

ABB Grain Ltd

**Port Terminal Services Access
Undertaking**

**Submission to the Australian Competition
and Consumer Commission**

**Response to issues raised in the
Commission's Draft Decision**

Dated 3 September 2009

ABB Grain Ltd

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1 Introduction

1.1 Purpose of submission

This submission sets out ABB's response to the matters raised in the Commission's Draft Decision dated 6 August 2009 in relation to the Access Undertaking submitted by ABB on 16 April 2009.

1.2 ABB will submit a revised Access Undertaking which addresses the issues raised by the Commission

ABB has considered each of the matters raised by the Commission in the Draft Decision, and the matters raised by interested parties in their submissions to the Commission (to the extent practicable, given the timing of their publication on the Commission's website).

ABB proposes to submit a revised Access Undertaking to the Commission which constructively addresses each of the matters raised in the Draft Decision. However, there are certain matters that ABB wishes to raise in this submission, as they are critical to, and provide context for, the Commission's consideration of any revised Access Undertaking.

Those matters are as follows:

- (a) the "non-discrimination" provision proposed in the Commission's Draft Decision, and any proposal to require an external audit of compliance with that provision (see Section 2 below);
- (b) the proposed ability for the Commission to arbitrate any disputes arising in connection with the negotiation of Access Agreements and, in particular, the scope of the Commission's powers in arbitrating any dispute (see Section 3 below);
- (c) the proposed requirement for any variations to the Standard Terms (or "indicative access agreement") to be implemented in accordance with section 44ZZA(7) of the *Trade Practices Act 1974* (Cth) ("TPA") (see Section 4 below);
- (d) the operational difficulties associated with any proposal to require binding external dispute resolution procedures for matters arising under the Port Loading Protocols, including practical vessel safety issues (see Section 5 below);
- (e) the key service standards that ABB considers reasonably appropriate, having regard to the Commission's general comments in its Draft Decision (see Section 6 below); and

- (f) the Commission’s proposed use of information provided to it by interested parties on a confidential basis, and the weight that the Commission proposes to give to that information in assessing the Access Undertaking (see Section 7 below).

This submission also explains certain further changes that ABB wishes to make to the revised Access Undertaking to facilitate the operation of the publish / negotiate / arbitrate model endorsed by the Commission in its Draft Decision. Specifically, those proposed changes involve:

- a mechanism to promote certainty in contractual arrangements and to create an incentive for Applicants to raise any issues in negotiations with ABB in a timely manner; and
- clarifying the port users that ABB has an obligation to consult with before implementing any changes to the Port Loading Protocols.

(See Section 8 below).

Each of these issues is addressed in the submission below.

1.3 The revised Access Undertaking may address other issues which are consistent with the Commission’s Draft Decision

For completeness, ABB notes that it may make certain minor changes to the revised Access Undertaking, which are in addition to those referred to in the Commission’s Draft Decision or this submission. However, those changes will be consistent with the Draft Decision and designed to facilitate the operation of the Access Undertaking based on the Commission’s feedback and consultation process. The purpose of this submission is only to address key issues that ABB considers to be critical to the Commission’s consideration of any revised Access Undertaking.

2 Non-Discriminatory Access

2.1 Introduction

In its Draft Decision (p135), the Commission proposed the replacement of the existing non-discrimination provisions of the Access Undertaking with a “simpler” non-discrimination clause.

ABB understands that the Commission’s proposed new non-discrimination clause is intended to prevent ABB from discriminating in favour of its own Trading Division in relation to the provision of Port Terminal Services, except where that discrimination can be justified by cost.

In addition, based on discussions with the Commission, ABB understands that, although the amount of any “cost” may not necessarily be always easy to quantify, there are a number of efficiencies that are accepted as cost-based (e.g. efficiencies that involve lower production or other costs), which are contemplated within the ambit of the Commission’s proposed new clause.

In particular, ABB understands that the following types of arrangements may be viewed as involving cost-based efficiencies which, assuming they can be justified in the particular circumstances, would permit differentiation under the Commission’s proposed “non-discrimination” clause:

- (a) take or pay arrangements provided by ABB's Trading Division (which clearly lessen the cost of business risks faced in the provision of infrastructure services); and
- (b) other practices put in place by ABB Marketing which had the effect of lessening the risks assumed (or costs faced) by ABB in relation to the provision of infrastructure services.

ABB notes that such cost-based efficiencies may also be available to other access seekers.

