

MALLESONS STEPHEN JAQUES

For public register

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Copy to
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19 August 2009

Dear Mr Wing and Ms Sheppard

ABB Grain Limited - Revised Port Loading Protocols

We attach on behalf of our client, ABB Grain Limited (“**ABB**”), a revised version of the Port Loading Protocols that ABB proposes will be included in its Port Terminal Services Access Undertaking, submitted to the Commission under section 24 of the *Wheat Export Marketing Act* 2008 (Cth) and Part IIIA of the *Trade Practices Act* 1974 (Cth).

The revised Port Loading Protocols are provided so that the Commission can commence its formal market enquiry process in relation to those protocols, as foreshadowed in its draft decision dated 6 August 2009.

As previously discussed, the Port Loading Protocols have been revised to reflect recommendations made in a recent auditor’s report prepared for ABB and Wheat Exports Australia (“**WEA**”) in accordance with the *Wheat Export Marketing Act* 2008 (Cth). ABB has also consulted with a number of customers in preparing the revised Port Loading Protocols, and was keen to ensure that feedback from those customers and the WEA was reflected in the Port Loading Protocols before they were provided for the Commission’s detailed consideration.

In this regard, in the period of less than 2 weeks since the Commission issued its draft decision, ABB has:

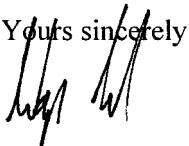
- made substantial changes to its Port Loading Protocols to address the issues raised by the Commission in its draft decision;
- discussed the revised Port Loading Protocols with a number of customers, including representatives of the Australian Grain Exporters Association, and made a number of additional changes to reflect feedback from those customers;
- updated the Port Loading Protocols, following its meeting with the Commission on 18 August 2009; and

- submitted the revised Port Loading Protocols so that the Commission can commence its formal market enquiry process.

ABB is hopeful that this process of engagement and consultation with customers, and addressing issues raised in the Commission's draft decision in an expeditious manner, will facilitate the Commission's consideration of the Port Loading Protocols. In particular, ABB trusts that this process will reduce any unnecessary duplication and confusion which may have otherwise arisen from multiple versions.

If the Commission has any questions in relation to the attached Port Loading Protocols or this letter, we would be pleased to assist.

Yours sincerely



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ABB Port Loading Protocols

1 Introduction

- 1.1 These ABB Port Loading Protocols (the “**Protocols**”) are intended to be a guide to the pathway for the export of commodities out of ABB’s Port Terminals and set out the principles by which ABB will order and manage vessels for loading.
- 1.2 These Protocols apply to all commodities exported from ABB’s Port Terminals. In the case of Bulk Wheat, these Protocols also form part of the Access Undertaking provided by ABB to the Australian Competition & Consumer Commission.
- 1.3 These Protocols apply equally to all Clients, including ABB’s Trading Division.
- 1.4 In order to become a client of ABB, an exporter (the “**Client**”) must first enter into a Port Terminal Services Agreement and/or a Storage & Handling Agreement (“**Handling Agreements**”) with ABB.
- 1.5 Any terms not otherwise defined in these Protocols will have the same meaning as defined in the Handling Agreements.

2 Slot Booking Process

- 2.1 In order to establish a load date and Terminal Services Priority for a vessel in accordance with these Protocols, the Client must book a Slot on ABB’s Shipping Stem.
- 2.2 The Client can book a Slot on ABB’s Shipping Stem for either a named or TBN vessel by submitting ABB’s booking form (“**Booking Form**”) with all mandatory fields completed and otherwise in compliance with Table A. The Booking Form may be found on ABB’s web site. The completed form must be emailed to ABB at abb_vessel_nomination@abb.com.au.
- 2.3 Following receipt of a completed Booking Form, ABB will place the Client’s booking in “Pending” status on the Shipping Stem when the Shipping Stem is next updated. Please note that “Pending” status does not mean that the booking is accepted.
- 2.4 Once the Client’s booking is accepted by ABB (refer clause 3), the Shipping Stem will be amended at the next update to reflect the acceptance.
- 2.5 The Shipping Stem is updated each business day.

