



Australian  
Competition &  
Consumer  
Commission

# **Co-operative Bulk Handling Limited proposed 2014-17 Port Terminal Services Access Undertaking**

Issues Paper

4 April 2014



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

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# List of abbreviations and acronyms

2009 Undertaking	The Part IIIA port terminal services access undertaking submitted by Co-operative Bulk Handling Limited on 24 September 2009, accepted by the Australian Competition and Consumer Commission on 29 September 2009 and expired on 30 September 2011
2011 Undertaking	The Part IIIA port terminal service access undertaking submitted by Co-operative Bulk Handling Limited on 20 September 2011, accepted by the Australian Competition and Consumer Commission on 28 September 2011 and expiring on 30 September 2014
ACCC	Australian Competition and Consumer Commission
CBH	Co-operative Bulk Handling Limited
CCA	<i>Competition and Consumer Act 2010 (Cth)</i>
LTAs	Long term capacity agreements, defined at clause 17.1 of CBH's Port Terminal Rules as "an agreement between CBH and any Customer who is allocated Long Term Capacity after submitting a Long Term Capacity Offer and as described in clause 3.3(k)"
PTRs	CBH's Port Terminal Rules detail CBH's policies and procedures (published on CBH's website) for managing demand for port terminal services
Proposed Undertaking	The proposed Part IIIA port terminal services access undertaking provided to the ACCC by CBH on 14 March 2014
Standard Terms	CBH's Port Terminal Services Agreement 2014/2017 – attached as a schedule to the Proposed Undertaking
WEMA	<i>Wheat Export Marketing Act 2008 (Cth)</i> (as amended by the <i>Wheat Export Marketing Amendment Bill 2012</i> )

Aside from proper nouns, capitalised terms used in this Issues Paper and not defined in this glossary or the body of this document are terms defined in clause 2 of CBH's Port Terminal Services Agreement or clause 17.1 of CBH's Port Terminal Rules.

# 1 Introduction

On 14 March 2014, Co-operative Bulk Handling Limited (**CBH**) submitted a new port terminal services access undertaking (**Proposed Undertaking**) to the Australian Competition and Consumer Commission (**ACCC**) for assessment under Part IIIA of the *Competition and Consumer Act 2010* (Cth) (**CCA**). The Proposed Undertaking relates to the provision of access to port terminal services at the four port terminals from which CBH exports bulk wheat: Albany, Esperance, Geraldton and Kwinana.

The ACCC may accept an undertaking under Part IIIA of the CCA from a person who is, or expects to be, the provider of a service, in connection with the provision of access to that service.<sup>1</sup>

This Issues Paper constitutes a notice inviting public submissions for the purposes of subsection 44ZZBD(1) of the CCA, responses to which will inform the ACCC's assessment of the Proposed Undertaking.

On 28 September 2011, the ACCC accepted an access undertaking from CBH (**2011 Undertaking**). This undertaking, which was subsequently varied on 26 November 2012 and 22 March 2013, is due to expire on 30 September 2014. The Proposed Undertaking would commence after the expiry of the 2011 Undertaking. The 2011 Undertaking took effect following the expiry of CBH's 2009 Undertaking, which was accepted by the ACCC on 29 September 2009 and expired on 30 September 2011.

As with the 2009 Undertaking and 2011 Undertaking, CBH has lodged the Proposed Undertaking in order to meet the access test prescribed by the *Wheat Export Marketing Act 2008* (**WEMA**). The access test, in part, can be met if port terminal operators that also export bulk wheat have an access undertaking accepted by the ACCC.

In December 2012, amendments to the WEMA took effect which stipulate that the access test will be repealed on 1 October 2014, subject to there being in place a mandatory code of conduct.<sup>2</sup> The mandatory code must (among other things):

- deal with the fair and transparent provision to wheat exporters of access to port terminal services by the providers of port terminal services, and
- be consistent with the operation of an efficient and profitable wheat export marketing industry that supports the competitiveness of all sectors through the supply chain.<sup>3</sup>

CBH's Proposed Undertaking makes provision for the undertaking to operate from 1 October 2014 to 30 September 2017, notwithstanding the amendments to the WEMA and potential repeal of the access test should a mandatory code be in place. Accordingly, the Proposed Undertaking provides for the undertaking's early expiry in the event that a mandatory code comes into effect, or the legislative requirement for CBH to have an access undertaking accepted by the ACCC is otherwise removed.

The Proposed Undertaking and associated documents are available on the ACCC's website including:

- the Proposed Undertaking, attaching:
  - CBH's proposed Port Terminal Services Agreement (Standard Terms)<sup>4</sup>

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<sup>1</sup> Subsection 44ZZA(1) of the CCA.

<sup>2</sup> Schedule 3 – *Wheat Export Marketing Amendment Act 2012* (Cth).

<sup>3</sup> Section 12 of the *Wheat Export Marketing Act 2008*.

<sup>4</sup> The Port Terminal Services Agreement contains the 'Standard Terms' which represent the minimum terms that an access seeker may seek access to CBH's port terminal services on. The client is free, under the terms of the Proposed

- CBH's proposed Port Terminal Rules (PTRs)<sup>5</sup>, and
- a supporting submission from CBH.

The documents can be accessed by visiting the ACCC's website at [www.accc.gov.au/wheat](http://www.accc.gov.au/wheat).

## 1.1 CBH's Proposed Undertaking

The Proposed Undertaking is largely similar to CBH's 2011 Undertaking, with the key difference being the proposed introduction of Long Term Agreements (LTAs). CBH has proposed to incorporate both LTAs for 'long term' capacity and an auction system to allocate 'near term' capacity. Any capacity not booked under LTAs or via the auction will be allocated on a first-come, first-served basis.

