



**Australian  
Competition &  
Consumer  
Commission**

## **Draft Determination**

### **Applications for Authorisation**

Lodged by

**Perkins Properties Pty Ltd and Perkins Shipping Pty Ltd**

**and**

**Alcan Gove Pty Limited and Alcan Gove Development Pty Limited**

in respect of

**The operation of a new heavy lift wharf at the Port of Gove**

**Date: 18 May 2005**

**Authorisation Nos:** A90951  
A90953

**Public Register No:** C2005/212

**Commissioners:**  
Samuel  
Sylvan  
King  
Martin  
Smith  
Willett

## **Executive Summary**

### **The applications**

On 24 January 2005, Perkins Properties Pty Ltd and Perkins Shipping Pty Ltd (together 'Perkins') lodged application A90951 with the Australian Competition and Consumer Commission (the ACCC). On 3 February 2005, Perkins lodged application A90953 with the ACCC. On 26 April 2005 Perkins amended application A90953 such that it is now made for and on behalf of Alcan Gove Pty Limited and Alcan Gove Development Pty Limited (together 'Alcan').

Under application A90951, Perkins (the Applicant) seeks authorisation to give effect to an agreement with Alcan under which Perkins agrees to give Alcan priority use of a proposed new heavy lift wharf facility at the Port of Gove.

Under application A90953, Perkins and Alcan (together 'the Applicants') seek authorisation for conduct whereby Alcan will acquire wharf services at the new heavy lift wharf from Perkins on condition that Perkins give priority to vessels carrying equipment for the expansion of Alcan's alumina refinery at Gove.

Authorisation has been sought for a period of three years from the date of completion of the new heavy lift wharf, or until the delivery of all material and equipment necessary for the Alcan expansion is complete, whichever comes first.

### **The authorisation process**

A key objective of the Trade Practices Act 1974 (the TPA) is to prevent anticompetitive arrangements or conduct, thereby encouraging competition and efficiency in business, resulting in greater choice for consumers in price, quality and service.

The TPA however, allows the ACCC to grant immunity from legal action for anticompetitive conduct in certain circumstances. One way in which parties may obtain immunity is to apply to the ACCC for what is known as an 'authorisation'.

Broadly, the ACCC may 'authorise' businesses to engage in anti-competitive arrangements or conduct where it is satisfied that the public benefit from the arrangements or conduct outweighs any public detriment.

The ACCC conducts a comprehensive public consultation process before making a draft decision and ultimately a final decision to grant or deny authorisation.

### **Assessment of public benefit and anti-competitive detriment**

The ACCC considers the anti-competitive detriment generated by the proposed arrangements and conduct to be negligible. While there appears to be potential for restricted access to existing landing facilities at the Port of Gove during the period of the Alcan expansion, it would seem that these access restrictions would exist whether Alcan vessels use the new heavy lift wharf on an exclusive basis or not. The absence

of submissions from interested parties on this issue suggests that it is not of concern to those parties which may use the Port of Gove.

The ACCC considers that the proposed arrangements and conduct will result in some public benefit. In particular, the ACCC considers that the proposed arrangements will minimise any delay to the expansion of Alcan's alumina refinery at Gove.

Consequently, following consideration of the information submitted by Perkins, the ACCC concludes that the public benefits likely to result from the arrangements and conduct will outweigh the anti-competitive detriment.

### **Draft determination**

The ACCC therefore proposes, subject to any pre-determination conference requested, to grant authorisation to applications A90951 and A90953 for a period of three years from the date of completion of the new heavy lift wharf.

In respect of application A90951, the ACCC proposes to grant authorisation to Perkins to give effect to clause 3.1 of the Operations Deed, under which Perkins agrees to give Alcan priority use of the new heavy lift wharf facility during the period of Alcan's proposed expansion of its alumina refinery.