2.6 Bookings accepted by ABB are allocated personally to the Client and are not transferable.

3 Acceptance of Booking and Ongoing Compliance

The following conditions must be satisfied before a booking will be accepted by ABB:

- 3.1 compliance with Table A requirements (to the extent they are required at the time of booking);
- 3.2 ABB must have sufficient intake, grain storage and shipping capacity to honour the booking, taking into account the status of the Shipping Stem; and
- 3.3 the booking when aggregated with other bookings of the Client must not expose ABB to undue Performance Risk (refer clause 12).

4 Advice of Acceptance or Non-Acceptance

ABB will reply to the Client within 2 business days following the receipt of fully completed Booking Form, with notification of:

- 4.1 acceptance of the booking nominated by the Client on a TBN basis; or
- 4.2 acceptance of the booking nominated by the Client for a named vessel; or
- 4.3 non-acceptance of the booking nominated by the Client, including reasons for non-acceptance; or
- 4.4 in circumstances where ABB cannot satisfy the Client's booking in full due to operational factors (including a lack of available capacity or existing commitments to other export shippers), a proposal for a Client's acceptance of alternative arrangements, namely:
 - 4.4.1 an alternative Slot;
 - 4.4.2 acceptance of non-standard service levels and associated costs; and/or
 - 4.4.3 alternative port arrangements, stock swaps or load grades.
- 4.5 ABB cannot guarantee acceptance of a booking within 2 business days where the Client and ABB have entered into discussions and/or negotiation in relation to the booking Slot. Where this occurs, the vessel will remain on the Shipping Stem in a pending status until the relevant issues are resolved.

5 Allocation of Load Date

As soon as reasonably practicable after the Client names its vessel and its ETA (and, in any event, within 2 business days), ABB will assess its terminal services capacity and notify the Client of the vessel's estimated load date ("**Load Date**").

6 Notification of Changes in Slots and Load Dates

6.1 ABB will endeavour to ensure that the Client's Slot and Load Date will be held for the Client. However, in certain circumstances, ABB may make changes to the Slot or Load Date for the following reasons:

- 6.1.1 If the cargo is not in an export ready and shippable position by the relevant Load Date;

- 6.1.2 If a Force majeure event occurs;
 - 6.1.3 If there is a change of Terminal Services Priority in accordance with these Protocols (see clauses 7-8);
 - 6.1.4 If a vessel fails to pass customary port surveys;
 - 6.1.5 If poor or dangerous weather reasonably requires the scheduled Slot or Load Date to be delayed in the interests of safety;
 - 6.1.6 In accordance with clause 12, to ensure that the booking does not expose ABB to undue Performance Risk or Slot hoarding by a Client;
 - 6.1.7 If there is a change to the ETA's of the Client's vessel or others in the queue (see clause 8);
 - 6.1.8 If there is a delay in receipt of the Client's authority to load;
 - 6.1.9 If necessary to reflect the impact of any changes to Flinders Ports SA Port rules for Grain Berth Loading Priorities at the relevant port;
 - 6.1.10 If the Client fails to pay any storage or handling charges due and payable to ABB when they are due (and which are not the subject of a genuine dispute);
 - 6.1.11 If the Client ceases to comply with the Table A requirements.
- 6.2 In the event of a change in the Client's Slot or Load Date, ABB will provide notification to Client via the Shipping Stem on the ABB website. The Shipping Stem is updated each business day and is available to all Clients.
- 6.3 In the event that a Slot is vacated (for example because of a failure to adhere to Table A requirements) the Shipping Stem will be updated and Clients may apply to book the vacated Slot on a "first come first served" basis.

