



Australian
Competition &
Consumer
Commission

ABB Grain Limited

Port Terminal Services Access Undertaking

Draft Decision

6 August 2009



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Glossary

ABB	ABB Grain Ltd
ACCC	Australian Competition and Consumer Commission
AGEA	Australian Grain Exporters Association
ARTC	Australian Rail Track Corporation
AWE	accredited wheat exporters
BHC	bulk handling company
CBH	Cooperative Bulk Handling Ltd
ESCOSA	Essential Services Commission of South Australia
ETA	estimated time of arrival
GIAV	Grain Industry Association of Victoria
GrainCorp	GrainCorp Operations Ltd
GTA	Grain Trade Australia
MGC	Metro Grain Centre (CBH)
MSA	Maritime Services (Access) Act 2000
mt	million tonnes
NCC	National Competition Council
PLP	Port Loading Protocols
SAFF	South Australian Farmers Federation Grains Industry Committee
TPA	<i>Trade Practices Act 1974</i> (Cth)
WEA	Wheat Exports Australia
WEMA	<i>Wheat Export Marketing Act 2008</i> (Cth)

1 Executive summary

This draft decision details the Australian Competition and Consumer Commission's (ACCC's) preliminary assessment of the proposed Undertaking lodged by ABB Grain Ltd (**ABB**) on 16 April 2009 for consideration under Division 6 of Part IIIA. The proposed Undertaking relates to the provision of access to services for the export of bulk wheat at six grain terminals operated by ABB in South Australia. These terminals are:

- Port Adelaide;
- Outer Harbor;
- Port Giles;
- Wallaroo;
- Port Lincoln; and
- Thevenard.

ABB's proposed Undertaking provides for, amongst other matters:

- a publish/negotiate/arbitrate model in relation to price and non-price terms (rather than including prices or a detailed pricing methodology in the Undertaking);
- obligations regarding non-discrimination in the provision of port terminal services;
- obligations regarding port terminal capacity management, including the shipping stem, and
- ring-fencing obligations providing for restrictions on information flows.

Broadly, the ACCC's draft decision covers the following issues relevant to the ACCC's assessment of ABB's proposed Undertaking:

- Background, Objectives, Structure;
- Term and variation;
- Scope;
- Publish/negotiate/arbitrate;
- Indicative Access Agreement;
- Non-discrimination;
- Ring-fencing;

- Capacity management; and
- Other Issues (KPIs, publication of information)

The ACCC reviewed all sections of ABB’s proposed Undertaking and assessed whether, overall, the proposed Undertaking was appropriate, having regard to the matters set out in section 44ZZA of the *Trade Practices Act 1974* (Cth) (**TPA**). In making that assessment the ACCC has drawn on:

- ABB’s proposed Undertaking, its initial supporting submission and other submissions it has provided to the ACCC;
- submissions from interested parties on ABB’s proposed Undertaking; and
- the ACCC’s own research.

ACCC Draft Decision

The ACCC has reached a view that it would not accept ABB’s proposed Undertaking in its current form. The following discussion summarises the key issues considered in the draft decision and highlights those areas where the ACCC considers that the approach proposed by ABB is not appropriate having regard to the matters in section 44ZZA(3) of the TPA. In a number of cases the ACCC has suggested ways that ABB could address the issues identified.

Relevance of the context in which the proposed Undertakings have been assessed

The specific clauses of the proposed Undertaking have been assessed having regard to the matters specified under section 44ZZA(3) of the TPA, taking into account the wider context within which ABB has submitted the proposed Undertaking (which, as discussed in the Legislative Framework chapter of this draft decision, fall for consideration within the scope of the matters set out in 44ZZA(3)).

In particular, the ACCC considers the following matters (amongst others) to be relevant to the assessment of the proposed Undertaking:

- the objective of Part IIIA of the TPA of promoting the economically **efficient operation of, use of and investment in facilities** by which port terminal services are provided – thereby promoting competition in the wheat export industry and the overall supply chain;
- the objectives of the ‘Access Test’ embodied in the *Wheat Export Marketing Act 2008*, and, in particular, the objective of ensuring that vertically integrated bulk handling companies provide **fair and transparent access** to their facilities to other accredited exporters;
- the transitional nature of the wheat export industry, having moved from a single wheat exporter to 23 accredited wheat exporters in 12 months;

- the legitimate business interests of ABB in being able to run its port terminal facilities with a sufficient degree of flexibility and without unduly prescriptive regulation so as to maintain an efficient supply chain;
- the interests of access seekers that in so running their operations, ABB should do so in a fair and non-discriminatory manner
 - noting also that the pricing principles in s.44ZZCA of the TPA provide that access price structures should not allow a vertically integrated provider to set terms and conditions that discriminate in favour of its downstream operations, except to the extent that the cost of providing access to other operators is higher;
- whether the proposed Undertaking provides for **sufficient certainty and clarity** in its terms, effect and operation that access seekers are able to understand and enforce their rights;
- the risk and undesirability of imposing regulation that is not appropriate at a time when the industry is newly liberalised and in transition;
- ABB's incentive to run its operations in a fair and transparent manner arising from the threat of more prescriptive regulation in two years time if required; and
- the object of Part IIIA to provide a framework and guiding principles to encourage a consistent approach to access regulation in each industry.

It is noted that the factors listed above are not the actual 'matters' listed under section 44ZZA(3) of the TPA,¹ but rather fall for consideration within the scope of the relevant matters under section 44ZZA(3).

In having regard to the objectives of the WEMA, the ACCC specifically acknowledges Parliament's recognition that the promotion of competition may potentially be limited by anti-competitive conduct associated with port terminal facilities, and that the inclusion of the access test demonstrates a clear intention to legislate measures to mitigate the possibility of such conduct undermining the broader intent of the legislation.

In having regard to the WEMA, the ACCC has not conducted a comprehensive market analysis in relation to each of the ports that will be subject to the proposed Undertaking to assess whether they should be subject to access regulation. Rather, the role of the ACCC in this context is to decide whether the Undertaking proposed by ABB is appropriate. The ACCC considers that Parliament has expressed a clear intention to require port terminal operators to provide access undertakings to mitigate the potential for anti-competitive harm, and it is in that context that the ACCC must consider the appropriateness of those undertakings as provided.

¹ Other than the first two matters, which the ACCC considers are relevant pursuant to section 44ZZA(3)(e) of the TPA.

The ACCC recognises that, as ABB has submitted, it is clear that the intention of the WEMA is that the proposed Undertaking should apply only to services offered at port.

In this regard, the ACCC notes that the Explanatory Memorandum to the WEMA dismissed calls to extend the access test to cover up-country services, stating that:

Up-country facilities do not display natural monopoly characteristics as they have low barriers to entry and there are already a number of competitors in the industry who provide up-country storage services.²

The Explanatory Memorandum goes on to note that an extension of the access arrangements to up-country storage facilities would ‘impose an excessive regulatory burden’.³ Further, the Second Reading Speech of the WEMA provides:

The Senate inquiry also identified concerns in relation to the potential for bulk-handling companies to restrict access to up-country storage facilities in a similar manner to concerns in relation to port facilities.

It is unclear from the evidence presented to the Senate inquiry whether the problem would necessarily arise, and if so, the extent of legislation that would be required to correct it.

If the highest level of regulation were to be imposed on the more than 500 up-country facilities, there is no doubt that this would create increased compliance costs which would almost certainly be directly passed back to growers.

The government will, therefore, continue to monitor the ability of exporters to access up-country storage facilities.

Let me say here, if any problems are identified then the government will take steps to remedy the situation including, if necessary, the development of a code of conduct.⁴

Nevertheless, the ACCC is cognisant of the submissions made calling for the Undertaking to be extended to include services offered at ABB’s up-country storage and handling facilities. Many of these submissions stated that it was artificial to draw a distinction between services offered at port and those offered up-country.

However, the ACCC, in this process, has not formed any views on the competitiveness of the supply of up-country storage and handling services. As set out in the Legislative Framework chapter, the ACCC does not consider that its role in this process was to conduct a thorough assessment of the state of competition in the entire bulk wheat export supply chain.

It is the ACCC’s view that, given the clear express intention of the WEMA, and having regard to the risk and undesirability of imposing regulation that is not appropriate at a time when the industry is newly liberalised and in transition, the

² Explanatory Memorandum, *Wheat Export Marketing Bill 2008*, p. 13.

³ Explanatory Memorandum, *Wheat Export Marketing Bill 2008*, p. 14.

⁴ House of Representatives, *Votes and Proceedings, Hansard*, Thursday 29 May 2009, pp. 76-77.

ACCC considers that it is appropriate pursuant to section 44ZZA(3) of the TPA that the scope of the proposed Undertaking be limited to services at port.

The ACCC notes, however, that providing access at the port creates incentives for other parts of the supply chain to be as efficient as possible, as access to the port would facilitate dissatisfied customers taking the option of bypassing ABB's up-country facilities.

General approach to pricing and other terms and conditions

Given the circumstances in which ABB has submitted its proposed Undertaking, the ACCC is of the view that a prescriptive regulatory approach including ex ante price setting is not warranted, and that a less prescriptive publish-negotiate-arbitrate approach is appropriate.

However, in order for the publish-negotiate-arbitrate framework to be appropriate, the ACCC is of the view that it needs to be underpinned by a robust set of mechanisms giving effect to the publication, negotiation and arbitration procedures. Clarity about the terms and conditions for access that are on offer by ABB is an important consideration in this respect. Further, given that ABB is vertically integrated, strong non-discrimination obligations and appropriate transparency measures are also appropriate.

The ACCC is of the view that appropriate non-discrimination measures should prohibit ABB discriminating in favour of itself except to the extent that the cost of providing access to other operators is higher, as per section 44ZZCA of the TPA. As a transparency measure to support this, appropriate measures would require ABB to publish a single set of prices for port terminal services, which may include differentiated prices for different circumstances (i.e., for different processes for testing of grain depending on where it has been stored – but only where these processes are justifiable with regard to hygiene, quality or associated factors), provided those circumstances are transparently stated and the pricing differences are justified on the basis of different costs.

The ACCC is of the view that these underpinning measures would allow access seekers to commercially negotiate with ABB in a framework where both parties know that prices, terms and conditions may be subject to arbitration by the ACCC or a private arbitrator, applying the pricing principles in section 44ZZCA of the TPA and general non-discrimination requirements.

It is also relevant to note that ABB's proposed Undertaking is for a limited duration, and should the publish-negotiate-arbitrate framework prove not to be effective, the ACCC may adopt a more prescriptive method in any future access undertaking assessments.

The ACCC also notes the port loading protocols, which are not terms of access but rather general procedures for operational management of the ports, including how capacity allocation/nomination of shipping slots occurs. The ACCC is of the view that it is in the legitimate business interests of ABB, and indeed in the interests of efficiency in the overall supply chain, that ABB has sufficient flexibility to run its

day-to-day operations without unduly prescriptive interference. The ACCC also notes that it is in the interests of the access seekers, and of competition in downstream markets, that these operations are conducted on a non-discriminatory basis, in a manner that is clear and transparent, and with recourse to adequate and swift dispute resolution procedures in the event of dispute between ABB and access seekers. It is therefore the ACCC's view that any changes to the port loading protocols occur with adequate notice and consultation – but not be subject to the variation procedures in section 44ZZA(7) of the TPA. The ACCC notes that should such processes prove unsatisfactory, the port terminal protocols may in future need to be the subject of more prescriptive processes.

In relation to ring-fencing, the ACCC's view is that the weak ring-fencing rules in ABB's proposed Undertaking would not, in their current form, serve as an effective safeguard against anti-competitive discrimination in the provision of port terminal services.

However, ring-fencing is just one tool that can be used to ensure against anti-competitive discrimination.

Were ABB's proposed Undertaking amended to contain robust non-discrimination and no hindering access clauses, fair and transparent port terminal protocols and indicative access agreements (as well as measures to deal with the potential for information about port terminal services to be used to the advantage of ABB's wheat exporting arm), then, in the circumstances, it would not be necessary for ring-fencing measures to be included in ABB's undertaking at this particular point in time.

In forming this view, the ACCC has taken into account the transitional nature of the industry and the possibility that any ring-fencing measures that were implemented at this point in time could need to be revised in the near future in accordance with any regulatory changes (either to extend or reduce the regulation to which ABB is subject).

The ACCC considers that this would be an undesirable outcome in that it could impose unnecessary regulatory costs during a time of industry transition.

The ACCC has also taken into account the short duration of ABB's proposed Undertaking (two years) and will closely monitor the effectiveness of the undertaking in ensuring against anti-competitive discrimination during its operation.

The ACCC notes that, once the regulatory framework to which ABB is subject to is more certain, that any future undertaking submitted by ABB may need to include robust ring-fencing rules (significantly more robust than the weak ring-fencing measures offered by ABB to the ACCC in its proposed Undertaking).

It is important to note that the ACCC's approach taken to ring-fencing in assessing this particular access undertaking is not indicative of the approach to ring-fencing that the ACCC would be likely to take in relation to other regulated industries. The approach taken on this occasion reflects the factors outlined above, and in particular, that the industry is still transitioning from having a single desk responsible for the export of wheat in mid 2008 to the current situation of having 23 wheat exporters

accredited to export wheat from Australia, and that the arrangements can be revisited in two years.

The ACCC therefore notes that, overall, its views and recommendations about the appropriateness of the measures in the proposed Undertaking are less prescriptive than they might otherwise be in relation to longer term undertakings in other industries.

The ACCC has provided its draft views throughout on provisions that would not be appropriate, and alternatives that might be more appropriate.

The ACCC's views on particular sections of the proposed Undertaking are summarised as follows:

Background, Objectives and Structure

Background

It is not necessary for the ACCC to form a view on the appropriateness of the background section pursuant to section 44ZZA(3), given that it is merely descriptive and places no obligations on ABB.

Objectives

The objectives section, critical to the operation of the proposed Undertaking, is not appropriate pursuant to section 44ZZA(3) given concerns with the following particular objectives:

- “The recovery of all reasonable costs associated with the granting of access to the Port Terminal Services” (clause 1.2(e)(i)(A)); and
- “The Port Operator’s ability to meet its own or its Trading Division’s reasonably anticipated requirements for Port Terminal Services” (clause 1.2(e)(i)(D)).

Structure

The structure section of the proposed Undertaking is not appropriate pursuant to section 44ZZA(3) given concerns with:

- The reference to specific terms and conditions being set out in the Port Schedules (clause 2.1(b)(ii));
- The reference to using ‘reasonable endeavours’ to procure (clause 2.3).

The ACCC notes that ABB has agreed to remove the term ‘reasonable endeavours’ from clause 2.3.

Commencement, term and variation

Commencement

The commencement clause is not appropriate pursuant to section 44ZZA(3) given it does not clarify that the proposed Undertaking may commence for the purposes of passing the access test under WEMA at a different time from its commencement date under the TPA

Term

The two year term of the proposed Undertaking is appropriate pursuant to section 44ZZA(3) given the transitional state of the wheat export industry.

Withdrawal and variation

It is not necessary for the ACCC to form a view on the appropriateness of the withdrawal and variation clauses pursuant to section 44ZZA(3) given that they are merely descriptive.

Extension

The extension clause of the proposed Undertaking is not appropriate pursuant to section 44ZZA(3) given that clause 3.6(a) refers to submitting an undertaking 'at least three months' before the expiry of the proposed Undertaking. This is inconsistent with the statutory obligation in section 44ZZBC of the TPA for the ACCC to use reasonable endeavours to make a decision on an access undertaking application within 6 months.

Scope

In the present circumstances, it is appropriate that the proposed Undertaking applies only to wheat (rather than all grains).

In the present circumstances, it is appropriate that the proposed Undertaking applies only to port terminal services (rather than including up-country services).

The drafting of the scope of the proposed Undertaking is not appropriate because it lacks clarity. It would be appropriate:

- for the definition of Port Terminal Services to be amended to make it clear that the lists of port terminal services in the Port Schedules are not exhaustive;
- for the Port Schedules to expressly include 'cargo accumulation';
- for clause 4.4(d) (regarding sharing of efficiency savings) to be removed given its lack of clarity.

It is not necessary for the proposed Undertaking to expressly provide for access to port terminals by employees of superintendence companies.

Publish, negotiate, arbitrate mechanism

The ACCC is of the view that, in the present circumstances, it is appropriate that the proposed Undertaking adopts a publish-negotiate-arbitrate approach (rather than providing for ex ante price regulation). In forming this view, the ACCC has had regard to the transitional state of the industry and the relatively short duration of the proposed Undertaking.

The ACCC considers, however, that the drafting of the publish-negotiate-arbitrate component of the proposed Undertaking is not appropriate. A more appropriate publish-negotiate-arbitrate model would:

- include an indicative access agreement setting standard terms for access to the service;
- require ABB to publish a single set of prices for port terminal services, which may include differentiated prices for different circumstances (i.e., for different processes for testing of grain depending on where it has been stored – but only where these processes are justifiable with regard to hygiene, quality or associated factors), provided those circumstances are transparently stated and the pricing differences are justified on the basis of different costs;
- require ABB to publish prices within a timeframe that allows sufficient opportunity for access seekers to negotiate non-standard terms and prices;
- provide appropriate holding over arrangements to ensure access seekers are not delayed in obtaining access by reason of engaging in a negotiation with ABB on non-standard terms or prices, or by reason of resolving a dispute with ABB pursuant to the processes in the proposed Undertaking;
- address the issues identified by the ACCC in the discussion below regarding the timeframes and lack of clarity and certainty in the drafting of the proposed Undertaking, as well as the disproportionate discretion of the access provider;
- not include a ‘pre-condition’ to invoking the dispute resolution process, as currently included in clause 6.3(c);
- provide that when a Dispute is referred to arbitration, it is referred to the ACCC in the first instance;
- provide a mechanism by which the ACCC may consider whether or not it wishes to arbitrate the Dispute;
- provide for the Dispute to be arbitrated by the ACCC if it so chooses, or for the Dispute to be arbitrated by a private arbitrator if the ACCC so chooses;
- permit the ACCC to conduct an arbitration adopting the processes and having regard to the matters set out in Part IIIA of the TPA if it chooses to be the arbitrator;
- require a private arbitrator, if appointed, to keep the ACCC informed of the progress of the arbitration, including timelines and processes for making submissions; and
- allow the ACCC to make submissions in its absolute discretion in relation to an arbitration conducted by a private arbitrator.

Indicative Access Agreement

Inclusion of an indicative access agreement

The approach of not including an indicative access agreement in the proposed Undertaking is not appropriate pursuant to section 44ZZA(3), given that it results in a lack of certainty and clarity for potential access seekers.

Including an indicative access agreement in the proposed Undertaking would:

- provide a clear starting point for negotiations between an access seeker and ABB (and is therefore critical to ensuring access seekers can effectively negotiate with ABB); and
- ensure that the costs of negotiation and/or arbitration are not excessive.

The ACCC notes that inclusion of an indicative access agreement in the proposed Undertaking does *not* mean that access seekers and ABB cannot negotiate around that agreement, either by commercial agreement or by utilising the negotiation and/or arbitration provisions in the proposed Undertaking.

The ACCC is seeking submissions on whether ABB's 2009–10 Port Terminal Services Agreement for Standard Port Terminal Services provided to the ACCC on 22 May 2009 and annexed to this draft decision at Annexure A would form an appropriate basis for an indicative access agreement.

Variation of an Indicative Access Agreement

ABB's approach of retaining discretion to unilaterally vary its 'Standard Terms' (i.e. which are likely to be similar to an indicative access agreement) is not appropriate. It results in a lack of certainty and clarity for potential access seekers and undermines the benefits of inclusion of an indicative access agreement in the proposed Undertaking.

It would be more appropriate for the variation provisions in section 44ZZA(7) of the TPA to apply to variations of the indicative access agreement. This does not mean of course, that parties are not able to negotiate non-standard terms that vary from those in the indicative access agreement.

Non-discrimination

It is appropriate that the proposed Undertaking includes non-discrimination and 'no hindering access' clauses.

However, the precise non-discrimination and 'no hindering access' clauses proposed by ABB are not appropriate given the lack of clarity about their interpretation. Further, the drafting of the non-discrimination clauses does not ensure that they will prohibit ABB from discriminating in favour of its own trading business.

The ACCC has made recommendations in the Non-Discrimination chapter about changes that could be made to the non-discrimination clauses and no hindering access clauses to make them sufficiently robust to protect against anti-competitive self-

preferential treatment by ABB. For the avoidance of doubt, the non-discrimination clause should protect against (amongst other matters) the ability of ABB to anti-competitively discriminate between wheat exporters on the basis of where grain was stored (i.e. whether it was stored in ABB's up-country storage and handling network, a third party storage network or on-farm).

The ACCC seeks submissions on whether it would be appropriate for ABB's proposed Undertaking to provide for an annual audit procedure of compliance with the Undertaking's non-discrimination clause.

Ring-fencing

Ring-fencing is one tool that can be used, in conjunction with robust non-discrimination and no hindering access clauses, fair and transparent port terminal protocols and an indicative access agreement to ensure against anti-competitive discrimination.

The ACCC's view is that the weak ring-fencing rules in ABB's proposed Undertaking would not, in their current form, serve as an effective safeguard against anti-competitive discrimination in the provision of port terminal services.

However, were ABB's proposed Undertaking amended to contain robust non-discrimination and no hindering access clauses, fair and transparent port terminal protocols and indicative access agreements (as well as measures to deal with the potential for information about port terminal services to be used to the advantage of ABB's wheat exporting arm), then, in the circumstances, it would not be necessary for ring-fencing measures to be included in ABB's undertaking at this particular point in time.

In forming this view, the ACCC has taken into account the transitional nature of the industry and the possibility that any ring-fencing measures that were implemented at this point in time could need to be revised in the near future in accordance with any regulatory changes (either to extend or reduce the regulation to which ABB is subject). The ACCC considers that this would be an undesirable outcome in that it could impose unnecessary regulatory costs during a time of industry transition.

The ACCC has also taken into account the short duration of ABB's proposed Undertaking (two years) and will closely monitor the effectiveness of its undertaking in ensuring against anti-competitive discrimination during its operation.

The ACCC notes that, once the regulatory framework to which ABB is subject to is more certain, that any future undertaking submitted by ABB may need to include robust ring-fencing rules (significantly more robust than the weak ring-fencing measures offered by ABB to the ACCC in its proposed Undertaking).

It is important to note that the ACCC's approach taken to ring-fencing in assessing this particular access undertaking is not indicative of the approach to ring-fencing that the ACCC would be likely to take in relation to other regulated industries. The approach taken on this occasion reflects the factors outlined above, and in particular, that the industry is still transitioning from having a single desk responsible for the

export of wheat in mid 2008 to the current situation of having 23 wheat exporters accredited to export wheat from Australia; and that the arrangements can be revisited in two years.

