Australian Bulk Alliance Proprietary Limited

Port Terminal Services Access Undertaking

Draft Decision

11 August 2011

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Contents

Contents ... **iii**

Glossary ... **iv**

1 Summary ... **1**

1.1 The Proposed Undertaking ... 2
1.2 Draft revision ... 2
1.3 ACCC Draft Decision ... 3
1.4 Draft amendment notice ... 11
1.5 Stakeholder views ... 11

2 Procedural Overview ... **12**

2.1 ABA's Proposed Undertaking ... 12
2.2 Submissions from ABA ... 12
2.3 Draft revision of Proposed Undertaking and draft amendment notice ... 12
2.4 Public consultation process to date ... 13
2.5 Indicative timeline ... 13
2.6 Consultation on the Draft Decision and draft amendment notice ... 14
2.7 Further information ... 15

3 Term, expiry and transitional arrangements ... **16**

3.1 ABA's Proposed Undertaking ... 16
3.2 ABA and third-party submissions ... 16
3.3 ACCC view ... 17

4 The Publish-Negotiate-Arbitrate Framework ... **21**

4.1 ABA's Proposed Undertaking ... 21
4.2 ABA and third-party submissions ... 27
4.3 ACCC view ... 29

5 Capacity Management ... **43**

5.1 ABA's proposed Undertaking ... 43
5.2 ABA and third-party submissions ... 46
5.3 ACCC view ... 47

6 Conclusion ... **71**

Appendices ... **1**

1 Appendix: Industry Overview ... **2**

2 Appendix: Legislative Framework ... **13**

Annexure: Draft amendment notice ... **1**

Glossary

ABA	Australian Bulk Alliance Proprietary Limited
ABARES	Australian Bureau of Agricultural and Resource Economics and Sciences
ACCC	Australian Competition and Consumer Commission
the Act	*Competition and Consumer Act 2010* (Cth) (previously the *Trade Practices Act 1974* (Cth))
AQIS	Australian Quarantine and Inspection Service
CBH	Cooperative Bulk Handling Limited
Client	As defined in ABA's proposed Indicative Access Agreement.
draft revision	Draft revised version of the Proposed Undertaking provided by ABA on 28 July 2011
Emerald	Emerald Group Australia Pty Ltd
FCFS	'First come, first served' system of capacity allocation
GrainCorp	GrainCorp Operations Limited
IAA	The Indicative Access Agreement attached to the Proposed Undertaking at Schedule 1
MPT	Melbourne Port Terminal
PC	Productivity Commission
Proposed Undertaking	The access undertaking received from Australian Bulk Alliance Proprietary Limited on 23 December 2010
SHA	ABA's Storage and Handling Agreement, which has been submitted as the Indicative Access Agreement to the Proposed Undertaking at Schedule 1
VFF	Victorian Farmers Federation Grains Group
Viterra	Viterra Operations Limited
WEA	Wheat Exports Australia
WEAS	Wheat Export Accreditation Scheme 2008
WEMA	*Wheat Export Marketing Act 2008* (Cth)
2009 Undertakings	Access undertakings for GrainCorp Operations Limited, AusBulk Ltd (now Viterra Operations Limited) and Co-Operative Bulk Handling Limited accepted by the ACCC on 29 September 2009

1 Summary

This Draft Decision details the Australian Competition and Consumer Commission's (**ACCC**'s) preliminary view of the proposed access undertaking lodged by Australian Bulk Alliance Pty Ltd (**ABA**) on 23 December 2010 (**Proposed Undertaking**) for consideration under Division 6 of Part IIIA of the *Competition and Consumer Act 2010* (Cth) (the *Trade Practices Act 1974* (Cth) at the time of lodgement) (the **Act**). The Proposed Undertaking relates to the provision of access to services for the export of bulk wheat at Melbourne Port Terminal (**MPT**), which is operated by ABA in Victoria.

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

ABA's Proposed Undertaking is one of three bulk wheat port terminal services access undertakings currently being considered by the ACCC. The ACCC has received proposed undertakings from Viterra Operations Limited (**Viterra**) regarding its operations in South Australia and Co-operative Bulk Handling Limited (**CBH**) regarding its operations in Western Australian. On 22 June 2011, the ACCC accepted an undertaking from GrainCorp Operations Limited (**GrainCorp**) regarding its operations on the east coast of Australia.

In considering whether to accept an undertaking the ACCC has regard to the matters set out in s. 44ZZA(3) of the Act. These include, *inter alia*, the objects of Part IIIA in s. 44AA, which are to:

> *(a) promote the economically efficient operation of, use of and investment in the infrastructure by which services are provided, thereby promoting effective competition in upstream and downstream markets; and*
>
> *(b) provide a framework and guiding principles to encourage a consistent approach to access regulation in each industry.*

GrainCorp, Viterra and CBH each have in place an access undertaking accepted by the ACCC in 2009 (**2009 Undertakings**), while ABA is providing an undertaking to the ACCC for the first time. The ACCC will consider each undertaking on its own merits and notes that, while undertakings accepted by the ACCC from each port terminal operator will reflect the particular circumstances of that operator, there are certain aspects of the undertakings for which the ACCC will be seeking a consistent approach across the bulk wheat export industry. In this Draft Decision, the ACCC has set out issues which are particular to ABA's Proposed Undertaking as well as issues for which a consistent approach across the industry is considered appropriate. The ACCC considers that the 2009 Undertakings are a relevant matter in the assessment of ABA's Proposed Undertaking, in accordance with s. 44ZZA(3)(e). This is discussed further in Appendix 2: Legislative Framework.

The ACCC's preliminary view is that ABA's Proposed Undertaking is appropriate subject to being revised in accordance with the draft amendment notice annexed to this Draft Decision, which sets out a number of amendments to the Proposed Undertaking. ABA provided a revised version of its Proposed Undertaking (**draft revision**), to the ACCC on 28 July 2011, which is published on the ACCC's website.

The draft amendment notice largely reflects the amendments proposed by ABA in its draft revision. The ACCC welcomes submissions on any of the preliminary views set out in this Draft Decision, any other aspect of ABA's Proposed Undertaking, the draft revision and draft amendment notice.

The ACCC seeks comments from stakeholders on its Draft Decision by 5:00pm (Australian Eastern Standard Time) on **Wednesday, 31 August 2011**, after which the ACCC will finalise its amendment notice and form a final decision.

1.1 The Proposed Undertaking

ABA's Proposed Undertaking is based on the general approach of the 2009 Undertakings with some differences:

- a one-year term, as opposed to the two-year term of the 2009 Undertakings and the three-year term proposed by the other port operators for their 2011 Undertakings

- the Indicative Access Agreement (**IAA**) (Schedule 1 to the Proposed Undertaking), which sets out the standard terms of access to Port Terminal Services, is ABA's Storage and Handling Agreement (**SHA**). The result is that certain provisions of the IAA relate to matters outside the scope of the Proposed Undertaking. The other port operators have separate IAAs, which are part of the respective 2009 Undertakings, and SHAs, which are not part of the 2009 Undertakings

- a less detailed Loading Protocol, being the document that governs the operation of the port, than those in the 2009 Undertakings and

- fewer performance indicators than provided under the 2009 Undertakings.

The ACCC released an Issues Paper on ABA's Proposed Undertaking on 20 January 2011. The ACCC invited public submissions by 4 March 2011 and received three submissions. The ACCC notes the following comments from stakeholders:

- the proposed term of one year is too short

- there needs to be increased transparency regarding the Loading Protocol and the published shipping stem

- performance reporting should be more detailed.

1.2 Draft revision

The ACCC has conveyed the preliminary views set out in this Draft Decision to ABA and ABA has responded by providing a draft revision of the Proposed Undertaking to address the ACCC's concerns. Where the ACCC considers that the draft revision has addressed its concerns, this has been noted in the Draft Decision. The draft revision is published on the ACCC's website.

1.3 ACCC Draft Decision

The ACCC has formed a preliminary view regarding the overall approach and specific provisions of the Proposed Undertaking. This preliminary view has been formed having regard to the matters specified under s. 44ZZA(3) of the Act (which are detailed in the Legislative Framework set out in Appendix 2 to this Draft Decision), taking into account the wider context within which ABA has submitted the Proposed Undertaking.

The matters specified under s. 44ZZA(3) of the Act, to which the ACCC must have regard when deciding the appropriateness of an undertaking, include the objects of Part IIIA of the Act which are, in summary, to promote the economically efficient operation of, use of and investment in the infrastructure and encourage a consistent approach to access regulation in each industry.

The ACCC has identified a number of issues which are dealt with in the Draft Decision. The majority of changes have been proposed in order to make ABA's Proposed Undertaking consistent with industry-wide minimum standards for effective bulk wheat port terminal services access undertakings. There are also aspects, particularly in the detail of the Loading Protocol, where changes are proposed in order to document, in sufficient detail, arrangements already functioning in practice at MPT.

However, there are several instances in which the ACCC has taken the view that it is appropriate that arrangements for ABA are different to those that may be required for other port terminal operators, due to the particular circumstances of ABA. In this regard the ACCC considered that ABA has a lesser degree of market power than other port terminal operators, has less incentive to use the market power it does have, and further to this point:

- ABA provides a small proportion of total up-country storage in Victoria and New South Wales relative to that provided by up-country competitors GrainCorp and Grainflow
- there is competition in the provision of Port Terminal Services in Victoria, particularly between ABA's MPT and GrainCorp's Geelong port terminal
- ABA has a different corporate structure to that of the other port terminal operators in that there is a greater degree of separation between ABA and the grain marketer Emerald Group Australia Pty Ltd (**Emerald**).

The ACCC considers that for smaller players facing competition from larger competitors nearby it is generally not necessary to require significant changes to access arrangements that are already working well. In such circumstances the ACCC's key concern is to ensure that arrangements meet certain minimum standards around transparency and other basic requirements for an effective undertaking.

The ACCC's preliminary views on key issues are set out in this Summary.

1.3.1 Term and expiry

The ACCC's preliminary view is that it is not appropriate for the Proposed Undertaking to have a term of only one year because this will not provide sufficient certainty to access seekers. ABA's draft revision prescribes an end date for the undertaking of 30 September 2013, which the ACCC considers appropriate, as it ensures the undertaking will not expire mid-season. Further, the longer term will provide greater certainty for access seekers.

The ACCC considers that the provisions proposed by ABA for automatic expiry of the Proposed Undertaking are also not likely to be appropriate given s. 44ZZA(7)(b) of the Act which provides that an accepted undertaking may only be withdrawn with the consent of the ACCC. ABA has removed these provisions in its draft revision.

1.3.2 Access to information and ring-fencing

The ACCC noted calls for ring-fencing arrangements from a number of interested parties in its assessment of the 2009 Undertakings and emphasised that, should the 2009 Undertakings not prove effective, the ACCC may impose ring-fencing in future regulatory arrangements. The ACCC considers that the following factors, specific to the circumstances of ABA, indicate that ring-fencing should not be required for the purposes of the Proposed Undertaking:

- ABA has a different corporate structure to that of the other port terminal operators in that there is a greater degree of separation between ABA and the grain marketer Emerald.
- In its response to the ACCC's request for information, ABA submitted that its internal policy is that it does not share non-public domain information with third parties, including Emerald.[1]
- ABA provides a small proportion of total up-country storage in Victoria and New South Wales relative to that provided by up-country competitors GrainCorp and GrainFlow, and therefore has a relatively small information advantage regarding available stock quantities and qualities of grain.
- The ACCC has not received any submissions calling for ring-fencing or expressing concern regarding ABA's relationship with Emerald.
- ABA has included non-discrimination and no hindering access clauses in its Proposed Undertaking.

Based on the factors outlined above, the ACCC has formed the preliminary view that it is not necessary to require ABA to include ring-fencing requirements in the Proposed Undertaking.

[1] ABA, Response to ACCC Request for Information, 29 April 2011, p. 4. Available at the ACCC website: http://www.accc.gov.au/content/index.phtml?itemId=964331.

1.3.3 Non discriminatory access and the publish-negotiate-arbitrate framework

The ACCC considers that the publish-negotiate-arbitrate framework of the Proposed Undertaking is likely to be appropriate in providing the transparency necessary for access seekers to obtain fair access to ABA's port terminal services.

The ACCC takes the preliminary view that prescriptive provisions relating to pricing or ring-fencing are not required, provided that certain amendments are made. In particular, ABA should provide the ACCC with a copy of the Access Agreement for access to port terminal services that it enters into with its own trading business or that of any Related Body Corporate, where the terms of that agreement differ from the standard terms. Related Body Corporate has the meaning given in the *Corporations Act 2001*. Having regard to the object of Part IIIA in s. 44AA(b) of the Act, the ACCC considers that this requirement should be applied consistently across industry. ABA has addressed this in its draft revision.

1.3.4 The Indicative Access Agreement

As noted in section 1.1, the Indicative Access Agreement (**IAA**) (Schedule 1 to the Proposed Undertaking), sets out the standard terms of access to Port Terminal Services. ABA has used its Storage and Handling Agreement (**SHA**), which relates to both port terminal and up-country services, as its IAA.

The result of having a 'coupled' agreement is that certain provisions of the IAA relate to matters outside the scope of the Proposed Undertaking. The other port operators have separate IAAs, which are part of the respective 2009 Undertakings, and SHAs, which are not part of the 2009 Undertakings. The purpose of having two separate agreements is to distinguish between Port Terminal Services, which are covered by the Undertakings, and upcountry services, which are not. The ACCC takes the preliminary view that the IAA requires clarification with regard to its operation as a dual document.

The ACCC also takes the preliminary view that certain provisions of the IAA require amendments for clarification, having regard to the interests of access seekers and ABA. Specifically, the ACCC's concerns relate to the dispute resolution provisions and ABA's ability to vary executed agreements.

In its draft revision, ABA has proposed various amendments to the IAA and related provisions of the Proposed Undertaking:

- ABA has proposed to remove clause 18.2 of the IAA so that it may only vary the terms of an executed access agreement by agreement with the Client.
- ABA has revised the dispute resolution provisions in the IAA to allow 30 days for parties to resolve their dispute before it would be referred to arbitration, reduced from 60 days.
- To provide additional clarity regarding the coupling of the IAA and SHA, ABA has inserted clause 6.3 in the draft revision, which clarifies that the undertaking applies to the IAA only so far as the latter relates to Port Terminal Services.

The ACCC considers that these changes address its concerns with those particular provisions of the IAA.

The ACCC does not take a view on the appropriateness of the remaining provisions of the IAA, but considers that the IAA's terms are negotiable between ABA and an access seeker. Where an access seeker believes that negotiation of an agreement does not occur in accordance with clause 7 of the Proposed Undertaking, the access seeker may use the dispute resolution provisions in clause 8 of the Proposed Undertaking. The proposed dispute resolution regime provides for arbitration of disputes by the ACCC or a private arbitrator.

1.3.5 Performance Indicators

The ACCC considers that the publication of performance indicators provides useful information to potential access seekers comparing the overall operations at each port in their decisions and negotiations over access.

The ACCC's preliminary view is that it is not appropriate for ABA to publish only the proposed two performance indicators. This falls short of the level of information published by the other port terminal operators. Having regard to the object of Part IIIA in s. 44AA(b) of the Act, the ACCC considers that a level of consistency with the reporting requirements of other port operators is appropriate and therefore ABA should include additional performance indicators to provide a sufficient level of transparency around its operations. The ACCC does not seek to be prescriptive in determining what specific service performance indicators should be included.

ABA, in its draft revision, has proposed to address the ACCC's concern by including additional performance and capacity indicators, which ABA considers would be relevant and useful to access seekers. The ACCC considers the additional indicators proposed by ABA in its draft revision are appropriate.

1.3.6 Capacity management and the Loading Protocol

The ACCC is of the preliminary view that, having regard to s. 44ZZA(3) of the Act, a first come, first served (**FCFS**) approach to capacity allocation at MPT is likely to be appropriate. This view may differ for other port operators and is contingent on ABA's specific circumstances, including:

- strong domestic demand on the east coast which alleviates demand for export capacity at the port terminals
- competition in the provision of Port Terminal Services in Victoria, particularly between ABA's MPT and GrainCorp's Geelong port terminal
- operational separation between ABA and Emerald, as discussed in section 4.3.2 on information sharing and ring-fencing arrangements, which means that the non-refundable \$5 booking fee is more likely to provide Emerald with an appropriate disincentive to overbook the stem.

As a general approach, the FCFS system can provide a framework for capacity allocation that does not facilitate discrimination by ABA in favour of its up-country supply chain or the trading interests of related entities. Section 5.3.1 details the

circumstances and factors that the ACCC has considered in order to determine whether ABA's capacity allocation system is appropriate.

ABA's implementation of the approach is contained in its Loading Protocol. As set out in the Decision to Accept GrainCorp's 2011 Undertaking, the ACCC considers two key market characteristics relevant to the view formed on the appropriateness of particular capacity management arrangements in specific market circumstances:

- the relationship between total port elevation capacity and average annual and seasonal demand for it
- the extent to which the incentive exists for vertically integrated port operators to pursue self preferential treatment—including blocking other exporters from accessing port services.[2]

The ACCC has identified several aspects of the Loading Protocol, as set out below, where amendments should be made. These proposed amendments are set out in the draft amendment notice at Appendix B.

The ACCC notes that the Loading Protocol proposed by ABA for inclusion in the Proposed Undertaking is less detailed overall than the protocols contained in the 2009 Undertakings. Despite the views given by stakeholders regarding the lack of clarity in the Loading Protocol, the ACCC has not been made aware of any problems at MPT that have arisen as a result. However, the ACCC considers that the lack of detail in the Loading Protocol does create uncertainty around how capacity allocation functions in practice. The ACCC, in considering the interests of access seekers in accordance with s. 44ZZA(3)(c) of the Act, takes the view that the Loading Protocol should be reworded to better express its intended application.

ABA, in its draft revision, has redrafted its Loading Protocol in order to more accurately reflect the arrangements in place at MPT. The ACCC considers that the revised Loading Protocol provides greater clarity and certainty to access seekers regarding the terms of access and is likely to be appropriate. However, the ACCC is seeking views from stakeholders regarding the appropriateness of the Loading Protocol proposed by ABA in its draft revision.

1.3.6.1 Sufficient information regarding available capacity.

The ACCC considers that, having regard to s. 44ZZA(3)(c), ABA's Proposed Undertaking should include a requirement to publish information on remaining available capacity for each month or elevation period to ensure clarity in the quantification of the capacity available to be booked by access seekers. The ACCC considers that this requirement is addressed by clause 11.1 of the Proposed Undertaking, which requires ABA to publish cargo nominations and nominated monthly export Baseline Capacity.

Further, clause 11.1 of the Proposed Undertaking requires ABA to publish information regarding stocks at port. The ACCC considers this to be appropriate.

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[2] ACCC, *GrainCorp Operations Limited Port Terminal Services Access Undertaking, Decision to Accept*, 22 June 2011, p. 23.

The ACCC also considers that clause 10.1(b) of the Proposed Undertaking is not appropriate, as it requires ABA to update the shipping stem information on its website within 24 hours of any change. Clause 24(4)(c) of the WEMA requires that the shipping stem is to be updated each business day. ABA has addressed the ACCC's concern by amending its reporting requirements under the draft revision to conform to the provisions of the WEMA that the shipping stem is to be updated each business day.

1.3.6.2 Clear and transparent booking arrangements

The ACCC considers that there is ambiguity around the application of a number of clauses in ABA's proposed Loading Protocol. Specifically:

- It is not clear from the wording in ABA's Loading Protocol whether ABA will make exceptions to the FCFS capacity allocation system.
- The time period for which a booking is made is not certain.
- It is unclear when a client is required to specify a vessel for a booking.
- The Loading Protocol does not specify how and when ABA will notify a client whether it will accept the client's booking request.

The ACCC's preliminary view is that this uncertainty is not appropriate and that, having regard to s. 44ZZA(3)(c), the Loading Protocol is more likely to be appropriate if it is clear as to the actions ABA and wheat exporters must follow regarding the initial allocation of capacity.

The ACCC is also of the preliminary view that 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.

ABA has redrafted its Loading Protocol in the draft revision to provide greater certainty and transparency around the rights and obligations of ABA and access seekers. Subject to views of interested parties, the ACCC considers that the revised Loading Protocol is likely to be appropriate.

1.3.6.3 Flexible arrangements

The Loading Protocol requires clients to give three months notice in order for ABA to defer or split a booking. The ACCC considers that this requirement is not likely to be appropriate as three months is an excessively long period and is unlikely to afford sufficient flexibility to shippers.

The ACCC is of the preliminary view that the flexibility permitted for shippers within ABA's capacity management arrangements is unnecessarily limited and unclear. It is the ACCC's preliminary view that the Proposed Undertaking is not likely to be appropriate unless further detail about the functionality of flexible arrangements is included in the Loading Protocol, to ensure sufficient transparency for access seekers regarding the options available to them.

However, the ACCC notes that it is in ABA's legitimate business interests and the interests of terminal efficiency for exporters to provide notice well in advance if flexible arrangements are required. ABA has responded to the ACCC's concerns by providing in its draft revision that it may consider requests of less than three months notice subject to certain conditions. The ACCC considers this is likely to be appropriate.

In its draft revision, ABA has amended clause 18 of the Loading Protocol (clause 19 in the draft revision) to remove the partial booking fee refund for unused capacity. Instead, ABA proposes to allocate the unused capacity to the nearest month. The ACCC takes the view that the amendment is not inappropriate and, insofar as it reflects what actually occurs in practice at the port terminal, may be more appropriate than the originally submitted provision.

1.3.6.4 Capacity management during peak periods

The ACCC considers that allowing transfer of slots may result in more efficient use of capacity at peak times by reducing the likelihood of unused capacity and facilitating the use of capacity by those who value it most highly. However, the ACCC considers that the circumstances of ABA, listed at the beginning of section 1.3.6, which indicate that the FCFS approach is appropriate also mitigate the need to introduce transferability of slots in the case of MPT. MPT does not appear to have been operating at full capacity even during peak periods, indicating that capacity is not significantly constrained.

The east coast of Australia has a strong domestic market for wheat, in contrast to other markets where exports are dominant. This reduces demand for export capacity at the port terminals. ABA operates a single port terminal with annual capacity significantly less than other port operators, and therefore the potential gains arising from transferability of capacity at MPT would be less significant than for larger port terminal operators.

