

FOR PUBLIC REGISTER

ABB Grain Ltd

Port Terminal Services Access Undertaking

Supplementary submission to the
Australian Competition and Consumer
Commission

Dated 23 June 2009

ABB Grain Ltd

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1 Introduction

1.1 Background

This supplementary submission is provided by ABB Grain Ltd (“**ABB**”) in response to various matters raised by:

- (a) the Commission in its Issues Paper dated 29 April 2009;
- (b) the Australian Grain Exporters Association (“**AGEA**”) in its three submissions dated 7 May 2009, 15 May 2009 and 29 May 2009 respectively;
- (c) SGS Australia and Intertek in their submissions dated 26 and 29 May 2009 respectively; and
- (d) the Commission in its letter dated 2 June 2009 (“**Information Request**”)¹.

This supplementary submission is provided in support of the Port Terminal Services Access Undertaking (“**Access Undertaking**”) submitted by ABB on 16 April 2009.

1.2 Structure of submission

ABB has considered each of the issues raised in the Issues Paper, the Information Request and in each of the submissions made by third parties. ABB has sought to respond constructively on each of those issues, has sought to clarify issues and, where appropriate, has suggested certain amendments to the Access Undertaking.

However, ABB considers that a number of the issues raised in AGEA’s submissions are based on certain misconceptions in relation to the role and purpose of the Access Undertaking. Those misconceptions and other responses to specific issues raised by AGEA in relation to the Australian wheat industry are addressed in Section 2 below. A further detailed response to the issues raised in AGEA’s submission of 29 May 2009 is set out in Attachment 2.

Issues raised by SGS Australia and Intertek are addressed in Section 3 below.

ABB’s response to the questions raised in the Commission’s Information Request are set out in Attachment 1 below.

¹ ABB has also reviewed each of the other submissions which have been placed on the Commission’s website in relation to ABB’s Access Undertaking. The issues raised in those submissions are either addressed in this supplementary submission (i.e. as they are similar to issues raised by others or by the Commission in its Information Request), or are not identified as applying specifically to ABB (see paragraph 1.3(c) below).

1.3 Context in which the Access Undertaking must be considered

In ABB's view, the role of Access Undertakings is not to address a "wish list" of issues across the Australian wheat or grains industry that participants or others would like to have addressed.

Rather, under the legislation, the sole issue to be addressed relates to access to "Port Terminal Services" for export bulk wheat in accordance with the requirements for access undertakings set out in section 44ZZA of the *Trade Practices Act 1974* (Cth) ("TPA").

In considering issues relating to Port Terminal Services raised by AGEA in its various submissions, and by the Commission in its Issues Paper and Information Request, it is important that appropriate consideration is given to factual matters relating to access to the Port Terminal Services provided by ABB. These matters include the following:

ABB has a history of providing access to its terminals and has every incentive to continue to do so

- (a) ABB has provided access to its port terminal services to a number of third party grain exporters over a number of years and in relation to a range of non-regulated grains. This open access has been provided both:
 - (i) without any formal access undertaking in relation to the provision of those services; and
 - (ii) in a manner that is substantially similar (both operationally and commercially) to the access contemplated under:
 - (A) the "2009/2010 Season Port Terminal Services Agreement for Standard Port Terminal Services" provided to the Commission on 22 May 2009 on an indicative basis given the normal seasonal process; and
 - (B) the Port Loading Protocols.

There is no evidence to suggest that the basis on which ABB has supplied those services in the past (particularly in relation to other de-regulated grains such as barley) has had any detrimental impact on competition by, or competitive opportunities available for, competing grain exporters in relation to those grains. As with those other grains, ABB has every incentive to allow access and maximise throughput for wheat exports via its terminal facilities. It is therefore unclear to ABB how the general matters raised by AGEA would "*dramatically improve competition in the export wheat market*" as apparently suggested in its submissions².

This is particularly the case given that many of the matters raised by AGEA in its submissions dated 7 May and 15 May 2009:

- are framed in very general terms (and, accordingly, ABB's position is that, based on the history in relation to other de-regulated grains, there is no evidence to support the concerns or arguments put forward by AGEA); and

- are, in any event, already adequately addressed in the Access Undertaking submitted by ABB.

Moreover, suggestions that ABB has incentives to limit throughput at its port terminals from independent wheat exporters, in order to provide unencumbered access for ABB's marketing division are inaccurate. ABB has clear financial incentives to maximise wheat throughput. Lost profit arising from reductions in the total volume of wheat shipped through ABB's Ports [**CONFIDENTIAL**] (see further response to Question 7(a) of the Commission's Information Request in Attachment 1).

Competition in a newly de-regulated and transitioning market should not be undermined by overly intrusive regulation

- (b) All accredited wheat exporters are operating in a newly de-regulated environment. It is possible that some exporters may have a level of uncertainty as to how the new environment will develop and operate, particularly given the increase from one to 22 licences in the space of one season. However, ABB considers that the promotion of competition and genuine increases in efficiency are best facilitated by commercially negotiated outcomes, rather than by premature or overly prescriptive regulatory intervention in the newly developing and transitioning market. It is this process of market-based and commercially negotiated outcomes that the Access Undertaking seeks to facilitate.

In ABB's view, given this transition, it could be extremely prejudicial for a regulator to over react and be overly prescriptive in access or other regulation, thereby curtailing the very competition that deregulation has sought to promote. Indeed, ABB notes that there has been a movement towards 'lighter touch' regulation in the context of other grain regulatory regimes (e.g. by the ESC Victoria).

ABB considers that this approach is entirely consistent with the Objects and other provisions of Part IIIA of the TPA. It is also entirely appropriate given that the members of AGEA comprise six of the largest wheat traders and exporters globally -- namely, Cargill, Louis Dreyfus, Glencore, Toepfer, Bunge and Noble Grain.

Those global exporters are each well informed and have a clear ability -- both individually and collectively through AGEA -- to address any concerns they have within the framework set out in the Access Undertaking (particularly given the current level of regulatory scrutiny).

In particular, given that the Access Undertakings generally seek to deal with an imbalance of regulatory positions, AGEA and its members are well resourced and are in a strong position to negotiate access under the regulate/arbitrate model.

Relatively few issues have been raised directly in relation to ABB

- (c) While the submissions by AGEA raise a number of issues about the wheat industry generally, the submissions do not adequately demonstrate that those issues would be appropriately or more efficiently addressed by changes to the current draft Access Undertaking.

In addition, interested parties have had more than a month between the publication of the Access Undertaking and the deadline for submitting comments to the Commission in response. Even with this time, AGEA and other respondents have raised relatively few issues which relate specifically to ABB's provision of Port Terminal Services and the Access Undertaking. While ABB can respond to the issues which are identified as applying to it, it is difficult for ABB to comment on general issues which may relate to other port terminal operators.

In this regard, where:

- issues have not been clearly identified as relating to ABB; or
- matters have been submitted to the Commission on a confidential basis,

and, as a result, ABB is unable to properly consider the issues raised and their veracity or otherwise, ABB submits that the Commission should not give any weight to those issues in its consideration of ABB's Access Undertaking.

ABB notes that it is a fundamental requirement of natural justice and procedural fairness that it has a right to know what matters have been raised about it, and has a proper opportunity to respond to those matters.

ABB notes that one of the Objects of Part IIIA is to "*provide a framework and guiding principles to encourage a consistent approach to access regulation in each industry*". However, this does not mean that the Commission cannot (and is not required to) consider each individual access undertaking on its merits, having regard to the specific industry environment in which that applicant operates and matters which relate specifically to the provision of the relevant services by that applicant. To do otherwise risks imposing unnecessary regulation in respect of ABB's Terminal Services, and the provision of these services has not demonstrated a need for regulation.

Having regard to these matters, ABB considers that its proposed Access Undertaking is a reasonable and proportionate approach which meets the requirements under Part IIIA of the TPA.

The operation of common use facilities

- (d) Both the Port Terminal Facilities and various other parts of the grain supply chain in South Australia are by their nature common use facilities. This means that access is shared with a number of users. This sharing of access provides large cost savings to individual users and, as a result, significant efficiencies for the benefit of the entire industry. However, it also means that the use of those facilities by any one user can have a substantial impact on the use of the facilities by others. For example, inadequate quality control procedures (or inability to demonstrate adequate procedures), gaming in seeking rail, storage, port terminal or shipping allocations, or delays in delivery or other inefficient practices by one user can have a significant impact on both other users of the supply chain and the ability of service providers to facilitate exports in a timely and efficient manner.

ABB has some concerns that AGEA's submissions may tend, inaccurately, to suggest implicitly that all delays and additional costs on exporters are the result of "*bulk handler negligence*" and that all such costs should be borne by the port terminal operator. This is neither correct nor appropriate.

It may be that certain users would prefer no limitations on liability, stronger commitments in relation to service timeframes, an ability to transfer more risk onto port terminal operators and a greater ability to reserve exclusive or priority use of certain assets. However, this is not consistent with the reality of operating a common use supply chain involving multiple participants in which delays and other operational matters often result from matters outside the control of the port terminal operator.

Issues raised are adequately addressed in the Access Undertaking and supporting material

- (e) ABB considers that the issues raised by AGEA, SGS Australia, Intertek and others are, in any event, already addressed in its proposed Access Undertaking. Moreover, ABB submits that potential issues relating to transparency, non-discrimination, information sharing and negotiation of terms are clearly addressed in an Access Undertaking which ensures the provision of access to Port Terminal Services, includes provisions dealing with non-discriminatory access (supported by external audit requirements), includes ring-fencing provisions, and sets out an arbitration mechanism which can be invoked if users are dissatisfied with the terms on which access is provided.

Having regard to the matters set out above (and the matters set out in ABB's initial submission dated 16 April 2009), ABB considers that the 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.

2 Key issues raised in AGEA's submissions

2.1 Introduction

This section sets out ABB's response to key issues raised in AGEA's submissions dated 7 May and 15 May 2009, with some consideration also of comparable points raised in its submission of 29 May 2009. ABB's further response to issues raised in AGEA's submission dated 29 May 2009 is set out in Attachment 2.

2.2 Misconception No 1 - That the Access Undertaking is deficient because it does not set out all price and non-price terms

In its submission dated 7 May 2009, AGEA states that:

"[t]he proposed undertakings are deficient because they do not include binding prices or terms and conditions upon which these bulk handlers propose to provide access to port terminal services"... without the opportunity to review the actual terms and prices on which bulk handlers intend to provide access to port terminal services, interested parties are unable to make meaningful submissions and the ACCC cannot properly evaluate the undertakings.

AGEA further states that:

“[u]nless the ACCC has the opportunity to assess key elements such as prices and terms and conditions with the proposed undertakings, it cannot properly assess whether they meet the objects of Part IIIA or the pricing principles”.

Similarly, in paragraph 4.2 of its submission of 29 May 2009, AGEA asserts that:

“‘fair and transparent access’ means the proposed access undertakings must specify the prices and non-price terms on which access to port terminal services will be provided”.

AGEA expands on this issue in paragraph 9 of its 29 May 2009 submission.

ABB considers that the concerns raised in relation to this issue are misconceived. The TPA does not prescribe the matters that must be included in an access undertaking, and there is no requirement that all price and non-price terms must be included in an access undertaking before it can be considered by the Commission. ABB also understands that it is not the Commission’s practice to require that all terms (price and non-price) are set out in an access undertaking.

To the contrary, section 44ZZA of the TPA states that ABB may give an access undertaking to the Commission *“in connection with the provision of access to the service”*. The Commission may accept the Access Undertaking, if it thinks it appropriate to do so, having regard to a number of matters, including:

- (a) the objects of Part IIIA;
- (b) the pricing principles specified in section 44ZZCA;
- (c) ABB’s legitimate business interests;
- (d) the public interest, including the public interest in having competition in markets (whether or not in Australia);
- (e) the interests of persons who might want access to the service; and
- (f) any other matters that the Commission thinks are relevant.

ABB considers that its proposed Access Undertaking satisfies each of these criteria. In particular, the Access Undertaking:

- sets out a clear and legally enforceable framework in accordance with which ABB must provide access to its Port Terminal Services;
- together with the *Wheat Export Marketing Act 2008 (Cth)* (“WEMA”), sets out requirements to provide transparency in relation to the terms on which ABB will provide access to Standard Port Terminal Services;
- sets out a regime to address potential concerns about anti-competitive discrimination in favour of ABB’s marketing division (supported by external audit requirements);

- sets out confidentiality and information ring-fencing arrangements between ABB's port terminal operations business and its marketing division (which ABB considers are appropriate, given the lack of access to any competitively sensitive information even in the absence of those arrangements); and
- provides a clear process for negotiating the terms of access to the Port Terminal Services (including relevant timeframes) and provides a mechanism for binding third party arbitration if access seekers are dissatisfied with the terms of access offered by ABB.

Given this clear framework for agreeing the terms of access with users, and the requirement for all agreements to be consistent with the requirements specified in the Access Undertaking, it is unclear to ABB why AGEA considers the Access Undertaking to be deficient and has suggested that it cannot be considered by the Commission.

This is particularly the case given that the overarching framework of the Access Undertaking is based on the negotiate / arbitrate model in Divisions 2 and 3 of Part IIIA of the TPA, which presumably meets the requirements of an effective access arrangement and is presumably also consistent with the COAG Competition and Infrastructure Reform Agreement principles referred to in AGEA's submission³.

In particular, ABB considers that the purpose of the Access Undertaking is to set out a clear and transparent framework for the provision of Port Terminal Services, and the negotiation of contracts in respect of Port Terminal Services. It is not appropriate or reasonable for the Access Undertaking to provide prescriptive and exhaustive detail of all aspects of Port Terminal Services, in the manner that AGEA's submissions appear to suggest.

Accordingly, ABB is confident that its Access Undertaking is consistent with the requirements of the TPA and WEMA, and provides an appropriate framework for the provision of access to Port Terminal Services in South Australia, taking into account the particular circumstances of the South Australian wheat industry.

2.3 Misconception No 2 - That "Port Terminal Services" are not adequately defined in the Access Undertaking

Definition of "Port Terminal Services" and scope of Access Undertaking

In its submission dated 15 May 2009, AGEA states that:

"[t]he access undertakings do not provide clear definitions of "port terminal service". Instead, they include very narrow and imprecise descriptions as to what "may" or may not, in their view, fall within the definition.

At the same time, in their undertakings, the bulk handlers reserve the right to rely upon matters and services that are clearly outside of their definitions as a basis to exclude access to "port terminal services".

³ See AGEA submission dated 15 May 2009.

Similarly, paragraph 4.3 of AGEA's submission of 29 May 2009 states that:

“the proposed access undertakings must clearly define port terminal services to which access will be provided so that there is certainty as to the scope of the undertakings and the services to which access will be provided”

The concerns raised in relation to this issue are misconceived. The term “Port Terminal Services” has an expansive definition under the Access Undertaking which is intended to cover each of the standard services provided by ABB at its port terminals. In paragraph 8.4 of its submission of 29 May 2009, AGEA raised a number of specific issues that it considers should be included within the definition of “Port Terminal Services”. ABB has responded to this issue in paragraph 1.9 of Attachment 2 to this submission.

ABB also notes that there is no requirement under the WEMA for services which are not “Port Terminal Services” to be the subject of its Access Undertaking. The fact that certain services are more efficiently (or are for historical or genuine commercial reasons) provided at an up-country location, and are therefore not included in the definition of “Port Terminal Services” covered by the Access Undertaking, is plainly not a basis for suggesting that ABB has sought to (or that it will) exclude access to the Port Terminal Services, or that those services should be subject to the Access Undertaking.

Similarly, there is no basis for AGEA seeking to extend the coverage of the Access Undertaking from “at-port” to include “related supply chain services”.

Protocols for accepting grain outside ABB's storage and handling system

ABB regularly receives, and has established protocols in relation to the receipt of, grain from outside its storage and handling system.

For practical and logistics purposes, there may from time to time be some differentiation in relation to grains received, based on where the grain is located, when in the season the grain is shipped, the availability of infrastructure to handle the grain and testing and segregation requirements for each shipment. However, the protocols and ABB's practices are applied objectively, based on operational and logistics requirements.

When wheat is stored within ABB's storage and handling system, ABB has information about how much wheat a person in theory has within that system⁴, and has information about the quality controls which have been applied in respect of that wheat entitlement (e.g. whether it has been fumigated, whether or not contact fumigants have been used, and the quality control history of the relevant storage facilities). Accordingly, when an exporter wishes to move wheat within ABB's system, ABB already has much of the information that it requires to fulfil that export task on the basis of what it has been advised.

However, before ABB can accept shipments of wheat that has been stored outside of its storage and handling system, it needs to obtain a range of information from the exporter so it does not compromise the wheat owned by others if transportation and storage is not fully segregated. That information includes details in relation to:

⁴ ABB is not aware of swaps or unverified ownership entitlement.

- the exporter's ownership or entitlement to the grain (i.e. if an exporter wishes to obtain a shipping slot to export 20,000 tonnes of grain, ABB needs to be satisfied that the exporter in fact has ownership of (and therefore has an ability to ship) that amount of grain so that the slot is not lost to others who would have otherwise genuinely used that slot); and
- the quality control procedures, fumigation and other pest control measures that have been applied in respect of the grain; and
- the grade of grain, presence of GMO's and any segregation or blending requirements at port.

These are not onerous requirements. To the contrary, ABB considers that they are entirely reasonable and appropriate. This is particularly the case given the:

- significant potential for any misalignment of exporters' entitlements and shipping logistics to cause delays and other interruptions to the efficient operation of the export chain as a whole (which in turn can have significant implications for the timely loading of grains by other exporters); and
- significant potential for failures in quality control procedures to cause both delays and inefficiencies and harm to the integrity and reputation of the South Australian and Australian wheat industry.

There are significant increased exposures in managing grain in respect of which ABB does not have a full history. The potential for a single truck load of grain to contaminate other grain or the system through pesticides, GMO's or treatment resistant insects (resulting in substantial delays) is compounded by the inability to test for these on receipt.

In this regard, AGEA's apparent suggestion that Port Operators should accept greater liability for certain delays or supply chain issues (even if outside the Port Operator's control), yet at the same time not have rigorous controls, is somewhat counterintuitive.

ABB's protocols are intended to address this issue and manage the risks to ABB, the efficiency of the supply chain and, ultimately, the South Australian industry.

ABB's protocols essentially involve:

- a requirement for exporters who have stored grain in on-farm or other external storage facilities to complete a Vessel Nomination / Site Accumulation advice (see Attachment 3 of this submission). As part of that nomination, the relevant exporter is required to declare what non-ABB sites will be used to supply grain for the vessel and fumigation details for the relevant grain. Exporters are also required to provide a fumigation certificate and demonstrate a logistical capacity to deliver grain to the port in a timely manner;
- a system for late season deliveries. This system provides protocols (see Attachment 4 of this submission) for late season ex-farm deliveries. Depending on the location of the grain, there may also be certain requirements in relation to dates, sites for receipt and booking-in loads in order to manage the process efficiently and not create additional risks while shipping or receiving the grain; or

- in certain cases, specific agreements with exporters to handle grain outside of the ABB system.

Exporters are also required to sign a Commodity Vendor Declaration (see Attachment 5 of this submission).

As set out above, ABB does not believe that these are onerous requirements. However, they are critical for the continued efficient operation of the supply chain and the maintenance of quality controls which are necessary for the benefit of the entire industry.

2.4 Misconception No 3 - That exporters will not have access to terms and conditions in sufficient time to be able to enter into supply contracts with export customers

In its paragraph 9.6 of its submission of 29 May 2009, AGEA states that:

“price and non-price terms must be published in advance of the commencement of the undertakings. Users need to know the terms and conditions on which the services will be provided to assess the reliability of the service, plan budget and generally compete in the market”.

