

FOR PUBLIC REGISTER

ABB Grain Ltd

Port Terminal Services Access Undertaking

Submission to the
Australian Competition and Consumer
Commission in Response to Submission by
the South Australian Farmers Federation

Dated 15 July 2009

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1 Introduction

1.1 Background

ABB Grain Limited (“**ABB**”) refers to the public submission made by the South Australian Farmers Federation (“**SAFF**”) (in multiple parts) to the Australian Competition and Consumer Commission (“**Commission**”), and put on the Commission’s public register on 3 July 2009.

The SAFF submission has been prepared in response to the Commission’s Issues Paper dated 29 April 2009, which set out certain information relating to, *inter alia*, ABB’s proposed Port Terminal Services Access Undertaking. The SAFF submission makes a number of arguments that ABB has already addressed in its supplementary submission of 23 June 2009 (“**Supplementary Submission**”), in response to the Commission’s letter dated 2 June 2009 (“**Information Request**”). The SAFF submission includes material dated May 2009.

ABB considers that its Supplementary Submission addresses the issues raised by SAFF in its submission relating to the Port Terminal Services Access Undertaking. ABB remains of the view that, the proposed Access Undertaking represents a reasonable and proportionate approach that satisfies the requirements for acceptance by the Commission under Part IIIA of the *Trade Practices Act 1974* (Cth) (“**TPA**”), having particular regard to the transition that is occurring in the deregulated wheat industry.

ABB notes that some of the SAFF submission is dated May 2009, and its publication on 3 July 2009 places ABB in a problematic position for responding, given the Commission’s regulatory timetable for responses. Nonetheless, while ABB believes it is inappropriate to give weight to such a late submission, to assist the Commission, ABB has sought to address the principal issues raised in the SAFF submission below, using the structure adopted in the SAFF submission for ease of reference.

2 SAFF Submission 1: “Responses from the Grains Industry Committee”

2.1 Introduction

On p.3 of Submission 1, SAFF states that “*there are various business practices undertaken by ABB which should be taken into account by the Commission in determining whether the Commission will accept the [Access Undertaking]*”. Contrary to the suggestion by SAFF, the “*business practices*” referred to, and described in greater detail in the section “*Issues of Concern*” do not represent

discriminatory, unfair or unreasonable practices by ABB, as is suggested, for the legitimate business reasons set out below.

2.2 “Price discrimination for non-ESP storage and logistics”

SAFF suggests that the provision by ABB of its Export Select option for the receipt, transportation and export of bulk wheat “*is not justified and amounts to price discrimination for the purpose of forcing traders to operate within the ESP and not opt out of it*”.

ABB does not accept the suggestion that, by providing exporters with different options, it is engaging in anticompetitive price discrimination, or that it operates its Export Select programme with the “*purpose of forcing*” bulk wheat exporters to use that product. By contrast, ABB provides access to bulk wheat exporters on fair and reasonable terms. As noted in the Supplementary Submission, Export Select allows ABB to pass back supply chain efficiencies to bulk wheat exporters by way of a discount on the standard fee payable (see responses to questions 12 and 44 of the Commission’s Information Request).

SAFF Submission 1 also addresses prices charged by ABB for grain logistics services. Many of the issues raised indicate a lack of broader consideration of the commercial practicalities of running a complex and multifaceted logistics operation of the sort provided by ABB. Rather, SAFF appears to present only a growers perspective, without considering the other side of the logistics equation.

Moreover, there are a number of inaccuracies and inconsistencies in this section of SAFF Submission 1, which negate the points raised. For example, ABB notes that:

- SAFF implies that non-Export Select customers are charged additional fees which Export Select customers are not charged. This is not accurate. The charges levied under ABB’s Export Standard product are ABB’s Standard charges. Export Select represents a discount on the standard rate, which reflects efficiencies achieved by ABB as a result of managing the accumulation and logistics tasks for vessels in the most efficient way possible (e.g. by allowing full trains to be loaded, rather than part trains);
- in paragraph 1.5, SAFF uses a base grain price of \$300 per tonne from which to calculate the charges payable. However, the shrinkage fee amount in paragraph 1.6 is calculated on a base grain price of \$350 per tonne. The total shrinkage fee on grain valued at \$300 is necessarily lower than that incurred on grain valued at \$350. There is no explanation of this discrepancy;
- in calculating the total charges payable in paragraph 1.6, SAFF has relied on the highest possible differentiation in charge for grain exporters between Export Select and Export Standard prices. There is no reference to the different levels of charge for Export Select customers, based on their particular circumstances or preferences;
- SAFF suggests that all the fees listed in paragraph 1.6 are payable up front by Export Select customers. This is not the case. The point at which fees are incurred varies, and not all fees are incurred up front. For example, carrying fees are charged on a ‘pay as you go’ basis for customers who retain stock within ABB’s system for more than a month,

road rail out loading fees are incurred on the physical outturn of the grain from ABB sites, and blending, volume variation and ship sampling fees are charged only when those services are incurred at port; and

- SAFF has relied on figures from 2007-2008, rather than more recent figures from 2008-2009. ABB considers that reliance on historical figures undermines the issues raised.