It is therefore the ACCC's preliminary view that it is not necessary to require ABA's FCFS system of capacity allocation to be supplemented by capacity tradeability.

1.3.6.5 Dispute resolution in the Loading Protocol

Having regard to s. 44ZZA(3)(c) of the Act, which provides that the ACCC must consider the interests of access seekers, the ACCC considers that the dispute resolution process in the Loading Protocol is not sufficiently transparent, as it does not specify a timeframe for the final decision by ABA's Chief Executive Officer. ABA has addressed this in its draft revision and attached revised Loading Protocol, which provides that the Chief Executive Officer will make a final decision within 10 Business Days.

1.3.7 Variation of the Loading Protocol

The 2009 Undertakings accepted by the ACCC each contain a version of the protocols, with a process for their variation, although the variation process differs to a degree. Further, each port operator varied its protocols from those accepted by the ACCC in 2009 and different issues arose in each variation process.

In assessing the Loading Protocol submitted by ABA and the Loading Protocol variation process set out in the Proposed Undertaking, the ACCC has taken into consideration the experience of port operators' previous variation processes. The ACCC considers, with regard to s. 44ZZA(3)(aa), that a consistent approach across the industry is appropriate on this issue.

Chapter 5 of this Draft Decision sets out the minimum standards the ACCC considers necessary for an efficient, meaningful and transparent variation process. Application of these standards to ABA's Proposed Undertaking would require the following changes:

- a provision that the Loading Protocol must be, and continue to be, a comprehensive statement of ABA's policies and procedures for managing demand for the port terminal services
- inclusion of further provisions regarding ABA's consultation process when varying its Loading Protocol
- inclusion of a provision for the ACCC to object to a variation in circumstances where:
  - the proposed variation is material and/or
  - the proposed variation gives rise to concerns under the non-discriminatory access (clause 6.4) and/or the no hindering access (clause 10.4) provisions of the Proposed Undertaking.

As set out in section 5.3.9.4, the ACCC also considers that ABA should include a provision that the ACCC may approve the Regulated Access, Pricing and Monitoring Committee (a sub-committee of Commissioners) or a member of the ACCC to exercise the ACCC's decision making functions under the Proposed Undertaking. ABA has proposed drafting which substantively addresses the ACCC's concerns in its draft revision.

1.3.8 ACCC information gathering provision

The ACCC takes the preliminary view that an information gathering provision is necessary to enable it to properly discharge the functions required by the Proposed Undertaking. With regard to s. 44ZZA(3)(aa), this is an issue for which the ACCC considers that a consistent approach across the industry is required. ABA has proposed drafting in its draft revision to address this issue.

1.3.9 Conclusion

The ACCC's Draft Decision is that it should not accept the Proposed Undertaking given to the ACCC by ABA on 23 December 2010 in its current form. The ACCC has provided its preliminary views throughout the Draft Decision on provisions that would not be appropriate, and alternatives that would be appropriate. The ACCC considers that the Proposed Undertaking is likely to be appropriate if amended to reflect the proposed amendments set out in the draft amendment notice.

1.4 Draft amendment notice

As noted above, the ACCC has conveyed the preliminary views set out in this Draft Decision to ABA, and ABA has responded by providing a draft revision of the Proposed Undertaking. The ACCC considers that the draft revision substantially addresses its concerns, and amendments in line with the changes proposed by ABA would be appropriate.[3] The ACCC is therefore also publishing a draft amendment notice in relation to the Proposed Undertaking, the reasons for which are included in this Draft Decision. The draft amendment notice provides cross-references to this Draft Decision where appropriate.

The ACCC is releasing the draft amendment notice annexed to this Draft Decision for consultation. Following the ACCC's consideration of the submissions received to this Draft Decision and draft amendment notice, the ACCC proposes to give ABA a final amendment notice under s. 44ZZAAA(1) of the Act, setting out amendments that should be made to the Proposed Undertaking.

The ACCC invites comment on any aspect of the draft amendment notice, particularly the amendments proposed in accordance with the revised Loading Protocol provided by ABA at schedule 5 to the draft revision.

1.5 Stakeholder views

The ACCC welcomes comments on the preliminary views in this Draft Decision regarding the Proposed Undertaking lodged by ABA on 23 December 2010, and the response of ABA as reflected in the draft revision of 28 July 2011. The ACCC also welcomes comments on any other aspect of the Proposed Undertaking.

Submissions must be forwarded by 5:00pm on **Wednesday, 31 August 2011** to:

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

Email: **transport@accc.gov.au**

[3] The ACCC has proposed some additional minor changes, for example, proposed amendment 1.1 in the draft amendment notice.

2 Procedural Overview

2.1 ABA's Proposed Undertaking

Under Division 6 of Part IIIA of the *Competition and Consumer Act 2010* (previously the *Trade Practices Act 1974*) (**the Act**), the Australian Competition and Consumer Commission (**ACCC**) may accept an undertaking from a person who is, or expects to be, the provider of a service, in connection with the provision of access to that service.

The ACCC received an access undertaking (**Proposed Undertaking**) from Australian Bulk Alliance Proprietary Limited (**ABA**) on 23 December 2010 for consideration under Division 6 of Part IIIA of the Act. The Proposed Undertaking relates to the provision of access to services for the export of bulk wheat at the Melbourne Port Terminal operated by ABA in Victoria.

ABA has submitted the Proposed Undertaking in accordance with legislative requirements under the *Wheat Export Marketing Act 2008* (**WEMA**), further details of which are set out below in the Legislative Framework: Appendix 2.

2.2 Submissions from ABA

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

- initial supporting submission provided on 29 November 2010
- submission in response to third party submissions on 17 March 2011
- a response to the ACCC's request for information, which was sent to ABA on 13 April 2011. A public version of ABA's response is published on the ACCC website.

2.3 Draft revision of Proposed Undertaking and draft amendment notice

The ACCC has conveyed the preliminary views set out in this Draft Decision to ABA and ABA has responded by providing a draft revision of the Proposed Undertaking. The draft revision addresses a number of the aspects of the Proposed Undertaking which the ACCC considers are not appropriate in their current form.

The mark up of the draft revision, showing ABA's proposed revisions to the Proposed Undertaking, is published on the ACCC's website.

The ACCC is also publishing a draft amendment notice in relation to the Proposed Undertaking (annexed to this Draft Decision), which incorporates the changes made by ABA in its draft revision which the ACCC considers are appropriate. The ACCC is releasing the draft amendment notice for consultation with the Draft Decision.

2.4 Public consultation process to date

The Act provides that the ACCC may invite public submissions on an access undertaking application.[4]

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

2.4.1 Submissions received

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

- Victorian Farmers Federation (**VFF**)
- Asciano
- CBH Grain.

These submissions are published on the ACCC's website. The ACCC has not received any confidential submissions regarding ABA's Proposed Undertaking.

2.5 Indicative timeline

Under the Act, the ACCC must make a decision on an access undertaking application within 180 days of the day it received the application. Stop clock provisions apply for the calculation of the 180 days including when:

- a notice is given under s. 44ZZBCA(1) requesting information in relation to the application
- a notice is published under s. 44ZZBD(1) inviting public submissions in relation to the application
- an agreement in writing between the ACCC and the provider of the service is made in relation to the application.

The clock has previously stopped three times and the statutory time limit for the ACCC decision extended by:

- 44 days for consultation on the ACCC Issues Paper
- 17 days for the ACCC's request for information under subsection 44ZZBCA
- 18 days by agreement with ABA under subsection 44ZZBC(4).

Consultation on this Draft Decision stops the clock again for 21 days.

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

The statutory time limit for the ACCC decision now expires on 28 September 2011.

After considering submissions received on this Draft Decision and draft amendment notice, the ACCC proposes to issue a final amendment notice pursuant to s.44ZZAAA of the Act to ABA. (Information regarding the use of amendment notices is provided in Appendix 2.) Unless substantial changes are required following consultation on the draft amendment notice, the ACCC does not propose to consult on the final amendment notice prior to issuing.

The ACCC expects that, following the response to the amendment notice by ABA, it will release a final decision in late September 2011.

2.6 Consultation on the Draft Decision and draft amendment notice

The ACCC invites submissions from interested parties on its Draft Decision and draft amendment notice regarding ABA's Proposed Undertaking. Submissions must be forwarded by 5:00pm on **Wednesday, 31 August 2011** to:

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

Email: **transport@accc.gov.au**

Submissions are to be sent preferably by email, in Microsoft Word or other text readable document form.

2.6.1 Confidentiality of submissions

The ACCC acknowledges the need for a balance between permitting the provision to a regulator of relevant information on a confidential basis, where that information is commercially sensitive or otherwise confidential, and the need to allow parties whose legitimate interests are likely to be affected by an administrative decision the opportunity to respond to relevant material. In this regard, the ACCC notes that a party may request that the ACCC not make the whole or part of a submission available for confidentiality reasons.[5]

In the current context, the ACCC considers that this balance is adequately found by giving weight to comments made in public submissions, and considering comments made in confidential submissions only where such comments are relevant, determinative of a particular issue and contribute considerations not already dealt with in a public submission.

The ACCC strongly encourages parties who intend to provide submissions on the ACCC's Draft Decision and draft amendment notice to make public submissions. Unless a submission is marked confidential, it will be made available to

5 *Competition and Consumer Act 2010* (Cth) s. 44ZZBD.

any person or organisation on request. The sections of submissions that are confidential should be clearly identified with reasons as to why they are confidential.

2.7 Further information

The Proposed Undertaking and other relevant materials, including supporting submissions from ABA and submissions by interested parties, are available on the ACCC's website at www.accc.gov.au by following the links to 'For regulated industries' and 'Wheat Export,' or via the following link: Wheat Exports: Port Terminal Services Access Undertakings.

If you have any queries in relation to the ACCC's process, or to any matters raised in this Draft Decision, please contact:

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3 Term, expiry and transitional arrangements

3.1 ABA's Proposed Undertaking

The Proposed Undertaking commences on the date of acceptance by the ACCC. Clause 4.2(a) provides that ABA's Proposed Undertaking will apply for a maximum of one year.

Clause 4.2 provides that the Proposed Undertaking will expire prior to the end of one year under the following circumstances:

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

(c) where there are changes to the requirements under the WEMA such that an Accredited Wheat Exporter is no longer required to have an undertaking; or

(d) the day the ACCC consents to ABA withdrawing the Undertaking in accordance with Part IIIA of the TPA (now the CCA).

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

(a) when ABA or a Related Body Corporate ceases to be an Accredited Wheat Exporter under the WEMA, or

(b) where there are changes to the requirements under the WEMA such that an Accredited Wheat Exporter is no longer required to have an access undertaking for the purposes of maintaining accreditation.

ABA may also apply to the ACCC to vary the Proposed Undertaking in accordance with clause 4.4.

3.2 ABA and third-party submissions

3.2.1 Victorian Farmers Federation (VFF) submission

VFF considers that publication of the shipping stem, stocks of grain at port and port access protocols are crucial to enabling competition. It submits that the one year term proposed by ABA is not appropriate and that ABA's Proposed Undertaking should extend to 30 September 2014. VFF also notes that this would accord with one of the objectives of ABA's Proposed Undertaking, being a 'consistent approach to access… at the different port terminals to the extent practical'.[6]

[6] Victorian Farmers Federation, Submission to the ACCC Issues Paper on ABA's Proposed Undertaking, 4 March 2011, p. 6.

3.2.2 Asciano submission

Asciano considers that the one year term proposed by ABA may be too short, and that a longer term of at least two years would provide additional certainty for both ABA and access holders.[7]

3.2.3 CBH Grain submission

CBH Grain considers that it is not appropriate for the Proposed Undertaking to be withdrawn during the course of the year. It considers that the Proposed Undertaking should be in place for at least a full season. CBH Grain states that if ABA wishes to provide the ACCC with a one year undertaking it is within its rights to do so.[8]

3.2.4 ABA's response to third party submissions (17 March 2011)

ABA submits that the one year term it has proposed is appropriate given the uncertainty as to whether an undertaking will be necessary in the longer term, and considers that it should have this discretion.[9]

3.3 ACCC view

3.3.1 Term

The ACCC considers that ABA's interests in specifying that its Proposed Undertaking will have a term of one year from the date of acceptance by the ACCC must be balanced against the interests of access seekers in having certainty in the provisions of access. In this regard, the ACCC notes that all submissions received expressed dissatisfaction with the term proposed by ABA. To assess whether the term proposed by ABA is appropriate the ACCC has considered two aspects: the length of the term, and the potential for mid-season expiry.

3.3.1.1 Length of the term

The ACCC considers that the term of an access undertaking should allow sufficient time for access seekers to negotiate the terms of an agreement and for that agreement to apply for a reasonable period, such as at least one full season, prior to the expiry of the undertaking. However, it is likely that ABA's Proposed Undertaking will expire prior to the end of the season for which any negotiated agreements would apply. A portion of the term will be spent negotiating an agreement, leaving less than a year for the agreement to apply. A one year term is therefore unlikely to allow for effective negotiation of access agreements between ABA and access seekers, and the ACCC's preliminary view is that it is not appropriate for ABA to have a term of one year.

The ACCC notes that the undertakings submitted by GrainCorp, Viterra and CBH and accepted by the ACCC in 2009 (**2009 Undertakings**) had a term of two years, which, while a relatively short period, was considered appropriate by the ACCC given that the industry was transitioning to new wheat marketing arrangements. GrainCorp's

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7 Asciano Limited (Asciano), 'Submission to the ACCC Issues Paper on ABA's Proposed Undertaking', 4 March 2011, pp. 1-2.

8 CBH Grain Pty Ltd (CBH Grain), 'Submission to the ACCC Issues Paper on ABA's Proposed Undertaking', 4 March 2011, p. 1.

9 Australian Bulk Alliance (ABA), 'Response to Submissions to the ACCC Issues Paper on ABA's Proposed Undertaking', 17 March 2011, p. 1.

2011 Undertaking, accepted by the ACCC on 22 June 2011, has a term of three years, and CBH and Viterra's proposed 2011 undertakings each propose a term of three years, consistent with the Productivity Commission (**PC**)'s recommendation that bulk wheat exporters continue to be required to pass the access test until October 2014.[10]

Should ABA be required to have an undertaking in place following the expiry of the Proposed Undertaking, the submission and assessment of a new access undertaking will involve significant costs for all relevant parties. These costs could be minimised if the Proposed Undertaking applied for the duration of the period for which ABA is likely to be required to have an undertaking in place under the existing regulatory arrangements. If, following acceptance of the Proposed Undertaking, circumstances change and ABA considers it should no longer be required to have an undertaking in place, ABA may apply to the ACCC to withdraw the Proposed Undertaking in accordance with clause 4.3. The withdrawal process is discussed in section 3.3.2.

The ACCC notes section 44AA(b) of the Act, which refers to the object of encouraging 'a consistent approach to access regulation in each industry'. In this regard, the ACCC considers that a three year term consistent with that of the other three port terminal operators' proposed 2011 access undertakings would be appropriate as it would facilitate consistency of regulation across the industry. A three year term would also address the ACCC's concerns in providing sufficient time for effective negotiation of access agreements between ABA and access seekers.

However, given that this is the first undertaking submitted by ABA, the ACCC considers that a two year term balances the interests of ABA in having a shorter initial term and the interests of access seekers in having sufficient certainty having regarding to subsections 44ZZA(3)(a) and (c) of the Act.

ABA has proposed an undertaking end date of 30 September 2013 in its draft revision. The ACCC considers that this adequately addresses the concerns with the initial one year term, as outlined above.

3.3.1.2 Potential for mid-season expiry

ABA has not provided a date for the expiry of the Proposed Undertaking. Depending on the date of acceptance by the ACCC, it is possible that the Proposed Undertaking could expire during the season. The ACCC understands that access agreements generally apply for an entire season which enables industry participants to contract sales and plan storage and shipping requirements for that season. A change of regulatory arrangements mid-season would create uncertainty for industry participants and negatively impact on the ability of exporters to plan their export requirements in advance. In this regard, the ACCC notes the submission by CBH Grain which states that:

> Entry into agreements may be made on the understanding that the [Proposed] Undertaking is in existence and without the [Proposed] Undertaking different terms may have been requested. CBH Grain considers that the [Proposed] Undertaking should be for a minimum term that would comprise a full season.[11]

[10] Productivity Commission, *Wheat Export Marketing Arrangements*, Report no. 51, 2010, p. 191.
[11] CBH Grain, 4 March 2011, p. 1.

The ACCC's preliminary view is that it is not appropriate that ABA has not specified an expiry date, as this may lead to the undertaking expiring mid-season. The ACCC considers that a change to regulatory arrangements during the season is not appropriate.

ABA's draft revision proposes an expiry date of 30 September 2013. The ACCC considers this to be appropriate, as it avoids mid-season expiry of the undertaking.

3.3.2 Provisions for early expiry

ABA has included in the Proposed Undertaking events that would trigger its early expiry. These triggers include amendments to the WEMA that obviate the need to have an access undertaking to maintain export accreditation, or if ABA or a related body corporate ceases to be an accredited wheat exporter under the WEMA.

Section 44ZZA(7)(b) of the Act provides 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. The ACCC considers that it would not be consistent with the requirement for ACCC approval in s. 44ZZA(7)(b) for an access provider to have the ability to withdraw an accepted undertaking at its own discretion without the consent of the ACCC.

Under clause 4.3 of ABA's Proposed Undertaking, the circumstances listed in clause 4.2(b) and (c) for automatic expiry also provide an opportunity for ABA to request the ACCC's approval to withdraw the Proposed Undertaking after it has been accepted. The overlap in these provisions results in uncertainty of the application for each provision. Under the 2009 Undertakings the circumstances listed in clause 4.2(b) and (c) of ABA's Proposed Undertaking would prompt a request for approval by the ACCC of the early withdrawal of the undertaking, and not result in the automatic expiry of the undertaking.

The ACCC considers that the ambiguity around the application of clauses 4.2 and 4.3 of the Proposed Undertaking is not likely to be appropriate and should be removed. The ACCC also considers that clauses 4.2(b) and (c), resulting in automatic expiry of the Proposed Undertaking, are not likely to be appropriate. The ACCC's preliminary view is that it would be appropriate for ABA to remove subclauses 4.2(b) and (c) and for these circumstances to prompt a request for approval by the ACCC to withdraw the Proposed Undertaking in accordance with clause 4.3.

ABA has removed these provisions in its draft revision. The ACCC considers this to be appropriate.

3.3.3 Continuity arrangements

The PC report on wheat export marketing arrangements has recommended that current port terminal services access arrangements should continue until 2014 but that the accreditation provisions of the WEMA should be abolished from 1 October 2011.[12] Therefore, in response to the PC report the government may make legislative changes adopting the PC recommendations. This would have implications for the current drafting of ABA's Proposed Undertaking.

[12] Productivity Commission, *Wheat Export Marketing Arrangements*, Report no. 51, 2010, p. 191.

The ACCC considers that it is inappropriate for the Proposed Undertaking to contain terms that create uncertainty regarding their application under potential future legislative arrangements. The ACCC considers that changes to the Proposed Undertaking are required to ensure, if and when it is accepted by the ACCC, that it will continue to be applicable and relevant should the government adopt the PC recommendations. Specifically, the ACCC notes the following:

- References in clause 2.1 of the Proposed Undertaking to the requirement to satisfy the access test should be broadened to allow for the possibility that the access test requirement for bulk wheat exporters may be the subject of amended or different legislation on or after 1 October 2011.

- Similarly, the Proposed Undertaking should be amended so that it relates to both access for 'accredited wheat exporters' during such time that accreditation is required under the WEMA and 'wheat exporters' from such time that accreditation may no longer be a legal requirement to export bulk wheat.

The ACCC takes the preliminary view that the Proposed Undertaking should be amended to reflect the possible future legislative amendments that may occur during the term of the Proposed Undertaking. The ACCC considers that a uniform approach across industry is appropriate on this matter, to facilitate consistent regulation having regard to s. 44AA(b) of the Act. The ACCC also considers that this approach will provide clarity for all parties going forward, which is in both ABA and access seekers' interests in accordance with subsections 44ZZA(3)(b) and (c).

ABA, in its draft revision, has amended clause 7.4, which now provides the following:

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.

The ACCC considers that ABA's revised drafting is appropriate, as it takes into account the potential for different regulatory arrangements arising during the term of the undertaking.

4 The Publish-Negotiate-Arbitrate Framework

4.1 ABA's Proposed Undertaking

ABA has proposed a publish-negotiate-arbitrate approach to its Proposed Undertaking. This approach provides that:

- ABA will publish the standard price and non-price terms on which it will provide access. Clause 6 outlines the standard price and non-price terms and requires ABA to provide non-discriminatory access. Schedule 1 of the Proposed Undertaking contains the proposed Indicative Access Agreement (**IAA**) (the Standard Terms). The Reference Prices are attached as a Schedule to the IAA, which is also published on ABA's website.

- ABA and an access seeker may negotiate price and non-price terms other than the Standard Terms and Reference Prices contained in the IAA. Clause 7 outlines the process for negotiation.

- Where there is a dispute between ABA and an access seeker relating to the negotiation of a new access agreement or access to additional Port Terminal Services in additional to Port Terminal Services already the subject of an access agreement, or a dispute is raised by an access seeker regarding a decision by ABA to unilaterally vary the Reference Prices, the dispute will be resolved through the Dispute Resolution process outlined in clause 8 of the Proposed Undertaking.

- The Dispute Resolution process includes a negotiation period between parties, provision for both formal and informal mediation, and referral to arbitration by the ACCC or an independent arbitrator.

- ABA will publish information on the stock at port, vessel booking applications, and performance indicators to assist access seekers in their negotiations and increase the transparency of ABA's operations, as outlined in clauses 11 and 12.

4.1.1 Publication of price and non-price terms and non-discriminatory access

4.1.1.1 Price and non-price terms

Clause 6.1 of the Proposed Undertaking provides that ABA will offer to supply Port Terminal Services to an Applicant at the published Reference Prices and in accordance with the Standard Terms. The clause also provides that an applicant may negotiate for prices other than the Reference Prices and non-standard terms.

Port Terminal Services are defined in clause 5.2 of the Proposed Undertaking.

The Reference Prices are to be published each year in accordance with clause 6.2 of the Proposed Undertaking, and will apply until at least 31 October of the following year unless varied in accordance with clause 6.5. Where ABA varies the Reference

Prices it must provide copies of variations to the ACCC within three Business Days of publication.