CBH proposes to enter into LTAs with qualifying customers for a period of three years, which is the term of the Proposed Undertaking. The key features of the proposed LTA arrangements are:

- At least 34 per cent of capacity will be reserved for near term acquisition in an auction capacity allocation system.
- LTA capacity will also be tradable in a secondary market and be able to be re-positioned during the year, consistent with the current flexibility for capacity acquired at auction.
- Customers with LTAs will be required to spread their bookings over at least three quarters of the year, and no customer will be able to acquire more than 50 per cent of total LTA capacity, or of the LTA capacity offered in any given month at a particular port.
- If total LTA capacity is oversubscribed in a given month at a particular port then CBH will negotiate with parties to reduce or re-position their volumes. If these negotiations are unsuccessful, all capacity in that port during that month will revert to the auction mechanism.
- In order to qualify for LTA capacity, parties must book a minimum qualifying tonnage of 600 000 tonnes per annum for the three year term of the LTA.

There are several other differences between the 2011 Undertaking and the Proposed Undertaking, including:

- the proposed early expiry of the undertaking upon the commencement of the mandatory code of conduct or the removal of CBH's obligation to have an access undertaking accepted by the ACCC (described at chapter 3.1)
- clauses that make provision for CBH to remove one or more of its port terminals from regulation under the Proposed Undertaking through the use of an addendum (described at chapter 3.3.1)
- clauses that allow CBH to co-mingle a customer's grain pursuant to CBH's 'Common Stack Segregation' system and the obligations and standards associated with that grain (described at chapter 3.4.1)
- several additions and amendments to CBH's Standard Terms (discussed at chapter 3.5).

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Undertaking, to enter into negotiations with CBH and agree to port access terms that differ from those contained in the Standard Terms.

<sup>5</sup> The PTRs provide information on how CBH will allocate and provide ship loading services at Albany, Esperance, Geraldton and Kwinana, and how vessels will be managed for loading.

CBH submits the following regarding the general appropriateness of the Proposed Undertaking:

CBH believes that the Proposed Undertaking will promote increased certainty for exporters, users of CBH's export terminals and will provide CBH with increased certainty in investing in its export wheat terminals and expansions. This will be to the benefit of Western Australian growers and to the Western Australian economy as a whole.<sup>6</sup>

## 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 chapter 3 of this paper.

Matters that the ACCC must have regard to include the objects of Part IIIA of the CCA. These include the provision of a framework and guiding principles to encourage a consistent approach to access regulation in each industry.

For the purposes of this Issues Paper the ACCC has focused its questions on terms of the Proposed Undertaking that are different to those contained in the 2011 Undertaking, particularly those related to LTAs. However, the ACCC's decision in consideration of the matters set out at subsection 44ZZA(3) of the CCA relates to the Proposed Undertaking as a whole. Accordingly, the ACCC invites views on all aspects of the Proposed Undertaking, including provisions that remain unchanged from the 2011 Undertaking.

## 1.3 Indicative timeline for assessment

Subsection 44ZZBC(1) of the CCA provides that the ACCC must make a decision on the access undertaking application within 180 days, starting on the day that the application was received (referred to in the CCA as the 'expected period'). The application was received from CBH on 14 March 2014.

The CCA also provides for 'clock-stoppers', meaning that some days will not count towards the 180-day expected period. Specifically, the 'clock is stopped' where the ACCC publishes a notice inviting public submissions on an undertaking application or gives a notice requesting information about an application.<sup>7</sup> 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.

The ACCC has developed the following indicative timeline for its assessment of the Proposed Undertaking, although the actual timeframe will depend on the nature and timeliness of comments received from industry:

- receipt of submissions on the ACCC draft Issues Paper by **30 April 2014**
- ACCC draft decision - June 2014
- ACCC final decision - August 2014.

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<sup>6</sup> *CBH Port Access – Submission in support of a proposed access undertaking under Part IIIA of the Competition and Consumer Act 2010*, p. 4

<sup>7</sup> See chapter 3 for further information on these provisions of the CCA.

## 1.4 Consultation

Chapter 3 of this Issues Paper sets out specific matters on which the ACCC is seeking views. The matters listed in chapter 3 do not represent a comprehensive summary of all aspects of the Proposed Undertaking, nor are comments required on each of those matters. Interested parties are invited to comment on any aspect of the application 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 at chapter 3 of this Issues Paper. If practicable, submissions should refer to the legislative criteria, as this will assist the ACCC in assessing the application.

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 Invitation to make a submission

The ACCC, pursuant to section 44ZZBD of the CCA, invites public submissions on the Proposed Undertaking.

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

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 5:00pm (EST), **30 April 2014**. The ACCC may disregard any submissions made after this date, as provided under section 44ZZBD of the CCA. Therefore it is in submitting parties' interest 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 publication *Australian Competition and Consumer Commission / Australian Energy Regulator Information Policy – the collection, use and disclosure of information*, available on the ACCC website.<sup>8</sup>

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<sup>8</sup> Available at [www.acc.gov.au](http://www.acc.gov.au).



## 1.5 Further information

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

Mr Michael Eady  
Director  
Fuel, Transport and Prices Oversight  
ACCC  
GPO Box 520  
MELBOURNE VIC 3001  
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## 2 Matters for comment

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

### 2.1 Term

In December 2012, the *Wheat Export Marketing Amendment Act 2012* made a number of changes to the WEMA. One significant change is allowing for the introduction of a mandatory code of conduct to govern access to bulk wheat ports, in place of the current access test arrangements. More specifically, the amending legislation provides that if, as at 30 September 2014, the Minister for Agriculture has approved a code of conduct governing port access, and that code is declared as a mandatory code under the CCA, then the WEMA, including the access test, is repealed. As noted above, the Proposed Undertaking has been provided in order to meet the current requirements of the access test in the WEMA.