Accordingly, ABB does not agree with the implication in SAFF Submission 1 that its fees are somehow discriminatory, in any anticompetitive manner. In any event, the Access Undertaking will ensure that all bulk wheat exporters may obtain fair and reasonable access to Port Terminal Services, as required by the *Wheat Export Marketing Act 2008* (Cth), and consistent with Part IIIA of the TPA.

2.3 “Regrading”

It is not a requirement for growers to regrade wheat as new season in order to sell it, as suggested by SAFF. Rather, the majority of old season grain is not regraded, but can nevertheless still be sold to market. Additionally, the fee of \$3.50 referred to by SAFF in its submission is a fee charged to ABB’s bulk wheat exporter customers, not a fee charged to growers. Accordingly, the implication that growers must account for such a fee is inaccurate.

3 SAFF Submission 2: “Issues for Comment from the ACCC Issues Paper”

3.1 Background

In Submission 2, SAFF responds to the particular questions raised in the Commission’s Issues Paper of 29 April 2009. ABB has addressed the points raised by SAFF in its Supplementary Submission. However, ABB makes the following comments, using the structure adopted by SAFF in its Submission 2 for ease of reference.

3.2 “Introduction”

ABB has provided extensive information in respect of the ability of bulk wheat exporters to switch between different supply chains in its responses to questions 1-3 and 7 of the Commission’s Information Request. Accordingly, the realistic option for customers to switch between ports constrains ABB’s provision of Port Terminal Services. Indeed, SAFF indicates that inter-state competition and switching does occur (“*when it became more difficult to access grain in other States...there was a move to South Australia*”).

SAFF also states that ships “*cannot be ‘nominated’ or ordered by a grain trader until the trader has sufficient grain available to fill the ship to capacity*”, the implication being that ABB should provide access to wheat exporters to part fill ships with small amounts of grain. In ABB’s view, this approach does not take into account the complexities of providing Port Terminal Services to multiple bulk wheat exporters and ships, and the capacity constraints at port, if ABB were to do so.

SAFF raises a number of issues relating to vertical information flows, ABB’s alleged control of industry data, and information which gives rise to “*a potential*

conflict of interest which needs to be removed by having an independent operator". ABB would like to focus the review on the Port Terminal Services Access Undertaking, as required under the legislation, and notes that the shipping stem is publicly available and updated daily. It is therefore transparent, and provides bulk wheat exporters and interested parties with access to information necessary for the carrying out of their business. ABB has provided extensive detail in relation to information flows, transparency and the shipping stem in its Supplementary Submission, particularly responses to questions 2, 7 and 9 of the Commission's Information Request, and paragraph 1.15 of Attachment 2. Accordingly, ABB does not accept the implication that it has access to, or control of, information that provides it with a competitive advantage, or disadvantages bulk wheat exporters.

On p.3 of SAFF Submission 2, SAFF states that "*currently there is no risk to ABB about delivering service*". This is incorrect. The Access Undertaking sets out a clear and comprehensive negotiate/arbitrate model for the provision of access to Port Terminal Services. This model provides clear incentives to ABB to adhere to the Access Undertaking, and introduces a clear risk to failing to adhere to its terms. Moreover, as noted in ABB's Supplementary Submission, particularly the responses to questions 1-2 and 7-8, ABB faces credible constraints from alternative supply chains should it not satisfy customer needs. These alternative supply chains provide clear incentives for ABB to provide access on fair and reasonable terms, and in line with the Access Undertaking.

3.3 "Objectives"

The Objectives clause of the Access Undertaking sets out a statement of intent for the purposes of the Access Undertaking, which is clear and unambiguous. It is also consistent with the need to balance the competing interests that the Commission must have regard to under Part IIIA of the TPA. Further detail in relation to the issue raised by SAFF on p.3 of SAFF Submission 2 has been provided in ABB's Supplementary Submission, particularly the response to question 45 of the Information Request, and paragraph 1.6 of Attachment 2.

