



Australian
Competition &
Consumer
Commission

Australian Bulk Alliance Pty Ltd

Port Terminal Services Access Undertaking

Amendment Notice

7 September 2011

Section 44ZZAAA(1) Amendment Notice

The Australian Competition and Consumer Commission (ACCC) gives this amendment notice to Australian Bulk Alliance Pty Ltd (ABA) under section 44ZZAAA(1) of the *Competition and Consumer Act 2010* (Cth) (Act).

The ACCC may issue an amendment notice setting out proposed amendments to an undertaking given to the ACCC under section 44ZZA(1) of the Act. On 23 December 2010, ABA gave the ACCC an undertaking under section 44ZZA(1) of the Act (Proposed Undertaking).

The ACCC's proposed amendments to the Proposed Undertaking, including the reason for each proposed amendment, are set out in this notice. Part 1 of this notice sets out the proposed amendments to the general terms of the Proposed Undertaking, Part 2 sets out the proposed amendments to the Indicative Port Terminal Services Agreement in Schedule 1 and Part 3 sets out the proposed amendments to the Loading Protocol in Schedule 5. References in this amendment notice to the 'Draft Decision' are references to the ACCC Draft Decision released on 11 August 2011, which is available on the [ACCC's website](#).

In suggesting the amendments to the Proposed Undertaking, the ACCC has had regard to the matters listed in section 44ZZA(3) of the Act, including in particular the legitimate business interests of ABA (section 44ZZA(3)(a)) and the interests of access seekers (section 44ZZA(3)(c)).

Typographical errors in the Proposed Undertaking and Schedules should be corrected, and cross references to amended clauses should be updated.

ABA has until 21 September 2011 ('due date') to respond to this notice. ABA may give the ACCC a revised undertaking incorporating the proposed amendments in response to this notice. If ABA does not respond by the due date, the proposed amendments are taken to not be accepted by ABA and the ACCC will proceed to make its decision on whether to accept the Proposed Undertaking.

1 Proposed Undertaking – general terms

The following proposed amendments relate to various general provisions of the Proposed Undertaking.

1.1 Proposed amendment

Clause 3.2, insert the following —

Priority

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

Reasons

The Proposed Undertaking should contain a clause setting out the order of priority of the general terms of the Proposed Undertaking and the Schedules. This will assist in providing clarity and certainty to ABA and access seekers, which are relevant factors under s. 44ZZA(3) of the Act, regarding the operation of the Proposed Undertaking. This is considered further in section 4.3.4.3 of the draft decision.

The ACCC notes that the insertion of this new clause 3.2 would result in the existing clause 3.2 ‘obligation to procure’ being renumbered clause 3.3.

1.2 Proposed amendment

Clause 4.2, delete the existing clause and insert the following —

Expiry

This Undertaking expires on the earlier of:

- (a) 30 September 2013; or
- (b) the day the ACCC consents to ABA withdrawing the Undertaking in accordance with Part IIIA of the CCA.

Reasons

The existing clause 4.2 set a term of one year for the Proposed Undertaking and included provisions for its automatic expiry in the event that either:

- ABA or a related body corporate ceased to be an Accredited Wheat Exporter under the *Wheat Export Marketing Act 2008* (Cth) (WEMA);
- The WEMA is amended such that an Accredited Wheat Exporter is no longer required to have in place an access undertaking under Part IIIA of the [CCA] in

relation to access to any of the Port Terminal Services for the purposes of maintaining accreditation under that Act.

A one year term is not appropriate as it is unlikely to allow sufficient time for effective negotiation of access agreements between ABA and access seekers to occur. It is also not appropriate that the Proposed Undertaking does not specify an expiry date as this may lead to the undertaking expiring mid-season.

ABA's draft revision proposes an expiry date of 30 September 2013. This appropriately balances the need to provide access seekers with greater certainty of access than a one year term and is reflected in the proposed amendment. This is considered further in section 3.3.1 of the draft decision.

Section 44ZZA(7)(b) of the Act states that an undertaking which has been accepted by the ACCC may be withdrawn or varied at any time but only with the consent of the ACCC. ABA's inclusion of provisions in clause 4.2 that would trigger the automatic expiry of the Proposed Undertaking are not consistent with the requirement for ACCC approval to withdraw an undertaking in s. 44ZZA(7)(b). The automatic expiry provisions should be removed and clause 4.2 amended as set out above. This is considered further in section 3.3.2 of the draft decision.