On this basis, ABB proposes to amend the Access Undertaking to include the Commission's new non-discriminatory access provision, subject to a minor amendment to remove the bracketed words "including its own Trading Division". This minor amendment is intended to provide clarity, as the original proposed wording in the Commission's Draft Decision duplicated the reference to ABB's Trading Division and, in ABB's view, introduces a level of uncertainty.

2.2 Consequences of breach and commercial disincentives created by uncertainty

Notwithstanding its proposal to amend the Access Undertaking to include the Commission's new non-discriminatory access provision, ABB has a number of concerns, as previously expressed to the Commission, that it may be possible for different people to reach different conclusions in relation to how particular costs should be calculated and quantified (and therefore when cost-based differentiation is justifiable). This is particularly the case, in circumstances where the cost saving or risk-reduction involves a level of judgment. In particular, the Commission or an independent arbitrator, acting in the context of a dispute, could form a different view to that formed by ABB in calculating cost-based savings, notwithstanding that ABB had implemented a methodology and determined a quantum in good faith.

In view of the potential consequences of breaching the non-discrimination clause in the Access Undertaking, the possibility of cost quantum being analysed retrospectively and found to be incorrect is likely to act as a substantial disincentive for ABB to actively pursue cost-based efficiencies. This would be an unfortunate outcome and one that ABB would not view as intended by the *Wheat Export Marketing Act 2008* (Cth) ("**WEMA**"), the TPA or the Access Undertaking.

While ABB understands that the basis of the Commission's proposed new non-discrimination clause is the Pricing Principles set out in Part IIIA of the TPA, ABB considers that the risk of underinvestment, and of not passing genuine cost-based efficiencies on to customers could be ameliorated by a broader non-discrimination clause. This is particularly the case given that Port Terminal Service fees are a small component of the overall costs of exporting Bulk Wheat. Accordingly, the potential for these costs to have any material impact on competition in the export market for Bulk Wheat is extremely limited.

ABB would welcome the Commission's views on this issue in its proposed new draft decision.

2.3 Duplication of WEMA audit oversight if additional audit of ABB's compliance is required

In its Draft Decision in relation to the proposed new non-discriminatory access provision (p141), the Commission raised the possibility of instituting “*an annual audit procedure of compliance with the Undertaking's non-discrimination clause*”. In particular, the Commission stated (p141) that “*such a procedure would assist in the enforcement of the non-discrimination provisions*” and requested submissions on “*whether such a procedure would be appropriate taking into account the matters in section 44ZZA(3)*”.

In ABB's view, having regard to the matters in section 44ZZA(3) of the TPA (in particular the Objects of Part IIIA, ABB's legitimate business interests and the interests of users of ABB's Port Terminals) such a formal audit procedure is not necessary or appropriate. This is because:

- (a) ***existing scrutiny and oversight is sufficient*** - ABB is already subject, without a further audit, to a high degree of scrutiny with regard to its non-discriminatory provision of access to Port Terminal Services. ABB is subject to the oversight of Wheat Exports Australia (“WEA”) under Part 3 of the WEMA. In particular, WEA has the authority to require ABB to appoint an independent auditor to assess ABB's compliance with any condition of ABB's accreditation. Introducing an additional audit requirement as suggested by the Commission would add to and replicate aspects of ABB's existing regulatory burden without any clear justification.

Moreover, the addition of a further audit requirement would be inconsistent with ABB's long history of providing access to Port Terminal Services without encountering material complaints. ABB has, for a number of years, provided access to its Port Terminal Services on fair and reasonable terms, without the requirement of an external audit mechanism. However, in the space of two years, ABB will, if the Commission introduces an audit requirement, be subject to two separate audit processes. Not only would this involve substantial compliance costs (i.e. with the separate regulatory regimes under the WEMA and the Access Undertaking), but the output of the two audit processes would necessarily be duplicative; and

- (b) ***Revised Access Undertaking involves increased scrutiny*** - following commencement of the Access Undertaking, ABB will be subject to a very high level of scrutiny of its compliance with the Access Undertaking, both on an internal and external basis. In particular, ABB's compliance with the objectives and requirements of the Access Undertaking (including the non-discriminatory access provisions) will be monitored by way of:
- (i) a high degree of transparency and information, including through:
- (A) the Shipping Stem (updated daily);
 - (B) ABB's proposal to publish certain information about wheat at port and vessel nominations; and
 - (C) ABB's proposal to satisfy regular reporting requirements in relation to performance standards.