In respect of application A90953, the ACCC proposes to grant authorisation to Alcan to engage in conduct whereby once the new heavy lift wharf at Gove is completed, Alcan will acquire wharf access, management and other related services from Perkins on condition that Perkins will only supply these services to third parties when to do so will not interfere with Alcan's priority use of the wharf.

### **The section 87B undertaking**

On 22 December 2003, to resolve competition concerns arising from Perkins' acquisition of Gulf Freight Services, the ACCC accepted an undertaking pursuant to section 87B of the TPA from Perkins with regard to access to port facilities at Gove and maintaining levels of customer service (the Undertaking).

There would appear to be potential for the provisions of the Undertaking to be interpreted such that they might apply to the new heavy lift wharf referred to in the authorisation applications. Following on from this, there would appear to be an inconsistency between the arrangements the subject of Perkins' authorisation application and Perkins' obligations under the undertaking.

To address this issue, Perkins has provided the ACCC with a draft revised undertaking for consideration. In its current form, the draft revised undertaking appears to retain the principles of the Undertaking and the ACCC is proposing to accept it.

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## 1. Introduction

- 1.1. The Australian Competition and Consumer Commission (the ACCC) is the Australian Government agency responsible for administering the *Trade Practices Act 1974* (the TPA). A key objective of the TPA is to prevent anti-competitive arrangements or conduct, thereby encouraging competition and efficiency in business, resulting in greater choice for consumers in price, quality and service.
- 1.2. The TPA, however, allows the ACCC to grant immunity from legal action for anti-competitive conduct in certain circumstances. One way in which parties may obtain immunity is to apply to the ACCC for what is known as an 'authorisation'. Broadly, the ACCC may 'authorise' businesses to engage in anticompetitive arrangements or conduct where it is satisfied that the public benefit from the arrangements or conduct outweighs any public detriment.
- 1.3. The ACCC conducts a comprehensive public consultation process before making a decision to grant or deny authorisation.
- 1.4. Upon receiving an application for authorisation, the ACCC invites interested parties to lodge submissions outlining whether they support the application or not, and their reasons for this. The TPA requires that the ACCC then issue a draft determination in writing proposing either to grant the application (in whole, in part or subject to conditions) or deny the application. In preparing a draft determination, the ACCC will take into account any submissions received from interested parties.
- 1.5. This document is a draft determination in relation to application for authorisation A90951 lodged with the ACCC by Perkins Properties Pty Ltd (Perkins Properties) and Perkins Shipping Pty Ltd (Perkins Shipping) (together 'Perkins' or 'the Applicant') and application for authorisation A90953 lodged with the ACCC by Perkins for and on behalf of Alcan Gove Pty Limited and Alcan Gove Development Pty Ltd (together 'Alcan').
- 1.6. Once a draft determination is released, Perkins and Alcan (together 'the Applicants') or any interested party may request that the ACCC hold a conference. A conference is generally called by a party dissatisfied with the ACCC's decision and provides interested parties with the opportunity to put oral submissions to the ACCC in response to a draft determination. The ACCC will also invite interested parties to lodge written submissions on the draft determination.
- 1.7. The ACCC then reconsiders the application taking into account the comments made at the conference (if one is requested) and any further submissions received and issues a written final determination. Should the public benefit outweigh the public detriment the ACCC may grant authorisation. If not, the authorisation may be denied. However, in some cases it may still be possible to grant authorisation where conditions can be imposed which sufficiently increase the public benefits and decrease the public detriment.

## **2. Background to the applications**

### **Port of Gove**

- 2.1. The Port of Gove is located on the Gove Peninsula, in the north-eastern part of Arnhem land in the Northern Territory. All wharf and terminal facilities at the Port of Gove are built on land belonging to the traditional owners, the Gumatj People. Any party wishing to make use of any of the facilities must obtain permission from the traditional owners.
- 2.2. Perkins Properties is the leaseholder of wharf facilities at the Port of Gove while Perkins Shipping is the manager of wharf facilities at the Port of Gove.
- 2.3. Perkins has entered into a contract with Alcan in relation to the construction of a new heavy lift wharf facility at the Port of Gove.

