



Australian  
Competition &  
Consumer  
Commission

Compliance with the Port Terminal Access  
(Bulk Wheat) Code of Conduct: information  
for industry participants

# **Guidelines on the ACCC's process for approving capacity allocation systems**

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Australian Competition and Consumer Commission  
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#### **Important notice**

This guide is designed to give you basic information; it does not cover the whole of the mandatory Code of Conduct and is not a substitute for professional advice. Moreover, because it avoids legal language wherever possible there may be generalisations about the application of the Code of Conduct.

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## Introduction

The *Port Terminal Access (Bulk Wheat) Code of Conduct* that commenced on 30 September 2014 (the Code) provides for the ACCC to have a role approving the capacity allocation system used by a port terminal service provider. These guidelines set out the ACCC's process for considering whether or not to approve a capacity allocation system.

In deciding whether to approve a port terminal service provider's capacity allocation system, the ACCC must have regard to a list of matters set out at subclause 25(3) of the Code.

Some port terminal service providers have been operating capacity allocation systems which were accepted by the ACCC as part of an access undertaking under the previous 'access test' regime. Subclause 25(5) of the Code provides that a capacity allocation system may be taken to be approved by the ACCC if it was included in an undertaking that was accepted by the ACCC and in force immediately before 30 September 2014, so that the port terminal service provider does not have to apply for approval of a system which the ACCC already 'approved' under the previous regime.

If a port terminal service provider's capacity allocation system has not been approved by the ACCC in accordance with subclause (3), and is not taken to be approved by the ACCC under subclause (5), subclause (2) provides that the port terminal service provider may only allocate capacity up to 6 months in advance.

### **Box 1: Subclause 25(3) of the Code**

In deciding whether or not to approve a port terminal service provider's capacity allocation system, the ACCC must have regard to:

- (a) whether the capacity allocation system will operate efficiently fairly and consistently with clause 10 (non-discrimination); and
- (b) whether the capacity allocation system will operate efficiently and provide sufficient information to exporters about the capacity of port terminal facilities owned or operated by the port terminal service provider to help exporters plan export activities and acquire required port terminal services; and
- (c) whether the capacity allocation system will operate efficiently and provide flexibility and transferability of shipping slots, including the ability to move allocated capacity of port terminal facilities owned or operated by the port terminal service provider across times or ports where appropriate; and
- (d) whether the capacity allocation system will operate efficiently and contains mechanisms to ensure that the provider takes all reasonable steps to ensure that capacity of port terminal facilities owned or operated by the port terminal service provider is not unused during times of peak use; and
- (e) the potential effects that the capacity allocation system has on upstream and downstream markets; and
- (f) the business interests of the port terminal service provider; and
- (g) the public interest, including the public interest in having competition in markets; and

- (h) the interest of exporters wanting access to port terminal services; and
- (i) the economically efficient operation and use of, and investment in port terminal facilities; and
- (j) any other matters that the ACCC considers relevant.

These guidelines are published in accordance with subclause 25(6) of the Code and set out the ACCC's process for deciding whether to approve a capacity allocation system.

Unless the context requires otherwise, if a term is defined in the Code it has the same meaning in these guidelines as given to it in the Code.