The submission also claims in paragraph 9.5 that:

“Australian wheat exporters will feel compelled to enter into contracts with bulk handlers without a proper opportunity to negotiate”.

ABB does not agree that the proposed timetable for issuing terms, and negotiating access to port terminal capacity is in any way discriminatory or disadvantageous to wheat exporters. Moreover, the period between publication of price and non-price terms and receipt of the first harvested wheat at port in South Australia is typically a minimum of six weeks from 30 September, thereby providing exporters sufficient time to negotiate and enter into both Access Agreements and supply contracts with export customers. Further, the majority of wheat receipts at port occur between 15 November and 15 December. Accordingly, ABB does not accept that wheat exporters “will feel compelled to enter into contracts...without a proper opportunity to negotiate”.

ABB also considers that the assertion that exporters will not have access to terms and conditions in sufficient time to enter into supply contracts with export customers should be viewed in the context that the timing arrangements set out in the Access Undertaking reflect the practices which have existed in the industry for a number of years in relation to other de-regulated grains, and in the 2008/2009 season for export Bulk Wheat. There has been no evidence that this timing has prevented exporters from being able to enter into forward contracts or compete in relation to the export sale of grains. There is nothing unusual or delaying in the proposed publication of price and non-price access terms. Moreover, the South Australian grain industry has certainly been able to operate on this basis in the past.

ABB also notes that the pricing of other service providers (e.g. above and below rail and other bulk handlers’ grain receipt and storage fees) and, indeed, the pricing of the grain itself, is often not available until much closer to the commencement of harvest season. In addition, freight rates may be dealt with on the spot market and not be known until accumulation occurs, at any time during the year. Again, there does not appear to be any evidence that this has had the

effect that exporters have not been able “to effectively plan, budget, enter into forward sale and other contracts and make investment decisions”⁵. Indeed the very nature of agricultural industries and exposure to the vagaries of the weather mean that there will always be a range of variable factors to take into account in planning.

In these circumstances, ABB considers that the processes set out in the Access Undertaking for publishing Reference Prices and Standard Terms, and the process and timeframes set out in the Access Undertaking for negotiating Access Agreements, are both consistent with industry practices over a number of years, and are appropriate for inclusion in any Access Undertaking accepted by the Commission.

2.5 Further issue - “Reasonable fees”

In its submission dated 15 May 2009, AGEA states that “[c]ertain bulk handling fees appear to be greatly disproportionate to the actual cost incurred by the bulk handler in providing the relevant service”. AGEA cites the existence of a “per tonne” fee for performing certain administrative tasks and the existence of certain pre-payment requirements as examples of this alleged disproportionality.

In response, ABB would wish to make three high level points:

- (a) first, the general assertion by AGEA about fees being “greatly disproportionate” to actual cost is not supported by any evidence. As a general allegation (which is not apparently directed to any particular fees, port terminals or operators), the Commission should give it no weight as ABB cannot properly respond to this claim;
- (b) second, the example provided in relation to a “per tonne” fee appears to confuse the cost of performing the particular administrative task requested with the need for ABB to recover all administrative and other fixed costs. It is not apparent, and AGEA provides no support for any argument, that a per tonne fee is not an appropriate and efficient way of recovering fixed costs. There is similarly no evidence provided as to why pre-payments may not be a legitimate and efficient means of charging for certain services; and
- (c) third, as set out above, ABB considers that the issues raised by AGEA are adequately addressed by the Access Undertaking which sets out clear processes for negotiating Access Agreements, with recourse to an arbitration mechanism in the event of a dispute. As set out in ABB’s initial submission dated 16 April 2009, the substantial level of regulatory oversight, and clear threat of re-regulation in the event of inappropriate market conduct, also operates as a powerful constraint on the conduct of all port terminal operators.

Further, ABB notes that, in relation to a third party receival fee, independent arbitration conducted by an experienced and senior Queens Counsel determined that the fee charged was justifiable and fair. ABB provided the Commission with details of this arbitration on 11 June 2009.

⁵ See AGEA submission dated 11 May 2009.

2.6 Further issues

In its submissions, AGEA raises a number of further issues in relation to “transparent terms”, “clear and certain commercial terms” and “fair and open access”. For the reasons set out above, ABB considers that each of these issues is addressed in its proposed Access Undertaking.

ABB submits that potential issues in relation to these matters are clearly addressed in an Access Undertaking which ensures the provision of access to Port Terminal Services, includes provisions dealing with non-discriminatory access (supported by external audit requirements), includes ring-fencing provisions, and sets out an arbitration mechanism which can be invoked if users are dissatisfied with the terms of which access is provided.

3 Specific issues raised in SGS Australia and Intertek’s submission

The submissions by SGS Australia and Intertek raise a number of issues in relation to the level of access provided to Superintendence and Inspection companies. However, the submissions do not specify to which of the Bulk Handlers the concerns raised in them relate. To the contrary, the SGS Australia submission states that “*specific details vary between operators*” and “*[e]ach port operator differs in their policy and also to the extent to which they have a formal policy*”.

Similarly, though in its introductory summary the Intertek submission states that “*it will refer to one Port Operator company policy (Graincorp) which we feel is restrictive to the performance of our business*”, the remainder of the submission is unclear as to whether it refers solely to the Graincorp policy and access undertaking, or refers equally to the policies and undertakings of all bulk handlers.

ABB has some difficulty in understanding the basis for SGS Australia and Interteks’ concerns as:

- neither SGS Australia nor Intertek has previously raised these concerns with ABB;
- ABB provides access to its port terminals for SGS Australia, Intertek and other third party superintendent companies, as requested, on a regular basis and both SGS Australia and Intertek provide services to a number of exporters at ABB-operated port terminals. In particular, ABB does not act as intermediary in any way with regard to the collection of samples for quality assurance testing, unless requested, thereby ensuring that all third party superintendent companies have the opportunity to have access to unadulterated samples; and

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In these circumstances, and in the absence of any evidence provided to the contrary, ABB is proceeding on the basis that the concerns raised in SGS Australia’s and Interteks’ submissions do not apply to ABB’s practices and protocols.

In any event, ABB considers that both SGS Australia and Interteks' concerns are, and will be, addressed by the Access Undertaking which sets out a clear mechanism for obtaining access to Port Terminal Services.

4 Conclusion

Having regard to the matters set out in this supplementary submission (including attachments), and the matters set out in ABB's initial submission dated 16 April 2009, ABB considers that the Access Undertaking represents a reasonable and proportionate approach that satisfies the requirements for acceptance by the Commission under Part IIIA of the TPA.

In this regard, ABB notes that, in its submission of 29 May 2009, AgForce Grains Limited concluded that:

“the access undertakings presented by the bulk handlers/port operators seem to cover most aspects of the movement of wheat...and seems to, in most cases provide a fair access arrangement for all parties”.

Further, AgForce states that:

“the Port Services Access Undertakings are a good way to ensure the continued fair and competitive access to grain transport services in Australia”.

ABB therefore respectfully requests the Commission to approve its Access Undertaking before 1 October 2009.

If the Commission has any further questions, ABB would be pleased to assist.

ABB Grain Ltd
23 June 2009

Attachment 1: Response to Commission's Information Request dated 2 June 2009

Part A – Matters raised in ABB's supporting submission

'Competition from other grain terminals'

1 **Question 1: Paragraph 5.17 of ABB's supporting submission to its proposed undertaking, dated 16 April 2009 (ABB submission), notes that ABB's port terminal at Port Adelaide competes with GrainCorp's port terminals at Geelong and Portland and to a lesser extent Australian Bulk Alliance's (ABA) Melbourne Port terminal. In this regard, please elaborate on the following:**

(a) ***What impact, if any, has this had upon terms and conditions of access to ABB's Port Adelaide terminal? Please provide any relevant documents/ materials to support your response.***

Given the geographic proximity of wheat areas in South Australia and Victoria, and the relatively close proximity of port terminals, it has always been possible for grain harvested in South Australia to be exported through Victorian ports and vice versa. However, historically above rail subsidies for grain harvested in Western Victoria resulted in the vast majority of such grain being exported through Victorian ports.

With the removal of those rail subsidies following the introduction of Pacific National as the above rail operator, there is now an increased opportunity for the "least cost path" for grain harvested in Victoria to involve the exporting of that grain through South Australian export terminals. In practice, this has resulted in "the State border being moved approximately 100km east", and ABB increasingly competing to provide terminal pricing which ensures that the least cost path for grain produced in the Western Victorian zone is through ABB ports in South Australia.

To assist in competing for the provision of Port Terminal Services in respect of grain harvested in Victoria, ABB:

- has constructed upcountry storage facilities in Victoria (e.g. at Walpeup and Werrimul);
- has commenced construction of the new Outer Harbor Terminal (which will further assist in providing a least cost path for Victorian grain); and
- [

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In the past two years, ABB has received [] tonnes of grain from its Victorian storage facilities (Werrimul and Walpeup), and has received [] tonnes of incremental tonnage from Victoria during this season to date.

ABB notes that these tonnages have been achieved in drought conditions.

Each of these matters reflects the increasing competition between Victorian and South Australian ports for the export of grain.

On the basis of the information available to ABB, it is difficult to quantify the precise amount of South Australian grain that is exported through Victorian ports each year, particularly given that (as a result of drought conditions) total exports from Victoria have been quite low over the past 3 years. However, if ABB's price and non price terms are not competitive, ABB considers that there is a real risk that it will lose export grain to:

- Victorian export port terminals;
- the container trade in Victoria or other non-ABB South Australian ports (e.g. Balco and Northern Yorke);
- domestic sales, as growers and traders divert their sales to the domestic market; or
- ultimately, supply chains in other countries as global traders focus their commercial activities in other grain areas around the world.

As set out in Section 1(d) below, in the 2006/2007 season, []% of all wheat harvested in South Australia was not exported through ABB ports (i.e. it was either sold domestically, through Victorian ports, through the container trade, or for other purposes). In 2007/2008, []% of all wheat harvested in South Australia was not exported through ABB ports.

This level of competition from Victorian ports, domestic sales and the container trade operates as a substantial competitive constraint on the terms (both price and non-price) offered by ABB in respect of its Port Terminal Services.

(b) Does ABB consider that any of ABB's other port terminals compete with port terminals owned by parties other than ABB?

As set out above, ABB considers that its South Australian port terminals compete with a range of alternative supply chains.

If the terms and conditions offered by ABB for Port Terminal Services are not competitive, there is a real risk that ABB will lose export grain to:

- Victorian export port terminals (i.e. Geelong, Portland and Melbourne). As set out above, the new Outer Harbor terminal will also compete very directly with Victorian export terminals for Victorian grain;
- the container trade in Victoria or other non-ABB South Australian ports (e.g. the container packing facilities in Balaklava and Northern Yorke Peninsula operated by Balco and Northern Yorke Processing);

- domestic sales, as growers and traders divert their sales to the domestic market; or
- ultimately, supply chains in other countries as global traders focus their commercial activities in other grain areas around the world.

(c) *Is there any difference between the price and non-price terms offered to marketers exporting out of different ABB terminals in South Australia?*

Yes. The price for the provision of specific services at different ABB ports is determined having regard to the cost of providing the relevant service using that terminal infrastructure, including efficiencies associated with the operation of that infrastructure.

Details in relation to prices for the 2008/2009 season are set out in the Storage and Handling Services Agreement which is available on ABB's website (www.abb.com.au). ABB is in the process of developing its proposed charges for the 2009/2010 season.

ABB currently offers a discount to all exporters if their volume exceeds 400,000 tonnes per annum across all ABB terminals.

In relation to non-price terms, there are also a number of differences which reflect the different operating characteristics of the relevant terminals. For example:

- Outer Harbor will be restricted to major wheat grades and feed barley (unless separately negotiated with ABB);
- road receipt hours may vary across the terminals;
- shipping shift hours may vary across the terminals; and
- various operational practices and protocols may vary between different terminals (see the Port Loading Protocols).

ABB considers that each of these variations between price and non-price terms are reasonable and justifiable having regard to the costs of providing the services, the differences between the terminal facilities and operational constraints in relation to the individual terminals.

(d) *What proportion of South Australian grain is exported via Victorian ports? Please provide estimates for the past 3 calendar years.*

As set out above, it is difficult to quantify the precise amount of South Australian grain that is exported through Victorian ports each year. The flow of grain between supply chains is dynamic and is subject to both market prices (for wheat) and supply chain costs. In ABB's experience, growers and exporters are highly price sensitive.

Table 1 below sets out ABB's share of total bulk wheat exports from South Australia. The remainder of wheat is accounted for by a combination of export through Victorian ports, exports via the container trade, domestic sales and grain retained for seed.

Table 1: ABB Share of Total South Australian Wheat Exports, 2006/7 - 2008/09

Season	Opening stock ABB 1.10	Production (PIR SA)	Exports All SA Ports	Closing stock 30.9	Total Wheat Disposal	ABB Ports Exports as % of total disposal
2006/2007	[]	[]	[]	[]	[]	[]
2007/2008	[]	[]	[]	[]	[]	[]
2008/2009 to date	[]	[]	[]	[]	[]	[]

Source: ABB

Additionally, ABB notes that, on average, an additional [] tonnes per annum of South Australian produced grain was not received into South Australian Port Terminals from 2005/06 to 2007/08. The majority of this was delivered into the GrainCorp network in Victoria⁶.

Total exports from Victoria have been relatively low over the past 3 years (primarily due to drought conditions in Victoria). However, ABB considers that grain collected at each of the Frances, Wolseley, Naracoorte, Milicent and Padthaway receival facilities in South Australia could feasibly be exported through the export terminal at Portland in Victoria at a lesser cost than ABB's Port Adelaide facility. In this regard, GrainCorp has also constructed a storage and handling facility at Naracoorte to draw grain into Portland. However, how Portland competes for that grain is a matter for GrainCorp.

Further, ABB notes that, in a normal season, it would expect to compete for the provision of Port Terminal Services in respect of grain received at Dimboola, Yelta and Ouyen East, due to the freight advantages that South Australia has in comparison to Victoria.

2 Question 2 - What factors influence the ability of bulk wheat exporters to switch between terminals (either located in different port zones or owned by different bulk handlers) for the export of bulk wheat? What is the effect of transport costs, infrastructure constraints (including facilities at different terminals), availability of transport providers, terminal capacity and terminal availability?

There are a number of factors that may affect the ability of bulk wheat exporters to switch between port terminals. The key factors include:

- the quality of the grain in each port zone - this is relevant first to the exporter's decision whether or not to acquire grain in a particular area, or whether it will acquire grain from another area, either in South Australia, other parts of Australia, or from other countries.

The quality of the grain (and therefore the price that the exporter is able to obtain for the grain, and specific customer requirements in relation to the grain) is also likely to be a factor in determining whether it should be

⁶ Based on an estimated figure of [] tonnes remaining on-farm in South Australia, consistent with figures from 2004/05 and 2008/09.

transported to the nearest export terminal, or whether it is commercially desirable (or feasible) for it to be exported from another port;

- the availability of shipping slots at the relevant port. Based on shipping stem information, exporters are able to determine the expected vessel queues, load dates and delivery times from individual port terminals. Exporters may wish to switch between port terminals, if this enables them to better meet customer delivery times and other requirements, or to minimise demurrage costs. In this regard, customers will weigh up an ability to reduce vessel waiting time (and associated demurrage costs) against the potential additional costs of transporting grain over longer distances (by road or rail) and potential additional operating hours at port or upcountry sites;
- the wheat exporter's ability to accumulate grain in the relevant area (i.e. based on the availability of stock), and access to transport capacity to move the grain to port. For example, each of the following factors are relevant to an exporter's decision concerning the port from which it will export its grain:
 - the volume of grain available in one area;
 - the potential for aggregating it (or blending it) with grain from another area;
 - the total size of the exporter's required shipment to particular customers or destinations (and the economics associated with those shipment sizes);
 - the availability of shipping slots at particular ports;
 - the cost of those port terminal services; and
 - the availability of road or rail transport to port.
- the level of stocks that an exporter may already have in storage at a particular port (due to grower deliveries or export select movements), and whether it is commercially more efficient and profitable to aggregate other grains with that stored grain in order to finalise a shipment (rather than transport that additional grain to a closer port);
- terminal capabilities - that is, the ability of a particular port terminal to service an exporter's requirements (e.g. available capacity, availability of grain storage facilities, efficiency etc);
- any requirements of the exporter's charter party (i.e. whether that charter party is contracted to provide services at a particular port);
- the ability for wheat exporters to switch grain between port zones either through ABB storage and handling or by trading grain. This is dynamic. Grain swaps and trades occur between marketers both within and across port zones. For example, it is possible for an exporter to swap grain held at a port in South Australia with grain held at port elsewhere in Australia, or globally. Prices for grain traded in this manner can vary between port zones, and are affected by numerous market dynamics, such as:

- supply and demand;
- the need to consolidate disaggregated ownership;
- proximity of grain to domestic markets (and demand from domestic customers);
- demand in the container trade or from alternative supply chains;
- grain quality; and
- seasonal conditions.

ABB may also seek to facilitate swaps at the request of customers; and

- relative costs between different supply chains. Exporters continuously monitor the cost of exporting grain, and seek the least cost path to export. This can include freight, costs of third party receipt into an alternate system, the impact of switching from or into a panamax capable port or port with greater loading capacity, variations in shipping costs and available space to receive accumulation. The availability of transport providers is dynamic and varies depending on the time of year and demand from competing users.

As set out in ABB's previous submission, many of the exporters of bulk wheat are highly sophisticated, multinational corporations that are very well placed to make judgements about the least cost path to port, and alternative ways of meeting market and customer demands. They are highly experienced in undertaking swaps, trades and other transactions, and switching between ports and sources of supply to take advantage of commercial opportunities. Those exporters are also able to fulfil customer requirements from a range of ports globally.

'Possibility of entry'

3 Question 3 - Paragraph 5.19 of the ABB submission notes that 'ABB regards the threat of new port development or new export grain facilities, as more than theoretical.' Please elaborate on this comment, and in relation to a possible new bulk wheat grain export terminal:

(a) *What capacity (intake, shipping bin and ship loading) would a new terminal need to be competitive?*

ABB considers that [CONFIDENTIAL].

In this regard, [

CONFIDENTIAL

]

(b) *What is the likely cost of construction?*

ABB estimates that [

CONFIDENTIAL

]

(c) *What would be likely locations for a new terminal, and what would be required to obtain/utilise those locations?*

ABB considers that:

- [

CONFIDENTIAL

]

- [

CONFIDENTIAL

] In a recent presentation by Centrex Metals Limited, the potential for 1-3 million tonnes of grain to be exported through Sheep Hills was recognised⁷;

- [

CONFIDENTIAL

] ABB would anticipate that other requirements would involve obtaining necessary government consents and development approvals.

⁷ Presentation to brokers, 23 February 2009, available online at: http://www.centrexmetals.com.au/investorinformation/inv_presentations.html.

- (d) ***What would be the minimum level of volume required for the terminal to operate successfully?***

In ABB's view, the minimum level of volume [

CONFIDENTIAL

]

- (e) ***Would it be possible to obtain sufficient volumes for the terminal to operate successfully?***

In ABB's view, [

CONFIDENTIAL

]

- (f) ***Who would be likely to pursue development of a new terminal?***

[

CONFIDENTIAL

]

- (g) ***What regulatory or other approvals (such as approval from the port authority) would it be necessary to obtain in order to commence construction?***

ABB is not aware of any significant regulatory barriers in relation to the construction of competing terminal facilities (other than the requirement under the WEMA for a Port Operator that is also a wheat exporter to have an Access Undertaking in place).

