in response*, p. 1.

⁶⁵ Graincorp *Submission in response*, p. 1.

ACCC's preliminary view

The ACCC considers that it is important to consider the method by which near term capacity is allocated, and whether that has implications for near term capacity customers. The ACCC has generally been of the view that overall the auction mechanism used by CBH had worked effectively to ensure that capacity has gone to those who value it the most.⁶⁶ However, the ACCC has previously raised concerns about how the auction process may operate alongside long term arrangements.

The ACCC considered that CBH's 2011 BLC proposal would only suit a limited number of larger WA exporters. In the ACCC's assessment of this proposal, customers who were not eligible to engage in a BLC arrangement were seen to face disadvantage compared to those customers who were eligible.

The ACCC noted in its draft assessment of CBH's 2011 BLC proposal:

Those customers that are not eligible for BLC may be placed at a significant disadvantage compared to those that are eligible. This disadvantage arises because [...] during peak periods, the share of capacity available to these customers through auction is likely to be significantly constrained and the average price paid by these customers for capacity at peak times will be higher than the price to customers acquiring BLC or as compared to auction only arrangements.⁶⁷

The ACCC also noted the possibility that a proposal could be designed that achieved the efficiencies and benefits of longer-term arrangements, but avoided or limited the problems associated with restricting access to these agreements to a small number of industry participants.⁶⁸

While non-LTA customers are still required to pay an auction premium for all of their capacity under CBH's proposal, the ACCC considers that the Proposed Undertaking makes it more accessible and flexible than the previous BLC proposal. CBH's current proposal includes provisions for:

- lower eligibility requirements, allowing more customers to take up and acquire capacity through an LTA
- transferability of capacity, where LTA and non-LTA customers are able to trade both long and near term capacity
- spread requirements, which force LTA customers to allocate their LTA capacity across at least three quarters of the year.

Compared to the 2011 BLC proposal, these provisions may serve to reduce overall demand for near term capacity via the auction and hence limit the overall incentive to bid aggressively at auction in order to secure capacity. The ACCC considers that lower eligibility requirements make LTA capacity easier to obtain and that transferability allows access to capacity already allocated. Also, customers will already have capacity in several slots due to the spread requirements, making them less likely to bid for additional capacity.

⁶⁶ ACCC, *Co-operative Bulk Handling Limited proposed 2014-17 Port Terminal Services Access Undertaking Issues Paper*, 2014, p. 12.

⁶⁷ ACCC, *Co-operative Bulk Handling Limited Port Terminal Services Access Undertaking – Draft Decision*, 2011, p. 61.

⁶⁸ *ibid*, p. 62.

In addition, the ACCC notes recent changes to CBH's Port Terminal Rules which were consented to by the ACCC in August 2013.⁶⁹ The ACCC notes that industry participants have attributed the recent reduction in overall auction premiums to these changes. Table 4 shows average annual auction premiums over the five years from 2009-10 to 2013-14.

Table 4: Average auction premiums per tonne by season, 2009-10 to 2013-14^a

Season	Average auction premium per tonne
2009-10	\$7.76
2010-11	\$0.05
2011-12	\$16.52
2012-13	\$17.61
2013-14	\$4.69

^a Average premiums are based on total capacity awarded and total auction premiums paid across all auctions each season.

Source: CBH Port Capacity Auction Results, <https://www.portcapacity.com/Site.mvc/AuctionSchedule>.

In particular, the August 2013 changes to CBH's auction system limit the ability of exporters to withdraw large amounts of capacity from the auction at one time, and also allow CBH Operations to close the auction even if all slots are not necessarily at or below capacity. These two changes make it less likely that LTA customers will bid up premiums, as the risk of having large amounts of capacity in the auction when it closes is significantly higher.

For peak shipping windows however, where demand for this capacity would likely remain strong, particularly in large harvest years, the ACCC considers that there remains a risk of the LTA arrangements providing an advantage to LTA customers relative to non-LTA customers through the ability to 'bid up' auction premiums. The overall reduction in demand for near term capacity however would serve to at least partly offset this.

As discussed in section 3.4.2, the ACCC considers that the proposed LTA eligibility requirements are appropriate. The proposed LTAs are more accessible than under CBH's previous BLC proposal and are open to a wider range of customers. LTAs are intended to offer various benefits to a wide range of access seekers, including those customers willing to make a commitment to utilise a certain level of capacity.