1.3 Proposed amendment

Clause 6.3, subsection (a) delete the existing clause and insert the following —
The Standard Terms are the terms and conditions set out in the Indicative Access Agreement to the extent that those terms and conditions relate to the provision of Port Terminal Services (**Standard Terms**).

Reasons

The Indicative Port Terminal Services Agreement submitted as part of the Proposed Undertaking is ABA's Storage and Handling Agreement, which relates to both port terminal and up-country services, the latter of which do not form part of the Proposed Undertaking. It is in the interests of access seekers to have greater certainty. It is therefore necessary for ABA to clearly distinguish that certain provisions of the Indicative Port Terminal Services Agreement fall within the ambit of the Proposed Undertaking, while others do not. This is considered further in section 4.3.4.3 of the draft decision.

For clarity, the Indicative Port Terminal Services Agreement should be renamed the 'Indicative Access Agreement'. This is set out in section 2 below.

1.4 Proposed amendment

Clause 6.4(c), delete the existing subsection and insert the following subsection

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

Reasons

It is appropriate for ABA to provide the ACCC with a copy of an access agreement executed with a Trading Business of ABA. Trading Business is defined in the Proposed Undertaking as a business unit or division of ABA or its Related Bodies Corporate which have responsibility for the trading and marketing of bulk wheat. This will enable the ACCC to assess ABA's compliance with the non-discriminatory access provisions in clause 6.4 of the Proposed Undertaking, which is relevant to the fair provision of access to third party access seekers, a relevant consideration under s. 44ZZA(3)(c) of the Act. This is considered further in section 4.3.3 of the draft decision.

The existing clause 6.4(c), which provided that the ACCC could authorise a member of the ACCC to exercise the ACCC's powers under clause 6.4(b), has been redrafted by ABA in its draft revision published on the ACCC website, and renumbered as clause 13(c), and is considered at proposed amendment 1.16 below.

1.5 Proposed amendment

Clause 7.4, delete the existing subsection (a)(vi) and insert the following provisions —

7.4 (a)(vi)

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

7.4 (b)

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

Reasons

The existing clause 7.4(a)(vi) provides that an Applicant is eligible to apply to ABA for access under the Proposed Undertaking if 'the Applicant is an Accredited Wheat Exporter and fully complies with the relevant legal requirements for wheat export as set out in WEMA and WEAS'. WEAS is defined in the Proposed Undertaking as the

‘Wheat Export Accreditation Scheme’. The existing clause should be removed and replaced with the proposed amendment set out above to allow for the possibility that Accreditation under the WEMA may not be a continuing requirement during the term of ABA’s Proposed Undertaking, but ABA may still be required to have an undertaking in force. Access seekers should have ongoing certainty of access so long as ABA’s undertaking is in place. This is considered further in section 3.3.3 of the draft decision.

1.6 Proposed amendment

Clause 8.1, delete subsection (a)(iii) relating to application of the dispute resolution provisions to a decision by ABA to unilaterally vary the prices at which Port Terminal Services are provided under an executed Access Agreement.

Reasons

Clause 18.2 of the Indicative Port Terminal Services Agreement at Schedule 1 of the Proposed Undertaking provides that ABA may unilaterally vary the terms of an executed access agreement subject to certain conditions. Under subclause 8.1(a)(iii) of the Proposed Undertaking, a unilateral variation by ABA of the prices at which Port Terminal Services are provided under an executed Access Agreement is subject to the dispute resolution provisions contained in that Agreement.

In its draft revision, ABA removed the unilateral variation provision in clause 18.2, and this change is reflected in proposed amendment 2.2 below. It is therefore not necessary for the dispute resolution provisions in clause 8 of the Proposed Undertaking to apply to a variation of an access agreement. This is discussed further in section 4.3.4.2 of the draft decision.

1.7 Proposed amendment

Clause 8.5, subsection (b), delete the following words —
The ACCC may authorise a member of the ACCC to make a decision under this clause 8.5(b).

Reasons

The existing clause 8.5(b), which provided that the ACCC could authorise a member of the ACCC to make a decision under clause 8.5(b), has been redrafted by ABA in its draft revision published on the ACCC website, and renumbered as clause 13(c), and is considered at proposed amendment 1.15 below.

1.8 Proposed amendment

Clause 8.5, subsection (c), delete the existing clause and insert the following —

If, within five Business days of receiving notice in accordance with clause 8.5(a), the ACCC:

- (i) advises each party to the Dispute in writing that it does not wish to be the arbitrator in respect of the Dispute; or
- (ii) does not advise each party to the Dispute in writing that it wishes to be the arbitrator in respect of the Dispute,

then subject to clause 8.5(e), the arbitration will be conducted by an arbitrator appointed by the agreement of the parties to the Dispute.

