Australian
Competition &
Consumer
Commission

Issues Paper

Australian Bulk Alliance Pty Ltd proposed Port Terminal Services Access Undertaking

30 April 2013

Australian Competition and Consumer Commission
23 Marcus Clarke Street, Canberra, Australian Capital Territory, 2601

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Contents

List of abbreviations and terms

2011 Undertaking	The Part IIIA port terminal service access undertaking submitted by Australian Bulk Alliance Pty Ltd on 21 September 2011, accepted by the ACCC on 28 September 2011 and expiring on 30 September 2013
ABA	Australian Bulk Alliance Pty Ltd
ACCC	Australian Competition and Consumer Commission
CCA	*Competition and Consumer Act 2010* (Cth)
IAA	ABA's Indicative Access Agreement (Schedule 1 to the Proposed Undertaking) sets out the standard terms of access to port terminal services at Melbourne Port Terminal
PLPs	the Port Loading Protocols detail ABA's policies and procedures (published on ABA's internet site) for managing demand for port terminal services
Loading Statement	A statement (published on ABA's internet site) setting out, amongst other things, the name of each ship scheduled to load grain using port terminal services and the estimated date on which grain will be loaded onto the ship
Proposed Undertaking	The proposed Part IIIA port terminal service access undertaking provided to the ACCC by ABA on 26 March 2013
WEMA	*Wheat Export Marketing Act 2008* (Cth) (as amended by the *Wheat Export Marketing Amendment Bill 2012*)

1 Introduction

Under Part IIIA of the *Competition and Consumer Act 2010* (Cth) (**CCA**), 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.

On 28 September 2011, the ACCC accepted an access undertaking from Australian Bulk Alliance Pty Ltd (**ABA**) (**2011 Undertaking**). ABA's 2011 Undertaking relates to the provision of access to port terminal services for the export of bulk wheat at the Melbourne Port Terminal operated by ABA. This undertaking is due to expire on 30 September 2013.

On 26 March 2013, ABA submitted a new access undertaking (**Proposed Undertaking**) to the ACCC for assessment under Part IIIA of the CCA. The Proposed Undertaking is intended to cover the period from when ABA's 2011 undertaking expires (30 September 2013) until 30 September 2014, after which it is expected that access to ABA's port terminal services will be covered by the mandatory code of conduct currently being developed.

Until such time as a code is in place, the *Wheat Export Marketing Act 2008* (Cth) (**WEMA**) requires parties seeking to export bulk wheat from Australia, who also own and operate port terminal facilities used to provide port terminal services, to pass an 'access test'. Part of satisfying the access test involves having an access undertaking relating to access to port terminal services accepted by the ACCC. Relevantly, ABA is a wholly owned subsidiary of the grain marketer Emerald Grain Pty Ltd (which in turn is 50% owned by Sumitomo Corporation) and has submitted the undertaking to continue to satisfy the access test.

The ACCC is conducting public consultation as part of its assessment of the Proposed Undertaking and seeks submissions from interested parties by 21 May 2013.

1.1 ABA's Proposed Undertaking

ABA provided the Proposed Undertaking to the ACCC on 26 March 2013. The relevant documents are available on the ACCC's website and include:

- the Proposed Undertaking (including a version with changes to the 2011 Undertaking marked up), attaching:
    - the Indicative Access Agreement (**IAA**)[1] (including a version with changes to the existing document marked-up),
    - the Port Loading Protocols (**PLPs**)[2] (including a version with changes to the existing document marked-up); and
- a supporting submission from ABA.

[1] The IAA contains the 'Standard Terms' which represent the minimum terms that an access seeker may seek access to ABA's port terminal services on. The client is free, under the terms of the Proposed Undertaking, to enter into negotiations with ABA and agree to port access terms that differ from those contained in the IAA.
[2] The PLPs provide information on how ABA will allocate and provide ship loading services at Melbourne Port Terminal and how vessels will be managed for loading.