Clause 4.2 of the Proposed Undertaking provides that the undertaking will expire on the earlier of 30 September 2017 or:

- (b) the date on which the WEMA (including the "access test") is repealed, the Code having been declared by regulations under section 51AE of the CCA as a mandatory code; or
- (c) the date on which the WEMA is repealed or amended such that there is no longer any requirement for the Port Operator to have in place any access undertaking under Part IIIA of the CCA in order for the Port Operator to export Bulk Wheat (and there is no requirement for the Port Operator to have in place an access undertaking for this purpose under any other legislation); or
- (d) the date this Undertaking is replaced in accordance with Part IIIA of the CCA; or
- (e) the day the ACCC consents to the Port Operator withdrawing this Undertaking in accordance with Part IIIA of the CCA.

Regarding the term and early expiry clauses, CBH submits:

The Proposed Undertaking has regard to the possible delay in relation to the proposed mandatory prescribed Code of Conduct ("**Code**") in relation to bulk wheat port terminal services that was anticipated to commence in October 2014, as well as the Productivity Commission's Final Report on the National Access Regime released by the Australian Treasurer in February 2014. In these circumstances, CBH has included provisions which allow CBH to request the ACCC's approval to withdraw the Proposed Access Undertaking pursuant to Government amendments and policy including the proposed Code.<sup>9</sup>

#### Issues for comment

- *Is the early expiry of CBH's Proposed Undertaking, in the event that a mandatory code is introduced, appropriate?*
- *Does the Proposed Undertaking (inclusive of the early expiry clause) provide certainty to access seekers regarding the arrangements for acquiring port terminal capacity?*

<sup>9</sup> CBH, *Supporting submission*, March 2014, p. 4.

## 2.2 Carried-over arrangements

As previously noted, aside from the introduction of the LTAs (discussed below at section 2.3), CBH's Proposed Undertaking is largely similar to its 2011 Undertaking. Key features of both the 2011 Undertaking and Proposed Undertaking include:

- a 'publish, negotiate, arbitrate' framework
- obligations on CBH not to discriminate in favour of its own trading division when providing port terminal services
- obligations on CBH not to hinder access to port terminal services
- flexibility to vary CBH's PTRs, which govern access to port terminal services (subject to a process where CBH publishes the variations, conducts public consultation and allows a notification period in which the ACCC can object to the variations)
- the inclusion of the Standard Terms to be offered to access seekers
- dispute resolution provisions including processes for mediation and arbitration of disputes
- auction then first-come, first-served capacity allocation mechanisms (this system will be retained in the Proposed Undertaking for near term Capacity only)
- a requirement to publish a Loading Statement and key port terminal information.

CBH submits regarding this continuity:

CBH has essentially retained the provisions of the previous access undertaking for a period of 3 years to 30 September 2017.<sup>10</sup>

The ACCC notes that no disputes have been formally brought to the ACCC's attention pursuant to clause 8 of the 2011 Undertaking.

The ACCC welcomes comments on all provisions of the Proposed Undertaking, including those that remain unchanged from the 2011 Undertaking.

### ***Issues for comment***

- *Has the bulk wheat export market undergone any significant changes since the acceptance of the 2011 Undertaking, such that the ongoing operation of some of the provisions in the Undertaking is not appropriate?*
  - *In so far as CBH's access arrangements will remain unchanged with respect to:*
    - *the publish-negotiate-arbitrate framework*
    - *the non-discrimination and no hindering access provisions*
    - *the operation of the auction then first-come first-served capacity allocation mechanisms (for near term Capacity)*
- do the existing arrangements appropriately balance the interests of CBH and access seekers?*

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<sup>10</sup> CBH, *Supporting submission*, 14 March 2014. p. 4.

- *Are there other issues with any other aspect of CBH's existing arrangements?*

## 2.3 Long Term Arrangements

The primary and most significant change that CBH proposes from its existing undertaking arrangements relates to the proposed introduction of long term agreements (LTAs) for the allocation of port capacity.

As such, the ACCC has focused its questions in this Issues Paper on the LTA arrangements. This chapter focuses on what appear to the ACCC to be the main features of the proposed LTA arrangements. Interested parties should feel free to make a submission on any other aspect of the proposed LTA arrangements.

### 2.3.1 Benefits of LTAs

In its supporting submission, CBH identifies a number of benefits that it submits will arise from establishing an LTA process in its undertaking.<sup>11</sup> These include:

- additional commercial certainty, leading to the encouragement of investment in port and related infrastructure, both for CBH as port operator and for exporters
- greater certainty for marketers who will be able to make longer term marketing plans
- a likely reduction in total auction premiums paid by exporters and held by CBH<sup>12</sup>
- increased certainty about regulation in light of uncertainty about the Code.

#### ***Issues for comment***

- *Do access seekers consider a long term capacity allocation approach to be appropriate to allocate port capacity for bulk wheat in Western Australia?*
- *Do interested parties consider that investment is likely to be encouraged if longer term arrangements are in place? Does this apply to both exporters and the port operator?*
- *In relation to investment, how likely is it that CBH will expand capacity from 15m tonnes to 18m tonnes per annum?*
- *To what extent are capacity constraints at CBH's ports currently an issue?*
- *Will exporters make longer term marketing plans if they have LTAs in place?*
- *Is it likely that there will be a reduction in total auction premium pools as a result of the LTAs? If so, is this a significant benefit to the industry and/or individual access seekers?*
- *Are there other benefits of LTAs not identified by CBH?*

### 2.3.2 Length of agreements

CBH has proposed that the length of LTAs under the undertaking will be for a period of three years.<sup>13</sup> CBH submits that its preference is for a three year period as this will provide certainty to CBH to enable continued investment in the supply chain.

<sup>11</sup> CBH, *Submission in support*, pp. 19-20.

<sup>12</sup> Note that this may not be the case for individual slots

The three year term is the same as the three year term used by GrainCorp in its long term capacity allocation arrangements.