Reasons

The proposed amendment to clause 8.5(c) does not alter the intent or operation of the clause, but suggests wording which is intended to provide greater clarity to ABA and access seekers on the operation of the provision. The proposed amendment reflects the drafting provided by ABA to the ACCC in the draft revision, which is published on the ACCC website.

1.9 Proposed amendment

Clause 10.1, delete existing clause and insert —

Continuous Disclosure Rules

ABA must, as a condition of this Undertaking, comply with the Continuous Disclosure Rules under the WEMA from time to time and at the commencement of this Undertaking publish on its website in relation to Port Terminal Services:

- (a) ABA's Loading Protocol; and
- (b) A Shipping Stem (to be updated each Business Day) setting out, for each ship scheduled to load grain using a Port Terminal Service:
 - (i) the name of the ship;
 - (ii) the date when the ship was nominated to load grain using a Port Terminal Service;
 - (iii) the date when the ship was accepted as a ship scheduled to load grain using a Port Terminal Service;
 - (iv) the quantity of grain to be loaded by the ship using a Port Terminal Service;
 - (v) the estimated date on which grain is to be loaded by the ship using a Port Terminal Service.

(c) ABA's Shipping Stem will be available at: <http://www.bulkalliance.com.au> or such other domain as notified from time to time.

Reasons

It is not appropriate that the Proposed Undertaking, which requires the Shipping Stem be updated within 23 hours of any change, is inconsistent with the requirements in the WEMA, which requires that the Shipping Stem be updated each business day. The proposed amendment ensures that the requirements in the Proposed Undertaking are consistent with the requirements under the WEMA and has updated drafting in accordance with the draft revision provided by ABA. This is considered further in section 5.3.3 of the draft decision.

Port Terminal Services Protocols variation process

The following discussion relates to proposed amendments 1.10-1.13.

The Loading Protocol prescribes how ABA will operate its ports regarding bulk wheat export. ABA may vary the Loading Protocol in accordance with the process set out in its Proposed Undertaking. The Loading Protocol variation process requires the following amendments to ensure the process is fair and transparent.

1.10 Proposed amendment

Clause 10.2, subsection (b), insert the following —

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

Reasons

Section 44ZZA(3)(c) of the Act requires the ACCC to have regard to the interests of access seekers. Access seekers require certainty of the Loading Protocol, given that the Loading Protocol is the operational document governing how access to the port occurs. To provide sufficient certainty to access seekers the Loading Protocol should be a comprehensive document that encompasses all of ABA's policies and procedures for managing demand for Port Terminal Services. A consistent approach across all access undertakings for port terminal services is appropriate on this issue. To ensure clarity and certainty, the Proposed Undertaking should expressly provide that the Loading Protocol must be, and continue to be, a comprehensive document. This is considered further in section 5.3.9.1 of the draft decision.

The ACCC notes that the inclusion of this clause would require the existing clause 10.2(b) to be renumbered as 10.2(c).

1.11 Proposed amendment

Clause 10.3, subsection (a)(iii), insert the following —

(E) publishing on ABA’s website any written responses received from an interested party under clause 10.3(a)(iii)(D) within five Business Days of receiving that response, provided that ABA is not required to publish any response which it reasonably considers to contain material which is offensive, confidential or otherwise inappropriate for publication;

Reasons

In the interests of transparency and having regard to s. 44ZZA(3)(a) and (c) of the Act, ABA should be required to publish all written submissions received during the Loading Protocol variation process. Transparent consultation will facilitate dialogue between ABA and access seekers in the variation process. This is considered further in section 5.3.9.2 of the draft decision.

1.12 Proposed amendment

Clause 10.3, subsection (b), insert the following —

At any time during the consultation process under clause 10.3(a)(iii), ABA may prepare and circulate a further variation to the proposed changes to take into account feedback from interested parties or from the ACCC. To avoid doubt, this clause does not require ABA to recommence the consultation process under clause 10.3(a)(iii).

Reasons

If the Proposed Undertaking is amended to expressly allow ABA to amend a proposed variation based on consultation, the variation process will benefit from increased efficiency and a greater ability for ABA to respond to consultation.

With regard to s. 44ZZA(3)(a) of the Act, taking the operational nature of the Loading Protocol into account and the importance of certainty in port operations, it is not necessary to recommence the consultation process if a proposed variation is amended based on engagement between ABA and access seekers. This is considered further in section 5.3.9.2 of the draft decision.