The documents can be accessed by visiting the ACCC's homepage at www.accc.gov.au and following the links to 'Regulated Infrastructure', 'Wheat Export' and 'ABA'. Alternatively, go directly to: http://transition.accc.gov.au/content/index.phtml/itemId/964331.

ABA's Proposed Undertaking is largely similar to ABA's 2011 Undertaking. However ABA has made a number of key changes to the Undertaking as well as the scheduled IAA and PLPs. The key changes include:

- a new requirement for customers to demonstrate access to rail and commit to a certain level of accumulation by rail
- a new requirement for customers to consent to stock swapping arrangements
- a new requirement to nominate half month shipping windows
- a new requirement for customers to make provision for the outturn of grain in lieu of executing a new access agreement prior to 30 September 2014.

ABA submits that the changes it has made to its 2011 Undertaking are intended to 'introduce operational requirements aimed at improving the throughput efficiency of the port terminal' and 'address concerns or implement suggestions of market participants'.[3]

These key differences (along with more minor changes) are outlined in more detail in Section 2.

1.2 ACCC assessment

The ACCC must apply the test set out in subsection 44ZZA(3) of the CCA in deciding whether to accept the access undertaking application. Essentially, the ACCC may accept the undertaking if it thinks it appropriate to do so, having regard to various matters. The full test is set out in Section 3 of this paper.

Matters that the ACCC must have regard to include the objects of Part IIIA of the CCA.[4] These include the provision of a framework and guiding principles to encourage a consistent approach to access regulation in each industry.[5] In its assessment of the Proposed Undertaking, the ACCC will be required to form views regarding what constitutes an appropriate access undertaking in the bulk wheat export industry over the term of the undertaking.

1.3 Indicative timeline for assessment

The ACCC received the Proposed Undertaking from ABA on 26 March 2013. Under section 44ZZBC(1) of the CCA, the ACCC must make a decision in relation to the application within the period of 180 days starting at the start of the day the application was received (referred to as 'the expected period').

[3] ABA, *Public Submission to the Australian Competition & Consumer Commission – Proposed ABA Port Terminal Services Undertaking*, 26 March 2013, accessed at http://transition.accc.gov.au/content/index.phtml/itemId/964331 paragraph 1.3.
[4] Section 44ZZA(3)(IAA).
[5] Section 44AA sets out the objects of Part IIIA.

The CCA also provides for 'stopping the clock' mechanisms, meaning that some days will not count towards the 180-day period. Specifically, the timeframe is suspended when the ACCC either publishes a notice inviting public submissions on an undertaking application, or gives a notice requesting information about an application.[6] As such, the consultation period following the release of this Issues Paper will not count towards the 180 day timeframe for this decision, in accordance with the 'stopping the clock' provisions.

Given the nature of ABA's Proposed Undertaking, at this stage the ACCC does not consider it will take as long as 180-day to reach a final decision in relation to the Proposed Undertaking. The ACCC has developed the following indicative timeline:

- receipt of submissions on ACCC Issues Paper by 21 May 2013
- ACCC draft decision in early June 2013
- ACCC final decision in July 2013.

1.4 Consultation

The CCA provides that the ACCC may invite public submissions on an access undertaking application. As such, the ACCC invites submissions on ABA's Proposed Undertaking. Interested parties are welcome to provide submissions on any aspect of the Proposed Undertaking, including the proposed changes to the IAA and PLPs.

Section 2 of the Issues Paper sets out specific matters on which the ACCC is seeking views. The matters listed in Section 2 do not represent a comprehensive summary of all aspects of the Proposed Undertaking, nor are comments required on each of those matters. Further, interested parties are invited to comment on any aspect of the Proposed Undertaking they consider relevant to the ACCC's assessment.

Background information on the legislative criteria by which the Proposed Undertaking will be assessed is set out in Section 3. If practicable, submissions should refer to the legislative criteria, as this will assist the ACCC in assessing the Proposed Undertaking.

Please include detailed reasons to support the views put forward in submissions. If interested parties consider that any aspect of the Proposed Undertaking is *not* appropriate, please suggest changes that may address the concern/s, including drafted amendments where possible.