### **Existing landing facilities at the Port of Gove**

- 2.4. The ACCC understands that the following four landing facilities are currently in operation at Gove, within close proximity to Alcan's alumina refinery:
  - A deep water wharf controlled by Alcan and used exclusively by vessels shipping bauxite and alumina from the Alcan mine and refinery.
  - A wharf owned and operated by Alcan for the shipment of general cargo and aluminium hydrate. This wharf is used exclusively by vessels transporting products for Alcan or by vessels, such as tug boats, which support these activities.
  - A public wharf managed and maintained by Perkins which comprises a hard stand section and a pier suspended finger wharf jetty (the old wharf). The jetty is primarily used by fishing vessels to refuel and take on provisions.
  - A landing ramp with roll-on, roll-off and mooring facilities which is used by Perkins to load and discharge its own vessels.
- 2.5. Additionally, a public landing ramp owned and managed by the traditional owners is located approximately 14km from the Alcan facility.

### **The new heavy lift wharf**

- 2.6. It is proposed that a new heavy lift wharf with roll-on, roll-off capabilities be constructed at Gove. Alcan will fund the construction of the new heavy lift wharf. Perkins will manage the facility. The new heavy lift wharf will enable the delivery of parts and equipment necessary for the planned expansion of Alcan's alumina refinery at Gove.

### **Proposed expansion of Alcan's refinery**

- 2.7. The expansion of Alcan's refinery will be undertaken using preassembled modules (PAMs) of equipment, which will be constructed off site and then

shipped to Gove for installation. The PAMs will be placed on special purpose large multiple-wheel low loaders and then loaded onto specially designed roll on, roll off vessels for transport to Gove. When arriving at Gove, the vessel will berth at the seaward face of the new heavy lift wharf. The vessel will discharge the low loaders, which will transport the PAMs to staging areas on the land.

- 2.8. The process of unloading a PAM from the vessel will vary depending on the particular cargo, but is expected to take between five and eight days per vessel. Gove has a 3.5 metre tidal range which will require continual trimming of the vessel during unloading to maintain the correct height alignment between the vessel and the wharf. This arrangement is expected to provide berthing opportunities at all stages of the tidal cycle.
- 2.9. In addition to specialist PAM carrying vessels, other vessels are expected to use the new heavy lift wharf to deliver equipment for the expansion of Alcan's refinery.
- 2.10. A total of forty three vessel movements over a period of approximately eighteen months are anticipated. During this period, the new heavy lift wharf is likely to be almost continually used for the unloading of PAMs and other equipment.

### 3. The applications and submissions

#### The Applicants

- 3.1. The **Perkins** Group of companies, of which Properties and Shipping are members, is a transport and logistic group situated in Darwin. Perkins provides a range of services including:
- regular barge services to remote Aboriginal communities in the Northern Territory and Western Australia;
  - regular fixed day shipping services to the resource industry townships of Gove, Groote Eylandt and Weipa; and
  - cargo services between Darwin, Singapore, Malaysia and Indonesia.
- 3.2. **Alcan** conducts a mining and processing operation in the Nhulunbuy area of the Northern Territory comprising a bauxite mine, alumina refinery, residual disposal and port facilities together with an associated township and infrastructure.