The ACCC notes that the inclusion of this clause would require the existing clauses 10.3(b)-(d) to be renumbered as 10.3(c)-(e).

1.13 Proposed amendment

Insert new clause 10.4, Objection notice —

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

Reasons

Considering the scope of matters ABA could amend through a Loading Protocol variation process, it is necessary to introduce a mechanism for the ACCC to object to a proposed variation.

The ACCC's power to issue an objection notice would be discretionary and be limited to variations that are:

1. material in nature; and/or
2. amount to a breach of the anti-discrimination clause 6.4 and / or the no hindering access clause (which would be renumbered as clause 10.5).

The ACCC notes that certainty, flexibility and timeliness regarding the operation of the Loading Protocol are of critical importance, given that the Loading Protocol is the document by which the port operates. However, the objection notice is a timely mechanism necessary to ensure that the Loading Protocol is not used to discriminate or hinder access. The ACCC considers this is a relevant factor with regard to s. 44ZZA(3)(c) of the Act.

The objection notice is not onerous, particularly as the process requires that a draft objection notice be given to ABA, allowing ABA the ability to address the ACCC's concerns before reaching the stage of the formal objection notice.

The power to issue an objection notice will not interfere with port operations when proposed variations do not give rise to concerns within the limited criteria above. This is considered further in sections 5.3.9.3 and 5.3.9.4 of the draft decision.

The ACCC notes that if this proposed amendment is adopted, the existing no hindering access clause 10.4 in the Proposed Undertaking would be renumbered clause 10.5

1.14 Proposed amendment

Clause 12, delete the existing clause and insert the following —

Report on Performance and Capacity Indicators

- (a) ABA will publish the following key service performance and capacity indicators:
- (i) in the case of the period from 1 October 2011 to 31 March 2012, by no later than 31 May 2012;
 - (ii) in the case of the period from 1 April 2012 to 30 September 2012, by no later than 30 November 2012;
 - (iii) in the case of the period from 1 October 2012 to 31 March 2013, by no later than 31 May 2013;
 - (iv) in the case of the period from 1 April 2013 to 30 September 2013, by no later than 30 November 2013,

in each case, providing details on the following key service standards and capacity indicators in respect of the provision of Port Terminal Services for Bulk Wheat at the Port Terminal during the relevant period:

- (v) total capacity;
 - (vi) Bookings received (tonnage);
 - (vii) spare available capacity;
 - (viii) monthly tonnes shipped;
 - (ix) capacity utilisation (percentage);
 - (x) stock on hand at the end of month;
 - (xi) average daily receivals by road and rail.
- (b) ABA will publish its report to the ACCC in a prominent position on its website within five Business Days of the date on which it provides it to the ACCC.

Reasons

In its Proposed Undertaking, ABA has undertaken to publish only two performance measures: monthly tonnes shipped, and the number of ships loaded. While recognising that there is a level of variation in the indicators published by the different port operators, the level of information ABA proposes to publish falls short of that published by the other port terminal operators. It would be in the interests of access

seekers for ABA to include additional performance indicators, as set out in the proposed amendment above, to provide a sufficient level of transparency around ABA's operations. The six-monthly reporting schedule proposed by ABA is appropriate given that access agreements are generally negotiated on an annual basis. This is considered further in section 4.3.5 of the draft decision.

1.15 Proposed amendment

Insert the following clause —

13 Cooperation with ACCC

- (a) The ACCC may, by written notice, request ABA to provide information or documents that are required by the ACCC for the reasons specified in the written notice to enable it to exercise its powers or functions specified in this Undertaking.
- (b) ABA will provide any information requested by the ACCC under clause 13(a) in the form and within the timeframe (being not less than 14 days) specified in the notice.
- (c) The ACCC may approve the Regulated Access, Pricing and Monitoring Committee or a member of the ACCC to exercise a decision making function under this Undertaking on its behalf and that approval may be subject to any condition which the ACCC may impose.

Reasons

The ACCC notes that under the current drafting of ABA's Proposed Undertaking, it may obtain information from ABA through an ACCC directed audit. Further, the ACCC may obtain information at any time on a voluntary basis. These methods of information gathering may not be appropriate in every instance. Specifically, an audit may not lead to the timely provision of information to the ACCC and is limited to information related to the non-discrimination provisions of the Proposed Undertaking. Broader information gathering powers should be included in ABA's undertaking to allow the ACCC to exercise its powers and functions. This is discussed further in section 4.3.6 of the draft decision.