Additionally, the support for the introduction of CBH's LTAs indicates that the majority of industry seeks the contractual certainty of longer-term arrangements in preference to the auction system.

The ACCC's preliminary view is that the flexibility of the proposed LTAs, the likely reduction in overall demand for auctioned near term capacity and the recent reduction in auction premiums, suggests that the overall risk of larger customers actively bidding up prices in auctions is likely to be lower.

3.4.7. Tradability and repositioning of capacity

CBH proposes to allow tradability of LTA capacity following the first auction of each season. This would allow customers to trade capacity acquired as LTA Capacity in the same manner as customers who acquire capacity via the auction. CBH submits that this will ensure LTA

⁶⁹ ACCC, *Co-operative Bulk Handling Limited's Port Terminal Services Access Undertaking: Decision to consent to variation*, 2013, pp. 21-27.

participants can sell capacity to other participants who may value the capacity more highly, thus ensuring that capacity acquired through the LTA process which cannot be used will not be wasted. CBH submits:

As a result of the ability to trade long term capacity, the overall allocative efficiency of the capacity allocation system will not be adversely affected by the Proposed Undertaking.⁷⁰

CBH also proposes to allow capacity acquired via an LTA to be repositioned into any available windows once the first auction for that season has concluded (and the results declared). CBH submits:

...by allowing repositioning on the same rules as auction capacity, CBH has provided a mechanism for the trade to mitigate some of the seasonal harvest risk associated with grain, whilst at the same time preserving the guaranteed available capacity for each auction and ensuring that LTA customers cannot block out windows prior to non-LTA customers having the opportunity to acquire capacity in the window of their choice.⁷¹

ACCC's preliminary view

The ACCC considers that transferability of capacity reduces the likelihood of capacity going unused, aids in the efficient operation of the ports and may assist in capacity going to those who value it the most. The ACCC has previously acknowledged that transferability of capacity promotes economic efficiency in the operation of, use of and investment in infrastructure used for the provision of port terminal services to the wheat export market in circumstances where capacity is constrained.⁷² Consistent with the objectives of Part IIIA of the CCA, the ACCC considers the efficient operation of CBH's port terminal infrastructure is in the interests of the public.

The ACCC's preliminary view is that transferability and the ability to reposition capacity, as allowed for in the Proposed Undertaking, is in the interests of access seekers, both LTA and non-LTA customers. As LTA customers' needs change over the term of their LTA, the ability to reposition capacity booked up to three years in advance (or sell to other exporters) will be of benefit to them. Non-LTA customers looking to secure additional capacity after the auction and FCFS allocations have been exhausted will benefit from the ability to purchase capacity on the secondary market. The ACCC considers the ability to reposition or trade capacity may benefit CBH as the port terminal operator, to the extent it helps ensure greater utilisation of port infrastructure.

3.4.8. Approach to pricing

Under the Proposed Undertaking, CBH's proposed Port Terminal Rules states:

The Port Operator must supply Long Term Capacity at the same price to all Customers.⁷³

CBH also states in its submission that it intends to apply uniform pricing to long term and near term capacity. CBH highlighted two fees that would apply to customers acquiring long term and near term capacity, the Upfront Marketer Fee and the Export Fee.

The Upfront Marketer fee is currently applied to each tonne of bulk wheat where a customer obtains capacity through the auction system. Under the Proposed Undertaking this fee is set to also apply to allocated LTA capacity, but is called the Long Term Capacity Charge.

⁷⁰ CBH, *Submission in support*, p.11.

⁷¹ *ibid*, p.10.

⁷² See, for example, ACCC decision to accept GrainCorp's 2011 Undertaking, 22 June 2011.

⁷³ CBH Group, *Proposed Port Terminal Rules 2014-17*, p. 5.

For LTA customers, the Upfront Marketer Fee would be set at the execution of their LTA, and is locked in for the full three year term of the agreement. The fee for the first year is paid immediately, and in June for each year thereafter.⁷⁴ For non-LTA customers, the Upfront Marketer Fee is payable at the time of acquiring capacity through the auction or FCFS process. CBH submits:

Due to the differences in the timing of the acquisition of capacity there will be differences in when a party pays the up-front marketer fee. In effect this will mean that there is a time value of money to take into account. However, aligning the payment of the up-front marketer fee with the capacity acquisition is necessary to ensure that speculation is discouraged and that capacity is not hoarded by customers without any financial cost (and also that CBH is not disadvantaged by reason of providing a long term commitment).⁷⁵

The Export Fee applies to each tonne of Bulk Wheat that is loaded onto a Nominated Vessel.⁷⁶

The ACCC notes that no stakeholder submissions addressed the proposed pricing arrangements under CBH's Proposed Undertaking.