[

CONFIDENTIAL

]

In general, regulatory requirements would include:

- State and local government approvals, including planning approval;
- Environmental Protection Agency approvals; and
- Australian Quarantine and Inspection Services approval.

(h) Could an existing terminal be converted to export bulk wheat?

[

CONFIDENTIAL

]

(i) What would be the likely timeframe for constructing and commissioning a new port terminal?

ABB estimates that [

CONFIDENTIAL

]

4 Question 4 - Paragraph 5.13 of ABB's submission notes that there is significant excess capacity at each of ABB's port terminals.

(a) In light of this excess capacity, why did ABB decided to invest in further capacity at the Outer Harbor terminal?

ABB's decision to construct the new Outer Harbor terminal has followed years of discussion about the establishment of a deep water port east of St Vincent's Gulf. This discussion included input from Government, industry and growers as represented by the South Australian Farmers Federation. The South Australian Government chose Outer Harbor as its preferred site for the development.

The Outer Harbor development will provide a number of benefits, including:

- increased cost efficiency. For example, it is expected that supply chain costs to export via Outer Harbor will be in the order of \$[] per metric tonne less than the comparable cost of exporting through Port Adelaide. These cost savings will be achieved through reduced freight costs associated with single port loading, quicker loading rates, and the ability to fully load panamax vessels, and part load cape-size vessels; and
- the provision of an efficient and cost effective deepwater port which will enable ABB to provide more efficient services and compete more effectively with Victorian ports. The Outer Harbor terminal facility will also enable the more efficient use of existing ABB upcountry infrastructure.

In addition, the supply chain cost benefit will allow ABB to capture incremental tonnages from Victoria as exporters determine that the least cost path for their grain ownership is through Outer Harbor rather than alternative supply chains. The automation and speed of operation of Outer Harbor will allow the rapid cycling of trains, thereby increasing accumulation capacity to assist in meeting peak shipping demands, without incurring further fixed costs.

(b) What has been the total cost of the Outer Harbor development? Please provide a breakdown of fixed and variable costs.

The total capital costs associated with the development of the Outer Harbor terminal are expected to be approximately \$[]. As Outer Harbor is not yet in operation, there are no variable costs at this stage.

5 Question 5 - What were the total upfront capital costs incurred for each of ABB's grain terminals (other than Outer Harbor, which is dealt with above at question 4)? (for terminals that were purchased rather than built, please provide the purchase price for that terminal).

ABB's wheat port terminals have been built in stages over a significant period of time. Accordingly, in ABB's view, it is more appropriate (and useful for the Commission), to consider the current replacement value of these facilities, details of which are set out below:

Site Valuations 2008/09 - Terminals	
Site	Current
Port Adelaide	\$ []
Port Giles	\$ []
Port Lincoln	\$ []
Thevenard	\$ []
Wallaroo	\$ []
Total	\$ []

Note: "Current" refers to the current insured value of the Port Terminals

6 Question 6 - For each of ABB's grain terminals, what were the annual total operating costs for the grain terminal for financial years 2005/06, 2006/07 and 2007/08?

	2005/06	2006/07	2007/08
Terminal & BLP Operating Expenses			
Port Adelaide	[]	[]	[]
Port Giles	[]	[]	[]
Port Lincoln	[]	[]	[]
Thevenard	[]	[]	[]
Wallaroo	[]	[]	[]

'Power of customers'

7 Question 7 - Paragraph 5.11 of the ABB submission suggests that ABB's export terminal customers have a level of countervailing power that will

operate as a ‘powerful constraint’ on ABB. Please elaborate on this comment:

In its previous submission, ABB stated that there are a number of factors which *in combination* operate as a powerful constraint. Many of ABB’s customers are large and sophisticated multi-national grain exporters, which are well resourced and have considerable expertise in operating in global grain and other commodity markets. Those customers are well placed to take steps under both the Access Undertaking and the current regulatory environment in response to any use of market power by ABB. In particular, given:

- the level of transparent and publicly available information in relation to the operation of ABB’s Port Terminal Services;
- the commercial incentive for ABB to maximise throughput at each of its terminals;
- the high level of regulatory scrutiny of ABB’s provision of port terminal services -- by the Commission (under the Access Undertaking), Wheat Exports Australia (“WEA”), and the scheduled review by the Productivity Commission in 2010 -- all of which involves the threat of more intrusive regulation if ABB were to exercise market power;
- the non-discrimination, ring-fencing, information publication and binding arbitration provisions in the Access Undertaking; and
- ultimately, the ability of ABB’s customers to source grain from elsewhere in Australia or globally should the Port Terminal Services be offered on uncompetitive terms, or the reliability of the supply chain be undermined,

ABB considers that bulk grain exporters are well positioned to negotiate access to ABB’s Port Terminal Services and ensure that they are provided on commercial terms. This countervailing power operates as a significant constraint.

- (a) *If a port terminal customer (i.e., a bulk wheat exporter) was dissatisfied with proposed access terms, what alternatives for equivalent services are currently available in Australia, and what would be the typical costs (monetary and otherwise) to the customer in switching to such alternatives? Further, what would be the costs (monetary and otherwise) to ABB of losing the customer to such alternatives?***

As set out above, exporters continuously monitor the cost of exporting grain, and consistently seek the least cost path to export. As indicated in the response to Questions and 1 and 2 above, wheat exporters are able to switch grain supplies to alternative supply chains and engage in a wide range of grain trades or swap activities in order to take account of efficiencies, cost savings and commercial opportunities.

The alternative supply chains referred to above include:

- domestic sales;
- sales through the container trade;

- exporting bulk wheat from competing Victorian export terminals; or
- ultimately, fulfilling export customer requirements from other wheat producing States or countries.

Transporting wheat to competing Victorian ports may (or may not) involve certain additional costs. However, as set out in Question 2 above, there are a range of factors that exporters routinely consider in determining which ports they will export from (including port and freight costs). The alternate supply chains set out above are real alternatives, as demonstrated by the fact that in 2007/2008, only []% of all South Australian production was exported through ABB ports.

However, perhaps most fundamentally, ABB considers that if its customers were dissatisfied with the proposed terms of access, they could under the terms of the Access Undertaking, seek binding arbitration. This is the ultimate constraint under any negotiate/arbitrate model.

In addition, as set out in ABB's submission dated 16 April 2009, ABB has a clear incentive to maximise throughput at each of its port terminals. The loss of export customers has a significant impact on ABB's ability to recover its costs in providing Port Terminal Services. ABB does not have specific data in relation to the cost to it of losing export port terminal service customers. However, ABB estimates that:

- if it were to lose [] tonnes from its storage and handling system, this would result in a \$[] reduction in ABB's earnings before interest and taxes ("EBIT");
- if it were to lose [] tonnes from its storage and handling system, this would result in a \$[] reduction in EBIT; and
- if it were to lose [] tonnes from its storage and handling system, this would result in a \$[] reduction in EBIT.

Lost profit arising from reductions in the total volume of wheat shipped through ABB's ports [**CONFIDENTIAL**].

Accordingly, ABB has a clear commercial incentive to provide access to its Port Terminal Services on commercial terms, such that customers do not divert grain to alternative supply chains.

(b) *Please provide examples of the ways in which an export terminal customer (i.e., a bulk wheat exporter) could use bargaining power in its negotiations with ABB in relation to the provision of port terminal services at a given terminal.*

As set out above, ABB's bulk wheat export customers are generally large, commercially focused, sophisticated and well resourced and informed companies. Each of the matters set out above operates as a significant constraint on ABB in negotiating the terms of access to its Port Terminal Services.

In undertaking negotiations with ABB, customers can, if dissatisfied with the terms offered by ABB, credibly threaten to:

- divert grain from ABB ports to alternative supply chains (as noted in response to Question 1(a) above). When combined with ABB's clear commercial incentive to maximise through-put and the financial costs to ABB of losing such grain to alternative supply chains, this operates as a material constraint;
- [**CONFIDENTIAL**] (see Questions 2 and 3 above). In this regard, certain exporters have already invested in dedicated rail assets (e.g. AWB's purchase of rail wagons), and exporter ownership of port terminal infrastructure is common in a number of other wheat producing countries;
- seek arbitration under the terms of the Access Undertaking;
- complain to the Commission, WEA, the Federal Government, or participate in the Productivity Commission's forthcoming review in order to agitate for greater regulation of Port Terminal Services; and/or
- employ a combination of the above strategies.

ABB considers that, in combination, these alternatives provide a substantial degree of bargaining power for export customers.

(c) *Currently, what options are available to an export terminal customer (i.e., a bulk wheat exporter) in the event it believes that ABB had engaged in discriminatory conduct in relation to the provision of port terminal services? In particular, would the customer have any recourse under contractual arrangements with ABB?*

If a customer considers that ABB has engaged in discriminatory conduct, it can:

- make a complaint to the Commission if it considers that ABB's conduct would contravene the competition provisions of the TPA; or
- submit a complaint or seek arbitration alleging a breach of the section 87(b) Undertaking provided by ABB in connection with its acquisition of AusBulk. This undertaking expires on 20 September 2009.

Prior to entering into an agreement with ABB, a customer can also raise any concerns with the Essential Services Commission of South Australia, which can hear disputes in relation to bulk loading plants.

Customers can also raise any concerns through the dispute resolution mechanism set out in their contracts with ABB. Details of the dispute resolution procedure for the 2008/2009 season are set out in the Storage and Handling Services Agreement which is available on ABB's website (www.abb.com.au).

However, more importantly (and more relevantly for the purposes of the Commission's assessment of ABB's proposed Access Undertaking), the Access Undertaking itself contains clear provisions relating to non-discriminatory access. Any contracts (both price and non-price terms) in relation to Port Terminal Services would need to be consistent with the Access Undertaking. The Access Undertaking also sets out a separate dispute resolution procedure, if customers are dissatisfied with the terms of access.

'Incentive to maximise throughput'

8 Question 8 - Paragraph 5.8 of the ABB submission states that ABB's incentive is to maximise throughput at its port terminals. Please elaborate on this comment:

(a) What significance, if any, does the vertical integration of ABB as both a provider of port terminal services and as a bulk wheat exporter have for the incentives of ABB in relation to the port terminal services it provides to itself and other users of those services? Would ABB's incentives change if it was not vertically integrated as a bulk wheat exporter?

As indicated in Table 4 of the submission of 16 April 2009, ABB's ports operate at substantially less than full capacity. This creates a clear incentive for ABB to maximise its grain throughput in order to defray its costs and ensure that its Port Terminal Services provide a commercial return. This incentive is not affected whether or not ABB were vertically integrated, and the identity of the bulk exporter is irrelevant.

As set out in Section 7(a) above, the loss of grain from ABB's system would also [**CONFIDENTIAL**].

Having regard to these matters, the fact that ABB is vertically integrated does not affect the service provided by ABB's port terminals to wheat exporters, as ABB is reliant on the business of all customers and the level of service and price provided by ABB will determine if other export customers seek alternatives.

In any event, regardless of potential or theoretical incentives if ABB were not vertically integrated, ABB submits that for the reasons set out in this submission, there are a number of constraints (including the Access Undertaking itself) which operate as a significant constraint on the way that it negotiates with and deals with all Users, including ABB Marketing.

Information flows and ring-fencing

9 Question 9 - Paragraph 6.7 of the ABB submission states:

'ABB considers that any concerns about unfair informational advantages are overstated as knowledge of ownership of grain stocks at port does not bestow any practical competitive advantage on ABB's Marketing division.'

(a) In light of this comment, please elaborate on why knowledge of ownership of grain stocks does not bestow any practical competitive advantage, and please list what other information ABB receives from wheat exporters.

Paragraph 6.7 of ABB's submission dated 16 April 2009 provides a detailed explanation of the reasons why knowledge of ownership of grain stocks at port does not bestow any practical competitive advantage. In summary, the information that ABB may have is only a small component of information about grain traders' stock ownership. It does not detail a trader's actual grain position and a nomination relates primarily to sales which have already taken place.

Details of the other information that ABB obtains from its customers (in particular where it involves the handling of grain from outside ABB's system) include the following:

- ABB obtains fumigation certificates prior to customers moving third party approved grain;
- Customers are required to detail stock they wish to allocate (move) for a vessel from third party sites when they nominate a vessel (this will be by site and grade). However, this information may not reflect all of their ownership in these sites;
- ABB may obtain quality detail of the stock in third party storages if allocated to the vessel to enable total quality of the cargo to be calculated. This information is taken at face value;
- Information in relation to the shipping nomination which is required to assist ABB in understanding the customer's requirements and then determining if they can be achieved; and
- ABB may obtain information on a customer's forward ship intentions to facilitate forward planning. However, this is not a mandatory request.

Other

10 Question 10 - Since the removal of the 'single desk' for bulk wheat exports, what are the market shares of each accredited exporter of bulk wheat exported from each of ABB's port terminals (by tonne and percentage)?

Please see the Table set out in Schedule 1 to this Attachment.

Part B – Matters related to the operation of the proposed undertaking

General

11 Question 11 - How, if at all, will the proposed undertaking impact on the export of grains other than bulk wheat at ABB's terminals? How will areas of potential overlap between wheat and non-wheat areas be dealt with? For example, will the shipping stem include vessels for wheat and other grains?

The Access Undertaking will apply to the provision of Port Terminal Services in relation to the export of bulk wheat. Accordingly, to the extent that ABB is providing the relevant services in respect of bulk wheat, the Access Undertaking will apply. However, it will not apply to the provision of services in respect of other grains. From a practical perspective, ABB does not consider that there are any potential areas of overlap such as may give rise to confusion whether or not the Access Undertaking would apply.

The Port Loading Protocols are modelled on existing practices at ABB's ports. Accordingly, ABB intends that the Port Loading Protocols will apply to all grains shipped through ABB's port terminals.

This reflects ABB's view that it would be impractical to operate different Port Loading Protocols and different shipping stems for different grains.

12 Question 12 - To the extent that ABB proposes to offer bundled services (i.e. port terminal services plus up-country services), does ABB envisage that the proposed undertaking (both in general, and specifically in relation to the negotiate/arbitrate process) will apply to those bundled offers?

As the Commission is aware, ABB will provide Port Terminal Services for bulk wheat under a separate contract. ABB provided the Commission with a copy of its draft indicative "2009/2010 Season Port Terminal Services Agreement for Standard Port Terminal Services" on 22 May 2009.

If ABB were to offer bundled services including Port Terminal Services, the Access Undertaking would apply to the component of that bundle which involves the provision of Port Terminal Services. All provisions of the Access Undertaking (including the negotiate/arbitrate process) would apply to the Port Terminal Services component of the bundled offer. The Access Undertaking would not apply to the non-Port Terminal Services component of any bundled offer.

Put another way, ABB does not consider that it is possible to avoid the application of the Access Undertaking to Port Terminal Services, by bundling those services with other services. Conversely, the Access Undertaking will not apply to services which are not Port Terminal Services.

ABB notes that it currently seeks to pass certain supply chain efficiency savings back to customers who use Export Select (and therefore generate those efficiency savings) in the form of lower shipping charges (see response to Question 44 below for further detail). Customers who use Export Select (and therefore ABB upcountry accumulation and logistics services) receive a discount on the shipping fee that they pay. This discount reflects the efficiency savings in accumulating grain at ABB upcountry sites and transporting the grain to port (i.e. due to the timing of payments, it is reflected as a discount at port, but in reality reflects the efficiency savings in the provision of up-country services).

13 Question 13 - To the extent that there are any differences between the port terminal services offered under the proposed undertaking, and the port terminal services that are offered under any bundled offer, please set out these differences.

Please see the response to Question 12 above.

14 Question 14 - Outline the basis on which ABB will provide access to port terminal services to its Trading Division. That is, will such access be at 'arms length?' If so, how will this be effected? Will it be on the same terms of access as offered to other bulk wheat exporters?

In accordance with the Access Undertaking, ABB will provide Port Terminal Services to its Trading Division on commercially arms length terms and in accordance with the non-discrimination provisions set out in the Access Undertaking.

The provision of Port Terminal Services on commercial arms length terms will be effected by following the same process set out in the Access Undertaking for each export customer, including ABB Marketing. In particular, all wheat exporters (including ABB's marketing division) will be required to enter into a Port Terminal Services Agreement, abide by the terms of the Access Undertaking (for example with regard to the information requirements as set under the nomination process and by meeting specified price and payment terms), and adhere to the terms of the published Shipping Protocols.

15 Question 15 - Clause 3.5 (b) contains an obligation to 'consult' with various parties prior to seeking the ACCC's consent to vary the proposed undertaking. What, specifically, does the obligation to 'consult' on a proposed variation include?

The obligation on ABB to "*consult with counterparties to Access Agreements and Applicants*" regarding any proposed variation of the terms of the Undertaking involves ABB:

- advising interested parties of the proposed changes and ABB's reasons for the proposed changes;
- providing parties with a reasonable opportunity to provide comments, and raise any concerns, in relation to the proposed changes;
- considering all issues raised in those responses and, where necessary, seeking clarification and further details from relevant parties;
- considering whether, in light of the feedback received, any modification to its proposal is necessary or desirable;
- providing feedback to the interested parties and making a decision, based both on its independent views and the information provided by others throughout the consultation process; and
- providing reasons for its decision.

The precise timeline for a consultation process will reflect the individual circumstances surrounding the proposed amendments to the Access Undertaking, with interested parties given longer to consider material changes, but less time as appropriate to consult on minor amendments.

16 Question 16 - In relation to the timeframes specified in clauses 5, 6 and 7 of the proposed undertaking, please provide an explanation as to why those timeframes are appropriate.

The timeframes set out in clauses 5, 6 and 7 of the Access Undertaking are underpinned by a range of practical commercial considerations in relation to the provision of Port Terminal Services, and reflect current practices in South Australia.

These timeframes are designed to provide sufficient time for all parties to negotiate Access Agreements and, in the event of a dispute, to obtain timely redress by way of a binding arbitration process.

With regard to the individual clauses referred to in the Commission's question, ABB makes the following comments:

- **Clause 5** - The publication of price and non-price terms on or before 30 September each year is appropriate for the following reasons:
 - South Australia is prone to drought, and grain harvest levels can fluctuate year on year. This degree of volatility means that it is only possible to provide clear indications and estimates of total wheat production and wheat flows close to the first harvest period. ABB relies on this information in order to be able to set clear price and non-price terms for the upcoming year, which reflect the size of the harvest and market demand;
 - first harvests in South Australia are typically not until mid to late October, with the first receivals of wheat to port in late October at the earliest. However, the majority of receivals occur between 15 November and 15 December. Moreover, in the last two years, only 3% of total exports were shipped before 1 December;
 - accordingly, if price and non-price terms are not published until 30 September, grain exporters will have approximately six weeks in which to negotiate access to ABB's Port Terminal Services. Based on past experience, this is more than adequate. In any event, negotiations for access may take place at any time, so bulk exporters are not required to wait until the terms are published to begin negotiations;
 - the Undertaking sets out a clear process for negotiations and involves a number of obligations on ABB in relation to the provision of access;
 - bulk wheat exporters already operate in an environment in which they are required to make estimates on various input costs (such as wheat purchase prices, freight rates etc) on a regular basis. Negotiating port terminal prices and terms in September / October each year is unlikely to have any material effect on their business or current commercial operations;
 - in practice, ABB provides information relating to its access terms in advance of 30 September. For example, in 2008, ABB released draft charges, which were followed by visits to customers, well before 30 September. Feedback obtained in these meetings was reflected in the final terms released by 30 September 2008;
 - publication of terms prior to September is difficult to achieve due to the nature of the annual wheat cycle. The majority of exports occur from December to May, which leaves only a short period to review the previous season's terms and prepare updating terms for the coming season; and
 - clause 5.1(c) relates only to the first year of the Access Undertaking. While it is intended that ABB will have published its Standard Terms and Reference Prices by the commencement of the Undertaking on 1 October 2009, ABB considers that it is necessary in the first year of the Access Undertaking to retain a small degree of flexibility, having regard to the process for (and progress of) the Commission's consideration of the Access Undertaking.