Collectively, this information will ensure that access seekers, the Commission and other interested parties will have up to date and extensive knowledge about the operation of ABB's Port Terminals, the provision of Port Terminal Services and compliance with the terms of the Access Undertaking;

- (ii) access seekers negotiating for access to Port Terminal Services will monitor ABB's compliance with the Access Undertaking generally, and the non-discrimination provisions particularly. In the event that an access seeker considers that ABB is non-compliant, it will be entitled to refer the matter to arbitration in accordance with the process in clause 7 of the Access Undertaking, or investigation by the Commission;
- (iii) following any reference to arbitration, the arbitrator (which may be the Commission) will assess ABB's compliance with the Undertaking, including whether ABB has provided access on non-discriminatory terms; and
- (iv) internal procedures and processes designed to ensure compliance with ABB's obligations pursuant to the Access Undertaking, and assessment of ABB's compliance with those procedures and processes.

In addition, the level of oversight by the WEA, the Commission and the forthcoming regulatory review (together with the potential consequences of breaching the Access Undertaking) will operate as a substantial constraint.

For these reasons, ABB considers that an audit of its compliance with the non-discriminatory access provisions of the Access Undertaking is not required or desirable. However, in the event that the Commission is minded to require such an audit process, ABB submits that, in order to minimise costs, and regulatory duplication, it should only be introduced on the basis that:

- (a) audits will only be conducted at the direction of the Commission;
- (b) the Commission will not require audits more than once in any 12 month period; and
- (c) where an audit has been prepared for WEA in accordance with the WEMA during the six month period prior to an audit requested by the Commission, the Commission will have regard to that audit, in the interests of preventing the unnecessary duplication of work.

3 Arbitration of disputes by the Commission

3.1 The Commission's Draft Decision

In its Draft Decision, the Commission raised certain concerns in relation to the dispute resolution processes set out in ABB's proposed Access Undertaking. In particular, the Commission indicated (p118-119) that the arbitration process would be likely to be more appropriate if it had a role as an arbitrator and could elect whether or not to arbitrate a particular dispute.

In arbitrating a dispute, the Commission further indicated that it should be able to adopt the processes and have regard to the matters set out in Part IIIA of the TPA if it chooses to be the arbitrator.

ABB does not agree that it is necessary or appropriate for the Commission to be the arbitrator in relation to what are essentially commercial arrangements. However, ABB acknowledges that this has been identified as an important issue for the Commission. Accordingly, ABB proposes to amend its Access Undertaking to address the matters raised by the Commission in relation to the dispute resolution process, so that the Commission effectively becomes a “gate keeper” for deciding who can arbitrate a dispute.

However, ABB considers that there are a number of powers or procedural matters set out in Division 3 of Part IIIA of the TPA which should not apply to any arbitration by the Commission in accordance with the Access Undertaking.

A summary of those matters is set out below

3.2 Certain aspects of the Part IIIA arbitration process are not appropriate for the purposes of the Access Undertaking

The purpose of the Access Undertaking offered by ABB is to facilitate the negotiation and conclusion of commercial agreements between ABB and its customers. Accordingly, ABB considers that it is not appropriate for the following aspects of Division 3 of Part IIIA of the TPA to apply to arbitrations conducted in accordance with the Access Undertaking:

- (a) **section 44U(c) and section 44ZNA of the TPA** - ABB considers that, unless agreed by all parties, the only parties to any arbitration should be ABB (as the Port Operator) and the party that issued the initial Dispute Notice (or, if ABB issued that notice, the addressee of the notice). As ABB is seeking to enter into bi-lateral agreements with each of its customers on a commercial basis, ABB considers that any disputes should be resolved on a bi-lateral basis. ABB does not consider that this in any way undermines the public policy objectives of the TPA, or the Commission’s “public interest” role;
- (b) **section 44X(4) of the TPA** - ABB considers that, while the Commission should have an ability to make interim determinations, any interim determination should be limited to providing access to the Standard Port Terminal Services on the Standard Terms and at the Reference Prices.

Consistent with the Commission’s Draft Decision, ABB proposes to amend the Access Undertaking so that it is clear that it will offer access to all Applicants (who meet the Prudential Requirements) to the Standard Port Terminal Services on the Standard Terms and at the Reference Prices. Accordingly, there is no question that ABB will deny (or ever has denied) access on reasonable terms to an Applicant.