**Issues for comment**

- *Do interested parties consider three years to be an appropriate length of time for a LTA? Do interested parties consider three year agreements to be equally accessible to all exporters? If not, why not?*
- *Does three years provide an appropriate balance of certainty and flexibility for both exporters and for CBH as the port operator? In other words, is three years an appropriate length of time for an exporter and the port operator to be 'locked into' port capacity arrangements?*

### 2.3.3 Amount of LTA capacity available

CBH proposes to offer an approximate total of 15m tonnes of capacity per annum for both long term and near term capacity.<sup>14</sup> It proposes that no less than 34 per cent (i.e. around 5m tonnes) of this would be reserved for near term capacity that is allocated on an annual basis. Accordingly, up to 10m tonnes of capacity would be available as LTA capacity. Any capacity not allocated as long term capacity will be treated as near term capacity and subject to auction and then first-come first-served allocation methods (see below at 4.1.6). CBH argues that this will ensure that there is sufficient capacity for customers that do not take up LTA capacity, and submits that it expects customers who do not take up LTAs to only require about 7% of total shippable quantities.<sup>15</sup>

The requirement that at least 34 per cent of capacity is made available as near term capacity applies both on an overall level (that is, at least 5m tonnes of capacity each year must be available as near term capacity) and on a shipping window by port basis (e.g. if 300,000 tonnes is available at Kwinana in the first half of October, then 102,000 tonnes must be available as near term capacity in that shipping window). CBH provides an illustration of the distribution of capacity in Attachment A to its supporting submission.<sup>16</sup> CBH submits that the minimum amounts of capacity available as near term capacity are all shippable quantities of grain.<sup>17</sup>

The same attachment also demonstrates that CBH's proposed capacity profile offers differing amounts of capacity in each quarter of the year, with highest quantities available in the February to April period; then May to July; then the other two quarters.

CBH states that if it expands its overall capacity after the LTA allocation process, any additional capacity would become near term capacity and be subject to the near term capacity allocation rules.

**Issues for comment**

- *Is the 66 / 34 per cent split between long term capacity and near term capacity appropriate?*
- *Does reserving 34 per cent of available port terminal capacity on an aggregate basis provide a sufficient amount of near term capacity for the requirements of access seekers that do not wish or are unable to take up a long term agreement?*
- *Does the requirement that at least 34 per cent of capacity be available in a shipping window provide sufficient capacity for access seekers that do not wish or are unable to take up a long term agreement?*

<sup>13</sup> CBH, *Submission in support*, p. 8.

<sup>14</sup> CBH, *Submission in support*, p. 8.

<sup>15</sup> CBH, *Submission in support*, p. 8, 26.

<sup>16</sup> CBH, *Submission in support*, p. 54.

<sup>17</sup> CBH, *Submission in support*, p. 30.

- *Are the amounts allocated to near term capacity likely to be shippable quantities?*
- *Are there any other relevant considerations for the ACCC in relation to the amount of capacity available for long term and near term capacity?*

### 2.3.4 Qualifying tonnage

CBH proposes that an exporter that wishes to acquire long term capacity must commit to acquiring 600,000 tonnes of capacity a year.<sup>18</sup> CBH submits that:

The LTA process merely provides a shipper the potential to export a cargo that is equivalent to a single panamax vessel (50,000 tonnes) per month at one port. Feedback to CBH from customers is such that when bidding for capacity customers tend to work in multiples of 50,000 tonnes.<sup>19</sup>

and that:

the LTA minimum standard has a 600,000 tonne annual requirement which is the equivalent of one panamax vessel per month. On this basis the LTA minimum standard would appear to be reasonable on its face and not a barrier to take up by prospective customers. In any event, there is no prescription on the parcel size to acquire capacity in the LTA process, capacity can be shipped in smaller parcels if required or split and partially sold off.<sup>20</sup>

CBH also notes that the 600,000 tonnes of capacity can be used across multiple ports, in comparison to GrainCorp's long term capacity arrangements where the qualifying tonnages are per-port.<sup>21</sup>

CBH submits that it expects seven of its exporter customers would be in a position to acquire long term capacity under this qualifying tonnage.<sup>22</sup>

#### **Issues for comment**

- *Is it appropriate that parties be required to commit to a minimum tonnage to access long term capacity?*
- *Is there alternative criteria that should determine whether a party qualifies for long term capacity?*
- *Is the proposed minimum qualifying tonnage level of 600,000 tonnes per annum appropriate? Do submitting parties agree with CBH's rationale for adopting the 600,000 minimum qualifying tonnage? If not, what alternative minimum qualifying tonnage should be adopted (if any)?*
- *Is 600,000 tonnes a difficult amount of annual tonnage for exporters to be able to commit to?*
- *Which/how many exporters will be able to qualify for LTAs at a minimum qualifying tonnage of 600,000 tonnes per annum?*
- *At what minimum qualifying tonnage would the number of qualifying exporters be expected to increase?*
- *Does the proposed minimum qualifying tonnage have the potential to limit or hinder access to CBH's ports?*
- *Does the proposed minimum qualifying tonnage have the potential to put medium to small exporters at a competitive disadvantage relative to parties able to qualify for LTA capacity?*

<sup>18</sup> CBH, proposed Port Terminal Rules, clause 3.2(b)(ii).

<sup>19</sup> CBH, *Submission in support*, p. 26.

<sup>20</sup> CBH, *Submission in support*, p. 30.

<sup>21</sup> CBH, *Submission in support*, p. 47.

<sup>22</sup> CBH, *Submission in support*, p. 11.