The ACCC notes that the Proposed Undertaking includes a provision for the ACCC to authorise ACCC Commissioners to exercise the powers conferred on it regarding the non-discrimination provisions (clause 6.4(c)). As stated in the reasons for proposed amendment 1.7, the provision should be that the ACCC may approve ACCC Commissioners to exercise the power to avoid confusion for both the access provider and access seekers regarding the use of the term authorise. The approval provisions should be extended to cover all the ACCC's functions and powers under the Proposed Undertaking. Extending the approval provisions will allow the ACCC to respond and act in a timely manner, thereby facilitating the efficient operation of the undertaking, which is in the interests of both access seekers and ABA, a relevant factor under

section 44ZZA(3)(a) and (c) of the Act. Broadening the approval provision will assist ABA in running its operations efficiently for the benefit of the supply chain.

The ACCC notes that the Regulated Access, Pricing and Monitoring Committee is comprised of several ACCC Commissioners.

This is considered further in section 5.3.9.4 of the draft decision.

Note if the proposed amendment is adopted, clause 13 in the Proposed Undertaking 'contact details' should be renumbered clause 14.

1.16 Proposed amendment

Clause 1.1, remove the definitions of 'TPA', 'Loading Protocols', 'Port Terminal Facilities' and 'Trading Business'. Insert the following:

CCA means the Competition and Consumer Act 2010 (Cth);

Loading Protocol means the policies and procedures published by ABA from time to time in accordance with the continuous disclosure rules and clause 10.2. The Loading Protocol as at the commencement date of this Undertaking is set out in Schedule 5;

Port Terminal Facility has the meaning given in clause 5.3;

Trading Business means a business unit or division of ABA or its Related Bodies Corporate which has responsibility for the trading and marketing of Bulk Wheat;

Replace the following terms where they occur throughout the Proposed Undertaking, other than in the Schedules:

- 'TPA' with 'CCA'
- 'Port Terminal Facilities' with 'Port Terminal Facility', except in clauses 3.1, 5.4(a)(ii), and 11.1(a)
- 'Loading Protocols' with 'Loading Protocol'.

Clauses 3.1, 11.1(a)(i) and 11.1(a)(ii), replace 'Port Terminal Facilities' with 'the Port Terminal Facility'

Clause 4.1, replace 'on and from this date' with 'on and from that date'.

Clause 4.3(b), replace 'that Act' with 'the WEMA'.

Clause 5.4(a)(ii), replace 'Port Terminal Facilities' with 'a Port Terminal Facility'.

Clause 6.2(c), delete existing clause and insert:

(c) The Reference Prices for the period from 1 October 2010 to 30 September 2011, subject to variation in accordance with clause 6.5, are set out in the Indicative Access Agreement at Schedule 1 and are published at www.bulkalliance.com.au.

Clause 6.2(e), replace 'copies' with 'notice'.

Clause 7.4(a), replace 'the Eligibility Requirements' with 'the following Eligibility Requirements'

Clause 7.5(a), delete existing clause and insert:

(a) An Applicant's request for access to the Port Terminal Services (Access Application) is to be submitted to ABA and must include the information contained in Schedule 2.

Clause 8.3(e)(i), delete ', by either mediator appointed by the parties or a mediator appointed by the President of the Victorian Chapter of the IAMA,'.

Clause 8.3(e)(v), replace 'ABA and the applicant or User' with 'the parties'.

Clause 8.5(e), delete 'clause 8.5(c)(i) or 8.5(c)(ii) respectively' and insert 'clause 8.5(c)'.

Clause 10.3(a)(iii)(D) remove 'ABA'

Reasons

ABA's draft revision includes a number of minor drafting and grammatical amendments from the Proposed Undertaking. This includes updating references to the *Trade Practices Act* (TPA) to the new *Competition and Consumer Act* (CCA).

The proposed amendment reflects these drafting changes which were proposed by ABA in order to provide additional clarity and certainty around the operation of the undertaking. This additional clarity and certainty is appropriate having regard to the legitimate business interests of ABA and the interests of access seekers, relevant factors in accordance with s. 44ZZA(3)(a) and (c).

2 Indicative Port Terminal Services Agreement, Schedule 1 of the Proposed Undertaking

The following proposed amendments relate to Schedule 1 of the Proposed Undertaking.

2.1 Proposed amendment

Rename the Indicative Port Terminal Services Agreement to 'Indicative Access Agreement'.

Reasons

To ensure consistent term of reference is applied to the agreement submitted as Schedule 1 of the Proposed Undertaking, the document should be renamed as the 'Indicative Access Agreement'.