In this situation, ABB considers that it is not appropriate for the Commission to make any interim determination (i.e. without considering each of the factors set out in section 44X) that differs from the Standard Terms and Reference Prices;

- (c) **sections 44V(2)(d) or (da)** - ABB considers that, in the context of an Access Undertaking which is intended to ensure that Applicants have

access to the standard, basic or minimum services necessary to export Bulk Wheat from ABB's Port Terminal Facilities, it is not appropriate that the Commission might be able -- in arbitrating any dispute concerning the negotiation of access to those standard or minimum services -- to require ABB to extend its facilities or allow third party interconnections. In this regard, provision of the Standard Port Terminal Services by ABB at each Port Terminal (as set out in the Port Schedules) is already sufficient to enable exporters to export Bulk Wheat. There is no need for any expansions to enable grain exporters to export Bulk Wheat from Port Terminals operated by ABB.

While ABB appreciates that any mandated extension of its facilities would be at the relevant user's cost, ABB considers that any additional or value-added services (e.g. additional services which are not standard and which require expansions) -- and, indeed, any matters which may have a very significant impact on the overall operation of its facilities -- should be the subject of commercial negotiations, not arbitration. Regulatory arbitration is also not a suitable mechanism to deal with port terminal expansions, given the need for underwritten capacity expansions and commercial contracts.

In ABB's view, it is simply not consistent with the objective of the Access Undertaking being intended to cover only access to the standard, basic or minimum services necessary to export Bulk Wheat, that an external party might require ABB to make fundamental changes to the configuration and operation of its facilities; and

- (d) ***sections 44ZG(2) and (5) of the TPA, and the penalties referred to in sections 44ZI, 44ZJ and 44ZK of the TPA*** - ABB considers that it is not appropriate for the criminal offences and penalties specified in these sections to apply to any arbitration which is implemented in accordance with a voluntary access undertaking.

ABB considers that certain amendments will also need to be made to the operation of sections 44ZO(1)-(4) of the TPA to make it clear that any determination is final and binding (subject to any rights of review) and has effect on and from the date specified by the arbitrator.

In addition, given the seasonal nature of the wheat export industry, ABB's yearly contracting process and the 2 year duration of the Access Undertaking, ABB considers that it should be specified in the Access Undertaking that the Commission will not make a determination which would have the effect of setting the terms and conditions of access to a Port Terminal Service for more than one season (expiring on the following 30 September) or in respect of any period following the expiry of the Access Undertaking.

ABB respectfully requests the Commission to consider these matters.

ABB naturally believes that these provisions (and arbitration powers) should not extend to arbitration by any other party. They are not matters which are appropriate in any commercial arbitration.

4 The process for implementing variations to the Standard Terms

In its Draft Decision (page 123), the Commission stated that clause 5.6 of ABB's proposed Access Undertaking is inappropriate as the:

“ability for ABB to unilaterally change the Indicative Access Agreement would result in a lack of certainty and clarity for potential access seekers and undermine the benefits of inclusion of the Indicative Access Agreement in the Undertaking...the ACCC considers that it would be more appropriate for any variation of the Indicative Access Agreement to take place in accordance with the process under section 44ZZA(7) of the TPA”.

ABB proposes to include a provision for the Standard Terms to be amended in accordance with section 44ZZA(7) of the TPA in its revised Access Undertaking.

However, ABB is concerned that reliance on the mechanism set out in section 44ZZA(7) alone, and in particular the period of up to 6 months (or more) for the Commission to consider any proposed variations, may not enable ABB to respond in a flexible and timely manner to market developments or to meet customer requirements.

Given the inherently cyclical nature of the wheat export industry and the relatively short period of time to assess and implement any necessary changes to the Standard Terms following the end of each harvest period, ABB respectfully requests the Commission to consider accepting a more streamlined and flexible mechanism for making minor changes to the Standard Terms which would operate in addition to the procedure set out in section 44ZZA(7). The key features of this streamlined and flexible mechanism would be as follows:

- (a) a requirement for ABB to notify the Commission of the proposed variation, and an ability for the Commission to object to that variation in its absolute discretion within 20 Business Days;
- (b) if the Commission objects to the proposed variation (for any reason in its absolute discretion), ABB would retain an ability to seek to vary the Standard Terms in accordance with the more formal procedure set out in section 44ZZA(7) of the TPA;
- (c) a requirement for any variations to be in accordance with the objectives of the Access Undertaking and ABB's obligations to provide non-discriminatory access;
- (d) a requirement for ABB to consult with “Major Users” in accordance with a specified and formal process, and provide a reasonable period of notice of any variation;
- (e) a requirement for ABB to publish any variation to the Standard Terms and notify the Commission of any variation within 2 Business Days; and
- (f) an express provision in the Access Undertaking stating that any variation to the Standard Terms will not override any Access Agreements which have been negotiated and concluded with Applicants.