Capacity Management

Given that the Port Loading Protocols (PLPs) set out the key process by which ABB will allocate port terminal capacity, the inclusion of the PLPs in the proposed Undertaking is appropriate.

However, the substance of the PLPs as proposed by ABB are not appropriate as they lack sufficient clarity, certainty and transparency, and allow ABB a level of discretion in making key decisions about capacity management and variation that is not appropriate.

The ACCC considers it desirable that ABB have the flexibility to run its operations in an efficient manner. However, access seekers must have a sufficient degree of notice about amendments and it should be made clear that any variations will be subject to the non-discrimination clauses in the proposed Undertaking. It is also desirable that the PLPs include a swift dispute resolution mechanism.

In the interests of retaining flexibility and efficiency, the ACCC would be prepared for the variation mechanism to be based on a robust industry consultation process rather than a formal ACCC consultation process. The ACCC will, however, closely monitor the success of this variation method and will take its findings into account in any future review of the proposed Undertaking.

To ensure that the PLPs that have been varied can be enforced, the ACCC considers that a provision should be included in the proposed Undertaking that obliges ABB to comply with the PLPs (as varied from time to time). In addition, a provision should be included in the proposed Undertaking that states that any variations to the PLPs are subject to the non-discrimination provision in the proposed Undertaking.

ABB has advised that it proposes to provide the ACCC with revised PLPs by mid-August 2009. Upon receipt, the ACCC will post these revised PLPs on its website and seek submissions from interested parties on the appropriateness of their inclusion in a revised undertaking from ABB.

Other Issues

Publication of stocks of grain at port

It is not appropriate that the proposed Undertaking does not include an obligation to publish stocks of all grains at port. Such an obligation would address concerns raised by interested parties that port operators have the potential to restrict access to port by exhausting the port terminal's capacity in favour of other grains.

For the avoidance of doubt, this obligation would not extend to publication of up-country information. This is because, as set out in the Scope chapter of this draft decision, it is the ACCC's view that ABB's approach of limiting its proposed

Undertaking to port terminal services (and by extension, information about its port operations) is appropriate in the circumstances.

Publication of key port terminal information

As set out in the Ring-Fencing chapter, the ACCC considers that it is appropriate that arrangements be provided for in the proposed Undertaking to address the potential for ABB's marketing arm to misuse port terminal information to its advantage.

The ACCC considers that the appropriate approach to dealing with this issue would be for the proposed Undertaking to require publication of key port terminal information (such as cargo nomination applications) on the shipping stem a short time after its receipt by ABB. This would increase transparency of nominations that have been made and lessen the opportunity for ABB's marketing arm to misuse key port terminal information. It is important to note that any such discriminatory conduct would be prohibited by a robust non-discrimination clause, such as that recommended by the ACCC in the Non-Discrimination chapter.

Publication of key service standards

It is not appropriate that the proposed Undertaking does not include an obligation to report on a number of key service standards. The ACCC is of the view that such reporting would provide a degree of transparency around the level of service being provided to wheat exporters and assist potential access seekers in assessing the appropriateness of the price offered for a service.

Conclusion

The ACCC's draft decision is that it should not accept the proposed Undertaking proffered by ABB on 16 April 2009 in its current form.

The ACCC has provided its draft views throughout on provisions that would not be appropriate, and alternatives that might be more appropriate.

2 Procedural overview

Summary

The ACCC is seeking submissions on its draft decision not to accept ABB's proposed Undertaking and the reasons for its draft decision.

In particular, the ACCC seeks views on:

- whether, if the ACCC's recommendations were adopted by ABB in a revised Undertaking, the revised proposed Undertaking would be appropriate; and
- whether ABB's proposed standard terms and conditions of access to port terminal services (at Annexure A to this draft decision) would form an appropriate Indicative Access Agreement (if annexed to a revised Undertaking submitted by ABB).

ABB has advised that it proposes to provide the ACCC with revised PLPs by mid-August 2009. Upon receipt, the ACCC will post these revised PLPs on its website and seek submissions from interested parties on the appropriateness of their inclusion in a revised undertaking from ABB.

Submissions are due by 5:00pm on Thursday, 3 September 2009 to:

Mr Anthony Wing
General Manager
Transport and General Prices Oversight
ACCC
GPO Box 520
MELBOURNE VIC 3001

Email: transport@accc.gov.au

2.1 ABB's proposed Undertaking

Under Division 6 of Part IIIA of the *Trade Practices Act 1974 (Cth)* (**the TPA**), the Australian Competition and Consumer Commission (**ACCC**) may accept an undertaking from a person who is, or expects to be, the provider of a service, in connection with the provision of access to that service.

The ACCC received an access undertaking (**the proposed Undertaking**) from ABB Grain Ltd (**ABB**) on 16 April 2009 for consideration under Division 6 of Part IIIA. The proposed Undertaking relates to the provision of access to services for the export of bulk wheat at certain grain terminals operated by ABB in South Australia.

ABB has submitted the proposed Undertaking in accordance with legislative requirements under the *Wheat Export Marketing Act 2008 (Cth)* (**the WEMA**),

further details of which are set out below in the Legislative Framework chapter. Two other parties, Cooperative Bulk Handling Limited (**CBH**) and GrainCorp Operations Ltd (**GrainCorp**), have also submitted access undertakings to the ACCC, and the ACCC has also published draft decisions in respect of those applications.

2.2 Submissions from ABB

During the current process, in addition to the initial supporting submission provided by ABB on 16 April 2009 in conjunction with the proposed Undertaking, the ACCC sought and received further information from ABB as follows:

- On 13 May 2009 the ACCC requested ABB's proposed standard terms and conditions for access to port terminal services for 2009/10. On 22 May 2009 ABB provided the standard terms.
- On 2 June 2009 the ACCC requested further information from ABB in relation to various matters raised in ABB's initial supporting submission, and in relation to various clauses of the proposed Undertaking.
- On 30 June 2009 ABB provided a response to the ACCC's information request, the ACCC's Issues Paper and to comments made by third parties during the public consultation.
- On 3 July 2009 the ACCC sought clarification from ABB of matters raised in a newspaper article published on 2 July 2009 regarding the potential development of a grain terminal at Port Stanvac in South Australia. ABB provided a response on 6 July 2009.
- On 15 July 2009 ABB provided a further supplementary submission to the ACCC in response to the 3 July 2009 submission of the South Australian Farmers' Federation.

2.3 Public consultation process to date

The TPA provides that the ACCC may invite public submissions on an access undertaking application.⁵

The ACCC published an Issues Paper on 29 April 2009 inviting submissions on the proposed ABB Undertaking, as well as on the proposed CBH and GrainCorp Undertakings. The ACCC directly advised approximately 80 stakeholders, including accredited wheat exporters, grain growers, farming organisations and state regulatory bodies of the public consultation process.

As part of the public consultation process the ACCC also held meetings in several capital cities during May 2009 to allow interested parties the opportunity to discuss relevant matters with the ACCC in person. Meetings were held as follows:

- 7 & 8 May 2009: Brisbane

⁵ *Trade Practices Act 1974* (Cth) s 44ZZBD(1).

- 11 & 12 May 2009: Sydney
- 18 & 19 May 2009: Adelaide
- 25 & 26 May 2009: Perth
- 22 & 28 May 2009: Melbourne

2.3.1 Submissions received

The ACCC received public submissions from the following parties in relation to the proposed ABB Undertaking:

Australian Grain Exporters Association (AGEA) – submissions received 11, 18 and 29 May 2009

AGEA is a representative body of exporters of Australian grain, formed in 1980 to promote their philosophy that competition, represented by open and contestable markets, is the most effective and efficient means of delivering the maximum benefits to the grains industry, and the community as a whole.

Members of the AGEA are active participants in both domestic and export grain markets, with a particular focus on providing efficient access to international markets. Members of AGEA are Bunge Global Markets Australia Pty Ltd, Cargill Australia Limited, Louis Dreyfus Australia Pty Ltd, Glencore Grain Pty Ltd, Noble Grain Australia Pty Ltd and AC Toepfer International (Australia) Pty Ltd.⁶

SGS Agricultural Services – submission received 27 May 2009

SGS provides inspection, testing, certification and verification services to ensure that products, services and systems across a range of industries meet quality, safety and performance standards and specifications.⁷

Victorian Farmers Federation – submission received 28 May 2009

The VFF is a federation made up of seven commodity groups representing Victorian farmers in the dairy, grains, livestock, horticulture, chicken meat, eggs and pig industries.⁸

Intertek – submission received 29 May 2009

Intertek is commodities and products testing company, carrying on a wide range of testing, inspection and certification services across a number of different industries.⁹

Grain Industry Association of Victoria – submission received 4 June 2009

The GIAV is the representative body for key participants in the grain industry supply chain in Victoria. Its membership includes grain marketers and trades, grain brokers, end-user processors such as millers, maltsters and stockfeed manufacturers, as well as

⁶ <http://www.agea.com.au/default.asp?ID=223>.

⁷ http://www.au.sgs.com/agriculture_au?lobId=17163.

⁸ http://www.vff.org.au/main/index.php?option=com_content&task=view&id=22&Itemid=68.

⁹ Intertek, *Submission in relation to proposed access undertakings*, 29 May 2009, p. 6.

bulk handling companies, seed specialists, grain transport operators and container packers.¹⁰

New South Wales Farmers Association – 10 June 2009

The NSW Farmers Association represents the interests of the majority of commercial farming operations throughout New South Wales. It states that through its commercial, policy and apolitical lobbying activities it provides a link between farmers, government and the general public.¹¹

South Australian Farmers Federation – submission received 3 July 2009

The SAFF is South Australia's principal farmer organisation, and works in partnership with government departments, statutory authorities, politicians, businesses, the media and members to assist in the development of the rural sector.¹²

2.4 Confidential submissions

The ACCC notes that it received some confidential submissions as part of its consultation, from both ABB and from third parties. In this regard, the ACCC notes that a party may request that the ACCC not make the whole or part of a submission available for confidentiality reasons.¹³ The ACCC acknowledges 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. 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. In this regard, limited weight has been given to confidential submissions made on this process.

The ACCC also notes that several submissions have made allegations that ABB has engaged in conduct that may raise issues under the prohibitions on anti-competitive conduct under Part IV of the TPA. In the context of the current Part IIIA assessment, the ACCC has not formed any views on the legitimacy or otherwise of these allegations. To the extent that claims have raised concerns under restrictions on anti-competitive conduct in Part IV of the TPA, these matters are being assessed by the ACCC's Enforcement and Compliance Division.

2.5 Indicative timeline

Under the TPA, the ACCC must use its best endeavours to make a decision on an access undertaking application within 6 months of the day it received the application,

¹⁰ Grain Industry Association of Victoria, *Submission in relation to proposed access undertakings*, 1 June 2009, p. 1.

¹¹ NSW Farmers Association, *Submission in relation to proposed access undertakings*, June 2009, p. 1.

¹² South Australian Farmers Federation Grains Industry Committee, *covering letter*, 3 July 2009.

¹³ *Trade Practices Act 1974* (Cth) s 44ZZBD(5).

or within any further, extended period if the ACCC so decides.¹⁴ The ACCC is therefore obliged to use its best endeavours to make a final decision on the proposed Undertaking by 16 October 2009, or such further period as the ACCC decides.

The ACCC acknowledges, however, that ABB is required to have an access undertaking in place from 1 October 2009 in order to meet the accreditation requirements of the WEMA.

The ACCC therefore aims to make a final decision on ABB's proposed Undertaking by the end of September 2009.

However, ABB has indicated it may withdraw this Undertaking and resubmit a revised Undertaking, taking into account public submissions made in relation to the ACCC's views on what might be appropriate in this reasons for the Draft Decision, and public submissions made on the indicative access agreement and any port loading protocols for 2009/10 subsequently provided. If so, the ACCC will aim to make a final decision on any revised Undertaking as soon as possible, and preferably by the end of September 2009. However, this will still be subject to when ABB lodges any revised Undertaking and how effectively it has taken these matters into account.

2.6 Consultation on the draft decision

The ACCC invites submissions from interested parties on its draft decision not to accept the proposed ABB Undertaking.

In particular, the ACCC seeks views on:

- whether, if the ACCC's recommendations were adopted by ABB in a revised Undertaking, the revised proposed Undertaking would be appropriate; and
- whether ABB's proposed standard terms and conditions of access to port terminal services (at Annexure A to this draft decision) would form an appropriate Indicative Access Agreement (if annexed to a revised Undertaking submitted by ABB).

ABB has advised that it proposes to provide the ACCC with revised PLPs by mid-August 2009. Upon receipt, the ACCC will post these revised PLPs on its website and seek submissions from interested parties on the appropriateness of their inclusion in a revised undertaking from ABB.

2.6.1 Making a submission

Submissions must be forwarded by 5:00pm on **Thursday, 3 September 2009** to:

Mr Anthony Wing
General Manager
Transport and General Prices Oversight
ACCC

¹⁴ *Trade Practices Act 1974* (Cth) s 44ZZBC(1).

GPO Box 520
MELBOURNE VIC 3001

Email: transport@acc.gov.au

Submissions are to be sent preferably by email, in Microsoft Word or other text readable document form.

2.6.2 Confidentiality of submissions

As indicated above, the ACCC acknowledges the need for a balance between permitting the provision to a regulator of relevant information on a confidential basis, where that information is commercially sensitive, and the need to allow parties whose legitimate interests are likely to be affected by an administrative decision the opportunity to respond to relevant material.

However, the ACCC strongly encourages parties who intend to provide submissions on the ACCC's draft decision to make public submissions. Unless a submission, or part of a submission, is marked confidential, it will be published on the ACCC's website and may be made available to any person or organisation on request. The sections of submissions that are claimed to be confidential should be clearly identified.

2.7 Further information

The proposed ABB Undertaking and other relevant materials, including supporting submissions from the ABB and public submissions by interested parties, are available on the ACCC's website at www.acc.gov.au by following the links to 'For regulated industries' and 'Wheat Export,' or via the following link:

<http://www.acc.gov.au/content/index.phtml/itemId/868799>

If you have any queries about any matter in relation to the ACCC's process, or to any matters raised in this draft decision, please contact:

Ms Sarah Sheppard
Director
Transport & General Prices Oversight, Wheat Access Section
Ph: (03) 9290-1992
Email: sarah.sheppard@acc.gov.au
Fax: (03) 9663-3699

3 Legislative Framework

Summary

In assessing the appropriateness of ABB's proposed Undertaking, the ACCC has had regard to the matters specified under s44ZZA(3) of the TPA. In particular, the ACCC has considered:

- the objectives of the 'access test' embodied in the *Wheat Export Marketing Act 2008* and, in particular, the objective of ensuring that vertically integrated bulk handling companies provide **fair and transparent access** to their facilities to other accredited exporters;
- whether the proposed Undertaking provides **for sufficient certainty and clarity** in its terms, effect and operation;
- the legitimate business interests of the bulk handlers in being able to run their port terminal facilities with a sufficient degree of flexibility and without unduly prescriptive regulation so as to maintain an efficient supply chain;
- the objective of promoting competition in the wheat export industry;
- the desirability of having consistent bulk wheat port access regulation arrangements across Australia;
- the risk and undesirability of imposing regulation that is not appropriate at a time when the industry is newly liberalised and in transition;
- the need to balance the legitimate business interests of ABB with the interests of access seekers; and
- that price discrimination in favour of ABB's trading operations should not occur except to the extent that the cost of providing access by ABB to other users is higher than provision of the service to itself.

It is noted that the factors listed above are not the actual "matters" listed under section 44ZZA(3) of the TPA,¹⁵ but rather fall for consideration within the scope of the relevant matters under section 44ZZA(3).

3.1 Part IIIA of the Trade Practices Act

The legislative framework for the ACCC's consideration of the proposed Undertaking is set out in Part IIIA of the TPA.

¹⁵ Other than the first two matters, which the ACCC considers are relevant pursuant to section 44ZZA(3)(e) of the TPA.

Part IIIA was inserted into the TPA in 1995 by the *Competition Policy Reform Act 1995* (Cth) and provides three main mechanisms to facilitate access to services provided by means of infrastructure:

- via declaration of a service (under section 44H) and arbitration (under section 44V);
- through the provision of access undertakings and access codes (under sections 44ZZA and 44ZZAA respectively); and
- via a decision that a State or Territory access regime is effective (under section 44N).

3.1.1 Access undertakings

Division 6 of Part IIIA provides that a provider of a service (or a person who expects to be the provider of a service) may give an undertaking to the ACCC in connection with the provision of access to the service. An undertaking may specify the terms and conditions on which access will be made available to third parties. The ACCC may accept the undertaking if it thinks appropriate to do so having regard to the matters set out in section 44ZZA(3). If the ACCC accepts the undertaking, the provider is required to offer third party access in accordance with the undertaking. An access undertaking is binding on the access provider and can be enforced in the Federal Court upon application by the ACCC.

3.2 Matters in section 44ZZA

Section 44ZZA(3) provides that the ACCC may accept an access undertaking, if it thinks it appropriate to do so, having regard to the following matters:

- the objects of the Part IIIA of the TPA;
- the pricing principles specified in section 44ZZCA of the TPA;
- the legitimate business interests of the provider of the service;
- the public interest, including the public interest in having competition in markets (whether or not in Australia);
- the interests of persons who might want access to the service;
- whether the undertaking is in accordance with an access code that applies to the service; and
- any other matters that the ACCC thinks are relevant.¹⁶

This part of the document discusses in a general sense how the ACCC proposes to have regard to these matters in making its decision under section 44ZZA(3) in relation

¹⁶ *Trade Practices Act 1974* (Cth) s 44ZZA(3).

to the proposed Undertaking. The discussion in this chapter is general in the sense that it largely does not refer to specific clauses of the proposed Undertaking, but rather constitutes a consideration of the wider context within which the proposed Undertaking exists, and which underpin the more specific analysis of particular proposed clauses. Subsequent chapters consider specific clauses of the proposed Undertaking by reference to this foundational discussion, and refer again to matters in section 44ZZA(3) as relevant.

The discussion in this chapter does not consider each of the matters listed in section 44ZZA(3) in the same order as those matters are listed in that section. Instead, the matters are listed in the following order:

1. any other matters that the ACCC thinks are relevant;
2. the objects of Part IIIA;
3. the public interest, including the interest in having competition in markets (whether or not in Australia);
4. the legitimate business interests of the provider (that is, ABB);
5. the interests of access seekers;
6. the pricing principles in section 44ZZCA; and
7. whether the undertaking is in accordance with an access code that applies to the service.

This re-ordering is simply designed to make the discussion easier to follow; it should not be interpreted as the ACCC placing a particular weight on a matter by virtue of its position in the discussion.

The ACCC notes as a general comment that section 44ZZA(3) describes matters to which the ACCC is required to have regard, not criteria of which the ACCC must be satisfied. The ACCC therefore does not consider that ‘satisfaction’ of a particular ‘criterion’ under section 44ZZA(3) leads to a conclusion that a proposed access undertaking should be accepted. The test under section 44ZZA(3) is whether the Commission considers it “appropriate” to accept the undertaking, having regard to the matters in section 44ZZA(3).

3.3 Any other matters the ACCC thinks are relevant

Section 44ZZA(3)(e) of the TPA provides that, in deciding whether to accept an undertaking, the ACCC may have regard to any other matters it thinks are relevant.

For the reasons outlined below, the ACCC thinks it appropriate for it to have regard to the following matters:

- the *Wheat Export Marketing Act 2008* (Cth) (**the WEMA**), and the intention of Parliament in enacting that legislation; and
- the extent to which the proposed Undertaking is clear and certain.

The ACCC acknowledges that subsection (e) comes at the end of the list of matters to which the ACCC has regard in deciding whether to accept an undertaking. However,

the matters arising under subsection (e) are discussed here as it covers the WEMA, which provides context to the ACCC's consideration as a whole.

3.3.1 The Wheat Export Marketing Act

The WEMA came into effect on 1 July 2008. Section 24 of that Act relevantly requires that, for the period after 1 October 2009, in order for a person that provides port terminal services to also hold or maintain accreditation to export bulk wheat, there must be in operation, under Division 6 of Part IIIA of the TPA, an access undertaking relating to the provision of access to port terminal services for purposes relating to the export of wheat. It is therefore pursuant to section 24 of the WEMA that ABB has proffered the proposed Undertaking to the ACCC.

Regulatory scheme established by the WEMA

Section 3 of the WEMA states that the objects of the Act are to promote the development of a bulk wheat export marketing industry that is efficient, competitive and advances the needs of wheat growers, and to provide a regulatory framework in relation to participants in the bulk wheat export marketing industry.

In relation to the second objective, the WEMA sets up a system for the regulation of Australian bulk wheat exports, establishing an accreditation scheme for exporters and a regulatory body, Wheat Exports Australia (**WEA**), to administer the scheme. Under the WEMA, parties without WEA accreditation are prohibited from exporting wheat in bulk from Australia, and parties seeking accreditation as bulk wheat exporters must be determined by WEA to be 'fit and proper' having regard to certain criteria.

The WEMA therefore replaces the previous 'single desk' marketing arrangements for bulk wheat exports with a system that allows multiple accredited firms to export bulk wheat from Australia. As stated in the Explanatory Memorandum:

'The [WEMA] will introduce competition into the bulk wheat export industry. Rather than forcing growers to sell their wheat through a single exporter they will be able to choose from a number of accredited exporters as well as domestic outlets.'¹⁷

The 'access test' in the WEMA

The WEMA further provides that parties seeking bulk wheat export accreditation that also provide 'port terminal services' must satisfy an 'access test'.

A 'port terminal service' is defined to mean a service (within the meaning of Part IIIA of the TPA) provided by means of a port terminal facility, and includes the use of a port terminal facility.¹⁸ A 'port terminal facility' is defined as:

'...a ship loader that is:

- (a) at a port; and
- (b) capable of handling wheat in bulk;

and includes any of the following facilities:

¹⁷ Explanatory Memorandum, *Wheat Export Marketing Act 2008* (Cth), p. 3.

¹⁸ *Wheat Export Marketing Act 2008* (Cth) s 5.