### 2.3.5 Limits on LTA capacity allocations

In addition to the restrictions placed on the amount of long term and near term capacity available for exporters, CBH has placed two restrictions on the way that the total available LTA capacity can be used:

- Firstly, no exporter customer may request, and CBH may not allocate, more than 50 per cent of total LTA capacity for a given year or month.<sup>23</sup>
- Secondly, customers must request to distribute their capacity over at least three quarters in a year. A customer may not request more than half of that customer's annual LTA capacity in one quarter of a year, and may not request more than 30 per cent of the annual LTA capacity in another quarter of the year.<sup>24</sup>

In relation to the 50% limit in a year and month, CBH submits that:

This limit is consistent with the existing make up of customers of CBH. To have a lower cap would ultimately be discriminatory against existing users, which would have the adverse result of forcing CBH's trading division to acquire a higher percentage of its capacity in the auction process, thereby potentially overheating the auction. This would not be advantageous to the overall acceptance of the solution among industry. In addition, no Customer can apply for more than 50% of LTA capacity in a month, again preventing an LTA customer from blocking out a shipping window / month.<sup>25</sup>

In relation to the spread across quarters, CBH submits that:

As part of the LTA capacity, CBH is seeking customers to commit to a minimum of 3 quarters of the year as the spread requirements will act as a damper on volatility of exports across the year. Without this, CBH would potentially face very large swings in utilisation from month to month and quarter to quarter.<sup>26</sup>

There are no restrictions on customers requiring a spread of capacity across ports. This means that customers could take the entirety of their capacity at one of CBH's four ports. CBH submits on this that:

Customers will be free to place their LTA demand where they consider appropriate, subject to the rules requiring a spread amongst quarters as well as not requesting more than 50% of all LTA capacity or LTA capacity in a month. This removal of a minimum requirement at any port terminal provides the maximum flexibility for customers by permitting them to allocate as few as one vessel a year a port. However, ultimately if customers place all their shipping requirements at a single port, the port will be oversubscribed and revert to an auction. It is therefore in the interests of customers' as a whole to spread their utilization across port terminals as they currently do.<sup>27</sup>

#### **Issues for comment**

- *Is it appropriate that a restriction be placed on the proportion of total LTA capacity an individual exporter can acquire? If so, is the proposed limit of 50 per cent of total LTA capacity (per year and per month) appropriate?*

<sup>23</sup> CBH, proposed Port Terminal Rules, clause 3.2(b)(iv) and 3.3(n).

<sup>24</sup> CBH, proposed Port Terminal Rules, clause 3.2(b)(iii). This requirement may be lifted following renegotiations if a particular slot or quarter is oversubscribed (see below at 2.3.8 of this document).

<sup>25</sup> CBH, *Submission in support*, p. 11.

<sup>26</sup> CBH, *Submission in support*, p. 10.

<sup>27</sup> CBH, *Submission in support*, p. 10.

- *Is the requirement on exporters to spread capacity over at least three quarters appropriate?*
- *Do the proposed LTA capacity allocation limits provide adequate protection against any potential for discrimination or hindering in the allocation of LTA capacity?*
- *Is it appropriate that there is no restriction on the way exporters may distribute their capacity over different ports?*

### 2.3.6 Subsequent allocation of near term capacity

Under CBH's proposal, near term capacity – either the 34 per cent of capacity reserved for near term allocations, or any additional amount not taken up in LTA – will be subject to the same auction mechanism currently used by CBH on an annual basis, and then revert to a first-come first-served allocation. Details of the auction and first-come first-served mechanism are discussed in the ACCC's decisions on CBH's 2013 variation to its 2011 Undertaking.<sup>28</sup> CBH submits that:

CBH does not propose any major changes to the auction process to how it was run during the 2013/14 season. The auction take[s] place later in the year than current [sic] and would be closer to a period when reasonable demand certainty was available and hence booking capacity was not as speculative. This would then allow a flexible response to global grain market dynamics for participants in the auction process.<sup>29</sup>

The ACCC has been of the view that overall the auction mechanism used by CBH in WA had worked effectively to ensure that capacity has gone to those who value it the most. However, as noted by CBH, the ACCC in its assessment of CBH's 2011 baseload capacity proposal had concerns that, in an auction following LTA allocations, LTA customers may have a bidding advantage over other customers.<sup>30</sup> This was because those LTA customers may have a greater ability to bid up the price for sought-after auction capacity due to the fact that no auction premium was paid for LTA capacity. In response to this concern, CBH submits that large exporters can do this now under the auction system and that the spread requirements of the LTA capacity will mitigate against any ability to bid up premiums:

Following allocation of LTA capacity and due to the spread requirements imposed by the application process, LTA customers will face a more significant task to balance out their net auction premium, meaning that their ability to bid up premiums will most likely be lower than current demands.<sup>31</sup>

The port loading protocols and auction rules do not specify a particular time period for the auction, but CBH has indicated that it intends to hold the auction later than at present and closer to harvest.

#### **Issues for comment**

- *Is it appropriate that near term capacity be allocated via auction mechanism, followed by a first-come first-served allocation?*
- *Is there the potential for the auction process to be manipulated by LTA capacity holders (e.g. by bidding up premiums)? Would such exporters have the incentive to do so?*
- *How might the potential for auction manipulation differ with the introduction of LTA capacity compared to the current auction system?*
- *Are the current clauses in relation to auction timing sufficient?*

<sup>28</sup> ACCC, *Decision to consent to variation - Co-operative Bulk Handling Limited's Port Terminal Services Access Undertaking*, 7 August 2013.

<sup>29</sup> CBH, *Submission in support*, p. 12.

<sup>30</sup> ACCC, *Co-operative Bulk Handling Limited Port Terminal Services Access Undertaking - Draft Decision*, 23 August 2011 (2011 draft decision), pp. 41-64.

<sup>31</sup> CBH, *Submission in support*, p. 26.



- *Is there any need to have the auction timetable specified in the undertaking or protocols, given that some capacity will be allocated via LTAs?*

### 2.3.7 Repositioning and tradability of LTA capacity

CBH has proposed that tradability of LTA capacity will be allowed.<sup>32</sup> Following the first auction of each season, LTA capacity will be subject to the same rules about tradability as near term capacity. CBH has submitted that transferability is working appropriately under the current system.<sup>33</sup> CBH is also proposing to allow long term capacity to be repositioned according to the same rules as for near term capacity.<sup>34</sup> The ACCC had concerns with CBH's baseload capacity proposal in 2011, which did not allow for transferability of capacity, as this may have prevented capacity from moving to its highest valued use at times of constrained capacity. The ACCC was concerned that this would not result in allocative efficiency.<sup>35</sup>

Presently, CBH's customers are able to observe on CBH's daily shipping stem the total allocated capacity in the slots for each year, and also which exporters have capacity in which months of the year. However, information is not provided on the amount of capacity held by each exporter. CBH is proposing to maintain this approach in relation to long term capacity.