ABB considers that this proposed mechanism has a number of key benefits, including that:

- (a) it provides greater flexibility and a greater ability to respond to market developments in a more timely way than would be the case if section 44ZZA(7) of the TPA were to provide the only mechanism for varying the Standard Terms. This is particularly important in relation to minor or operational changes where any cost / benefits analysis would not justify requiring variation in accordance with the more formal processes set out in section 44ZZA(7) of the TPA;
- (b) the proposed “parallel” mechanism enables the Commission to make a relatively quick assessment in relation to whether or not the proposed variation may raise any issues or concerns which require further consideration (without invoking the formal procedures set out in section 44ZZA(7) of the TPA); and
- (c) from the Commission’s perspective, it ensures that the Commission has an absolute veto right if it does not agree with a proposed change, or is unable to assess the impact of the proposed change within the 20 Business Day period.

ABB considers that this mechanism is a more equitable process for all users

The proposed mechanism is also similar to the mechanism that exists for price variations under the prices notification regime in Part VIIA of the TPA, and is therefore clearly a mechanism that has been considered and accepted as reasonable and appropriate by Parliament.

Accordingly, ABB considers that the proposed “parallel” variation mechanism, operating in conjunction with the formal variation mechanism specified in section 44ZZA(7) of the TPA, appropriately balances the interests of ABB, access seekers and the public. It is also consistent with the criteria for acceptance of access undertakings under Part IIIA of the TPA.

ABB notes for completeness that the Commission has power to accept the proposed mechanism under section 44ZZA(6A) of the TPA.

5 Port Loading Protocols - Dispute resolution process

5.1 The Commission’s Draft Decision

In its Draft Decision (page 192), the Commission stated that the dispute resolution procedure contained in the then current version of the Port Loading Protocols was inappropriate (for acceptance by the Commission) as it:

“...provides excessive flexibility for ABB and insufficient certainty for access seekers as the process is open-ended and the final stage leaves the matter in ABB’s hands with ABB not obliged to provide reasons for the decision within set times and no timeframes for ultimate resolution of the dispute.

The ACCC’s preliminary view is that the provision would be more likely to be appropriate if the process was not open ended, reasons for decision were required to be given and set timeframes for final decisions to be

made and the recommendation in the Non-Discrimination chapter for a clearer non-discrimination provision in the Undertaking are accepted”.

One of the issues raised by market participants prior to the Commission’s Draft Decision was the possibility that any disputes arising under the Port Loading Protocols should be able to be escalated for resolution by an external person or body.

ABB provided a substantially revised version of the Port Loading Protocols to the Commission on 19 August 2009. The changes made to the Port Loading Protocols were intended to address both the issues raised in the Commission’s Draft Decision and issues raised with ABB during its consultation process with customers in relation to the new Port Loading Protocols. However, ABB strongly believes that it is neither appropriate nor practicable (nor in the genuine interests of all users) for the Port Loading Protocols to be subject to a binding third party dispute resolution process.

5.2 It is not appropriate or practicable for the Port Loading Protocols to be subject to a third party dispute resolution process

Consistent with the Commission’s Draft Decision, ABB proposes to amend the Access Undertaking so that the Port Loading Protocols expressly form part of the Access Undertaking. This means that:

- (a) a breach of the Port Loading Protocols (either one-off or systematic) would be a breach of the Access Undertaking; and
- (b) the operation of the Port Loading Protocols will be subject to the non-discrimination clauses set out in the Access Undertaking.

ABB has also made a number of changes to the Port Loading Protocols since the Commission’s Draft Decision (as reflected in the version provided to the Commission on 19 August 2009) to provide a much higher degree of clarity and transparency. The matters set out in the Port Loading Protocols are therefore much more certain and capable of enforcement as part of the Access Undertaking.

ABB does not consider that the interpretation or enforcement of part of the Access Undertaking is a matter which would require a separate and additional third party dispute resolution procedure.

If the concern identified by market participants relates to disputes about matters which are not addressed in the Port Loading Protocols, then it is also difficult to see how or upon what basis the relevant operational decision could be made by a third party.

ABB notes that the two main issues raised by third parties appear to relate to the speed with which disputes can be resolved, and the possibility of including a further layer of dispute-resolution process. While not completely mutually exclusive, there is clearly a tension between these issues.

In relation to the expeditious resolution of disputes, ABB has substantially amended clause 13 of the Port Loading Protocols. There are now clear timeframes for each step, a number of which involve a response the following business day. For example, ABB must use its best endeavours to advise the other party to the dispute whether or not it proposes to change its decision (with reasons) within one business day, and if the other party issues an Escalation

Notice, it must be dealt with by the ABB Executive General Manager National Supply Chain (or delegate) within 2 business days. Although individual matters may be dealt with more quickly, it is difficult to see how the process set out in an Access Undertaking could be further expedited.