The Standard Terms are set out in the IAA in Schedule 1. Unless ABA receives approval from the ACCC to vary the Standard Terms in accordance with clause 6.5(b), the Standard Terms will apply for the term of the Proposed Undertaking. Clause 6.3(c) specifies that the Standard Terms must include the Loading Protocol as varied from time to time.

4.1.1.2 Non-discriminatory access

Clause 6.4 provides that ABA must not discriminate between different Applicants or Users in favour of its own Trading Business, except to the extent that the cost of providing access to other Applicants or Users is higher. 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.' Related Body Corporate has the meaning given in the *Corporations Act 2001*. The ACCC may require ABA to appoint an independent auditor to report on ABA's compliance with the non-discrimination requirement up to twice in every 12 month period in accordance with the provisions in Schedule 3.

The Proposed Undertaking does not contain provisions for ring fencing between ABA and Emerald Group Australia Pty Ltd.

4.1.2 The Indicative Access Agreement

The document ABA has put forward as its proposed IAA is its current Storage and Handling Agreement (**SHA**). The ACCC understands that the SHA is ABA's standard agreement for access to all of its storage and handling operations, including its up-country storage network, and also applies to commodities other than wheat.

In summary, ABA's IAA includes provisions relating to the following matters concerning the supply of port terminal services by ABA to access seekers:

- definition of terms and interpretation[13]
- term and application of the agreement, including provisions in relation to commencement, termination, and continued application of the agreement[14]
- reference to the purchase options available[15]
- receival standards and testing conducted on incoming grain[16]
- receipt and storage services provided, including the obligations of both ABA and Clients[17]

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13 ABA, 'Storage and Handling Agreement', 23 December 2010, clause 1.
14 ibid., clause 2.
15 ibid., clause 3.
16 ibid., clauses 4-5.
17 ibid., clause 6.

- terms of outturn, including entitlements, provisions for in-store transfer, and Client warranties of ownership[18]

- transport and freight outturn conditions[19]

- a requirement that the client comply with ABA's published Port Terminal Operating Protocols (**Loading Protocol**)[20]

- grain storage[21]

- charges and invoices, including provisions in relation to invoices, payment facilities, liability for Port Authority and AQIS charges, goods and services tax, reimbursements, and interest on overdue accounts[22]

- books and records to be kept by ABA relating to transactions in stored grain[23]

- lien on Client Grain held by ABA[24]

- security requirements[25]

- risk and insurance provisions[26]

- exclusions of ABA liability, and indemnity for ABA against certain losses, costs, damages, expenses, charges and surcharges in relation to the provision of services to the Client[27]

- variations to and termination of the agreement[28]

- provisions for force majeure events, including definition, suspension of obligations, minimisation of impact, obligation to mitigate, payments, and exclusion of labour disputes[29]

- dispute resolution process for disputes arising under the executed agreement, including provisions in relation to independent arbitration and continuation of the pre-dispute status quo[30]

- miscellaneous other matters, including provisions in relation to notices, assignment, costs, compliance with laws, governing law, endorsement, severability, waivers, and no partnership clause[31]

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[18] ibid., clause 7.
[19] ibid., clause 8.
[20] ibid., clause 9.
[21] ibid., clause 10.
[22] ibid., clause 11.
[23] ibid., clause 12.
[24] ibid., clause 13.
[25] ibid., clause 14.
[26] ibid., clause 15.
[27] ibid., clauses 16-17.
[28] ibid., clauses 18-19
[29] ibid., clause 20.
[30] ibid., clause 21.

- Schedule A, attaching the relevant reference prices for port terminal services under the executed agreement with explanatory notes.[32]

4.1.2.1 Limitation of liability

Clause 16.1 of the proposed IAA provides that ABA will be liable to the Client for failing to outturn grain, where the grain does not meet the quality standards prescribed in clause 5 of the IAA, or as a direct result of ABA's gross negligence.

Clause 16.2 excludes liability for any other loss or damage, and specifically provides the following:

> 16.2 Except as expressly contained in this Agreement, the Company will not be liable for any other loss or damage, including but not limited to:
>
> (a) any special or unusual event or any natural process (as determined by the Company) causing loss or damage to the Grain;
>
> (b) any loss or damage arising out of or related to the incidence or effect or both of any delays in the loading of trains, trucks, containers or ships;
>
> (c) any loss or damage arising out of or related to Grain passing or failing to pass inspection by the Department of Primary Industry inspectors, or similar;
>
> (d) any loss or damage arising out of or related to any quality or quantity deficiencies claimed after Outturn from a Facility;
>
> (e) any loss or damage arising out of or related to toxic or other chemical residues, other contamination or genetic modification;
>
> (f) any loss (including claims for loss of profit, loss of opportunity or indirect or consequential loss such as loss of reputation), cost, damage or expense suffered or incurred directly or indirectly by the Client as a result of any loss or downgrade of or damage to a Grain however caused (including without limitation any loss, cost, damage or expense caused by the failure of the Company to comply with any of its obligations under this Agreement or any negligent act or omission on the part of the Company, its employees or Agents);
>
> however caused (including without limitation any loss, cost, damage or expense caused by the failure of the Company to comply with any of its obligations under this Agreement or any negligent act or omission on the part of the Company, its employees or Agents).

Clause 16.3 of the proposed IAA caps ABA's liability to $100,000 in total for all events that occur during the term of the agreement, and will be limited to $30,000 per event.

4.1.2.2 Indemnity

The proposed IAA requires the Client to indemnify ABA for the following:

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[31] ibid., clauses 22-30.

[32] ABA, 'Storage and Handling Agreement', 23 December 2010, Schedule A.

- losses, costs, damages, expenses, charges and surcharges incurred by ABA as a result of a claim made against it by any person holding a security interest over Client Grain that forms the subject of the IAA[33]

- labour costs incurred by ABA due to road or rail arrivals 30 minutes outside the ETA where ABA was not notified of the delay by 1pm the previous working day[34]

- charges levied by the Port Authority or AQIS.[35]

The proposed IAA requires the Client to indemnify ABA for the following, except to the extent that ABA's gross negligence contributed to the losses, costs, damages, expenses, charges and surcharges:

- any breach or non-performance of the Client's obligations under the agreement[36]

- a claim by a third party relating to Client Grain, the subject of the IAA[37]

- a claim by a third party relating to the Purchase Options under the IAA.[38]

4.1.2.3 Risk and insurance

The IAA places risk and the obligation for insurance onto the Client. Clause 15.1 provides that the Client bears all risk for loss and damage to its grain during the provision of services under the IAA. Clause 15.2 provides that the Client must insure its grain, naming ABA in the relevant insurance policies. If the client fails to comply with clause 15.2, it must indemnify ABA for any losses ABA incurs as a result of the failure to comply.

4.1.3 Negotiating for access

Clause 7 sets out how applicants and ABA are to negotiate access to the Port Terminal Services. The framework includes:

- Preliminary inquiry – exchanges of information and meetings to enable an Access Application to be lodged.

- Access Application – a formal request for access by the Applicant, which must include the information specified in Schedule 2 of the Proposed Undertaking.

- Standard Access Agreements – The procedure through which the Applicant seeks access in accordance with the Standard Terms and published Reference Prices.

- Negotiation and Acceptance – negotiation, acceptance and execution of an Access Agreement.

[33] ABA, 'Storage and Handling Agreement', 23 December 2010, clause 7.5.
[34] ibid, clause 8.2.
[35] ibid, clause 11.6.
[36] ibid, clause 17.1(a).
[37] ibid, clause 17.1(b).
[38] ibid, clause 17.1(c)

Clause 7.7 provides that if an Applicant lodges an Access Application and requests access to the Port Terminal Services prior to executing an Access Agreement, ABA may offer to provide the Applicant with access on the Standard Terms at the Reference Prices, prior to finalising an Access Agreement. This arrangement involves executing an 'Interim Agreement' to apply until it is replaced by a negotiated Access Agreement.

ABA's obligation to negotiate with an Applicant is subject to the Applicant satisfying Eligibility Requirements outlined in clause 7.4. The requirements include that the Applicant must:

- be Solvent
- not be in Material Default of any agreement, or have been in the previous two years (this requirement also applies to Related Bodies Corporate)
- either have a legal ownership structure with a sufficient capital base and assets of value to meet the actual or potential liabilities under an Access Agreement or provide Credit Support
- be an Accredited Wheat Exporter and fully comply with the legal requirements for wheat export set out in the WEMA and WEAS.

4.1.4 Dispute resolution

The Dispute resolution provisions are set out in clause 8 of the Proposed Undertaking. Clause 8 applies to disputes arising in relation to:

- the negotiation of new Access Agreements
- the negotiation of access to Port Terminal Services in addition to Port Terminal Services already the subject of an executed Access Agreement
- a decision by ABA to unilaterally vary the prices at which Port Terminal Services are provided, provided the Client raises a Dispute within 30 days of publication of the new prices.

Within five business days of a party giving the other a Dispute Notice, the Dispute resolution process commences with a negotiation period, where the parties will meet and attempt to resolve the Dispute. If the parties fail to resolve the Dispute within the negotiation period, they may attempt to resolve the dispute by mediation. This involves referral of the Dispute to the CEOs of both parties to attempt to resolve, including by informal mediation. Where the Dispute is not resolved within five Business Days following referral to the CEOs, it will be referred to formal mediation by a single mediator appointed in accordance with clause 8.3(d).

Either party may also refer a Dispute to arbitration by the ACCC or an independent arbitrator at any time following the issue of a Dispute Notice. The process for referring a dispute and the arbitration procedure is outlined in clauses 8.4-8.7.

4.1.5 Publication of Information and Performance Indicators

Clauses 11 and 12 of the Proposed Undertaking require ABA to publish certain information relating to the Port Terminal Services. This information is designed to assist access seekers in their negotiation of the terms of access, and increase the transparency of ABA's operation of the port.

4.1.5.1 Publication of information

Clause 11 requires ABA to publish and update monthly:

- total stocks of Bulk Wheat held at Port Terminal Facilities
- total stocks of all other grain held at Port Terminal Facilities on an aggregated basis
- cargo nominations
- nominated monthly export Baseline Capacity.

For any booking it receives, ABA is required to include on its shipping stem the name of the exporter, the volume of grain to be exported and the shipment period.

4.1.5.2 Performance indicators

Clause 12 requires ABA to publish, within three months of the end of the relevant period:

- Monthly tonnes shipped
- Number of ships loaded.

ABA will publish the performance information for a six-month period on its website, and the information will be provided to the ACCC.

4.1.6 Information gathering

Clause 6.4(b) provides that the ACCC may require ABA to appoint an Independent Auditor to assess ABA's compliance with its obligation to provide non-discriminatory access to port terminal services. The ACCC may require an audit up to twice per year. Schedule 3 of the Proposed Undertaking sets out how an auditor is to be appointed.

During the operation of a Part IIIA access undertaking, the ACCC can request information from the undertaking provider at any time, but the provision of information is voluntary.

4.2 ABA and third-party submissions

4.2.1 ABA's submission in support of the Proposed Undertaking (29 November 2010)

<u>Arbitration:</u> ABA submits that clauses 8.4 to 8.7 of its Proposed Undertaking, dealing with arbitration, are largely identical to GrainCorp's 2009 Undertaking. ABA submits that there is one difference set out in clause 8.7(xii), which provides that not only is

the determination of the arbitrator to be confidential, but also any information received by the parties during the course of the arbitration and the content of the arbitration is confidential. ABA submits that the arbitrator's powers are sufficiently clear.[39]

Publication requirements: ABA submits that it is smaller than its competitors and other port operators with Part IIIA access undertakings in place. ABA submits that consequently, it has fewer employees and therefore detailed reporting requirements will add significant compliance costs for ABA. ABA submits that its berth is a common user berth and the Port of Melbourne can and does place vessels on the berth without seeking ABA's approval, although ABA has a 24 hour priority. ABA submits that this can lead to the situation where grain vessels have to wait to berth, for reasons outside of ABA's control. ABA submits that as a result, ABA considers the publication requirements concerning key information and performance indicators in the 2009 Undertakings would be too onerous if applied to ABA. ABA submits that the publication requirements set out in clause 11 of the Proposed Undertaking are appropriate, given ABA's size and capacity.[40]

Performance indicators: ABA submits that it has reviewed the performance indicators set out in the 2009 Undertakings, however it believes that many of those performance indicators are inappropriate to ABA's facility. ABA submits that this is because they include factors outside ABA's control, and ABA considers that published performance indicators should relate to matters within its control. ABA submits that the performance indicators set out in clause 12 of the Proposed Undertaking are appropriate, given ABA's size and capacity.[41]

4.2.2 Victorian Farmers Federation (VFF) submission

Transparency of information: VFF submits that publication of the shipping stem, stocks of grain at port, and the port access protocols are essential for competition in the provision of port terminal services.[42]

4.2.3 Asciano submission

Pricing and analysis of costs: Asciano submits that there should be increased regulatory scrutiny of pricing for access to bulk wheat port terminal services. In this regard, Asciano submits that ABA should provide increased cost information which would counter the asymmetry of information between access providers and access seekers.[43]

4.2.4 CBH Grain submission

Indicative Access Agreement: CBH Grain submits that the variation provisions in the Indicative Access Agreement are not appropriate, as they allow ABA to unilaterally vary the terms of the agreement. CBH Grain also submits that the liability arrangements in the Indicative Access Agreement are not appropriate, and that ABA

[39] ABA, 'Port Terminal Services Access Undertaking, Supporting Submission to the ACCC', 29 November 2010, p. 4.
[40] ABA, 29 November 2010, pp. 3-4.
[41] ABA, 29 November 2010, pp. 3-4.
[42] Victorian Farmers Federation, 4 March 2011, p. 6.
[43] Asciano, 4 March 2011, p. 1.

should be responsible for either outturning grain delivered into its care or compensating for any losses where ABA is responsible.[44]

Performance Indicators: CBH Grain submits that additional performance indicators should be published by ABA, and that publication should be more frequent than six monthly. CBH Grain suggests that ABA should publish:

- days between ETA and Notice Of Readiness receipt
- number of vessels failing survey in the quarter and year to date
- average time between receipt of application and acceptance or rejection
- number of vessels loaded in the quarter and year to date
- number of tonnes loaded in the quarter and year to date.[45]

4.2.5 ABA's response to third party submissions (17 March 2011)

Publication of cost information: In response to Asciano's submission, ABA submits that requiring publication of cost information falls outside of Division 6 of the Act, and that for costs and profits to be regulated the service would need to be declared.[46]

The Indicative Access Agreement: In response to CBH Grain's submission, ABA submits that it does not agree with changes proposed by CBH Grain to the IAA. ABA submits that in its view the document is transparent, even-handed and adequate for the Proposed Undertaking. ABA notes that 'access seekers are free to choose whether or not to use the port based on these terms'.[47]

Publication of information and performance indicators: In response to CBH Grain's submission regarding the publication of additional performance indicators, ABA re-states its position that further obligations would be onerous and relate to matters outside its own control. ABA submits that there would be 'no utility in adding additional burdens to the already substantial reporting undertaken by ABA'.[48]

4.3 ACCC view

The publish-negotiate-arbitrate model of access provision proposed by ABA is relatively light handed compared with alternative approaches such as ex ante regulated pricing and ring-fencing arrangements.

In its final decisions on the 2009 Undertakings, the ACCC noted the transitional state of the bulk wheat export industry at that time and acknowledged that there is a risk in such circumstances that regulation that is not appropriate may distort the effective

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44 CBH Grain, 4 March 2011, p. 3.
45 CBH Grain, 4 March 2011, p. 3.
46 ABA, 17 March 2011, pp. 1-2.
47 ABA, 17 March 2010, p. 2.
48 ABA, 17 March 2011, p. 2,

development of the industry.[49] The ACCC view on the appropriateness of the publish-negotiate-arbitrate approach at that time was based on the 2009 Undertakings also containing:

- robust non-discrimination clauses and no hindering access clauses
- fair and transparent port terminal protocols and an indicative access agreement
- measures to deal with the potential for information about port terminal services to be used to the advantage of the port terminal operators' wheat exporting arm.[50]

It is the preliminary view of the ACCC that the overall approach of non-discrimination, no hindering access and dispute resolution provisions of the Proposed Undertaking is appropriate to ensure fair access to port terminal services supplied by ABA for access seekers. (This is the overall approach currently applying to the other port terminal operators.) However, there are a number of issues discussed in the sections below where the ACCC considers that amendments to particular aspects of the approach, as proposed by ABA, are required.

4.3.1 Publication of price and non-price terms

ABA is required under the Proposed Undertaking to publish the Standard Terms and Reference Prices which apply to Port Terminal Services. ABA is also required to notify the ACCC of any changes in the Reference Prices, and may request ACCC approval for changes to the Standard Terms.

ABA currently publishes its Storage and Handling Agreement on its website, with the reference prices included in the published document as Schedule A to the agreement. ABA does not publish its prices separately anywhere else on the website. As noted in section 4.1.2 above, the Storage and Handling Agreement has been submitted by ABA as the IAA, which forms part of the Proposed Undertaking. Further, the reference prices set out in Schedule A are referred to as 'Charges'.

The ACCC considers that publication of standard terms and reference prices on which access seekers can gain access to MPT is an integral part of the publish negotiate arbitrate framework. The ACCC considers that the provisions in clause 6 of the Proposed Undertaking requiring ABA to publish its Standard Terms and Reference Prices are appropriate. ABA's Proposed Undertaking is appropriate in this regard.

The ACCC also considers that it would be appropriate following commencement of the Proposed Undertaking for ABA to clearly identify the schedule of fees it intends to function as the Reference Prices in accordance with the Proposed Undertaking. The ACCC considers that this will help to facilitate effective negotiation by ABA and access seekers of individual agreements with respect to the Reference Prices.

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[49] ACCC, Decision to Accept GrainCorp Operations Limited Port Terminal Services Access Undertaking, 29 September 2009, p. 31. A similar view was included in the Decisions to Accept Viterra and CBH's 2009 Undertakings.

[50] ACCC, GrainCorp Decision to Accept, 29 September 2009, pp. 222-223.

Additionally, ABA should delete the Charges in Schedule A of the IAA. The Charges described in the IAA are representative of the Reference Prices described in the Proposed Undertaking. Once ABA's Proposed Undertaking is in operation, ABA will have the ability to vary the Reference Prices under 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 therefore it is not appropriate for these details to be included in the Proposed Undertaking. The Reference Prices should instead be published on ABA's website.

ABA has addressed this concern in its draft revision.

4.3.2 Access to information (ring-fencing)

The ACCC noted calls for ring-fencing arrangements from a number of interested parties in its assessment of the 2009 Undertakings and emphasised that, should the 2009 Undertakings not prove effective, the ACCC may impose ring-fencing in future regulatory arrangements. The ACCC considers that several factors are relevant to its consideration of whether ring-fencing arrangements should be required for ABA.

ABA is not itself an exporter of bulk wheat, but is related through common ownership to Emerald and its respective joint venture partners. ABA is wholly owned by Sumitomo Australia Pty Ltd through a subsidiary, Summit Grain Investments Australia Pty Ltd, and Sumitomo Australia Pty Ltd also owns a 50 per cent share in Emerald.[51] While the corporate structures of other bulk handing companies include separate divisions for trading and port terminal operations, the degree of separation in the case of Emerald and ABA is greater as Emerald is not fully owned by Sumitomo.

As a separate company, it is less likely that Emerald or any of Emerald's respective joint venture partners would have access to information obtained by ABA through its operations at the port terminal. Information submitted by ABA regarding its internal policies indicates that it does not share information, other than public domain information, with other parties, including Emerald. In practice, operational separation between ABA and Emerald mitigates the need for imposing ring-fencing requirements.

The ACCC also notes that ABA provides a small proportion of total up-country storage capacity in Victoria and New South Wales. The majority of up-country storage is provided by GrainCorp, with AWB's GrainFlow also operating in the eastern states. This dilutes the information advantage regarding stock quantities and qualities of grain obtained by ABA as a vertically-integrated provider of upcountry storage and port terminal services, as ABA only has information about a relatively small proportion of all stock in the east coast market.

The ACCC has not received any submissions expressing concern regarding ABA's relationship with Emerald, and the potential that relationship raises for sharing of information between the two entities.

The ACCC notes that ABA has included clauses requiring it not to discriminate in favour of its own Trading Business, or that of a related entity (clause 6.4), and not to

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[51] ABA website, viewed 30 June 2011, http://www.bulkalliance.com.au/Our-Company; Emerald website, viewed 30 June 2011, http://www.emerald-group.com.au/corporate_structure.

engage in conduct for the purpose of hindering access to the Port Terminal Services by another user (clause 10.4 in the Proposed Undertaking and clause 10.5 in the draft revision).

In light of the considerations outlined above, the ACCC considers it is likely to be appropriate for ABA to adopt a publish-negotiate-arbitrate approach to access without requiring the inclusion of ring-fencing provisions. As it did in its Final Decision on the 2009 Undertakings, the ACCC emphasises that this view applies to ABA's circumstances at the present time and may not apply in different circumstances, including to other providers of port terminal services and other services or industries.

4.3.3 Non-discriminatory access

The ACCC notes that under clause 6.4 of the Proposed Undertaking, ABA must not discriminate against access seekers in favour of its own Trading Business, except to the extent that the cost of providing access to other applicants or users is higher. The Proposed Undertaking defines 'Trading Business' as a business unit or division of ABA or its Related Bodies Corporate which has responsibility for the trading and marketing of Bulk Wheat. Related Body Corporate has the meaning given in the *Corporations Act 2001*.

Under the publish-negotiate-arbitrate framework, ABA has the ability to negotiate access agreements with its customers, including its own trading business or that of a Related Body Corporate, which differ from the standard terms. The ACCC considers that to assess ABA's compliance with its non-discrimination obligations, it is necessary for the ACCC to know details of the access agreement ABA reaches with its Trading Business, including a business unit or divisions of a Related Body Corporate.

The ACCC is of the preliminary view that to be considered appropriate the Proposed Undertaking should include a provision requiring ABA to provide the ACCC with a copy of the access agreement entered into with its Trading Business. The ACCC takes the view that this is a common issue across industry and considers a consistent regulatory approach to be appropriate, having regard to s. 44AA(b) of the Act.