#### **Issues for comment**

- *Is it appropriate that long term capacity be subject to the same transferability and repositioning rules as near term capacity?*
- *Are the proposed LTA arrangements, including the provisions for repositioning and transferability, likely to achieve allocative efficiency? That is, are they likely to ensure that capacity is allocated to those who value it most?*
- *Will there be adequate information in the market to allow transfer of capacity and repositioning of capacity to take place?*
- *Are parties that do not sign LTAs likely to be able to participate in the trading of LTA capacity originally purchased by other parties?*

### 2.3.8 LTA capacity allocation process

CBH has set out a process in its Port Loading Protocols to deal with the offers it receives from LTA customers, including the situation where LTA capacity is oversubscribed by exporters making nominations.<sup>36</sup>

When customers make their offers to acquire long term capacity, they provide a shipment schedule that must conform to the rules and restrictions discussed above. They are also required to provide the amount that they consider a minimum shippable quantity that it would accept.

Following the receipt of these offers, CBH then considers whether it can meet all the offers, and makes a provisional allocation into shipping windows by reference to the minimum shippable quantities provided by exporters. If it can meet all offers, it will allocate the capacity to each customer. This process takes 10 business days.

<sup>32</sup> CBH, *Submission in support*, p. 9.

<sup>33</sup> CBH, *Submission in support*, p. 25.

<sup>34</sup> CBH, *Submission in support*, p. 9.

<sup>35</sup> ACCC, *2011 CBH draft decision*, p. 59.

<sup>36</sup> CBH, proposed Port Terminal Rules, clause 3.3.

If it cannot meet the offers, in that the offers exceed the capacity offered for a month or a quarter, CBH has full discretion to either:

- refuse to allocate any long term capacity in the relevant month or quarter
- enter into a consultation with customers to either reduce or move their requested long term capacity.<sup>37</sup>

This additional process will take up to 20 business days. CBH's proposed system does not use a pro-rata process to scale back the quantities sought by exporters. CBH submits that:

In order to avoid detrimental consequences of inefficient and uneconomical small parcels of capacity, additional industry costs in determining pro-rated capacity acceptability and trading capacity and to reduce incentives for customers to over estimate the quantum of demand for capacity, CBH has adopted different rules to those previously seen. If any given Quarter, or any month within a Quarter (relevant "window"), is oversubscribed, and following discussions between CBH and relevant participants, LTA participants do not wish to reduce or relocate their demand, then each oversubscribed window will revert to be auctioned.

...

Following discussions with customers on the Proposed Undertaking and the introduction of LTA's CBH has taken on board that feedback and modified its proposal to add an interim step following receipt of all LTA applications. Instead of CBH merely reverting all oversubscribed Quarter's and months, CBH will discuss the demand profile with customers and offer them an opportunity to rearrange or reduce their LTA application. As soon as a sufficient number of moves or reductions have been made by customers so that the overall demand profile falls within the LTA capacity limits, CBH will allocate the LTA capacity to all applicants.<sup>38</sup>

Customers then are required to confirm the allocation, and pay the appropriate charges.

#### ***Issues for comment***

- *Is CBH's proposed approach to allocating LTA capacity appropriate?*
- *Is it appropriate that CBH has full discretion in the case of oversubscription to decide on whether to negotiate reductions or repositioning with LTA customers, or to revert the entire month or quarter to auction allocation?*
- *Should CBH's discretion to negotiate reductions be further defined or limited, and if so, how?*
- *Is it appropriate that customers nominate a minimum shippable quantity that CBH then uses to make a provisional allocation of LTA capacity? Does this adequately account for the interests of exporters?*
- *Is there sufficient transparency regarding how CBH will negotiate reductions and which parties will be approached to reduce or reposition capacity?*

### **2.3.9 Long term annual shipment schedule**

CBH proposes to require that LTA customers provide a 'long term annual shipment schedule' (LTASS) to CBH.<sup>39</sup> This must initially be provided at the time of the long term capacity offer. The LTASS will set out information about the breakdown of the capacity by ports and commodity, and indicating whether the grain will come via CBH's upcountry infrastructure.

<sup>37</sup> CBH, Proposed Port Terminal Rules, clause 3.3(e).

<sup>38</sup> CBH, *Submission in support*, p. 9.

<sup>39</sup> CBH, Proposed Port Terminal Rules, clause 3.4.

The customer must then subsequently provide an updated LTASS monthly for the following three months of shipments. CBH may propose changes to the LTASS if it considers it will incur additional operational costs to comply.

If a long term customer fails to provide a LTASS as required, pay the long term capacity charge or to use or transfer a majority of its acquired long term capacity, CBH may elect to terminate the long term capacity agreement. In such a scenario, the customer will still be obliged to pay the long term capacity charge.<sup>40</sup>

#### **Issues for comment**

- *Is it appropriate that a long term customer is required to provide a LTASS and update it monthly for the upcoming three months of shipping?*
- *Are the information requirements of the LTASS appropriate?*
- *Is the basis upon which CBH may propose a revised LTASS appropriately clear?*
- *Is the clause regarding potential termination of a long term capacity contract (3.4(e) of the PTRs) an appropriate one?*

### **2.3.10 Pricing**

CBH states that it intends to use consistent pricing for long term and near term capacity (other than the auction premium and rebate):

CBH proposes to retain the same pricing per tonne of capacity utilised to load vessels irrespective of the manner by which a customer acquires the capacity.<sup>41</sup>

While elevation costs appear to be the same for both customers, there is a difference between LTA and near term capacity customers in relation to the timing and variability of the Upfront Marketer Fee.