In relation to the proposed introduction of an external third party to resolve disputes, this would necessarily involve the addition of a further layer of decision-making or appeal, with a consequential impact on the timing for decisions. ABB has very significant doubts that the introduction of a further procedure (which must necessarily involve rules, information gathering and an opportunity for all parties to be heard) would speed up the process.

Moreover, the involvement of a third party in operational decisions would necessarily give rise to significant operational risks, including safety and environmental risks. ABB does not consider it appropriate that the dispute resolution process in the Port Loading Protocols should exacerbate these risks through third party actions.

ABB also notes that many of the types of operational decisions required under the Port Loading Protocols involve relatively quick judgments, based on requirements for the efficient, consistent and non-discriminatory operation of the port. It is inherent in any dispute that the immediate outcome may be more beneficial to one party than another.

It is also often the case that a decision delayed for even one or two days -- as any dispute escalated for external consideration would inevitably be -- is the same as no decision. That is, by the time the dispute is escalated between the parties (as it should be) and then externally, the opportunity to make a meaningful decision in the circumstances has disappeared. For example, if the dispute is about which party's ship should have priority in loading grain in a particular situation, the whole loading process would in any event be completed within 3 days, and ABB (as the operator of an efficient port terminal) cannot hold up any loading until an external arbitrator is appointed and the arbitrator considers the matter (based, presumably, on the arbitrator's personal views as to appropriate practice).

Under the revised Port Loading Protocols, ABB is required, in resolving any dispute, to have regard to the objectives of:

- (a) maximising the efficient operation of the port terminal;
- (b) maximising export throughput at the port terminal;
- (c) ensuring the non-discriminatory treatment of clients; and
- (d) ensuring consistency of decisions.

It would be a poor outcome if, rather than basing decisions on these principled matters, the decision were to be made by default or decided by "no decision", because delays in escalating the dispute to a third party meant that the time within which a principled decision may be made has passed.

ABB also considers that there are likely to be difficulties in identifying particular persons qualified to resolve disputes about the technical and operational aspects of ABB's business. Notwithstanding certain third party submissions to the Commission about their willingness to act as an arbitrator, it is unclear to ABB that:

- those third parties have the necessary experience to arbitrate on matters concerning the operation of export port terminal facilities, particularly in situations where the matter may not be directly addressed in the Port Loading Protocols, and taking into account the safety implications of a third party taking operational decisions;
- arbitration within “3-5 days” as suggested by GTA is likely to provide any real assistance to either the parties to the dispute, other users of the port or ABB;
- GTA’s proposal would be viewed as a genuine alternative, given its suggested fees of approximately \$7,000.

ABB will certainly bear in mind GTA’s willingness to assist. However, ABB considers that there would be substantial difficulties with including a mandatory third party dispute resolution process in the Port Loading Protocols.

Finally, ABB notes that the operation of the Port Loading Protocols is subject to audit by the WEA. If an issue arises in relation to the operation of the protocols, it is likely to be raised and addressed through this process. This is a clear incentive for ABB to implement the Port Loading Protocols in an objective, fair and efficient manner.

6 Key service standards

6.1 Introduction

In its Draft Decision (page 203), the Commission stated that:

“...it is not appropriate that ABB’s proposed Undertaking does not include a requirement to report on a number of service performance levels. Such reporting would provide a degree of transparency around the level of service being provided”.

The Commission noted six possible indicators that may be reported on, but stated that it was *“not seeking to prescribe what service performance indicators should be included in an undertaking”*.

6.2 ABB will amend the Access Undertaking to include a requirement to report on key service standards

In response to the Commission’s comments, ABB proposes to amend the Access Undertaking so that it is required report to the Commission:

- (a) in the case of the period from 1 October 2009 to 31 March 2010, by no later than 31 May 2010;
- (b) in the case of the period from 1 April 2010 to 30 September 2010, by no later than 30 November 2010;
- (c) in the case of the period from 1 October 2010 to 31 March 2011, by no later than 31 May 2011; and
- (d) in the case of the period from 1 April 2011 to 31 July 2011, by no later than 30 September 2011,

in each case, providing details on the following key service standards in respect of the provision of Port Terminal Services for Bulk Wheat at each Port Terminal during the relevant period:

- (a) tonnage loaded each month for each Port Terminal;
- (b) number of vessels loaded each month for each Port Terminal;
- (c) the average waiting time for vessels to complete loading for each month by Port Terminal. Waiting time will exclude if the vessel is not load ready; and
- (d) percentage of vessels that failed either AQIS or marine surveys for each month by Port Terminal.