- (c) an intake/receival facility;
- (d) a grain storage facility;
- (e) a weighing facility;
- (f) a shipping belt;

that is:

- (g) at the port; and
- (h) associated with the ship loader; and
- (i) capable of dealing with wheat in bulk.¹⁹

The 'access test' is outlined in section 24 of the WEMA and, in summary, provides that:

- *for the period between 1 July 2008 and 30 September 2009*: accredited exporters who operate bulk wheat terminals at ports are required to publish a statement on their website outlining the terms and conditions on which they will allow other accredited exporters access to their port terminal facilities (unless, at the relevant time, there is in force a decision under Part IIIA of the Act that a State or Territory regime is an 'effective access regime' and that regime provides for access to the port terminal service for purposes relating to the export of wheat); and
- *for the period on or after 1 October 2009*: exporters that provide port terminal services will be required to have a formal access undertaking pursuant to Part IIIA of the TPA accepted by the ACCC (or that there be in force a decision under Part IIIA of the TPA that a State or Territory regime is an 'effective access regime' and that regime provides for access to the port terminal service for purposes relating to the export of wheat).

Under the 'access test' providers of port terminal services must also comply with 'continuous disclosure rules' set out in subsection 24(4) of the WEMA. In summary, the continuous disclosure rules require the provider of port terminal services to publish on their website:

- their policies and procedures for managing demand for port terminal services (commonly termed 'Port Loading Protocols' or 'Shipping Protocols'); and
- a statement, updated daily, setting out, amongst other things, the name of each ship scheduled to load grain using port terminal services, the estimated date on which grain will be loaded into the ship, the date on which the ship was nominated and the date on which the nomination was accepted (this statement is commonly termed the 'Shipping Stem').

The rationale for accreditation of bulk wheat exporters and the 'access test'

The Explanatory Memorandum to the WEMA compares the options of retaining the single desk for bulk wheat exports (option A) and introducing a scheme for accreditation of bulk wheat exporters (option B). It was considered that option B would:

¹⁹ *Wheat Export Marketing Act 2008* (Cth) s 5.

- significantly increase the marketing options for growers;
- mean that more buyers will be competing for wheat, thereby helping growers get a price that reflects market forces;
- force marketers to improve the services they provide to growers to secure supplies of wheat;
- create the opportunity for potential exporters to compete in the export wheat market, which would be likely to drive innovation in marketing, research and development;
- more effectively manage the risk of market lock out; and
- as a result of increased competition, drive supply chain efficiencies in grain marketing.²⁰

It was acknowledged, however, that under option B the benefits of the reform may be mitigated if ‘...bulk handling companies (and potential exporters) deny other potential exporters reasonable access to critical handling and storage infrastructure.’²¹ The Report of the Senate Standing Committee on Rural and Regional Affairs and Transport on the exposure draft of the WEMA includes discussion of these concerns:

‘It was argued that bulk handling and storage facilities throughout Australia are owned and controlled by a limited number of companies. Concerns were raised that, in the event that some or all of these companies became accredited exporters under the proposed legislation, they may be in a position to limit access to these facilities by other exporters.’²²

The Committee also considered the extent to which such concerns could be dealt with under provisions of the TPA, noting that views from witnesses and submitters on the effectiveness of existing powers under the TPA ‘varied greatly.’²³ In providing its view on the issue, the Committee said:

‘While the committee notes that provisions exist under the TPA to address anti-competitive practices, careful consideration needs to be given to the extent to which these provisions offer practical remedies to the concerns raised during this inquiry.’²⁴

In the Explanatory Memorandum to the WEMA, it was noted that, under option B, a potential exporter having difficulty gaining access to port terminal services could apply to the National Competition Council (NCC) for a declaration that the port

²⁰ Explanatory Memorandum, *Wheat Export Marketing Act 2008* (Cth), pp. 12-13.

²¹ Explanatory Memorandum, *Wheat Export Marketing Act 2008* (Cth), p. 8.

²² Parliament of Australia, Senate Standing Committee on Rural and Regional Affairs and Transport, *Report on the Wheat Export Marketing Bill 2008 Exposure Draft*, para 3.93.

²³ Parliament of Australia, Senate Standing Committee on Rural and Regional Affairs and Transport, *Report on the Wheat Export Marketing Bill 2008 Exposure Draft*, para 3.127.

²⁴ Parliament of Australia, Senate Standing Committee on Rural and Regional Affairs and Transport, *Report on the Wheat Export Marketing Bill 2008 Exposure Draft*, para 3.144.

terminal facility was essential infrastructure as a means of obtaining access. It was noted, however, that this could involve long timeframes.²⁵

It was therefore considered that an ‘option C’, involving the introduction of a scheme of accreditation for wheat exports, plus a mechanism for allowing access to port terminal facilities, would be appropriate.²⁶

The Explanatory Memorandum notes that while the lodgement of an access undertaking will involve costs to the port terminal operator, it will ensure access to port facilities, which will in turn allow marketers to participate effectively in the export of bulk wheat and provide increased choice to growers in their marketing options.²⁷

ACCC’s views

The ACCC therefore considers that the regulatory scheme established by the WEMA, and the rationale for the inclusion of the access test in the statute are, under section 44ZZA(3)(e), matters relevant to the current decision.

In particular, the ACCC acknowledges that the intention of Parliament to promote competition in the export of bulk wheat has various dimensions, including:

- the promotion of competition between marketers for the acquisition of bulk wheat from growers;
- the promotion of competition between exporters for the export of wheat from Australia; and
- the concomitant promotion of competition for associated products and services, such as supply chain services and grower services.

The ACCC further acknowledges Parliament’s recognition that the promotion of competition in the form described may potentially be limited by anti-competitive conduct associated with port terminal facilities, and that the inclusion of the access test demonstrates a clear intention to legislate measures to mitigate the possibility of such conduct undermining the broader intent of the legislation.

The ACCC notes the intention of Parliament in including the access test in the WEMA:

‘This clause [that is, containing the access test] is intended to ensure that accredited exporters that own, operate or control port terminal facilities provide *fair and transparent access* to their facilities to other accredited exporters. The test aims to avoid regional monopolies unfairly controlling infrastructure necessary to export wheat in bulk quantities, to the detriment of other accredited exporters. All accredited exporters should have access to these facilities while allowing the operators of the facilities to function in a commercial environment.’²⁸

²⁵ Explanatory Memorandum, *Wheat Export Marketing Act 2008* (Cth), p. 8 & 13.

²⁶ Explanatory Memorandum, *Wheat Export Marketing Act 2008* (Cth), p. 8.

²⁷ Explanatory Memorandum, *Wheat Export Marketing Act 2008* (Cth), p. 13.

²⁸ Explanatory Memorandum, *Wheat Export Marketing Act 2008* (Cth), p. 31, emphasis added.

The ACCC therefore considers it relevant, and consistent with the intentions of Parliament, to have regard to the extent to which the proposed Undertaking provides for 'fair' access to port terminal services. The ACCC considers that in the current context, 'fair' access ought largely to be equated with non-discriminatory access, reflecting the desirability of ensuring that access to port terminal services is, on the whole, provided on a non-discriminatory basis except where there is a legitimate reason for differential treatment.

The ACCC also considers it relevant, and consistent with the intentions of Parliament, to have regard to the extent to which the proposed Undertaking provides for transparency in relation to the provision of access to port terminal services. That said, the ACCC notes as a general statement that the desirability of transparency ought to be balanced against the desirability of protecting commercially sensitive or otherwise confidential information.

The ACCC notes that ABB has recognised these concepts of fairness and transparency in its supporting submissions:

'...**Non-discriminatory access:** ABB is required to provide access to the Port Terminal Services in accordance with price and non-price terms that include efficiency, fairness and transparency as central elements...'²⁹

'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.'³⁰

3.3.2 Other matters

The ACCC also considers it relevant that the proposed Undertaking provide for sufficient certainty and clarity in its terms, effect and operation, so as to:

- enable the access provider and access seekers to be sufficiently aware of their respective rights and obligations, and thereby avoid unnecessary costs, monetary or otherwise, when utilising the processes set by the proposed Undertaking;
- enable the mediator and/or arbitrator appointed pursuant to the proposed Undertaking to quickly and effectively resolve any dispute that may arise between an access seeker and the access provider; and
- enable the ACCC to quickly and effectively resolve any potential enforcement concerns that may arise regarding potential non-compliance with the proposed Undertaking by ABB.

3.4 The objects of Part IIIA

The objects of Part IIIA are to:

²⁹ ABB Grain Ltd, *Submission to the ACCC*, 16 April 2009, para 2.1(b), emphasis in original.

³⁰ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 8

- promote the economically efficient operation of, use of and investment in the infrastructure by which services are provided, thereby promoting effective competition in upstream and downstream markets; and
- provide a framework and guiding principles to encourage a consistent approach to access regulation in each industry.³¹

3.4.1 ABB's submissions

In relation to this matter, ABB submits that:

‘...the access arrangements (as already exist and now expanded and more fully documented in the Undertaking) promote the economically efficient use of, and investment in, ABB’s bulk wheat export terminals, and also promote competition in upstream and downstream markets by giving industry confidence that the transition to deregulation will not be hindered by port access issues arising from anti-competitive behaviour...’³²

ABB further submits that:

‘To the extent that port terminal facilities cannot be economically duplicated, an undertaking to provide access to services from those facilities on transparent and non-discriminatory terms (backed up by binding dispute resolution procedures) would promote the economically efficient use of those facilities and competition in vertically related markets...

However, critically, the assumption that port terminal facilities cannot be economically duplicated has not been fully established. To the contrary...ABB considers that there is genuine scope for competitive new entry, and there is genuine scope for intra-port competition, particularly between South Australian and Victorian grain export terminals.

Given that ABB has historically provided access to Port Terminal Services in the absence of a formal access undertaking, ABB submits that the ACCC should accept an undertaking that requires it to publish reference prices for a set of standard services without a further requirement to submit price and non-price terms and conditions to the ACCC for prior approval as part of the undertaking. This approach would protect investment incentives and promote economically efficient investments in port terminal facilities.³³

ABB also submits that the proposed Undertaking promotes the objects of Part IIIA by ‘...giving industry confidence that the transition to deregulation will not be hindered by port access issues arising from anti-competitive behaviour.’³⁴

3.4.2 Objects of Part IIIA – promotion of efficiency and competition

The ACCC considers that economic efficiency has three components.

Productive efficiency refers to the efficient use of resources within each firm such that all goods and services are produced using the least cost combination of inputs.

³¹ *Trade Practices Act 1974* (Cth) s 44AA.

³² ABB Grain Ltd, *Submission to the ACCC*, 16 April 2009, para 2.11(a), p. 4.

³³ ABB Grain Ltd, *Submission to the ACCC*, 16 April 2009, para 8.4, p. 28.

³⁴ ABB Grain Ltd, *Submission to the ACCC*, 16 April 2009, para 8.7, p. 29.

Allocative efficiency refers to the efficient allocation of resources across the economy such that the goods and services that are produced in the economy are the ones most valued by consumers. It also refers to the distribution of production costs amongst firms within an industry to minimise industry-wide costs.

Dynamic efficiency refers to the efficient deployment of resources between present and future uses such that the welfare of society is maximised over time. Dynamic efficiency incorporates efficiencies flowing from innovation leading to the development of new services, or improvements in production techniques.

The ACCC notes that its present role is to decide whether or not it is appropriate to accept the proposed Undertaking having regard to the matters in section 44ZZA(3) of the TPA.

It is not the ACCC's role in the current context to re-evaluate the policy considerations of government that led to the removal of the single desk, nor to assess the rationale of the access test. As outlined above, the ACCC acknowledges the objects of the WEMA to promote the development of a bulk wheat marketing industry that is efficient, competitive and advances the needs of wheat growers, and the rationale for including the access test as a measure against the potential for port facility operators to frustrate the competitiveness of that industry. The ACCC is therefore not assessing the *need* for an undertaking in the first place but rather the appropriateness of the proposed Undertaking, having regard to the matters in section 44ZZA(3).

There is no requirement in Division 6 of Part IIIA that requires the ACCC to be satisfied, prior to accepting an access undertaking proffered pursuant to that Division, that it is uneconomical to duplicate the facility by means of which the service the subject of the undertaking is provided.³⁵ In particular, the matters listed in section 44ZZA(3) of Division 6 do not require the ACCC to have regard to whether or not it is uneconomical to duplicate the particular facility. Therefore, even absent the existence of the WEMA, the ACCC considers it is not its role in assessing an undertaking provided under Division 6 of Part IIIA to determine whether the facility to which the undertaking relates is uneconomical to duplicate, nor whether the facility would otherwise meet the requirements for declaration under Division 2.

The ACCC therefore does not consider that its role in the current context is to thoroughly assess the state of competition in the bulk wheat export industry and evaluate whether access undertakings are justified (such as by reason of the port terminal facilities being uneconomical to duplicate). Instead, the ACCC considers that Parliament has expressed a clear intention to require port terminal operators to provide access undertakings to mitigate the potential for anti-competitive harm, and it is in that context that the ACCC must consider the appropriateness of those undertakings as provided.

³⁵ This concept is relevant to Division 2 of Part IIIA of the TPA which sets out a mechanism by which parties may seek to have certain services declared. Section 44G(2) of the TPA provides that the NCC cannot recommend to the Minister that a service be declared unless it is satisfied of various matters, including '...that it would be uneconomical for anyone to develop another facility to provide the service.'

The ACCC nonetheless considers it appropriate, in having regard to the matters in section 44ZZA(3)(aa) and (b) of Part IIIA, to have some regard to the competitive environment in which the services the subject of the undertaking are provided. That is, section 44ZZA(3)(aa), by referring to the objects of Part IIIA, recognises the promotion of the economically efficient operation of, use of and investment in infrastructure, thereby promoting competition in upstream and downstream markets, while section 44ZZA(3)(b) refers to the public interest, including the public interest in having competition in markets (whether or not in Australia).

3.4.3 Objects of Part IIIA – a consistent approach to access regulation

Section 44AA(3)(b) of the TPA states that an object of Part IIIA is to provide a framework and guiding principles to encourage a consistent approach to access regulation in each industry.

In this particular instance, the ACCC notes that the undertaking provided by ABB is one of three undertakings that have been proposed by three bulk handling companies that, taken together, cover services provided by means of facilities at seventeen grain export terminals around Australia. Further, the undertakings have been proffered to the ACCC pursuant to a Commonwealth scheme designed to introduce competition into the bulk wheat export industry.

In this context, the ACCC acknowledges differences in the circumstances of each bulk handler, including differences in the services provided by means of a particular facility, and the extent to which such differences may influence the ACCC's consideration of the appropriateness of the undertaking proposed by that bulk handler.

The ACCC also acknowledges, however, the desirability of encouraging a consistent approach to access regulation, as recognised in section 44AA(b) of the TPA, and considers that, to the extent possible and appropriate, the Undertaking proposed by ABB ought to maintain consistency with the Undertakings proposed by the other bulk handlers.

3.5 The public interest

Section 44ZZA(3)(b) requires the ACCC to have regard to the public interest, including the public interest in having competition in markets (whether or not in Australia).

3.5.1 ABB submissions

ABB submits that the public interest and the interests of access seekers are served by:

‘...ABB continuing to provide access to Port Terminal Services to accredited wheat exporters but under more fully documented arrangements which ensure certainty, transparency and non-discrimination such that the public and access seekers can be confident of a successful transition from a single desk to competition in the export of bulk wheat.’³⁶

ABB further considers that the public interest would be served if:

³⁶ ABB Grain Ltd, *Submission to the ACCC*, 16 April 2009, para 2.11(d), p. 8.

‘...ABB continues to provide access to Port Terminal Services on terms and conditions determined by ABB, subject to clear non-discrimination provisions and a binding process for resolving any dispute about the terms of access. It would protect incentives to make economically efficient investment in Port Terminal Services which would promote the public interest in the long run. It also balances the potentially large cost of regulation with the relatively minimal benefits of access regulation in this case.

The more fully documented arrangements under the Undertakings ensure certainty, transparency and non-discrimination such that the public can be confident of a successful transition from a single desk to competition in the export of bulk wheat³⁷

ABB also submits that:

‘...if the ACCC did not approve the Undertaking or required onerous regulatory requirements, there is a real risk that exporters of bulk wheat who provide Port Terminal Services may cease to be accredited wheat exporters. This may reduce competition between exporters of bulk wheat, which would not be in the interest of the Australian export industry or Australian farmers who would face reduced choice of bulk wheat exporters.’³⁸

3.5.2 ACCC’s views

Section 44ZZA(3)(b) reflects the reference in the Part IIIA objects to the promotion of effective competition in upstream and downstream markets, as discussed above. Therefore, in having regard to this matter, the ACCC again notes the previous discussion regarding the rationales for the WEMA and the access test. However, the public interest also encompasses broader considerations.

Relevantly, the ACCC also considers it appropriate to have regard to the transitional state of the bulk wheat export industry. ABB notes in its submission that the proposed Undertaking ‘...represents an appropriate balance for an industry transitioning from one wheat exporter to multiple sophisticated exporters.’³⁹ Further, ABB submits that the proposed Undertaking ‘...may be only a transitional measure while the industry adapts to deregulation.’⁴⁰

The ACCC recognises that the replacement of the single desk for bulk wheat exports with multiple accredited exporters is a significant change to Australia’s bulk wheat export industry. Experience in dealing with multiple exporters competing in the high volume bulk wheat industry is currently limited to a single season only. To the extent that parties have commented on problems within the industry in the first season following deregulation, the ACCC recognises that certain of those comments likely derive from teething problems as the industry adapts to the changes.

In this context the ACCC recognises the risk and undesirability of imposing regulation that is not appropriate at a time when the industry is newly deregulated and in transition, and the associated risk of distorting the effective development of competition and efficiency in that industry. The ACCC considers it would not be in the public interest for such an outcome to occur. The ACCC notes, in this regard, that ABB’s proposed Undertaking has a short term of two years.

³⁷ ABB Grain Ltd, *Submission to the ACCC*, 16 April 2009, para 8.12-8.13, p. 30.

³⁸ ABB Grain Ltd, *Submission to the ACCC*, 16 April 2009, para 8.15, p. 30.

³⁹ ABB Grain Ltd, *Submission to the ACCC*, 16 April 2009, para 2.5, p. 5.

⁴⁰ ABB Grain Ltd, *Submission to the ACCC*, 16 April 2009, para 2.5(a), p. 5.

3.6 The legitimate business interests of the provider

Section 44ZZA(3)(a) requires the ACCC to have regard to the legitimate business interests of the provider, in this case ABB.

3.6.1 ABB submissions

ABB submits that the proposed access arrangements will promote its legitimate business interest in providing access on price and non-price terms and conditions that ensure that it receives a return on investment that is commensurate with risk.⁴¹

3.6.2 ACCC's views

When having regard to the legitimate business interests of the access provider the ACCC considers whether particular terms and conditions in the proposed Undertaking are sufficient and necessary to maintain those interests. The ACCC agrees with ABB's general proposition that it should be able to receive a return on investment that is commensurate with risk.

Potentially relevant to this criterion, is that, if the ACCC does not accept ABB's proposed Undertaking by 1 October 2009, the marketing arm of ABB is likely to lose accreditation under the WEMA to export bulk wheat.

While acknowledging that loss of accreditation is likely to have adverse commercial consequences for ABB, the ACCC does not consider that such an adverse consequence necessarily outweighs other matters to which the ACCC is having regard in deciding whether it is appropriate to accept the proposed Undertaking. For example, the ACCC does not consider that the loss of accreditation is likely to justify the ACCC accepting the proposed Undertaking where the ACCC takes the view that the proposed Undertaking does not appropriately give effect to the objectives of the WEMA.

That said, the ACCC is making every effort to ensure its assessment of ABB's proposed Undertaking is carried out in a timely manner to alleviate the extent to which the consequences of failing to meet the 1 October 2009 deadline may need to be taken into account by the ACCC.

In this regard, the ACCC notes that ACCC staff began engaging with ABB in March 2008 about the need to ensure that sufficient time (i.e. at least 6 months, if not longer) was allowed for the ACCC's assessment of the proposed Undertaking.

Despite this, the ACCC did not receive the proposed Undertaking until 16 April 2009 but are still endeavouring to accommodate the timing set by ABB as much as possible.

3.7 The interests of access seekers

Section 44ZZA(3)(c) requires the ACCC to have regard to the interests of persons who might want access to the service.

⁴¹ ABB Grain Ltd, *Submission to the ACCC*, 16 April 2009 para 2.11(c), p. 8.

3.7.1 ABB submission

In relation to this matter, ABB submits that:

‘Under the Undertaking, ABB will continue to provide access to Port Terminal Services to any accredited wheat exporter that meets reasonable prudential requirements. Such users are adequately protection by the requirement to publish pricing for standard services, the obligations not to discriminate and the detailed negotiate/arbitrate mechanisms.’⁴²

3.7.2 ACCC’s views

This matter is counterpoised to the ‘legitimate business interests of the provider’ matter. While the two matters may appear to be in conflict with each other, over the long term any conflict is likely to be ameliorated. That is, it is in access seekers’ long-term interest that prices and returns are sufficient to provide the incentives needed to induce the access provider to invest in and adequately maintain services.

To assess the interests of access seekers the ACCC has conducted a public consultation process on the proposed Undertaking, during which the ACCC sought and received comments from a range of participants in the bulk wheat export industry. The ACCC considers that submissions made during the public consultation by actual and potential access seekers are relevant in having regard to section 44ZZA(3)(c). Public submissions provided by interested parties are available on the ACCC’s website.

In summary, the ACCC notes that a number of common matters raised by third parties in submissions concerned:

- the degree of transparency around allocation of shipping capacity, including the criteria used to determine positions on the shipping stem, and the ability of exporters to obtain a shipping slot;
- the acceptance of grain at port that has not come from the port operators’ own storage and handling network;
- the possibility of effectively bypassing the port operators’ up-country storage and handling facilities;
- the availability of information on grain stocks; and
- the reasonableness of terms and conditions of access to supply chain services.

The ACCC notes that this list is a high level summary only of matters raised during the public consultation and is not indicative of matters that the ACCC considers would need to be addressed by the proposed Undertaking.

3.8 The pricing principles in section 44ZZCA

The ACCC is required to have regard to the pricing principles specified in section 44ZZCA of the TPA, which provides as follows:

⁴² ABB Grain Ltd, *Submission to the ACCC*, 16 April 2009, para 8.14, p. 30.