7 Guiding Principles for determining Terminal Services Priority

- 7.1 The following principles will be followed by ABB in determining the priority of terminal services at port for the loading of vessels on the Shipping Stem:
- 7.1.1 ABB will ensure that terminal services at the nominated Port Terminal are in an order consistent with the allocated order of vessels booked for that Port Terminal on the Shipping Stem.
 - 7.1.2 However, named vessels currently on the Shipping Stem will receive priority over TBN vessels (even if the TBN vessel has an earlier booking Slot).
 - 7.1.3 Where named vessels are estimated to arrive at around the same time, priority of terminal services will be awarded to the vessel which has been first named to ABB.
 - 7.1.4 In order to maximise Port Terminal capacity utilisation, ABB may accept a new booking on the Shipping Stem only where ABB, acting reasonably, has an objective and reasonable basis to believe that the new booking will not unduly prejudice existing bookings.
 - 7.1.5 ABB may load Clients' vessels out of arrival order where the required stock is either available at the Port Terminal or can be made available without unduly prejudicing

vessels that were initially prioritised over another and ABB has reasonable grounds to believe that the overall speed and efficiency of the Port Terminal will be enhanced on an objective and ascertainable basis.

- 7.1.6 At Port Terminals, where the Client occupies the berth and has stock available but will not work the vessel on a 24 hour / 7 day basis, and another client has stock available and is willing to work the vessel on a 24 hour / 7 day basis, the Client must either work the vessel on a 24 hour / 7 day basis or vacate the berth for the other client.
- 7.1.7 If a Client's vessel fails to pass marine or AQIS surveys, then ABB may re-prioritise terminal services.
- 7.1.8 Where the grain berth is congested, all vessels will be required to perform marine survey at anchor where possible.
- 7.2 Terminal Services Priority may be impacted by the berthing requirements of the Flinders Ports SA Port Rules for Grain Berth Loading Priorities in force from time to time for each Port. ABB may vary Terminal Service Priority to the extent necessary to address these external requirements.

8 Changes to Nominations and Failure to Meet Table A Requirements

- 8.1 Where a Client does not meet the timeframes set out within Table A then a new nomination will be deemed to have occurred, a new booking fee will be payable and the vessel will be re-prioritised in accordance with these Protocols.
- 8.2 Where the arrival of the vessel varies from ETA by greater than 3 days or is outside of the last declared booking Slot, ABB may re-prioritise terminal services.

9 Demonstrating Stock Entitlement

- 9.1 The Client is required by Table A to demonstrate at various points of time its entitlement to stock.
- 9.2 Stock entitlement may be demonstrated by the Client providing:
 - 9.2.1 details of commodity held by the Client at ABB sites that meets the Client's nomination;
 - 9.2.2 details of commodity held at Third Party Sites (refer clause 10) that meets the Client's nomination;
 - 9.2.3 adequate evidence of forward purchases and sales commitments going to meeting the Client's nomination; and
 - 9.2.4 any other form of evidence of entitlement which shows that the Client will have sufficient stock to load the Client's vessel at the load dates indicated by the vessel's priority on the Shipping Stem.

10 Stock at Third Party Sites

- 10.1 In order to qualify for stock entitlement for the purposes of Table A, commodities held at a Third Party Site will only be taken into account if:

- 10.1.1 the Third Party Site has been approved by ABB having regard to appropriate industry standards (e.g. hygiene and quality);
- 10.1.2 The Third Party Site is adequately serviced by road or rail;
- 10.1.3 Upon request by ABB, the Client promptly provides the most recent treatment history of the commodity;
- 10.1.4 Upon request by ABB, the Client promptly provides a valid fumigation certificate for the stock to be exported through an ABB Port Terminal; and
- 10.1.5 Upon request by ABB, the Third Party Site operator confirms in writing within two Business Days of ABB's request, the Client's entitlement and that the Client's stock is available for outturn at the commencement of the Client's Slot.