2.2 Proposed amendment

Schedule 1, clause 18, delete the existing clause and insert the following –
18.1 No variation to this Agreement is valid or has any effect unless initialled by both the Client and the Company.

Reasons

Clause 18 of the Indicative Port Terminal Services Agreement submitted as Schedule 1 of the Proposed Undertaking gives ABA discretion to unilaterally vary any provision of the agreement once executed, provided ABA notifies the Client and allows the Client to terminate the agreement if the terms are not acceptable.

The proposed amendment set out above removes the ABA's discretion to unilaterally vary an agreement, requiring instead that both ABA and the Client must agree to the variation. The ACCC considers that this balances the legitimate business interests of ABA with the interests of access seekers, relevant factors under s. 44ZZA(3)(a) and (c) of the Act, respectively. This is considered further in section 4.3.4.2 of the draft decision.

2.3 Proposed amendment

Schedule 1, clause 21.2, remove the reference to '60 days' and insert '30 days'.

Reasons

Clause 21 of the Indicative Port Terminal Services Agreement governs disputes that arise concerning the Indicative Port Terminal Services Agreement's terms. Clause 21.2 of the Indicative Port Terminal Services Agreement submitted as Schedule 1 of the Proposed Undertaking provides that if the parties cannot resolve the disputes between themselves within 60 days of lodging a dispute notice, the dispute may be referred to arbitration in accordance with the *Commercial Arbitration Act 1984 (Vic)*. The 60 day period for a dispute to be escalated to arbitration is too long and may not provide for timely resolution of disputes under the Indicative Port Terminal Services Agreement, which is critical to ongoing certainty of access. Specifically, this is not in the interests of access seekers. A 30 day time period provides greater certainty for access seekers and ABA and is therefore appropriate. This is considered further in section 4.3.4.1 of the draft decision.

2.4 Proposed amendment

Delete the details of the Charges in Schedule A.

The Charges published in Schedule A of the Indicative Port Terminal Services Agreement are representative of the Reference Prices referred to in clause 6 of the Proposed Undertaking. ABA is able to vary the Reference Prices at any time in accordance with clause 6. Therefore the Reference Prices at which port terminal services are provided do not form part of the assessment of the Proposed Undertaking and should not be included in the Proposed Undertaking. This is considered further in section 4.3.1 of the draft decision.

3 Loading Protocol – Schedule 5 of the Proposed Undertaking

The following proposed amendments relate to the Loading Protocol, which governs the operation of the port under the Proposed Undertaking.

The Loading Protocol submitted by ABA as Schedule 5 of the Proposed Undertaking is less detailed overall than the protocols submitted by other port operators with Part IIIA access undertakings in force. The ACCC has not been made aware of any problems at Melbourne Port Terminal that have arisen as a result of ABA's less detailed Loading Protocol, however, the lack of detail does create uncertainty around how capacity allocation functions in practice.

The proposed amendments set out below reflect the draft revised Loading Protocol provided by ABA in response to the ACCC's concerns around the lack of detail and transparency in the submitted Loading Protocol. The changes are intended to represent increased clarity and certainty, rather than suggesting significant changes to the current operation of the port. The proposed amendments are provided with a view to balancing the interests of ABA and access seekers and provide certainty of access. Reasons for the proposed amendments are considered further in the sections below and in sections 5.3.2 – 5.3.8 of the draft decision.

3.1 Proposed amendment

Schedule 5, insert new clause 2 –

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

Reasons

This principle is intended to provide additional certainty to access seekers around the overriding objectives which ABA will consider in applying the terms and conditions of the Loading Protocol. This amendment is appropriate having regard to the interests of access seekers, a relevant factor in s. 44ZZA(3)(c). The inclusion of this provision will require renumbering of subsequent clauses.

3.2 Proposed amendment

Publication of the Shipping Stem

Schedule 5, insert new clause 6 –

By a notice on its website ABA will provide at least 10 business days notice of the opening of its shipping stem for each year.

Clause 5 (renumbered clause 7) delete the existing clause and insert the

following –

ABA will post its shipping stem on its website <http://bulkalliance.com.au/>. It will be updated each business day.

Reasons

It is appropriate that the Loading Protocol includes a requirement to specify an opening date for the shipping stem. When there is a lack of transparency regarding an opening date for the shipping stem, or when the stem is continually open, this may lead to confusion for access seekers as to whether the port operator is accepting bookings for a particular period. Further, when the shipping stem is continually open, bookings that are made far in advance may be highly speculative in nature. The Loading Protocol should be amended to require that ABA must specify an opening date for the shipping stem each year and announce the opening date in a timely way, in order to provide sufficient certainty to access seekers. This is considered further in section 5.3.4 of the draft decision.