ACCC's preliminary view

CBH's proposal includes a provision which ensures that all LTA customers are subject to the same prices for long term capacity. In the past, the ACCC has not objected to port operators negotiating in good faith on price with access seekers and considered that consistent pricing may be appropriate given considerations of efficiency under s. 44ZZA(3) of the CCA.

However, under the Proposed Undertaking, where all LTA customers are subject to the same prices for long term capacity, prices would not be able to be negotiated between individual access seekers and CBH. As such, the ACCC considers that effectively, CBH's proposal would ensure that the prices it charges to its own trading arm for long term capacity are no different to the prices it charges all other customers for long term capacity. This would ensure that there was not discriminatory behaviour in favour of CBH Grain in respect of the price charged, but equally may limit the ability of specific exporters to negotiate terms appropriate to their specific situation. Industry has not commented on CBH's pricing provisions and has not expressed concern about the absence of negotiations on pricing for long term capacity.

A further consideration is the application of fees and charges across long and near term capacity. The ACCC considers that CBH's proposal to apply the same Upfront Marketer Fee and Export Fee across capacity allocation methods to be appropriate. The ACCC accepts CBH's justification in regards to the timing of the Upfront Marketer Fee across allocation methods, which seeks to align the payment of the Upfront Marketer Fee with the actual acquisition of capacity.⁷⁷ However, the ACCC notes that this is not written within the undertaking or protocols.

In regards to potential changes to the Upfront Marketer fee over time, the ACCC acknowledges that while it is possible for differences in the fee for long and near term capacity acquisition to occur, CBH submits that requiring payment of the Upfront Marketer Fee at the time capacity is acquired is intended to discourage hoarding and speculative bidding.

⁷⁴ CBH Port Access, *Submission in support*, p. 12.

⁷⁵ *ibid*, p. 12

⁷⁶ CBH Group, *Port Terminal Services Agreement Charges Schedule: 2013-14*, p. 2.

⁷⁷ CBH Port Access, *Submission in support*, p. 12

The ACCC considers that fixing the Upfront Marketer Fee for capacity allocated in the LTA recognises the commitment made by LTA customers. The ACCC also notes that any change in the Upfront Marketer Fee would also affect LTA customers seeking additional capacity in the near term.

Therefore, overall the ACCC's preliminary view is that CBH's pricing arrangements under its Proposed Undertaking are appropriate, having regard to subs. 44ZZA(3) of the CCA.

3.4.9. Overall appropriateness of CBH's LTA proposal

CBH's proposed LTAs mark a significant change in the process of allocating port terminal capacity in the Western Australian bulk wheat market. The ACCC acknowledged the in-principle benefits of LTAs in its assessment of CBH's 2011 BLC proposal. The BLC proposal was withdrawn from CBH's 2011 after a generally negative response from stakeholders. In comparison to that proposal, the structure and features of CBH's current LTA proposal appear more accessible to exporters, and have received strong industry support.

Industry participants have largely welcomed and shown strong support for CBH's LTA proposal, submitting that the arrangements are more efficient, more desirable than the current mechanism and provide greater certainty for both CBH and access seekers.

The ACCC considers that the proposed LTAs offer a range of benefits to CBH as the port operator, to access seekers and to the public in terms of promoting competition. Key benefits include:

- increased commercial certainty for CBH, access seekers and grain growers
- enhanced efficiency in port operations
- better utilisation of port terminal capacity
- greater incentives to invest and expand in port infrastructure and up-country facilities.

Some benefits of LTAs are specific to LTA customers, such as greater certainty in export program planning, the ability to align booked port capacity with supply chain planning and a greater ability to build long-term relationships with overseas customers. In this regard, the ACCC's preliminary view is that while LTA customers are able to access certain benefits from taking up an LTA relative to non-LTA customers, this utility is appropriate compensation for making an LTA commitment to pay for capacity for three years. Other benefits that arise from a longer-term agreement, including stronger incentives for investment in port terminal and supply chain infrastructure, however, can extend to all industry participants, including non-LTA customers.