‘The pricing principles relating to the price of access to a service are:

- (a) that regulated access prices should
 - (i) be set so as to generate expected revenue for a regulated service or services that is at least sufficient to meet the efficient costs of providing access to the regulated service or services; and
 - (ii) include a return on investment commensurate with the regulatory and commercial risks involved; and
- (b) that the access price structures should:
 - (i) allow multi-part pricing and price discrimination when it aids efficiency; and
 - (ii) not allow a vertically integrated access provider to set terms and conditions that discriminate in favour of its downstream operations, except to the extent that the cost of providing access to other operators is higher; and
- (c) that access pricing regimes should provide incentives to reduce costs or otherwise improve productivity.⁴³

3.8.1 ACCC’s views

The pricing principles are intended to assist in the achievement of the objects of Part IIIA by ‘providing effective market signals for the efficient use of existing resources and for future investment in infrastructure’.⁴⁴

Pricing principle (a): Recovery of efficient costs

Part IIIA does not prescribe a particular methodology for setting an access price. Rather, pricing principle (a) aims to address the motive for regulating access prices (monopoly pricing) whilst not deterring investment.⁴⁵

The explanatory memorandum states that the ‘starting point to achieving efficient use of infrastructure’ is for the price of access to equal the cost of providing an additional unit of the service.

Pricing principle (b): Pricing structure

Part IIIA does not prescribe a particular access price structure that must be used in an undertaking. However, pricing principle (b) refers to two specific price structures: multi-part pricing and price discrimination.

Multi-part pricing typically involves an up-front price to access the network, plus a per-unit or usage price. Price discrimination occurs where, for instance, individual access users are charged a different price for the same service.

⁴³ *Trade Practices Act 1974* (Cth) s 44ZZCA.

⁴⁴ Revised Explanatory Memorandum, *Trade Practices Amendment (National Access Regime) Bill 2006* (Cth), p. 64.

⁴⁵ Revised Explanatory Memorandum, *Trade Practices Amendment (National Access Regime) Bill 2006* (Cth), p. 65.

Pricing principle (b) provides that a price structure should allow multi-part pricing and price discrimination but only when it aids efficiency.

In particular, where an access provider is vertically integrated, price discrimination in favour of the access provider's own operations should not occur (except when the cost of provision by the provider to other users is higher than provision of the service to itself).

Pricing principle (c): Productivity

Pricing principle (c) refers to the desirability for access pricing regimes to provide incentives for infrastructure providers to make productivity gains without prescribing the specific mechanisms.⁴⁶

The ACCC notes that the proposed Undertaking submitted by ABB does not propose ex ante pricing regulation, and instead proposes a 'publish-negotiate-arbitrate' approach, under which ABB is obliged to publish prices at a certain time.

Accordingly, the ACCC is not, in this context, assessing the appropriateness of pricing for port terminal services.

However, the ACCC considers that the pricing principles are nonetheless relevant in the sense that they provide guidance on the appropriateness of any pricing discrimination envisaged by the proposed Undertaking. It is the ACCC's view that, in accordance with pricing principle (b), price discrimination in favour of ABB's own operations should not occur except when the cost of provision by ABB to other users is higher than provision of the service to itself.

3.9 Whether the undertaking is in accordance with an access code

Section 44ZZAA of the TPA provides that an industry body may give a written code to the ACCC setting out rules for access to a service.⁴⁷ The ACCC may accept the code, if it thinks it appropriate to do so having regard to matters set out in section 44ZZAA(3).⁴⁸ An 'industry body' means a body or association (including a body or association established by a law of a State or Territory) prescribed by the regulations for the purposes of section 44ZZAA.⁴⁹

In having regard to this matter in the current context, the ACCC notes that there is currently no access code in place that applies to the service that is the subject of the proposed Undertaking.

⁴⁶ Revised Explanatory Memorandum, *Trade Practices Amendment (National Access Regime) Bill 2006* (Cth), p. 67.

⁴⁷ *Trade Practices Act 1974* (Cth) s 44ZZAA(1).

⁴⁸ *Trade Practices Act 1974* (Cth) s 44ZZAA(3).

⁴⁹ *Trade Practices Act 1974* (Cth) s 44ZZAA(8).

4 Industry background

Summary

This chapter sets out an overview of the grains industry in South Australia.

4.1 ABB Grain Ltd

ABB is a publicly listed agribusiness with diversified operations including the provision of storage and handling services, grain trading and marketing, grain processing, malt manufacture and pastoral, and rural services. ABB was formed in 2004 as the result of a merger between three South Australian grain companies—the Australian Barley Board, AusBulk and United Grower Holdings.

ABB is the dominant storage and handling company in South Australia and has a minor presence in Victoria. Although the company lost its sole rights to export barley from South Australia on 1 July 2007, it is still the state's dominant barley marketer.⁵⁰

Background information on the grain industry in South Australia is presented below.

4.2 Structure of the wheat industry in South Australia

South Australia is the third largest grain producing state in Australia and over the five years from 2002 to 2006, South Australia has accounted for an average of 18 per cent of Australia's grain production. Grain production makes a major contribution to the South Australian economy. In 2005-06, the sector made up 28 per cent (or \$2.8 billion) of the state's gross food revenue of \$10.1 billion, making it the largest contributing sector in the South Australian food industry. In addition to food revenue, the sector provides an important feed (grain and fodder) input to the livestock industry, which is worth an additional \$600 million.⁵¹

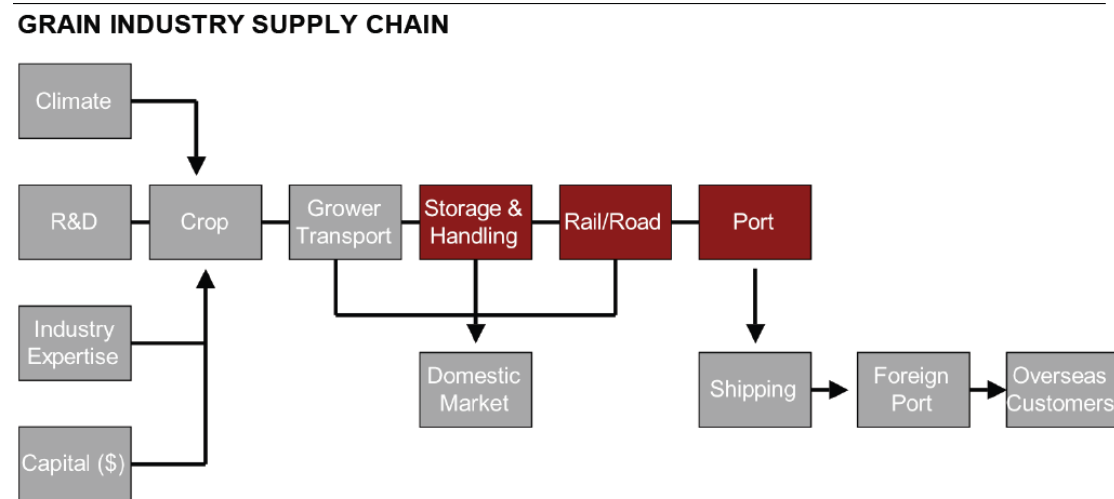
Figure 1.2.1 sets out the grain supply chain for South Australia and includes primary inputs (climate, research and development, industry expertise and capital), grain production, transportation (road, rail and ship), storage and handling and the domestic and foreign markets.⁵²

⁵⁰ Allen Consulting Group (2008) *Competition in the Export Grain Supply Chain*, March, p. 68.

⁵¹ Figures from: South Australia Department of Primary Industries and Resources (2009) *Grain Value Chains*, accessed on 21 July 2009, at: http://www.pir.sa.gov.au/grains/grain_value_chains

⁵² Allen Consulting Group (2008) *Competition in the Export Grain Supply Chain*, March, p. 11.

Figure 1.2.1: Grain industry supply chain



Source: Ernst & Young (2008)

Source: Ernst & Young (2008), in Allen (2008).

The following sections expand on some of the key segments of the supply chain.

4.2.1 Grain production

Around 70 per cent of food grade grain produced in South Australia is exported, with South Australia accounting for 17 per cent of Australia's grain commodity exports. On average, grain commodities contributed 15 per cent to the total value of all exports from South Australia for the period 2002–06. During this period, South Australia exported an average of 3.3 mt of grain, pulse and oilseed annually, representing a free on board value of over \$839 million per annum. In addition, the sector exported around \$338 million of feed grains, processed stock feeds and fodder.⁵³

Wheat is South Australia's main grain crop. South Australia produces around 14 per cent of wheat in Australia, which accounted for roughly 54 per cent of total state production on average in the five years to 2007-08.⁵⁴ The area planted to wheat in South Australia in 2008-09 is estimated at around 2.1 million hectares. Total wheat production is estimated at about 2.3 mt for 2008-09, which is nearly the same as what was produced in the previous season.⁵⁵

According to ABB, the major grain production areas in South Australia are:

- Northern Area (stretching from Quorn in the north to Roseworthy and Stockwell in the south), which is responsible for approximately 30 per cent of total grain production
- Eyre Peninsula (stretching from Pintumba in the west to the Spencer Gulf in the east), which produces approximately 28 per cent of total production

⁵³ Figures from: South Australia Department of Primary Industries and Resources (2009) *Grain Value Chains*, accessed on 21 July 2009, at: http://www.pir.sa.gov.au/grains/grain_value_chains

⁵⁴ ABARE (2009) *Australian Crop Report*, report no. 150, June 2009.

⁵⁵ ABARE (2009) *Australian Crop Report*, report no. 150, June 2009.

- Yorke Peninsula, which produces approximately 19 per cent of total production
- Murray Mallee, which is responsible for approximately 14 per cent of total production
- South East (stretching from Tailem Bend in the north to Millicent in the south), which produces approximately 7 per cent of total production.⁵⁶

Grain from silos in the central and northern areas is now either delivered to nearby railheads such as Crystal Brook for haulage to Adelaide, or moved by road direct to regional ports like Wallaroo, while Port Lincoln serves grain originating from the Eyre Peninsula.

4.2.2 Up-country storage and handling

Two companies operate the majority of grain storage and handling facilities in South Australia. The dominant player is ABB, which according to Allen Consulting Group, handled approximately 95 per cent of the state's wheat receivals between 2001-02 and 2005-06. The other company in South Australia is AWB GrainFlow, which Allen Consulting Group states, handled approximately 5 per cent of the state's wheat receivals for the five years to 2005-06.⁵⁷

ABB owns 111 country silos and has a total network capacity of about 9.5 mt, which is capable of handling the entire South Australian harvest.⁵⁸ Individual country sites range in capacity from less than 10 000 tonnes to more than 440 000 tonnes.⁵⁹

Storage facilities consist of sheds, bunkers, and vertical concrete or steel silos. Storage is filled using fully-automated loading systems and elevators, or using mobile drive-over hopper stackers, which can be moved from site to site to boost intake rates as necessary.

ABB's storage network includes 33 'strategic' sites (figure 1.2.2).⁶⁰ Key features of strategic sites include faster intake and outload rates, a larger range of grain and grade segregations, and lower operating costs. Country sites are generally 'tributary' to an ABB grain export terminal.

⁵⁶ ABB Grain Ltd, *Port Terminal Service Access Undertaking, Submission to the ACCC*, 16 April 2009, p. 13.

⁵⁷ Allen Consulting Group (2008) *Competition in the Export Grain Supply Chain*, March, p. 11.

⁵⁸ ABB Grain Ltd (2009) *Who We Are*, accessed on 21 July 2009, at: <http://www.abb.com.au/AboutABB/WhoWeAre.aspx>.

⁵⁹ ABB (2009) Operational Services, accessed on 21 July 2009, at: <http://www.abb.com.au/StorageHandling/StorageHandlingServices.aspx>.

⁶⁰ ABB (2009) Operational Services, accessed on 21 July 2009, at: <http://www.abb.com.au/StorageHandling/StorageHandlingServices.aspx>.

Figure 1.2.2: ABB grain storage and handling



4.2.3 Transportation

The South Australian Government privatised its rail network in 1997 which was purchased by American regional freight rail operator, Genesee and Wyoming Inc (GWI), who owns and operates short line and regional freight railroads in the United States, Canada, Australia and the Netherlands. GWI provides rail service at 16 ports in North America and Europe and performs contract coal and grain loading and railcar switching for industrial customers.⁶¹

Genesee and Wyoming Australia Pty Ltd (GWA), an Adelaide based business, was formed in June 2006 and is a 100 per cent-owned subsidiary of GWI. GWA is the primary provider of grain rail freight in South Australia.⁶²

South Australia's grain belt is generally close to the coast, so export haul distances are relatively short. On average, 70 per cent of grain produced in South Australia reaches the export facilities via rail transport.⁶³

Road transport, however, is becoming increasingly common for the movement of grain. This is because as noted above grain terminal ports in South Australia are much closer to the grain producing areas than in other states, making direct road transport cheaper and more efficient.⁶⁴ The majority of ABB grain receipt sites are now not

⁶¹ Genesee & Wyoming Inc (2009) *GWI Worldwide—Who We Are*, accessed on 21 July 2009, at: <http://gwiweb.gwrr.com>.

⁶² Single Vision Grains Australia, *Transport Infrastructure Issues paper One—Network Review for the Australian Grains Industry*, January 2007.

⁶³ Allen Consulting Group (2008) *Competition in the Export Grain Supply Chain*, March, p. 11.

⁶⁴ ABB Grain (2008) *ABB and Genesee & Wyoming's New Rail Agreement*, 15 September.

serviced by rail, and the only ports with rail intake are Adelaide, Outer Harbor and Port Lincoln, with the remainder served by road.

Rail usually moves around 1.5 mt to Port Adelaide, and up to 1 mt into Port Lincoln, accounting for around half the export tonnage each year. The proportion is higher in gross tonne kilometre terms, since rail typically handles the task from the more distant areas, notably the task in the Crystal Brook–Jamestown area on the main Sydney Adelaide standard gauge line.⁶⁵

Several narrow gauge lines running north from Adelaide have been closed or had services withdrawn under the private ownership. Most recently, services on the Burra and Eudunda lines have been replaced by road connections to the new railhead at Roseworthy, on the outskirts of Adelaide. The transfer of grain from road to rail at Roseworthy ensures that road vehicles do not mix with heavy traffic on the Sturt Highway, the main road into the Port of Adelaide.⁶⁶

The Eyre Peninsula rail system includes a pair of narrow gauge lines which meet at Cummins, 60 km north of Port Lincoln. These lines are critical to the economy of the Peninsula, which is almost solely dependant on grain growing.⁶⁷

The Eyre Peninsula grain logistics chain is a system separated geographically from any other in Australia. Grain growing is the dominant industry in the entire region, and almost the entire product is exported through Port Lincoln, with only a small proportion consumed domestically outside the region. The rail system is isolated and dedicated entirely to grain (except for a small section west of Ceduna). Three road routes also link the farming region to Port Lincoln.

Considerable export volume is trucked into the only export terminal at Port Lincoln, from the eastern areas not served by rail. ABB has a major receival point at Tumbly Bay which attracts deliveries from the central areas.⁶⁸

4.2.4 Port terminals

There are eight bulk grain terminals all owned by ABB in South Australia, six of which are currently used to export bulk wheat.⁶⁹ The port terminals, along with their storage capacity, and key commodities exported from the port are listed below.

- Port Adelaide—60 000 tonnes storage capacity.
 - *Primary exports:* grains and seeds, limestone, petroleum products, soda ash, motor vehicles, containers, metals and metal scrap,

⁶⁵ Single Vision Grains Australia, *Transport Infrastructure Issues paper One—Network Review for the Australian Grains Industry*, January 2007, p. 23.

⁶⁶ Single Vision Grains Australia, *Transport Infrastructure Issues paper One—Network Review for the Australian Grains Industry*, January 2007, p. 23.

⁶⁷ Single Vision Grains Australia, *Transport Infrastructure Issues paper One—Network Review for the Australian Grains Industry*, January 2007, p. 23.

⁶⁸ Single Vision Grains Australia, *Transport Infrastructure Issues paper One—Network Review for the Australian Grains Industry*, January 2007, p. 23.

⁶⁹ ABB notes at page 9 of its 16 April 2009 submission to the ACCC that Port Pirie and Ardrossan no longer export bulk wheat.

cement/cement clinker, fertilisers, agricultural commodities, iron and steel, livestock, and break-bulk and general cargoes

- Outer Harbor⁷⁰—65 000 tonnes storage capacity.
- Port Giles—75 000 tonnes storage capacity
 - *Primary exports:* grains and seeds.
- Wallaroo—150 000 tonnes storage capacity.
 - *Primary exports:* grains and seeds, and fertilisers.
- Port Lincoln—300 000 tonnes storage capacity.
 - *Primary exports:* grains and seeds, petroleum products, and fertilisers.
- Thevenard—200 000 tonnes storage capacity.⁷¹
 - *Primary exports:* gypsum, grains and seeds, and salt.

4.2.5 Wheat trading

Prior to the introduction of the WEMA on 1 July 2008, AWB had an effective monopoly in the export of bulk wheat through the single desk system. The introduction of the WEMA saw the implementation of an export accreditation system that allows multiple parties to export bulk wheat. In the first season since its introduction, over 20 parties were granted export accreditation.⁷²

This liberalisation of the export of bulk wheat in Australia means that wheat farmers now have more control over the marketing of their product, with several options as to how to market their wheat including: ‘cash’ sales; ‘pool’ sales; and the futures market. In mid 2009 the WEA accredited the first farming based exporter, Greentree Farming which allowed Greentree Farming to exclusively market its own wheat and maintain control of the wheat through the entire supply chain.⁷³

4.2.6 Industry structure—ABB submission

The ACCC’s Issues Paper and information request to ABB on 2 June 2009 included questions on industry structure. ABB’s response to some of these questions is set out below.

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

⁷⁰ Note that, as at the date of this draft decision, Outer Harbor was not yet operational.

⁷¹ ABB Grain Ltd, *Port Terminal Services Access Undertaking*, 16 April 2009.

⁷² For the current list of accredited bulk wheat exporters, see:
<http://www.wea.gov.au/WheatExports/RegisterOfAccreditedWheatExporters.htm>.

⁷³ Wheat Exports Australia, *Greentree Farming - a new era in wheat export marketing*, Media release, 7 July 2009. See: http://www.wea.gov.au/Media/Media_Releases/7July%202009.html

Australian Bulk Alliance's (ABA) Melbourne Port terminal. In this regard, please elaborate on the following:

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 100 km 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).

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 three 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.

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.

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

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.

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 2008-09 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 2009-10 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
- 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.

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

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.

Total exports from Victoria have been relatively low over the past three years (primarily due to drought conditions in Victoria). However, ABB considers that grain collected at each of the Frances, Wolseley, Naracoorte, Millicent and Padthaway receipt 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.

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 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
 - 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
 - seasonal conditions
- ABB may also seek to facilitate swaps at the request of customers
- 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.⁷⁴

4.3 Regulatory regimes

In South Australia, regulated services are subject to the ports access regime set out in Part 3 of the Maritime Services (Access) Act 2000 (the MSA Act). The objects of this Act are to:

- provide access to maritime services on fair commercial terms
- facilitate competitive markets in the provision of maritime services

⁷⁴ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, pp. 14-19.

- protect the interests of users of essential maritime services by ensuring that regulated prices are fair and reasonable having regard to the level of competition in, and efficiency of, the regulated industry
- ensure that disputes about access are subject to an appropriate dispute resolution process.⁷⁵

The following services have been proclaimed by the Essential Services Commission of South Australia (ESCOSA) as regulated services:

- providing, or allowing for, access of vessels to the port;
- pilotage services facilitating access to the port;
- providing berths for vessels at the following common user berths -
 - Port Adelaide Outer Harbor berths numbers 1 to 4 (inclusive), 16 to 20 (inclusive) and 29;
 - Wallaroo berths numbers 1 South and 2 South;
 - Port Pirie berths numbers 5 and 7;
 - Port Lincoln berths numbers 6 and 7; and
 - berths adjacent to the loading and unloading facilities referred to 2 points below;
- providing port facilities for loading or unloading vessels at berths adjacent to the loading and unloading facilities referred to in the next point;
- loading or unloading vessels by means of facilities that -
 - are bulk handling facilities as defined in the *South Australian Ports (Bulk Handling Facilities) Act 1996*; and
 - involve the use of conveyor belts;
- providing access to land in connection with the provision of the above maritime services.⁷⁶

4.3.1 Access regime

The access regime which applies to the regulated service (which includes bulk loading at ports) is set out in part 3 of the *Maritime Services (Access) Act* (the MSA Act). It operates under a negotiate/arbitrate framework. ESCOSA has the power to appoint the arbitrator after consultation with the parties to the dispute (or may elect to arbitrate the dispute itself). There are no legislative provisions within the existing access regime for access providers to submit access undertakings for approval by the regulator, and the access regime under the MSA Act has not been certified as an effective access regime under Division 2A of Part IIIA of the TPA.

⁷⁵ *Maritime Services (Access) Act 2000* (SA), Section 3.

⁷⁶ ESCOSA, <http://www.escosa.sa.gov.au/site/page.cfm?u=70>, accessed 26 July 2009.

4.3.2 Grain storage and handling facilities

The MSA Act also requires ESCOSA to conduct periodic reviews of the price regulation under the regime. In its 2007 ports pricing and access review, ESCOSA considered whether coverage of the access regime should include storage and handling facilities. ESCOSA's draft report observed that:

... while the provision of at-port storage facilities is not defined as a Regulated Service, it is captured within the definition of Maritime Services and could therefore be brought within the scope of the access regime by proclamation.⁷⁷

In its final inquiry report, ESCOSA concluded that, while there may be an argument for extending coverage of the access regime to grain storage and handling facilities at ports, it saw merit in considering the issue as part of a broader review of regulation across the entire supply chain.⁷⁸

4.3.3 Rail access regime inquiry

ESCOSA has been directed by the South Australian Acting Treasurer to conduct an inquiry into the access regime that applies to the major intrastate railways in South Australia. The inquiry is to focus on the extent to which the existing access regime, which is set out in the *Railways (Operations and Access) Act 1997*, is consistent with certain principles under the Council of Australian Government's Competition and Infrastructure Reform Agreement (CIRA). ESCOSA anticipates releasing a final report in September 2009.⁷⁹

⁷⁷ Essential Services Commission of South Australia (2007) *2007 Ports Pricing and Access Review Final Report*, September, p. 36.

⁷⁸ ESCOSA, *2007 Ports Access and Pricing Review, Final Report*, September 2007, p. 40.

⁷⁹ Essential Services Commission of South Australia, *2009 SA Rail Access Regime Inquiry, Draft Inquiry Report*, July 2009.

5 Background, Objectives and Structure sections of the proposed Undertaking

Summary

Background section

It is not necessary for the ACCC to form a view on the appropriateness of the background section pursuant to section 44ZZA(3) given that it is merely descriptive and places no obligations on ABB.