The amendment also requires ABA to update its shipping stem each business day, rather than within 24 hours of any change, to be consistent with the requirements of the WEMA and proposed amendment 1.9.

3.3 Proposed amendment

Amend clause 7 (re-numbered as clause 9) to replace references to ‘PoMC’ with ‘POMC’ and replace phone number ‘9687 9253’ with ‘9680 6200’.

Clause 8 (re-numbered as clause 10) delete existing clause and insert the following –

To request elevation and monthly shipping capacity at MPT a Client must:

- complete and lodge an Intent to Ship Advice (Annexure 1) and
- pay the Booking Fee in accordance with the terms of the Storage and Handling Agreement.

Reasons

This proposed amendment reflects drafting changes proposed by ABA in its draft revision of the Proposed Undertaking. These changes are appropriate as they provide additional clarity for access seekers around the operation of the Loading Protocol and the terms of access.

3.4 Proposed amendment

Delete clause 9 relating to “TBA” vessel notifications.

Clause 10 (re-numbered as clause 11) delete the existing clause and insert –

By the close of business on the next business day after receipt of a valid Intent to Ship Advice ABA will make a record of this intent on its Shipping Stem as “pending”. ABA will accept or reject the Intent to Ship Advice within 5 Business Days of receipt.

Clause 11 (re-numbered as clause 12) delete ‘nominations’ from the second dot point and insert the following dot point:

- Other matters which ABA reasonably considers to be relevant.

Clause 12 (re-numbered clause 13) delete the existing clause and insert –

Subject to clause 12, Intent to Ship Advices will be dealt with in the order that they are received.

Delete clause 15 relating to payment of the booking fee within contractual terms.

Reasons

The uncertainty in the Loading Protocol regarding the booking process is not appropriate. The Loading Protocol should be amended to be clear as to the actions ABA and wheat exporters must follow regarding the initial allocation of capacity. This proposed amendment reflects drafting changes proposed by ABA in order to provide additional certainty to access seekers. This is considered further in section 5.3.4 of the draft decision.

3.5 Proposed amendment

Insert new clause 17 –

If a Booking remains unused by the end of the nominated month it lapses and the Booking Fee is forfeited.

Clause 18 (re-numbered as clause 19) delete the existing clause and insert –

If the nominated or actual tonnage loaded is lower than that initially nominated then ABA will allocate the unused nominated capacity to the nearest month with spare capacity but no later than 30 September of that calendar year.

Reasons

This proposed amendment reflects drafting changes proposed by ABA, which are intended to more accurately reflect the arrangements in place and thereby provide sufficient certainty to access seekers. The need to provide additional detail and certainty is considered further in section 5.3.6 of the draft decision.

3.6 Proposed amendment

Clause 20 (renumbered clause 21) delete the existing clause and insert –

Written nomination of a vessel name must be received at least 15 business days prior to the vessel’s ETA in the form of the Vessel Nomination (Annexure 2). Vessel Nomination must be complete.

Insert new clause 22 –

ABA may, at its sole discretion, consider Vessel Nominations received on less than 15 business days notice.

Reasons

It is not appropriate that the Loading Protocol contains ambiguity around when a vessel must be specified for a booking. The proposed amendment clarifies the due date for the vessel nomination form and ABA’s discretion regarding vessel nominations received after this date. This is considered further in section 5.3.4 of the draft decision.

3.7 Proposed amendment

Clause 28 (re-numbered clause 30), delete ‘and vessel loading’. Insert new clauses 35 and 36 –

35. The order of vessel loading will generally be determined in accordance with:

- Vessel ETA
- Date Vessel Nomination received by ABA
- Date Vessel passed Surveys
- Grain availability at MPT
- Site accumulation and transport plan
- Ownership of stock
- Impact on terminal efficiencies

36. ABA may, at its sole discretion, determine that loading a vessel the subject of the Vessel Nomination received later or with a later ETA is in the interests of terminal efficiency.

Reasons

It is not appropriate that the Loading Protocol does not provide sufficient detail around how ABA will determine vessel loading priority. This proposed amendment reflects drafting changes proposed by ABA which are intended to provide more transparency for access seekers around the criteria ABA will consider in determining vessel loading priority. This is considered further in section 5.3.5 of the draft decision.