- **Clause 6** - Given the commercial demands to move grain to export as quickly as possible, the process for negotiating Access Agreements is time sensitive and the timeframes set out in clause 6 have been designed to reflect and balance these factors.

Clause 6.4(b)(v) provides that ABB must provide reasons to an Applicant within 10 Business Days if it proposes not to negotiate with the Applicant (either because the Applicant is not complying with the processes under the Undertaking or because the Applicant does not satisfy the Prudential Requirements). This period provides sufficient time for the Applicant to address any deficiencies and respond or re-apply.

Similarly, the requirement to notify receipt of an application within five Business Days under clause 6.5(b) is appropriate. The period gives ABB sufficient time to ensure that the application contains all necessary information and that, once application has been acknowledged, negotiations for access can begin.

In relation to clause 6.6(b)(iii), ABB considers that a 3 month negotiation period (for a 12 month contract) represents a reasonable “negotiation window”. This time period can be extended by the agreement of the parties and, in the event of a dispute, can be referred to arbitration.

- **Clause 7** - the timeframes set out in the dispute resolution process seek to balance the need to reach a clear resolution to any disputes in a timely manner, with the fact that any effective dispute resolution procedure must allow for sufficient time for all parties to the dispute to make their case and for the correct outcome to be achieved. The commercial demands to export grain in a timely manner require a practical, comprehensive and swift dispute resolution mechanism. Accordingly, clause 7.3 allows for a short period of initial negotiation, before permitting escalation of the dispute, either to mediation or arbitration.

The periods for negotiation and then escalation to the parties respective Chief Executive Officers or to mediation or arbitration are not dissimilar to the time frames set out in a range of commercial agreements or in other Access Undertakings considered by the Commission.

Non-discrimination

17 Question 17 - Clause 5.4 proposes a mechanism by which ABB may provide access to Applicants or Users, including its own Trading Division, on differentiated terms, provided such terms are consistent with the objectives of the proposed undertaking, taking into account the 22 matters set out in clause 5.5, and offered on an arms length commercial basis.

- (a) If in a given circumstance ABB considered that one of the matters listed in clause 5.5 provided a reason for providing access on differentiated terms, what information or evidence would ABB rely upon to demonstrate that such circumstances existed and different terms were appropriate?*

Where an access seeker requests access to Port Terminal Services on differentiated terms, the information or evidence which ABB would seek to rely upon in concluding that the provision of differentiated access was

consistent with clause 5.5 of the Access Undertaking would necessarily vary on an individual basis.

It is difficult to provide a detailed or comprehensive list of the information or evidence that ABB may seek to rely upon to demonstrate that differentiated access would be appropriate, given that it is not possible to forecast all situations or factors which might give rise to a request for differentiated access. However, the nature of the access application, the commitment sought by the Applicant and the terms offered previously, or to other exporters, could ordinarily be expected to be integral to the application and the question of whether it would be appropriate to offer differentiated terms to that exporter.

Moreover, ABB is aware that the information or evidence that is produced during the course of a negotiation for differentiated access may be reviewed in a binding arbitration process pursuant to clause 7 of the Access Undertaking and may also need to be justified to the Commission in the event that it were to be challenged.

Accordingly, ABB will seek to ensure that all information and evidence relied on when providing differentiated access is:

- adequately documented and collated;
- clear and understandable;
- relevant to the provision of differentiated access; and
- provides objective support for any provision of access to Port Terminal Services on differentiated terms.

As required by the Access Undertaking, ABB will ensure that differentiation of terms is not an arbitrary outcome without reference to objective criteria, information or evidence.

(b) *How would ABB communicate the reason/s for such terms to the Applicant/User?*

If ABB were proposing to offer differentiated terms, or a customer requested differentiated terms, communication would be undertaken and agreement reached through normal commercial negotiations between ABB and the customer. This would involve discussions around the appropriateness of certain terms offered and/or requested. Once terms were agreed, the proposals would be set out in writing for approval, with further negotiation taking place as necessary. If the customer was dissatisfied with the terms offered, it would have the opportunity to seek a resolution of that dispute pursuant to the Undertaking.

(c) *What measures will ABB implement to ensure that differentiated terms are offered on an arms length commercial basis to its own Trading Division?*

ABB's National Supply Chain division negotiates the terms of access for all wheat exporters (including ABB Marketing) on a commercial arms' length basis.

ABB will put in place protocols and staff training measures to ensure that the requirements set out in the Access Undertaking are complied with in respect of all negotiations with ABB Marketing.

These protocols will be further supported by the proposed ring-fencing arrangements set out in the Access Undertaking, which involves oversight by an independent auditor. The auditor will report its findings to the Commission each year.

18 Question 18 - What conduct would be viewed as ‘substantially damaging a competitor’ or ‘conferring ... any unfair competitive advantage over a competitor’ for the purposes of clause 5.4(b)?

Clauses 5.4 and 5.5 of the Access Undertaking set out a framework for the provision of access to Standard Port Terminal Services on non-discriminatory terms.

Clause 5.4(a) provides that, if an Applicant requests a Standard Port Terminal Service, ABB must offer that service at the Reference Price applicable to that terminal. Clause 5.4(a) further provides that ABB must not provide access to Applicants and Users (including ABB Marketing) which are different from:

- in the case of Standard Port Terminal Services, the Reference Prices or Standard Terms; or
- in all cases, the price and non-price terms offered to another Applicant or User,

unless those different terms are:

- consistent with the objectives of the Undertaking, as set out in clause 1.2;
- commercially justifiable taking into account the matters set out in clause 5.5; and
- offered on an arms length commercial basis.

Clause 5.4(b) is intended to provide an additional assurance to Users that, if ABB offers differentiated terms to a User (which can be justified having regard to the objectives of the Undertaking, the matters set out in clause 5.5 and have been negotiated on commercially arms length terms), that differentiation will not be for the purpose of substantially damaging a competitor, or conferring an unfair advantage on ABB’s Trading Division.

In this context, clause 5.4(b) is intended only to provide an additional guarantee that the terms on which ABB deals with its Trading Division will be on an arms length commercial basis, and will not have the purpose of providing an unfair competitive advantage to ABB.

ABB considers that terms of access provided to ABB’s Trading Division would contravene clause 5.4(b) if they could not be justified having regard to the criteria set out in clause 5.4(a) and clause 5.5 and, instead, the purpose was simply to provide more favourable terms to ABB’s Trading Division in order to substantially damage a competitor or provide ABB with an unfair competitive advantage.

Publication of and variation to Reference Prices and Standard Terms

19 Question 19 - In relation to clause 5.2(b), what does ABB envisage as ‘appropriate “holding over” provisions’?

Clause 5.2(b) provides that, unless otherwise specified in a Port Schedule, ABB will offer one year contracts to customers. This is consistent with long standing industry practices, given the seasonal nature of the grain industry.

The Access Undertaking provides that ABB will publish its Reference Prices and Standard Terms for the upcoming season by no later than 30 September each year (the date on which Access Agreements for the previous season will expire). ABB proposes to consult and negotiate with customers prior to 30 September each year (being the last date under the Undertaking on which it must publish its Reference Prices and Standard Terms). However, in the event that this consultation is continuing, or there are matters still being negotiated with customers, clause 5.2(b) is intended to ensure that there is not a contractual void with regard to the provision of Port Terminal Services until such time as individual Access Agreements have been entered into.

In summary, there may be 22 or more exporters each seeking to enter into an individual Access Agreement each season. Where (after 1 October) a customer has not yet entered into an agreement for the provision of Port Terminal Services for the new season, and that customer takes certain steps seeking access to those Port Terminal Services, that customer will be ‘deemed’ to accept the new season Standard Terms and Reference Prices until an individual agreement is executed. This ‘deeming’ provision does not prevent negotiation of terms from taking place. To the contrary, ABB and the customer will negotiate access and may agree to amend the Standard Terms as appropriate.

Accordingly, the “holding over” mechanism does not eliminate flexibility in the negotiation of individual access agreements, nor does it predetermine the contents of those agreements prior to their being entered into. The “holding over” provision is purely a means of ensuring that there is not a contractual void in the provision of Port Terminal Services between 1 October (following the introduction of the Standard Terms and Reference Prices), and the date on which individual agreements take effect.

20 Question 20 - Under what circumstances would ABB envisage varying Standard Terms or Reference Prices pursuant to clause 5.6? Does ABB propose any limitations or restrictions on its ability to make such variations? How many times in a particular year would ABB be likely to vary Standard Terms or Reference Prices?

At the time of publishing the standard terms and conditions, it is ABB’s intention to be bound by those terms and conditions for the term of the agreement and not to vary them. However, it is possible (although it has not occurred recently) that the terms and conditions may need to be varied during the course of an agreement. Reasons for such a change would include where procedures and/or services change significantly, such as with the mid-year introduction of a new service, or where a term or condition has been inadvertently omitted. In the event that such a change occurs, the Undertaking sets out the process for varying the terms. ABB believes that 30 days notice to customers of a change in terms and conditions is reasonable.

21 Question 21 - What is the role of bulk wheat exporters in the variation process set out in clause 5.6, if any? (Such as consultation prior to publication of new prices, or renegotiation of existing prices?)

Clause 5.6 provides that ABB may vary the Reference Prices or Standard Terms at any time. However, ABB must publish any varied Reference Prices or Standard Terms at least 30 days before they come into effect. In addition, any new Reference Prices or Standard Terms will not override the terms of existing Access Agreements.

This means that, if ABB published revised Reference Prices or Standard Terms, this will not automatically affect Access Agreements which have already been entered into.

As a practical matter, ABB is also likely to consult with its customers before introducing any variation to the Reference Prices and/or Standard Terms.

In addition, if customers have not yet entered into an Access Agreement with ABB, they will have an opportunity to negotiate with ABB in accordance with clause 6 of the Access Undertaking and, if dissatisfied with the terms of access, seek binding arbitration in accordance with clause 7 of the Access Undertaking.

22 Question 22 - In relation to the requirement to publish a variation at least 30 days prior to its effective date in clause 5.6(b), why is there no similar requirement in relation to the annual publication of Standard Terms and Reference Prices?

The publication of Reference Prices and Standard Terms by 30 September each year is approximately 6 weeks before bulk wheat is typically exported through ABB port terminals in any year.

In general, the first harvest of wheat in South Australia is around the end of October. Given handling process, quality controls and transport times, this means that grain is not typically received into port for export until around mid-November.

Accordingly, while clause 5.1 does not require ABB to publish the Reference Prices and Standard Terms 30 days prior to them having effect, there is, in practice, an approximate 6 week lead time before wheat is received at port (at which time the Reference Prices and Standard Terms will apply).

In the ordinary course of its operations (and consistent with existing and past practices), ABB would also intend to consult with customers in relation to the Reference Prices and Standard Terms prior to 30 September each year.

Negotiating for access

23 Question 23 - Clause 5.1 provides that ABB must publish Reference Prices and Standard Terms by no later than 30 September of each year. Please elaborate on whether publication by this date allows sufficient time for an exporter to have an Access Agreement in place for the harvest season in a particular year.

Please see the response to Questions 16 and 22. ABB considers that the publication of Reference Prices and Standard Terms prior by 30 September each year provides a reasonable and appropriate opportunity for customers to have an

Access Agreement in place (in accordance with the process set out in clause 6) by the time that wheat is available for export.

That this is the case is clearly supported by past and existing practices in relation to a range of de-regulated grains. In addition, given the inherently seasonal nature of the grains industry, annual contracts are frequently negotiated and concluded within similar timeframes.

24 Question 24 - What ability will bulk wheat exporters have to negotiate terms prior to the publication of Reference Prices and Standard Terms, given that ABB is required to publish by no later than 30 September in each year?

Under clause 5.1 of the Access Undertaking, 30 September is the last date each year that ABB must publish its Reference Prices and Standard Terms.

The Access Undertaking does not preclude customers from seeking to negotiate an Access Agreement with ABB prior to 30 September each year (or, indeed, at any time).

From a practical perspective, it may not be possible for ABB to enter into concluded agreements significantly earlier than August or September each year (i.e. when the Reference Prices and Standard Terms have been determined), as the inherently seasonal nature of the industry means that ABB needs to consider a range of business factors on seasonal basis. However, ABB implemented a 'Harvest Ready' programme in 2008, which resulted in ABB:

- engaging with and providing detailed information (including indicative terms and prices) to its customers; and
- commencing consultation and negotiations with customers,

prior to 30 September. This reflects a significant advancement on previous existing practices which had been in place for a number of years in relation to other de-regulated grains, which saw pricing and terms released at a later date.

In any event, ABB notes that there is no evidence that this later publication in previous years had any detrimental on exporters.

25 Question 25 - Under what terms and conditions will ABB provide access to its port terminal services to wheat exporters prior to execution of an Access Agreement (such as where parties are involved in a Dispute)?

Please see the response to Question 19.

Clauses 6 and 7 of the Access Undertaking provide a binding mechanism for the negotiation of terms of access, and arbitration of any disputes. Together these provisions provide an expeditious process for facilitating negotiations to conclude Access Agreements. The holding over provisions in clause 5.2(b), and the possibility for retrospective application of prices (once agreed), also ensure that there is no "gap" in the terms that will apply.

26 Question 26 - In relation to clause 6.4(a)(ii)(B), what factors will ABB take into account in deciding if a request is ‘unduly onerous’ or ‘disproportionate’?

In determining whether a request for information is “unduly onerous” or disproportionate, ABB will have regard to what is standard industry practice, both in Australia and at other port terminals in Australia and around the world.

ABB has provided access to its port terminal services on an open access basis for a number of years and in relation to a range of de-regulated grains. ABB and AusBulk combined have operated in the grains industry (both as a port operator and grain exporter) for in excess of 50 years. Accordingly, ABB has substantial experience in determining, and knowledge of, the information that is necessary in order to export grain and apply for access to port terminal services.

Similarly, the majority of ABB’s customers are sophisticated grain exporters, that have substantial experience in acquiring (and in many cases providing) port terminal services around the world. Accordingly, they also have substantial experience in determining, and knowledge of, the information that is necessary in order to export grain and apply for access to port terminal services.

If ABB receives a request for information which goes beyond what is required as a matter of standard industry practice, ABB will:

- seek clarification as to why the information is required;
- assess the cost to ABB of providing the information (noting that clause 6.4(a)(C) enables ABB to recover its reasonable costs in providing information that is not ordinarily and freely available to ABB); and
- assess the time and other resources that would be involved in ABB complying with the information request.

ABB’s intention is to provide all reasonable assistance to enable customers to apply for, and enter into, Access Agreements. This is consistent with ABB’s clear incentive to maximise throughput at its terminals. However, in circumstances where:

- the information request goes beyond what is generally required having regard to industry practices in Australia and globally;
- the customer cannot justify why the information requested is necessary to apply for access to Port Terminal Services, or negotiate and conclude an Access Agreement; and
- compliance with the request would be costly and time-consuming for ABB,

then ABB may form the view that the request is unduly onerous or disproportionate. In this regard, ABB’s key imperative is to negotiate and conclude Access Agreements with a range of customers prior to the commencement of harvest season, so that it can provide access in accordance with the Access Undertaking. It should not be hampered in achieving this outcome by unnecessary information requests which go beyond what is (and has over a number of years been) required by industry participants. It is also not appropriate that there be a regulatory requirement (i.e. under an Access

Undertaking) for ABB to provide information that is not relevant to the provision of the services.

ABB also notes that, given the long history of providing open access, much of the information that is genuinely required for an access seeker is already publicly available, or made publicly available by ABB in a transparent and timely manner.

27 Question 27 - In relation to clause 6.4(b)(i), why is it necessary for ABB to have discretion not to negotiate with the Applicant if ABB considers that the Applicant has not followed the process in the proposed undertaking? What factors will inform ABB's consideration that an Applicant has not followed the process?

The Access Undertaking involves ABB committing to negotiating the terms of access to its Port Terminal Services and Access Agreements in accordance with a specified process. That process is clear, transparent and efficient. It is also reasonable and based on existing industry practices.

The purpose of committing to this process in the Access Undertaking is to provide certainty for both ABB and access seekers. Access seekers know what is required of them, and ABB is required to provide access to customers who comply with the Access Undertaking.

The Access Undertaking therefore sets out clear obligations for both ABB and access seekers. In relation to access seekers, those obligations are not onerous. They include a requirement to provide information that is necessary for ABB to be able to provide Port Terminal Services to the access seeker, and also determine potential impacts on other customers. The information required is also necessary to facilitate the efficient operation of the port terminals, for the benefit of all users.

ABB submits that there is very little purpose in committing to a process if access seekers are not also required to comply with that process. Indeed, ABB's ability to comply with the requirements and processes set out in the Access Undertaking may be substantially undermined if access seekers do not also comply with their minimal obligations.

Under the Access Undertaking, ABB only has an ability to cease negotiations with an access seeker if the access seeker does not comply with its obligations and the specified processes *and* ABB considers that this failure is material. ABB would anticipate that, in practice, this right would be invoked in very few circumstances (given that both ABB and its customers have operated in the industry for a large number of years). Any cessation of negotiations by ABB is also a matter that can be referred to binding arbitration in accordance with clause 7 (see clause 6.4(b)(vi)).

In determining whether an access applicant has complied with the requirements and processes of the Undertaking and whether or not any failure to do so is material, ABB will consider:

- the circumstances of any non-compliance (for example, if the non-compliance was caused by a simple error and does not significantly affect the provision of, or negotiation for, Port Terminal Services, it would be unlikely to be held to be "material");

- the impact of non-compliance on ABB (e.g. in terms of costs, resources, management time) and other users;
- previous decisions (if any). Where ABB has made a determination in relation to a similar or equivalent matter, it will seek to ensure consistency of approach in determining whether failure to follow the requirements and procedures of the Access Undertaking is “material”.

28 Question 28 - In relation to clause 6.5 & Schedule 1 (on the proposed form requirements for an access application):

(a) *What is meant by ‘Customer Application Type’ and ‘Business Category?’*

These expressions were unintentionally ‘held over’ from the draft Template Undertaking providing to the Commission, ABB proposes to delete “Customer Application Type” and “Business Category” from the access application form set out in Schedule 1.

(b) *Why is it necessary for the Applicant to have a website in order to seek access? If the Applicant does not have a website, will ABB refuse access?*

ABB does not require that its customers have a website. ABB will not refuse access to customers if they do not have a website.

If a customer does not have a website, ABB anticipates that the customer would simply leave that section of the standard application form blank.

29 Question 29 - In relation to clause 6.6(b)(iv), what factors would ABB take into account in deciding if the negotiations were not progressing in good faith towards the development of an Access Agreement within a reasonable time period?

As set out above, ABB’s clear commercial imperative is to facilitate throughput at its port terminals and obtain additional customers and incremental tonnes. As demonstrated by its history of providing open access, ABB is willing to consider and negotiate all reasonable matters with access seekers. However, ABB should not be required to continue negotiations indefinitely with an access seeker in circumstances where it is clear that the access seeker is not genuinely, and in good faith, seeking to negotiate an Access Agreement.

To require otherwise would impose a significant burden on ABB and detract from its ability to negotiate access with its other customers on a timely basis.

Given that many of its customers are highly sophisticated operators in the global wheat industry, that have substantial experience in negotiating infrastructure access (and who similarly have little time for protracted, frivolous and non-genuine negotiations), ABB would anticipate that clause 6.6(b)(iv) would be invoked in only very exceptional cases. ABB also appreciates that demonstrating a lack of good faith by another party (as distinct from different commercial objectives) would involve a relatively high threshold.