3.4 "Terms and variation"

SAFF raises a number of arguments in relation to the term of the Access Undertaking, and the circumstances in which ABB may seek permission from the Commission to vary the Access Undertaking. Further detail in relation to these issues has been provided in ABB's Supplementary Submission, particularly the response to question 15 of the Commission's Information Request, and paragraph 1.8 of Attachment 2.

3.5 "Scope"

SAFF indicates that the Access Undertaking should extend beyond Port Terminal Services. ABB rejects this view, for the reasons set out in its Supplementary Submission, particularly paragraph 2.3 of the main submission, and paragraphs 1.3 and 1.9 of Attachment 2.

3.6 "Price and non-price terms"

SAFF raises a number of arguments in this section. ABB makes the following comments:

- **“obligation to publish price and non-price terms” (p.6)** - SAFF calls for the publication of terms by 30 June each year. ABB considers that the date of 30 September each year is reasonable, for the reasons set out in detail in the Supplementary Submission, particularly paragraphs 2.2 and 2.4 of the main submission, the responses to questions 16 and 19-22 of the Commission’s Information Request, and paragraphs 1.7 and 1.10 of Attachment 2;
- **“standard terms” (p.7)** - SAFF states that clause 5.3(b) of the Access Undertaking “*appears to be allowing ABB to have a ‘bob each way’ in keeping the Undertaking to the provision of access of Port Terminal Services*”. This is not the case. The clause provides necessary commercial flexibility, and reflects the position articulated by ABB in its Supplementary Submission, particularly the response to question 12 of the Commission’s Information Request;
- **“non-discriminatory access” (p.8)** - SAFF reiterates its view articulated in SAFF Submission 1 that ABB currently engages in “*discriminatory access backed up by price penalties*”. ABB rejects this view, for the reasons set out in Part 2 above;
- **“variation to reference prices and standard terms” (p.8)** - SAFF considers that it is inappropriate that “*ABB can vary the terms and prices*”. This approach does not appear to take into account the commercial realities of providing access in a newly deregulated market. ABB has addressed SAFF’s issues in its Supplementary Submission, particularly in paragraph 1.3(b) of the main submission, the responses to questions 19-22 of the Commission’s Information Request, and paragraph 1.8 of Attachment 2.

3.7 “Negotiating for access”

SAFF reiterates its issues regarding ABB’s control of the shipping stem and its control of information to the detriment of bulk wheat exporters. ABB does not agree with these concerns, for the reasons noted in paragraph 3.2 above.

SAFF also raises issues relating to the negotiation process, as set out in clause 5 of the Access Undertaking. ABB considers that the negotiation provisions of the Access Undertaking are transparent and will require access to Port Terminal Services to be provided on fair and reasonable terms. Extensive information relating to the negotiation provisions of the Access Undertaking has been set out in ABB’s Supplementary Submission, particularly the responses to questions 23-31 of the Commission’s Information Request, and paragraph 1.12 of Attachment 2.

3.8 “Capacity Management”

SAFF states that the shipping stem requires more information to be provided on it. As noted in paragraph 3.2 above, ABB does not agree with SAFF’s arguments. ABB notes that, following the introduction of the Access Undertaking, it will be impractical to operate different shipping stems for different grains, which means that information about all grains exported through ABB’s ports will be available on the shipping stem (see further the response to question 11 of the Information Request, available in ABB’s Supplementary Submission).

SAFF has indicated that the dispute resolution process in the Port Protocols should include a requirement to “*report to the ACCC*”. ABB does not consider that the dispute resolution process in the Port Protocols is somehow lacking, as suggested. The process is effective and tailored to the needs of both parties, as discussed in ABB’s Supplementary Submission (in particular the responses to question 48 of the Commission’s Information Request).

Further, ABB does not agree that it has incentives to “*manipulate times of loading*” to increase overtime costs. ABB’s clear incentive is to maximise throughput volumes, as discussed in the Supplementary Submission, particularly paragraph 1.3(a) of the main submission and the responses to questions 1-3 and 7-8 of the Commission’s Information Request.

3.9 “Information flow restrictions - ring fencing”

ABB does not agree with SAFF’s perceived concerns as to the proposed ring-fencing arrangements. In ABB’s view, the ring-fencing arrangements are proportionate and effective. Further detail has been provided in the Supplementary Submission, particularly the responses to questions 9, 17(c) and 40-42 of the Commission’s Information Request, and paragraph 1.17 of Attachment 2.

4 SAFF Submission 3: “Submission to the ACCC on Market Failure Because of the Existence of a Monopoly in the South Australian Grains Industry”

4.1 Background

SAFF’s Submission 3 reiterates a number of arguments outlined in Submission 1 and 2 (particularly with regard to ABB’s pricing for non-Export Select customers), as well as drawing on findings set out in the Econosearch Report dated 25 August 2008¹.