The ACCC's draft view is that the three-year term of CBH's LTAs is appropriate given the three year term of the Undertaking. While there is a degree of uncertainty in the current regulatory environment with the anticipated introduction of the Mandatory Code, the ACCC considers that enabling CBH and access seekers the opportunity to make commercial decisions in regards to LTAs and the proposed Undertaking is appropriate, having regard to the matters set out in subs. 44ZZA(3) of the CCA, including the legitimate business interests of the access provider, and the interests of access seekers.

The proposed LTAs appear to be available to a range of bulk wheat exporters in WA, including exporters responsible for the majority of export from WA in recent years, despite the minimum 600,000 annual tonnage requirement. The vast majority of exporters have

supported the tonnage requirement, and a significant proportion of exporters have expressed interest in taking up an LTA.

The amount of capacity available for long term allocation - up to 66 per cent of total capacity - appears appropriate, and based on capacity acquisition over the last four years, reserves sufficient available capacity for customers who are not likely to take up an LTA.

The flexibility for exporters to trade any surplus capacity encourages better port utilisation and provides secondary options to access port capacity to the benefit of access seekers. The ACCC considers that the ability to trade and reposition all forms of capacity will promote access to and the efficient use of port terminal services where capacity is constrained, benefiting all parties involved.

The spread requirements outlined in the proposal also promote port utilisation throughout the year, and the cap on one exporter acquiring more than 50 per cent of long term capacity guards against exporters hoarding capacity, and facilitates competition in the interests of access seekers and the public, as outlined in subs. 44ZZA(3) of the CCA.

The ACCC notes the benefits to CBH of obtaining a Long Term Annual Shipment Schedule (LTASS) from its LTA customers to assist in logistics and targeting infrastructure spending. The ACCC also acknowledges that CBH should be able to exercise a level of discretion to manage long term capacity, including where customers make changes to their LTASS. The ACCC however did not consider that CBH's proposal sufficiently addressed the implications for customers after CBH proposes changes to the LTASS. CBH have since proposed a new clause 3.4(e) which clarifies the process for customers. While the ACCC's preliminary view is that the amended LTASS process may be appropriate, stakeholder feedback on the new clause is invited before the ACCC makes a final conclusion on this provision.

The ACCC considers that the allocation of near term port capacity, which is proposed to remain in accordance with the current auction and FCFS processes is appropriate. It is uncertain exactly how the auction process would play out in practice. Under the proposed LTA model, customers could meet their capacity requirements through LTAs, leading to a reduction in overall demand for auctioned capacity. This, in combination with the August 2013 changes to CBH's auction system, suggests that auction premiums may not be any higher under the proposal and the risk of larger customers bidding up prices is likely to be lower. While some potential remains for an increase in bidding competitiveness, the ACCC considers that the overall likelihood to be significantly lower than under the BLC proposal.

The ACCC notes, however, that the port terminal operator would continue to be required to comply with its obligations in the Undertaking and its conduct is subject to the competition provisions of the CCA.

Pricing principles are proposed to remain the same for all customers, regardless of the capacity allocation method. The payable amounts of fees are proposed to be largely the same, although non-LTA customers are subject to a variable Upfront Marketer Fee for their capacity, while the equivalent fee is fixed for LTA customers' long term capacity over three years. The ACCC considers that this recognises the commitment of LTA customers and that the overall standardised pricing principles facilitate competition and benefit the public in accordance with subs. 44ZZA(3).

In summary, the ACCC's preliminary view is that the Proposed LTAs are appropriate, subject to the proposed change to clarify the process relating to the LTASS. The ACCC considers that both the number and degree of expected benefits of the proposed LTAs outweigh the uncertainties and risks, and overall, are in the interests of the port terminal operator, access seekers and the public in accordance with subs. 44ZZA(3) of the CCA.

The ACCC, however, welcomes any additional feedback from stakeholders, particularly in regards to matters noted in the draft decision.