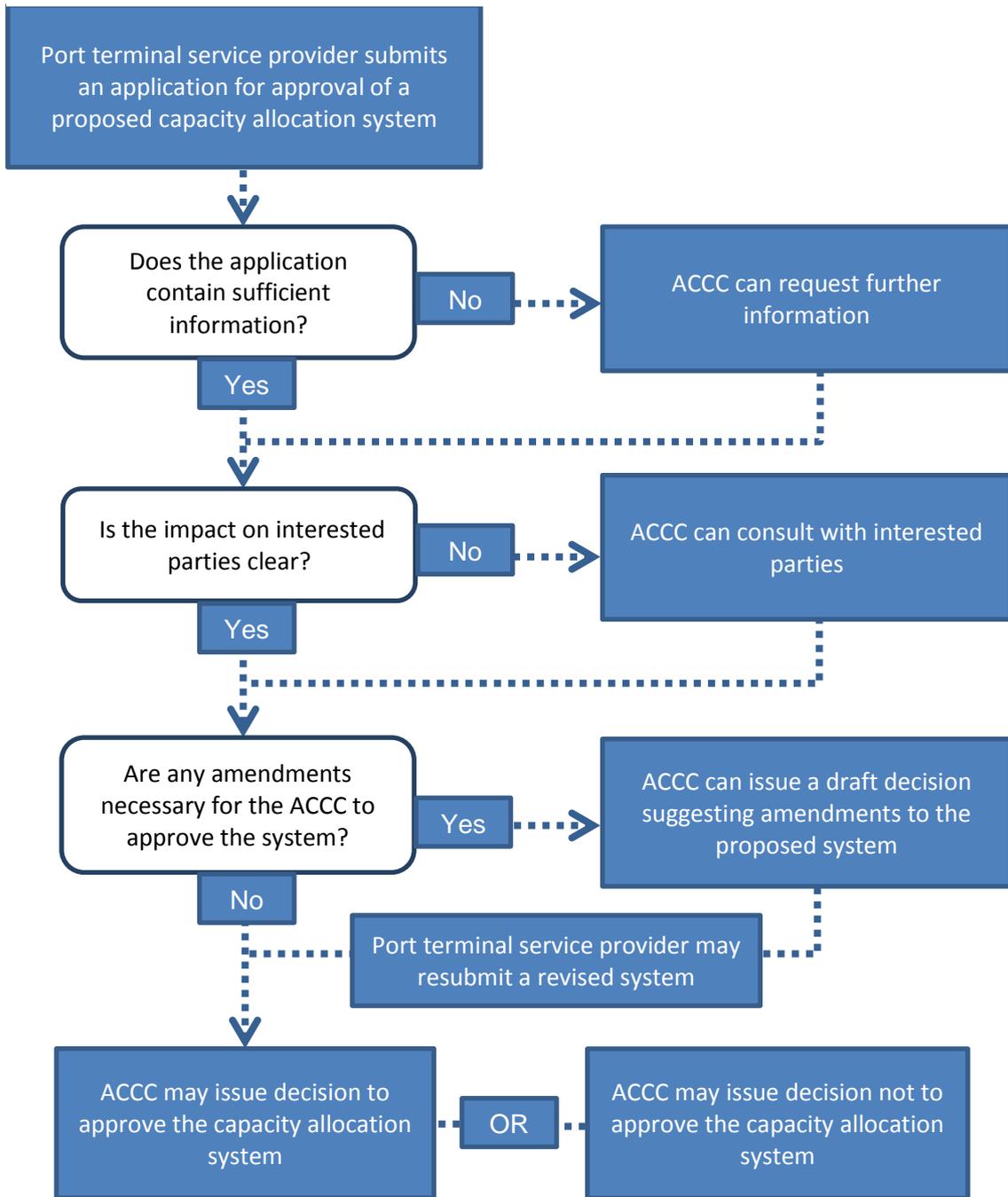
The ACCC may vary these guidelines from time to time, and will consult with parties subject to the Code on any substantive proposed changes. The ACCC will notify these parties of any changes as well as publishing the revised guidelines on the ACCC's website at [www.accc.gov.au/wheat](http://www.accc.gov.au/wheat).

## Assessing a proposed capacity allocation system

Each assessment process is likely to be different and may include requests for information, consultation with interested parties, and proposed changes to the application, before the ACCC makes its final decision.

The following sections provide further detail about the potential stages in the ACCC's capacity allocation system assessment process. A diagram showing how each of the stages may typically interact is at Figure 1 below.

**Figure 1: Potential stages of an ACCC capacity allocation system assessment**



## Port terminal service provider submits an application for approval of a proposed capacity allocation system

To commence the assessment, a port terminal service provider must formally submit an application for approval of a proposed capacity allocation system (an **application for approval**). This application for approval should include supporting documentation relevant to the ACCC's assessment. Further information on how to submit an application for approval, including what information should be included, is on page 8 below.

The ACCC's assessment will have regard to the matters listed at subclause 25(3) of the Code. Some of these matters are similar to the matters listed at subsection 44ZZA(3) of the *Competition and Consumer Act 2010* (Cth) which the ACCC must have regard to in assessing access undertaking applications under Part IIIA. Previous ACCC decisions in relation to Part IIIA access undertaking applications, including those in relation to access to wheat ports, are available on the ACCC's website at [www.accc.gov.au/wheat](http://www.accc.gov.au/wheat).

## ACCC may request further information

If the ACCC considers that it requires additional information from the port terminal service provider in order to properly assess the proposed capacity allocation system, the ACCC may issue a written notice requesting that information. This notice, and the port terminal service provider's response, will be published on the ACCC's website (subject to the redaction of any confidential information in accordance with the ACCC's general confidentiality policy).

## ACCC may consult with interested parties

The ACCC may also consult with persons it considers reasonable and appropriate for the purposes of assessing the potential effects of the proposed capacity allocation system. This consultation may be in the form of a public consultation notice document calling for written submissions, stakeholder forums, meetings with interested parties, or a combination of these. The length of the consultation period will vary depending on the complexity of the issues, previous consultation with users on the proposal and the time of the year, for example.

## ACCC may suggest changes to application in draft decision

The ACCC may form a preliminary view that it would approve the proposed capacity allocation system if certain changes were made. In this case, the ACCC may notify the port terminal service provider in writing of those changes it considers necessary for the capacity allocation system to be approved. This may be in the form of a draft decision on which the ACCC conducts public consultation.