In its draft revision, ABA has included the following drafting at clause 6.4(c):

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

The ACCC considers this to be appropriate; however, notes that the appropriateness of the proposed clause 6.4(c) is contingent upon the included definition of 'Trading Business', as set out above.

4.3.4 The Indicative Access Agreement

The ACCC indicated in the Final Decision on the 2009 Undertakings, that the terms in the IAAs are intended to represent a minimum standard and that access seekers have the ability to negotiate or arbitrate non-standard terms based on their own particular commercial considerations and circumstances.[52] Accordingly, in 2009 the

[52] ACCC, *GrainCorp Decision to Accept*, 29 September 2009, pp. 176-177.

ACCC did not form views on whether the terms and conditions of the IAAs would be acceptable to particular parties.

In its Final Decision on the 2009 Undertakings, the ACCC stated that it was necessary for the indicative access agreements attached to the 2009 Undertakings to ensure the following:

- the inclusion of a robust dispute resolution process that balances the legitimate business interests of the port terminal operator with the interests of access seekers
- any ability of the port terminal operator to unilaterally vary the terms of an executed indicative access agreement is only to be exercised in appropriate circumstances
- the terms and conditions of the indicative access agreement must provide for sufficient certainty and clarity in their terms, effect and operation.[53]

The ACCC considers that a consistent regulatory approach to the IAAs remains appropriate, with regard to the three key considerations noted above. The ACCC recognises several issues with ABA's proposed IAA. The ACCC's concerns are discussed in the context of the three considerations developed during assessment of the 2009 Undertakings. Each component is examined in turn.

4.3.4.1 Dispute resolution

Clause 21 of the IAA governs disputes that arise concerning the IAA's terms. Clause 21.2 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 ACCC's concerns with ABA's dispute resolution approach are two-fold. First, the ACCC considers that the dispute resolution provisions may not adequately set out a formal process by which disputes can be raised. Clause 21.2 refers to 'notice of the dispute'; however the IAA makes no reference to what constitutes notice of a dispute, how that notice should be given and what is considered as receipt of a notice. Further there is a lack of detail surrounding the steps that must be taken by the recipient of a notice of dispute.

The ACCC considers that it is in the interests of access seekers and ABA to increase clarity and certainty regarding the operation of dispute resolution under the IAA.

Secondly, the ACCC considers that 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 IAA, which is critical to ongoing certainty of access. Further, the ACCC notes that the 60 day timeline proposed by ABA is significantly longer that the dispute resolution timelines in the indicative access agreements attached to the 2009 Undertakings. Comparatively, IAAs submitted as part of the 2009 Undertakings provide the following:

[53] ACCC, *GrainCorp Decision to Accept*, 29 September 2009, p. 176.

- GrainCorp – starting on the date the original dispute notice is served, the parties have 15 business days to resolve the dispute before it is referred to formal mediation in New South Wales (clause 11). This provision is mirrored in GrainCorp's accepted 2011 Undertaking.

- Viterra – the parties have five business days to resolve the dispute before the dispute is referred to either mediation or arbitration (clause 16).

- CBH – the parties have ten business days to resolve the dispute before it is referred to arbitration in Western Australia (clause 19).

The ACCC takes the view that certainty of access is a key consideration, which is in the interests of both the port operator and access seeker. Therefore, a long delay in resolving disputes is inappropriate.

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

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

4.3.4.2 Ability to vary the terms of a bi-lateral access agreement executed between ABA and an access seeker

Clause 18.2 of the IAA gives ABA discretion to unilaterally vary or add to the IAA, provided it notifies the Client and allows the Client to terminate the agreement if the terms are not acceptable. Clause 6.5(b) of the Proposed Undertaking provides that ABA may vary the standard terms of the IAA through the formal variation process to a Part IIIA access undertaking, set out in s. 44ZZA(7)(b) of the Act, which requires ACCC approval.

The ACCC agrees with the submission of CBH Grain,[54] and takes the view that clause 18.2 of the IAA is not appropriate because it is in conflict with clause 6.5(b) of the Proposed Undertaking, and for the reasons outlined below.

Although the ACCC considers it important that the Standard Terms of access are certain, there should also be flexibility for parties to negotiate an agreement different to the Standard Terms. The ACCC notes that, while the ability to vary a contract post-execution allows for the terms to continue to reflect changing circumstances, the terms of executed contracts are typically only varied with the consent of both parties.

The IAAs submitted as part of the 2009 Undertakings allowed for variations to be made to an executed agreement during its term with the consent of the parties, while

[54] CBH Grain, 4 March 2011, p. 3.

variations to the Standard Terms could be made under the formal variation process in Part IIIA.

ABA has proposed to remove the unilateral variation provision in its draft revision. The ACCC considers the proposed amendments to clause 18 set out in the draft revision adequately address its concerns and are appropriate having regard to the interests of access seekers in accordance with s. 44ZZA(3)(c). The ACCC has therefore included an amendment to that effect in its draft amendment notice.

4.3.4.3 Certainty and clarity of the IAA's terms

The ACCC considers that there are several issues with the current structure and drafting of the IAA.

Coupling of Indicative Access Agreement with Storage and Handling Agreement

The IAA submitted as part of the Proposed Undertaking is ABA's SHA, which relates to both port terminal and up-country services, the latter of which do not form part of the Proposed Undertaking.

By way of example, under clause 6 of the IAA, ABA has discretion to move Client grain to another of its storage and handling facilities, including for operational reasons. Movement of grain is to be at the Client's expense. Given that ABA owns only one port terminal, which is a just-in-time port used for accumulation to ship rather than general storage, it is likely that clause 6 is intended to apply to ABA's upcountry storage and handling facilities.[55] The ACCC considers that it is not appropriate for clause 6, and similar clauses targeted at up-country services, to appear in the IAA, as these services are not covered by the Proposed Undertaking.

The ACCC considers that the Proposed Undertaking is more likely to be appropriate if the terms of the IAA relate only to access to Port Terminal Services, specifically that the IAA should be a standalone document, separate from the SHA. The ACCC notes that the IAAs attached to the 2009 Undertakings relate only to port terminal services, while each of the three port operators has a separate SHA, which falls outside the scope of each port operator's 2009 Undertaking.

In the alternative, the ACCC considers it may be appropriate for ABA to distinguish the provisions of the IAA which fall within the ambit of the undertaking from those that do not.

ABA has amended clause 6.3(a) in the draft revision, which now provides that:

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

The ACCC considers that, generally, the preferred approach is for the port operator to offer a separate SHA and IAA. However, as noted section 4.3.4.2 above, ABA is a smaller operator with a lesser degree of market power than other port operators. The ACCC understands that the agreement submitted as Schedule 1 of the Proposed

[55] A 'just-in-time' port such as MPT generally has limited storage capacity and therefore grain is only brought to the port when it is ready to be loaded onto a vessel.

Undertaking is currently in use by ABA as the agreement by which it offers port access. No submissions received to date have made comment on the coupling of the SHA and IAA and the ACCC has not been made aware of any problems arising from ABA's use of the agreement to date in providing access to the port. The ACCC considers that in ABA's case, separating the SHA and IAA would represent an administrative and financial burden, which is unnecessary. This may not be the case for other port operators.

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

Proposed Undertaking to take precedence over IAA

The ACCC notes that ABA's Proposed Undertaking does not specify whether the IAA or the general terms of the Proposed Undertaking would take precedence in the event of any inconsistency. The ACCC notes that the 2009 Undertakings each contain a clause indicating an order of priority for all components of the undertakings, and specifically that the general terms of the undertaking take precedence over the terms of other components and schedules.

The ACCC's preliminary view is that ABA's Proposed Undertaking is not likely to be appropriate unless it includes a clause setting out the priority of the Proposed Undertaking components. Specifically, the Proposed Undertaking should set out that the general terms of the Proposed Undertaking take precedence over any inconsistency between the general terms and the IAA. The ACCC considers that it is necessary for ABA to provide a similar level of clarity and certainty on this issue, as is provided in the 2009 Undertakings.

ABA, in its draft revision, has inserted a new clause 3.2 to the undertaking, which provides that:

To the extent of any inconsistency between them, the terms of this Undertaking take priority over the terms of the Schedules.

The ACCC considers that the inclusion of a clause specifying the priority of the various components of the Proposed Undertaking is appropriate. However, the ACCC considers that ABA's drafting of the proposed clause 3.2 may not sufficiently distinguish between the terms of the undertaking that are outside the Schedules and those that are in the Schedules. The proposed amendment 1.1 of the draft amendment notice contains wording which addresses the ACCC's concerns.

General drafting issues

Clause 9 of the IAA provides that the Client must comply with the Port Terminal Operating Protocols. The ACCC notes that in the Proposed Undertaking the protocol document is referred to as the 'Loading Protocol'. The ACCC takes the view that any references to the protocol document in the Proposed Undertaking and the schedules should refer to one document consistently, so as to avoid confusion for access seekers.

There are several instances in the IAA where ABA has capitalised a word, which is then not included in the definitions at clause 1. The ACCC considers that drafting issues of this nature should be rectified in order to ensure that access seekers have

clarity and certainty of the IAA's terms. Such clarity and certainty is in the interests of both access seekers and ABA, which the ACCC has regard to under s. 44ZZA(3) of the Act, when assessing the Proposed Undertaking.

4.3.4.4 Limitation of liability

Clause 16 of the IAA deals with liability. ABA may only incur liability to an access seeker for:

- Failing to outturn the client's grain at the quality required, where this is set out in clause 5, as a direct result of ABA's gross negligence (clause 16.1).
- Breach of any non-excludable implied condition or warranty, which cannot by law be excluded, liability is limited pursuant to clause 16.5 to the resupply of the relevant services or the lowest cost of replacing the goods, as applicable.

Liability is subject to a cap of $30 000 per event, and $100 000 for all events occurring during the term of the IAA (clause 16.3).

Clause 16.2 excludes ABA's liability for any loss or damage, except where provided in clause 16.1, even where ABA has failed to comply with its obligations under the IAA, or been responsible for any negligent act or omission. The exclusions of liability are not limited to those listed in clause 16.2. The clause provides that liability is excluded, inter alia, for demurrage costs, consequential loss and quality deficiencies in outturned grain.

In its Final Decisions on the 2009 Undertakings, the ACCC took the view that certain aspects of the IAAs are commercial issues to be negotiated between parties. In the final decision on GrainCorp's 2009 Undertaking, the ACCC noted that:

> the standard terms provided under an indicative access agreement are intended to be the minimum terms and conditions of access to GrainCorp's port terminal services, and that access seekers will have the ability to negotiate (or arbitrate) non-standard terms that vary from any of those standard terms that they consider to be unacceptable, based on their own particular commercial considerations and circumstances.
>
> Accordingly, in this Final Decision, the ACCC has not found it necessary to form views about whether the particular terms and conditions of the August Indicative Access Agreement would be acceptable to particular parties (given likely differences between the commercial considerations and circumstances of specific access seekers).[56]

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

CBH Grain has submitted that the liability provisions in ABA's IAA are not appropriate, and that 'ABA should be responsible for outturning grain delivered into its care or else compensating the affected party to the extent that ABA is responsible

[56] ACCC, *GrainCorp Decision to Accept*, 29 September 2009, pp. 176-7. A similar position was reflected in the Final Decisions on Ausbulk (now Viterra) and CBH.

for the loss.'[57] The ACCC also notes Emerald's submission, made in the context of the assessment of Viterra's Proposed 2011 Undertaking, that a cargo of wheat can be valued at up to $6 million.[58]

The ACCC has not received submissions on the operation of ABA's current liability regime in practice and therefore has no reason to believe that the current arrangements are causing difficulties for users at MPT. The ACCC considers that liability is a commercial issue suited to commercial negotiation between the parties to the IAA. For these reasons, the ACCC has not formed a view on the appropriateness of the liability regime in ABA's IAA and whether particular clauses will be acceptable to all parties.

Instead, the ACCC reiterates that the IAA's terms are negotiable between ABA and an access seeker. Where an access seeker believes that negotiation of an agreement does not occur in accordance with clause 7 of the Proposed Undertaking, the access seeker may make use of the dispute resolution provisions in clause 8 of the Proposed Undertaking. The proposed dispute resolution regime provides for arbitration of disputes by the ACCC or a private arbitrator. Parties seeking to negotiate in relation to the liability provisions of the IAA may avail themselves of these dispute resolution procedures.

4.3.4.5 Remaining provisions of the IAA

With the exception of the provisions discussed above where the ACCC has explicitly noted that ABA's proposed IAA may not set an appropriate minimum standard, the ACCC does not take a view on the appropriateness of the remaining provisions of the IAA. Further, the ACCC has not received submissions raising concerns with any of the remaining terms. The terms of the IAA are negotiable between ABA and access seekers, as the Proposed Undertaking applies a negotiate/arbitrate model by which access seekers can seek arbitration under clause 8 of the Proposed Undertaking, for disputes relating to the negotiation of access agreements.

4.3.5 Publication of performance indicators

The undertakings initially proposed by the port operators in 2009 did not include performance indicators. In its assessment, the ACCC considered that the publication of key performance indicators provided a degree of transparency around the level of service being provided to wheat exporters and assists potential access seekers in assessing the appropriateness of the price offered for a service. The ACCC did not seek to be prescriptive in determining what specific service performance indicators should be included in each access undertaking – but provided an indicative list which included possible reporting on:

- vessel rejections
- cargo assembly times
- transport queuing times
- port blockouts

[57] CBH Grain, 4 March 2011, p. 3.

[58] Emerald, 'Submission to the ACCC on Viterra Issues Paper', 4 March 2011, pp. 4-5.

- overtime charged
- demurrage.

The ACCC did not intend for this reporting obligation to be onerous and recognised that the obligation should not involve the collation of data that the port operators do not already collect as part of their commercial practice. This was in recognition of the need to appropriately balance the legitimate business interests of the port operator and the interests of access seekers, factors which the ACCC must have regard to under subsections 44ZZA(3)(a) and (c) of the Act.[59]

Table 1 provides an overview of the different performance indicator reporting requirements of the other port terminal operators (GrainCorp, Viterra and CBH) under their 2009 Undertakings.

Table 1: Performance indicators in the 2009 Undertakings

GrainCorp	Viterra	CBH
Vessels failing survey	Percentage of vessels that failed either AQIS or marine surveys for each month	Number of vessels rejected in the year to date
Monthly tonnes shipped	Tonnage loaded each month for each Port Terminal	Tonnes of wheat exported in the year and month to date
Average daily road receival rate (to be provided monthly)	Number of vessels loaded each month	Number of vessels loaded in the year and month to date
CNA's (bookings) rejected	Average waiting time for vessels to complete loading for each month by Port Terminal. Waiting time will exclude if the vessel is not load ready	Days between the ETA on original vessel nomination and the date of the presentation of the Notice of Readiness (NOR) (on average)
Port blockouts		Days between NOR and Commencement of Loading for vessels arriving within their contracted Shipping Window (on average)
Average CNA assessment times		Days between NOR and Commencement of Loading for vessels arriving outside their contracted Shipping Window (on average)
		Number of vessels presenting a NOR outside of the contracted Shipping Window

ABA has undertaken to publish two measures in its Proposed Undertaking: monthly tonnes shipped, and the number of ships loaded. While recognising that there is a

59 ACCC, GrainCorp Decision to Accept, 29 September 2009, pp. 314-15.

level of variation in the indicators published by the different port terminal operators, the level of information ABA proposes to publish falls short of that published by the other port terminal operators.

The ACCC recognises that not all of the indicators published by the other port terminal operators are within their control and that there may be a number of factors affecting each indicator. Nevertheless, these indicators provide useful information to potential access seekers comparing the overall operations at each port in their decisions and negotiations over access. As such, the ACCC considers that consistency on this matter is appropriate, having regard to s. 44ZZA(3)(aa) of the Act, which refers to the objects of Part IIIA, where the objects include encouraging a consistent approach to regulation.

Accordingly, the ACCC considers that it would be appropriate for ABA to include additional performance indicators, such as those provided in the indicative list above and those provided by the other port terminal operators, to provide a sufficient level of transparency around its operations.

Further, the ACCC considers that it is important to have regard to the 2009 Undertakings in assessing ABA's Proposed Undertaking and that this is consistent with s. 44ZZA(3)(e), where the ACCC considers the 2009 Undertakings to be a relevant matter.

The six-monthly reporting schedule proposed by ABA is equivalent to that in GrainCorp's 2009 and 2011 Undertakings and Viterra's accepted 2009 Undertaking. The ACCC considers that the frequency of reporting proposed by ABA is likely to be appropriate given that access agreements are generally negotiated on an annual basis.

In its draft revision, ABA proposes to publish the following indicators:

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

The ACCC considers that the publication of additional indicators, proposed by ABA, is appropriate.

4.3.6 Information gathering provision

Clause 6.4(b) of the Proposed Undertaking provides that the ACCC may require ABA to appoint an independent auditor to report on ABA's compliance with its obligation to provide non-discriminatory access in accordance with clause 6.4(a). This is the

only information gathering provision for the ACCC in the Proposed Undertaking and follows the approach of the 2009 Undertakings. Where an undertaking is in place, the ACCC can obtain information from a port operator voluntarily at any time.

As set out in the ACCC's Decision on GrainCorp's Proposed 2011 Undertaking, the ACCC considers that it is necessary for it to have a general information gathering provision in the port terminal services access undertakings.[60]

To assist the ACCC in making effective and appropriate decisions when exercising its powers under the undertakings, the ACCC considers it necessary to be in a position to obtain relevant information, in a timely manner. For example, this will be relevant to the objection notice power, if introduced into the Proposed Undertaking. The objection notice is discussed in section 5.3.9.3.

The ACCC considers that neither the audit power nor the ability to obtain information voluntarily represents an appropriate way for the ACCC to obtain the relevant information it requires to exercise the objection notice power. Specifically, assessing the port operator's performance against the non-discrimination clause via audit may be a relevant consideration for the decision on whether to issue the objection notice; however, it does not encapsulate all the information that the ACCC would need in making the decision. For example, it does not provide information on the port operator's compliance with the no hindering access requirements in clause 10.4.

The ACCC further notes that while an audit may provide the ACCC with relevant information on whether to issue an objection notice, it may not be possible for the ACCC to receive the information within the variation timeframe. Timeliness regarding the variation process is discussed above, but the ACCC considers that any extension of the variation timeframe, even for the ACCC to investigate whether or not to make use of the objection notice power, may give rise to uncertainty regarding port operations and should be avoided if possible.

For the reasons outlined above, the ACCC considers that the Proposed Undertaking is unlikely to be appropriate unless it includes an information gathering provision. The ACCC considers, having regard to s. 44AA(b) of the Act, that a consistent regulatory approach is appropriate and that similar provisions will be required for other port terminal services access undertakings.

The ACCC notes that if information gathering provisions were inserted into the undertaking, a failure by the port operator to provide the information requested by the ACCC would result in a breach of the undertaking.

ABA has proposed the insertion of the following provision in its draft revision:

13 ***Cooperation with the ACCC***

(a) The ACCC may, by written notice, request ABA to provide information or documents that are required by the ACCC for the reasons specified in the written notice to enable it to exercise its powers or functions specified in this Undertaking.

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[60] ACCC, GrainCorp Operations Limited Port Terminal Services Access Undertaking, Decision to Accept, 22 June 2011, pp. 19-20.

(b) ABA will provide any information properly requested by the ACCC under clause 13(a) in the form and within the timeframe (being not less than 14 days) specified in the notice.

The ACCC considers that ABA's proposed drafting is appropriate.

5 Capacity Management

5.1 ABA's proposed Undertaking

Capacity management provisions are set out in clause 10 of ABA's Proposed Undertaking. Clause 10 details the requirement on ABA to comply with the Continuous Disclosure Rules under the WEMA, provisions relating to ABA's Loading Protocol, including the Loading Protocol variation process and provisions relating to no hindering access.

5.1.1 Continuous Disclosure Rules

Clause 10.1 sets out the requirement on ABA to comply with the Continuous Disclosure Rules under the WEMA.

Specifically, clause 10.1(a) provides that ABA must publish a statement setting out its policies and procedures for managing demand for the port terminal services. This is represented by the Loading Protocol document attached to the Proposed Undertaking as Schedule 5.

5.1.2 The Substance of the Loading Protocol[61]

Introduction: Clause 2 of the Loading Protocol provides that they apply to all commodities including wheat. Clause 3 provides that to have ABA load vessels, an exporter must become a Client of ABA by entering into a Storage and Handling Agreement (which is attached to the Undertaking as the Indicative Access Agreement in Schedule 1).

Shipping stem: Clause 5 provides that ABA will publish the shipping stem on its website. The shipping stem will be updated within 24 hours of any change.

Intent to Ship: Clause 8 provides that to request elevation and shipping capacity, a Client must complete an Intent to Ship Advice (attached to the Loading Protocol as Annexure 1) and pay the Booking Fee. This must be done at least 30 days prior to loading, or within a shorter period that ABA may determine.

Clause 10 provides that within 24 hours of receiving a valid Intent to Ship Advice, ABA will make a record on the shipping stem as "pending". ABA must accept or reject the Intent to Ship Advice within 5 days of receipt of the Intent to Ship advice.

Clause 11 sets out that in deciding whether to accept or reject the Intent to Ship Advice, ABA may consider existing shipping nominations, unallocated capacity at the port terminal, the Client's accreditation and whether the Client has executed a Storage and Handling Agreement with ABA.

Clause 12 provides that Intent to Ship Advices will be dealt with in the order they are received by ABA and that, in general, earlier Intent to Ship Advices will be given priority over later ones. This makes ABA's capacity allocation system a 'first come, first served' (**FCFS**) model.

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[61] Note that all clause references in section 5.1.2 are to the Loading Protocol.

A 'Booking' is made when ABA accepts the Intent to Ship Advice (clause 14), however the booking will lapse if the Booking Fee is not paid in time (clause 16). Additional Booking Fees will be payable, or rebates due if the actual tonnage is higher or lower than initially nominated (clauses 17 and 18).

Clause 19 provides that ABA may, at its discretion, defer or split a Booking. This will only be done if notice is given three months prior to the vessels ETA.

Vessel Nomination: Clause 20 provides that ABA must be given written vessel nominations 21 days prior to loading. ABA provides a nomination form at Annexure 2 of the Loading Protocol. ABA must accept or reject a vessel nomination within five days of receipt (clause 21).