Objectives

The objectives section, critical to the operation of the proposed Undertaking, is not appropriate pursuant to section 44ZZA(3) given concerns with the following particular objectives:

- “The recovery of all reasonable costs associated with the granting of access to the Port Terminal Services” (clause 1.2(e)(i)(A)); and
- “The Port Operator’s ability to meet its own or its Trading Division’s reasonably anticipated requirements for Port Terminal Services” (clause 1.2(e)(i)(D)).

Structure

The structure section of the proposed Undertaking is not appropriate pursuant to section 44ZZA(3) given concerns with:

- The reference to specific terms and conditions being set out in the Port Schedules (clause 2.1(b)(ii));
- The reference to using ‘reasonable endeavours’ to procure (clause 2.3).

It is noted that ABB has since agreed to remove the term ‘reasonable endeavours’ from clause 2.3.

5.1 ABB’s proposed Undertaking

5.1.1 Background section of the proposed Undertaking

ABB’s proposed Undertaking includes the following introductory section at clause 1.1:

1.1 Introduction

- a. The Port Operator operates the Port Terminal Facilities at the Port Terminals.

- b. The Port Terminal Facilities provide services relating to the export of Bulk Wheat and other commodities.
- c. The Port Operator has historically provided access to services provided by the Port Terminals to third parties under open access policies.
- d. The Port Operator or a Related Body Corporate has applied to become an Accredited Wheat Exporter under the *Wheat Export Marketing Act 2008* (Cth).
- e. Under section 24 of the WEMA, a person who is also the provider of one or more port terminal services (as defined under that Act) must satisfy the 'access test' to be eligible for accreditation to export bulk wheat.
- f. The 'access test' under the WEMA requires:
 - i) the person to comply with the continuous disclosure rules in relation to a port terminal service; and
 - ii) either there is:
 - A. an access undertaking in operation (under Division 6 Part IIIA of the Trade Practices Act 1974) relating to the provision to Accredited Wheat Exporters of access to the port terminal service for purposes relating to export of Bulk Wheat; or
 - B. a decision in force that a regime established by a State or Territory for access to the port terminal service is an effective access regime (under Division 2A Part IIIA of the TPA) and under that regime Accredited Wheat Exporters have access to the port terminal service for purposes relating to the export of Bulk Wheat.
- g. The Port Operator has submitted this Undertaking to the ACCC for approval under Part IIIA of the TPA for the purpose of satisfying the 'access test'.

5.1.2 Objectives of the proposed Undertaking

At clause 1.2 ABB states that the proposed Undertaking has the following objectives:

- a. providing a framework to manage negotiations with Applicants for access to services provided by certain facilities at the Port Terminals in relation to export of Bulk Wheat;
- b. establishing a workable, open, non-discriminatory and efficient process for lodging and processing Access Applications;
- c. providing a non-discriminatory approach to pricing under which the Port Operator publishes reference prices and terms and conditions for the provision of certain standard services annually;
- d. operating consistently with the objectives and principles in Part IIIA of the TPA and the Competition Principles Agreement;
- e. reaching an appropriate balance between:

- i. the legitimate business interests of the Port Operator, including:
 - A. the recovery of all reasonable costs associated with the granting of access to the Port Terminal Services;
 - B. a fair and reasonable return on the Port Operator's investment in the Port Terminal Facility commensurate with its commercial risk;
 - C. the Port Operator's business interests relating to the export of grain other than Bulk Wheat and to the export of non-grain commodities using the Port Terminal Facilities;
 - D. the Port Operators' ability to meet its own or its Trading Divisions' reasonably anticipated requirements for Port Terminal Services; and
- ii. the interest of the public, including:
 - A. ensuring efficient use of resources; and
 - B. the promotion of economically efficient investment, use and operation of the Port Terminals; and
- iii. the interests of Applicants wanting access to the Port Terminal Services, including providing access to the Port Terminal Services:
 - A. on non-discriminatory price and non-price terms; and
 - B. in a transparent, open, efficient and non-discriminatory manner;
- f. providing an efficient, effective and binding dispute resolution process in the event that the Port Operator and the Applicant are unable to negotiate a mutually acceptable Access Agreement; and
- g. in accordance with the objective in s44AA(b) of the TPA, providing for a uniform approach to access to the Port Terminal Services at the different Port Terminals to the extent practicable having regard to the different characteristics of the Port Terminals.

5.1.3 Structure of the proposed Undertaking

The structure section of ABB's proposed Undertaking is set out at clause 2 as follows:

2.1 Components

- (a) This Undertaking applies in relation to access to Port Terminal Services provided by means of Port Terminal Facilities at a number of Ports Terminals. The Port Terminal Facilities are geographically separate and have different physical and operating characteristics and modes of operation.
- (b) Accordingly, this Undertaking comprises:
 - i) these **General Terms** (and **Schedules**) which apply to Port Terminal Services provided by means of each Port Terminal Facility; and
 - ii) the specific **Port Schedules** which describe:
 - i) any variations to the general Port Terminal Services provided by means of a Port Terminal Facility; and

- ii) any specific terms and conditions on which access will be offered to the Port Terminal Services provided by means of that Port Terminal Facility,

and apply only to Port Terminal Services provided by means of that particular Port Terminal Facility.

2.2 Priority

The terms of a Port Schedule will prevail over the General Terms to the extent of any inconsistency between them.

2.3 Obligation to procure

If the performance of an obligation under this Undertaking requires a Related Body Corporate of the Port Operator to take some action or refrain from taking some action, the Port Operator must use reasonable endeavours to procure that Related Body Corporate to take that action or refrain from taking that action.

5.2 ABB's supporting submissions

In response to AGEA's claims (outlined below) in relation to the requirement to make 'reasonable endeavours' to procure a body corporate to take action (or refrain from taking action) ABB states that it was never the intent of clause 2.3 to enable ABB to 'avoid its obligations' as claimed by AGEA, and ABB agrees to delete the words 'use reasonable endeavours to' from the clause.⁸⁰

In response to a question in the ACCC's Issues Paper dated 29 April 2009 relating to whether clause 1.2(e)(i)(D) of the proposed Undertaking means 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, ABB states:

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.⁸¹

5.3 Submissions received

5.3.1 Australian Grain Exporters Association

AGEA states that the objectives clause is 'a mere statement of intent', highlights the BHCs' 'inevitable conflict of interest' and 'may be used to condone discriminatory behaviours by the BHCs'.⁸² AGEA submits that this point is demonstrated at clauses 1.2(e)(i)(A) and (D) which refer to the legitimate business interests of the BHCs,

⁸⁰ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 68.

⁸¹ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 52.

⁸² Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, p. 16.

including ‘recovery of reasonable costs’ and their ability ‘to meet its own or its Trading Divisions’ reasonably anticipated requirement for Port Terminal Services’.⁸³

AGEA submits that the objectives clause defines the objectives of the proposed access undertakings using nebulous concepts like “operating consistently with”, “reaching an appropriate balance”, “fair and reasonable return ... commensurate with ... commercial risk”, “the interest of the public” and so on. AGEA submits that there is no tangible basis upon which to assess actual compliance.⁸⁴

AGEA states that it is impossible to assess the appropriateness of the structure of the proposed Undertaking because it does not contain or refer to the prices or terms and conditions on which access will be provided. On this basis, AGEA states ‘it is impossible to say whether specific terms and conditions relating to a particular Port Facility should be permitted to override General Terms’.⁸⁵

AGEA submits that clause 2.3 is unsatisfactory in that it enables ABB, or its related entities to avoid their obligations under the proposed Undertaking. AGEA states:⁸⁶

If a related entity is required to take or refrain from taking some action under the proposed access undertaking, the related entity should be a party to the undertaking or the BHCs should be obliged to procure the related entity to take or refrain from taking action. A ‘reasonable endeavours’ obligation is not sufficient. There should also be an obligation for the BHCs to indemnify any party that suffers loss or damage as a result of the breach.

5.3.2 South Australian Farmers Federation

The South Australian Farmers Federation (SAFF) submits that the objectives of the proposed Undertaking are vague and somewhat meaningless and questions what is meant by ‘appropriate’ at clause 1.2(e).⁸⁷

SAFF also questions whether the ‘legitimate business interests’ as set out in the objectives section can all be achieved while also providing for the interest of access seekers. Further, SAFF states that the reference to the ‘reasonably anticipated requirements’ of ABB or its trading division in clause 1.2(e)(i)(D) is not appropriate.⁸⁸

⁸³ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, p. 16.

⁸⁴ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, p. 16.

⁸⁵ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, p. 17.

⁸⁶ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, p. 17.

⁸⁷ South Australian Farmers Federation Grains Industry Committee, *Submission in relation to proposed ABB access undertaking*, May 2009, p. 3.

⁸⁸ South Australian Farmers Federation Grains Industry Committee, *Submission in relation to proposed ABB access undertaking*, May 2009, p. 4.

5.4 ACCC's views

5.4.1 Background to the proposed Undertaking

Given that the background section of the proposed Undertaking is merely descriptive and does not place any obligations on ABB, it is not necessary for the ACCC to consider whether it is appropriate pursuant to section 44ZZA(3).

5.4.2 Objectives of the proposed Undertaking

Unlike the background section, the objectives section is critical to the working of the proposed Undertaking.

The objectives section ties into key clauses of the proposed Undertaking in the following manner:

- the first non-discriminatory access clause (5.4) provides that ABB must not provide access on 'different terms' unless such terms are, inter alia, 'consistent with the objectives of this Undertaking set out in clause 1.2';⁸⁹
- the second non-discriminatory access clause (8.3) provides that ABB undertakes not discriminate between access seekers or in favour of its trading division in providing Port Terminal Services, 'subject to clause 5.4 and 8.4' (note that, as mentioned above, clause 5.4 refers back to clause 1.2 – the objectives section); and
- it is proposed that any variations to the Port Loading Protocols must be consistent with the objectives section;⁹⁰

The ACCC considers that the objectives section, as a whole, is not appropriate having regard to matters at section 44ZZA given its concerns with the following particular objectives:

“The recovery of all reasonable costs associated with the granting of access to the Port Terminal Services” (clause 1.2(e)(i)(A))

The ACCC considers that the reference to 'reasonable costs' at clause 1.2(e)(i)(A) is ambiguous with respect to what costs an access provider may recover through charges levied on the access seeker. Further, it is not clear whether allowing for recovery of 'all reasonable costs' would be in accordance with the pricing principles at 44ZZCA (which make reference to 'efficient costs' rather than 'reasonable costs').

The ACCC considers that this ambiguity does not appropriately balance the legitimate business interests of ABB with the interests of access seekers, nor does it provide for sufficient certainty and clarity in the terms of the proposed Undertaking.

The ACCC is of the view that this objective is more likely to be appropriate pursuant to section 44ZZA(3) of the TPA if the word 'efficient' is substituted for 'reasonable'.

⁸⁹ ABB Grain Ltd, *Port Terminal Services Access Undertaking*, 16 April 2009, clause 5.4(a)(ii)(C).

⁹⁰ ABB Grain Ltd, *Port Terminal Services Access Undertaking*, 16 April 2009, clause 8.2(b)(i)(A).

“The Port Operator’s ability to meet its own or its Trading Division’s reasonably anticipated requirements for Port Terminal Services” (clause 1.2(e)(i)(D))

The ACCC considers that the interpretation of clause 1.2(e)(i)(D) in the context of an access undertaking (rather than in relation to a Part IIIA arbitration) is unclear and that it is likely that difficulties would arise in determining the proper application of this clause. It is noted that the use of the term ‘reasonably anticipated requirements’ in section 44W of the TPA is referring to “an existing user” (i.e. any existing user, not just the access provider).

One interpretation of the clause could be that ABB intends to reserve and set aside its own or its Trading Division’s ‘reasonably anticipated requirements’ for port capacity and then provide access to third parties for the remaining capacity. This could allow ABB to significantly promote the interests of ABB above those of potential access seekers in a manner that is neither in the interests of potential access seekers, or in the broader public interest, including the public interest in having competition in markets. This interpretation of the clause runs counter to the objectives of the WEMA and particularly the objective of ensuring ‘fair’ access to port terminal services.

Given the ambiguity over the interpretation of this provision, another concern with this clause is that it does not provide for sufficient certainty and clarity in the terms of the proposed Undertaking.

5.4.3 Structure of the proposed Undertaking

The ACCC considers that the structure section is not appropriate having regard to matters at section 44ZZA(3) given its concerns with the following particular objectives:

Specific terms and conditions in the Port Schedules (clause 2.1(b)(ii))

The ACCC is of the view it is not appropriate for the Port Schedules to include any ‘specific terms and conditions on which access will be offered’.

The terms and conditions on which access is offered are set out in the standard terms offered to accredited wheat exporters. Having other terms and conditions in the Port Schedules is likely to create confusion and uncertainty about the terms of access (even with the operation of clause 2.2 – setting out that the terms of a Port Schedule will prevail over the General Terms to the extent of any inconsistency).

It is the ACCC’s view that, instead, the terms and conditions of access should *all* be clearly set out in the standard terms offered to accredited wheat exporters.

The ACCC considers this will not cause any issues for ABB because, despite clause 2.1(b)(ii), its Port Schedules do not appear to include any specific terms or conditions, but rather refer to additional terms set out in other documents.

Using ‘reasonable endeavours’ to procure (clause 2.3)

The ACCC considers that if another body was required to act (or not act) in a certain manner by the proposed Undertaking, then that party should be a party to the proposed Undertaking.

However, the ACCC considers that inclusion of the obligation to procure clause is nonetheless appropriate in the unlikely case that it is required.

However, an obligation to use ‘reasonable endeavours’ does not appropriately balance the legitimate business interests of ABB with the interests of access seekers, who require more certainty that the terms of the proposed Undertaking will be carried out.

It is the ACCC’s view that the words ‘use reasonable endeavours to’ should be removed from this clause to strengthen the obligation to procure. As set out above, the ACCC notes that ABB has already agreed to such a change.⁹¹

⁹¹ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 68.

6 Term of, and variation to, proposed Undertaking

Summary

Commencement

The commencement clause is not appropriate pursuant to section 44ZZA(3) given it does not clarify that the Undertaking may commence for the purposes of passing the access test under WEMA at a different time from its commencement date under the TPA.

Term

The two year term of the proposed Undertaking is appropriate pursuant to section 44ZZA(3) given the transitional state of the wheat export industry.

Withdrawal and variation

It is not necessary for the ACCC to form a view on the appropriateness of the withdrawal and variation clauses pursuant to section 44ZZA(3) given that they are merely descriptive.

Extension

The extension clause of the proposed Undertaking is not appropriate pursuant to section 44ZZA(3) given that clause 3.6(a) refers to submitting an undertaking 'at least three months' before the expiry of the proposed Undertaking. This is inconsistent with the statutory obligation in section 44ZZBC of the TPA for the ACCC to use reasonable endeavours to make a decision on an access undertaking application within 6 months.

6.1 ABB's proposed Undertaking

6.1.1 Commencement and Term

The proposed Undertaking is expressed to commence on 1 October 2009.⁹²

The proposed Undertaking provides for expiration on the earlier of 30 September 2011, or when the ACCC consents to ABB withdrawing the Undertaking in accordance with Part IIIA of the TPA, including under clause 3.3 of the Undertaking (which provides for 'early withdrawal,' as described below).⁹³

⁹² ABB Grain Ltd, *Port Terminal Services Access Undertaking*, 16 April 2009, clause 3.1.

⁹³ ABB Grain Ltd, *Port Terminal Services Access Undertaking*, 16 April 2009, clause 3.2.

6.1.2 Withdrawal & variation of the proposed Undertaking

The proposed Undertaking provides that ABB may seek the approval of the ACCC to the withdrawal of the Undertaking if:

- a. ABB or a Related Body Corporate ceases to be an Accredited Wheat Exporter under the WEMA; or
- b. the WEMA is amended such that an Accredited Wheat Exporter is no longer required to have in place an access undertaking under Part IIIA of the TPA in relation to access to any of the Port Terminal Services for the purposes of obtaining or maintaining accreditation under that Act.⁹⁴

In terms of variation, the proposed Undertaking provides that ABB may seek the approval of the ACCC for variation via the removal of the Port Terminal Services provided at a particular Port on the occurrence of:

- a. the disposal of the Port Terminal to a person who is not a Related Body Corporate of ABB, and ABB ceases to operate or control the Port Terminal Facilities at that Port Terminal; or
- b. if there is in force under Division 2A Part IIIA of the TPA a regime established by a State or Territory for access to services provided at the Port Terminal, and under that regime Accredited Wheat Exporters have access to Port Terminal Services (or services substantially similar to the Port Terminal Services) for purposes relating to the export of Bulk Wheat.⁹⁵

The proposed Undertaking also provides, in relation to variation, that ABB may seek the approval of the ACCC to vary the Undertaking if ABB is of the opinion that circumstances have changed such that the Undertaking:

- a. is no longer commercially viable for ABB or becomes inconsistent with the objectives set out in clause 1.2; or
- b. is no longer consistent with the Continuous Disclosure Rules as a result of changes to the WEMA.⁹⁶

The proposed Undertaking also provides that, prior to seeking the approval of the ACCC for a variation of this kind,⁹⁷ ABB will first consult with counterparties to Access Agreements and Applicants regarding the proposed variation.⁹⁸

6.1.3 Extension of the proposed Undertaking

Clause 3.6 proposes a mechanism for extension of the proposed Undertaking in certain circumstances. In summary, this clause provides:

⁹⁴ ABB Grain Ltd, *Port Terminal Services Access Undertaking*, 16 April 2009, clause 3.3.

⁹⁵ ABB Grain Ltd, *Port Terminal Services Access Undertaking*, 16 April 2009, clause 3.4.

⁹⁶ ABB Grain Ltd, *Port Terminal Services Access Undertaking*, 16 April 2009, clause 3.5.

⁹⁷ That is, per clause 3.5(a), where ABB is of the opinion that circumstances have changed such that the undertaking is no longer commercially viable or becomes inconsistent with the objectives; or that the undertaking is no longer consistent with the Continuous Disclosure Rules as a result of changes to the WEMA.

⁹⁸ ABB Grain Ltd, *Port Terminal Services Access Undertaking*, 16 April 2009, clause 3.5(b).

- a. at least three months before the expiry of the Undertaking, ABB will submit to the ACCC a written statement outlining whether or not it intends to submit a new Undertaking to the ACCC for its consideration;
- b. if ABB intends to submit a new Undertaking to the ACCC, ABB will also apply to the ACCC for an extension of the expiring Undertaking;
- c. the application for extension would include a proposed extension period which, in ABB's view, 'reasonably estimates the time it would take for [ABB] to formulate a new Undertaking and have that undertaking take effect following approval by the ACCC.'⁹⁹

It is proposed that if ABB does not propose to submit to the ACCC a new Undertaking, then the steps at paragraphs (b) and (c) are not applicable.¹⁰⁰ It is also proposed that nothing in clause 3.6 (regarding the extension of the Undertaking) prevents ABB from submitting a new Undertaking to the ACCC at any time during the term of current Undertaking.¹⁰¹

6.2 ABB's submissions

In its initial submission, ABB notes that the term of the proposed Undertaking is 2 years, and submits that a lesser term 'may impose an unreasonable administrative burden on both ABB and the Commission if the Undertaking is required to be renewed.'¹⁰²

Further, ABB submits that a longer term is not appropriate given:

'...the potentially transitional nature of the oversight of wheat exports by the WEA, the review of the wheat export arrangements by the Productivity Commission in 2010 and the likelihood that the newly deregulated wheat export industry will undergo rapid change and evolution over the next few years.'¹⁰³

In its supplementary submission, ABB clarified, in response to a question from the ACCC, that the obligation in clause 3.5(b) on ABB to '...first consult with counterparties to Access Agreements and Applicants...' prior to seeking the ACCC's approval for a variation to the proposed Undertaking would involve ABB:

- advising interested parties of the proposed changes and the reasons for the same;
- providing parties with a 'reasonable opportunity' to comment and raise concerns in relation to the proposed changes;
- considering issues raised by third parties and seek further information where necessary;
- considering whether, in light of comments made, any modification to the proposed change is desirable or necessary; and

⁹⁹ ABB Grain Ltd, *Port Terminal Services Access Undertaking*, 16 April 2009, clause 3.6(c).

¹⁰⁰ ABB Grain Ltd, *Port Terminal Services Access Undertaking*, 16 April 2009, clause 3.6(d).

¹⁰¹ ABB Grain Ltd, *Port Terminal Services Access Undertaking*, 16 April 2009, clause 3.6(e).

¹⁰² ABB Grain Ltd, *Submission to the ACCC*, 16 April 2009, para 2.3, p. 4.

¹⁰³ ABB Grain Ltd, *Submission to the ACCC*, 16 April 2009, para 2.4, p. 5.

- providing feedback to parties and ‘making a decision,’ and providing reasons for its decision.¹⁰⁴

ABB submits that the timeline for consultation will vary depending on the circumstances, with interested parties given longer to consider material changes, and less time to consider minor amendments.¹⁰⁵

ABB also submits in its supplementary submission, in response to comments from AGEA (see below), that:

- the circumstances in clauses 3.4 and 3.5 in which the proposed Undertaking may be varied are designed to provide sufficient flexibility to vary the proposed Undertaking in the event it is no longer appropriate;
- the ACCC would need to approve any variation pursuant to section 44ZZA(7) of the TPA;
- the inclusion of specific circumstances in which variation may be sought is intended only ‘...to provide further certainty and transparency to wheat exporters, the Commission and ABB.’¹⁰⁶

6.3 Submissions received from third parties

6.3.1 Australian Grain Exporters Association¹⁰⁷

Term

The Australian Grain Exporters Association (AGEA), in its submission of 29 May 2009, suggested that the two year term of the proposed Undertaking is unacceptable to wheat exporters and unlikely to promote efficient investment. AGEA submits that wheat exporters ‘need the comfort of knowing that their investment is protected by guaranteed access to port terminal services for at least five years.’¹⁰⁸

AGEA submits that the proposed Undertaking should operate for a minimum of five years and have a common expiry date with the Undertakings of the other bulk handlers.¹⁰⁹

Early withdrawal and variation

In relation to the variation of the proposed Undertaking, AGEA submits that:

¹⁰⁴ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, pp. 31-32.

¹⁰⁵ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 32.

¹⁰⁶ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, pp. 68-69.

¹⁰⁷ The ACCC notes that AGEA’s submission of 29 May 2009 was made in relation to all three bulk handlers. In summarising AGEA’s submission, the ACCC interprets references to ‘the bulk handlers,’ ‘the BHCs’ and ‘the Port Operators’ as references to ABB in circumstances where the AGEA submission is commenting on aspects common to all three of the undertakings.

¹⁰⁸ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 7.1, p. 18.

¹⁰⁹ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, Schedule 1, para D2(i), p. 40.