3.8 Proposed amendment

Capacity management and cargo accumulation

Insert new clause 34 –

Where grain remains at MPT after completion of ship loading and the Client retains ownership of the grain, the Client must remove it within 2 business days. If ABA reasonably considers that the presence of the grain may interfere with the receipt of grain for the next due shipment, ABA may remove the residual grain to another ABA site and all costs of transport and further storage will be to the Client's account.

Insert new clauses 39 to 43 –

39. Prior to commencement of loading a vessel must have passed a Marine, AQIS or any other survey required by law.
40. Should a vessel fail such survey ABA may, at its sole discretion, order the vessel removed from the berth.
41. ABA reserves the right to seek costs from the client in relation to a vessel failing surveys. Such costs may include but are not limited to:
 - Cancelled labour costs
 - Treatment costs
 - Opportunity costs where the terminal is blocked and causes other clients to experience delays
42. If ABA determines, at its sole discretion, that a vessel has a high risk of failing surveys it may require that an 'in transit' marine surveyor's report be provided prior to allowing the vessel to berth.
43. ABA will not commence loading without prior written instructions from the Client to do so and without receipt from the Client of a Notice of

Reasons

The Loading Protocol does not provide sufficient information regarding the respective rights and obligations of ABA and exporters regarding vessel surveys and authority to load. To provide access seekers with greater clarity, ABA should provide additional detail regarding this process, including vessel surveys that may be required, the process that will take place should a vessel fail survey, exporters' obligation to provide any information or certification, and how exporters will obtain authority to load.

To provide clarity to ABA and access seekers, it would be appropriate for ABA to specify the process and timeframes for storage and removal of residual grain at Melbourne Port Terminal.

This is considered further in section 5.3.5 of the draft decision.

3.9 Proposed amendment

Flexible arrangements

Clause 19 (re-numbered clause 20) delete the existing clause and insert –

ABA may, at its sole discretion, allow the deferral or splitting of a Booking. At least 3 months written notice prior to the vessel's ETA is required to defer or split a Booking. In determining acceptance or rejection of such changes to a Booking ABA will consider, amongst other matters:

- Existing shipping intentions/nominations
- Un-allocated capacity at MPT

ABA may, at its sole discretion, consider requests of less than 3 months notice. In such circumstances, ABA's Chief Executive Officers' (or his authorised representative's) determination is final.

Reasons

The flexibility permitted for shippers within ABA's capacity management arrangements is limited and unclear. ABA should provide further detail about how the flexible arrangements included in the Loading Protocol function in practice, to ensure sufficient transparency for access seekers regarding the options available to them. ABA's response to the ACCC Request for Information, which is available on the ACCC website, indicates that flexibility to split and defer bookings inside the 3-month window set out in the Loading Protocol does operate in practice.

This proposed amendment reflects drafting changes proposed by ABA which are intended to more accurately reflect ABA's current practices. This is considered further in section 5.3.6 of the draft decision.

3.10 Proposed amendment

Dispute Resolution

Schedule 5, clause 38 (re-numbered clause 47), delete the sixth and seventh dot points and replace with the following –

- At the meeting, ABA's Chief Executive Officer (or appointed representative) and the Client will discuss the subject of the dispute notice and ABA response and use all reasonable endeavours to reach an agreed outcome. Where such agreed outcome cannot be achieved, given the need for clarity, efficiency and certainty in this dispute resolution process, ABA's Chief Executive Officer (or appointed representative) will make a final decision in relation to the dispute notice and (within 10 business days after the meeting) notify that decision and the reasons for that decision in writing to the client.
- In reaching the final decision, ABA's Chief Executive Officer (or appointed representative), acting on behalf of ABA, must take into account the circumstances of the dispute and details set out in the dispute notice and, acting reasonably and in good faith, reach a decision that is consistent with the wording, or if that is unclear, the intent of these Protocols (and, in the case of Bulk Wheat, the Access Undertaking). ABA's Chief Executive Officer (or appointed representative) may also have regard to the objectives of:
 - maximising the efficient operation of MPT;
 - maximising export throughput at the MPT;
 - ensuring the non-discriminatory treatment of clients; and
 - ensuring consistency of decisions.

Reasons

The dispute resolution process in the Loading Protocol lacks transparency, as it does not specify a timeframe for the final decision by ABA's Chief Executive Officer. To provide certainty to access seekers regarding the operation of the dispute resolution provisions, ABA should include a time period for which a decision is to be made. The dispute resolution provisions are considered further in section 5.3.8 of the draft decision.