#### The applications

- 3.3. **Application A90951** was lodged by Perkins on 24 January 2005 under sub-section 88(1) of the TPA to give effect to arrangements that might substantially lessen competition within the meaning of section 45 of the TPA. Under the application, Perkins seeks authorisation to give effect to an agreement with Alcan, known as the Deed of Agreement – Operations (the Operations Deed). The Operations Deed concerns the construction of a new heavy lift wharf at the Port of Gove and the operation of the new heavy lift wharf during the period of Alcan's proposed expansion of its nearby alumina refinery.
- 3.4. In particular, Perkins seeks authorisation to give effect to clause 3.1 of the Operations Deed, under which Perkins agrees to give Alcan priority use of the new heavy lift wharf facility during the period of Alcan's proposed expansion of its alumina refinery. The Operations Deed is conditional upon the ACCC granting authorisation to give effect to it.
- 3.5. **Application A90953** was finalised on 26 April 2005 and was lodged by Perkins for and on behalf of Alcan under sub-section 88(8) of the TPA to engage in conduct that constitutes or may constitute the practice of exclusive dealing. Under the application, Alcan seeks authorisation to engage in conduct whereby once the new heavy lift wharf at Gove is completed, Alcan will acquire wharf access, management and other related services from Perkins on condition that Perkins will only supply these services to third parties when to do so will not interfere with Alcan's priority use of the wharf.

#### Period for which authorisation is sought

- 3.6. Authorisation is sought for a period of three years from the date of the completion of the new heavy lift wharf, or until such time as the delivery of all



PAMs and other equipment required for the Alcan expansion is complete, whichever comes first.

- 3.7. If the priority use of the new heavy lift wharf is still required for the Alcan expansion at the end of three years, Perkins has advised that it will seek a further authorisation.

### **The Applicants' supporting submission**

- 3.8. Perkin's submission in support of the applications is summarised below. A copy of this submission is available from the ACCC's Public Register.

### ***The relevant market***

- 3.9. Perkins submits that the relevant market is that for the provision of general cargo freight services to remote communities of north-western Australia, the Northern Territory and the Gulf of Carpentaria.

### ***Anti-competitive detriment***

- 3.10. Perkins submits that there will be no substantial lessening of competition in any market as a result of the arrangements and conduct for which authorisation is sought.
- 3.11. Perkins submits that the nature of the existing landing facilities at Gove will not be affected by the arrangements and conduct for which authorisation is sought.
- 3.12. Perkins notes the possibility of restricted access to existing landing facilities at Gove during the period of the Alcan expansion. In particular, Perkins notes that access to the old wharf, which is primarily used by fishing and other private vessels for refuelling purposes, may be affected as a consequence of occupational health and safety requirements associated with the discharge and transport of very large, very heavy PAMs. In addition, the harbourmaster may impose restrictions on vessel movements in the vicinity of the old wharf while vessels carrying PAMs are manoeuvring, berthing or leaving the area. Additional customs and security restrictions may also apply. Perkins notes that only the occupational health and safety aspects of these possible restrictions are within its control.
- 3.13. In any event, Perkins submits that the following two factors will minimise any anti-competitive detriment arising from the arrangements and conduct for which authorisation is sought:
- Alcan will have priority, but not exclusive, use of the new heavy lift wharf. Should another vessel seek access to the new heavy lift wharf at a time when the provision of that access would not interfere with Alcan's access, Perkins submits it will provide access in a manner consistent with its obligations under an undertaking it provided to the ACCC pursuant to section 87B of the TPA in 2003 (see section 6 for further information).

Perkins notes that neither it nor Alcan anticipate that there will be many occasions on which this could occur.

- Authorisation is only sought for the period during which the delivery of PAMs and other equipment for the Alcan expansion is expected. Once these deliveries are concluded, Perkins submits that it will grant access to the new heavy lift wharf in a manner consistent with its obligations under its section 87B undertaking.