- a. the circumstances in which ABB may seek to vary the proposed Undertaking are broader than the TPA;¹¹⁰
- b. the provider of an access undertaking is adequately protected by section 44ZZA(7) of the TPA,¹¹¹ and it is unnecessary for the proposed Undertaking to specify the circumstances in which ABB may seek the ACCC's approval for withdrawal or variation, as this is covered by that section;¹¹²
- c. 'it is not appropriate for the undertaking to specify the circumstances in which the ACCC may (or may not) consent to a variation of an access undertaking as this may fetter the ACCC's statutory discretion;¹¹³ and
- d. if the proposed Undertaking is to contain a term regarding variation, that term should be consistent with section 44ZZA(7) of the TPA.¹¹⁴

AGEA also notes that the proposed Undertaking provides that ABB may seek variation if the Port Terminal is disposed to a person who is not a Related Body Corporate of ABB, and ABB ceases to operate or control the Port Terminal Facilities at that Port Terminal. AGEA submits that '[a]ny disposal of a port terminal service that is the subject of an access undertaking should be strictly on terms that access to those services continues.'¹¹⁵

Extension

AGEA submits that there is a 'mismatch' between what is suggested in the proposed Undertaking in relation to extension and what is specified in section 44ZZBC(1) of the TPA in terms of extension to an access undertaking. AGEA submits that the bulk handlers should be required to submit a statement outlining their intention to provide a new undertaking at least six months prior to the expiry of the existing Undertaking, and to submit a new undertaking not less than six months before the expiry of the existing Undertaking.¹¹⁶

6.4 ACCC's consideration

6.4.1 Commencement and Term

Section 44ZZBA(1) of the TPA provides:

- (1) If the Commission accepts an access undertaking or an access code, it comes into operation at:

¹¹⁰ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 7.2, p. 18.

¹¹¹ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 7.2, p. 18.

¹¹² Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, Schedule 1, para D2(iii), p. 40.

¹¹³ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 7.2, p. 18.

¹¹⁴ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, Schedule 1, para D2(iv), p. 40.

¹¹⁵ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 7.3, p. 18.

¹¹⁶ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 7.4, p. 18.

- (a) If, within 21 days after the Commission publishes its decision, no person has applied to the [Australian Competition] Tribunal for review of the decision – the end of that period; or
- (b) If a person applies to the Tribunal within that period for review of the decision and the Tribunal affirms the decision – the time of the Tribunal’s decision.

However, section 24(3) of the WEMA provides:

- (1) For the purposes of paragraph (2)(c) [regarding whether a person passes the access test at a particular time]:
 - (a) assume that subsection 44ZZBA(1) of the *Trade Practices Act 1974* had never been enacted; and
 - (b) assume that an access undertaking comes into operation at the time when the ACCC publishes its decision to accept the undertaking.

The Explanatory Memorandum to the WEMA explains that this clause was included to clarify that the ACCC’s decision to accept an access undertaking is sufficient to pass the access test. The Explanatory Memorandum goes on to state that:

...This contrasts with section 44ZZBA of the *Trade Practices Act 1974* which provides for appeal processes before an undertaking comes into force. Subclause 24(3) of the Bill does not prevent appeals against the ACCC’s decisions from taking place, but means that the access test is passed once the ACCC approves an undertaking. This has been done to eliminate the possibility of a third party delaying the accreditation of a port terminal service provider through vexatious use of the legal process. A port terminal service provider should not be disadvantaged by such appeals if it has acted in good faith and provided an access undertaking that is satisfactory to the ACCC...

Given the interaction between section 44ZZBA(1) of the TPA and section 24(3) of the WEMA, the ACCC considers it is not appropriate for the proposed Undertaking to simply specify that it commences on 1 October 2009.

It would be more likely to be appropriate if the clause specified that this was the commencement date for the purposes of section 24 of the WEMA.

The ACCC considers it is appropriate for the proposed Undertaking to have a term of two years. In taking this view the ACCC notes the transitional state of the bulk wheat export industry and the desirability of avoiding the imposition of regulation that is not appropriate on a newly deregulated industry, which would not be in the public interest. The ACCC notes that, given the transitional state of the industry, access arrangements that are appropriate now may not be appropriate in several years time. The ACCC considers that a short term undertaking (of two years) mitigates these risks.

6.4.2 Withdrawal and variation

Section 44ZZA(7) of the TPA states that an access provider may withdraw or vary an undertaking at any time, but only with the consent of the ACCC. Further, the ACCC

may consent to a variation of the undertaking if it thinks appropriate, having regard to the matters in section 44ZZA(3).¹¹⁷

The ACCC considers that, in light of section 44ZZA(7), it is unnecessary for the proposed Undertaking to specify the particular circumstances in which ABB may seek the withdrawal or variation of the proposed Undertaking. The ACCC considers that the clauses ABB has proposed are merely indicative of the circumstances in which variation or withdrawal may be sought, and in no way fetter the discretion of the ACCC in relation to those matters as provided under the TPA.

Therefore, it is not necessary for the ACCC to form a view on the appropriateness of the withdrawal and variation clauses pursuant to section 44ZZA(3) given that they are merely descriptive.

6.4.3 Extension

Section 44ZZBB of the TPA provides, in relation to the extension of access undertakings:

- (1) If an access undertaking is in operation under section 44ZZBA (including as a result of an extension under this section), the provider of the service may apply in writing to the Commission for an extension of the period for which it is in operation.
- (2) The provider of the service must specify in the application a proposed extension period.
- (3) The Commission may, by notice in writing, extend the period for which the undertaking is in operation if it thinks it appropriate to do so having regard to the matters mentioned in subsection 44ZZA(3). The notice must specify the extension period.¹¹⁸

The ACCC considers that, in light of section 44ZZBB, it is unnecessary for the proposed Undertaking to specify the particular circumstances in which ABB may seek the extension of the proposed Undertaking. The ACCC considers that the clauses ABB has proposed are merely indicative of what ABB may do in seeking an extension, and in no way fetter the discretion of the ACCC in relation to those matters as provided under the TPA.

Furthermore, it is the ACCC's view that clause 3.6(a) of the proposed Undertaking is not appropriate pursuant to section 44ZZA(3). This clause refers to ABB submitting a statement regarding whether or not it intends to submit a new undertaking at least three months before the expiry of the proposed Undertaking. The ACCC considers that, in light of the statutory obligation in section 44ZZBC of the TPA for the ACCC to use reasonable endeavours to make a decision on an access undertaking application within 6 months of receiving the application, or such longer period, the reference to 3 months in clause 3.6(a) creates confusion and is not appropriate. The ACCC also notes that it is not possible to foresee whether ABB will wish to submit a different undertaking in the future, or the length of time it would take for the ACCC to consider such undertaking, and it is therefore not appropriate to attempt to anticipate such time frames in the current proposed Undertaking.

¹¹⁷ *Trade Practices Act 1974* (Cth) s 44ZZA(7).

¹¹⁸ *Trade Practices Act 1974* (Cth) s 44ZZBB(1) – (3), note omitted.

7 Scope

Summary

In the present circumstances, it is appropriate that ABB's proposed Undertaking applies only to wheat (rather than all grains).

In the present circumstances, it is appropriate that ABB's proposed Undertaking applies only to port terminal services (rather than including up-country services).

The drafting of the scope of the proposed Undertaking is not appropriate because it lacks clarity. In relation to the drafting of the scope of the proposed Undertaking:

- it would be appropriate for the definition of Port Terminal Services to be amended to make it clear that the lists of port terminal services in the Port Schedules are not exhaustive;
- it would be appropriate for the Port Schedules to expressly include 'cargo accumulation';
- it would be appropriate for clause 4.4(d) (regarding sharing of efficiency savings) to be removed given its lack of clarity.

It is not necessary for ABB's proposed Undertaking to expressly provide for access to port terminals by employees of superintendence companies.

7.1 ABB's proposed Undertaking

ABB's proposed Undertaking applies to access to Port Terminal Services provided by means of its Port Terminal Facilities located at Port Adelaide, Outer Harbor, Port Giles, Wallaroo, Port Lincoln and Thevenard. Port Terminal Services are defined at clause 4.1 in the Undertaking as:

"Port Terminal Services" means 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.¹¹⁹

ABB further outlines the nature of Port Terminal Services stating that subject to the Port Schedules, they may include:

- a. intake and receival services;
- b. storage and handling services;
- c. ship nomination, acceptance, booking, cancellation and cargo accumulation;
and
- d. ship loading.¹²⁰

¹¹⁹ ABB Grain Ltd, *Port Terminal Services Access Undertaking*, 16 April 2009, clause 4.1.

The proposed Undertaking also sets out the meaning of Port Terminal Facilities:

“Port Terminal Facility” means a ship loader that is:

- (a) at a Port Terminal; and
- (b) capable of handling Bulk Wheat;

and includes any of the following facilities:

- (c) an intake/receival facility;
- (d) a grain storage facility;
- (e) a weighing facility;
- (f) a shipping belt;

that is:

- (g) at the Port Terminal; and
- (h) associated with the ship loader; and
- (i) capable of dealing with Bulk Wheat.

The Port Terminal Facilities at each Port Terminal are described in the relevant Port Schedules.¹²¹

The proposed Undertaking also seeks to clarify what is not covered by the Undertaking, stating:

...

- (b) To avoid doubt, this Undertaking does not apply:
 - (i) to access to services not being Port Terminal Services provided by the Port Operator in relation to Bulk Wheat; or
 - (ii) in relation to other facilities owned by the Port Operator which are part of the grain supply chain such as up country receival and accumulation facilities; or
 - (iii) to the transportation of Bulk Wheat to port; or
 - (iv) to grains which are not wheat; or
 - (v) to wheat which is not Bulk Wheat.¹²²

ABB’s proposed undertaking provides more detail on the Port Terminal Facilities and Port Terminal Services on a port by port basis in Schedules A to F. The schedules include a description of the capacity of the port, and a description of the services that ABB undertakes to offer at each particular port, including:

¹²⁰ ABB Grain Ltd, *Port Terminal Services Access Undertaking*, 16 April 2009, clause 4.3.

¹²¹ ABB Grain Ltd, *Port Terminal Services Access Undertaking*, 16 April 2009, clause 4.2.

¹²² ABB Grain Ltd, *Port Terminal Services Access Undertaking*, 16 April 2009, clause 4.4(b).

- Receiving;
- Storage;
- Weigher services; and
- Ship loading services.¹²³

7.2 ABB supporting submissions to the proposed Undertaking

In its supplementary submission ABB states that the definition of Port Terminal Services included in its proposed Undertaking is modelled on, and consistent with the definition adopted in the WEMA.¹²⁴

ABB states that there is no requirement under the WEMA to include services which are not Port Terminal Services in its proposed Undertaking.¹²⁵ ABB states that the approach it has taken to the proposed service definition involves both a ‘broad and inclusive definition’ which adequately covers all relevant services which it provides to wheat exporters, coupled with port specific schedules which set out the standard services which are provided to wheat exporters at each port terminal.¹²⁶

In response to industry submissions, ABB provided the following clarification on the operation of its service 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, receiving, 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)¹²⁷ 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.¹²⁸

ABB considers that its approach to service definition is consistent with:

- the need to provide a description of the relevant services; and

¹²³ ABB Grain Ltd, *Port Terminal Services Access Undertaking*, 16 April 2009, Schedules A–F.

¹²⁴ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 67.

¹²⁵ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 8.

¹²⁶ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 68.

¹²⁷ Note that this appears to be a drafting error in it is the Port Schedules A – F rather than Schedule 2 that contain the Port Schedules for each port terminal.

¹²⁸ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 67.

- the need to avoid over-prescription by including an exhaustive list.¹²⁹

ABB states that including an exhaustive list would not be appropriate 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.¹³⁰

ABB also clarifies that the proposed Undertaking will apply to the port terminal service component of any bundled offer, for example its Export Select service, which is a bundled service offered by ABB encompassing storage, freight, insurance, cargo assembly, quality management and loading on the ship.¹³¹ In this regard ABB states:

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.¹³²

In response to the question in the ACCC's Issues Paper about how the proposed Undertaking would interact with other grains exported via ABB's port terminals, ABB states:

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.¹³³

7.3 Submissions from interested parties

7.3.1 Australian Grain Exporters Association

AGEA submits that the scope of the proposed Undertaking should not be limited to services at port, and not limited to only bulk wheat. AGEA states that upstream facilities cannot feasibly be separated from port terminal services and notes that

¹²⁹ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 68.

¹³⁰ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 68.

¹³¹ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 29.

¹³² ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, pp. 28-29.

¹³³ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 28.

currently the port operator provides both port services and upstream services under a single contract.¹³⁴ AGEA states:

It is artificial to try to compartmentalise port terminal services from the upstream services when such services are all provided by the same company and under the same contract.¹³⁵

AGEA submits that as the proposed Undertaking only covers bulk wheat, port operators have the potential to restrict access to port by exhausting the port terminal's capacity in favour of other grains.¹³⁶

AGEA submits that the service definition must include 'all services provided by means of the port terminal facilities to which the undertaking applies, as well as the use of the port terminal facilities'.¹³⁷ Further, AGEA states that the service definition must identify the geographical parameters of the port terminal facilities and include all service provided within that area. It states that the geographical boundaries should at least begin at the point where the wheat arrives and include every other point until the wheat is loaded into the ship's hold.¹³⁸ However, AGEA points out the limitations of defining the service on geographical lines, providing an example of where storage facilities at some ports in Western Australian and South Australia ports are located outside the geographical confines of the port.¹³⁹

AGEA sets out in detail what it considers must be included in the service definition:

- i) daily intake to port by grade;
- ii) information of stock on hand at port;
- iii) port capacity;
- iv) stock movements back out of port (prior consultation with marketer in question);
- v) managing port-related stock swaps;
- vi) weighing of wheat upon receipt by BHCs and again upon outturn onboard vessel;
- vii) unloading;
- viii) storage;

¹³⁴ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, p. 4.

¹³⁵ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, p. 9.

¹³⁶ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, p. 10.

¹³⁷ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, p. 19.

¹³⁸ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, p. 19.

¹³⁹ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, p. 20.

- ix) fumigation and management—quality of grain is to be maintained at the same level as when it was delivered to the BHCs “quality in = quality out” over the rail;
- x) segregating/blending as directed by AWE;
- xi) accumulating;
- xii) elevating to ship;
- xiii) sampling of wheat upon receipt by BHCs and again upon outturn onboard vessel;
- xiv) loading, stowing and trimming;
- xv) access by independent superintendent/surveyor;
- xvi) documentation evidencing the process;
 - A. weight
 - B. quality
 - C. AQIS compliance
- xvii) managing vessel nominations and shipping stem on a timely basis;
- xviii) notifying problems and respond to request from marketers on a timely basis e.g. daily report on quality loaded.¹⁴⁰

7.3.2 South Australian Farmers Federation

In relation to the drafting of the scope of the proposed Undertaking the South Australian Farmers Federation Grains Industry Committee (SAFF) notes that “[i]t is pleasing that there are separate Port Schedules for the six ports in South Australia and that these detail the facilities and capacities at each port.”¹⁴¹

However, SAFF states that:

In the case of this Undertaking by ABB Grain, the scope is far too narrow. In fact clauses 4.3 and 4.4 directly conflict with each other, and there needs to be a determination of what is in and what is not in the Undertaking.

For this Undertaking, the services to be covered must not only include the port terminal services, but the freight and up-country storage and handling. In South Australia, the ports, storage and transport network are all integrated and either owned or controlled by ABB Grain. And under ABB Grain’s Export Select there is a bundled storage and logistics package available for exporters. In fact, ABB Grain itself admits that “*Export Select allows ABB the maximum flexibility to choose grain paths and manage the supply chain in the most efficient way*” (clause 4.10 of ABB Grain submission).

¹⁴⁰ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, pp. 19-20.

¹⁴¹ South Australian Farmers Federation Grains Industry Committee, *Submission in relation to proposed ABB access undertaking*, May 2009, p. 4.

In South Australia with 80% of the cereal crop exported, the whole grains industry is designed around the ports and with ABB Grain's Export Select program in place it enables ABB Grain to have an export chain monopoly and with a monopoly charging structure in place. This needs to be subject to competition.¹⁴²

7.3.3 Grain Industry Association of Victoria

The Grain Industry Association of Victoria (GIAV) (who provided a submission relating to all three bulk handlers, not just ABB) submits that the scope of the proposed Undertaking should not be limited to services at the port terminal, but should also cover rail and road access.¹⁴³ GIAV states that it is often 'upstream access' issues - for instance transport to port, and the capacity of the bulk handler to load transport at its up-country facilities - that are the constraining factor on export capacity.¹⁴⁴

GIAV states that the BHCs charge a higher fee for handling grain from third parties.¹⁴⁵ GIAV submits that this should not be allowed to occur pursuant to the proposed Undertaking.

GIAV also submits that the Undertaking should apply equally to parties who use the port operators' up-country services and those that do not.¹⁴⁶

7.3.4 New South Wales Farmers Association

The NSW Farmers Association (who provided a submission relating to all three bulk handlers, not just ABB) notes that the proposed Undertaking does not cover up-country storage and handling facilities and is concerned that 'a lack of regulation has possibly led to the deterioration of competition, and therefore higher fees and charges which are inevitably passed on to the industry'.¹⁴⁷

7.3.5 Victorian Farmers Federation Grains Group

The Victorian Farmers Federation (VFF) considers that the current wheat export marketing legislation is flawed due to its limited scope.¹⁴⁸

7.3.6 Intertek

Intertek submits that some port operators unnecessarily restrict the rights of exporters and customers to appoint an independent superintendent to supervise the loading of a vessel, and collect samples and monitor quality. Intertek submits that superintendent

¹⁴² South Australian Farmers Federation Grains Industry Committee, *Submission in relation to proposed ABB access undertaking*, May 2009, pp. 5-6.

¹⁴³ Grain Industry Association of Victoria, *Submission in relation to proposed access undertakings*, 1 June 2009, p. 1.

¹⁴⁴ Grain Industry Association of Victoria, *Submission in relation to proposed access undertakings*, 1 June 2009, p. 1.

¹⁴⁵ Grain Industry Association of Victoria, *Submission in relation to proposed access undertakings*, 1 June 2009, p. 2.

¹⁴⁶ Grain Industry Association of Victoria, *Submission in relation to proposed access undertakings*, 1 June 2009, p. 2.

¹⁴⁷ NSW Farmers Association, *Submission in relation to proposed access undertakings*, June 2009, p. 5.

¹⁴⁸ Victorian Farmers Federation, *Submission in relation to proposed access undertakings*, 28 May 2009, p. 1.

companies need access to maintain a chain of custody on samples; and conduct testing and monitor the quality of cargo during loading.¹⁴⁹ Intertek states that there appears to be a disparity among the port operators in the grain industry and those in other industries, such as oil and chemical plants, that permit greater access to their ports.¹⁵⁰

7.3.7 SGS Australia

SGS states that superintendence and inspection companies ‘play a vital role in facilitating trade by assisting their clients to mitigate the substantial risk taken on by parties buying and selling large quantities of grain’.¹⁵¹ SGS submits that Australian port operators are generally very restrictive in granting access to superintendence companies at loading, and is concerned that the ‘continuation of such policies will jeopardize Australia’s place in the international market in the future’.¹⁵²

7.4 ACCC’s views

This section sets out the ACCC’s views as to whether the services definition in the proposed Undertaking is appropriate having regard to the matters in section 44ZZA(3) of the TPA.

7.4.1 Scope of the proposed service definition

Appropriate that the proposed Undertaking relates only to wheat

The ACCC accepts ABB’s submissions that it is appropriate that the proposed Undertaking applies only to wheat.

The ACCC recognises that, as ABB has submitted, it is clear that the intention of the WEMA is that the proposed Undertaking should apply only to wheat.

This is because section 24 of the WEMA requires that, for the period after 1 October 2009, in order for a person that provides port terminal services to also hold or maintain accreditation *to export bulk wheat*, there must be in operation, under Division 6 of Part IIIA of the TPA, an access undertaking relating to the provision of access to port terminal services for *purposes relating to the export of wheat* (our emphasis).

The ACCC also considers that limiting the scope of the Undertaking to wheat reduces the risk and undesirability of imposing regulation that is not appropriate at a time when the industry is newly liberalised and in transition.

However, the ACCC recognises that limiting the proposed Undertaking to wheat has the potential to create a number of issues in the grains industry.

First, limiting the proposed Undertaking to wheat leaves open the possibility that different port terminal protocols could apply for wheat than apply for other grains.

¹⁴⁹ Intertek, *Submission in relation to proposed access undertakings*, 29 May 2009, p. 5.

¹⁵⁰ Intertek, *Submission in relation to proposed access undertakings*, 29 May 2009, p. 5.

¹⁵¹ SGS Australia, *Submission in relation to proposed access undertakings*, 26 May 2009, p. 1.

¹⁵² SGS Australia, *Submission in relation to proposed access undertakings*, 26 May 2009, p. 2.

In this regard, it is very encouraging that ABB has submitted that the Port Loading Protocols for wheat will apply to all grains shipping through ABB's port terminals. The ACCC considers that this approach will alleviate any possibility of inconsistency between protocols that apply to wheat and those applying to other grains.

The second issue is one raised by AGEA, that given the proposed Undertaking relates only to wheat, port operators have the potential to restrict access to port by exhausting the port terminal's capacity in favour of other grains.¹⁵³

While the ACCC has no evidence to suggest that such behaviour would be likely to occur, the ACCC recognises that providing a greater level of transparency over stocks at port would assist access seekers and would alleviate the potential for port operators to engage in this behaviour. Accordingly, in the Other Issues chapter the ACCC sets out its view that publication of stocks at port (all grains) would be an appropriate part of any revised proposed Undertaking.

The ACCC also notes that if an access seeker experiences access issues in relation to access the port terminal services for the export of wheat, that have been influenced in some way by decisions made about other grains, that the access seeker could seek to arbitrate on that access issue or enforce the non-discrimination clause in the proposed Undertaking.

Appropriate that proposed Undertaking relates only to services offered at port

The ACCC also accepts ABB's submissions that it is appropriate that the proposed Undertaking applies only to services offered at port (not upcountry).

The ACCC recognises that, as ABB has submitted, it is clear that the intention of the WEMA is that the proposed Undertaking should apply only to services offered at port.

In this regard, the ACCC notes that the Explanatory Memorandum to the WEMA dismissed calls to extend the access test to cover up-country services, stating that:

Up-country facilities do not display natural monopoly characteristics as they have low barriers to entry and there are already a number of competitors in the industry who provide up-country storage services.¹⁵⁴

The Explanatory Memorandum goes on to note that an extension of the access arrangements to up-country storage facilities would 'impose an excessive regulatory burden'.¹⁵⁵ Further, the Second Reading Speech of the WEMA provides:

The Senate inquiry also identified concerns in relation to the potential for bulk-handling companies to restrict access to up-country storage facilities in a similar manner to concerns in relation to port facilities.