LTA customers will be required to pay their Upfront Marketer Fee (in the form of the Long Term Capacity Charge) following the execution of the agreement for the first year, and in June for each year thereafter. In comparison, the Upfront Marketer Fee payable for near term capacity is incurred after the auction and closer to the time of execution of the capacity. CBH submits that:

Due to the differences in the timing of the acquisition of capacity there will be differences in when a party pays the up-front marketer fee. In effect this will mean that there is a time value of money to take into account. However, aligning the payment of the up-front marketer fee with the capacity acquisition is necessary to ensure that speculation is discouraged and that capacity is not hoarded by customers without any financial cost (and also that CBH is not disadvantaged by reason of providing a long term commitment.<sup>42</sup>

Regarding the variability of the fee, the Upfront Marketer Fee for near term capacity is published by CBH each year and may vary between seasons. However, the Standard Terms state that the long term capacity charge is equal to the Upfront Marketer Fee 'at the time of execution of this Agreement'.<sup>43</sup>

Accordingly, it appears that the up-front marketer fee for long term capacity is locked in at the execution of the access agreement for the term of the agreement, while the equivalent fee for near term capacity may vary between seasons.

<sup>40</sup> CBH, Proposed Port Terminal Rules, clause 3.4(e), proposed Standard Terms, clause 9.12.

<sup>41</sup> CBH, *Submission in support*, p. 12.

<sup>42</sup> CBH, *Submission in support*, p. 12.

<sup>43</sup> CBH, proposed Port Terminal Services Agreement, clause 2, definition of 'long term capacity charge'.

More generally, and consistent with the previous approach to pricing, CBH proposes to publish on an annual basis the prices and Standard Terms for its standard port terminal services.<sup>44</sup>

#### **Issues for comment**

- *Is it appropriate that, excluding the auction premium and rebate and the timing and variability of the up-front marketer fee, the same pricing per tonne of capacity used to load vessels is used irrespective of whether it is near term capacity or long term capacity?*
- *Is there any reason why the charges for long term and near term capacity should be differentiated?*
- *Is it appropriate that there will be differences between the timing of the Upfront Marketer Fee for near term and long term capacity due to the differences in the timing of acquisition?*
- *Do interested parties agree with CBH's reasons for aligning the payment of the Upfront Marketer Fee with the timing of capacity allocation?*
- *Is it appropriate that the Long Term Capacity Charge is locked in for the length of the agreement (i.e. three years) while the equivalent charge for near term capacity (the Upfront Marketer Fee) may vary year-to-year?*
- *Are there any other concerns about the pricing approach taken?*

## **2.4 Provision for future exclusion of particular CBH ports from regulation**

The Proposed Undertaking contains clauses relating to CBH's potential application to have one or more of its port terminals removed from the coverage of the Proposed Undertaking.

CBH has amended the definition of 'Port' at clause 1.1 of the proposed undertaking to include CBH's ports at Albany, Esperance, Geraldton and Kwinana:

Unless the ACCC allows in writing the removal of any of those Ports from the coverage of this Undertaking by a Variation to this Undertaking.

CBH has also included a clause that references CBH's potential application to have one or more of its ports removed from the coverage of the Proposed Undertaking:

#### 4.3 Variation

During the term of this Undertaking, the Port Operator may seek the approval of the ACCC to vary this Undertaking under section 44ZZA(7) of the CCA to:

- (a) Remove Port Terminal Services provided at a particular Port from coverage under this Undertaking (except in relation to the Continuous Disclosure Rules) if the ACCC accepts that the relevant Port is subject to sufficient competitive constraint, such that the access arrangements at the relevant Port would no longer be required and the access provisions for that Port would no longer apply or could be otherwise varied by an addendum to this Undertaking limiting the extent of rights and obligations that would otherwise apply under this Undertaking to that Port; or
- (b) Take into account any other legislative or regulatory changes that occur which affect the operation of this Undertaking.

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<sup>44</sup> CBH, *Submission in support*, p. 12.

If the ACCC consents to any variation to this Undertaking, those variations will come into operation at the time specified in section 44ZZBA(4) of the CCA.

Subsection 44ZZA(7)(b) of the CCA provides CBH with the ability to vary its 2011 Undertaking, but only with the consent of the ACCC. The ACCC may consent to a variation of CBH's undertaking if it thinks it appropriate to do so, having regard to the matters specified in subsection 44ZZA(3) of the CCA. Clause 4.3 of the Proposed Undertaking provides that if a port is to be removed from the coverage of the Undertaking through such a variation, this would be reflected through an addendum to the undertaking.

#### **Issues for comment**

- *Is CBH's proposed method of varying the Proposed Undertaking to remove a port from the coverage of the Undertaking (i.e. an addendum at the end of the document as opposed to variation of the terms of the document) appropriate?*

## **2.5 CBH's proposed Port Terminal Services Agreement**

The ACCC acknowledges that all elements of the Standard Terms are subject to negotiation between CBH and access seekers in accordance with the publish-negotiate-arbitrate model. Regarding the assessment of the Standard Terms, the ACCC seeks interested parties' views on whether the Standard Terms represent an appropriate 'starting point' for negotiations between the port operator and access seekers.

### **2.5.1 Co-mingling of grain**

CBH submits that the approach to the co-mingling of wheat under the Undertaking and Standard Terms is a feature of note.<sup>45</sup> Relevantly, CBH's Standard Terms allow CBH to co-mingle grain in certain circumstances. The definition of 'Common Stack Segregation' was not included in the 2011 Undertaking, and is defined at clause 2 of the Standard Terms:

**"Common Stack Segregation"** means the CBH system of grain storage whereby grain belonging to different customers is stored in the same grain stack on the basis that the quality of all such grain in that stack conforms to the same Receival Standard.