1.4.1 Making a submission

Submissions should be addressed to:

Mr David Salisbury
Deputy General Manager
Fuel, Transport and Prices Oversight
ACCC
GPO Box 520
MELBOURNE VIC 3001
Email: transport@accc.gov.au

[6] See Section 3 of this Paper for further information on these provisions of the CCA.

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

1.4.2 Due date for submissions

Submissions must be received before **COB Tuesday 21 May 2013**. The ACCC may disregard any submissions made after this date, as prescribed by section 44ZZBD of the CCA. Therefore it is in the interest of submitting parties to make submissions within this timeframe.

1.4.3 Confidentiality of information provided to the ACCC

The ACCC strongly encourages public submissions. Unless a submission, or part of a submission, is marked confidential, it will be published on the ACCC's website and may be made available to any person or organisation upon request.

Sections of submissions that are claimed to be confidential should be clearly identified. The ACCC will consider each claim of confidentiality on a case by case basis. If the ACCC refuses a request for confidentiality, the submitting party will be given the opportunity to withdraw the submission in whole or in part. The ACCC will then assess the Proposed Undertaking in the absence of that information.

For further information about the collection, use and disclosure of information provided to the ACCC, please refer to the ACCC/AER publication *Australian Competition and Consumer Commission / Australian Energy Regulator Information Policy - the collection, use and disclosure of information*, available on the ACCC website.[7]

1.5 Further information

As noted in 1.1 above, the Proposed Undertaking and associated documents, including versions with changes from the 2011 Undertaking marked-up, and a supporting submission from ABA, are available at the ACCC's website.[8]

Public submissions made during the current consultation process will also be posted at that location.

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

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[7] Available at http://transition.accc.gov.au/content/index.phtml/itemId/846791.
[8] Available at http://transition.accc.gov.au/content/index.phtml/itemId/964331.

2 Matters for comment

This section outlines matters on which the ACCC is seeking comment from stakeholders in order to assess whether the Proposed Undertaking is likely to be appropriate.

2.1 Term and carried-over arrangements

The Proposed Undertaking is intended to commence on 1 October 2013, after ABA's 2011 Undertaking expires. The ACCC accepted Part IIIA access undertakings from port terminal operators CBH, GrainCorp and Viterra in 2011. All three undertakings are due to expire on 30 September 2014. ABA's Proposed Undertaking will align in expiry with those three other port terminal services access undertakings and the anticipated repeal of the WEMA.[9]

As previously noted, ABA's Proposed Undertaking is largely similar to its 2011 Undertaking. No disputes have been formally brought to the ACCC pursuant to clause 8 of ABA's 2011 Undertaking. The ACCC has not been made aware of any issues or concerns related to the operation of the 2011 Undertaking.

Key features of ABA's 2011 Undertaking, which ABA proposes to carry over to its new Proposed Undertaking, include:

- a 'publish, negotiate, arbitrate' framework
- a requirement not to discriminate when providing port terminal services or hinder access to these services
- flexibility to vary the PLPs governing access to port terminal services (subject to a process whereby ABA publishes the variations, conducts public consultation and allows a notification period in which the ACCC can object to the variations)
- the inclusion of an IAA to be offered to access seekers
- dispute resolution provisions including processes for mediation and arbitration of disputes
- a 'first in, first served' capacity allocation system
- publication of a Loading Statement and key port terminal information.

[9] The repeal of the WEMA (and the associated end of the 'access test' requirement) is contingent upon the Minister declaring a mandatory code of conduct under section 51AE of the CCA. The WEMA as amended by the *Wheat Export Marketing Bill 2012* can be found at: http://www.comlaw.gov.au/Details/C2012A00170.