It is unclear from the evidence presented to the Senate inquiry whether the problem would necessarily arise, and if so, the extent of legislation that would be required to correct it.

¹⁵³ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, p. 10.

¹⁵⁴ Explanatory Memorandum, *Wheat Export Marketing Bill 2008*, p. 13.

¹⁵⁵ Explanatory Memorandum, *Wheat Export Marketing Bill 2008*, p. 14.

If the highest level of regulation were to be imposed on the more than 500 up-country facilities, there is no doubt that this would create increased compliance costs which would almost certainly be directly passed back to growers.

The government will, therefore, continue to monitor the ability of exporters to access up-country storage facilities.

Let me say here, if any problems are identified then the government will take steps to remedy the situation including, if necessary, the development of a code of conduct.¹⁵⁶

Nevertheless, the ACCC is cognisant of the submissions made calling for the Undertaking to be extended to include services offered at ABB's up-country storage and handling facilities. Many of these submissions stated that it was artificial to draw a distinction between services offered at port and those offered up-country.

However, the ACCC, in this process, has not formed any views on the competitiveness of the supply of up-country storage and handling services. As set out in the Legislative Framework chapter, the ACCC does not consider that its role in this process was to conduct a thorough assessment of the state of competition in the bulk wheat export supply chain.

It is the ACCC's view that, given the clear express intention of the WEMA, and having regard to the risk and undesirability of imposing regulation that is not appropriate at a time when the industry is newly liberalised and in transition, the ACCC considers that it is appropriate pursuant to section 44ZZA(3) of the TPA that the scope of the proposed Undertaking be limited to services at port.

The ACCC notes, however, that providing access at the port creates incentives for other parts of the supply chain to be as efficient as possible, as access to the port would facilitate dissatisfied customers taking the option of bypassing ABB's up-country facilities.

Drafting of the scope lacks clarity

While the ACCC recognises that the ABB has attempted to draft the scope of its proposed Undertaking to be consistent with the service definition in the WEMA, the ACCC nevertheless considers that the drafting of the scope of ABB's proposed Undertaking lacks clarity and is therefore not appropriate pursuant to section 44ZZA(3).

The definition of Port Terminal Service in the WEMA is:

Port terminal service means a service (within the meaning of Part IIIA of the *Trade Practices Act 1974*) provided by means of a port terminal facility, and includes the use of a port terminal facility.¹⁵⁷

A Port Terminal Facility is defined in WEMA the following manner:

“Port Terminal Facility” means a ship loader that is:

- (a) at a Port Terminal; and

¹⁵⁶ House of Representatives, *Votes and Proceedings, Hansard*, Thursday 29 May 2009, pp. 76-77.

¹⁵⁷ *Wheat Export Marketing Act 2008* (Cth) s 5.

(b) capable of handling Bulk Wheat;

and includes any of the following facilities:

(c) an intake/receival facility;

(d) a grain storage facility;

(e) a weighing facility;

(f) a shipping belt;

that is:

(g) at the Port Terminal; and

(h) associated with the ship loader; and

(i) capable of dealing with Bulk Wheat.¹⁵⁸

Clause 4.1(b) – amendment to make it clear that the lists of port terminal services in the Port Schedules are not exhaustive

ABB states that including an exhaustive list would not be appropriate 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.¹⁵⁹ ABB states that it has structured the service definition to strike a balance between the need to describe the relevant services and the risk of over-prescription by including an exhaustive list.¹⁶⁰

However, the ACCC considers that the current drafting of the scope of ABB's proposed Undertaking does risk inadvertently excluding relevant services.

Despite ABB's submission, it is not clear whether the services described in the Port Schedules are exhaustive. That is, clause 4.1(b) provides that Port Terminal Services 'means the services described in the Port Schedule' (emphasis added). This drafting leaves the services definition open to an interpretation that the specified services in the Port Schedules may be an exhaustive list.

Therefore, for the avoidance of doubt, the ACCC is of the view that the service description should include drafting such that any services necessarily required by access seekers to port terminal services are captured. This would be consistent with ABB's stated intention. This could be achieved by the substitution of clause 4.1(b) with the following:

Port Terminal Services means the services described in the Port Schedules in relation to Bulk Wheat provided by means of a Port Terminal Facility, and includes the use of a Port Terminal Facility and the use of all other associated infrastructure necessary to allow an Accredited Wheat Exporter to export Bulk Wheat through that Port Terminal.

¹⁵⁸ *Wheat Export Marketing Act 2008* (Cth) s 5.

¹⁵⁹ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 68.

¹⁶⁰ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 68.

Port Schedules – inclusion of ‘cargo accumulation’

The ACCC is of the view that it would be appropriate for cargo accumulation services to be explicitly included within the scope of the Undertaking.

The ACCC accepts arguments made by AGEA that cargo accumulation is an essential part of port terminal services. The ACCC considers that a transparent cargo accumulation procedure is an important element of the port terminal service, as the potential costs to the industry could be significant if the cargo accumulation process is poorly managed.

The ACCC notes that the exclusion of ‘cargo accumulation’ from the Port Schedules may have been inadvertent given that clause 4.3(c) of the proposed Undertaking includes a reference to ‘cargo accumulation’ (although the ACCC understands that clause 4.3 is merely illustrative in nature).

Removal of clause 4.4(d) – irrelevant to scope

The ACCC notes that under the heading “What this Undertaking does not cover”, clause 4.4(d) provides:

Nothing in this Undertaking requires a Port Operator or Related Body Corporate to share efficiency savings or benefits from the operation of a separate integrated supply chain service whether or not the integrated supply chain service utilises the Port Terminal Facilities.

The ACCC considers that the rationale for, and implications of, clause 4.4(d) are not clear.

The ACCC is of the view that inclusion of this clause in the context of defining the scope of the Undertaking introduces an unnecessary degree of uncertainty for access seekers and is therefore not appropriate.

Not necessary for ABB’s proposed Undertaking to expressly provide for access to employees of superintendence companies

The ACCC notes that several submissions called for increased access to ports for employees of superintendence companies.

The ACCC accepts that there may be benefits in allowing employees of superintendence companies to access port terminals, particularly in relation to improving the transparency of port operations.

However, the proposed Undertaking is an undertaking to provide access to port terminal services to *accredited wheat exporters*. It is not an undertaking to provide access to employees of superintendence companies.

The ACCC notes that a failure of ABB to allow an accredited wheat exporter to bring an employee of a superintendence company into the port terminal area could be an issue dealt with by negotiation or arbitration (see the Publish, Negotiate, Arbitrate chapter of this draft decision).

Regardless of the merits of providing access to employees of superintendence companies to port terminals, this issue is outside the scope of the intention of the access test.

8 Publish/Negotiate/Arbitrate

Summary

The ACCC is of the view that, in the present circumstances, it is appropriate that ABB's proposed Undertaking adopts a publish-negotiate-arbitrate approach (rather than providing for ex ante price regulation). In forming this view, the ACCC has had regard to the transitional state of the industry and the relatively short duration of the proposed Undertaking.

The ACCC considers, however, that the drafting of the publish-negotiate-arbitrate component of the proposed Undertaking is not appropriate. A more appropriate publish-negotiate-arbitrate model for ABB's proposed Undertaking would:

- include an indicative access agreement setting standard terms for access to the service;
- require ABB to publish a single set of prices for port terminal services, which may include differentiated prices for different circumstances (i.e., for different processes for testing of grain depending on where it has been stored – but *only* where these processes are justifiable with regard to hygiene, quality or associated factors), provided those circumstances are transparently stated and the pricing differences are justified on the basis of different costs;
- require ABB to publish prices within a timeframe that allows sufficient opportunity for access seekers to negotiate non-standard terms and prices;
- provide appropriate holding over arrangements to ensure access seekers are not delayed in obtaining access by reason of engaging in a negotiation with ABB on non-standard terms or prices, or by reason of resolving a dispute with ABB pursuant to the processes in the proposed Undertaking;
- address the issues identified by the ACCC in the discussion below regarding the timeframes and lack of clarity and certainty in the drafting of the proposed Undertaking, as well as the disproportionate discretion of the access provider;
- not include a 'pre-condition' to invoking the dispute resolution process, as currently included in clause 6.3(c);
- provide that when a Dispute is referred to arbitration, it is referred to the ACCC in the first instance;
- provide a mechanism by which the ACCC may consider whether or not it wishes to arbitrate the Dispute;
- provide for the Dispute to be arbitrated by the ACCC if it so chooses, or for the Dispute to be arbitrated by a private arbitrator if the ACCC so chooses;
- permit the ACCC to conduct an arbitration adopting the processes and having regard to the matters set out in Part IIIA of the TPA if it chooses to be the arbitrator;
- require a private arbitrator, if appointed, to keep the ACCC informed of the progress of the arbitration, including timelines and processes for making submissions; and

- allow the ACCC to make submissions in relation to an arbitration conducted by a private arbitrator.

The ACCC seeks views on:

- ABB's submissions (outlined below) regarding the appropriateness of its proposed 30 September date for publication of price terms; and
- The dispute resolution provisions in ABB's proposed Standard Terms for 2009/2010 (annexed to this Draft Decision at **Annexure A**)

8.1 ABB's proposed Undertaking

The proposed Undertaking proposes a 'publish-negotiate-arbitrate' model for dealing with the publication of prices and terms, negotiating for access and resolving disputes. The key relevant clauses are 5, 6 and 7 of the proposed Undertaking, though other clauses are also relevant.

8.1.1 Obligation to publish price and non-price terms

Clause 5.1 obliges ABB, by no later than 30 September each year, for access to each of its Standard Port Terminal Services, to publish 'Reference Prices' and 'Standard Terms.' If ABB has not published by that time at the commencement of the proposed Undertaking, it must publish within 15 Business Days of commencement. Unless varied, the Reference Prices and Standard Terms must apply at least until 30 September of the next year.

8.1.2 Access, Standard Terms and Standard Services

Clause 5.2 provides that the 'Standard Port Terminal Services' for each Port are set out in the relevant Port Schedules. Further, clause 5.2(b) provides that, unless otherwise specified in a Port Schedule, access to a Standard Port Terminal Service (and ABB's obligation to enter into an Access Agreement for them) will only be offered for a term expiring no later than 30 September of the year following the year in which the Standard Terms were first published, subject to appropriate 'holding over' provisions.

Clause 5.1(e) provides that if an Applicant seeks access to non-standard Port Terminal Services, ABB and the Applicant may negotiate different prices and non-price terms.

Clause 5.3 provides that parties may agree to include terms in an agreement applying to services other than Port Terminal Services, but that the Undertaking only applies to the terms relating to the provision of Port Terminal Services. Clause 5.3(a) of the Undertaking also provides that the Standard Terms must include the Port Loading Protocols. Clause 6.7(b) reiterates that a negotiated Access Agreement will, unless otherwise agreed between ABB and the Applicant, at least include the Port Loading Protocols.

Clause 5.4 provides that if an Applicant requests a Standard Port Terminal Service, ABB must *offer*, in accordance with clause 6, that Service at the Reference Prices for that Service applicable at that time. Clause 6 sets out the negotiation process (see below). Clause 6.7(b)(i) reiterates that ABB must offer the Standard Terms to the

Applicant where the Applicant requests access to a Port Terminal Service, subject to the Applicant satisfying the Prudential Requirements (see below).

Clause 5.4 goes on to provide that ABB must not *provide access* on terms¹⁶¹ which are different from the Standard Terms and Reference Prices, or which differ between Applicants/Users, except in certain circumstances. Per clause 5.4, ABB may provide access on different terms where those terms are:

- consistent with the objects of the proposed Undertaking;
- offered on an arm's length commercial basis; and
- commercially justifiable, taking into account the 22 matters listed in clause 5.5.

Clause 5.4(b) contains an obligation regarding non-discrimination. Please refer to the Non-Discrimination chapter for further discussion of this obligation. Clause 6.7 reiterates that, subject to clauses 5.4 and 5.5, ABB may offer amended Standard Terms to reflect terms which ABB considers reasonably necessary or desirable to accommodate a request for access to a non-standard Port Terminal Service. Further, clause 6.7 states that ABB may agree changes to the Standard Terms requested by the Applicant.

Clause 6.7(a) provides that the granting of access is finalised by the execution of an Access Agreement. Clause 6.7(c) provides that once the Applicant has notified ABB that it is satisfied with the terms and conditions of the Access Agreement as drafted, ABB will, as soon as reasonably practicable, provide a final Access Agreement (or if applicable, an amendment to an existing Access Agreement) to the Applicant for execution. Clause 6.7(d) provides that if ABB offers an Access Agreement and the Applicant accepts the terms and conditions offered in that Access Agreement, ABB and the Applicant will execute the Access Agreement. The clause states that the parties will use reasonable endeavours to comply with this clause as soon as practicable.¹⁶²

8.1.3 Negotiating for access

Good faith negotiations

Clause 6.1 of the Undertaking provides that ABB will negotiate in good faith for the provision of access to Port Terminal Services.

Confidentiality

Clause 6.2 relates to confidentiality during the negotiation process. It provides that if a party provides 'Confidential Information' to the other party as part of the negotiation process, the party receiving that information will treat it as secret and confidential, as the property of the provider, and will not use the information for any purpose outside the provisions of the Undertaking. A party may disclose the Confidential Information to the extent necessary for the provision of advice from legal

¹⁶¹ There appears to be a typographical error in clause 5.4(a)(ii). The ACCC interprets clause 5.4(a)(ii) to include the words 'on terms' after the word 'Division' and before the words 'which are.'

¹⁶² ABB Grain Ltd, *Port Terminal Services Access Undertaking*, 16 April 2009, clause 6.7.

advisors, financiers, accountants or other consultants, provided those persons are under a legal obligation not to disclose the information. The confidentiality obligation is reiterated in clause 6.3(b).

Provision of information by ABB to Applicant

Clause 6.4(a) provides that, if requested by the Applicant, ABB will provide the Applicant with information related to access to the Port Terminal Services that may be reasonably required by the Applicant in relation to the Access Application. ABB will provide this information subject to:

- ABB not disclosing any information which would breach a confidentiality obligation or which it considers is commercially sensitive in relation to its own operations; or
- the Applicant paying the reasonable costs incurred by ABB in obtaining information that is not ordinarily and freely available to ABB.

Under clause 6.4(a)(ii)(B), ABB may also refuse an information request if it is unduly onerous, or the expense and resources required to provide the information is disproportionate to the benefit to be obtained from the information.

Access application, acknowledgement and commencement of negotiations

Clause 6.5(a)(i) provides that requests for access to Port Terminal Services are to be submitted in the form of an Access Application, which is set out at Schedule 1. The form requires the Applicant to provide 'request details,' being season; customer application type and business category; and 'applicant details', being company name; ACN/ABN; website; address; contact details; details of authorised company representative, including authorisation; and duration of the agreement sought. Clause 6.5(a)(ii) provides that an Applicant may seek initial meetings with ABB to discuss the application and seek clarification on the process as outlined in the Undertaking, or the information requirements of the form.

Parties will commence negotiation to progress towards an Access Agreement as soon as reasonably possible following ABB's acknowledgement of receipt of an Access Application.¹⁶³ Clause 6.5(b) requires ABB to acknowledge receipt of the Application within five Business Days of receipt, or such longer period as required if ABB requires additional information regarding, or clarification of, the Application. If ABB seeks further information or clarification, it must advise the Applicant of the additional information or the clarification within five Business Days of receipt of the Application. Upon receiving the required information or clarification, ABB will provide written acknowledgement of the receipt of the completed Access Application within five Business Days. The 'Negotiation Period' commences upon ABB's acknowledgement of receipt.¹⁶⁴

Negotiation, 'pre-conditions' to negotiation and ceasing negotiation

Clause 6.4(b) provides that:

¹⁶³ ABB Grain Ltd, *Port Terminal Services Access Undertaking*, 16 April 2009, clause 6.6(a).

¹⁶⁴ ABB Grain Ltd, *Port Terminal Services Access Undertaking*, 16 April 2009, clause 6.6(b).

1. ABB reserves the right to negotiate only with Applicants who comply with the requirements and processes set out in the Undertaking, and that if an Applicant does not comply and ABB considers that such non-compliance is material, ABB is not obliged to continue negotiations with the Applicant;
2. the Applicant must be an Accredited Wheat Exporter;
3. ABB may require, at any time, the Applicant to demonstrate that it can meet the Prudential Requirements (see further below), and ABB may refuse to commence negotiations, or may cease negotiations, with an Applicant if they do not meet or are unable to demonstrate that they meet the Prudential Requirements;
4. ABB may at any time refer a request for access to the arbitrator if ABB is of the view that the Applicant's request is frivolous in nature, or that the Applicant is not negotiating in good faith. If the arbitrator determines that the request is frivolous, then ABB will be entitled to cease negotiations, and will not be obliged to comply with the proposed Undertaking in respect of the request.

Clause 6.4(b)(iv) provides that if ABB refuses to negotiate for the reasons described at points 1 or 3 above, then within 10 Business Days of the decision to refuse to negotiate, ABB must explain in writing to the Applicant the reasons for the refusal.

Clause 6.6 provides that ABB will be entitled to cease negotiations upon the cessation of the 'Negotiation Period,' which will occur upon:

1. ABB believing that the negotiations are not progressing in good faith towards the development of an access agreement within a reasonable time period;
2. ABB receiving evidence confirming that the Applicant no longer satisfies the Prudential Requirements;
3. the execution of an Access Agreement;
4. written notification from the Applicant that it no longer wishes to proceed with its Access Application; or
5. the expiration of three months, or if an extension is agreed upon, at the end of that extended period.

Clause 6.4(b)(vi) states that if the Applicant considers that ABB has unreasonably refused to commence or unreasonably ceased negotiations under clause 6.4(b) or clause 6.6(c), then the Applicant may refer the matter to an arbitrator.

Clause 6.6(b)(v) states that if ABB receives evidence confirming that the Applicant no longer satisfies the Prudential Requirements, it will advise the Applicant of the evidence and issue a notice of intent to end the Negotiation Period, to become effective ten Business Days after the issue of the notice. ABB will be required to provide the Applicant with written reasons for its decision to end the Negotiation Period.

Prudential requirements

Clause 6.4(b)(iv) stipulates that to meet the Prudential Requirements, the Applicant must:

- be solvent; and
- the Applicant, or a Related Body Corporate, must not be currently, or have been in the previous two years, in ‘Material Default’ of any agreement with ABB; and
- be able to demonstrate to ABB that it has a legal ownership structure with a sufficient capital base and assets of value to meet the actual or potential liabilities under an Access Agreement, including timely payment of access charges and payment of insurance premiums and deductibles under the required policies of insurance, or otherwise provides Credit Support acceptable to ABB (acting reasonably).

8.1.4 Pre-arbitration dispute resolution

Clause 6.3(c) provides that, if at any time during the negotiation process a dispute arises between the parties which, after reasonable negotiation, the parties are unable to resolve, then either party may seek to resolve the dispute in accordance with the process in clause 7.

Clause 7.1(a) of the Undertaking provides for ‘Disputes’ to be resolved in accordance with clause 7, unless expressly agreed otherwise. ‘Dispute’ in this sense is defined as a bona fide dispute between ABB and an Applicant/User arising under the proposed Undertaking, but excludes any disputes in relation to an executed Access Agreement. Clauses 7.1(b) reiterates that Disputes in relation to an executed Access Agreement will be dealt with under the provisions of that Access Agreement.

Clause 7.1(c) states that by 31 July of each year, ABB will report to the ACCC on any material Disputes in relation to an Access Agreement and any Disputes raised by Applicants, Users or ABB in the last 12 months, which will include the details of any resolution and the status of unresolved matters.

Clause 7.1(a) goes on to provide that either party to a Dispute may give the other party a ‘Dispute Notice’ specifying the Dispute and requiring it to be dealt with under clause 7. The parties are required to use ‘reasonable endeavours acting in good faith’ to settle the Dispute as soon as practicable.

Clause 7.2 states that within five Business Days of a party giving the other party a Dispute Notice, senior representatives from each party are to meet and use reasonable endeavours acting in good faith in order to resolve the Dispute by joint discussions.

Clause 7.3(a) provides that if a Dispute is not resolved via discussion between senior representatives, then within 10 Business Days after the date of the Dispute Notice and if the parties agree, they can attempt to resolve the Dispute by mediation. Clause 7.3(b) states if the parties agree to attempt to resolve the dispute by mediation, the Dispute will be referred to the Chief Executive Officers of the parties involved who will attempt to resolve the Dispute, including by informal mediation. Clause 7.3(c) states if the dispute is not resolved within 10 Business Days of being referred to

CEOs, the Dispute will be referred to formal mediation. If the parties are unable to agree upon a mediator within 10 Business Days, on the request of either party the Dispute will be referred to a mediator appointed by the President of the South Australian Chapter of the Institute of Arbitrators and Mediators of Australia (IAMA). Clause 7.3(d) sets out matters in relation to the conduct and costs of the mediation.

8.1.5 Arbitration

Referral to arbitration

Clause 7.3(a)(ii) provides that, if after senior representatives have discussed the Dispute, the parties do not wish to resolve the Dispute by mediation, either party may, by notice in writing to the other and the arbitrator, refer the Dispute to arbitration. A Dispute may also be referred to arbitration:

- if the Dispute is not resolved by joint discussion under clause 7.2;
- at any time after the appointment of the mediator under clause 7.3(c).¹⁶⁵

Under clause 7.4(b), ABB must notify the ACCC of the details of any Dispute which has been referred to arbitration, the progress of the arbitration and also provide the ACCC with the arbitrator's final determination. Clause 7.4(d) requires ABB to indemnify the arbitrator from any claims made against it arising out of the performance of its duties under clause 7, except for certain conduct, and will pay costs.

Clause 7.4(c) provides that if the Applicant serves notice of a Dispute on the arbitrator,¹⁶⁶ the notice will also include an agreement by that Applicant to:

- pay any of the costs of the arbitration as determined by the arbitrator under clause 7.10; and
- indemnify the arbitrator from any claims made against the arbitrator arising from the performance of its duties under clause 7, except for certain conduct.

Selection of arbitrator

Clause 7.5(a) provides that the arbitration must be conducted by an arbitrator appointed by agreement of the parties.