Further, the Standard Terms define the standard of grain that a customer is entitled to have outturned at clause 7.6(b):

(b) Where the Customer's Grain at the Port Terminal Facility is stored in a Common Stack Segregation:

(i) CBH is obliged to Outturn Grain to a standard not less than the Receival Standard applicable to the Common Stack Segregation unless CBH is permitted by the Bulk Handling Act 1967 (WA) or the Bulk Handling Act Regulations 1967 (WA) to Outturn Grain to a standard that is less than the Receival Standard applicable to the Common Stack Segregation.

The Standard Terms also set out the obligations that will be placed on CBH in the event that CBH is unable to outturn a Customer's Grain Entitlement.<sup>46</sup>

<sup>45</sup> CBH, *Submission in support*, p. 15.

<sup>46</sup> Clause 13.1(b)(ii).

CBH submits that co-mingling is essential to the efficiency of its port operation:

...the Port Terminal Service is most efficient if it involves co-mingling. The Proposed Undertaking allows CBH to co-mingle the wheat of an access seeker with the wheat of other users, in certain circumstances as set out in the Port Terminal Services Rules.<sup>47</sup>

**Issues for comment**

- *Is the co-mingling of a customer's grain under "Common Stack Segregation" appropriate?*
- *Are there any potential issues associated with CBH's approach to co-mingling?*
- *Is the approach taken to the Outturn Standards relating to grain stored under "Common Stack Segregation" appropriate?*

## **2.5.2 Other changes to CBH's Standard Terms when compared to the 2011 Undertaking**

CBH has made a number of changes and amendments to its proposed Standard Terms when compared to its existing Standard Terms. These include:

- changes that allow the document to apply to 'Grain' as opposed to bulk wheat only
- changes to CBH's receival procedures to provide for the sampling and weighing of grain (as well as the fees that a customer will incur for those services) – clauses 5.4(g) – (i)
- clarification that a customer's warranty is 'not intended to apply to grain delivered by Growers under the CBH Delivery and Warehousing Terms which is subsequently transferred to the Customer' – clause 5.5
- introduction of a 'Remnants and Regrading' clause that stipulates 'If the Customer's Grain Entitlement of a particular type and Grade of Grain is between the values of -1.00 and +1.00 tonne that stock will be deemed NCV Grain and will be removed from CBH's stock information systems and neither party will have any liability to the other for that amount of Grain' – clause 6.9(a)
- changes to CBH's Outturn Standard to define obligations on CBH when outturning grain that has been stored in a Common Stack Segregation – clause 7.6(b)
- revision of the previous Statutory Lien clause to provide that 'the Customer grants a security interest to CBH over the Customer's Grain Entitlement and proceeds of sale thereof as security for the payment of all monies now or hereafter due and payable (on any account whatsoever) by the Customer to CBH and its Related Bodies Corporate' – clause 10
- inclusion of a clause that specifically addresses the parties obligations under the Personal Properties Securities law – clause 10.3
- changes to the situations where CBH will not be liable or responsible for any loss or damage to grain to include variations in the quality of grain resulting from 'the loss of germinative capacity of Grain' and 'variations within the generally accepted standard deviation error of Grain sampling equipment' – clauses 13.4(b) and 13.4(c)
- changes to CBH's indemnity for loss or damage – clauses 13.2(b) and 13.2(c)

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<sup>47</sup> CBH, *Submission in support*, p. 13.

- inclusion of the enactment or promulgation of any 'Code by-law or statutory instrument' as a 'Change in Law' that will entitle CBH to increase the price paid by customer's for Port Terminal Services (to offset increased costs) – clause 29.1(a)(b).

***Issues for comment***

- *Do any of these changes to the Standard Terms raise concerns that may be relevant to the ACCC's assessment?*
- *Are the proposed drafting amendments sufficiently clear and transparent?*

## 3 Legal framework

This chapter sets out the legislative framework for assessing access undertaking applications under Part IIIA. It also includes information about the public consultation process under the legislation. The chapter also considers the possible introduction of a mandatory code of conduct and the cessation of the undertakings.

### 3.1 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.

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 specified 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

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

that access pricing regimes should provide incentives to reduce costs or otherwise improve productivity.

## **3.2 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 180 days starting on the day the application is received (referred to as the 'expected period').

Pursuant to 44ZZBC(6), 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.

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

- by written agreement between the ACCC and the access provider, and such agreement must be published in accordance with subsections 44ZZBC(4) and 44ZZBC(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, and

- if 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.

### 3.3 Current legislative arrangements

The WEMA came into effect on 1 July 2008 and was amended by the *Wheat Export Marketing Amendment Act 2012* (Cth) in December 2012.

In 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.<sup>48</sup>

Amendments to the WEMA in November 2012 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 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.

Until then, 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<sup>49</sup> 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 disclosure rules in relation to the port terminal service.

The WEMA will be repealed in its entirety on 1 October 2014 if the Minister for Agriculture has by notice published in the Gazette approved a code of conduct and the code has been declared by regulations under section 51AE of the CCA to be a mandatory industry code.<sup>50</sup>

The Minister must not approve a code of conduct unless the Minister is satisfied that the code of conduct:<sup>51</sup>

- deals with the fair and transparent provision to wheat exporters of access to port terminal services by the providers of port terminal services

<sup>48</sup> The relevant transitional legislation is the *Wheat Export Marketing (Repeal and Consequential Amendments) Act 2008* (Cth).

<sup>49</sup> 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').

<sup>50</sup> Section 2 and Schedule 3 *Wheat Export Marketing Amendment Act 2012* (Cth).

<sup>51</sup> Clause 12 of Schedule 1 to the *Wheat Export Marketing Amendment Act 2012* (Cth).

- requires providers of port terminal services to comply with continuous disclosure rules
- is consistent with the operation of an efficient and profitable wheat export marketing industry that supports the competitiveness of all sectors through the supply chain, and
- is consistent with any guidelines made by the ACCC relating to industry codes of conduct.

If a code of conduct is not approved and declared by 30 September 2014, the WEMA will not be repealed and the current arrangements, including the access test, will continue.