3.5. CBH's proposed Port Terminal Services Agreement

There are a number of differences between the proposed Standard Terms and the standard terms in the 2011 Undertaking. These include:

- Definition of CBH's 'common stack segregation' system, which provides that grain belonging to different customers is stored in the same grain stack on the basis that the quality of all such grain in that stack conforms to the same receival standard.
- changes that allow the Standard Terms to apply to 'Grain' as opposed to bulk wheat only (only access agreements that related to bulk wheat will be covered by the Proposed Undertaking⁷⁸)
- changes to CBH's receival procedures relating to the sampling and weighing of grain (to be charged in accordance the CBH's Fees and Charges Schedule) – clause 5.4(g) – (i)
- clarification that a customer's warranty is 'not intended to apply to grain delivered by Growers under the CBH Delivery and Warehousing Terms which is subsequently transferred to the Customer' – clause 5.5
- introduction of a 'Remnants and Regrading' clause that stipulates 'If the Customer's Grain Entitlement of a particular type and Grade of Grain is between the values of -1.00 and +1.00 tonne that stock will be deemed NCV Grain and will be removed from CBH's stock information systems and neither party will have any liability to the other for that amount of Grain' – clause 6.9(a)
- changes to CBH's Outturn Standard to define CBH's obligations when outturning grain that has been stored in a Common Stack Segregation – clause 7.6(b)
- revision of the previous Statutory Lien clause to provide that 'the Customer grants a security interest to CBH over the Customer's Grain Entitlement and proceeds of sale thereof as security for the payment of all monies now or hereafter due and payable (on any account whatsoever) by the Customer to CBH and its Related Bodies Corporate' – clause 10
- inclusion of a clause that specifically addresses the parties' obligations under the Personal Properties Securities law – clause 10.3
- changes to the circumstances in which CBH will not be liable or responsible for any loss or damage to grain to include variations in the quality of grain resulting from 'the loss of germinative capacity of Grain' and 'variations within the generally accepted standard deviation error of Grain sampling equipment' – clauses 13.4(b) and 13.4(c)
- changes to CBH's indemnity for loss or damage – clauses 13.2(b) and 13.2(c)
- inclusion of a clause that states the enactment or promulgation of any 'Code by-law or statutory instrument' as a 'Change in Law' that will entitle CBH to increase the

⁷⁸ Clauses 5.3(f) and 5.3(g) of the Proposed Undertaking state that the undertaking does not apply to 'grains which are not wheat' and 'wheat which is not Bulk Wheat).

price paid by customer's for Port Terminal Services (to offset increased costs) – clause 29.1(a)(b).

CBH's supporting submission

CBH submits that the Proposed Undertaking requires CBH to offer Port Terminal Services on the Standard Terms and at the Reference Prices in response to a request from a customer. CBH submits that this mechanism provides certainty and transparency. CBH further submits:

Flexibility is achieved through the ability of access seekers to negotiate terms through the process specified in the Proposed Undertaking, and any changes from the Standard Terms are subject to non-discrimination principles. The Port Schedules specify the service definition by reference to the infrastructure present at each port.

The Proposed Undertaking does not preclude an access seeker requesting non-standard services or amendments to the Standard Terms. If there is a request for non-standard services, the Applicant is required to negotiate in good faith with the availability of binding arbitration should negotiations fail.⁷⁹

In relation to Standard Terms for LTA customers, CBH submits:

LTA customers will have certainty of contractual terms for three years once they have signed up. In addition, it is CBH's intention that the Standard Terms will remain constant for three years and that CBH will not have to revise them other than for small changes to be consistent with regulatory and legislative changes and such changes will occur in accordance with existing processes.⁸⁰

ACCC's preliminary view

The ACCC considers that while all elements of the Standard Terms are subject to negotiation between CBH and access seekers, the Standard Terms represent an important starting point for those negotiations.

As per clause 6.1(b) of the Proposed Undertaking, CBH can vary the Standard Terms with approval from the ACCC in accordance with the procedure for varying the undertaking as per the CCA.

It has been the ACCC's position since its assessment of the 2009 Port Terminal Service Undertakings⁸¹ that standard terms should ensure the following:

- the ability of CBH to unilaterally vary the terms of an executed indicative access agreement can only be exercised in appropriate circumstances
- the terms and conditions of the indicative access agreement provide for sufficient certainty and clarity in their terms, effect and operation.

The ACCC has not formed a specific view on individual clauses in the Standard Terms. This view is in consideration of the commercial nature of the Standard Terms, the ability of access seekers to negotiate different terms (with recourse to dispute resolution), and the lack of stakeholder comment on specific clauses. The ACCC does not have concerns that the Standard Terms do not represent a reasonable starting point for negotiations.

⁷⁹ CBH, *Submission in support*, p. 13.

⁸⁰ *ibid.*

⁸¹ Provided by CBH, GrainCorp and Viterra.