### *Public benefits*

3.14. Perkins claims that the key public benefits that flow from the conduct are the benefits which will result from Alcan's expansion. In summary, these benefits include:

- Economic benefits. The Alcan expansion is expected to significantly increase the volume of exports from the Alcan facility and to increase tax payments to the government by \$62 million per annum. Alcan forecasts that the expansion will create additional direct employment of 1200 jobs during peak construction and 120 jobs during the operational phase. It will also create 350 indirect jobs during operations. The expansion of the landing facilities at Gove increases the potential for new third parties to access Gove in the future.
- Social benefits. Perkins submits that the viability of the Gove operation is integral to maintaining and enhancing the quality of life of the region. The expansion is expected to create new opportunities for local Indigenous enterprises and the traditional land owners will receive a revenue benefit from the use of the new heavy lift wharf.
- Environmental benefits. The environmental benefits of the expansion will include improved alumina extraction from bauxite and a reduction of waste production and overall energy consumption per tonne of alumina.

3.15. Perkins submits that these benefits will only be attainable once the Alcan expansion is complete and therefore, it is in the public interest for the expansion to be completed as quickly as possible, with the assistance of the arrangements and conduct for which authorisation is sought.

### *Counterfactual*

3.16. Perkins submits that if the ACCC does not grant authorisation, it is probable that the wharf expansion and the Alcan expansion will still go ahead as planned. However, Perkins notes that if it is unable to assure priority access to the new heavy lift wharf for vessels carrying PAMs, considerable delays in their docking and unloading could result, with associated disruptions to the expansion of Alcan's alumina refinery. Perkins submits that such delays will increase the cost of the Alcan expansion very considerably. Further, Perkins notes that in the absence of authorisation, it would be concerned that granting priority access to the new heavy lift wharf to vessels carrying PAMs may be inconsistent with its commitments under the section 87B undertaking it provided to the ACCC in 2003 (see section 6 for further information).

## **5. ACCC assessment**

- 5.1. The ACCC's evaluation is in accordance with the statutory tests outlined in section 4 of this draft determination. As required by the test, it is necessary for the ACCC to assess and weigh the likely public benefits and detriment arising from the proposed arrangements.

### **Relevant market**

- 5.2. The first step in assessing the public benefits and anti-competitive detriment of the arrangements and conduct for which authorisation is sought is to consider the relevant market(s) in which that conduct occurs.
- 5.3. Identifying the markets affected by arrangements and conduct proposed for authorisation assists in assessing public benefit and public detriment arising from any lessening of competition from the arrangements and conduct. However, depending on the circumstances, the ACCC may not need to comprehensively define the relevant markets, as it may be apparent that a net public benefit will or will not arise regardless of this definition.
- 5.4. In respect of the current applications for authorisation, Perkins submits that the relevant market is the market for the provision of general cargo freight services to remote communities of north-western Australia, the Northern Territory and the Gulf of Carpentaria. This is the same market as that identified in Perkins' section 87B undertaking.
- 5.5. Given the conduct the subject of the authorisation applications relates to a restriction on access to a component of the wharf facilities at Gove, it would appear that market analysis could potentially focus on the provision of wharf facilities at the Port of Gove and whether the proposed access restrictions might impact upon the ability of existing or new users to access wharf facilities at Gove.
- 5.6. Alternatively, given the access restrictions specifically concern a new heavy lift wharf, consideration could be given to the likely sphere of competition associated with heavy lift wharf facilities at Gove. In this context, the ACCC notes that the new heavy lift wharf will be purpose built to accommodate vessels delivering PAMs for Alcan's refinery expansion and may not necessarily be suitable for more general use. For example, the ACCC understands that the new heavy lift wharf will be further above the water line than a typical wharf.
- 5.7. In any event, the ACCC is of the view that it is not necessary to comprehensively define the relevant market in this instance. In this respect, it is the ACCC's view that its assessment will not be overly affected by the possible variations in precise market definition.