In particular, ABB does not agree that it has “*monopoly control of the grains supply chain in South Australia*”. As set out in detail in its Supplementary Submission, particularly the responses to questions 1-2 and 7 of the Commission’s Information Request, there are credible alternative supply chains for bulk wheat exporters in South Australia.

With regard to the specific issues, ABB makes the following comments, using the structure adopted by SAFF in its Submission 3 for ease of reference.

4.2 “Introduction”

ABB does not consider that the South Australian grain sector suffers from “*market failure*”. On the contrary, the grain sector is expanding, with ABB pursuing investment (such as Outer Harbor) to enable it to better serve the needs of its bulk wheat export customers. Moreover, the competition provided by alternative supply chains (see Supplementary Submission, particularly the responses to questions 1-3 and 7-8 of the Commission’s Information Request),

¹ The Econosearch Report, along with a summary document prepared by SAFF, was provided to the Commission in response to its Issues Paper of 29 April 2009, along with SAFF Submissions 1 to 3.

has supported - and will continue to support - innovation by ABB, as it seeks to respond to customer demand and competitive constraints.

4.3 “ABB storage and handling charges”, “non ABB sites”, “rail and road freight”

ABB’s fees are transparent and ABB strongly disagrees with SAFF’s view that it is “*profiteering*” in its fee structure, for the reasons set out in Part 2 above. Moreover, ABB draws the Commission’s attention to the Econosearch Report, which compared CBH, ABB and GrainCorps’ 2007 - 2008 season port charges at Kwinana, Port Adelaide and Geelong respectively². As noted in Part 7 of its submission of 16 April 2009, the Econsearch study indicates that ABB’s charges are nationally competitive.

ABB’s fee structure is also comparable to those offered by other grain logistics providers. For example, the discount provisions of the Export Select product reflect efficiencies achieved by ABB as a result of customers accumulating grain at its up country sites, and is fair, transparent, and equivalent to a comparable pricing structure offered by other Port Terminal Operators, such as GrainCorp.

4.4 “ABB grain grade binning strategy”

ABB considers that its approach to storage and treatment of grains is an up country function, which does not affect its provision of Port Terminal Services pursuant to the Access Undertaking.

However, in order to provide clarification of the issues, ABB notes the following. During the 2008-2009 harvest, barley qualities were low, with significant tonnages of barley being downgraded from ‘malt’ quality to ‘feed’ quality, with associated drops in the value of the downgraded barley. In response, and in order to support up country growers who had suffered from stock downgrading, ABB introduced a new ‘no retention’ grade of barley. As part of this process, mixed bins were introduced which enabled growers to deliver stock and receive ‘malt’ grade payment. However, in response to market conditions and customer demand this policy was varied, and customers and growers who delivered ‘malt’ grades to ABB were entitled to outturn their delivered grade of barley, regardless of the introduction of mixed bins.

Accordingly, ABB does not agree with the implication that it discriminated against growers in any anticompetitive manner.

4.5 “Shipping stem”, “transparency”, “information”

SAFF states that “*the shipping stem needs to be managed by an independent body and be made fully transparent*”. ABB does not accept that this position is reasonable. In ABB’s view, it would be untenable to separate the management of the shipping stem from the Port Terminal Operator. Such a separation would create confusion, hinder responsiveness and not be in the interests of bulk wheat exporters. Additionally, ABB is confident that the shipping stem and other information provisions are sufficiently transparent for the reasons set out in paragraph 3.2 above.

² Econosearch Report, p.12.

4.6 “Regrading old season to new season”

SAFF raises issues in relation to the process for regrading old season wheat as new season wheat. ABB has provided a detailed response to this issue in paragraph 2.3 above.

4.7 “A solution?”

SAFF offers three possible options for consideration in response to what it considers to be “*market failure*” in the South Australian grains sector, each of which is both unworkable, and commercially and legally unrealistic, given requirement for forced divestiture of assets.

In any event, in ABB’s view, the proposed Access Undertaking provides sufficiently clear and transparent terms for the provision of access to Port Terminal Services on fair and reasonable terms to all access seekers. Accordingly, SAFF’s concerns are without foundation when examined against the open access regime that the Access Undertaking will create.

5 Conclusion

For the reasons set out above, the issues raised in SAFF’s submission received by the Commission on 3 July 2009 are unwarranted. In any event, the proposed Access Undertaking represents a reasonable and proportionate approach that satisfies the requirements for acceptance by the Commission under Part IIIA of the TPA, having particular regard to the transition that is occurring in the deregulated wheat industry.

ABB Grain Limited
15 July 2009