The ACCC's preliminary view therefore is that the Standard Terms contained in the Proposed Undertaking are appropriate.

3.6. Other differences between the 2011 Undertaking and Proposed Undertaking

In addition to the changes listed in chapter 3, the Proposed Undertaking also features a number of other differences when compared to the 2011 Undertaking:

- Removing obsolete references or clauses, such as references to the accreditation scheme previously regulated by the WEMA.
- Inserting definitions and references to LTAs.

ACCC's preliminary view

The ACCC considers these changes to be administrative (removing obsolete references) and/or consequential to other changes (new definitions). It is the ACCC's preliminary view that the new definitions provide clarity and certainty with respect to the operation of the Proposed Undertaking. Accordingly, the ACCC considers, having regard to subs. 44ZZA(3)(c) of the CCA, that clarity as to the operation of these provisions is in the interests of access seekers.

4. Draft Decision

The ACCC has considered the Proposed Undertaking provided to the ACCC by CBH on 14 March 2014, pursuant to section 44ZZA of the CCA.

Subject to CBH implementing amendments to clause 4.3 of the undertaking and clause 3.4 of the Port Terminal Rules, for the reasons outlined in chapter 3, having regard to the matters listed in subsection 44ZZA(3) of the CCA and in consideration of submissions received in response to the ACCC's Issues Paper, the ACCC's draft decision is to accept CBH's Proposed Undertaking.

The ACCC seeks views from interested parties on its draft decision.

Appendix A

This section sets out how the ACCC will assess the Proposed Undertaking and the timeframe within which it is required to complete that assessment.

Legal test for accepting an access undertaking

Part IIIA of the CCA establishes a regime to assist third parties to get access to services provided through certain facilities to promote competition in upstream or downstream markets.

In assessing a proposed access undertaking under Part IIIA of the CCA, the ACCC must apply the test set out in subs. 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
 - 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
- 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
- include a return on investment commensurate with the regulatory and commercial risks involved.

In addition, access price structures should:

- allow multi-part pricing and price discrimination when it aids efficiency

- 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

that access pricing regimes should provide incentives to cut costs or otherwise improve productivity.

If the ACCC publishes a notice inviting public submissions then the ACCC must specify how submissions may be made and the day by which submissions may be made (subs. 44ZZBD(2)). In making its decision, the ACCC must have regard to any submission made on or before the day specified in the notice in accordance with subs. 44ZZBD(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 the ACCC may apply to the Federal Court to enforce it. An undertaking may be withdrawn or varied at any time, but only with the ACCC's consent.

'Other matters the ACCC thinks are relevant' – the WEMA

In accepting CBH's 2011 Undertaking, the ACCC considered that the regulatory scheme established by the Wheat Export Marketing Act 2008 (Cth) (WEMA), and the rationale for the inclusion of the access test in the statute were, under subs. 44ZZA(3)(e) of the CCA, matters relevant to the decision. The ACCC considers that the policy, as reflected in the regulatory scheme established by the WEMA and the rationale for the access test, is a matter relevant to the current decision on whether to accept the Proposed Undertaking.

In particular, the ACCC acknowledges the policy objectives in introducing the access test in 2008, and in deciding to continue the access test when the WEMA was amended in December 2012. Specifically, the WEMA access test is:

...intended to ensure that owners, operators or controllers of port terminal facilities that also export bulk wheat, or have associated entities that do, provide fair and transparent access to their facilities to other exporters. The access test aims to avoid regional monopolies unfairly controlling infrastructure necessary to export wheat in bulk quantities, to the detriment of other bulk wheat exporters. All bulk wheat exporters should have access to these facilities while allowing the operators of the facility to function in a commercial environment.⁸²

Further, in the second reading speech regarding the introduction of the WEMA, the Minister stated that 'unless all exporters can get access to these critical facilities on fair and reasonable terms then one of the major objectives of the policy could be frustrated.'⁸³

In accepting undertakings from wheat port terminal service operators in 2009 and 2011, the ACCC acknowledged that the WEMA was introduced to promote competition in the export of bulk wheat, which has various dimensions including:

- the promotion of competition between marketers for the acquisition of bulk wheat from growers;

⁸² Commonwealth, *Revised Explanatory Memorandum – Wheat Export Marketing Amendment Bill 2012*, Senate, p. 6.