11 Export Standard Requirements

- 11.1 In the event that the Client selects Export Standard for the accumulation of the commodity the subject of a booking, the Client must provide ABB by no later than 18 days prior to the opening of the first day of the Slot:
 - 11.1.1 a Site Assembly Plan that is complete for the purposes of the export of stock; and
 - 11.1.2 a Transport Plan that is complete for the purposes of the export of stock.
- 11.2 If the Client fails to provide a Site Assembly Plan and/or a Transport Plan as required under clause 11.1, ABB may re-prioritise the Client's vessel on the Shipping Stem.

12 Performance Risk / Anti-hoarding

- 12.1 ABB may decide not to accept a booking if it considers (acting reasonably and in good faith) that the booking, taken in aggregate with other Slots of the Client (collectively, the "**Nominations**") involves an attempt by the Client to reserve Slots in excess of its reasonably anticipated requirements in order to prevent the Client's competitors from obtaining access to Slots at any of ABB's Port Terminals or limit throughput at the Port Terminal.
- 12.2 In forming its reasonable opinion pursuant to clause 12.1, ABB must have regard to:
 - 12.1.1 The quantity or grade of the Nominations relative to the forecast quantity or grade of the relevant commodity in the relevant port zone;
 - 12.1.2 The share of the market for the relevant commodity accumulated by the Client in the previous three years;
 - 12.1.3 Any previous failures of the Client within the preceding three calendar years to perform to its Nominations;
 - 12.1.4 Where available in published annual reports and accounts readily available from the Client's corporate website, the Client's profit and annual revenue in the preceding financial year relative to the quantity of the Nominations;
 - 12.1.5 The availability of transport to port;
 - 12.1.6 The extent of economic damage to ABB's investment in infrastructure and the supply chain which could be caused by non-performance (e.g. a reduction in efficient throughput); and

12.1.7 Any other information provided to ABB by the Client.

13 Dispute Resolution

In the event that the Client disputes ABB's adherence to these Protocols (including, without limitation the acceptance or rejection of a vessel nomination, or re-prioritisation of terminal services), the following procedures will apply:

- 13.1 The Client must notify ABB in writing of the dispute, the reasons for the dispute and the resolution which the Client requests ("**Dispute Notice**").
- 13.2 In the case of a dispute regarding rejection of a booking, the Dispute Notice must be received by ABB by 16:00 Australian Central Standard Time on the next business day following receipt of the notice from ABB that it does not intend to accept the booking (see clause 4.3);
- 13.3 ABB must use its best endeavours to respond to the Client within one business day following receipt of the Dispute Notice ("**ABB Response**"). The ABB Response must notify the Client whether ABB will change its decision and, if not, it must provide an explanation or basis for ABB's decision;
- 13.4 If the Client is not satisfied by the ABB Response, or if ABB fails to respond to the Dispute Notice within one business day of its receipt, the Client may serve written notice to ABB within one business day of receipt of the ABB Response, or within one business day of when the ABB Response was due ("**Escalation Notice**");
- 13.5 Upon receipt of the Escalation Notice, ABB must use all reasonable endeavours to arrange a meeting between ABB's Executive General Manager National Supply Chain and the Client within two business days of receipt of the Escalation Notice. Where ABB's Executive General Manager National Supply Chain is unavailable for such a meeting within the timeframe specified, ABB will make available a suitable alternative authorised representative ("**Alternate**") to meet with the Client within two business days of receipt of the Escalation Notice. To facilitate the expeditious resolution of disputes, the meeting can take place either face to face or by telephone;
- 13.6 At the meeting, ABB's Executive General Manager National Supply Chain (or Alternate) and the Client will discuss the subject of the Dispute Notice and ABB Response and use all reasonable endeavours to reach an agreed outcome. Where such agreed outcome cannot be achieved, given the need for clarity, efficiency and certainty in this dispute resolution process, ABB's Executive General Manager National Supply Chain (or Alternate) will make a final decision in relation to the Dispute Notice and notify that decision in writing to the Client within one business day of the meeting ("**Decision Notice**");
- 13.7 In reaching the final decision set out in the Decision Notice, ABB's Executive General Manager National Supply Chain (or Alternate), acting on behalf of ABB, must take into account the circumstances of the dispute and details set out in the Dispute Notice and, acting reasonably and in good faith, reach a decision that is consistent with the wording, or if that is unclear, the intent of these Protocols (and, in the case of Bulk Wheat, the Access Undertaking). ABB's Executive General Manager National Supply Chain (or Alternate) may also have regard to the objectives of:
 - 13.7.1 maximising the efficient operation of the Port Terminal;
 - 13.7.2 maximising export throughput at the Port Terminal;
 - 13.7.3 ensuring the non-discriminatory treatment of Clients; and