Estimated Load Dates: Clause 23 provides that upon ABA's acceptance of a vessel nomination, the Client will be notified of any vessel queuing and an estimate of load dates. Estimated load dates are not fixed or final (clause 25).

Cargo Accumulation and Vessel Loading: Clause 26 provides that cargo accumulation will not commence prior to payment of the Booking Fee or Vessel Nomination. Clause 27 provides that generally, cargo accumulation will commence not more than two weeks before vessel ETA. Clause 28 provides that, due to limited storage capacity at the port terminal, ABA will determine the order of cargo accumulation taking into account, inter alia, Vessel ETA, date of accepted Vessel Nomination and grain availability.

Clause 30 provides that Vessels are normally given priority in accordance with the date ABA received the Vessel Nomination, however ABA may determine that it is in the interests of terminal efficiency to first load a vessel that is the subject of a Vessel Nomination received later.

Clause 33 provides that Clients may negotiate changes to accumulation or estimated load dates between them and it is at ABA's sole discretion whether it accepts such changes.

Clause 34 provides that grain accumulated at the port terminal will be co-mingled with grain of the same grade regardless of ownership.

Vessel Substitution or Delay: Clause 35 provides that in the event that a Vessel is substituted or delayed, and the substituted Vessel ETA or revised ETA is greater than 5 days from the original ETA, the Booking Fee will be forfeited to ABA.

Clause 36 provides that ABA reserves the right to seek costs from the Client regarding the cancellation of a Vessel within 14 days of the original ETA, or if a substituted vessel ETA varies by more than five days.

Dispute Resolution: Clause 38 specifies dispute resolution procedures in the event that a Client disputes ABA's adherence to the Loading Protocol. If the dispute is not resolved in discussions between the parties, ABA's Chief Executive Officer (CEO) will make a final decision on the dispute. The CEO's decision must be made acting reasonably, in good faith and consistent with the wording or intent of the Loading Protocol.

5.1.3 Variation of the Loading Protocol

Clause 10.3 of ABA's Proposed Undertaking sets out the requirements for varying the Loading Protocol during the term of the Undertaking.

Clause 10.3(a)(i) provides that any variation to the Loading Protocol must be consistent with:

- the objectives of the Undertaking, as set out in clause 2.2; and
- ABA's obligations to provide non-discriminatory access under clause 6.4

Clause 10.3(a)(ii) provides that the Loading Protocol must include an expeditious dispute resolution mechanism for dealing with disputes relating to decisions made by ABA under the Loading Protocol (but need not include independent binding dispute resolution).

The elements of the variation process are set out in clause 10.3(a)(iii). Before ABA can vary the Loading Protocol, it must conduct a consultation process which involves:

- preparing and circulating proposed changes to interested parties, and to the ACCC, along with an explanation for the amendment (all to be published on ABA's website);
- allowing users, applicants and interested parties at least 10 Business Days to review and respond in writing to the proposed changes; and
- ABA collating, reviewing and actively considering in good faith the responses received from interested parties.

Clause 10.3(a)(iv) provides that any variation must be published on ABA's website at least 30 days prior to the date on which it is to become effective in the same locations as ABA publishes its Loading Protocol.

Clause 10.3(c) provides that ABA must provide the ACCC with copies of the variations to the Loading Protocol promptly following publication.

5.1.4 No hindering access

Clause 10.4(a) provides that ABA, or a related body corporate, must not engage in conduct for the purpose of preventing or hindering access to the port terminal services by any other access seekers.

Clause 10.4(b) provides that the existence of the purpose of hindering access can be established by inference from the conduct of ABA or a related body corporate.

5.2 ABA and third-party submissions

5.2.1 ABA's submission in support of the Proposed Undertaking (29 November 2010)

Capacity allocation: ABA submits that its limited capacity means it can only accumulate cargo for the next arriving vessel. ABA submits that for this reason it is critical that ABA and exporters liaise at least 2-3 weeks prior to a vessel's ETAs to ensure that the cargo being accumulated is for the next arriving vessel. ABA notes that if vessel ETAs change so that a vessel arrives later than originally advised, another vessel may arrive earlier and that was not known early enough, then ABA may have accumulated cargo for the now second vessel and therefore this vessel will be loaded first.[62]

Capacity management: ABA submits that clause 10.1(b) of the Proposed Undertaking, which relates to ABA's shipping stem, differs from the undertakings accepted by the ACCC from other port operators in 2009 in that it requires ABA to publish less information.. ABA submits that this is because it is smaller than its competitors and the other port operators. ABA submits that its facility can only accumulate one vessel at a time and has no trains or trucks, and therefore ABA does not accumulate grain until it is certain that the vessel is coming to the port. ABA submits that due to its much smaller capacity, some items required to be published in previously accepted access undertakings are not relevant to ABA and that ABA has included all relevant information in clause 10.1(b).[63]

ABA also submits that the publication requirements concerning key information and performance indicators in the undertakings given by other operators would be too onerous if applied to it. ABA considers that the publication requirements in clause 11 of the Proposed Undertaking are appropriate given ABA's size and capacity.[64]

Protocol variation: ABA submits that the provision for variation of its Loading Protocol in clause 10.3 is based on the 2009 Undertakings. ABA submits that its proposed process for variation involves a consultation process (which includes circulating the proposed changes to interested parties and the ACCC, as well as publication on ABA's website), a period for review and response from third parties and a requirement to consider responses from third parties.[65]

5.2.2 Asciano submission

Binding dispute resolution for Loading Protocol: Asciano notes that the Loading Protocol is currently excluded from the dispute resolution provisions in the Proposed Undertaking, and that ABA has the discretion to unilaterally vary the Loading Protocol. Asciano considers that this is not appropriate, and that the Loading Protocol should be subject to binding dispute resolution provisions rather than the current non-binding provisions in the variation process.[66]

[62] ABA, 29 November 2010, pp. 2-3.
[63] ABA, 29 November 2010, p. 3.
[64] ABA, 29 November 2010, pp. 3-4.
[65] ABA, 29 November 2010, p. 3.
[66] Asciano, 4 March 2011, p. 2.

5.2.3 CBH Grain submission

Capacity allocation and the Loading Protocol: CBH submits that additional transparency is required around ABA's capacity allocation and booking prioritisation processes in the Loading Protocol and shipping stem. Specifically, CBH Grain submits that:

- ABA does not appear to be bound by the 'first in first served' allocation system, and appears to have complete discretion as to which bookings it will accept
- there is no obligation on ABA to not accept more bookings than it can reasonably handle
- ABA should provide more detail regarding the prioritisation of vessels and prioritisation of grain accumulation at port
- the Loading Protocol lacks clarity regarding when the exporter must name the vessel for a booking (the Loading Protocol states that TBA Intent to Ship Advices will not be accepted but the current ABA shipping stem shows TBA nominations)
- definitional alignment is needed, specifically where the Loading Protocol is referred to by different names within the Proposed Undertaking, and to provide clarity around the application of the booking fee and the dispute resolution process in the Loading Protocol.[67]

5.2.4 ABA's response to third party submissions (17 March 2011)

The Loading Protocol and SHA: ABA submits that it does not agree with changes proposed by CBH Grain to the Loading Protocol and the Storage and Handling Agreement. ABA submits that that in its view the documents are transparent, even-handed and adequate for the Proposed Undertaking. ABA notes that 'access seekers are free to choose whether or not to use the port based on these terms'.[68]

Dispute resolution for Loading Protocol: ABA considers there is no inconsistency between allowing variation of the Loading Protocol and excluding it from the dispute resolution provisions in the Proposed Undertaking. ABA notes that the Loading Protocol applies equally to all access seekers and that any variation involves 'a lengthy consultation process and is subject to strict conditions'.[69]

5.3 ACCC view

In forming a preliminary view regarding management of its port terminal capacity by ABA the ACCC has considered both the appropriateness of the FCFS approach to allocation of capacity and the likely effectiveness of the arrangements set out in ABA's Loading Protocol.

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[67] CBH Grain, 4 March 2011, pp. 1-3.
[68] ABA, 17 March 2011, p. 2.
[69] ABA, 17 March 2011, p. 2.

5.3.1 Overall approach to capacity management

Under the Proposed Undertaking, ABA allocates capacity on a FCFS basis, subject to ABA having discretion to consider other matters when prioritising bookings and to change vessel loading priority for operational reasons. Clients book capacity by lodging an 'Intent to Ship Advice' and paying a non refundable booking fee.

5.3.1.1 Consistent approach to assessing port terminal capacity management

The ACCC is required to form a view regarding capacity management arrangements proposed in the undertakings offered by the four port operators. The ACCC considers that capacity management arrangements should be assessed for each port operator on the basis of its circumstances and notes that these circumstances differ between the four port operators (ABA, GrainCorp, Viterra and CBH) and the markets in which they operate.

However, while the ACCC is not of the view that capacity management arrangements should necessarily be the same for all port operators, it does consider that it should apply a consistent approach when forming its view on each of the proposed undertakings. The ACCC has analysed the similarities and differences between the port operators and the markets in which they operate so that its views regarding capacity management arrangements are made on a consistent basis across undertakings.

The ACCC considers that two key market characteristics are relevant to the view formed on the appropriateness of particular capacity management arrangements in specific market circumstances:

- the relationship between total port elevation capacity and average annual and seasonal demand for it

- the extent to which the incentive exists for vertically integrated port operators to pursue self preferential treatment—including blocking other exporters from accessing port services.

In relation to the first of these factors, generally the more constrained is capacity relative to the demand for it, the greater the imperative on economic efficiency grounds for market based allocation arrangements. As the PC stated in its Report, auctions can play a significant role in efficiently allocating limited port capacity.[70] This general economic principle, that allocative efficiency is best achieved through a price mechanism, has greatest application when supply is limited relative to demand. When no binding capacity constraint exists the demands of all users can be met and the means by which allocation occurs is not as critical to achieving efficiency.

In all Australian states from which wheat is exported there are periods when port capacity is more highly valued. These periods follow harvest when new season grain is available to be shipped and can vary from season to season and between the ports operated by the port operators. The extent to which each port operator's port capacity is constrained relative to the demand for it is relevant to the view the ACCC forms regarding appropriate capacity allocation and management arrangements.

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[70] Productivity Commission 2010, Wheat Export Marketing Arrangements, Report no. 51, p. 205.

On the issue of the incentive for self preferential treatment, the ACCC is of the view that a vertically integrated operator has an incentive to utilise infrastructure it controls to block competitors in upstream or downstream markets in order to gain market share at the expense of access seekers. The strength of such an incentive is determined by the existence, or threat, of competition to the integrated monopolist's position. Where actual or potential competition exists, the incentive to block competitors is moderated by the threat that the blocking behaviour may result in loss of business to an alternative supply-chain rather than increased market share for the integrated operator in upstream or downstream markets.

The appropriateness of a proposed capacity allocation will be informed by circumstances where competition is weak and the incentive to hoard capacity is strong. Where the incentive to block out access seekers is strong, so too is the argument that allocation arrangements should incorporate measures to prevent such behaviour.

Auctions are one approach that provides such a mechanism as they are a fair, transparent and efficient means of allocating capacity under which the incumbent faces the same limits on its ability to acquire capacity as other users.

An alternative to introducing an auction system is to consider an administrative solution to introduce a supply chain coordinator.

5.3.1.2 ABA port capacity and the east coast wheat export market

In determining the type of capacity management system that would be appropriate for ABA, it is necessary to consider ABA's particular circumstances and the market in which it operates:

- The east coast of Australia has a strong domestic market for wheat, in contrast to other markets where exports are dominant. This reduces demand for export capacity at the port terminals.
- As noted in the PC report, the bulk wheat export market in the east coast of Australia and particularly in Victoria is subject to more competition than other markets.[71] Specifically, ABA's operations at MPT compete directly with GrainCorp's Geelong port terminal operations.
- As discussed in section 4.3.2 on information sharing and ring-fencing arrangements, there is a greater degree of operational separation between Emerald and ABA than the trading and port operating divisions of the other bulk handling companies.

Further to the relationship between ABA and Emerald, the ACCC considers that the $5 non-refundable booking fee, applied by ABA for bookings made on the shipping stem, acts an appropriate disincentive to prevent speculation. As ABA and Emerald are not vertically integrated, the $5 booking fee is a 'real' cost for Emerald if it fails to ship. In other markets, there is greater risk of speculation by the trading arm of the port operator as any loss is perceived as merely a paper transfer of money from the

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[71] Productivity Commission 2010, Wheat Export Marketing Arrangements, Report no. 51, p. 68.

trading to the operational arm of the company. The booking fee is also discussed in the context of transferable slots in section 5.3.7.

The ACCC has compared data provided by ABA on tonnes already booked and shipped at MPT since October 2010 and tonnes booked until September 2011.[72] When compared with information ABA has provided to the ACCC regarding its maximum monthly throughput capacity, there does not appear to be a capacity constraint at MPT. Further, ABA's particular circumstances, noted directly above, also indicate that there is no significant capacity constraint at MPT. The ACCC considers that, taken together, the circumstances in which ABA operates provide weak incentives for self-preferential treatment.

5.3.1.3 ACCC view on capacity management of ABA's port terminal services capacity

In addition to an analysis of the factors outlined in the preceding section, the ACCC recognises that the appropriateness, or otherwise, of a particular proposed capacity allocation arrangement depends, *inter alia,* on the effectiveness of existing or past arrangements for the port facilities under consideration. The practice by other operators or in other markets may provide useful intelligence in forming a view as to what is appropriate. However, the ACCC considers that it is the individual circumstances of a particular port operator, including market characteristics, which are of most relevance.

In considering the capacity allocation methodology proposed by ABA, the ACCC must have regard to the matters listed in s. 44ZZA(3) of the Act. Section 4ZZA(3)(aa) requires the ACCC to have regard to the objects of Part IIIA which include promoting the economically efficient operation of, use of and investment in the infrastructure by which services are provided. Other relevant matters are the legitimate business interests of the provider (s. 44ZZA(3)(a)) and the interests of persons who might want access to the service (s. 44ZZA(3)(c)).

Submissions to the ACCC Issues Paper on ABA's Proposed Undertaking do not raise concerns with the appropriateness of ABA's FCFS approach to capacity allocation or suggest that introduction of an alternative approach should be required of ABA. However submissions did raise some concerns regarding the manner in which the FCFS arrangements operate under ABA's Loading Protocol, which are discussed in sections 5.3.2-5.3.8 below.

The ACCC is of the preliminary view that, having regard to s. 44ZZA(3) of the Act, that a FCFS approach to capacity allocation at MPT is likely to be appropriate subject to the arrangements satisfying the conditions discussed below.

5.3.2 Conditions for effective FCFS capacity management

This section addresses the capacity allocation system proposed by ABA as outlined in its Loading Protocol. In its decision on the 2009 Undertakings, the ACCC stated that it would consider whether the protocols proposed by the bulk handlers provided for:

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[72] ABA, 'Response to ACCC Request for Information', 21 April 2011, Schedule 1. Available at the ACCC website: http://www.accc.gov.au/content/index.phtml?itemId=964331.

> …sufficient certainty and clarity in its terms, effect and operation in order to enable the access provider and access seekers to be adequately aware of their respective rights and obligations, and thereby avoid unnecessary costs, monetary or otherwise, when utilising the processes set by the [protocols and undertaking].[73]

The ACCC also considered whether the protocols represented an appropriate balance between providing access seekers with sufficient certainty and clarity and the bulk handlers with sufficient flexibility in their management of Port Terminal Services. The ACCC recognised that a flexible and pragmatic approach was required to maintain the overall efficiency of the system.[74] The ACCC is of the view that the same considerations taken by the ACCC in the 2009 Undertakings assessment process are relevant in assessing ABA's Proposed Undertaking, having regard to section 44ZZA(3).

The ACCC considers that a key concern with respect to ABA's Loading Protocol relates to capacity allocation and particularly whether ABA can discriminate in favour of its up-country supply network or the trading interests of related entities. To do so would not be in the interests of access seekers, which is a factor under s 44ZZA(3) of the Act that the Commission must have regard to in deciding whether to accept an undertaking.

As noted in the decision to accept GrainCorp's 2011 Undertaking, the ACCC also considers economically inefficient initial allocation of capacity can be corrected by existing or proposed in-season adjustments to capacity utilisation, where there is no ongoing or significant capacity constraint, and these mechanisms include:

- flexibility for users to move the time and/or location of bookings
- incentives for shippers to return unwanted capacity
- measures to discourage or prevent hoarding
- transferability of capacity between users.[75]

As a general approach, the FCFS system can provide a framework for capacity allocation that does not facilitate discrimination by ABA in favour of its up-country supply chain or the trading interests of related entities. However, whether that is the case in practice depends on the provisions of the ABA's Loading Protocol and how ABA applies it.

One of the factors that the Commission must have regard to in deciding whether to accept the undertaking is the objects of Part IIIA of the Act (refer s 44ZZA(3)(aa)). One of those objects is to provide a framework and guiding principles to encourage a consistent approach to access regulation in the industry (refer s 44AA(b)). The ACCC considers, with particular consideration of the market characteristics in which ABA operates, that the conditions for effective capacity allocation considered in relation to

[73] ACCC, *GrainCorp Decision to Accept*, 29 September 2009, pp. 289-90.
[74] ibid, p. 290.
[75] ACCC, G*rainCorp Operations Limited Port Terminal Services Access Undertaking: Decision to Accept*, 22 June 2011, p. 26.

the 2009 Undertakings should be reflected in ABA's implementation of the FCFS system.

The ACCC notes that the Loading Protocol proposed by ABA for inclusion in the Proposed Undertaking is less detailed overall than the protocols contained in the 2009 Undertakings. The ACCC considers that it is not necessary for all the port operators protocols to be of the same detail, but considers that if provisions are drafted too broadly, this may inadvertently give rise to practices that are not appropriate. In ABA's case, despite the views given by stakeholders regarding the lack of clarity in the Loading Protocol, the ACCC has not been made aware of any problems at MPT that have arisen as a result. However, the ACCC considers that the lack of detail in the Loading Protocol does create uncertainty around how capacity allocation functions in practice

While the ACCC understands that MPT is operating well in practice, the Loading Protocol, in part, does not properly articulate its intended application. The ACCC, in considering the interests of access seekers as required under s. 44ZZA(3)(c), takes the view that the Loading Protocol should be reworded to better express its intended application. Specific aspects of ABA's approach and how they relate to these key conditions for an effective capacity allocation method are discussed in the sections below.

The ACCC considers that a consistent regulatory approach to the provision of sufficient certainty in the Loading Protocol is appropriate having regard to s. 44AA(b) of the Act, and that, while the actual provisions may be different, a similar level of certainty should be required for the protocols of all port terminal services access undertakings.

ABA has redrafted its Loading Protocol to more accurately reflect the arrangements in place at MPT, in its draft revision. The ACCC considers that the revised Loading Protocol provides greater clarity and certainty to access seekers regarding the terms of access. As set out in the following sections, the ACCC considers that the revisions are largely appropriate, subject to consideration of the views of interested parties – in particular, views regarding the operational aspects of the revised Loading Protocol.

The ACCC notes the submission of the Victorian Freight and Logistics Council (**VFLC**) calling for the formation of a grain supply chain co-ordinator 'to work on grain logistics optimisation'.[76] The ACCC recognises the value of supply chain co-ordinators and anticipates that ABA would co-operate with the activities of a co-ordinator, should a body be formed.

5.3.3 Information regarding available capacity

A fundamental requirement of efficient use of the port infrastructure across the bulk wheat export industry is the timely availability of information for access seekers regarding capacity at the port terminal. Relevant information is the total capacity of the port terminal capacity, bookings of that capacity and remaining available capacity.

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[76] Victorian Freight and Logistics Council, 'Submission to the ACCC's Draft Decision on GrainCorp's Proposed 2011 Undertaking', 21 April 2011, p. 1.

ABA's Proposed Undertaking requires it to comply with the Continuous Disclosure Rules under the WEMA, including the publication of its shipping stem, which will be available on ABA's website. However, the ACCC notes that clause 10.1(b) of the Proposed Undertaking requires ABA to update the shipping stem information published on its website within 24 hours of a change to the shipping stem, while s. 24(4)(c) of the WEMA requires the shipping stem to be updated each business day.

Under s. 44ZZA(3)(e) the ACCC may have regard to other matters that it considers relevant in deciding whether to accept an undertaking. As explained in its decisions regarding the port terminal services undertakings it accepted in 2009 the ACCC is of the view that the provisions of the WEMA are relevant matters.[77] Therefore, the ACCC takes the view that clause 10.1(b) of the Proposed Undertaking is not likely to be appropriate and that the clause should conform to the provisions of the WEMA, specifically that the shipping stem is to be updated each business day.

In its draft revision, ABA has amended clause 10.1(b) to provide that the shipping stem will be updated each business day, as prescribed by the WEMA.

The ACCC considers that the Proposed Undertaking should require ABA to publish information regarding available capacity.

Information provided on available capacity allows access seekers to assess the availability of capacity against their export needs and to make bookings in required months before all slots are booked. This information is clearly in the interest of access seekers, but it also promotes the efficient use of the infrastructure, having regard to s. 44AA(a) of the Act. Further the ACCC notes that the two other Port Terminal Operators using a 'first come first served' approach, GrainCorp and Viterra, publish 'Available Capacity' tables on their website.

The ACCC considers that, having regard to s. 44ZZA(3)(c), clause 11.1 of ABA's Proposed Undertaking is appropriate as it requires ABA to publish information on cargo nominations and nominated monthly export baseline capacity. The ACCC considers this will provide access seekers with clarity in the specification and quantification of the capacity available to be booked by access seekers.

Further, having regard to the interests of access seekers, the ACCC considers it appropriate that clause 11.1 requires ABA to publish information regarding stocks at port.

The ACCC considers that a consistent regulatory approach to provision of information on available capacity and stocks at port is appropriate, having regard to s. 44AA(b) of the Act. The ACCC considers that providing the same level of information regarding capacity and stocks at port at the same time, to all exporters seeking to export bulk wheat, is in the interests of access seekers in accordance with s. 44ZZA(3)(c) of the Act. However, the ACCC does not consider that it is necessary for ABA to publish information about the top three grades of stock at port as ABA operates a just-in-time port and has only a small number of up-country storage facilities.

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77 ACCC, *GrainCorp Decision to Accept*, 29 September 2009, p. 22.