However, for the reasons set out above, ABB considers it necessary, as would occur in any competitive market, to retain an ability to terminate vexatious and non-good faith negotiations. If dissatisfied with a decision by ABB to terminate

negotiations, an access seeker can refer the matter to arbitration in accordance with clause 7 (see clause 6.4(b)(i)). It is found that ABB has acted unreasonably, ABB is required to re-commence negotiations immediately.

In determining whether or not negotiations are “*progressing in good faith towards the development of an Access Agreement within a reasonable time period*”, ABB will consider the approach to negotiations adopted by the access applicant. In circumstances where an access applicant is obstructive, refuses to attend negotiation meetings, fails to comply with reasonable timeframes and/or is intransigent on matters which are common industry practice (and which are accepted by all other access seekers without apparent concern), it is possible that ABB would reasonably form the view that the access seeker is not progressing negotiations in good faith.

The reference to “three months” in clause 6.6(b)(iii) provides a benchmark for what is a reasonable period of time. However, in exceptional circumstances, ABB may seek to terminate negotiations earlier.

To address potential concerns, ABB would be prepared to amend clause 6.6(b)(iv) by inserting the words “(acting reasonably)” after the word “believes” in clause 6.6(b)(iv).

30 Question 30 - What is meant by ‘amended Standard Terms’ in clause 6.7(b)(ii)? How does this clause interact with the ability of the ABB to offer different terms under clause 5.4? (That is, what, if any, is the difference between an ‘amended Standard Term’ and a ‘different term’?)

The Reference Prices and Standard Terms apply to Standard Port Terminal Services.

Clause 5.1(e) provides that “[i]f an Applicant seeks access to non-standard Port Terminal Services, the Port Operator and the Applicant may negotiate prices and non-price terms that are different from the Reference Prices and Standard Terms”. However, those “non-standard terms” must also comply with the requirements in clause 5.4.

Clause 6.7(b)(ii) refers to the provision of non-standard Port Terminal Services. Specifically, if an Applicant seeks access to non-standard Port Terminal Services, ABB may, subject to the non-discrimination provisions, offer access to those services on terms which include certain variations to the Standard Terms. As indicated in the clause, those variations may be reasonably necessary or desirable to accommodate the different nature of the services.

The reference to “amended Standard Terms” in clause 6.7(b)(ii) is a reference to the fact that a varied or amended form of the Standard Terms may apply for non-standard Port Terminal Services.

31 Question 31 - If the Negotiation Period ceases, will the Applicant be entitled to make another application for access? How would any further application be dealt with?

In the event that the Negotiation Period lapses or otherwise ceases, an Applicant would be able to submit a new application for access. ABB would assess that new application on its merits, having regard to the processes and requirements set out in the Access Undertaking.

Any new application would need to follow the requirements of the Access Undertaking (with regard to information and process), and it would be assessed in the same way as any other application. In practice, due to the familiarity of both ABB and the Applicant with the previous application, if the new application is substantially similar to the previous one, it is possible that negotiations may proceed more quickly.

Disputes

32 Question 32 - In the definition of ‘Dispute’ in clause 11.1, what does ABB mean by a ‘bona fide dispute’? Please provide examples of disputes that ABB considers would be bona fide, and examples of disputes ABB considers would not be bona fide.

In relation to a dispute, “bona fide” means “genuine”, “real”, “of substance” and not frivolous or vexatious.

The effect of the definition is intended to be that only genuine disputes, which raise issues relating to the negotiation of Access Agreements (and which are not trivial or frivolous) are escalated by either ABB or access seekers through the dispute resolution process in clause 7 of the Access Undertaking.

This does not prevent access seekers from raising any issue that they choose to with ABB. ABB will consider each of those issues on their merits, and seek to resolve the issue with the relevant access seeker in an expeditious manner. It is simply intended to ensure that disputes have a degree of relevance and substance, and relate to genuine issues, before they are escalated to the parties’ respective CEOs or to an external mediator or arbitrator.

For this reason, it is not uncommon for dispute resolution clauses to provide a structured mechanism for the resolution of “bona fide” disputes.

It is difficult to provide in advance clear example of when a dispute would be “bona fide” and when it would not. Any examples provided in advance would tend to fall at one or the other end of the spectrum. However, where a dispute:

- relates to an aspect of the negotiation of an Access Agreement in relation to Port Terminal Services;
- raises matters which would have a more-than-trivial impact on either ABB or the access seeker;
- relates to matters which have been raised with ABB (or the access seeker), and in respect of which the parties cannot agree;
- raises matters or factual circumstances which have not previously been determined by an arbitrator; and
- raises matters which are not expressly addressed in the Access Undertaking,

the dispute is likely to be a bona fide dispute.

Conversely, if a dispute:

- does not relate to an aspect of the negotiation of an Access Agreement in relation to Port Terminal Services;
- raises matters which would not have any impact (or would only have a trivial impact) on either ABB or the access seeker;
- relates to matters which have never been raised with ABB (or the access seeker) in negotiations;
- raises matters or factual circumstances which have previously been determined by an arbitrator; or
- raises matters which are expressly addressed in, and are clear from, the Access Undertaking,

the dispute is unlikely to be bona fide, and should therefore not be required (at least at that stage) to be escalated to CEOs or external mediation or arbitration.

33 Question 33 - Clause 7.1(b) proposes that any disputes in relation to an Access Agreement once executed will be dealt with in accordance with the provisions of that Access Agreement. Does this include disputes regarding claims of discriminatory conduct? What dispute resolution mechanism will be provided under the Access Agreement?

The proposed dispute resolution procedure is set out in clause 16 of the draft indicative “2009/2010 Season Port Terminal Services Agreement for Standard Port Terminal Services” provided to the Commission on 22 May 2009.

In offering contracts to customers, ABB must comply with the non-discrimination provisions set out in the Undertaking. Any dispute in relation to alleged discriminatory conduct could be raised:

- as a complaint to the Commission regarding ABB’s compliance with the Undertaking; or
- under the dispute resolution procedure contained in clause 7 of the Undertaking.

34 Question 34 - In relation to clause 7.1(c), why should the report to the ACCC only deal with ‘material disputes’? What does ABB mean by a ‘material’ dispute? What does ABB consider to be a non-material dispute? Are material disputes different to bona fide disputes? If so, how?

Clause 7.1(c) is intended to be pragmatic and reflect ABB’s expectation -- based on past history and the very limited number of disputes between ABB and its customers -- that to the extent disputes arise, the vast majority are likely to be resolved quickly by negotiations between operational and commercial managers.

Clause 7.1(c) also reflects ABB’s assumption that the Commission would not wish to be advised of all disputes, no matter how minor, particularly if they are resolved between the parties quickly and with no significant impact on either access to the Port Terminal Services or the parties’ respective businesses. In this regard, ABB would anticipate that a need or justification for regulatory oversight would only arise if the dispute could not be readily resolved, required escalation to CEOs or to an external mediator or arbitrator, had an impact on the access of a

particular person to Port Terminal Services, or had a material impact on either ABB or an Applicant.

Put another way, it is difficult to see the logic for requiring ABB to report a dispute for regulatory oversight, when the dispute does not raise any material issues, or have any material impact on either access or the parties to the dispute.

As with Question 32 above, it is difficult to provide in advance clear examples of when a dispute would be “material” and when it would not. There is no bright line and any examples provided in advance would tend to fall at one or the other end of the spectrum. However, ABB considers that a dispute is likely to be material (and would therefore be required to be reported to the Commission) if:

- it cannot be resolved by the parties’ operational and commercial personnel and needs to be escalated to the parties’ respective CEOs or to an external mediator or arbitrator;
- it raises issues directly relevant to a parties’ ability to obtain access to the Port Terminal Services (e.g. a refusal to provide access, or to negotiate access); or
- the matter in dispute is likely to have a material impact on the business or operations of either ABB or the access seeker.

Conversely, a dispute is unlikely to be material if:

- it is resolved quickly by the parties’ operational and commercial personnel by negotiation and with no need to be escalated to the parties’ respective CEOs or to an external mediator or arbitrator;
- it does not raise any issues relevant to a parties’ ability to obtain access to the Port Terminal Services; or
- the matter in dispute would not have any real or significant impact on the business or operations of either ABB or the access seeker.

Material disputes would, by definition, be bona fide. However, it is possible that certain bona fide disputes would be raised and resolved very quickly so as not to raise any material issues, or require reporting for regulatory purposes.

As set out above, ABB does not anticipate that the “materiality” of disputes is likely to be a major issue, given the very limited number of disputes it has had with customers in the past.

35 Question 35 - In relation to clause 7.3(c), has ABB confirmed with the Institute of Arbitrators and Mediators of Australia (IAMA) that its involvement as a mediator, as contemplated by the proposed undertaking, is workable? Please provide copies of any correspondence between ABB and the IAMA to this effect.

ABB has not contacted IAMA directly to confirm that it would be prepared to appoint a mediator if requested by ABB or an Applicant (i.e. in the event that they cannot, within 10 Business Days, agree on the identity of a mediator).

However, this is a service commonly provided by professional mediation bodies, and is a common clause in commercial agreements.

In addition, the website of the Institute of Arbitrators and Mediators of Australia (“IAMA”) -- <http://www.iama.org.au/index.html> -- states that:

“The Institute of Arbitrators & Mediators Australia (IAMA) is the nation’s largest, independent and most experienced alternative dispute resolution (ADR) organisation. Founded in 1975, membership includes some of Australia’s eminent and experienced ADR professionals from a diverse range of sectors including commercial, legal, industry, education and government.

With offices in all states and territories, it also plays a key role in industry and consumer schemes. The IAMA provides services in all forms of ADR including arbitration, mediation, adjudication, conciliation, and expert determination, and is involved in the professional development, training and accreditation of ADR across Australia and internationally”.

The website further states that:

“The Institute aims to serve the community, commerce and industry by facilitating efficient dispute resolution methods including arbitration, mediation, conciliation and adjudication. It is Australia-wide, with members represented in all States and Territories and overseas.

Its membership brings the experience some of Australia's most eminent engineers, accountants, lawyers, building consultants, architects and other professionals to the practice of arbitration and mediation.

Its internal accreditation, professional development and training programmes, as well as its administrative back-up procedures, ensure quality of service delivery”.

Based on common industry practice and the matters set out on IAMA’s website, ABB considers that IAMA would be well placed to appoint a mediator if requested by either ABB or an Applicant.

In the extremely unlikely event that IAMA could not provide this service, ABB would be prepared for the President of the Law Society of South Australia to appoint the mediator. Again, this is a common clause in commercial agreements.

Arbitration

36 Question 36 - Who does ABB envisage as likely candidates for Arbitrator, especially considering the matters set out in clauses 7.6 – 7.9?

As set out in clause 7.5(a), any arbitration will be conducted by an arbitrator appointed by “*the agreement of the parties*”. ABB would propose to discuss with IAMA which of their members would be likely to have the requisite experience (legal and, potentially, industry knowledge) to arbitrate the specific matter in dispute, as set out in the Dispute Notice.

A list of IAMA’s members is set out in its website.

If an Applicant disagrees with the ABB’s suggested arbitrator, it is free to propose an alternative. ABB would consider that suggestion having regard to the proposed arbitrator’s capability, experience and independence.

If the Commission disagrees with the selection of arbitrator proposed by the parties, it has a right of veto (clause 7.5(b)).

If the parties are unable to agree on the identity of the arbitrator, either party may request the Commission to appoint an arbitrator (clause 7.5(c)).

37 Question 37 - In relation to clause 7.4(b), how soon after referral to arbitration must ABB notify the ACCC of the details of the dispute?

Clause 7.5(b) provides that ABB must notify the Commission within two Business Days of the parties agreeing to an arbitrator. If they cannot agree on an arbitrator within 10 Business Days, either party may request the Commission to appoint an arbitrator.

ABB anticipates that it would provide the Commission with details of the arbitration at that time (including a copy of the Dispute Notice).

ABB would propose to advise the Commission of the progress of the arbitration at any reasonable time requested by the Commission. ABB would also propose to provide the Commission with a copy of the arbitrator's final determination no later than 31 July (being the date under clause 7.1(c) when it is required to provide a report to the Commission in relation to all material Disputes).

38 Question 38 - What does ABB estimate as the likely duration and cost of an arbitration process?

The duration and cost of an arbitration will depend on:

- the number and complexity of the issues raised;
- the approach adopted by the parties in progressing the arbitration (e.g. whether the access seeker is committed to resolving the dispute in good faith and in a timely manner);
- the availability and hourly rate of the arbitrator.

ABB would anticipate that many disputes would be capable of being resolved within 3-4 weeks from the time an arbitrator is appointed. More complicated disputes may take longer. The likely cost of the arbitration will largely depend on the matters set out above.

39 Question 39 - In relation to clause 7.9(b), who determines whether an Applicant does not comply with a determination or direction of the Arbitrator? What is the basis for reaching a conclusion that non-compliance has occurred?

ABB anticipates that, in most cases, it will be clear whether or not a party has complied with a determination or direction of the arbitrator. In this regard, arbitral determinations and directions are generally expressed in a manner such that it is clear what each party's obligations are and the timeframe within which those obligations must be satisfied.

If concerned that an Applicant had not complied with an arbitrator's determination or direction, ABB would, in the first instance, write to the Applicant advising them that they had not complied and (where possible) provide an opportunity for the Applicant to rectify that non-compliance. The Applicant would have an opportunity to respond.

To the extent that there may be any doubt about whether an Applicant has complied with an arbitrator's determination or direction, it would be open to either party to obtain the views of the Arbitrator.

In addition, clause 7.9 of the Undertaking provides that:

“The determination of the arbitrator will be final and binding subject to any rights of review by a court of law.

...

Except where the determination or direction is subject to a review by a court of law, the Port Operator will comply with the lawful directions or determinations of the arbitrator”.

If ABB were not to comply with the direction or determination of the arbitrator, it would be breach of the Undertaking, which the Commission could enforce.

Ring fencing

40 Question 40 - Will the Compliance Auditor's report, referred to in clause 6(d) of Schedule 2 to the proposed undertaking, be required to identify potential breaches (if any) of the Ring Fencing Rules set out in Schedule 2?

The independent auditor will be independent of ABB. Accordingly, it is ultimately a matter for the independent auditor what he or she includes in the audit report to be provided to the Commission.

However, as set out in clause 6(a) of Schedule 2, the auditor's role is to audit ABB's compliance with the ring-fencing rules, and ABB's related processes and procedures. To undertake this audit, the auditor will review:

- records of any complaints;
- ABB's compliance with the ring-fencing rules;
- records held by ABB's compliance officer;
- and relevant policies or procedures that implement or otherwise relate to the ring-fencing rules; and
- any other issues relevant to the Port Operator's compliance with the principles and obligations stated in the ring-fencing rules.

Accordingly, from ABB's perspective, the purpose of the independent audit report would be to identify any breaches of the ring-fencing rules, any areas for improvement in ABB's policies or processes, and any non-compliance with previous auditor recommendations.

While it is a matter for the independent auditor, ABB considers that the auditor should not report on "potential" breaches, except to the extent that a potential breach may highlight an area for improvement in ABB's policies or processes. Rather, the report should focus on actual or alleged breaches.

41 Question 41 - In relation to clause 1 of Schedule 2, how does ABB define ‘financial records’? Please list the type of records and/or accounts which will be made available to the independent auditor.

Clause 1 of the ring-fencing rules requires ABB to “*make the financial records relating to its provision of access to and provision of Port Terminal Services available to the independent auditor*”. ABB envisages that the “*financial records relating to its provision of access to and provision of Port Terminal Services*” would include those records which would enable the independent auditor to conduct an audit, with the aim of determining whether ABB has complied with the ring-fencing rules. In particular, ABB would anticipate that the independent auditor would require:

- records of contracts entered into by ABB and wheat exporters (including ABB’s marketing division) for the provision of Port Terminal Services;
- records of invoices issued by ABB to grain exporters (including ABB’s marketing division) in relation to the provision of Port Terminal Services; and
- records of payments received by ABB from grain exporters (including ABB’s marketing division) in relation to the provision of Port Terminal Services.

42 Question 42 - Will the provision of financial records pursuant to clause 1 of Schedule 2 require the implementation of an accounting separation regime? If so, what would be the costs of implementing such a regime, and what cost allocation methodology would ABB propose to use in allocating costs to different business areas?

ABB does not propose to implement a system involving full accounting separation between its National Supply Chain Division (“NSC”) and Marketing Division.

ABB anticipates that the costs of implementing, operating and maintaining duplicate or separate accounting systems would be significant (i.e. based on ABB’s experience with SAP, in the order of \$[] in upfront costs, with an additional annual expenditure of around \$[]). These costs (and the associated disruption, inflexibility and inefficiency) would ultimately need to be borne by the industry.

As set out in ABB’s submission dated 16 April 2009, ABB considers that knowledge of ownership of grain stocks at port by NSC does not bestow any competitive advantage on ABB’s Marketing Division. In addition, the ring-fencing provisions in the Undertaking seek to formalise disciplines (re-enforced by clear audit protocols) whereby certain information relating to applications for access to port and the execution of those applications will be restricted to NSC staff and not made available to ABB Marketing staff.

To accommodate these new requirements, ABB will:

- introduce new policies and procedures;
- capture auditable arms length transactions between NSC and ABB’s Marketing Division; and

- modify its systems to ensure that restricted information cannot be passed on to unauthorised persons.

ABB considers that the ring-fencing provisions contained in the Access Undertaking represent a reasonable balance between the need for NSC customer confidentiality and the desirability of avoiding incurring the very significant costs associated with accounting separation (in circumstances where any calls for accounting separation would appear to relate to concerns with little substance and would ultimately impose significant inefficiency costs on industry and, ultimately, growers).

Service standards

- 43 Question 43 - Does ABB currently report (internally or externally) on any key performance indicators/service standards in relation to its port terminal operations? If so, please list and explain the measures.**

ABB currently maintains records in relation to, and reports on compliance with the following internal key performance indicators:

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Please let ABB know if further explanation of these key performance indicators is required.

Capacity management/Port protocols

- 44 Question 44 - How many (by number and tonnage) of ABB's customers use Export Select to export bulk wheat compared to the percentage that use Export Standard? What does ABB believe are the main considerations for a customer when deciding which option to choose?**

Between 1 November 2008 and 31 May 2009, a total of [] tonnes of bulk wheat was exported from ABB's South Australian ports. Of this, [] tonnes was shipped using Export Select. The remaining portion represents wheat from approved third party sites (GrainCorp, GrainFlow and Balco), and customers who have organised their own delivery of product to port.

A total of [] different customers have exported wheat from South Australia in the past season.

ABB considers that customers use its Export Select product because of its competitive pricing, efficiency and high levels of service.

Export Select is a highly efficient option for growers and exporters, involving total cargo management from silo to port and certainty around capacity to accumulate cargo within acceptable timeframes. The total management of all logistics functions from up-country to port involves a number of efficiencies. In addition to rigorous cost controls, ABB is aware of, and able to manage actively, the quality of the grain receival facilities and manage the separation of different qualities of grain and grain which has come into contact with particular pesticides. As set out in ABB's main submission, quality control standards and processes are a critical issue that can have a significant impact on the efficient operation of the supply chain as a whole, and on all users.

In addition to providing Export Select customers with access to competitive freight options, ABB also seeks to pass certain supply chain efficiency savings back to customers in the form of lower charges. For example, customers who use Export Select (and therefore ABB accumulation and logistics services) receive a discount on the shipping fee that they pay. This discount reflects the efficiency savings in accumulating grain at ABB upcountry sites and transporting the grain to port.

ABB's reputation in relation to the quality of services provided, and the convenience of obtaining a total management solution, are also key considerations for customers.