13.7.4 ensuring consistency of decisions.

14 Review of these Protocols

- 14.1 ABB may vary these Protocols from time to time in accordance with clause 14.2 provided that, in the case of Bulk Wheat, while the Access Undertaking is in force:
- 14.1.1 the variations are consistent with the Access Undertaking; and
 - 14.1.2 the Protocols include an expeditious dispute resolution mechanism for dealing with disputes over compliance with the Protocols.
- 14.2 ABB may vary these Protocols at any time if it:
- 14.2.1 commences consultation with Major Users in relation to the proposed variation at least 30 days before the variation takes effect; and
 - 14.2.2 provides Major Users with written notice of the proposed variation (“**Variation Notice**”) at least 10 business days before the proposed variation takes effect (which, for the avoidance of doubt, can be given before or after the expiry of the 30 day period set out in clause 14.2.1) by publishing the Variation Notice in a prominent place on its website.
- 14.3 For the purpose of clause 14.2.1, consultation by ABB with Major Users will involve ABB:
- 14.3.1 providing a written consultation notice to Major Users setting out the nature of, and reasons for, the proposed variation, and inviting comments from interested persons (“**Consultation Notice**”);
 - 14.3.2 publishing the Consultation Notice in a prominent place on its website (with a reference to the publication of the Consultation Notice on the Shipping Stem);
 - 14.3.3 providing a reasonable period (and, in any event, not less than 10 business days) for interested parties to provide their comments (if any) in relation to the proposed variation;
 - 14.3.4 meeting with interested parties (if requested) to discuss the proposed variations and for the interested parties to provide feedback to ABB (if any). Such meetings can be conducted with one or more interested parties, and may be conducted by telephone;
 - 14.3.5 considering the issues raised (if any) by Major Users and any other interested parties and, where necessary:
 - a. seeking clarification and further details from relevant parties; and/or
 - b. making any modifications to the variation proposal to reflect the feedback (if any) received from interested parties;
- 14.4 ABB will be deemed to have satisfied its obligation to consult with Major Users in clause 14.2.1 if it complies with the requirements set out in clause 14.3, even if no Major User or other interested party provides any response to the Consultation Notice issued by ABB.
- 14.5 ABB will publish an updated copy of these Protocols in a prominent place on its website within 3 business days of any variation to the Protocols taking effect.

15 Definitions

ABB means AusBulk Ltd (ABN 88 007 556 256) and includes associated entities, related bodies corporate and where applicable, their successors and permitted assigns.

ABB website means the website at www.abb.com.au

Access Undertaking means the Port Terminal Services Access Undertaking provided to the ACCC by ABB pursuant to section 24 of the *Wheat Export and Marketing Act 2008* (Cth) and Part IIIA of the *Trade Practices Act 1974* (Cth).

Bulk Wheat means wheat for export from Australia other than wheat that is exported in a bag or container that is capable of holding not more than 50 tonnes of wheat.

Client means an exporter of commodity out of one of ABB's Port Terminals that has entered into a Handling Agreement with ABB.

ETA means estimated time of arrival.

Export Standard means ABB's standard export offering under which Clients have the option to arrange their own transport of commodity to port and site accumulation.