General Issues for Comment

- *Has the publish-negotiate-arbitrate approach in ABA's 2011 Undertaking assisted access seekers to gain access to port services on reasonable terms, including through commercial negotiation?*
- *Have the clauses related to non-discrimination and no hindering access in ABA's 2011 Undertaking effectively prevented discrimination and hindering in relation to the provision of port terminal services?*
- *Has ABA's first in, first served capacity allocation system worked well and efficiently allocated port loading capacity?*
- *Given that the Proposed Undertaking is largely similar to ABA's 2011 Undertaking, and to a large extent ABA's existing arrangements will continue to operate over the term of the Proposed Undertaking, do access seekers have any issues or comments regarding any other aspects of ABA's existing arrangements? Do the existing arrangements in the 2011 Undertaking appropriately balance the interests of ABA and access seekers?*

2.2 Rail accumulation

ABA's Proposed Undertaking introduces a new requirement for access seekers to demonstrate an ability to accumulate by rail and commit to a certain level of accumulation by rail.

A new clause 9.2(a) in the proposed IAA at Schedule 1 of the Proposed Undertaking states that a client 'may not be able to book a shipping slot if it is not able to demonstrate access to rail resources for the movement of grain to port.'

Further, a new clause 29 in the proposed PLPs at Schedule 5 of the Proposed Undertaking states that 'accumulation of a significant proportion of the cargo by rail will be expected to be an important component of the execution of the cargo assembly plan.'[10]

Neither of these requirements form part of ABA's 2011 Undertaking.

Issues for Comment

- *Is the relationship between a client's ability to accumulate by rail and the ability to secure a booking slot under the new clause 9.2(a) sufficiently clear? Is this relationship appropriate having regard to the balance of interests of the port operator and of access seekers?*
- *Is the expectation for clients to demonstrate a significant proportion of accumulation of cargo by rail in the cargo assembly plan appropriate having regard to the interests of the port operator and of access seekers?*

[10] The cargo assembly plan sets out an access seekers plan for marshalling, freighting and accumulating at port sufficient grain to meet the access seeker's cargo requirement.

- *In reference to the new clause 29 of the PLPs, does 'significant proportion' indicate with sufficient clarity the level of accumulation that will meet ABA's expectation? Does the reference to such accumulation as 'an important component' of the execution of a cargo assembly plan provide sufficient transparency and certainty regarding the practical operation of this requirement?*

2.3 Stock swap arrangements

ABA seeks to introduce stock swapping as an arrangement that will influence the award of shipping stem, that is, the ordering of accumulation at port and vessel loading priority.

A new clause 9.2(b) of ABA's proposed IAA introduces a client acknowledgement that 'where necessary to facilitate efficient loading of the Client's ships and the ships of others, the Client will be expected to enter into commercially reasonable stock swaps with other clients'. Further, a new clause 9.2(c) introduces a client acknowledgement that by entering into an access agreement it gives its consent to ABA to swap a grade of the client's grain with the same grade of grain between ABA's facilities.

Clause 32 of ABA's proposed PLPs has been amended to include 'agreed stock swaps between clients' as a factor that ABA may take into account when determining the order of cargo accumulation at Melbourne Port Terminal. Further, clause 37 of the PLPs has been amended to include 'stock swaps between clients' in a list of factors that ABA may consider when determining the order of vessel loading.

Stock swapping arrangements are not part of ABA's 2011 Undertaking.

Issues for Comment

- *Is ABA's discretion to require clients to enter into 'commercially reasonable' stock swaps an appropriate one having regard to the interests of the port operator and of access seekers?*
- *Does 'where necessary to facilitate efficient loading' and 'commercially reasonable' in clause 9.2(b) of the IAA provide a sufficient level of clarity as to when and how ABA will be able to exercise this discretion?*
- *Is consent to the swapping of a client's grain (with the same grade of grain at an ABA facility) as a precondition of entering into an access agreement appropriate having regard to the interests of the port operator and of access seekers?*
- *Is the introduction of stock swapping as a factor that will influence the ordering of accumulation at port and loading priority (clauses 32 and 37) appropriate having regard to the interests of the port operator and of access seekers?*

2.4 Shipping windows

ABA intends to introduce a new requirement for clients to nominate a half-month shipping window when completing an 'Intent to Ship' advice (the document through which a client requests elevation and shipping capacity at Melbourne Port Terminal).