45 Question 45 - Clause 1.2(e)(i)(D) of the proposed undertaking refers to reaching an appropriate balance between the interests of various parties, including the legitimate business interests of ABB in meeting its own or its Trading Division's 'reasonably anticipated requirements' for Port Terminal Services.

(a) Does this objective mean that ABB intends to reserve and set aside its own or its Trading Division's 'reasonably anticipated requirements' and then provide access to third parties for the remaining capacity? If setting aside capacity for itself or its Trading Division, what criteria will ABB use to assess 'reasonably anticipated requirements'?

Given that each of ABB's ports currently has significant spare capacity, ABB does not consider that it would need to "set aside" capacity for ABB Marketing in order to meet ABB Marketing's reasonably anticipated requirements at any time during the term of the Undertaking.

The Port Loading Protocols will apply to ABB Marketing in the same way that they apply to all other bulk wheat export customers.

(b) If ABB does intend to set aside capacity for itself or its Trading Division, how does this interact with the relevant ring-fencing obligations?

Please see the response to Question 45(a) above.

- (c) *How does ABB otherwise propose to balance the port capacity requirements of itself or its own Trading Division with third party bulk wheat exporters?*

Please see the response to Question 45(a) above.

- 46 **Question 46 - Clause 8.2(b)(iii) of the proposed undertaking contains an obligation on ABB to consult with Major Users in relation to any proposed variation to the Port Loading Protocols in Schedule 3 of the proposed undertaking (the PLP). Based on the previous two years of operations, what are the names of the parties that would come within the definition of a Major User? In addition, what will consultation on a proposed variation to the PLP specifically entail?**

As at the date of this submission, “Major Users” (that is, Users who have shipped more than 20,000 tonnes of bulk wheat through the Port Terminals in the past 2 years) are:

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This is each of the [] customers referred to in the response to Question 44 above.

Additionally, ABB notes that, whilst [] have not exported bulk wheat from South Australia in excess of 20,000 tonnes, given their significant operations, it is envisaged that they would also be consulted.

The obligation on ABB to “*consult with Major Users*” regarding any proposed variation to the Port Loading Protocols involves ABB:

- advising Major Users of the proposed changes and ABB’s reasons for the proposed changes;
- providing all Major Users with a reasonable opportunity (potentially including meetings) to provide comments, and raise any concerns, in relation to the proposed changes;
- considering all issues raised in those responses and, where necessary, seeking clarification and further details from relevant parties;
- considering whether, in light of the feedback received, any modification to its proposal is necessary or desirable;

- providing feedback to the Major Users and making a decision, based both on its independent views and the information provided by others throughout the consultation process; and
- providing reasons for its decision.

The precise timeline for a consultation process will reflect the individual circumstances surrounding the proposed amendments to the Port Loading Protocols, with Major Users given longer to consider material changes, but less time as appropriate to consult on minor amendments.

47 Question 47 - In relation to clause 8.4(c) what are the ‘objective commercial criteria’ that ABB will use to make Operational Decisions that involve conflicts of interests between users of the Port?

ABB’s consistent past practice has been to make operational decisions, and adopt practices and policies, which promote fair and reasonable use of its terminal facilities.

The basis for those decisions are, in large part, set out in the Port Loading Protocols. For example, the Port Loading Protocols state as follows:

<p>Guiding Principals for determining Accumulation Priority and therefore allocation of Estimated Load Date(s)</p> <ol style="list-style-type: none"> 1. If a vessel is already nominated for the load port then it will receive accumulation priority even if the new vessel has an earlier ETA unless <ol style="list-style-type: none"> a. The Company deems it can manage the impact of accepting the second nomination otherwise this vessel accumulation will occur after the initial vessel is completed; or b. the ETA’s are within 3 days (and can be confirmed with the ship) and accumulation cannot be stopped without <ol style="list-style-type: none"> i. significant costs being incurred by the Company; ii. Port efficiencies being negatively impacted. 2. Where Export Select Cargo is already positioned at port it will be allocated to Clients who have in the first instance provided the earlier nomination (and in the form required by the Company). 3. The Company reserves the right not to fully accumulate a vessel cargo into Outer Harbor to maximise all Client vessel turnarounds where multiple vessels are arriving in a short timeframe. 4. Specific supply chain efficiencies including an ability to fully utilise available resources may result in vessels loading out of arrival order based on an ability to fully position enough stock at port. This is more likely to occur with minor grade commodities. 5. If a Client is willing to work outside of the standard operating conditions or increase accumulation capacity the vessel may receive accumulation priority if the initial prioritised Client rejects a similar offer. 6. The Company also reserves the right to adjust accumulation priority based <ol style="list-style-type: none"> a. On increased total terminal efficiencies and an ability to minimise the total

accumulation time based on total wait time of all vessels (although an individual Client's vessel may be delayed).

- b. The majority of the stock for a nominated vessel already being received at port and in a shippable position.
- c. Vessel ETA changes, to ensure the supply chain continues to operate in an efficient manner.

Berthing Priority

- Flinders Ports SA Port rules section 4.12 Grain Berth Loading Priorities
- Clients must work the vessel 24/7 basis (Labour Ordering conditions)
- If Stock in position and vessel not load ready, Client must vacate the berth if there is another vessel at anchor waiting to berth and can load stock.

However, if the Port Loading Protocols do not expressly address an issue in respect of which ABB is required to make an Operational Decision, then ABB will make its decision independently (i.e. independently of any exporter, including ABB Marketing), based on what is required to maximise terminal efficiencies and maximise the total tonnage that is shipped through the relevant port terminal. Accordingly, in circumstances where there are conflicting requirements, ABB may give priority to:

- loading consecutive “same cargos” rather than swap between commodities;
- utilising all or a proportion of existing stock that is already at port (due to harvest receivals; export select stock);
- making actual port space available for accumulation;
- decisions which maximise specific supply chain efficiencies (including the ability to fully utilise available transport resources);
- maximising use of a mix of sites and the availability/capacity of those sites in relation to a cargo accumulation; and
- decisions which minimise the operating costs of the terminal (subject to customers' willingness to accept overtime costs and/or purchase additional accumulation capacity).

Other relevant factors include:

- ABB's commercial and contractual commitments, for example by prioritising commitments by reference to which agreement was executed with ABB first;
- the impact of ABB's Operational Decisions on its provision of services to all port users;

- the costs of making, or failing to make, certain Operational Decisions, with the goal of minimising cost to customers and, where appropriate, to ABB;
- the operational, technical or other (e.g. safety) implications of making certain Operational Decisions; and
- ABB's compliance with the remainder of the Access Undertaking in taking certain Operational Decisions.

A key goal in making any Operational Decision is also to provide certainty and consistency, both for ABB and its customers and both in respect of the current and future circumstances.

Based on past experience, ABB considers that there are relatively few operational matters which cannot be resolved quickly, based on a consideration of what is required to maximise terminal efficiencies and maximise the total tonnage that is shipped through the relevant port terminal.

ABB appreciates that it may be necessary to document more fully the objective criteria on which it may make its Operational Decisions. However, any new document would merely reflect the existing practices implemented to:

- resolve conflicting requirements quickly;
- provide maximum certainty to exporters; and
- maximise the efficient operation of (and throughput of) the port terminals.

48 Question 48 - Under the proposed dispute resolution mechanism set out in the PLP, how is a dispute ultimately resolved once the parties have progressed through the four stages described?

The Port Loading Protocols are essentially an operational document. If matters arising under the Port Loading Protocols cannot be resolved at an operational level by representatives of ABB and the relevant customer, the matter can be escalated to ABB's Executive General Manager National Supply Chain for review.

Given the operational nature of the document (and the fact that decisions under the Port Loading Protocols may, of their very nature, have an impact on other port users), it is important that ABB has the flexibility to make any final decision which ultimately reflects what it considers to be appropriate having regard to:

- the customers' requirements;
- the requirements of other users;
- ABB's requirements for the efficient and safe operation of the port terminal; and
- the short period within which most operational decisions need to be made.

However, in making any decision ABB must ensure that its decision is consistent with the Undertaking and, in particular, complies with clause 8.3 of the Undertaking.

49 Question 49 - The PLP states that ‘Acceptance of a nomination of a vessel will be at the discretion of [ABB].’⁸ What criteria will be used to assess whether or not a nomination will be accepted or rejected? What is the timeframe in which a decision will be made? Are the reasons for the decision given to the access seeker? Is there an appeals process from the ABB’s decision?

The initial criteria for acceptance of a nomination of a vessel is set out in the Port Loading Protocols (under the heading “Access to ABB port terminals”). In particular, before being able to access port terminal services, an exporter must:

- enter into and comply with the terms of a storage and handling agreement. ABB notes that the reference to a storage and handling agreement will shortly be amended to refer to a “Port Terminal Services Agreement for Standard Port Terminal Services”;
- be creditworthy (including with no materially outstanding invoices);
- in the case of wheat exports, be accredited within the meaning of the WEMA; and
- hold all other licences and permits required by regulation for the export of the commodity to be shipped.

In addition, the customer must hold ownership in their name or be able to demonstrate remaining ownership in an ABB-approved third party bulk handler facility and that the grain is available (or that transfers will occur prior to accumulation commencing).

If this key criteria are met, ABB needs to ensure it has the stock to meet the customer’s requirements in terms of quality and being available for outturn from upcountry sites (i.e. ABB needs to ensure that the grain can be physically out turned from an upcountry site or sites). In making any final decision, ABB also needs to ensure that it has sufficient transport and port capacity (including having regard to any port scheduled maintenance).

In practice, unless the customer does not have ownership or the cargo is not available, ABB manages the port capacity issue by forecasting load dates and leaves it to each customer’s discretion if it wishes to order a vessel (even if the vessel may be significantly delayed).

In summary, ABB needs to have the discretion to ensure the criteria are met and that it is able (as a practical or logistical matter) to meet customers’ requirements. If ABB needs for any reason to reject a vessel based on the above criteria, it continues to work in good faith to find a mutually acceptable solution.

Consistent with current practices, decisions are made within the timeframe required for customers to order vessels and manage their export commitments.

⁸ Please note that the PLP does not include paragraph numbers or page numbers. This sentence appears immediately under the heading ‘Vessel Nomination.’

Any appeals would take place in accordance with the dispute resolution process set out in the Port Loading Protocols.

- 50 Question 50 - The PLP states that the allocation of estimated load date(s) will be based on the ability of the ‘Client’ to accumulate the cargo.⁹ What is the acceptable evidence that a Client must provide to show that it has the ability to accumulate a cargo? What are the differences in evidence required when the wheat is inside ABB's storage and handling facilities as compared to when the wheat is inside the storage and handling facilities of an ‘[ABB] approved third party bulk handler’?¹⁰**

Please see Section 2.3 of the main supplementary submission (“Protocols for accepting grain outside ABB’s storage and handling system”).

In summary, this will only be an issue if a customer elects to accumulate the cargo under “Export Standard”, in which case ABB would ask the customer for a transport plan showing their intended movements each day to port. The only difference for wheat outside of the ABB system would be linked to the receipt of third party bulk handler grain such as providing a fumigation certificate and proposed outturn dates and/or confirmation the grain is available to outturn.

As set out in Section 2.3 of the main supplementary submission, these are not onerous requirements. To the contrary, ABB considers that they are entirely reasonable and appropriate.

- 51 Question 51 - The PLP proposes that ‘Clients’ may be invoiced for a certain cost and fee if ABB has to clear cells at Outer Harbor for another vessel accumulation, including where a vessel ‘fails survey significantly.’¹¹ What is meant by a vessel failing survey ‘significantly,’ and what is a non-significant survey failure?**

Vessels require inspection by both a Marine Surveyor and the Australian Quarantine and Inspection Service. Where a vessel is held up due to failing survey and requires 2 or more days work, this would be considered to be of significance given its likely impact on other vessels in the queue. A non-significant survey failure would be considered to be 1-2 day event such as the requirement to fumigate or spray a vessel or minor cleaning / vessel repairs.

ABB would only make a decision to reposition cargo if it was going to delay other vessels in the shipping stem for Outer Harbor and the movement of cargo would assist with mitigating customer delays. Accordingly, it is intended to be a measure which protects other users and facilitates the efficient operation of the port terminal.

⁹ See second paragraph under heading ‘Vessel Nomination.’

¹⁰ See point 1 under heading ‘Load Grades and Specific Quality Parameters.’

¹¹ See third paragraph under heading ‘Vessel Repositioning.’

52 Question 52 - The PLP proposes that ABB may cease loading if, in its opinion, continued loading may result in breaches of any safety or environmental requirements.¹² What are the ‘safety and environmental requirements’ to which the PLP refers? What are the specific documents (legislation, regulations etc) from which these requirements are derived?

As with all States and Territories in Australia, South Australia has legislative requirements in relation to safety and environmental protection. These include the:

- *Maritime Transport and Offshore Facilities Security Act 2003* (Cth);
- *Occupational Health, Safety and Welfare Act 1986* (SA) and associated Regulations;
- *Environment Protection Act 1993* (SA) and associated Regulations; and
- *Radiation Protection and Control Act 1982* (SA).

ABB will not continue loading if, at any time, such loading presents an unacceptable risk to the safety and welfare of any person or an unacceptable risk to the environment. The determination of acceptable levels of risk take into account the real risk and the seriousness of any breach relevant safety or environmental laws.

In the event that it needs to cease loading due to a safety or environmental issue, ABB will work as quickly as possible to address the issue and recommence operations.

¹² See first sentence under heading ‘Limitation of Liability.’

Schedule 1: Market Shares for Accredited Wheat Exporters - Response to Question 10

Marketer	ADE	ADE% Mkt Share	GIL	GIL% Mkt Share	LIN	LIN% Mkt Share	THE	THE % Mkt Share	WAL	WAL % Mkt Share	Total Mkt Share
[]	[]	[]	[]	[]	[]	[]	[]	[]	[]	[]	[]
[]	[]	[]	[]	[]	[]	[]	[]	[]	[]	[]	[]
[]	[]	[]	[]	[]	[]	[]	[]	[]	[]	[]	[]
[]	[]	[]	[]	[]	[]	[]	[]	[]	[]	[]	[]
[]	[]	[]	[]	[]	[]	[]	[]	[]	[]	[]	[]
[]	[]	[]	[]	[]	[]	[]	[]	[]	[]	[]	[]
[]	[]	[]	[]	[]	[]	[]	[]	[]	[]	[]	[]
[]	[]	[]	[]	[]	[]	[]	[]	[]	[]	[]	[]
TOTAL	[]	[]	[]	[]	[]	[]	[]	[]	[]	[]	[]

*** Wheat Tonnes
Exported By Marketer
since 01 July 2008

ADE - Port Adelaide

GIL - Port Giles

LIN - Port Lincoln

THE - Thevenard

WAL - Wallaroo

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Attachment 2: Response to Issues Raised in AGEA's Submission dated 29 May 2009

1 Issues raised in AGEA's submission of 29 May 2009

1.1 Introduction

In addition to the issues set out in ABB's main submission, AGEA's submission of 29 May 2009 raises a number of further issues in relation to the Access Undertaking. ABB considers that each of these issues is addressed in ABB's submission of 16 April 2009, and is also addressed in the Access Undertaking. There is also a large degree of overlap with the matters raised in, and ABB's response to, the Commission's Information Request.

However, for the Commission's convenience, ABB has addressed a number of specific points raised in AGEA's submission below. The matters set out below:

- where possible follow the headings and structure used in AGEA's submission; and
- should be read in conjunction with the main submission and response to the Information Request.

1.2 'Lack of competition between Port Terminal Services'

In paragraph 3 of the submission, AGEA outlines a number of arguments which seek to demonstrate that there is no credible competition between Port Terminal Services, and that the level of vertical integration of Port Terminal Operators provides them with an unfair competitive advantage in the bulk grain export sector.

ABB has provided detailed information in relation to the level of competition between ports in response to Questions 1 and 2 of the Commission's Information Request.

ABB notes that AGEA uses specific examples of the difficulties of transporting grain "*from one port to another*", stating that the cost of doing so would be prohibitive, as a result of "*duplication of fees, such as receipt fees, shrinkage and transport costs*". However, this example is inaccurate and incomplete. Competition between ports for grain exports can occur both up-country and at port, with at port competition largely driven by market-based grain swaps, rather than physical substitution or movement of grain.

Up country competition typically occurs when the decision is made by exporters as to which ports to use to export grain. Indeed, in 2007/08, ABB only transported []% of the total wheat and barley crop produced in South Australia. A substantial share was therefore moved along rival supply chains, including exports through Victorian ports, the container trade, domestic sales and retention as seed. Additionally, competition can occur between grain held at different ports, primarily through the possibility of grain swaps, as described in response to Question 2 of the Commission's Information Request.

In this regard, ABB notes that AGEA, in its submission, recognises that there is interstate competition between ports in Victoria and South Australia, as noted in ABB's submission of 16 April 2009, and in Attachment 1 to this submission.

Provision of port terminal services on discriminatory terms

AGEA also states in its submission that *“at present, bulk handlers discriminate in the provision of port terminal services depending on whether the wheat enters the port via the bulk handlers' up country facilities and services or through services provided by third parties”* (AGEA submission, paragraph 3.13).

In particular, AGEA states, in relation to ABB, that:

- *“ABB charges wheat exporters a fee of \$2.50 per tonne for any wheat that is received into port from non-ABB up-country services”* (AGEA submission, paragraph 3.24).

This fee was the subject of a binding independent arbitration process in 2005 and 2006. As the Commission is aware, the arbitrator determined in that matter that the fee was both reasonable and justifiable (having regard to the relevant non-discrimination criteria).

The precise quantum of the fee has increased since 2006, in line with increased costs. However, given that the justification for the fee has been approved by an independent arbitrator, following a very detailed review, it is difficult to understand why AGEA has raised the fee in its submission as a potential issue.

ABB provided the Commission with a copy of the arbitrator's final determination on 11 June 2009.

- *“In the ABB 2007/2008 storage and handling agreement pursuant to item 17, ABB sought to impose a “ship loading efficiency fee”, which had the effect of entitling ABB to impose additional fees if the rate at which ABB loaded a vessel exceeded certain parameters. However, the loading rate “exclude[d] all delays”. This meant that ABB was entitled to charge an “efficiency” fee despite its delays in loading the vessel caused by equipment break downs or ABB running at a less than optimal rate. Further, ABB did not incur any penalties for delays in loading or transportation of the wheat to port. In other words, ABB could take an exorbitant amount of time to transport the wheat to port and still charge an additional fee (or the equivalent of overtime) to provide the services it was contractually obliged to provide”* (AGEA submission, paragraph 3.24).

As a general comment, it is important to note that ABB's margins are affected by the efficiency of the operations. The longer ABB takes to load a vessel, the less its margins will be (given that ABB charges on a per tonne basis). ABB also has a strong incentive to provide efficient services in order to ensure that customers continue to use its services.

ABB introduced the ship loading fee referred to in AGEA's submission as an incentive for ABB to load customers' ships more quickly, and to compensate ABB for the additional operational costs that it would incur at the terminal for providing this faster service. The faster loading of vessels provides a number of benefits to customers in terms of cost

savings, export efficiencies, ability to meet export customer demands, and reducing demurrage charges that may otherwise have been incurred.

Delays with transportation of the wheat to port were excluded from the charge mechanism, as there are many issues outside the control of ABB that can affect how long vessel accumulations may take. For example, customers' vessels could arrive on the same day and, as a result, the second vessel's accumulation may be significantly longer than the first. This is outside of ABB's control and does not relate to the efficiency with which ABB provides the services.

In any event, in response to customer feedback, ABB removed the charge in the 2008/2009 season.

Additionally, ABB notes that it does not have a despatch/demurrage vessel arrangement in place, due to the fact that there are a number of variables which would affect vessel timing, and which are beyond the control of both ABB and bulk wheat exporters.