If the port terminal service provider agrees to make those changes it may decide to withdraw its initial application and submit a revised application for approval of its capacity allocation system including those changes. The ACCC will finalise its assessment based on the revised application for approval and may issue a decision to approve the revised capacity allocation system.

If the port terminal service provider does not withdraw its initial application, the ACCC will finalise its assessment based on that initial application.

## **ACCC will decide whether to approve the capacity allocation system**

If the ACCC decides to approve a proposed capacity allocation system in accordance with subclause 25(3) of the Code, it will issue a decision and provide a copy of that decision to the port terminal service provider. The ACCC's decision will be accompanied by the reasons why it has decided to approve the proposed capacity allocation system.

Subclause 25(4) of the Code requires that if the ACCC approves a port terminal service provider's capacity allocation system, the port terminal service provider must publish the ACCC's decision on its website within ten business days.

If the ACCC decides not to approve the proposed capacity allocation system, it will issue a notice setting out its reasons for that decision.

## **Timeframe for capacity allocation system assessments**

Where a port terminal service provider submits an application for approval, the ACCC will seek to decide whether to approve the proposed capacity allocation system within 12 weeks. This timeframe may be extended where the ACCC:

- consults on the proposed capacity allocation system, and/or
- requests information from the port terminal service provider.

In general, the ACCC will notify the port terminal service provider within two weeks of receiving an application for approval whether it intends to issue a consultation notice, and the length of the consultation period. The length of any consultation period(s) will extend the ACCC's timeframe for assessing the application for approval.

The total time taken by the ACCC will depend on whether the port terminal service provider responds to requests for information by the ACCC in a timely manner. It will also likely depend on the complexity of the proposed capacity allocation system and other issues relevant to the assessment, including issues raised by other industry participants.

In some cases the assessment may be conducted more quickly than the 12 week timeframe, for example, where the capacity allocation system is similar to an existing system which has been approved for a port terminal facility in similar circumstances, or where the capacity allocation system represents a minor variation to an existing approved system for the same facility.

## **Variations to approved capacity allocation systems**

Subclause 27(2) of the Code provides that if a port terminal service provider wishes to vary an approved capacity allocation system, the capacity allocation system as varied must be approved by the ACCC. The ACCC's process for approving a variation to an existing capacity allocation system will be similar to its process for approving the capacity allocation system. However, if the variation is of a minor nature, then the assessment will likely be expedited.

## How to submit an application for approval

A port terminal service provider may submit an application for approval in writing to the ACCC. Applications for approval should be addressed to:

The General Manager  
Infrastructure & Transport – Access & Pricing  
Infrastructure Regulation Division

Email: [transport@acc.gov.au](mailto:transport@acc.gov.au)

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

### ***What should be included in an application for approval?***

In order to ensure a timely assessment of the application for approval, the ACCC requires that the port terminal service provider include in its initial application:

- a copy of the proposed port loading protocol setting out the proposed capacity allocation system (including mark-up of changes from a previous version where relevant)
- a copy of the port terminal service provider's standard terms and reference prices
- supporting documentation, which may include information relating to:
  - an explanation of how the proposed capacity system is intended to operate, or how proposed changes will alter a system currently in place
  - the annual capacity of the port terminal facility disaggregated by shipping window
  - current and prospective users of the facility
  - how capacity has previously been allocated at the facility
  - historical demand and usage of port terminal capacity
  - the matters listed at subclause 25(3) of the Code.

The ACCC will publish the application and supporting documentation on its public website subject to confidentiality claims (see below).

## Confidentiality

Sections of documents submitted to the ACCC by a port terminal service provider or other interested parties that are claimed to be confidential should be clearly identified. The ACCC will consider each claim of confidentiality on a case by case basis.

For information about the collection, use and disclosure of information provided to the ACCC, please refer to the ACCC publication *Australian Competition and Consumer*

*Commission / Australian Energy Regulator Information Policy – the collection, use and disclosure of information, available on the ACCC website.*<sup>1</sup>

## Further information

The ACCC has also published process guidelines in relation to its role making exemption determinations under the Code. The Code, these guidelines, and other information relevant to the ACCC's role in regulating access to wheat ports (both under the Code and the previous access undertaking regime) is available on the ACCC's website at [www.accc.gov.au/wheat](http://www.accc.gov.au/wheat).

Please direct enquiries regarding these guidelines to:

Mr Michael Eady  
Director  
Infrastructure & Transport – Access & Pricing branch  
ACCC  
GPO Box 520  
MELBOURNE VIC 3001

Ph: 03 9290 1945

Email: [transport@acc.gov.au](mailto:transport@acc.gov.au)

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<sup>1</sup> Available at [www.accc.gov.au](http://www.accc.gov.au).