A new clause 21 of the proposed PLPs states that the shipping window will include the period within which the vessel ETA will occur and will be either between the 1st and 15th of the month or between the 16th and the last day of the month. ABA also states in the new clause 21 that the purpose of the shipping windows is to spread the shipping task evenly across the month.

The Intent to Ship advice under ABA's 2011 Undertaking requires customers to nominate a shipping month.

Issues for Comment

- *Does the requirement to nominate a half-month shipping window at the time of providing ABA with an Intent to Ship advice appropriate having regard to the balance of interests of the port operator and of access seekers? Does clause 21 provide access seekers with appropriate flexibility regarding the estimated time of arrival of their vessels?*

2.5 Outturn of client grain

ABA has made changes to clauses of the IAA that govern the way that a client's grain will be handled at the expiration of the client's access agreement.

A new clause 2.4 states that the client's access agreement will terminate on 30 September 2014 and, 'in the absence of having agreed and signed a new 2014/15 access agreement, the Client must ensure that arrangements are made to outturn all the Client's Grain prior to this date.' The proposed amendment to clause 6.9(b) states that if a client's grain is not outturned on or prior to 30 September 2014, ABA may decide that the provisions of ABA's current IAA for the coming season will apply to the storage and handling of client grain, whether the client had signed it or not.

In ABA's 2011 Undertaking ABA has the discretion to continue to provide services to the client after the end of an access agreement's term on the terms and conditions of the existing IAA, until a new access agreement is executed or the agreement is terminated.

Issues for Comment

- *Is the requirement that clients ensure that they have arrangements to outturn grain prior to 30 September 2014 if they do not have a signed 2014/15 access agreement appropriate, having regard to the interests of port operator and the interests of access seekers?*

2.6 Other changes

ABA has made other minor changes to its 2011 Undertaking (and its IAA and PLPs) that the ACCC does not consider, at this stage, likely to raise any major concerns. These include, but are not limited to:

- changing references to ABA to 'the Port Operator'
    - ABA submits that it is likely that the business of ABA (including the provision of port terminal services) will in the future be conducted under the trading name 'Emerald Logistics'. This will not involve any change of the entity that is the port operator;[11]
- a new right of ABA to mitigate dust emissions by moisture conditioning (clause 9.4 of the proposed IAA);
- changes to grain testing procedures (clauses 5.4, 5.6, 5.8 and 6.2 of the proposed IAA);
- a new obligation on ABA to insure clients' grain stored at the port terminal against accidental loss (ABA submits this will provide protection to exporters against accidental loss of grain and will facilitate stock swaps and stock movements to aid efficiency) (clause 15.1);
- ABA increasing its limits of liability to $250,000 in aggregate and $100,000 per event (ABA's 2011 Undertaking limits ABA's liability to $100,000 in aggregate and $30,000 per event) (clause 16.3);
- clarification of the application of booking fees where the tonnes of capacity booked differs from the tonnes loaded (clauses 18 and 19 of the proposed PLPs); and
- a new requirement for clients to provide a cargo assembly plan (detailing supply chain arrangements) at the time they make a vessel nomination (clause 22 of the proposed PLPs).[12]

ABA has also made changes to defined terms (primarily in the IAA) and terminology that has changed as a result of amendments to the WEMA. Specifically, ABA has removed outdated terminology such as Wheat Exports Australia and revised its Continuous Disclosure Rules obligations.

It should be noted that ABA has made changes to the IAA relating to non-port terminal services which are not subject to the obligations set out in ABA's 2011 Undertaking or its Proposed Undertaking.[13] Accordingly, clauses in the IAA that do not relate to port terminal services do not form part of the ACCC's assessment of the Proposed Undertaking.