⁸³ Commonwealth, *Parliamentary Debates*, House of Representatives, 29 May 2008, 3860 (Tony Burke, Minister for Agriculture).

- 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 also acknowledged 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.

The ACCC notes that since accepting CBH's 2011 Undertaking, amendments to the WEMA have been introduced which stipulate that the access test will be removed on 1 October 2014, subject to there being in place a mandatory code of conduct covering grain export port terminal operators. The code must:

- deal with the fair and transparent provision to wheat exporters of access to port terminal services; and
- be consistent with the operation of an efficient and profitable wheat export marketing industry that supports the competitiveness of all sectors through the supply chain.⁸⁴

The intent of the code reinforces that the promotion of competition may potentially be limited by anti-competitive conduct associated with port terminal facilities.

The ACCC considers that the policy intentions as reflected in the WEMA are relevant to CBH's 2011 Undertaking and are relevant factors for the ACCC to consider in deciding whether to accept the Proposed Undertaking, pursuant to subs. 44ZZA(3)(e) of the CCA.

Timeframe for ACCC decisions and 'clock-stoppers'

Subsection 44ZZBC(1) of the CCA 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 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 subs. 44ZZBC(6).

Subsection 44ZZBC(2) of the CCA provides for 'clock-stoppers', which means that certain time periods are not taken into account when determining the expected period. In particular, the clock may be stopped:

- by written agreement between the ACCC and the access provider, and such agreement must be published: subss. 44ZZBC(4) & (5);

⁸⁴ These are the two criteria that the Minister for Agriculture, Fisheries and Forestry must be satisfied that the code of conduct meets before approving the code, as set out in section 12 of the *Wheat Export Marketing Act 2008*, p. 14.

- if the ACCC gives a notice under subs. 44ZZBCA(1) requesting information in relation to the application;
- if a notice is published under subs. 44ZZBD(1) inviting public submissions in relation to the application;
- a decision is published under subs. 44ZZCB(4) deferring consideration of whether to accept the access undertaking, in whole or in part, while the ACCC arbitrates an access dispute.

Current legislative arrangements

The Wheat Export Marketing Act 2008 (Cth) (the WEMA) came into effect on 1 July 2008. The WEMA was amended by the Wheat Export Marketing Amendment Act 2012 (Cth), which came into effect on 3 December 2012.

In 2008, the WEMA and associated transitional legislation replaced the Export Wheat Commission with a new statutory body, Wheat Exports Australia, which was given 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.

Amendments to the WEMA in November 2012 saw the Wheat Export Accreditation Scheme and the Wheat Export Charge abolished on 10 December 2012, and Wheat Exports Australia wound up on 31 December 2012. As per these amendments, the WEMA is intended to be repealed on 1 October 2014 on condition that a mandatory code of conduct has been declared under section 51AE of the CCA by this date.

Until then, parties seeking to export bulk wheat from Australia are required to pass the 'access test' in the WEMA until 30 September 2014. The access test, set out in section 9 of the WEMA, 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, and that undertaking relates to the provision to wheat exporters of access to the port terminal service for purposes relating to the export of wheat; and the access undertaking obliges the person to comply, at that time, with the continuous disclosure rules in relation to the port terminal service; and at that time, the person complies with the continuous disclosure rules in relation to the port terminal service, or
- there is in force a decision under Division 2A of Part IIIA of the CCA that a regime established by a State or Territory for access to the port terminal service is an 'effective access regime'; and under that regime, wheat exporters have access to the port terminal service for the purposes relating to the export of wheat; and at that time, the person complies with the continuous disclosure rules in relation to the port terminal service.

The Wheat Export Marketing Act 2008 (Cth) will be repealed in its entirety on 1 October 2014 if the Minister for Agriculture has by notice published in the Gazette approved a code of conduct and the code has been declared by regulations under section 51AE of the CCA to be a mandatory industry code.

The Minister must not approve a code of conduct unless the Minister is satisfied that the code of conduct:

- deals with the fair and transparent provision to wheat exporters of access to port terminal services by the providers of port terminal services;
- requires providers of port terminal services to comply with continuous disclosure rules;
- is consistent with the operation of an efficient and profitable wheat export marketing industry that supports the competitiveness of all sectors through the supply chain; and
- is consistent with any guidelines made by the ACCC relating to industry codes of conduct.

If a code of conduct is not approved and declared by 30 September 2014, the WEMA will not be repealed and the current arrangements, including the access test, will continue.