ABB is proposing a four month reporting period for the final period of the Undertaking from 1 April 2011 to 31 July 2011 as the Undertaking expires on 30 September 2011, and a six month period would require a report after the expiry of the Undertaking.

ABB considers that the information set out above, together with the Shipping Stem, will provide the Commission and industry participants with substantial information in relation to the operation of the Port Terminals. The information is also currently available to ABB (which is consistent with the Commission's stated intention of not requiring ABB to collate additional data), and is also consistent with relevant performance standards referred to in ABB's response to Question 43 of the ACCC's information request of 2 June 2009, provided to the Commission on 23 June 2009.

ABB also proposes to publish its report to the Commission on its website within 5 Business Days of the date on which it provides it to the Commission.

7 The proposed use of information provided to the Commission on a confidential basis

In its Draft Decision (page 19), the Commission stated that it proposes to give limited weight to confidential submissions by interested parties, and acknowledged:

“the need for a balance between allowing parties to submit relevant information on a confidential basis, where that information is commercially sensitive, and the need to allow parties whose legitimate interests may be adversely affected by an administrative decision the opportunity to respond to relevant material”.

However, in its Draft Decision the Commission also stated that:

*“In the current context, the ACCC considers that this balance is adequately found by giving weight to comments made in public submissions, and considering comments made in confidential submissions only where such comments are **relevant, determinative of a particular issue and contribute considerations not already dealt with in a public submission**” (emphasis added).*

ABB submits strongly that it is not appropriate for the Commission to consider matters raised in confidential submissions, and which have not been raised in any public submissions, to be determinative of issues. By definition, ABB will not have had an opportunity to consider or respond to those matters. To consider matters not put to ABB as determinative of particular issues raises clear issues of procedural fairness.

ABB submits that the Commission should give no weight to any matters -- and should certainly not consider them as determinative of particular issues -- if ABB has not been given a proper opportunity to respond to the matters raised. ABB considers that this can clearly be achieved without compromising genuine claims of confidentiality.

8 Additional changes to facilitate the operation of the Access Undertaking

8.1 Introduction

This section sets out an explanation of certain further changes that ABB wishes to make to the revised Access Undertaking to facilitate the operation of the publish / negotiate / arbitrate model endorsed by the Commission in its Draft Decision. Specifically, those proposed changes involve:

- a mechanism to promote certainty in contractual arrangements and to create an incentive for Applicants to raise any issues in negotiations with ABB in a timely manner; and
- clarifying the identity of port users that ABB has an obligation to consult with before implementing any changes to the Port Loading Protocols.

8.2 Promoting contractual certainty and an incentive for Applicants to raise issues in negotiations with ABB in a timely manner

Following the Commission's comments in its Draft Decision, ABB proposes to make a number of changes to the Access Undertaking to clarify the operation of the negotiate / arbitrate provisions. ABB also proposes to amend the Access Undertaking to make it clear that it will offer access to the Standard Port Terminal Services to all Applicants (who meet the Prudential Requirements) on the Standard Terms and at the Reference Prices, with an ability to effect a backwards adjustment once an Access Agreement is concluded.

However, in the interests of promoting certainty for both ABB and Applicants, ABB considers it important that the Access Undertaking contains a mechanism to ensure that any disputes are raised as early as possible, with a view to resolving that dispute expeditiously. In ABB's view, it cannot be the intention of the Access Undertaking to create the uncertainty which would arise (for the whole industry, but for ABB in particular) if an Applicant were to:

- (a) operate on the basis of the Standard Terms (possibly without signing any formal agreement with ABB);
- (b) not actively progress negotiations with ABB, and only notify ABB of a dispute in relation to the negotiation of its agreement very late in, or after the end of, the season; and

- (c) then seek to have any commercially agreed or arbitrated prices applied from the beginning of the harvest season.