5.3.4 Initial capacity allocation (bookings)

There are a number of aspects of the Loading Protocol, as currently drafted, in which there is uncertainty around the capacity booking and allocation process. These are outlined below.

Opening date for the shipping stem

ABA published a notice on its website on 18 March 2011 specifying that it considered it inappropriate to take bookings for the 2012 season while the ACCC was conducting the assessment of the Proposed Undertaking. ABA qualified its position, stating that if the Proposed Undertaking assessment was not completed by mid-2011, it would reconsider its position on opening the shipping stem.[78] ABA reiterated this position with a further notice to exporters on 21 June 2011.[79]

ABA does not include provisions for an 'opening date' for its shipping stem in the Proposed Undertaking. The ACCC notes the issues experienced in South Australia with bookings for Viterra's port terminal services in 2012, where in excess of 6 million tonnes of grain has been nominated for export after 30 September 2011. With respect to the 2012 booking, exporters in South Australia raised concerns with the lack of clarity regarding whether Viterra's shipping stem was open or not.[80] Viterra does not have an opening date for its 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 ACCC acknowledges ABA's efforts to prevent confusion for exporters using MPT, by publishing notices to exporters regarding what capacity is available to be booked and for what time period. However, the ACCC considers with regard to s. 44ZZA(3)(c) of the Act, that ABA's Proposed Undertaking should include an opening date for the shipping stem. In failing to specify an opening date in the Proposed Undertaking, ABA may not be providing sufficient certainty to access seekers regarding the operation of the booking system at MPT.

The ACCC considers that ABA should specify an opening date for the shipping stem each year and announce the opening date in a timely way, which affords access seekers sufficient time to consider their exporting requirements prior to the opening of the stem. Further, setting an opening date for the shipping stem may facilitate more efficient use of the port infrastructure.

In its draft revision, ABA has inserted a new requirement in clause 6 of the Loading Protocol, which requires it to provide at least 10 business days notice of the opening of the shipping stem for each year. The ACCC considers this to be appropriate.

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[78] ABA, 'Notice to exporters', 18 March 2011, viewed 4 May 2011, http://www.bulkalliance.com.au/ShippingStem/tabid/154/Default.aspx.

[79] ABA, 'Notice to exporters', 21 June 2011, viewed 27 June 2011, http://www.bulkalliance.com.au/Clients/Notice-Shipping-Bookings.

[80] Exporter Responses to ACCC Request for Information on Viterra Operations Limited, available at the ACCC website: http://www.accc.gov.au/content/index.phtml/itemId/993330.

Implementation of FCFS

The ACCC has concerns around ABA's implementation of the 'first in, first served' approach to booking arrangements and capacity allocation in the drafting of its Loading Protocol. Clause 12 of the Loading Protocol states that:

> In general, Intent to Ship Advices will be dealt with in the order that they are received, and, all other matters being equal, the earlier Intent to Ship Advice will be given priority over later Intent to Ship Advices.

Currently, the circumstances in which ABA would not give an earlier booking request priority over a later request are not specified.

The ACCC is concerned that the manner in which Intent to Ship Advices are dealt with is not sufficiently certain, which is not in the interests of access seekers. The ACCC considers that any exceptions to the FCFS principle should be clearly stated. The ACCC considers that it would be more appropriate for ABA to remove the words 'in general' from the clause in order to more accurately reflect a FCFS approach.

The ACCC notes that it is unlikely that 'all other matters' would be equal with respect to two separate booking requests, and that in practice the wording in Clause 12 gives ABA a large degree of discretion to determine the priority given to booking requests. The ACCC considers that it is appropriate for ABA to reserve some discretion to consider all relevant factors when determining whether to accept or reject a booking request. However, the ACCC also notes that ABA has listed the factors it will consider in deciding to accept or reject an Intent to Ship Advice in Clause 11 of the Loading Protocol, being:

- Existing shipping intentions/nominations
- Un-allocated capacity at MPT
- Whether the Client is an Accredited Wheat Exporter
- Whether the Client has executed a Storage and Handling Agreement.

The ACCC considers that these listed factors are relevant and should reasonably be taken into account by ABA when deciding whether to accept a booking. However, based on the brief nature of the Loading Protocol, the list may not be exhaustive. It is the ACCC's preliminary view that, having regard to s. 44ZZA(3)(c), clause 12 is more likely to be appropriate if it provides that ABA will assess each booking request individually in chronological order of receipt, and that each assessment will take into account the criteria listed in clause 11.[81]

ABA has amended clauses 11 and 12, which are renumbered as clauses 12 and 13 respectively in the draft revision. Clause 13 provides that subject to clause 12, Intent to Ship Advices will be dealt with in the order that they are received. Clause 12 has been broadened to provide that ABA may consider other matters it considers to be relevant in deciding to accept or reject an Intent to Ship Advice.

[81] Similarly, GrainCorp's 2009 and 2011 Undertaking deal with booking requests in chronological order.

The ACCC considers that the proposed amendments are appropriate as ABA has more clearly set out that a FCFS system is in operation. However, the ACCC seeks input from stakeholders on whether the draft revision makes the process sufficiently clear.

Certainty for access seekers

The Loading Protocol and Intent to Ship Advice template are not clear regarding specification of the time period for which a booking is made. ABA has informed the ACCC that slots are booked for a time period of one month. The ACCC's preliminary view, having regard to s. 44ZZA(3)(c), is that this ambiguity is not appropriate and ABA should specify the time period in the Loading Protocol in order to provide sufficient certainty to access seekers.

There is also uncertainty around the application of clause 9 and when a client is required to specify the vessel for a booking. The Vessel Nomination form is due 21 days from the loading date, and the original Intent to Ship advice is due 30 days from the loading date. However, clause 9 of the Loading Protocol states that 'TBA' vessel notifications will not be accepted. ABA has stated that:

> The purpose of clause 9 is to allow ABA to reject an Intent to Ship Advice which has not been completed in respect of the information required in accordance with Annexure 1, but instead purports to leave some or all information to be provided later by writing "To be Advised" or "TBA". This is not in any way inconsistent with clauses 8 or 20.[82]

Bookings with a vessel listed as 'TBA' do currently appear on the shipping stem. The ACCC considers that it is appropriate for ABA to require exporters to provide necessary information within certain timeframes to enable ABA to effectively manage capacity at the port terminal. This reflects ABA's legitimate business interest, which is a factor that the ACCC must consider under s. 44ZZA(3) of the Act when deciding whether to accept an undertaking. However, the ACCC considers that as currently drafted it is not clear whether clause 9 relates to the 'Vessel Nomination' form in clause 20 or the 'Intent to Ship Advice' form in clause 8. The ACCC considers that ABA should clarify when a client is required to specify the vessel by removing the ambiguity around the interaction of clauses 8, 9, and 20 in the Loading Protocol.

The due dates for the Intent to Ship Advice and the Vessel Nomination forms are both calculated from the 'loading' date, which ABA has stated is established in accordance with clauses 23-25 of the Loading Protocol. It is therefore determined by ABA following acceptance of a Vessel Nomination and would be unknown to the exporter at the time they are submitting the Intent to Ship Advice and Vessel Nomination forms. The ACCC considers that this is not appropriate having regard to s. 44ZZA(3)(c). ABA should define the 'loading' date and ensure that exporters have sufficient certainty regarding the timeframes they must meet in order to access the port terminal services.

Clause 13 of the Loading Protocol requires ABA to provide the Client with an acceptance notice and invoice where it accepts an Intent to Ship Advice. However, the Loading Protocol currently does not specify what action ABA must take if it wishes to reject an Intent to Ship Advice. Moreover, while clause 10 of the Loading Protocol specifies that ABA must decide whether to accept or reject an Intent to Ship Advice

[82] ABA, 'Response to ACCC Request for Information', 29 April 2011, p. 3.

within five business days of receipt, the Loading Protocol does not specify the time period within which ABA must advise the access seeker of its decision. Scrutiny of ABA's shipping stem shows that in some instances acceptance of a nomination has been on the day the nomination was received while, in other cases, it appears that more than two months has lapsed between the nomination and acceptance.

The ACCC's preliminary view is that this uncertainty is not appropriate and that, having regard to s. 44ZZA(3)(c), the Loading Protocol is more likely to be appropriate if it is clear as to the actions ABA must follow, when responding to an Intent to Ship Advice, including the timing of those actions.

In its draft revision, ABA has made a number of amendments to address the ACCC's concerns, as outlined above:

- Clause 8, renumbered as clause 10, no longer links the completion of the Intent to Ship Advice and payment of the booking fee to a 30 day period prior to loading.
- Clause 9 of the Loading Protocol, as submitted with the Proposed Undertaking, and which provided that '"TBA" vessel notifications will not be accepted' has been removed.
- Clause 20, renumbered as clause 21, provides that written nomination of a vessel name must be received at least 15 business days prior to the vessel's ETA. Previously, the Vessel Nomination was required 21 days prior to loading. While a new clause 22 provides that ABA, at its discretion, may consider Vessel Nominations in a shorter period.

The ACCC considers that the amendments proposed by ABA in its draft revision are appropriate, as ABA has addressed the ACCC's concerns. Specifically, the draft revised Loading Protocol has clarified the interaction between lodging an Intent to Ship Advice and the loading date, and have improved the process regarding Vessel Nomination.

5.3.5 Capacity management and cargo accumulation

Due to the limited storage space available at Melbourne Port Terminal, ABA operates a 'just–in-time' approach to cargo accumulation. It appears that storage of cargo at port is a key constraint on ABA's throughput capacity. Management of storage capacity is therefore likely to be an essential aspect of overall capacity management. The ACCC considers that the Loading Protocol as currently drafted does not provide sufficient detail around how grain is accumulated at port, how storage capacity is allocated to clients and how vessel loading priority is determined.

Clause 31 of the Loading Protocol states that ABA reserves the right not to fully accumulate a cargo in order to maximise client vessel turnarounds where multiple vessels are arriving in a short time frame. The ACCC recognises the need for ABA to have the ability to manage port operations to achieve supply chain efficiencies, but notes that a booking on the ABA stem should provide shippers with a reasonable degree of certainty regarding the booked services. ABA has informed the ACCC that:

> The most likely circumstances whereby a cargo will not be fully accumulated will be a customer's inability to access sufficient land transport to deliver the

> grain to the terminal in a timely way, causing potential delays to the shipping stem. The result may be that the cargo loaded is less than the quantity booked, or that loading is interrupted, depending on the circumstances. ABA's goal is to balance maximum efficiency of the terminal operation against fulfilling all customers' requirements, in an operating context that has many necessarily variable factors.[83]

The ACCC considers that it is appropriate for ABA to have reasonable discretion not to fully accumulate a cargo where the client fails to accumulate grain within agreed timeframes. The ACCC also notes that ABA has inserted a new clause 2 in its revised Loading Protocol in order to provide additional certainty to access seekers:

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

This clause, in conjunction with the non-discrimination and no hindering access clauses in the Proposed Undertaking, should provide sufficient certainty to access seekers and prevent unreasonable exercise of this discretion by ABA.

The ACCC considers that 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. The ACCC considers it would be appropriate for ABA to 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.

The Loading Protocol also does not provide sufficient information around how ABA will determine vessel loading priority. In its draft revision, ABA has included a list of factors it will consider in determining the order of vessel loading. The ACCC considers that this is appropriate as it balances the interests of ABA in having sufficient discretion to efficiently manage the port terminal, in accordance with s. 44ZZA(3)(b), and the interests of access seekers in having sufficient transparency regarding the terms of access, in accordance with s. 44ZZA(3)(c).

The Loading Protocol does not specify clients' obligations with respect to storage and removal of residual grain following the execution of a booking. The ACCC considers it would be appropriate for ABA to specify the process and timeframes for storage and removal of residual grain.

It is the ACCC's preliminary view that, having regard to efficient use of infrastructure as set out in s. 44AA(a) and the interests of access seekers set out in s. 44ZZA(3)(c) of the Act, the Proposed Undertaking is unlikely to be appropriate unless the Loading Protocol provides greater certainty for wheat exporters regarding provision of port terminal services in accordance with bookings made, by addressing the issues outlined above.

ABA, in its draft revision, has inserted additional clauses into the Loading Protocol to address the ACCC's concerns. Specifically, ABA has inserted provisions detailing the requirement on the client to ensure the nominated vessel has passed the surveys required by law and the consequences for the client, regarding its booking with ABA,

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83 ABA, 'Response to ACCC Request for Information', 29 April 2011, pp. 3-4.

where the client's vessel fails survey (clauses 41-45). Further, ABA has inserted a clause requiring a client to remove residual grain from MPT, at the client's cost (clause 34). The ACCC considers, having regard to ABA's legitimate business interests and the interests of access seekers set out in subsections 44ZZA(3)(a) and (c), that ABA's proposed clauses are appropriate, as the additional drafting provides clarity regarding client obligations.

5.3.6 Flexible Arrangements

With respect to the third condition of effective capacity management that ABA should meet, the ACCC notes that there are many factors that can impact exporter plans. These include disruption to the supply chain—from weather conditions that impact harvest timing and grain quality through up-country storage and transport to port, as well as events at port.

Flexible arrangements, such as the ability to change the elevation period or split a cargo, are important in ensuring an effective capacity allocation system. Flexibility in the use of booked capacity enables bulk wheat exporters to make changes to shipping arrangements in light of supply chain developments not in accord with expectations at the time a booking was made and supports efficiency in the utilisation of port capacity. However, this benefit is likely to be limited to periods when ports are operating with spare capacity and ABA is therefore able to accommodate requests from shippers to move shipping dates into later elevation periods or to split cargos between elevation periods.

Clause 19 of ABA's Loading Protocol states that ABA requires three months notice prior to the vessel's ETA in order to defer or split a booking. However, an initial Intent to Ship Advice must be received only 30 days in advance. The ACCC considers that this requirement is not likely to be appropriate as a 3-month period is unlikely to afford sufficient flexibility to shippers. Information provided by ABA indicates that flexibility to split and defer bookings inside the 3-month window does operate in practice. ABA received several requests by clients to defer and split bookings which were accepted by ABA, and were not received three months in advance.

The ACCC also notes that ABA has no time limit for its decision on whether to accept a request to defer or split a booking, and considers that such a time limit should be imposed.

As discussed in section 5.3.4 there is ambiguity in ABA's Loading Protocol regarding when a vessel is to be nominated for a booking. The proposed Loading Protocol also does not specify whether ABA will allow a Client to substitute a nominated vessel once it has been nominated in accordance with clause 20 of the Loading Protocol. In the context of the need for flexible arrangements, the ACCC considers that it would be more appropriate for ABA to allow Clients to substitute nominated vessels within a reasonable timeframe prior to execution of the booking, and to specify in the Loading Protocol what timeframes and limitations would apply.

The ACCC considers that the flexibility permitted for shippers within ABA's Loading Protocol is unnecessarily limited and unclear. However, information provided by ABA indicates that flexible arrangements do operate effectively in practice. It is the ACCC's preliminary view that the Proposed Undertaking is not likely to be

appropriate unless further detail about how flexible arrangements actually function in practice is included in the Loading Protocol, in order to ensure sufficient transparency for access seekers regarding the options available to them.

In its draft revision, ABA has amended clause 19 of the Loading Protocol, renumbered as clause 20, which provides that three months written notice prior to the vessel's ETA is required to defer or split a booking. However, ABA, at its sole discretion, may consider requests of less than three months. The ACCC considers that the amended clause is appropriate, as it more accurately reflects how ABA may deal with such requests in practice.

In its draft revision, ABA has also proposed to amend clause 18 (renumbered as clause 19 in the revised Loading Protocol). The original clause provided:

> If the nominated or actual tonnage loaded is lower than that initially nominated then ABA will rebate a proportional amount of the Booking Fee paid but in any case it will not refund more than 10% of the Booking Fee.

In its revised Loading Protocol, the clause now provides:

> 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.

With regard to changes proposed to the Loading Protocol in the draft revision, ABA has submitted that it:

> endeavoured to provide much more certainty as to the process and how decisions will be made by ABA, corresponding to what currently happens in practice (and will continue under the Undertaking).[84]

While the ACCC did not propose this change, the ACCC takes the view that the amendment is not inappropriate and, insofar as it reflects what actually occurs in practice at the port terminal, may be more appropriate than the originally submitted provision. In addition, the ACCC considers that the booking fee may act as a greater disincentive against speculation and hoarding of capacity if it is entirely non-refundable, thereby promoting the efficient use of infrastructure.

5.3.7 Capacity management during peak periods

The ACCC considers that it is in the interests of access seekers that access to capacity is provided on a fair and efficient basis; and it is in the public interest that port terminal services are used in an economically efficient manner and that competition in upstream and downstream markets is promoted. Implementation of an auction system is warranted if existing arrangements do not provide fair and efficient access or do not result in economically efficient outcomes.

While the ACCC considers that there is a strong economic efficiency argument for the use of auctions to allocate scarce capacity, the ACCC also recognises that a FCFS system may be appropriate having regard to the matters listed in s. 44ZZA(3) if the

[84] ABA, 'Letter to ACCC regarding Australian Bulk Alliance Port Terminal Services Access Undertaking', 12 July 2011, p. 3.

arrangements include appropriate safeguards to discourage discriminatory or hindering behaviours on the part of the access provider.

Bookings under a FCFS system mean that, in many cases, capacity bookings are made well before harvest yields and before traders have finalised sales. As a consequence eventual export requirements may vary from those anticipated at the time bookings were made. When there is spare capacity on the shipping stem this need not be a problem for exporters provided that the port operator allows shippers flexibility to change shipping arrangements to meet revised needs. As noted above, the intent of the Loading Protocol appears to be to provide flexibility for shippers but the Loading Protocol in its current form is not clear.

However, flexibility allowed under the Loading Protocol is unlikely to be effective at times of peak capacity at a port terminal as the operator may not have capacity to accommodate a change to a shipper's requirements. The likelihood then is that if an exporter is unable to execute a booking it will not be possible for the booking to be moved. Instead, the booked elevation capacity may go unused while other exporters, who may have been able to utilise the slot, are unable to do so.

Moreover, there is no incentive for the exporter to acknowledge a problem executing a booking early and return the capacity to ABA as the booking fee is still forfeited. Rather, the incentive is for the exporter to persist until the time allowed to execute the booking expires.

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

The ACCC considers that allowing transfer of slots may result in more efficient use of capacity at peak times by reducing the likelihood of capacity going unutilised and facilitating the use of capacity by those who value it most highly. Under a system where commercial transfer of a slot booking is permitted, such transfers may be at a premium or discount to the original booking fee, depending on demand for, and availability of slots as the confirmed elevation period of the booked slot approaches. In either case, the transfer is ensuring the capacity is utilised and is going to the highest value in use.

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

As discussed in section 5.3.1.2 in relation to the appropriateness of the FCFS approach, ABA's particular circumstances and the market in which it operates are characterised by the following:

- Strong domestic demand on the east coast which alleviates demand for export capacity at the port terminals
- Competition in the provision of Port Terminal Services in Victoria, particularly between ABA's MPT and GrainCorp's Geelong port terminal, and
- Operational separation between ABA and Emerald means that the non-refundable $5 booking fee is more likely to provide Emerald with an appropriate disincentive to overbook the stem.

The absence of significant capacity constraints and presence of disincentives to overbook indicates that requiring transferability may not be necessary for ABA. Further reasons why transferability may not be required for ABA are that:

- As MPT is one of three ports operating in Victoria, the benefits arising from transferability of capacity would be, in part, dependent on capacity at the ports operated by GrainCorp at Geelong and Portland also being transferable as this would increase the substitutability between capacities at the three ports thus promoting competition. However, capacity at GrainCorp's ports is not currently transferable.
- ABA operates a single port terminal with annual capacity significantly less than other port operators. As a consequence, the potential gains arising from transferability of capacity booked at MPT is not as significant as that arising if the arrangement was in place for larger port operators.
- Further, information provided by ABA indicates that MPT has not been operating at full capacity, even during the 2010-11 season when grain crops have been large by comparison to previous years. Capacity constraints therefore do not warrant transferability.

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

5.3.8 Dispute resolution in the Loading Protocol

The dispute resolution process in the Loading Protocol proposed by ABA is similar to that contained in the protocols attached to Viterra's 2009 Undertaking.

The ACCC considers that it is not appropriate that ABA has not specified a timeframe for the 'final decision' notice issued by ABA's Chief Executive Officer (or alternative). To ensure that the dispute resolution process reflects the interests of access seekers in achieving a timely response to disputes relating to access to the service, the ACCC considers that ABA should specify a reasonable timeframe for its decision.

The ACCC considers that, having regard to the object of Part IIIA to encourage a consistent approach to access regulation across the industry, which is a factor the ACCC is required to consider under s 44ZZA(3)(aa), a consistent regulatory approach

to dispute resolution in the protocols of bulk wheat port terminal operators is appropriate.

ABA, in its draft revision, has amended clause 38, renumbered as clause 49, which now provides that ABA's Chief Executive Officer (or alternative) will make a decision on a dispute 10 business days after the meeting held between ABA's Chief Executive Officer (or alternative) and the client. The ACCC considers the inclusion of a 10 business day decision making period to be appropriate.

The ACCC seeks views from stakeholders on whether the dispute resolution provisions in the Loading Protocol are sufficiently clear and certain.

5.3.9 Variation of the Loading Protocol

The provisions for variation of the Loading Protocol contained in the Proposed Undertaking largely mirror those of the 2009 undertaking submitted by GrainCorp.

This section focuses on the following issues:

- the comprehensive nature of the Loading Protocol
- the process for varying the Loading Protocol
- the ACCC's role in the process for varying the Loading Protocol.

During the operation of the 2009 undertakings, the protocols of GrainCorp, Viterra and CBH have gone through the variation process set out in each of the respective undertakings. Different issues have arisen with the variation processes undertaken by each of the port operators to date.

The ACCC has considered the experience of the previous variation processes under the 2009 Undertakings in assessing the Loading Protocol submitted by ABA. The ACCC considers this to be appropriate given the requirement under section 44ZZA(3)(aa) to have regard to the objects of Part IIIA of the Act, and that the object of Part IIIA of the Act specified in s. 44AA(b) is to:

> provide a framework and guiding principles to encourage a consistent approach to access regulation in each industry.

Further, the ACCC considers that the 2009 Undertakings are a relevant matter to take into consideration in assessing ABA's Proposed Undertaking, in accordance with s. 44ZZA(3)(e).