- *“ABB charge up to \$1.00 p/t for [transfer of ownership]...ABB applies a shrinkage factor of up to 0.6% of all wheat received and a grain deduction of 0.1%...ABB charges a minimum cargo lift fee of \$1.50 per tonne...ABB charges four levels of administration fees ranging from \$1,000 to \$25,000. It is unclear what services these ‘administration’ fees are charged in respect of or whether these fees are based on the cost to the BHC of providing those services plus reasonable commercial margin”*(AGEA submission, paragraph 3.24).

ABB does not accept that its administrative fees lack transparency or are, as implied, “unreasonable” or “arbitrary”. Nor are the shrinkage or other volume related figures unreasonable or arbitrary.

To the contrary, ABB's deduction rates reflect natural reductions in grain that occur in the process of receiving, storing and loading grain. Similarly, the administrative fee structure is related to the level of service provided to the customer, and is detailed in all storage and handling agreements, pursuant to which Port Terminal Services are provided. For example, a Level 1 (high volume) customer is provided with a dedicated account manager and assistance on export cargoes.

Additionally, ABB incurs a wide range of fixed costs in its provision of Port Terminal Services, including in the provision of administrative support. For example, ABB incurs costs in relation to the annual set-up for customers on its systems, the carrying out of credit checks, the maintenance of a dedicated customer services department, the provision of internet and technological support for customers (including assistance of posting cash prices), and the provision of reports. It is entirely reasonable that ABB recovers these fixed costs from its customers.

In this regard, ABB notes that AGEA has provided no information or evidence which provides any sound basis for concluding that those fees are not reasonable and justifiable.

1.3 'The scope of the Access Undertaking should be extended beyond Port Terminal Services and wheat'

Extending the scope of the Access Undertaking

In paragraph 4 of the submission, AGEA states that “*the scope of the undertakings should not be limited to services at the port*” and, similarly, that the Access Undertakings “*should not be limited to wheat*”.

As the Commission is aware, the WEMA only requires that Port Terminal Services are subject to an Access Undertaking. Similarly, the WEMA applies to wheat only, and does not require the Port Terminal Services Access Undertaking to extend beyond wheat. Consequently, AGEA’s call to extend the operation of the Access Undertaking in this way exceeds the statutory requirements laid down by Parliament. This is something that AGEA itself acknowledges in its submission, by recognising that “*section 24 of the WEMA is only directed at port services*” (AGEA submission paragraph 4.6).

AGEA also states that “*ABB has distorted accumulation of wheat in its port services, allowing it to reduce capacity at the port, by storing its own non-wheat commodities*” (AGEA submission, paragraph 4.9). No supporting evidence or further explanation is given in relation to this allegation. ABB stores non-wheat commodities for a range of participants at port (including direct from growers). This is undertaken on a commercial basis and is not intended to ‘distort’ wheat accumulation as suggested.

On this basis, ABB considers that there is no justification for suggesting that the Access Undertaking should extend beyond Port Terminal Services for bulk wheat.

“Minimum” terms to be included in the Access Undertaking

In addition, at paragraph 4.17 of its submission, AGEA sets out a list of the “*minimum terms and conditions in relation to the provision of access to port terminal services*” that it considers the Access Undertaking should contain. ABB has addressed these concerns and the specific proposals in its responses to the Commission’s Information Request.

However, in any event, ABB does not accept that AGEA’s suggested minimum terms are appropriate or “required” in the context of the proposed Access Undertaking. The Access Undertaking is not intended to provide a mechanism for specifying *all* of the commercial and operational terms to be included in contracts between ABB and its customers. Rather, the Access Undertaking is intended to set out a framework for the provision of access to Port Terminal Services, and, pursuant to which, contracts for access will be negotiated.

As noted in paragraph 2.2 of the main submission, there is no requirement in the TPA for Access Undertakings to set out all commercial and operational terms (such as those referred to in paragraph 4.17 of AGEA’s submission), and ABB considers that the Access Undertaking sets out appropriate processes and requirements to ensure that important terms and conditions are reflected in agreements negotiated with users.

As set out in paragraph 1.3 of the main submission, the role of Access Undertakings is not, in ABB’s view, to address a “wish list” of issues across the Australian wheat or grains industry that participants or others would like to see addressed. Rather, under the legislation, the sole issue to be addressed relates to

access to “Port Terminal Services” for export bulk wheat in accordance with the requirements for access undertakings set out in section 44ZZA of the TPA. ABB considers that the matters referred to in AGEA’s submission are not required in order for the Access Undertaking to meet this statutory test.

In any event, a number of the issues raised in paragraph 4.17 of AGEA’s submission are included in the Access Undertaking (for example, clear and comprehensive Shipping Protocols, a complaints procedure to an independent person and limits to the ability of ABB to seek to amend the Access Undertaking), and others are likely to be included in the contracts entered into pursuant to the Access Undertaking.

1.4 ‘The Access Undertaking must ensure that Port Terminal Service Operator’s decisions are transparent’

AGEA states, in paragraph 4 of its submission, that Port Terminal Operators “*have an obvious conflict of interest...and real incentive to...inhibit competition by discriminating in favour of their Trading Divisions*”. AGEA also states that the existing Access Undertaking does not provide transparency in relation to management of shipping slots and accumulation at port.

ABB does not agree with this assertion. When examined together, the WEMA and Access Undertaking provide a high level of transparency. In this regard:

- the Access Undertaking sets out transparent terms of access;
- the shipping stem is public;
- the port rules under which access is provided are public; and
- ABB provides substantial information on its website.

In addition, the Access Undertaking sets out a clear regime dealing with the provision of access, with provisions relating to non-discrimination and arms length dealings. Accordingly, to the extent that such an incentive may exist (which is not accepted by ABB), this is clearly addressed in the Access Undertaking. Further, the ability of dissatisfied access seekers to refer disputes to binding arbitration encourages the provision of access in accordance with the Access Undertaking.

1.5 ‘The Access Undertaking must ensure equal access to information’

In paragraph 4 of the submission, AGEA states that “*there is a critical imbalance between the information available to bulk handlers as port operators and the information available to wheat exporters*”.

ABB has addressed this issue in detail in its submission dated 16 April 2009 and in its response to Question 9 of the Commission’s Information Request. In summary:

- the Commission has considered on a number of occasions the level of information that participants in the grain storage and handling industry obtain from up-country operations and found that the competition issues raised by these information flows are not significant¹³. The information available from up-country operations is of limited competitive value given trading and stock movements and, in any event, much of it is publicly available in an aggregate form or by field agents;
- in providing Port Terminal Services, ABB will likewise have access to very little information about its competitors that is not already publicly available, or readily observable by any person experienced in the grain industry. Importantly, the WEMA requires publication of available data on wheat export shippers. This information about the volume of grain to be exported on one or more vessels is readily available to all market participants in the same form. ABB notes it does not (and cannot) provide ABB with any visibility of the exporters' customers, sale prices, future tenders or contracts, or wider global trading operations or trading position; and
- in any event, to the extent that any third party might have perceptions about ABB having access to confidential information of its competitors, this issue is addressed in the Undertaking through the non-discrimination, ring-fencing and binding dispute resolution procedures.

1.6 Objectives of the Access Undertaking'

Paragraph 5 of the AGEA submission states that "*the 'Objectives' clause is a mere statement of intent*", that "*there is no tangible basis upon which to assess actual compliance*" and that the Objectives clause is "*biased in favour of bulk handlers*".

ABB does not accept these criticisms. The Objectives clause of the Access Undertaking - as with the objectives clause of any similar document - is necessarily a statement of what the Undertaking is intended to achieve.

There is a clear basis on which to assess compliance with the terms of the Access Undertaking and, therefore, the Objectives of it. The Undertaking sets out detailed requirements which ABB must adhere to in providing access (such as the non-discrimination provisions in clause 5, the negotiation rules in clause 6, as well as detailed rules applying to variation of the Undertaking or terms of access). Further, the arbitration process permits assessment of compliance with the terms of the negotiation provisions. Similarly, the Shipping Protocols set out in Schedule 3 of the Undertaking specify clear requirements with which ABB must adhere.

In the event that an access seeker is dissatisfied with the terms of access, it may seek recourse to binding arbitration in line with the dispute resolution procedure set out in the Access Undertaking. These provisions provide a "*tangible basis upon which to assess actual compliance*".

¹³ See, for example, the Commission's clearance of the merger of Graincorp Limited and Grainco Australia Limited, 23 May 2003. Media release available online at: <http://www.accc.gov.au/content/index.phtml/itemId/347281/fromItemId/378016>.

1.7 'Structure of the Access Undertaking'

AGEA raises concerns about the structure of the Access Undertaking in paragraph 6 of its submission. In particular, AGEA states that the Access Undertaking should be considered flawed because it does not contain all price and non-price terms. ABB repeats the arguments set out in paragraph 2.2 of the main submission as to why all price and non-price terms do not need to be set out in the Undertaking.

ABB also refers to its response to Questions 16 and 23-25 of the Information Request.

AGEA also states that clause 2.3 of the Access Undertaking (which imposes an obligation on ABB to procure that a related body corporate take, or refrain from taking, some action in relevant circumstances) "*is unsatisfactory insofar as it enables the bulk handlers or their related entities to avoid their obligations under the proposed access undertaking*" (AGEA submission, paragraph 6.5). Further, AGEA considers that a reasonable endeavours clause to procure the necessary behaviour is not sufficient.

This is not an intended consequence and, accordingly, ABB is prepared to delete the words "*use reasonable endeavours to*" from clause 2.3 of the Access Undertaking.

1.8 'Term and variation of the Access Undertaking'

AGEA states, in paragraph 7 of its submission, that the proposed two year term of the Access Undertaking is "*unacceptable...and unlikely to promote efficient investment*". In ABB's view, the term of the Access Undertaking is reasonable, as a shorter term would be likely to impose an unreasonable administrative burden on both ABB and the Commission in the event that it were required to be renewed. Additionally, ABB considers that a longer term is not appropriate given:

- the potentially transitional nature of the oversight of wheat exports by Wheat Exports Australia;
- the review of wheat export arrangements by the Productivity Commission in 2010; and
- the likelihood that the newly deregulated wheat export market will undergo rapid development over the short to medium term.

ABB notes that there is also support for a shorter Undertaking period of one year, in order to provide a greater degree of flexibility in the context of a newly deregulated market (see AgForce Grains Limited's submission of 29 May 2009).

ABB does not accept AGEA's criticism of the circumstances under which it may seek to vary the Access Undertaking. The circumstances set out in clauses 3.4 and 3.5 of the Access Undertaking are designed to provide sufficient flexibility to vary the Undertaking in the event that it is no longer appropriate to serve the needs of the Australian wheat export industry, particularly in the context of a newly deregulated market.

In any event, in accordance with the TPA, the Commission would need to approve any variation to the Undertaking, thereby ensuring that the interests of all parties would be adequately maintained. Section 44ZZA(7) of the TPA states that the Commission may consent to a variation of an Undertaking if it thinks it appropriate to do so having regard to the following matters:

- the Objects of Part IIIA;
- the Pricing Principles set out in section 44ZZCA of the TPA;
- the legitimate interests of the provider;
- the public interest, including the public interest in having competition in markets;
- the interests of persons who 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 Commission thinks are relevant.

The inclusion of specific circumstances in which a variation may be sought is intended only to provide further certainty and transparency to wheat exporters, the Commission and ABB.

1.9 ‘Scope of the Access Undertaking’

In paragraph 8 of its submission, AGEA raises certain issues as to the scope of the Access Undertaking. In particular, AGEA reiterates a number of issues set out in paragraphs 4.3 to 4.9 of its submission, regarding the definition of Port Terminal Services. ABB has addressed these issues in paragraph 2.3 of the main submission, as well as its responses to Questions 16 and 23-25 of the Information Request.

However, AGEA sets out a list of those services which it considers must be included under the definition of “Port Terminal Services” (and included in the Access Undertaking) in paragraph 8.4 of its submission. ABB considers that AGEA’s position is based upon a misunderstanding of the current definition of Port Terminal Services in the Access Undertaking.

The definition of Port Terminal Services set out in clause 4.1 of the Access Undertaking is modelled on, and consistent with, the definition adopted in the WEMA. In particular, section 5 of the WEMA defines Port Terminal Services as those “*services provided by means of a Port Terminal Facility, and includes the use of a Port Terminal Facility*”. In ABB’s view, it is appropriate to use the same definition of Port Terminal Services in the Access Undertaking, as is set out in the WEMA, given that the Undertaking is offered pursuant to the WEMA.

ABB considers that AGEA has misinterpreted the proposed definition of Port Terminal Services. Consequently, ABB takes this opportunity to clarify the operation of that definition:

- clause 4.1 defines Port Terminal Services as “*the services described in the Port Schedule in relation to Bulk Wheat provided by means of a Port Terminal Facility, and includes the use of a Port Terminal Facility*”;

- clause 4.2 provides a broad and inclusive definition of a “Port Terminal Facility”, in a manner which adequately covers all relevant services which ABB provides to wheat exporters at its Port Terminals (for example, receipt, storage, weighing, loading and shipping). In particular, this definition covers the vast majority of issues listed in paragraph 8.4(b) of the AGEA submission;
- Schedule 2 (which contains the Port Schedules for each Port Terminal) sets out the standard services which are provided to wheat exporters at each Port Terminal; and
- clause 4.4 outlines those services which the Access Undertaking does not apply to, and which are not required to form part of the Undertaking pursuant to the WEMA.

Clause 4.4 is a clarification clause, intended to provide certainty to ABB and wheat exporters when applying for access to Port Terminal Services. In particular, clause 4.4 does not seek, as AGEA states, to “*exclude ‘intake and receipt services’...[or] ‘services at port terminals’ and ‘shipping services’*” (AGEA submission, paragraph 8.9). Rather, this clause provides clarification as to the component elements of the grain supply chain, and what constitutes Port Terminal Services for the purposes of the Access Undertaking.

Accordingly, the approach adopted by ABB in relation to the definition of Port Terminal Services is consistent with:

- the need to provide a description of the relevant services; and
- the need to avoid over-prescription by including an exhaustive list.

This latter approach is inappropriate due to the risk that vital services which should form part of the Port Terminal Services may be omitted as a result of an oversight. ABB is confident that its proposed approach is, therefore, both consistent with the requirements under the WEMA, and provides sufficient transparency and clarity for wheat exporters.

AGEA also states in its submission that, ABB’s recognition that “*‘Port Terminal Services are essentially a logistical function which takes place after the competition to accumulate the grain has been played out’*”, is “*an acknowledgment that restricting the access undertakings to the port terminal services will not achieve the objects of the WEMA*” (AGEA submission, paragraph 8.11). This is not the intention or meaning behind the statement.

For the reasons set out in its submission dated 16 April 2009 and in this submission, ABB is confident that the Access Undertaking will achieve the objectives of the WEMA.

ABB is constrained in its provision of Port Terminal Services by competition from alternative supply chains, the realistic threat of new entry, and the bargaining power of its customers (see responses to Questions 1-3 and 7 of the Information Request). Consequently, the concerns do not, in ABB’s view, reflect market dynamics in the grain sector.

1.10 ‘Price and non-price terms of the Access Undertaking’

In this section of its submission, AGEA reiterates its view that the Access Undertaking does not contain full details of the price and non-price terms under which access to Port Terminal Services will be provided to wheat exporters. ABB has addressed these issues in response to Questions 16, 19-22 of the Information Request, as well as in paragraphs 2.2 and 2.4 of the main submission.

1.11 ‘Non-discriminatory access terms of the Access Undertaking’

In paragraph 10 of its submission, AGEA outlines perceived issues in relation to the terms of the Undertaking under which non-discriminatory access is provided. ABB has provided detailed information in relation to this issue in response to Questions 17 and 18 of the Information Request.

Given its responses to the Commission’s Information Request, ABB does not agree that the Access Undertaking needs to be amended as suggested by AGEA in paragraph 10.5 of its submission. Moreover, ABB notes that it has strong incentives to comply with the Access Undertaking as a result not only of the Commission’s powers to enforce access undertakings under the TPA, but also as a result of the ability of dissatisfied access seekers to refer a matter to binding arbitration, the competitive constraints on its operations exercised by alternative supply chains, customer bargaining power, the realistic threat of new entry, and the importance of ABB maximising throughput of wheat through its ports (see responses to Questions 1-3 and 7-8 of the Information Request).

1.12 ‘Negotiating for access terms of the Access Undertaking’

In paragraph 11 of its submission, AGEA outlines perceived concerns with the provisions of the Access Undertaking for negotiation of access. ABB has provided detailed information in relation to the operation of the negotiation processes of the Access Undertaking in response to Questions 23-31 of the Information Request.

AGEA has identified a number of specific issues which it considers the Access Undertaking fails to address. In particular, AGEA states that:

- *“wheat exporters do not have a realistic alternative supplier of terminal services...the imbalance in market power has resulted in bulk handlers refusing to negotiate, imposing unfair terms and prices and discriminating against wheat exporters who do not accept bulk handlers’ standard terms and conditions”* (AGEA submission, paragraph 11.1).

As noted in paragraphs 1.3(b) of the main submission, and 1.2 of this Attachment above, as well as the responses to Questions 1-3 and 7 of the Information Request, ABB’s Port Terminal Services in South Australia face competitive pressure from other grain terminals in Victoria, alternative supply chains, customer bargaining power and the realistic threat of new entry. Accordingly, ABB considers that South Australian wheat exporters *do* have realistic alternatives.

The Access Undertaking would, in any event, address the concerns raised by AGEA in relation to the terms on which access is provided.

- *“bulk handlers are not required to negotiate in good faith and reach agreement on the terms of access”* (AGEA submission, paragraph 11.2).

AGEA’s statement that the Access Undertaking does not require Port Terminal Operators to *“negotiate in good faith and reach agreement on the terms of access”* is not accurate. Clause 5 of the Undertaking provides that ABB must offer access to wheat exporters in accordance with certain non-discrimination and other requirements.

Further, the provisions of clause 6 of the Access Undertaking set out clear procedures for negotiating access which ensure that negotiations take place on good faith terms.

- *“contrary to WEMA, bulk handlers have the opportunity to restrict access to port terminal services by reserving...the right to refuse to negotiate with an applicant who is or has in the previous two years been in ‘Material Default’ of any agreement with bulk handlers”* (AGEA submission, paragraph 11.2).

ABB does not accept AGEA’s view that a provision of the Access Undertaking which permits ABB limited discretion in negotiating for access with parties who are, or have been in the previous two years, in *“Material Default”* of any agreement with ABB, would be contrary to the WEMA. The WEMA does not prohibit the inclusion of any such provision in the Access Undertaking. Similarly, Part IIIA of the TPA does not prevent the inclusion of this provision.

Moreover, it is reasonable from a commercial perspective that ABB maintains a discretion to negotiate with any access seeker that is currently, or within a reasonable timeframe, has been, in *“Material Default”* of another agreement with ABB. Absent this provision, ABB may have no protection from continued exposure to high risk customers. ABB notes that, even in highly competitive markets, participants are not required to enter into new contracts with others who are materially defaulting, or have materially defaulted, in their contractual obligations.

- bulk handlers *“may publish its terms and conditions as little as one day before or up to 15 days after the undertakings take effect”* (AGEA submission, paragraph 11.3).

ABB has addressed this issue in paragraphs 2.2 and 2.4 of the main submission, as well as in its responses to Questions 16 and 23-25 of the Information Request.

- *“competition in the bulk wheat export market requires fair and transparent access to port terminal services to all accredited wheat exporters”* (AGEA submission, paragraph 11.5).