To address this issue, ABB proposes to include in the revised Access Undertaking a clause which provides that:

“If the Dispute relates to the terms and conditions on which the Port Operator is offering access to the Port Terminal Services, an Applicant may only seek mediation in accordance with [the Access Undertaking] or arbitration in accordance with [the Access Undertaking] if it issues a Dispute Notice within 90 days of the date on which the Port Operator acknowledged the Access Application [as required by the Access Undertaking] ... For the avoidance of doubt, nothing in this clause ... prevents an Applicant from submitting a new Access Application at any time, and:

- (i) *the provisions of clauses 6 and 7 [the “negotiating for access” and dispute resolution provisions] will apply to that Access Application; and*
- (ii) *subject to the Applicant satisfying the Prudential Requirements, the Port Operator will continue to offer to supply Standard Port Terminal Services to the Applicant on the then current Standard Terms and at the then current Reference Prices while any Access Agreement is negotiated. However ... that Access Agreement, once concluded by the Port Operator and the Applicant, will [only] be effective from the date on which the Applicant submitted the new and complete Access Application (and each party will make any necessary adjustments to give effect to that earlier start date)”.*

Importantly, the proposed new provision does not prevent an Applicant from submitting a new application at any time (including after the expiry of the 90 day period).

As set out above, the purpose of the proposed new clause is to ensure that Applicants, if they have a dispute in relation to the terms on offer, exercise their rights in relation to that dispute within a defined period. ABB considers that the period of 90 days is reasonable. It also aligns with the negotiation period specified in the Access Undertaking. Applicants should be able either to sign an Access Agreement or issue a Dispute Notice within 90 days.

ABB also notes that the requirement is not onerous. Applicants need only issue the Dispute Notice. It is not necessary that the Dispute is resolved within that time period. In addition, ABB will continue to offer access to the Standard Port Terminal Services on the Standard Terms. Applicants can also submit a new Access Application. The only consequence is that any agreed terms will only be backdated to the date the new Access Application is submitted. This is intended to remove any incentive for Applicants to issue multiple Access Applications and trigger a dispute about the terms of supply only late in the season.

8.3 Consult with “Major Users” when varying the Port Loading Protocols

Following the Commission’s Draft Decision, ABB has substantially amended its Port Loading Protocols, including the process for varying those protocols (see the

new version of the Port Loading Protocols provided to the Commission on 19 August 2009). Under the variation mechanism, ABB is required to consult with “Major Users” (in accordance with a specified procedure and specified timeframes) and notify them of the variations.

Under the current Access Undertaking, the term “Major Users” is defined to include users who shipped in excess of 20,000 tonnes of Bulk Wheat through the Port Terminal in the past two years. On reflection, ABB considers that 20,000 tonnes is a comparatively small amount of wheat, which equates to the cargo on only a single Handysize vessel¹. When viewed in this light, a person who ships only one Handysize vessel in the past 2 years cannot be considered a “Major User”. To the contrary, they may be only a very occasional user of the port terminal facilities.

ABB considers that, if the intention is to require it to consult with parties who are genuine users of the port as part of their ongoing business and who would understand the implications of any proposal to vary the Port Loading Protocols, then it is not necessary or desirable to require ABB to consult with “once every two years-type” users.

On this basis, ABB proposes to change the definition of “Major Users” in the Access Undertaking to mean users who have shipped an average of 50,000 tonnes of commodity through the Port Terminals in each of the preceding two years.

ABB does not consider that this in any way undermines the intention or effectiveness of the consultation obligation. Rather, it better focuses the consultation on users who have knowledge of the operation of the port, and who are well placed to understand and provide feedback on the implications of any variation proposal.

9 Other matters

9.1 The Access Undertaking will be provided by AusBulk

The initial Access Undertaking provided to the Commission on 16 April 2009 was submitted by ABB Grain Limited. However, given that:

- (a) each of the Port Terminals is owned and operated by AusBulk Limited; and
- (b) section 13(1)(e) and section 24 of the WEMA contemplate that the provider of the Port Terminal Services must satisfy the “access test”,

ABB proposes to amend the revised Access Undertaking so that AusBulk is the person providing the Access Undertaking to the Commission.

AusBulk is a wholly-owned subsidiary of ABB, and the change in persons providing the Access Undertaking does not have any impact on the operation of the Access Undertaking.

¹ Handysize vessels are smaller than Handymax, Panamax and Cape vessels.

9.2 Application of the Access Undertaking to the “Port Terminal Services” component of bundled offering

Following further discussions with the Commission, ABB confirms its view, as set out in its submission dated 23 June 2009 that:

“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”.

Naturally, if an Applicant sought to unbundle a package of services or seek a customised contract involving particular aspects of the bundle, this may involve additional costs for ABB.

10 Conclusion

ABB looks forward to continuing to work with the Commission in a constructive manner to develop and progress the revised Access Undertaking.

If the Commission has any questions in relation to the matters raised in this submission, ABB would be pleased to assist.

ABB Grain Ltd
3 September 2009