5.3.9.1 The comprehensive nature of the Loading Protocol

The ACCC considers that clause 10.1(a) of the Proposed Undertaking, (which incorporates the Continuous Disclosure Rules as set out in s. 24(4) of the WEMA), requires the published Loading Protocol to be comprehensive.

During the operation of its 2009 Undertaking, in January 2010 GrainCorp published Port Terminal Protocols Guidelines (Guidelines) to operate alongside its Port Terminal Services Protocols. Stakeholders expressed concerns to the ACCC about the introduction of the Guidelines and the ambiguity of the Guidelines' legal status. The

effect of the Guidelines was to put in place additional or alternative arrangements that may impact access to port terminal services but which did not form a part of the access undertaking. In March 2010, the ACCC had further discussions with GrainCorp, which resulted in GrainCorp agreeing to proceed with a formal variation of the Port Terminal Services Protocols in accordance with the terms of its 2009 Undertaking and remove the Guidelines. However, there was a lengthy period from GrainCorp's initial publication of the Guidelines on its website to the formal variation process, which commenced on 21 April 2010 and concluded in May 2010.

Similarly, in September 2010, Viterra conducted a variation of its Port Loading Protocols where it sought to introduce 'Explanatory Notes' to be read alongside the Port Loading Protocols. On 25 October 2010, Viterra released a final variation notice, which set out 'new' proposed variations including that the key components of the Explanatory Notes were moved from the Explanatory Notes into the actual Port Loading Protocols. Viterra stated that 'This was in direct response to feedback provided about the desire to avoid confusion about the status of the Explanatory Notes'.

The ACCC considers, in the case of all port operators, that it is preferable to avoid the publication of ancillary documents to be read alongside the protocols, as this may give rise to uncertainty for access seekers. To ensure ongoing clarity and certainty, the ACCC takes the preliminary view that subclause 10.1(a) of the Proposed Undertaking should be amended to provide that the Loading Protocol must be, and continue to be, a comprehensive statement of ABA's policies and procedures for managing demand for the port terminal services. The ACCC considers a consistent approach to regulation having regard to s. 44AA(b) is appropriate on this issue.

ABA's draft revision includes a new clause 10.2(b), which provides that:

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

The ACCC considers that ABA's insertion addresses the ACCC's concerns and is therefore appropriate.

5.3.9.2 Process for varying the Loading Protocol

In 2009 the ACCC accepted a protocol variation mechanism based on an industry consultation process rather than a formal ACCC consultation process. In its Further Draft Decision on the 2009 Undertakings the ACCC stated that it would monitor the success of this variation model and take its findings into account in any future review of access undertakings.[85]

The ACCC recognised at that time that the model accepted for variation of the protocols carried some risks as the ACCC would not review all proposed amendments to determine their appropriateness. The ACCC further noted that this risk was mitigated by:

[85] ACCC, *GrainCorp Decision to Accept*, 29 September 2009, p. 224.

- the inclusion of a robust consultation mechanism;
- the inclusion of a provision allowing the ACCC to treat a breach of the amended protocols as a breach of the Undertaking; and
- the recommendation of a robust non-discrimination provision and the inclusion of a provision that any variation to the protocols must be made in accordance with and subject to the non-discrimination provisions of the Undertaking.

As mentioned above, in assessing the appropriateness of the variation process contained in the Proposed Undertaking, the ACCC has taken into account the experience of the bulk handlers with 2009 Undertakings in making variations to their protocols. Based on this experience, the ACCC considers that there are a number of minimum standards that should apply to a variation process, in order to ensure an efficient, meaningful and transparent consultation process. The ACCC notes that the industry wide approach it is taking with regard to the protocols variation process is consistent with s. 44AA(b), which promotes consistency in access regulation across the industry.

Consistent with the Decision to Accept GrainCorp's 2011 Undertaking and the ACCC's industry wide approach,[86] the minimum standards that the ACCC considers are necessary for an efficient, meaningful and transparent variation process are:

- a draft variation and an explanation for the changes, circulated to interested parties and the ACCC
- a reasonable consultation timeframe, which allows for meaningful consultation between industry participants and the port operator
- an obligation on the port operator to consider submissions in good faith, with submissions to be made publicly available
- an ability for the port operator to amend the draft variation based on consultation, without having to withdraw the draft variation and start another process
- a reasonable period of time following publication of a finalised variation before the variation takes effect.

The ACCC considers that these minimum standards should apply consistently across the industry as discussed above. While minimum standards applying across the industry will provide a consistent approach, the ACCC acknowledges that the application of these standards may not necessarily result in identical variation processes.

The ACCC has assessed the variation process in the Proposed Undertaking against these proposed minimum standards in the discussion that follows. While the variation process meets some of these standards, the ACCC considers that some changes are necessary.

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[86] ACCC, *GrainCorp Operations Limited Port Terminal Services Access Undertaking: Decision to Accept*, 22 June 2011, p. 33.

A draft variation and an explanation for the changes, circulated to interested parties and the ACCC

The ACCC takes the preliminary view that clause 10.3(a)(iii)(A) and (B) of ABA's Proposed Undertaking fulfils this minimum standard.

A reasonable consultation timeframe, which allows for meaningful consultation between industry participants and the port operator

ABA's Proposed Undertaking allows for a 10 business day consultation period. The ACCC's preliminary view is that this is appropriate.

An obligation on the port operator to consider submissions in good faith, with submissions to be made publicly available

ABA's Proposed Undertaking requires ABA to actively consider submissions in good faith. The ACCC takes the preliminary view that this is appropriate.

ABA's Proposed Undertaking does not provide for the publication of written submissions received during the variation process. The ACCC takes the preliminary view that in the interests of transparency, the Proposed Undertaking is unlikely to be appropriate unless it contains a provision specifying that ABA must publish, on its website, written submissions received during the variation process consultation.

An ability for the port operator to amend the proposed variation based on consultation, without having to withdraw the current variation and start another process

The ACCC takes the view that, while not explicitly provided for, the Proposed Undertaking does allow ABA to consider responses from interested parties and amend its proposed variation in response to consultation before publishing the final variation notice. However, problems have arisen with the variation processes of other operators, resulting in the need for a variation process to be restarted to accommodate desired changes to a proposed variation. The ACCC is concerned that this is not in the interests of efficiency and that port operators should be able to amend a proposed variation, taking into account submissions made during the consultation process.

In the interests of certainty and transparency for users, the ACCC's preliminary view is that the Proposed Undertaking should explicitly recognise ABA's ability to amend a proposed variation based on consultation, without commencing a new variation process.

A reasonable period of time following publication of a finalised variation before the variation takes effect.

Clause 10.3(a)(iv) of ABA's Proposed Undertaking provides that the variation must be published at least 30 days prior to the date on which it is to become effective. The ACCC's preliminary view is that the current proposed timeframe is likely to be appropriate.

Summary of required changes

The ACCC takes the preliminary view that ABA's Proposed Undertaking is unlikely to be appropriate unless it is amended to reflect the following:

- publication, on ABA's website, of written submissions received during the variation process consultation

- a provision explicitly recognising ABA's ability to amend a proposed variation based on consultation, without commencing a new variation process.

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

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

The ACCC considers that ABA's draft revision addresses the ACCC's concerns with the variation process and is therefore appropriate.

5.3.9.3 The ACCC's role in the process for varying the Loading Protocol

In the Final Decision on 2009 Undertakings, the ACCC considered that it was appropriate for port operators to retain flexibility for varying the protocols without ACCC input on the appropriateness of the proposed variation, noting that the variation mechanism could be strengthened in any future undertaking, if necessary.[87]

The ACCC acknowledges that the protocols are operational and, as such, a degree of flexibility is required to ensure efficient operations at port. However, the wide scope of the protocols means that significant aspects of port operations, such as capacity allocation, can be altered through a protocol variation process without the ACCC having a role. The ACCC remains of the view that port operators require sufficient flexibility to manage operations at port, however in certain limited circumstances the ACCC considers that the lack of regulatory oversight is inappropriate. These limited circumstances are where:

- the proposed variation is material; and

- the proposed variation gives rise to concerns under either the anti-discrimination (clause 6.4) and/or the no hindering access (clause 10.4) provisions of the undertaking.

If these circumstances arise, then the ACCC may send a written notice to the port operator outlining its concerns, with reasons. Upon receipt of the notice, or earlier, the port operator must withdraw the proposed variation. The ACCC considers it necessary to support this notice making power with information gathering provisions. This issue is discussed in section 4.1.6.

[87] ACCC, *GrainCorp Decision to Accept*, 29 September 2009, p. 289.

As the ACCC considers that certainty, flexibility and timeliness regarding the operation of the protocols are of critical importance, given the protocols set out how the port operates, an approval role in respect of each proposed variation is inappropriate. The suggested role would be specifically limited to the circumstances set out above.

The ACCC takes the preliminary view that the undertaking is unlikely to be appropriate unless it includes:

(a) the ability of the ACCC to:

- gather the necessary information to assess whether the 'limited circumstances' exist; and
- issue a notice that the proposed variation raises concerns in relation to the port operator's anti-discrimination and/or no hindering access obligations.

(b) an obligation on the port operator to withdraw the proposed variation upon receipt of the notice.

This approach to an ACCC role in the variation process is appropriate for all port terminal services access undertakings. In proposing this consistent approach in relation to the protocols across the industry, the ACCC has had particular regard to s. 44ZZA(3)(aa) of the Act.

5.3.9.4 The mechanics of an ACCC role in the Loading Protocol variation process

How the proposed ACCC role would be applied to the variation process

Where the ACCC has concerns with the port operator's proposed variations, it would raise those concerns with the port operator, and access seekers if appropriate, prior to issuing a notice.

In practice, the ACCC considers that the assessment and notification would be applied within the current timeframe for variation. Clause 10.3(a)(iv) of the Proposed Undertaking provides that the variation must be published at least 30 days prior to the date it is to become effective (the effective date). As noted earlier, the ACCC is acutely aware of the importance of timeliness in the variation process and the consideration of operational certainty for the port operator and access seekers.

The ACCC considers that it would be required to issue the notice no less than ten days before the effective date, taking into account the overall period of time specified for the variation process in the Proposed Undertaking. Such a notice would include reasons.

Effect of the proposed ACCC role once exercised

The effect of the ACCC issuing a notice and the proposed variation to the protocols not taking effect will depend on whether the notice relates to the entire variation or only part of it. If the notice relates to the entire variation, the variation will not take effect, and the port operator will be required to commence a new variation process (if it still wishes to vary the protocols), amended to address the ACCC's concerns. Correspondingly, if only part of the proposed variation is the subject of a notice, those

changes that are not included in the notice, could proceed. It will only be possible for the ACCC to disallow the variation in part where the proposed varied terms are not intrinsically related.

ABA's draft revision includes a proposed new clause 10.4:

10.4 Objection notice

(a) If ABA seeks to vary the Loading Protocol in accordance with clause 10.3, the ACCC may object to the proposed variation (or part thereof). If the ACCC objects to a proposed variation (or part thereof), it must issue a notice to ABA stating that it objects to the proposed variation and providing reasons for its objection. The ACCC will publish any notice issued under this clause 10.4(a) on the ACCC website;

(b) Any notice issued under clause 10.4(a) must be issued at least 10 business days prior to the date on which the variation is proposed to become effective.

(c) At least 5 business days before issuing a notice under clause 10.4(a), the ACCC must provide ABA with a draft notice stating that it objects to the proposed variation and providing reasons for its objection.

(d) In issuing a draft notice under clause 10.4(c) or a final notice under clause 10.4(a), the ACCC must have regard to whether the proposed variation:

(i) is material; and/or

(ii) amounts to a breach of the anti-discrimination provision in clause 6.4 or the no hindering access provision in clause 10.5.

(e) The ACCC may withdraw a draft notice issued under clause 10.4(c) or a notice issued under clause 10.4(a) if in all the circumstances it becomes aware that the reasons specified in the draft notice issued under clause 10.4(c) or the notice issued under clause 10.4(a) no longer exist.

(f) If the ACCC issues a notice under clause 10.4(a), ABA will, within three business days:

(i) withdraw the proposed variation and commence a new variation process by placing a notice to that effect in a prominent place on the ABA website and notifying the ACCC in writing; or

(ii) withdraw the proposed variation and confirm the status of the existing Loading Protocol by publishing a notice in a prominent place on the ABA website and notifying the ACCC in writing.

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

The ACCC is of the preliminary view that a requirement for it to issue a draft notice of objection prior to issuing a final notice is appropriate. The ACCC notes the time

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

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

Other mechanics

The ACCC notes that clause 6.4(c) of the Proposed Undertaking provides for the ACCC to authorise a member of the ACCC to exercise its powers regarding the non-discrimination and audit provisions. The ACCC considers that the introduction of a decision-making role into the undertaking and the short timeframes attaching to that role, warrant an extension of this provision. The ACCC takes the preliminary view that the Proposed Undertaking is unlikely to be appropriate unless the provision extends to all ACCC decision-making functions under the undertaking.

ABA has proposed the following drafting at clause 13(c) of the draft revision, to address the ACCC's concern:

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

The ACCC considers that ABA's proposed clause 13(c) addresses the ACCC's concern and is therefore appropriate.

Accordingly, the draft amendment notice contains an amendment which includes an explicit acknowledgement of the ACCC's monitoring functions and a provision for the ACCC to approve the Regulated Access, Pricing and Monitoring Committee or a Commissioner to exercise a decision making function on its behalf (proposed amendment 1.15).

In line with the approach in ABA's draft revision, the draft amendment notice proposes to remove the existing authorisation provisions in clause 6.4(c), which relates to audit of the non-discrimination provision (proposed amendment 1.4), and clause 8.5(b), which relates to arbitration of disputes (proposed amendment 1.7). The ACCC considers this is appropriate as the proposed approval provision in the new clause 13 would take effect in these circumstances.

6 Conclusion

In relation to the Proposed Undertaking given to the ACCC by ABA on 23 December 2010, the ACCC's preliminary view is that, having regard to the matters listed in s. 44ZZA(3) of the Act, it would not be appropriate to accept the Proposed Undertaking.

As a result, the ACCC's Draft Decision is that it should not accept the Proposed Undertaking in its current form. The ACCC has provided its draft views throughout on provisions that would not be appropriate and possible alternatives.

The ACCC considers that the Proposed Undertaking is likely to be appropriate if it is amended in accordance with the proposed amendments set out in the draft amendment notice. The proposed amendments are based on ABA's draft revision, which it provided in response to concerns raised by the ACCC.

The ACCC seeks views on its Draft Decision and draft amendment notice. The ACCC also seeks views on ABA's draft revision of its Proposed Undertaking, in particular the revised Loading Protocol.

Appendices

1 Appendix: Industry Overview

1.1 Australian Bulk Alliance Proprietary Limited

Australian Bulk Alliance Proprietary Limited (ABA) is a wholly owned subsidiary of Summit Grain investments Australia Pty Ltd, part of the major Japanese conglomerate Sumitomo Corporation. ABA operates primarily in Victoria and New South Wales.[88]

ABA's principal business activities are grain handling and supply chain services. ABA owns and operates eight receival sites throughout Victoria and New South Wales, with a total storage capacity in excess of 800,000 tonnes.[89] The main commodities stored are wheat, barley and canola. ABA also operates the grain export terminal at the Port of Melbourne in Victoria, of which it is the part owner with AWB Limited. ABA's bulk wheat export operations at Melbourne Port Terminal compete directly with GrainCorp's operations at its Geelong Port Terminal.

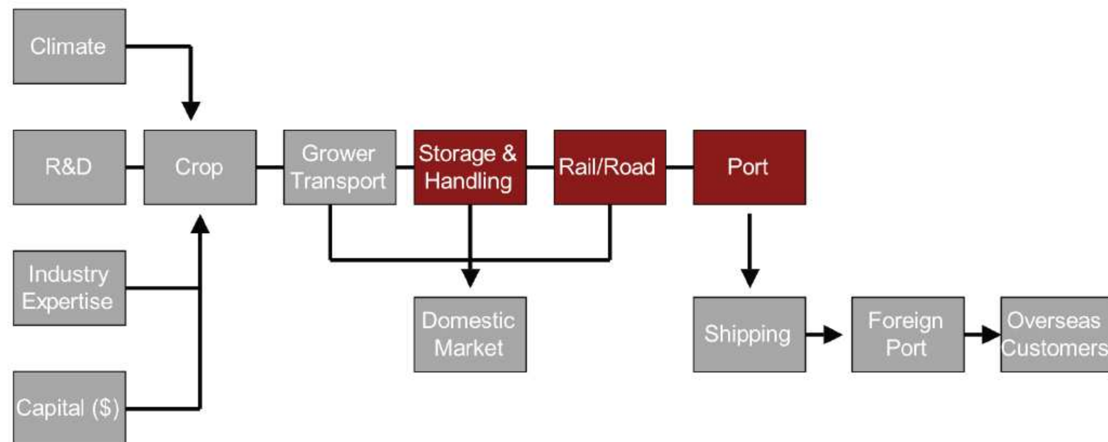
Background information on the grain industry in Victoria and New South Wales is presented below.

1.2 The wheat industry in south east Australia

Figure 1 sets out the grain supply chain for eastern Australia and includes primary inputs (climate, research and development, industry expertise and capital), grain production, transportation (road, rail and ship), storage and handling and the domestic and foreign markets.[90]

Figure 1

GRAIN INDUSTRY SUPPLY CHAIN



Source: Ernst & Young (2008)

Source: Ernst & Young (2008), in Allen (2008).

Figure 2 sets out ABA's storage, handling and port elevator network.

[88] ABA website, viewed 6 May 2011, http://www.bulkalliance.com.au.

[89] Australian Bulk Alliance Storage Network, viewed 6 May 2011, http://www.bulkalliance.com.au/AboutABA/ABAStorageNetwork/tabid/108/Default.aspx.

[90] Allen Consulting Group (2008) *Competition in the Export Grain Supply Chain*, March, p. 11.

Figure 2

Source: Australian Bulk Alliance Proprietary Limited, (2011).

ABARES forecast that winter crop production in the eastern states for the 2010-11 season would reach a total of 27.5 mt with wheat representing 17.7 mt. The remainder of this chapter expands on the key segments of the supply chain for Victoria and New South Wales.

1.2.1 Victoria

Grain production in Victoria

Victoria produces around 11 per cent of wheat in Australia.[91] Total wheat production was approximately 2.9 mt for 2009-10, which is around 1.2 mt more than what was produced in the previous season. The area planted to wheat in Victoria in 2010-11 is estimated at over 1.4 million hectares. Wheat production for the 2010-11 season is estimated to be just under 4.1 mt.[92]

The grain industry contributed nearly 17 per cent of Victoria's gross value of agricultural production in 2001-02, and in 2003-04 it accounted for 30 per cent of the state's direct agricultural exports.[93]

Up-country storage and handling in Victoria

The up-country storage facilities are largely controlled by three firms: ABA, GrainCorp and AWB GrainFlow (a subsidiary of AWB).

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[91] ABARES (2011) *Australian Crop Report*, report no. 157, February 2011.

[92] ibid.

[93] Victoria Department of Primary Industries (2005) *Priorities for Action: Victoria's Grain Industry*, p. 2.

Approximately 76 per cent of wheat receivals in Victoria were handled by GrainCorp between 2001-02 and 2005-06, achieved with a network of two sub-terminals, 27 primary sites and 63 storage sites. Sixteen per cent was handled by AWB Grainflow which owns and operates five receival sites.[94] The remainder was handled by ABA at its four receival sites, and Viterra which also operates two up-country receival sites in Victoria. An increasing proportion of grain destined for the domestic market is being stored on-farm and transported to market by road.

Transportation in Victoria

The majority of Victorian export grain is moved to port by rail. Rail has significant advantages over road for transporting export grain as it can transport larger volumes in shorter periods to meet shipping requirements and minimise at-port storage. However, transport to port by road has been increasing since the deregulation of the wheat industry.[95]

A large amount of the Victorian rail network is a broad gauge network. The Melbourne and Geelong port terminals both have dual gauge rail access, while the Portland terminal has only standard rail gauge access. Following the withdrawal of Pacific National from the management of Victoria's freight lines, El Zorro entered into an agreement with AWB Grainflow to operate two trains to transport grain from its inland facilities, while GrainCorp has entered into a five year contract with Asciano. Viterra has a memorandum of understanding with Genesee and Wyoming to operate one train on Victoria's broad gauge lines to rail grain from Viterra and ABA sites.

Port terminals in Victoria

There are three export grain terminals in Victoria—namely, Melbourne Port Terminal, Geelong, and Portland. Melbourne Port Terminal at Appleton dock in the port of Melbourne is owned by a joint venture of ABA and AWB, with each owning 50 per cent. ABA has operational management and control of the terminal, and during 2010 ABA became a wholly-owned subsidiary of Sumitomo Corporation. Both Geelong and Portland are owned and operated by GrainCorp.

Melbourne Port Terminal was commissioned in 2000 and has 20 steel bins of various sizes holding a total of 48 000 mt storage.[96] It is designed to operate as a high throughput just-in-time facility, and typically handles prime grades of wheat, as well as barley, canola and rice. On average, approximately 50 per cent of wheat exported from Victoria is shipped from Melbourne Port Terminal.[97]

Geelong is the largest of the terminals in terms of storage, with a total vertical storage capacity of 225 000 tonnes (wheat equivalent).[98] It has 99 concrete silos and 66 inner spaces, and can therefore provide a high degree of segregation between types and grades of grain. As well as grains and pulses, Geelong terminal handles woodchips

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94 Allen Consulting Group (2008) *Competition in the Export Grain Supply Chain*, March, p. 11.
95 Productivity Commission (2010) *Wheat Export Marketing Arrangements*, Report no. 51, Canberra, p. 257.
96 Australian Bulk Alliance, *Export Operation Guidelines for Melbourne Port Terminal*, accessed 9 February 2011 at http://www.bulkalliance.com.au/ShippingStem/tabid/154/Default.aspx
97 Wheat Exports Australia (2010), *2009/10 Marketing Year: Report for Growers*, December, p. 13.
98 GrainCorp Operations, *Port Operations*, pp. 10-11

and imports of fertiliser. Geelong is the largest regional port in Victoria and an important hub for the movement of cargo into and out of Victoria. It is situated at the western end of Port Phillip Bay, in reasonably close proximity to Melbourne Port Terminal (50 km).