### **The future with and without test (the counterfactual)**

- 5.8. The ACCC uses the 'future with-and-without test' established by the Australian Competition Tribunal to identify and measure the public benefit and anti-competitive detriment generated by the arrangements for which authorisation is sought.<sup>3</sup>
- 5.9. Under this test, the ACCC compares the public benefit and anticompetitive detriment generated by the arrangements in the future if the authorisation is granted with those generated if the authorisation is not granted. This requires the ACCC to make a reasonable forecast about how the relevant markets will react if authorisation is not granted. This forecast is often referred to as the counterfactual.
- 5.10. In identifying the likely situation without authorisation in respect of the current applications, the ACCC is mindful that the conduct for which authorisation is sought only concerns the operation of the new heavy lift wharf. The construction of the new heavy lift wharf is not related to the authorisation applications and indeed, in light of the magnitude of the proposed refinery expansion and the separation of the construction of the new heavy lift wharf from the current authorisation applications, it would appear highly likely that the wharf upgrade and refinery expansion will go ahead regardless of the outcome of the authorisation applications.<sup>4</sup> Perkins' submission supports this view.
- 5.11. Consideration must therefore focus on the operation of the new heavy lift wharf in the absence of authorisation.
- 5.12. Perkins submits that in the absence of authorisation, it would be concerned that granting priority wharf access to vessels carrying Alcan's PAMs may be inconsistent with its section 87B undertaking. The ACCC notes that authorisation is not available for conduct which may be inconsistent with a section 87B undertaking.
- 5.13. Perkins also submits that uncertainty about the legality of granting priority wharf access to vessels carrying Alcan's PAMs may potentially delay the berthing and unloading of such vessels at the new heavy lift wharf, if other vessels require wharf facilities at the same time. Any delay in unloading vessels carrying Alcan's PAMs will delay the expansion of Alcan's alumina refinery, with associated cost implications.
- 5.14. At this time, the likelihood of delays in berthing and unloading vessels carrying Alcan's PAMs in the absence of authorisation appears to be minimal, given Perkins' submission that it is not aware of any third parties who are likely to seek access to the new heavy lift wharf in the near future. In light of

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<sup>3</sup> See, for example, *Re Australasian Performing Rights Association* (1999) ATPR ¶41-701.

<sup>4</sup> The proposed expansion of the Gove alumina refinery is forecast to increase production from 2 million to 3.5 million tonnes of alumina per year by 2007, with potential for additional capacity in the future. The estimated cost of the expansion is in excess of \$1.5 billion.

this, it appears that there will be little difference between the ability of Alcan vessels to have priority access to the heavy lift wharf either with or without authorisation.

- 5.15. The ACCC therefore considers that the counterfactual is the situation in which the construction of the new heavy duty lift wharf and the expansion of Alcan's alumina refinery proceed, but priority access to the new heavy lift wharf for vessels carrying Alcan's PAMs cannot be assured.

#### **Effect on competition**

- 5.16. As discussed in Section 4, the ACCC must assess the extent to which the proposed arrangements give rise to detriment to the public constituted by any lessening of competition that flows from the proposed arrangements.
- 5.17. The ACCC notes that the proposed new heavy lift wharf is an addition to the range of existing landing facilities at Gove and will enable the berthing and unloading of vessels that currently cannot be accommodated at the Port of Gove.
- 5.18. While restricted access to the new heavy lift wharf for the period of the Alcan expansion is likely to reduce the ability of other parties to use the new heavy lift wharf for that period, Perkins' submits that it is not aware of any party seeking to use the new heavy lift wharf. Consequently, it would appear that the likely effect on competition of the access restriction will be minimal.
- 5.19. There is some possibility that access to the existing landing facilities at Gove may be affected during the period of the Alcan expansion and particularly when Alcan vessels unloading PAMs are berthed at the new heavy lift wharf. Such access restrictions may result from Australian Government requirements with respect to Customs, quarantine and security management, in addition to Harbour Master regulations concerning vessel movements and Perkins' obligations under occupational health and safety law.
- 5.20. The ACCC notes that these possible restrictions on access to the existing landing facilities at Gove are not a consequence of the arrangements and conduct for which authorisation are sought but are rather a consequence of the size of the vessels and the nature of the cargo to be unloaded at the new heavy lift wharf during the period of the Alcan expansion. Consequently, the possibility of impeded access to the existing landing facilities at Gove would appear to exist regardless of whether the new heavy lift wharf is used exclusively by Alcan vessels or not.
- 5.21. No submissions were received from interested parties on the issue of possible restricted access to existing landing facilities at the Port of Gove. The ACCC understands that the regional Chamber of Commerce held a public forum on 17 February 2005 where Perkins and Alcan discussed access issues with a wide range of potentially affected parties.