Laycan means a period of time from one date to another advised by the Client to ABB within which a vessel is ordered or expected by the Client to arrive at a Port Terminal to commence loading.

Major User means a Client which, as at the date of the proposed variation to these Protocols, has exported an average of 50,000 tonnes of commodity over the preceding two seasons.

Naming a vessel means providing the name of the vessel together with all the other information required by Table A to be given at that same time. "Named" has a corresponding meaning.

Performance Risk means the risks identified in clause 12 of these Protocols.

Port Terminal means, depending upon the context, one or all of ABB's seaboard terminals at:

- Port Adelaide, South Australia
- Outer Harbor, South Australia
- Port Giles, South Australia
- Wallaroo, South Australia
- Port Lincoln, South Australia; or
- Thevenard, South Australia

Port Terminal Services Agreement means a Port Terminal Services Agreement for Standard Port Terminal Services as may be varied by agreement between the Client and ABB.

Shipping Stem means the stem of ships nominated by Clients for loading at ABB's Port Terminals as published by ABB.

Site Assembly Plan means a plan for assembling stock at one or more storage sites for a ship's cargo.

Slot means a Laycan accepted by ABB via the vessel booking process set out in these Protocols as narrowed at the times specified in Table A.

Table A means the Table A attached to these Protocols.

TBN in relation to a vessel means a vessel that is yet to be named.

Terminal Services Priority means priority over other vessels for the terminal services at a Port Terminal as determined in accordance with these Protocols.

Third Party Site means a bulk commodity storage site operated by a person other than ABB.

Trading Division means a business unit or division of ABB or its related bodies corporate which has the responsibility for the trading and marketing of Bulk Wheat and other commodities.

Transport Plan means a plan for the movement to a Port Terminal of stocks assembled for a ship's cargo.

VERSION CONTROL

Version	Reference	Date of Release	Authorised by
1	EXE/ASR1806/asr	19.08.2009	John Warda

Table A: Booking Process

Timeline	Vessel	Contract /Load Details	Shipping Period	Charges	Export Licence (if applicable)	Current Stock Entitlement
1 Greater than 60 days prior to Slot commencing	TBN	<ul style="list-style-type: none"> • Load Port • Commodity • Tonnage • Tolerance • Sales • Specifications • Treatment • Requirements • Destination Details to be provided for all shipping parcels.	30 day Slot	Non – Refundable Booking Fee (as described in Schedule A of the Handling Agreements)	Not required at this point	Not required at this point
2 No later than 60 days prior to the opening of the Slot	TBN	In addition to obligations in section 1 of this table, load grades by tonnage are to be provided.	As per section 1 of this table (as required).	As per section 1 of this table (as required).	As per section 1 of this table (as required).	As per section 1 of this table (as required).
3 No later than 30 days prior to first day of the Slot commencing	TBN	As per section 2 of this table (as required)	Slot to be reduced to a 15 day period. This period must be within original specified Slot.	As per section 2 of this table (as required)	As per section 2 of this table (as required)	As per section 2 of this table (as required)
4 No later than 18 days prior to the opening of the first day of the booked Slot	TBN	As per section 3 of this table (as required)	As per section 3 of this table (as required)	Port handling and shipping fees to be prepaid	ABB may request evidence of such licence	Demonstrate ability to meet vessel load requirements
5 No later than 18 days prior to vessel ETA	Named vessel required and all associated mandatory fields completed on booking form	As per section 4 of this table and completion of blending options on booking form.	ETA Required	As per Handling Agreements	Required	Demonstrate ability to meet vessel load requirements

Notes to Table A:

- (1) In the event that the Client requests a booking Slot later than that required in accordance with Table A, the Client must satisfy all of its cumulative obligations owing and required under Table A for ABB to accept the booking.
- (2) ABB will consider that a new booking has been requested by the Client, if the Client changes, alters or modifies any information already provided to ABB. Accordingly any fees or obligations required for a new booking will be payable and owed by the Client to ABB.