The Portland grain terminal facility is situated in the far west of Victoria near the border with South Australia (approximately 300 km from Geelong Port and 350 km from Melbourne Port Terminal). It is a deep-water bulk port strategically located between the ports of Melbourne and Adelaide. It is the international gateway for the Green Triangle Region, an area with an abundance of natural resources and exports grain, woodchips, logs, aluminium ingots and livestock, while import commodities are alumina, liquid pitch and fertiliser products. The port is served by rail as well as by road which bypasses the City of Portland to allow 24-hour access. No wheat has been exported from the Portland terminal during the 2008-09 and 2009-10 seasons.[99]

1.2.2 New South Wales

Grain production in New South Wales

New South Wales is Australia's second largest grain producing state and supplies around 29 per cent of the country's wheat.[100] Total wheat production was 5.3 mt in 2009-10, which is around 1.6 mt less than what was produced in the 2008-09 season. The area planted to wheat in New South Wales in 2010-11 is estimated to have fallen to just under 4 million hectares. Wheat production for the 2010-11 season is estimated at 10.6 mt, which represents a substantial increase on previous seasons.[101]

Grain production in New South Wales is widely distributed and reliant on well coordinated storage and transportation links at harvest. The storage and transportation links are also integrated with port facilities.

GrainCorp divides grain production and storage in the eastern States into three areas: the Southern, Central and Northern Divisions. The grain market in New South Wales is covered by the Central and Northern Divisions, with grain produced and stored from Brocklesby in New South Wales' south to Coonamble in the State's north being exported or shipped through GrainCorp's Port Kembla grain terminal. Grain produced and stored in areas from Weemelah and North Star in the north of New South Wales to Merriwa further south is trafficked through GrainCorp's Newcastle grain terminal.

Up-country storage and handling in New South Wales

Three companies own and operate the majority of grain storage and handling facilities in New South Wales. GrainCorp handled approximately 82 per cent of the state's wheat receivals for the five years to 2005-06. This was achieved through a network of sub-terminals (with a combined storage capacity of 1.2 mt), over 30 primary sites (which are permanently staffed and handle the majority of the grain), and over 60 storage sites (which either handle the variable grain crop or are exclusively designated for particular grain commodities or domestic customers).[102]

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[99] Wheat Exports Australia (2010), *2009/10 Marketing Year: Report for Growers*, December, p. 13.
[100] ABARES (2011) *Australian Crop Report*, report no. 157, February 2011.
[101] ibid.
[102] Allen Consulting Group (2008) *Competition in the Export Grain Supply Chain*, March, p. 9.

The second largest storage and handling company in New South Wales is AWB Grainflow, which handled approximately 14 per cent of the state's wheat receivals between 2001-02 and 2005-06. The company has 10 grain centres in New South Wales.

Australian Bulk Alliance (ABA) is the smallest of the three storage and handling companies in New South Wales. It owns four receival sites in the state located in the Riverina and the South West, which handled approximately 3 per cent of the state's wheat receivals between 2001-02 and 2005-06.[103]

Transportation in New South Wales

Rail is the dominant method of transporting grain from receival sites in New South Wales. The average export haul distance in New South Wales is around 450 km and the industry relies heavily on rail to move at least 90 per cent of exports and about 75 per cent of wheat for milling.[104] The volume of annual grain exports from New South Wales ranges from less than 1 mt to over 5 mt.[105] Exports are sourced largely from the northern and south-western regions.

Rail also serves a large percentage of domestic demand, with flour mills and feed mills regularly requiring 1mt of wheat and other grains delivered by rail. The largest mill is at Manildra in the central west which consumes over 2 000 tonnes of grain per day from the surrounding region.[106]

Concern over the NSW rail network's ability to handle an increase in grain rail freight led to the announcement of an audit and a review of New South Wales grain freight in October 2008 by the Federal Department of Infrastructure, Transport, Regional Development and Local Government. The final report was released on 21 October 2009 and contained eighteen recommendations designed to support the industry's access to reliable, well maintained transport infrastructure, including:

- stabilising specific branch lines, and appropriate cost-sharing arrangements between the NSW government and owners for upgrading infrastructure
- a review of access charges to determine an appropriate level of user contribution to ongoing maintenance of the network
- investigating options to address capacity constraints on the track to Newcastle
- that the branch line network should remain in public ownership, with management and maintenance consolidated in the hands of ARTC
- planning a dedicated grain road network to support rail

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103 Allen Consulting Group, *Competition in the Export Grain Supply Chain*, March 2008, p. 10.

104 Single Vision Grains Australia, *Transport Infrastructure Issues paper One – Network Review for the Australian Grains Industry*, January 2007, pp. 17-19.

105 Department of Infrastructure, Transport, Regional Development and Local Government, *NSW Grain Freight Review – Final Report,* September 2009, p. 25.

106 Single Vision Grains Australia, January 2007, pp. 7-8.

- a government/industry grain logistics coordination group, which would assist in managing the challenges of bumper harvests and peaks in demand.[107]

Port terminals in New South Wales

There are two port terminals for bulk grain export in New South Wales, both operated by GrainCorp.

The terminal located at Carrington in Newcastle has overall storage capacity of 164 400 tonnes. It is serviced by both road and rail and can handle bulk exports of wheat, barley, oilseeds, legumes and sorghum. The Carrington terminal also receives and stores bulk orange juice under refrigeration and is the largest facility of this type in Australia.[108]

The terminal at Port Kembla (near Wollongong) has 30 storage bins and a storage capacity of 260 000 tonnes. Port Kembla is serviced by both road and rail, and at the time of completion in 1989 was considered to be the most advanced grain elevator in the world. The terminal can handle bulk exports of all cereal grains, sorghum, legumes and oilseeds.[109]

1.3 Industry structure – submissions

1.3.1 ABA 2010 Submission

Regarding its position in the bulk wheat export market, ABA submitted to the ACCC that:

- it is the only independent provider of port terminal services in Australia and that all other providers are part of an integrated export wheat supply chain
- the Melbourne Port Terminal competes directly with the Geelong Port
- it is the only port terminal services provider that operates in a competitive market.[110]

1.3.2 GrainCorp 2009 Submission

GrainCorp submitted to the ACCC in 2009 that unlike Western Australia and South Australia, the Eastern Australian Grain market is highly complex and fragmented, where:

- in excess of 10 000 active grain growers produce around 15 mt of grain annually. Wheat represents around 60 per cent of this grain production
- there is significant production and consumption variability. No other grain producing country experiences such variability in grain production. Accordingly

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107 Department of Infrastructure, Transport, Regional Development and Local Government, *NSW Grain Freight Review – Final Report,* September 2009, pp. 8-14

108 GrainCorp Operations, *Port Operations*, 2010, pp. 10-11

109 ibid.

110 ABA, 29 November 2010, p. 2.

the 'residual' bulk export volumes are highly variable, where GrainCorp's annual bulk grain exports can range from 0.8 to 10 mt

- Eastern Australia is serviced by over 40 mt of country storage, comprising of GrainCorp, AWB, ABA, ABB (now Viterra), other independent storage providers and on farm storage. GrainCorp receives on average 9 mt of grain, which accounts for approximately 60 per cent of grain produced

- a large number of grain traders aggressively compete for the purchase of wheat from growers to supply both domestic and export customers, as well as trading between each other for the purposes of speculation, and managing customer orders and logistics—this means that the ownership of the wheat may change hands many times through the supply chain

- the distinguishing feature of the grain and wheat industry in Eastern Australia is the primary focus in the supply of grain to domestic customers. Domestic end users have 'first call' on grain produced, currently consuming at least 9.5 mt of grain annually. GrainCorp handles around 4.5 mt of domestic grain, around 45 per cent of grain consumed domestically

- the export market consumes the 'residual' grain that is not consumed locally. This is handled at GrainCorp export terminals, Melbourne Port Terminal and via the expanding container market. GrainCorp handles on average 4 mt of bulk grain, of which 80 per cent is generally wheat.[111]

GrainCorp also provided answers to several questions posed by the ACCC. Their answers included the following points:

- Rail is, in almost all circumstances on the east coast, the most efficient and cost effective means of moving grain to port.

- Evidence given by WEA to the Senate Estimates Hearing on 25 May 2009 included that 'there is grain travelling from Queensland down to Victoria…'[112]

- There are key differences between grain growing and handling industries in the northern hemisphere and in Australia:

> The geographical distribution of northern hemisphere grain growing regions and the tonnages (higher) and volatility (lower) of production there make infrastructure service provision a significantly different commercial proposition. The development of grain handling infrastructure in Europe has been significantly different from the growth of the industry in Australia. The Australian industry is shaped by its history as a collection of statutory organisations and the 69 year presence of the bulk wheat export monopoly.
>
> Therefore it is not relevant to compare the structure of service provision in the northern hemisphere to that available in Australia; it is an apples and oranges comparison.[113]

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111 GrainCorp Operations Limited, *Submission to the ACCC*, 15 April 2009, para. 4.1, p. 14.

112 Parliament of Australia, Hansard, *Senate Standing Committee on Rural and Regional Affairs and Transport*, 25 May 2009, p. 54.

1.3.3 GrainCorp 2010 Submission

GrainCorp's submission to the ACCC in 2010 states that the eastern Australian grain industry is a highly competitive commodity market, where:

- the supply of grain to domestic customers is the primary focus. Eastern Australia produces 17 mt of grain crop annually, of which 10 mt is consumed domestically and 7 mt is exported

- of the 7 mt exported annually from eastern Australia, 5 mt is in bulk and 2 mt is in containers

- of the 5 mt bulk exports, 4 mt is exported via GrainCorp's bulk elevators and 0.5-1 mt is exported from the Melbourne Port Terminal.[114]

GrainCorp also provided information around changes to capacity:

- Total GrainCorp terminal capacity for the 2010-11 season increased from 12 mt pa to 15.12 mt. This was achieved through improvements in supply chain efficiency, including improved rail, road and shipping accumulation planning and execution.

- Total eastern Australian bulk grain export capability will expand to approximately 20 mt following completion of new project and upgrades.

- Capacity expansion projects for bulk and container grain export include:

    - commissioning of the Wilmar Gavilon former sugar export terminal in Queensland, which will add 0.5 mt of bulk export grain capacity

    - upgrade of the former Dunavant Cotton grain storage and container packing capacity at Moree and Narrabri, which will increase container export capacity by 0.5 mt

    - the P&O berth at Kooragang Island, Port Waratah at Newcastle, and the Lascelles Wharf Project at Geelong, which together will add up to 2 mt of bulk elevation capacity.[115]

1.4 Regulatory Regimes

The Melbourne Port Terminal currently does not have an ACCC access undertaking in place. However, on 23 December 2010 Australian Bulk Alliance submitted an access undertaking for the Melbourne Port Terminal to the ACCC for assessment.

Access to GrainCorp's port terminals for the export of bulk wheat has been regulated since 1 October 2009 via an access undertaking accepted by the ACCC.

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[113] GrainCorp Operations Limited, *Supplementary submission to the ACCC*, 24 June 2009, pp. 23-25
[114] GrainCorp Operations Limited, *Submission to the ACCC,* 22 September 2010, pp. 3-4.
[115] ibid., pp. 3-4, 9.

The regulatory framework applying to port terminal operators under state-based regulation in Victoria is outlined below.

1.4.1 State-based regulation in Victoria

In 1995, as part of the privatisation of the Grain Elevator Board, the Victorian Government introduced specific legislation in the form of the *Grain Handling and Storage Act 1995* (Vic) to regulate specific prescribed grain shipping services at Portland and Geelong. The purpose of this legislation is to promote competition in the storage and handling of grain, ensure charges are fair and reasonable, and ensure reasonable access to grain facilities.

Following amendments made in 2003 to the Grain Handling and Storage Act, direct price regulation of the services at the ports of Geelong and Portland was replaced by a negotiate-arbitrate access regime.[116] Under the new framework, GrainCorp, the owner/operator of the regulated terminals, was required to provide access to its export grain handling and storage facilities on ‘fair and reasonable terms’. Under the access regime, an access seeker can request an access provider to provide it with prescribed services from a significant infrastructure facility.

Under the Grain Handling and Storage Act, the ESC is responsible for the regulation of significant infrastructure facilities in the industry of facilitating the export shipping of grain. Section 14 of the Grain Handling and Storage Act sets out the specific objectives of the ESC in regulating the grain handling and storage industry:

- to promote competition in the storage and handling of grain
- to protect the interests of users of the grain handling and storage facilities in terms of price by ensuring that charges across users and classes of services are fair and reasonable
- to ensure users and classes of users have fair and reasonable access for grain to the port facilities whilst having regard to the competitiveness and efficiency of the regulated industry.

Also under the Grain Handling and Storage Act, the ESC is confined to resolving access disputes between access seekers and access providers and to arbitrate any disputes over the conditions of access that could not be resolved through commercial negotiation. Under the negotiate/arbitrate framework, the ESC will only make a determination concerning prices if notified that parties cannot agree on terms and conditions of access to the prescribed services.

In January 2008, ABA and GrainCorp made an application to the ESC for general access determinations (seeking approval of the proposed undertakings) under section 19 of the Grain Handling and Storage Act. The ESC final determination (16 April 2008) was not to make general access determinations mainly on the basis that the ESC

[116] Regulation of prices for prescribed services was discontinued on 9 October 2003.

was not satisfied that the access providers substantially addressed the specific requirement of the ESC as to non-discriminatory access.[117]

In May 2009, the ESC released its final review of the Victorian grain handling and storage access regime, which considered whether access regulation through the Act should continue to apply to any or all bulk grain handling terminals in Victoria, and if so what changes would need to be made to the Act to ensure that it could be certified as an effective state-based access regime.

The ESC previously found that increased competition between facilities had reduced the need for regulation, and the ESC was not convinced that the risk of misuse of market power was sufficient to warrant the continuation of access regulation. The ESC recommended that the Grain Handling and Storage Act cease to apply on 1 October 2009 in order to ensure a smooth transition to federal regulatory arrangements.

In accordance with this recommendation, on 28 September 2009 the Minister for Finance, Workcover and the Transport Accident Commission determined that the facilities used for grain bulk handling in the ports of Geelong, Melbourne and Portland are no longer 'significant infrastructure facilities'. The effect of this determination is that the Grain Handling and Storage Act regulatory framework ceased to apply to those ports from 1 October 2009. [118]

1.5 The Productivity Commission inquiry

The Productivity Commission (**PC**) conducted an inquiry into wheat export marketing arrangements, publishing its final report on 1 July 2010. In its final report, the PC stated that access to port terminal facilities represented the most significant issue in its inquiry, and that the ability of wheat exporters to access port terminal facilities is critical to the success of the deregulated market.[119]

The PC identified several characteristics particular to the wheat export industry in the eastern states:

- *A significant proportion of wheat is consumed domestically.* Wheat is exported and consumed domestically. Wheat destined for domestic markets is often delivered directly from farms to end users.[120]

- *Bulk wheat transport faces competition from transport in containers and bags.* The bulk supply chain competes with exports in containers and bags and the storage and transport of grain for sale in the domestic market. [121] There is also a wider choice of storage service providers in the eastern states as the major bulk

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[117] Section 17(1) of the GHS Act states that a provider must provide access to the prescribed services on fair and reasonable terms and conditions. Subsection (5) states that the terms and conditions of access must not vary according to the identity of the person seeking access.

[118] Essential Services Commission, *Review of the Victorian Grain Handling and Storage Access Regime*, Final Report, May 2009, pp. 11-12.

[119] Productivity Commission, *Wheat Export Marketing Arrangements*, Report no. 51, 2010, Canberra, p. 173.

[120] ibid., p. 255.

[121] ibid., p. 68.

handlers storage networks overlap to some extent, and compete with independent storage providers. [122]

- *Bulk wheat storage faces competition from on-farm storage.* The east coast typically has more private on-farm storage, more competition in bulk handling facilities and more contestability in the supply chain than the west coast.[123] Major bulk handler storage capacity is approximately 20 mt and on farm storage is 12 mt.[124] The trend toward on-farm storage began prior to deregulation, but it is likely that a deregulated environment gives increased incentives for growers to use on-farm storage.[125] Since deregulation, uneconomic bulk storage facilities have been closed down due to the increase in site-based costing.[126]

- *There may be competition in provision of port services.* Bulk grain export terminals in New South Wales, Victoria and South Australia operated by GrainCorp, Melbourne Port Terminal and Viterra are in relatively close proximity and might compete for some grain throughput.[127]

- *The share of wheat transported by road has increased relative to rail transport.* Prior to deregulation, 80-100 per cent of export wheat was transported by rail in the eastern states, excluding road transport from farm to bulk receival sites. Since then it is likely that the share of grain transported by road has risen.[128] This is partly a result of the privatisation of rail and deregulation of the wheat export industry, as:

  - the cost efficiency of road compared with rail transport has improved due to investment in road infrastructure and increased capacity of heavy vehicles.

  - competition in the wheat export market puts increased pressure on peak periods, resulting in increased use of trucks in conjunction with rail transport.

  - more cost reflective freight rates are being set across the different segments of the network. This has meant that in some areas road transport is now more cost effective.[129]

- *Investment in transport infrastructure is likely to be required in the future.* The Productivity Commission suggested that a thorough cost-benefit analysis, taking into account the economic and social costs and benefits of road and rail use, is required. [130]

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[122] Productivity Commission, 2010, p. 67.
[123] ibid., p. 251.
[124] ibid., p. 69.
[125] ibid., p. 259.
[126] ibid., pp. 261-2.
[127] ibid., p. 68.
[128] ibid., p. 257.
[129] ibid., pp. 263-5.
[130] ibid., p. 251.

2 Appendix: Legislative Framework

2.1 Access test

The *Wheat Export Marketing Act 2008* (Cth) (**WEMA**) came into effect on 1 July 2008. The WEMA and associated transitional legislation replaced the Export Wheat Commission with a new statutory body, Wheat Exports Australia (**WEA**), which has the power to develop, administer and enforce an accreditation scheme for bulk wheat exports, including the power to grant, vary, suspend or cancel an accreditation.[131]

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

Part of the 'access test' is linked to Part IIIA of the *Competition and Consumer Act 2010* (Cth) (**Act**), (previously the *Trade Practices Act 1974* (Cth)). The relevant part of the access test will be satisfied if either:

- the ACCC has accepted from a person who owns or operates a port terminal facility used to provide a port terminal service an access undertaking under Division 6 of Part IIIA of the Act, and that undertaking relates to the provision to accredited wheat exporters of access to the port terminal service for purposes relating to the export of wheat; or

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

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

- their policies and procedures for managing demand for port terminal services (generally known as Protocols)

- a statement, updated each business day, setting out, amongst other things, the name of each ship scheduled to load grain using port terminal services, the estimated date on which grain will be loaded into the ship, the date on which the ship was nominated and the date on which the nomination was accepted (this statement is commonly termed the Shipping Stem).[132]

ABA has submitted its Proposed 2011 Undertaking to the ACCC pursuant to Part IIIA of the Act for the purpose of satisfying the access test.

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

[132] See subsection 24(4) of the WEMA for detail about the continuous disclosure rules.

2.2 Productivity Commission inquiry

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

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

The full report is available on the PC website at:

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

As at the date of release of this Draft Decision, the government has not yet responded to the PC's report.

2.3 Legal test for accepting an access undertaking under Part IIIA

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

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

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

In relation to access undertakings, a provider of a service (or a person who expects to be the provider of a service) may give an undertaking to the ACCC in connection with the provision of access to the service. An undertaking may specify the terms and conditions on which access will be made available to third parties. The ACCC may accept the undertaking if it thinks appropriate to do so after considering the matters set out in subsection 44ZZA(3).

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

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

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

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

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

2.4 Other matters

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

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

> …intended to ensure that accredited exporters that own or operate port terminal facilities provide fair and transparent access to their facilities to other accredited exporters. The test aims to avoid regional monopolies unfairly controlling infrastructure necessary to export wheat in bulk quantities, to the detriment of other accredited exporters.[133]

Further, in the second reading speech, the minister stated that 'unless all exporters can obtain access to these critical facilities on fair and reasonable terms then one of the major objectives of the policy could be frustrated.'[134]

The ACCC also acknowledges that Parliament's intention to promote competition in the export of bulk wheat has various dimensions, including:

- the promotion of competition between marketers for the acquisition of bulk wheat from growers;
- the promotion of competition between exporters for the export of wheat from Australia; and
- the concomitant promotion of competition for associated products and services, such as supply chain services and grower services.

The ACCC further acknowledges Parliament's recognition that the promotion of competition in the form described may potentially be limited by anti-competitive conduct associated with port terminal facilities, and that the inclusion of the access test demonstrates a clear intention to legislate measures to mitigate the possibility of such conduct undermining the broader intent of the legislation.

The ACCC also considers that the 2009 Undertakings are a relevant matter under s. 44ZZA(3)(e) in the assessment of ABA's Proposed Undertaking. Through the

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133 Explanatory Memorandum, Wheat Export Marketing Bill 2008, p. 31.

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

operation of the 2009 Undertakings the ACCC has gained insight as to the effect of Part IIIA access undertakings across the wheat export industry in practice. The ACCC considers that this experience is relevant to the assessment of ABA's Proposed Undertaking and the Proposed 2011 Undertakings of the other port terminal operators.

2.5 Recent changes to Part IIIA

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

2.5.1 Timeframes for ACCC decisions and stopping the clock

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

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

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

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

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

2.5.2 Amendment notices

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

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

- the nature of the amendment or amendments (the 'proposed amendment or amendments') that the ACCC proposes be made to the undertaking; and

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

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

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

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

2.5.3 Other changes

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

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

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

Annexure: Draft amendment notice

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.

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 5pm on XX XXXX 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, delete the existing subsection and insert the following subsection (c) —
>
> 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, subsection (b), delete existing clause and insert —
>
> 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.

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.

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 the word ‘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

Delete clause 30 and insert new clauses 35 and 36 –

35. The order of vessels 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 receival 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 41 to 45 –

41. Prior to commencement of loading a vessel must have passed a Marine, AQIS or any other survey required by law.

42. Should a vessel fail such survey ABA may, at its sole discretion, order the vessel removed from the berth.

43. 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

44. 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.

45. 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 Intention to Export Prescribed Goods.

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 49), 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 the export throughput at the MPT;
  - ensuring the non-discriminatory treatment clients; and
  - ensuring consistency of decision.

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.