## **Public benefit**

- 5.22. In order to grant authorisation, the ACCC must be satisfied that the proposed arrangements would result in a benefit to the public that outweighs any detriment to the public constituted by any lessening of competition arising from the arrangements.
- 5.23. In its submission, Perkins identifies a number of benefits which it considers will stem from the Alcan expansion.
- 5.24. However, in the context of an assessment of applications for authorisation, any identified public benefits must result from the arrangements or conduct for which authorisation is sought. In this context, the ACCC notes that authorisation is not sought for the Alcan expansion but rather for the provision of priority use of the new heavy lift wharf to vessels carrying PAMs for the Alcan expansion.
- 5.25. Consequently, an assessment of public benefit must focus on benefits arising from Perkins granting priority use of the new heavy lift wharf to Alcan. The key public benefits stemming from this conduct would appear to be the economic efficiencies and advantages associated with minimising possible delays to the expansion of Alcan's alumina refinery which potentially include:
- Minimising the period of time during which access to other landing facilities at Gove may be disrupted while Alcan vessels are delivering equipment for the expansion of its alumina refinery. If Alcan vessels cannot be assured of exclusive access to the new heavy lift wharf, there may be access restrictions to the other landing facilities at Gove beyond the predicted three year period of the Alcan expansion.
  - Enabling the vessels designated to deliver PAMS to Gove to operate according to a set schedule and enter into other shipping agreements at the conclusion of the Alcan expansion, or as availability otherwise permits, which may potentially facilitate the development of other large projects.
  - Achieving the full operation of the alumina refinery as soon as possible, with associated benefits to Alcan and the Australian economy in terms of export earnings.
  - Ensuring employment opportunities associated with Alcan's expanded refinery are available as soon as possible.

## **Balance of public benefits and anti-competitive detriments**

- 5.26. Following consideration of the arguments advanced by the Applicant, the ACCC concludes that the public benefits likely to result from the arrangements will outweigh the anti-competitive detriment.

## 6. The section 87B undertaking

- 6.1. On 22 December 2003 the ACCC accepted an undertaking pursuant to section 87B of the TPA from Perkins with regard to access to port facilities at Gove and maintaining levels of customer service (the Undertaking).<sup>5</sup>
- 6.2. The Undertaking was accepted to allay competition concerns arising from the acquisition by Perkins of Gulf Freight Services, which formerly competed with Perkins in the provision of coastal shipping services to the remote communities of north-western Australia, the Northern Territory and the Gulf of Carpentaria.
- 6.3. At the time the Undertaking was accepted, it was anticipated that a new heavy lift wharf, referred to in the Undertaking as the new heavy duty cargo wharf, might be constructed at the Port of Gove. The Undertaking provides that Perkins will provide access to the new heavy duty cargo wharf on a reasonable basis, subject to a number of considerations.
- 6.4. There would appear to be potential for the provisions of the Undertaking to be interpreted such that they might apply to the new heavy lift wharf referred to in the authorisation applications. Following on from this, there would appear to be an inconsistency between the arrangements the subject of Perkins' authorisation application and Perkins' obligations under the Undertaking.
- 6.5. To address this issue, Perkins has provided the ACCC with a draft revised undertaking for consideration. The draft revised undertaking provides for access to the new heavy lift wharf and to the old wharf, subject to any restrictions which arise during the period of the Alcan expansion and subject to the same terms as set out in clause 2 of the Undertaking.
- 6.6. In its current form, the draft revised undertaking appears to retain the principles of the Undertaking and the ACCC is proposing to accept it.