[11] ABA, *Letter to ACCC enclosing Proposed Undertaking and accompanying submission*, 26 March 2013, available at: http://transition.accc.gov.au/content/index.phtml/itemId/964331.
[12] Written nomination of a vessel name must be received at least 30 business days prior to the vessel's estimated time of arrival (ETA).
[13] As per clause 6.3(a) of ABA's 2011 Undertaking and Proposed Undertaking, the 'Standard Terms' are the terms and conditions set out in the IAA to the extent that those terms and conditions relate to the provision of port terminal services.

It should also be noted that ABA is proposing to insert a new clause 9.3 in the IAA that states that, unless otherwise agreed with ABA, only wheat will be shipped out of the Melbourne Port Terminal. The ACCC notes that the access test in the WEMA states that a port terminal operator must have in operation an 'access undertaking relating to the provision to wheat exporters of access to the port terminal service for purposes relating to the export of wheat.'[14] As such, ABA's existing undertaking and its Proposed Undertaking only relate to the provision of port terminal services for the export of bulk wheat. Accordingly, the ACCC's assessment will not have regard to the provision of port terminal services for the export of non-wheat commodities. The ACCC notes that any decision that ABA makes to make its port terminal wheat-only would be a commercial decision for ABA.

Issues for Comment

- *Do any of the other above listed changes raise any concerns that may be relevant to the ACCC's assessment?*

In addition to the specific questions posed in this Issues Paper, the ACCC welcomes any other comments interested parties may wish to make relevant to the ACCC's assessment of ABA's Proposed Undertaking and associated documents.

[14] Subsection 9(1)(a).

3 Background information

3.1 Current legislative arrangements

The *Wheat Export Marketing Act 2008* (Cth) (**the 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, which was given the power to develop, administer and enforce an accreditation scheme for bulk wheat exports, including the power to grant, vary, suspend or cancel an accreditation.[15]

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

Parties seeking to export bulk wheat from Australia are required to pass the 'access test' in the WEMA until 30 September 2014. The access test, set out in section 9 of the WEMA, will be satisfied if either:

- the ACCC has accepted from a person who owns or operates a port terminal facility used to provide a port terminal service an access undertaking under Division 6 of Part IIIA of the CCA, and that undertaking relates to the provision to wheat exporters of access to the port terminal service for purposes relating to the export of wheat; and the access undertaking obliges the person to comply, at that time, with the continuous disclosure rules[16] in relation to the port terminal service; and at that time, the person complies with the continuous disclosure rules in relation to the port terminal service; or

- there is in force a decision under Division 2A of Part IIIA of the CCA that a regime established by a State or Territory for access to the port terminal service is an 'effective access regime'; and under that regime, wheat exporters have access to the port terminal service for the purposes relating to the export of wheat; and at that time, the person complies with the continuous disclose rules in relation to the port terminal service.

3.2 Legal test for accepting an access undertaking

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

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

[16] In summary, the continuous disclosure rules require port terminal operators to publish on their website their policies and procedures for managing demand for port terminal services; a statement, updated daily, 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 (if known), the date on which the ship was nominated and the date on which the nomination was accepted (this statement is termed the 'Loading Statement').

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 CCA, 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 CCA, which are to:
    - promote the economically efficient operation of, use of and investment in the infrastructure by which services are provided, thereby promoting effective competition in upstream and downstream markets; 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 CCA (see further below);
- the legitimate business interests of the provider of the service;
- the public interest, including the public interest in having competition in markets (whether or not in Australia);
- the interests of persons who might want access to the service;
- whether the undertaking is in accordance with an access code that applies to the service; and
- any other matters that the ACCC thinks are relevant.

In relation to the pricing principles, section 44ZZCA of the CCA provides that regulated access prices should:

- be set so as to generate expected revenue for a regulated service that is at least sufficient to meet the efficient costs of providing access to the regulated service or services; and

- include a return on investment commensurate with the regulatory and commercial risks involved; and

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.

3.3 Timeframes for ACCC decisions and stopping the clock

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

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

- made a decision to not accept the application; and

- published its decision under section 44ZZBE and its reasons for that decision: see subsection 44ZZBC(6).

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

- by written agreement between the ACCC and the access provider (in this case ABA), 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.

3.4 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).