The Access Undertaking as currently drafted is consistent with this requirement and the requirements of the WEMA. Moreover, the Access Undertaking is intended to achieve this aim by requiring ABB to provide access to Port Terminal Services in accordance with the specified non-discrimination provisions; introducing clear and effective ring-fencing provisions for the treatment and maintenance of confidential information; and through the inclusion of a process for the binding arbitration of access disputes.

- *“the obligation under clause 6.2 only applies to and during the negotiation process, after which time the obligation to comply with clause 6.2 ends”* (AGEA submission, paragraph 11.6).

The obligation to treat Confidential Information in line with clause 6.2 does not only apply to the period of the negotiation process. Under the clause, *“if a Party provides Confidential Information to another party as part of the negotiation process for access under this Undertaking, the receiver of the Confidential Information will treat that Confidential Information as secret and confidential and...not use that Confidential Information for any purpose other than the provisions of this Undertaking allow”* (emphasis added).

Accordingly, there is a clear requirement to treat the confidential information appropriately, and not to use it for any purpose other than as permitted by the Undertaking.

- *“the only situation where disclosure of confidential information should be permitted is where such disclosure is required by law”* (AGEA submission, paragraph 11.6).

The approach of AGEA with regard to the provision of confidential information by ABB to certain advisers is not, in ABB’s view, consistent with common commercial practice. It is very common in a wide range of agreements to permit the disclosure of a party’s confidential information to the recipient’s legal, accounting and other professional advisers where necessary. This ability is also intended to facilitate the provision of access in accordance with the Access Undertaking.

Clause 6.2(b) requires that, in the event that ABB discloses confidential information to its professional advisers in order to obtain advice, those advisers must be under a legal obligation not to disclose the confidential information to any third party. Consequently, the Access Undertaking adequately protects all confidential information that ABB may have access to pursuant to the Undertaking.

ABB also notes that the Commission adopts a similar position with regard to the receipt of confidential information in submissions made to it: parties may not prohibit the Commission from sharing the information provided with its professional advisers.

1.13 ‘Liability terms of the Access Undertaking and offering standard terms to access applicants’

In paragraph 12 of its submission, AGEA repeats its suggestion that price and non-price terms be published before the Access Undertaking comes into effect. ABB has addressed these issues in paragraphs 2.2 and 2.4 of the main submission, as well as in the responses to Questions 16 and 23-25 of the Information Request.

AGEA also suggests that bulk handlers should not be allowed to cap their liability, exclude consequential loss claims or exclude liability. However, the suggestion that parties should not be able to allocate risk and limit their exposure to certain liabilities does not reflect either commercial reality or the realities of a common user supply chain.

As set out in paragraph 1.3(d) of the main submission, in common user systems there are numerous stages at which delays to grain shipments, or faults with the product, can occur. For example, delays in shipping may be caused by the actions of exporters and others along the supply chain. This can delay other exporters' shipments, but is not caused by the Port Terminal Operator. Accordingly, it is unreasonable to expect the Port Terminal Operator to be liable for delays or other faults caused by users of the supply chain, simply by virtue of the fact that these delays and faults have culminated in delays at port.

1.14 'Dispute resolution terms of the Access Undertaking'

ABB does not agree with AGEA's statement in paragraph 13 of its submission that "*the dispute resolution mechanism under the undertakings is totally lacking*" (AGEA submission, paragraph 13.1).

The dispute resolution mechanism is detailed, transparent and designed to reflect commercial demands, including the need for certainty and quick resolution of disputes. In the context in which ABB operates, it is essential to maintain good relations with customers by handling any disputes effectively, while also continuing to provide access to Port Terminal Services as appropriate. To that end, the dispute resolution process is fair and decisive. In particular, it provides for a clear scale of escalation of disputes, ranging from informal discussions between the parties, through formal mediation, to referral to arbitration in the case of disputes that are not resolved by other means.

The process for referral to, and selection of, the arbitrator is transparent and does not favour any one of the parties in dispute. Additionally, the Commission has oversight of the process, thereby providing an adequate guarantee of the comprehensiveness of that dispute resolution framework.

Further, ABB notes that the model on which the dispute resolution framework is based is the negotiate/arbitrate model in Divisions 2 and 3 of Part IIIA of the TPA. Accordingly, in ABB's view, the dispute resolution procedure set out in the Access Undertaking is entirely reasonable and adequate. The escalation process from operational discussions, to discussions between Chief Executives, and then (where necessary) to mediation or arbitration, is very common in a wide range of commercial agreements. It is therefore unclear why AGEA views it as "*lacking*".

1.15 'Port protocols and rules of the Access Undertaking'

In paragraph 14 of its submission, AGEA raises a number of general issues in relation to the port protocols, as set out in Schedule 3 of the Access Undertaking. AGEA's concerns appear primarily to relate to what it indicates is a lack of transparency, objectivity and certainty in relation to the management and operation of Port Terminal Operators' Port Terminal Services. In particular, AGEA appears to consider that Port Terminal Operators will give preferential treatment to their trading divisions, or otherwise 'manipulate' the shipping stem in order to disadvantage bulk wheat exporters.

ABB considers that these concerns are unfounded. The Shipping Protocols are based on ABB's substantial experience in providing Port Terminal Services to the South Australian grain industry. They reflect the current shipping rules in operation at ABB's ports, and adequately balance the competing demands of users. In particular, the Shipping Protocols set out transparent and objective criteria and procedures for the provision of access to Port Terminal Services.

For example, the Shipping Protocols detail criteria on which vessels will be allocated estimated load dates, which are founded on accumulation priority. These criteria reflect the commercial and practical demands associated with the provision of efficient Port Terminal Services. The criteria take account of the full range of factors that can influence access to shipping slots.

AGEA states that a perceived Port Terminal Operators' conflict of interest "*make it inevitable*" that they "*will give preferential treatment to their Trading Divisions*" (AGEA submission, paragraph 14.2). Further, AGEA states that Port Terminal Operators "*have a vested interest in prioritising Trading Divisions over the interests of wheat exporters*" (AGEA submission, paragraph 14.8) As indicated in its responses to Questions 1-3 and 7-8 of the Information Request, ABB does not have the ability to discriminate unfairly in favour of its related Trading Division, as a result of the transparency of the shipping stem (which is updated daily), the rules of the ports and the clear and objective terms of the Shipping Protocols, which in each case must be consistent with the Access Undertaking.

Additionally, ABB has provided detailed information relating to the basis of dealings with its marketing division and others in response to Question 45 of the Information Request.

AGEA states that Port Terminal Operators "*control the ability of wheat exporters to get stock to port and accumulation*" (AGEA submission, paragraph 14.4). However, this does not fully account for the dynamics of the wheat supply chain, which is a multi-faceted chain with a number of up-country stages from farm which determine how and when grain gets to port. ABB has a strong track record of providing access to port for bulk exporters, as indicated in paragraph 1.3(a) of the main submission.

AGEA appears to suggest that Port Terminal Operators should be denied flexibility to reorder the shipping queue to take account of all eventualities, as they "*may assert that delays were encountered in getting stock to port or insufficient stock was accumulated, but wheat exporters would never know*" (AGEA submission, paragraph 14.5). ABB does not accept AGEA's concerns, and considers that its suggested solution is unreasonable. ABB could not intentionally block or delay access to Port Terminal Services without incurring substantial losses (see response to Question 7(a) of the Information Request). This would necessarily be reflected in ABB's financial records, which will be made available to an independent auditor.

Further, as discussed in paragraph 1.4 in this Attachment, decisions relating to shipping order and utilisation of Port Terminal Services are currently, and will continue to be under the Access Undertaking, transparent and fair.

In addition to the general issues raised in relation to the Shipping Protocols in paragraph 14 of AGEA's submission, Schedule 2 of AGEA's submission sets out a number of specific issues:

- Vessel nomination - "*it is inappropriate for acceptance to be at ABB's discretion*".

This issue is addressed in ABB's response to Question 49 of the Information Request.

The requirements for access to ABB port terminals are specified in the Shipping Protocols. Exporters must be accredited under WEMA, hold all necessary licences and permits and be creditworthy. The access criteria are supplemented by requirements that access seekers must meet to negotiate for access, as set out in clause 6.4(b) of the Access Undertaking.

Collectively, these requirements provide transparent and objective terms governing access to ABB's Port Terminal Services.

- Allocation of estimated load dates - "*...most of which are within ABB's complete control*".

The criteria which make up the accumulation priority under which vessels will be allocated space at port are transparent and objective. There are also a number of factors which are outside ABB's control. For example, the availability of transport resources, quality requests, changes to vessel estimated arrival times and the access seeker's ability to provide proof of ownership or transfers, to name a few, are clearly beyond the control of ABB as Port Terminal Operator. Indeed, these and other elements rely heavily on the movement and operations of third parties upstream or downstream of the provision of Port Terminal Services. In any event, it would not affect the provision of Port Terminal Services, as ABB has a clear incentive to maximise throughput in order to utilise the spare capacity in its ports (see Table 4 of ABB's submission of 16 April 2009, and responses to Questions 1-3 and 7-8 of the Information Request).

- Estimated load dates may change - "*many of the reasons entitling ABB to change estimated load dates are directly within its control*".

A number of the factors which determine when estimated load dates may change are not directly within ABB's control. AGEA's position does not, therefore, reflect the commercial realities of the wheat export supply chain. For example, the ability of a vessel to pass port surveys, a customer's variation in cargo requirements, weather events, cancellation of vessels or inability to provide accurate estimated arrival times and inability to provide payment in a timely manner, to name a few, are beyond the control of ABB as Port Terminal Operator. In any event, ABB's incentive is to maximise throughput and capacity utilisation, rather than to 'manipulate' exporters' cargo.

- Vessel nomination form - "*it is not commercial to require the name and details of a vessel 21 days prior to its arrival*".

It is standard (and current) commercial practice, for Port Terminal Operators to require the type of information requested under the Vessel Nomination Form to be provided in advance of the vessel's arrival in order to provide a shipping slot. The requirement for a named vessel beyond 21 days is currently being considered by ABB as part of its review of shipping protocols.

In any event, the information provided in the Vessel Nomination Application may be amended by the exporter at any time following the allocation of an estimated load date. Accordingly, ABB does not consider that AGEA's concern is warranted.

- Notification prior to vessel nomination and company acceptance - *“no transparency in relation to supply chain efficiencies”*.

The Shipping Protocols reflect existing practices at ABB’s ports. Accordingly, they provide commercially practical, transparent and objective criteria for enabling ABB to commence accumulation of grain to port, with movements subject to port space. This affords ABB the necessary flexibility to utilise excess capacity and maximise grain throughput in circumstances where there are no conflicting or outstanding Vessel Nominations to be serviced.

The effective operation of the Shipping Protocols is transparent as a result of the publication in the shipping stem of all changes made to estimated load dates. For example, if a particular cargo can only be serviced from limited sites and ABB has additional transport capacity available, the load dates could then be adjusted to reflect the early commencement of accumulation for the next-stemmed vessel. Accordingly, the Shipping Protocols are intended to facilitate optimal efficiency and to provide greater throughput of grain for exporters in a particular period, thereby maximising Australian wheat exports. Further, the Guiding Principles for determining accumulation will apply in circumstances where there is a conflicting accumulation between Nominated vessels or between a Nominated vessel and a notified vessel.

- Guiding principles for determining accumulation priority and therefore allocation of estimated load dates - *“ABB reserves the right to place a vessel in front of an earlier nominated vessel”*.

AGEA appears to be concerned that the Guiding Principles favour ABB and may result in wheat exporters being disadvantaged. ABB does not agree with these conclusions. The Guiding Principles reflect existing practice at ABB’s ports, and facilitate maximum grain throughput in the interests of all parties. In articulating current practice, the Guiding Principles set out clear and objective criteria for managing accumulation priority and access to Port Terminal Services, which are designed primarily on a ‘first come, first served’ basis, and give all parties commercial certainty.

It is appropriate under the Guiding Principles that ABB should prioritise the earlier nominated vessel in the event of a conflict in vessel arrivals or demand for Port Terminal Services. This principle will apply even where a later nominated vessel arrives earlier, unless ABB is able to manage the process of receiving the ‘conflicting’ vessels simultaneously and providing Port Terminal Services to both.

The Shipping Protocols necessarily contain contingency plans in circumstances in which the ‘first come, first served’ principle cannot be applied. To fail to include such contingency plans as are set out in the Guiding Principles clause would certainly make the Shipping Protocols deficient.

It is wholly reasonable that ABB, as the Port Terminal Operator, must be in a position to determine whether or not it is able to provide the contracted Port Terminal Services to ‘conflicting’ vessels where the situation arises.

- Vessel substitution/cancellation - *“the ABB protocol...display[s] a preference for clients which choose its bundled services”*.

ABB does not accept that the Access Undertaking as a whole, or the Shipping Protocols specifically, displays any preference for wheat exporters who choose to utilise ABB’s bundled services. To the contrary, this clause merely articulates the commercial reality of the provision of Port Terminal Services: where substitution of physical grain to account for variations in the shipping stem is possible, ABB will provide this service.

- Vessel repositioning - *“ABB retains the discretion to apply ‘variation fees’”*.

This clause is not an attempt by ABB to impose additional or unwarranted fees on exporters. It is entirely reasonable that the Shipping Protocols include a cost recovery provision allowing ABB to recover costs incurred in repositioning vessels as a result of something which is not ABB’s fault (e.g. a cancellation or delay by a wheat exporter). Further, the Shipping Protocol makes clear that ABB *“will use its best endeavours to mitigate the Client’s Repositioning fees”*.

Further details have been set out in response to Question 51 of the Information Request.

- Limitation of liability - *“the right to cease loading is not tempered with a requirement that ABB act reasonably”*.

It is entirely reasonable, and is consistent with ABB’s responsibilities under health and safety and environmental legislation and regulations, that the Shipping Protocols contain a provision permitting loading to cease where safety or environmental concerns arise. The health and safety and environmental legislation with which ABB must comply imposes absolute obligations on ABB’s provision of Port Terminal Services in order to preserve safety. Consequently, ABB will take appropriate steps to comply with its obligations under this legislation.

Further details are set out in response to Question 52 of the Information Request.

- Disputes - *“the dispute mechanism does not protect the interests of clients by providing a speedy mechanism for resolving disputes”*.

In ABB’s view, the dispute resolution process set out in the Shipping Protocols is transparent and swift, and is designed to provide a commercially focused procedure for resolving disputes. By any measure, a dispute resolution procedure which envisages the administration and resolution of a dispute within as little as 12 working days is *“speedy”*. Moreover, given the possibility for a dispute to escalate, the dispute resolution provisions must provide sufficient time for ABB to consider and respond to any dispute fully. ABB notes that, in reality, operational decisions are made (and dispute resolved) in a much shorter period of time, given the commercial incentives for efficiency incumbent on all parties.

Additionally, ABB's track record of providing access to Port Terminal Services, and lack of material disputes with export customers provides evidence of the level of commitment ABB has to providing access to third parties and, where necessary, to resolving disputes effectively. Accordingly, ABB does not agree that the dispute resolution process is defective, or in any way biased in favour of ABB.

1.16 'Operational decisions terms of the Access Undertaking'

In paragraph 15 of its submission, AGEA sets out a number of issues in relation to clause 8.4, which focus on a perceived lack of transparency, objectivity and certainty in relation to the taking and execution of operational decisions.

The provision of Port Terminal Services necessarily requires ABB to make operational decisions on a day to day basis about the allocation of limited capacity and the management of potential conflicts of interest between different port users. Accordingly, it is entirely appropriate that ABB retains discretion in the execution of its duties. As such, clause 8.4 of the Access Undertaking has the purpose of enabling these decisions to be taken, and reflects existing practice at ABB's ports.

Clause 8.4 is not intended to provide a definitive list of all elements that ABB must take into account when making operational decisions. It provides a transparent and objective framework for making operational decisions. In particular, clause 8.5 prohibits ABB from engaging in "*conduct having a purpose of hindering access to the Port Terminal Services by any other User in the exercise of a reasonable right of access*". When read in conjunction with clauses 8.5 and 1.2 (Objectives), it is clear that clause 8.4 sets out transparent and objective principles for the taking and execution of operational decisions by ABB.

Further, as suggested in paragraph 1.15 of this Attachment, it is wholly reasonable that ABB, as the Port Terminal Operator, must be in a position to make operational decisions in execution of its provision of Port Terminal Services.

ABB notes that it has provided detailed information in relation to the operation of clause 8.4 in its response to Question 47 of the Information Request.

1.17 'Ring-fencing terms in the Access Undertaking'

In paragraph 16 of its submission, AGEA highlights certain perceived issues with the ring-fencing provisions of the Access Undertaking.

ABB considers that the ring-fencing rules represent a fair and reasonable approach to the sensitivities around disclosure of confidential information by ABB's infrastructure to its other operations. In particular, the ring-fencing rules are transparent and objective, and impose a positive duty of guardianship of confidential information on ABB. Moreover, they do not unduly limit the ability of ABB to use the confidential information it receives in the execution of its duties (see further paragraph 1.12 of this Attachment).

Further, the duty to treat confidential information properly applies to all of ABB's officers, employees and agents under the ring-fencing rules, in addition to any professional advisers to whom ABB is required to disclose the information. The stringent rules applying to the treatment of confidential information received

by ABB, combined with the requirement that its compliance with the ring-fencing rules is subject to independent audit for each 12 month period, ensures that the ring-fencing rules are transparent, objective and proportionate.

ABB notes that it has provided detailed information in relation to the ring-fencing rules in its response to Questions 40-42 of the Information Request.

AGEA also raises a number of specific issues, which are addressed below:

- *“the definition of ‘Restricted Information’ is extremely narrow, falls well below the usual standards applied to such levels of commercially sensitive information”* (AGEA submission, paragraph 16.2).

In ABB’s view, the definition of Restricted Information is consistent with the purposes of the Access Undertaking. The information set out in the definition of Restricted Information is the type of information which would ordinarily be considered confidential and which is ordinarily provided to a Port Terminal Operator in order to obtain Port Terminal Services.

Additionally, ABB notes that this Restricted Information will continue to be Confidential Information in any event and treated accordingly.

- the *“clause 3...prohibition should apply to **any** disclosure to **any** entity”* (AGEA submission, paragraph 16.3).

The purpose of the ring-fencing rules is to control information flows between ABB’s infrastructure and its other operations. In ABB’s view, information control under the ring-fencing rules protects bulk wheat exporters’ interests and is appropriate in all the circumstances of the Undertaking. Requiring that the ring-fencing rules extend beyond this area is disproportionate. Accordingly, ABB considers that the restrictions in relation to ABB’s use of confidential information and restricted information (which is simply a category of confidential information) is adequate to protect the commercial interests of all wheat exporters seeking to obtain access to Port Terminal Services under the Access Undertaking.

- *“providing [aggregated information concerning the grade, quality, quantity, location or attributes of Bulk Wheat received by ABB] may confer an unfair advantage on the bulk handlers”* (AGEA submission, paragraph 16.5).

ABB does not agree with the suggestion that the provision of such information in aggregate may provide it with an unfair advantage. By aggregating this information, there is no risk that data relating to individual wheat exporters will be available, nor that it could be extrapolated from the aggregated figure.

In addition, AGEA states that some bulk handlers *“have delayed or refused to supply freight to move stock that is owned by a wheat exporter to port, so as to apply pressure on wheat exporters to buy stock from the bulk handlers’ Trading Divisions on unfavourable terms”* (AGEA submission, paragraph 16.5). AGEA does not provide specific examples of these alleged episodes in its submission, and ABB notes that no allegation of such conduct is made against ABB.

Attachment 3: Vessel Nomination/Site Accumulation Advice

Attachment 4: Late Season Delivery Protocols

Attachment 5: Commodity Vendor Declaration