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<sup>5</sup> A copy of the Undertaking is available from the ACCC's Section 87B Undertakings Public Register which can be accessed via the ACCC's website at [www.accc.gov.au](http://www.accc.gov.au)

## **7. Draft determination**

### **The applications**

- 7.1. Application A90951 was lodged by Perkins on 24 January 2005 under sub-section 88(1) of the TPA to give effect to arrangements that might substantially lessen competition within the meaning of section 45 of the TPA. Under the application, Perkins seeks authorisation to give effect to an agreement with Alcan, known as the Operations Deed. The Operations Deed concerns the construction of a new heavy lift wharf at the Port of Gove and the operation of the new heavy lift wharf during the period of Alcan's proposed expansion of its nearby alumina refinery. In particular, Perkins seeks authorisation to give effect to clause 3.1 of the Operations Deed, under which Perkins agrees to give Alcan priority use of the new heavy lift wharf facility during the period of Alcan's proposed expansion of its alumina refinery. The Operations Deed is conditional upon the ACCC granting authorisation to give effect to it.
- 7.2. Application A90953 was finalised on 26 April 2005 and was lodged by Perkins for and on behalf of Alcan under sub-section 88(8) of the TPA to engage in conduct that constitutes or may constitute the practice of exclusive dealing. Under the application, Alcan seeks authorisation to engage in conduct, for the period of the Alcan expansion, whereby once the new heavy lift wharf at Gove is completed, Alcan will acquire wharf access, management and other related services from Perkins on condition that Perkins will only supply these services to third parties when to do so will not interfere with Alcan's priority use of the wharf.

### **Statutory tests**

- 7.3. For the reasons outlined in this draft determination, the ACCC is satisfied in all the circumstances that the giving effect of provisions of the arrangement for which authorisation is sought under subsection 88(1) of the TPA:
- would be likely to result in a benefit to the public; and
  - this benefit would outweigh the detriment to the public constituted by any lessening of competition that would be likely to result from the contract, arrangement or understanding.
- 7.4. Additionally, for the reasons outlined in this draft determination, the ACCC is satisfied in all the circumstances that the proposed conduct for which authorisation is sought under subsection 88(8) of the TPA:
- would be likely to result in a benefit to the public; and
  - this benefit would outweigh the detriment to the public constituted by any lessening of competition that would be likely to result from the proposed conduct.



### **Draft determination**

- 7.5. The ACCC therefore proposes, subject to any pre-determination conference requested pursuant to section 90A of the TPA, to grant authorisation to application A90951 and A90953 for a period of three years from the date of the completion of the new heavy lift wharf.
- 7.6. In respect of application A90951, the ACCC proposes to grant authorisation to Perkins to give effect to clause 3.1 of the Operations Deed, under which under which Perkins agrees to give Alcan priority use of the new heavy lift wharf facility during the period of Alcan's proposed expansion of its alumina refinery.
- 7.7. In respect of application A90953, the ACCC proposes to grant authorisation to Alcan to engage in conduct whereby once the new heavy lift wharf at Gove is completed, Alcan will acquire wharf access, management and other related services from Perkins on condition that Perkins will only supply these services to third parties when to do so will not interfere with Alcan's priority use of the wharf.
- 7.8. Should authorisation be granted, it is open for the Applicants to reapply for authorisation at or shortly before the expiration of authorisation. In the event that an application for reauthorisation is received by the ACCC, it would be considered based on the circumstances at that time.
- 7.9. In addition, the ACCC may review an authorisation, prior to its expiration, if there has been a material change of circumstance since the authorisation was granted.

### **Further submissions**

- 7.10. The ACCC will now seek further submissions from interested parties. In addition, the Applicants or any interested party may request that the ACCC hold a pre-determination conference pursuant to section 90A of the TPA.