Clause 7.5(b) requires that within two Business Days of the parties agreeing to an arbitrator, ABB must notify the ACCC. Within five Business Days of receiving the notice, the ACCC may give notice to the parties of its objection and substitute a new arbitrator, which must not be the ACCC. If the ACCC does not provide notice within that time, the arbitrator appointed by the parties stands.

¹⁶⁵ ABB Grain Ltd, *Port Terminal Services Access Undertaking*, 16 April 2009, clause 7.4(a).

¹⁶⁶ There is an ambiguity in the proposed Undertaking at this point. It is not clear whether the reference here to the arbitrator should actually be to 'the mediator' or to 'the other party.'

Alternatively, under clause 7.5(c), if the parties fail to agree on an arbitrator within 10 Business Days of the referral to arbitration, either party may request the ACCC to appoint an arbitrator.

Termination of arbitration

Clause 7.6(d) provides that the arbitrator may at any time terminate the arbitration without making an award if it thinks that:

- the notification of the Dispute is vexatious;
- the subject matter of the Dispute is trivial, misconceived or lacking in substance;
or
- the party who notified the Dispute has not engaged in negotiations in good faith.

Conduct of the arbitration

Clause 7.6 outlines the arbitration procedures, though clause 7.5(d) provides that the arbitration will not proceed unless and until the Applicant has agreed to pay the arbitrator's costs as determined under clause 7.10. Clause 7.6 provides:

- the arbitration must be conducted in private, unless the parties agree otherwise, and subject to the involvement of and disclosures to the ACCC;
- parties may appoint representatives, including those with legal qualifications, to represent or assist in the arbitration;
- the arbitrator will:¹⁶⁷
 - observe the rules of natural justice, but is not required to observe the rules of evidence;
 - proceed as quickly as is possible and consistent with a fair and proper assessment;
 - encourage written presentations by the parties with rebuttal opportunities and questioning by the arbitrator;
 - call on any party the arbitrator believes necessary to give evidence;
 - permit the ACCC, on request, to make submissions to the arbitrator on matters relevant to the Dispute;
 - decide how to receive evidence and submissions and consider confidentiality issues;
 - present a draft determination and hear argument from the parties before making a final determination; and

¹⁶⁷ ABB Grain Ltd, *Port Terminal Services Access Undertaking*, 16 April 2009, clause 7.6(c).

- hand down a written final determination including reasons, findings of law and fact, and references to evidence on which findings of fact were based.

Matters the arbitrator must take into account

Clause 7.7(a) provides that, in deciding a Dispute, the arbitrator will take into account:

- ‘the principles, methodologies and provisions set out in this Undertaking, in particular clauses 5.4 and 5.5’;¹⁶⁸
- the objectives and principles in Part IIIA of the TPA and the Competition Principles Agreement;
- the benefit to the public from having competitive markets;
- any guidance published, or submissions provided, by the ACCC; and
- any other matter the arbitrator thinks appropriate.

Clause 7.7(b) provides that, in making its determination, the arbitrator:

- may deal with any matters referred to in section 44V of the TPA;
- will not make a decision which would have any of the effects described in section 44W of the TPA; and
- will take into account the matters referred to in section 44X of the TPA.

Other matters – confidentiality, costs and effect of decision

Clause 7.8 requires the arbitrator to take all reasonable steps to protect the confidentiality of information that a party has identified is confidential or commercially sensitive. The clause goes on to permit the arbitrator to require the parties to comply with confidentiality regimes, and to make confidential and public versions of its determinations, and limit access to the confidential version. Clause 7.8(d) states that the entire dispute resolution process remains subject to the confidentiality clause at clause 6.2.

Clause 7.10 provides that the arbitrator’s costs and the costs of the parties to the arbitration will be borne by the parties in such proportions as the arbitrator determines, and the parties may make submissions on the issue of costs prior to that determination.

Clause 7.9 states that the arbitrator’s determination is final and binding subject to any rights of review by a court of law. If an Applicant does not comply with the arbitrator’s determination or direction, ABB is no longer obliged to continue negotiations regarding the provision of access for that Applicant.¹⁶⁹ ABB will comply

¹⁶⁸ ABB Grain Ltd, *Port Terminal Services Access Undertaking*, 16 April 2009, clause 7.7(a)(ii).

¹⁶⁹ ABB Grain Ltd, *Port Terminal Services Access Undertaking*, 16 April 2009, clause 7.9(b).

with the lawful directions or determinations of the arbitrator except where the determination or direction is subject to a review by a court of law.¹⁷⁰

8.2 ABB submissions

6.2.1 Initial submission of 16 April 2009

ABB's initial submission focuses largely on why a negotiate-arbitrate model is appropriate rather than an ex ante pricing approach, and ABB makes few comments regarding the appropriateness of particular proposed publish-negotiate-arbitrate clauses.

ABB submits that the proposed Undertaking requires provision of access to Port Terminal Services on non-discriminatory terms, as well as provisions prohibiting ABB from discriminating in favour of its own business.¹⁷¹ ABB submits that this, together with the proposed dispute resolution process:

‘...ensures that ABB will continue to provide access at prices that generate expected revenue that is at least sufficient to meet the efficient costs of providing access to the Port Terminal Services including a return on investment commensurate with risk.’¹⁷²

ABB further submits that an undertaking that allows it to determine its own access prices at the first instance, coupled with clear non-discrimination and binding dispute resolution provisions, ‘...will retain the incentives to reduce costs.’¹⁷³ ABB submits that, in contrast:

‘...an undertaking that requires ABB to provide access at cost-based prices would dampen incentives to reduce costs and require further compensating regulatory mechanisms to provide this incentive such as CPI-X mechanisms which involve difficult regulatory judgments.’¹⁷⁴

ABB submits that the proposed Undertaking ‘...represents an appropriate balance for an industry transitioning from one wheat exporter to multiple sophisticated exporters’,¹⁷⁵ and that there is no need for ex ante pricing given:

‘...the lack of incentive to monopoly price, the countervailing power of customers to negotiate and the potential recourse to binding arbitration under the oversight of the Commission if a customer is not satisfied.’¹⁷⁶

ABB therefore submits that:

‘...the proposed process for publishing pricing and a binding third party arbitration process is, and provides for outcomes, consistent with the Pricing Principles set out in section 44ZZCA of the TPA...’¹⁷⁷

¹⁷⁰ ABB Grain Ltd, *Port Terminal Services Access Undertaking*, 16 April 2009, clause 7.9(c).

¹⁷¹ ABB Grain Ltd, *Submission to the ACCC*, 16 April 2009, para 8.8, p. 29.

¹⁷² ABB Grain Ltd, *Submission to the ACCC*, 16 April 2009, para 8.8, p. 29.

¹⁷³ ABB Grain Ltd, *Submission to the ACCC*, 16 April 2009, para 8.9, p. 29.

¹⁷⁴ ABB Grain Ltd, *Submission to the ACCC*, 16 April 2009, para 8.9, p. 29.

¹⁷⁵ ABB Grain Ltd, *Submission to the ACCC*, 16 April 2009, para 2.5, pp. 5-6.

¹⁷⁶ ABB Grain Ltd, *Submission to the ACCC*, 16 April 2009, para 2.10(a), p. 7.

¹⁷⁷ ABB Grain Ltd, *Submission to the ACCC*, 16 April 2009, para 2.11(b), p. 7.

In summary, ABB submits that it is appropriate for the proposed Undertaking not to include a 'heavier-handed approach such as an ex-ante approved pricing model'¹⁷⁸ because:

- ABB has a history of providing open access to third party exporters;¹⁷⁹
- ABB does not have any incentive or ability to monopoly price or deny access, as its incentive is to maximise throughput¹⁸⁰ at its terminals, which currently operate below capacity;¹⁸¹
- ABB is subject to competition from Victorian grain terminals and there is a threat of entry by a competing terminal operator;¹⁸²
- the customers using ABB's terminals have 'countervailing' and/or 'bargaining' power;¹⁸³ and
- ABB is subject to regulatory oversight, and there is the threat of heavier-handed regulation.¹⁸⁴

The ACCC notes the arguments ABB has made in relation to these points as follows.

(1) No history of access disputes

ABB submits that it has historically provided access to port terminal services in the absence of a formal access undertaking.¹⁸⁵ It submits that it has enjoyed a 'very good relationship' with its port terminal customers over many years, with no disputes under the ESCOSA access regime (see further below), nor, to ABB's knowledge, any instances of access to export facilities being refused to 'any credible bulk exporter.'¹⁸⁶ ABB notes that it received comments about its charges from time to time, but from growers more than marketers. ABB submits that these comments were more apparent in years of drought, as had recently been the case, because the charges represent a proportionately greater impost on farm incomes.¹⁸⁷ ABB notes that a dispute was notified to the ACCC pursuant to an 87B undertaking provided in connection with the ABB-Ausbulk merger (see further below), and that this dispute was arbitrated in 2006 and awarded in ABB's favour.¹⁸⁸

(2) Incentive to maximise throughput

ABB submits that it has significant excess capacity at each of its grain terminals and that this creates a clear incentive for it to maximise grain throughput at those

¹⁷⁸ ABB Grain Ltd, *Submission to the ACCC*, 16 April 2009, para 7.2, p. 25.

¹⁷⁹ ABB Grain Ltd, *Submission to the ACCC*, 16 April 2009, para 2.5, pp. 5-6 & paras 5-4 -5.6, p. 17.

¹⁸⁰ ABB Grain Ltd, *Submission to the ACCC*, 16 April 2009, para 2.5, pp. 5-6.

¹⁸¹ ABB Grain Ltd, *Submission to the ACCC*, 16 April 2009, para 5.8, p. 18.

¹⁸² ABB Grain Ltd, *Submission to the ACCC*, 16 April 2009, para 5.8, p. 18.

¹⁸³ ABB Grain Ltd, *Submission to the ACCC*, 16 April 2009, para 2.5, pp. 5-6.

¹⁸⁴ ABB Grain Ltd, *Submission to the ACCC*, 16 April 2009, para 2.5, pp. 5-6.

¹⁸⁵ ABB Grain Ltd, *Submission to the ACCC*, 16 April 2009, para 8.6, p. 28 & para 8.12, p. 30.

¹⁸⁶ ABB Grain Ltd, *Submission to the ACCC*, 16 April 2009, para 5.4-5.5, p. 17.

¹⁸⁷ ABB Grain Ltd, *Submission to the ACCC*, 16 April 2009, para 7.3, p. 25.

¹⁸⁸ ABB Grain Ltd, *Submission to the ACCC*, 16 April 2009, para 5.6, p. 17.

terminals.¹⁸⁹ Further, ABB states that has neither the desire nor the financial capacity to purchase the entire South Australian wheat crop.¹⁹⁰ ABB submits that this incentive is not affected by its vertical integration as port operator and bulk wheat exporter.¹⁹¹

(3) Competition from Victorian terminals (and other substitutes)

ABB submits that its Port Adelaide terminal competes with GrainCorp's terminals at Geelong and Portland, and to a lesser extent the Melbourne Port Terminal, as grain on the Victoria and South Australian standard gauge rail network can be consigned to each terminal. ABB submits that ABB's port charges therefore need to be competitive to attract Victorian grain.¹⁹²

ABB submits that it has constructed upcountry storage facilities in Victoria and the Outer Harbor terminal in Adelaide, to attract grain from Victoria.¹⁹³

In summary, ABB submits that if the terms and conditions it offers for port terminal services are not competitive, 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. the container packing facilities in Balaklava and Northern Yorke Peninsula operated by Balco and Northern Yorke Processing);
- domestic sales; or
- ultimately, supply chains in other countries as global traders focus their commercial activities in other grain areas around the world.¹⁹⁴

ABB also submitted that there are a range of factors that may affect the ability of bulk wheat exporters to switch between port terminals, including:

- the quality of the grain in each port zone;
- the availability of shipping slots at the relevant port;
- the wheat exporter's ability to accumulate grain in the relevant area;
- access to transport capacity to move the grain to port;
- the level of stocks that an exporter may already have in storage at a particular port;
- the ability of a particular port terminal to service an exporter's requirements;

¹⁸⁹ ABB Grain Ltd, *Submission to the ACCC*, 16 April 2009, para 5.8, p. 18.

¹⁹⁰ ABB Grain Ltd, *Submission to the ACCC*, 16 April 2009, para 5.14, p. 20.

¹⁹¹ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 27.

¹⁹² ABB Grain Ltd, *Submission to the ACCC*, 16 April 2009, para 5.17, p. 20.

¹⁹³ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 14.

¹⁹⁴ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 15.

- any requirements of the exporter’s charter party;
- whether there is an option to switch via a swap or trade; and
- relative costs between different supply chains.¹⁹⁵

(4) Threat of new entry

ABB stated in its first submission to the ACCC that ‘...the threat of new port development or new export grain facilities [is] more than theoretical.’¹⁹⁶ In its response to the ACCC’s information request, ABB provided additional information on a confidential basis.

The ACCC considers that ABB’s development of the grain terminal at Outer Harbor in Adelaide is a useful indication of the costs and timeframes involved in the construction of a major grain terminal in South Australia. ABB submits that construction of Outer Harbor commenced in 2006 and has involved investment of \$130 million.¹⁹⁷

The ACCC also notes ABB’s comments that there is significant excess capacity at each of its port terminals.¹⁹⁸

(5) Power of access seekers

ABB submits that, in relation to the countervailing and bargaining power of its customers:

‘...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.’¹⁹⁹

The factors ABB refers to are:

- publicly available information in relation to the operation of ABB’s port terminal services;
- the incentive for ABB to maximise throughput at its terminals;
- regulatory scrutiny of ABB’s provision of port terminal services, by the ACCC, Wheat Exports Australia (“WEA”), and the scheduled review by the Productivity Commission in 2010, which carry the threat of more intrusive regulation;
- the non-discrimination, ring-fencing, information publication and arbitration provisions in the proposed Undertaking; and

¹⁹⁵ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, pp. 17-19.

¹⁹⁶ ABB Grain Ltd, *Submission to the ACCC*, 16 April 2009, para 5.21, p. 21.

¹⁹⁷ ABB Grain Ltd, *Submission to the ACCC*, 16 April 2009, para 9.2, p. 31 & para 5.19, p. 21.

¹⁹⁸ ABB Grain Ltd, *Submission to the ACCC*, 16 April 2009, para 5.8, p. 18.

¹⁹⁹ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 24.

- the ability of ABB’s customers to source grain from elsewhere in Australia or globally should it offer port terminal services on uncompetitive terms, or should the reliability of the supply chain be undermined.²⁰⁰

(6) Regulatory oversight

ABB submits that the provision of port terminal services is subject to a degree of regulatory scrutiny, including by the ACCC, WEA, and the scheduled review by the Productivity Commission in 2010, all of which carry the threat of more intrusive regulation.²⁰¹

ABB submits also that at the state level, the *Maritime Services (Access) Act 2000* (SA) creates a regime for economic regulation of the bulk loading plants at the South Australian ports at which ABB operates. The regime covers only the belts themselves and does not extend to the grain terminals. ABB submits that on the basis of recommendations and conclusions arising out of ESCOSA’s 2007 Ports Pricing and Access Review, there was no justification for introducing more heavy-handed price regulation than currently exists.²⁰² ABB also notes that the regime has not been certified as an effective regime under Division 2A of Part IIIA of the TPA.²⁰³

ABB further submits that it is subject to an 87B undertaking provided to the Commission in connection with its merger with Ausbulk. ABB notes that the undertaking expires on 20 September 2009.²⁰⁴

(7) Other

The ACCC notes ABB’s other submissions that it is appropriate for the proposed Undertaking not to include a ‘heavier-handed approach such as an ex-ante approved pricing model’²⁰⁵ because of:

- the existence of a competitive export market;
- ‘Parliament’s direction that the port operators be allowed to function in a commercial environment; and
- the clear protections provided to access seekers in the Undertaking.’²⁰⁶

6.2.2 Further submission of 30 June 2009

In response to an information request from the ACCC, ABB provided further submissions on the appropriateness of the proposed publish-negotiate-arbitrate clauses.

²⁰⁰ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, pp. 25-26.

²⁰¹ ABB Grain Ltd, *Submission to the ACCC*, 16 April 2009, para 5.8, p. 18; ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 25.

²⁰² ABB Grain Ltd, *Submission to the ACCC*, 16 April 2009, para 8.2, p. 28.

²⁰³ ABB Grain Ltd, *Submission to the ACCC*, 16 April 2009, para 4.16, 4.18-4.19, pp. 15-16.

²⁰⁴ ABB Grain Ltd, *Submission to the ACCC*, 16 April 2009, para 4.22 & 4.24, p. 16.

²⁰⁵ ABB Grain Ltd, *Submission to the ACCC*, 16 April 2009, para 7.2, p. 25.

²⁰⁶ ABB Grain Ltd, *Submission to the ACCC*, 16 April 2009, para 7.2, p. 25.

(1) Timing for publication of terms and prices

ABB submits that the period between publication of price and non-price terms and the receipt of the first harvested wheat at port in South Australia is typically a minimum of six weeks from 30 September. ABB considered that this would provide exporters with sufficient time to negotiate and enter into both Access Agreements and supply contracts with export customers. ABB further noted that the majority of wheat receipts at port occurred between 15 November and 15 December each year.²⁰⁷

ABB further submits that:

- the proposed timing for publication in the proposed Undertaking reflects past industry practices for other deregulated grains, and for bulk wheat in the 2008/09 season;²⁰⁸
- 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;²⁰⁹
- pricing of other service providers (e.g. above and below rail and other bulk handlers' grain receipt and storage fees) as well as the pricing of grain itself is often not available until much closer to the commencement of harvest season;²¹⁰
- the nature of agricultural industries mean that there are a range of variable factors to take into account in planning (such as drought, weather conditions, harvest levels),²¹¹ and bulk wheat exporters are required to make estimates on various input costs on a regular basis;²¹²
- industry 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, and ABB relies on this information in order to be able to set clear price and non-price terms for the upcoming year;²¹³
- the majority of exports occur from December to May, leaving only a short period to review the previous season's terms and prepare updating terms for the coming season, thus making publication prior to September difficult.²¹⁴

ABB also submits that 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.²¹⁵ ABB submits that it provides information relating to its access terms in advance of 30 September, stating that in 2008 it released draft charges, followed by visits to customers, well before 30 September. ABB states that feedback obtained in

²⁰⁷ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 10.

²⁰⁸ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 10.

²⁰⁹ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 10.

²¹⁰ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 10.

²¹¹ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 11.

²¹² ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 33.

²¹³ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 32.

²¹⁴ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 33.

²¹⁵ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 33.

these meetings was reflected in the final terms released by 30 September 2008.²¹⁶ ABB further submits that it would intend to consult with customers in relation to the Reference Prices and Standard Terms prior to 30 September each year.²¹⁷

In relation to the publication of terms and prices following commencement of the proposed Undertaking, ABB submits that while it intends ABB to have published its Standard Terms and Reference Prices by 1 October 2009, ABB considers that it is necessary in the first year of the proposed 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.²¹⁸

(2) Holding over provisions

ABB submitted that in the event that consultation on Standard Terms and Reference Prices was still continuing each year, or there were matters still being negotiated with customers, the 'holding over' provision clause 5.2(b) was intended to ensure that there was not a contractual void with regard to the provision of Port Terminal Services until such time as individual Access Agreements have been entered into. ABB submitted that where after 1 October a customer has not yet entered into an agreement for the provision of Port Terminal Services for the new season, that customer is 'deemed' to accept the new season Standard Terms and Reference Prices until an individual agreement is executed. ABB submitted that the 'deeming' provision does not prevent the negotiation of terms from taking place.²¹⁹

(3) Access, standard terms etc

ABB submits that the Reference Prices and Standard Terms apply to Standard Port Terminal Services; ABB and an Applicant may negotiate different price and non-price terms for non-standard Port Terminal Services, however, those 'non-standard terms' must also comply with the requirements in clause 5.4.²²⁰ ABB submits that 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, and 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.²²¹

(4) Negotiation process

ABB submits that the timeframes in clause 6 regarding negotiation of access agreements reflect and balance the commercial demands to move grain to export as quickly as possible.²²² ABB submits that:

- the timing under clause 6.4(b)(v), where ABB must provide reasons to an Applicant within 10 Business Days if ABB proposes not to negotiate with the

²¹⁶ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 33.

²¹⁷ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 38.

²¹⁸ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 31.

²¹⁹ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 35.

²²⁰ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 43.

²²¹ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 43.

²²² ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 33.

Applicant provides sufficient time for the Applicant to address any deficiencies and respond or re-apply;²²³

- the requirement under clause 6.5(b) to notify receipt of an application within five Business Days is appropriate as it gives ABB sufficient time to ensure that the application contains all necessary information and that, once the application has been acknowledged, negotiations for access can begin;²²⁴
- the 3 month negotiation period set out in clause 6.6(b)(iii) represents a reasonable ‘negotiation window.’²²⁵

ABB submits that the proposed Undertaking does not preclude customers from seeking to negotiate an Access Agreement with ABB prior to 30 September each year (or at any time).²²⁶ However, ABB submits that from a practical perspective, it may not be possible for ABB to enter into concluded agreements significantly earlier than August or September each year because of the seasonal nature of the industry.²²⁷ ABB noted that it 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.²²⁸

ABB submits that in the event that the Negotiation Period lapses or otherwise ceases, an Applicant would be able to submit a new application for access which would need to follow and be assessed in accordance with the requirements of the proposed Undertaking.²²⁹ ABB submits that, 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.²³⁰

(5) Information requests

ABB submits that the ‘Customer Application Type’ and ‘Business Category’ expressions were unintentionally ‘held over’ from a draft undertaking provided to the ACCC, and that ABB proposes to delete them from the access application form in Schedule 1.²³¹ Further, ABB does not require that its customers have a website, and will not refuse access to customers if they do not have a website. ABB submits that if a customer does not have a website, the customer would simply leave that section of the standard application form blank.²³²

ABB submits that in determining whether a request for information is unduly onerous or disproportionate pursuant to clause 6.4(a)(ii)(B), it will have regard to standard

²²³ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 33.

²²⁴ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 33.

²²⁵ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 32.

²²⁶ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 38.

²²⁷ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 38.

²²⁸ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 37.

²²⁹ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 43.

²³⁰ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 43.

²³¹ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 41.

²³² ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 42.

industry practice in Australia and at other port terminals around the world, as well as drawing on its own experience of the information necessary to export grain and apply for access.²³³ ABB also notes that many of its customers have similar experience in relation to port terminal services and the information necessary to export grain and apply for access.²³⁴

ABB submits that if it receives a request for information beyond standard industry practice, it would:

- seek clarification as to why the information is required;
- assess the cost to ABB of providing the information (noting clause 6.4(a)(C)); and
- assess the time and other resources that would be involved in ABB complying with the information request.²³⁵

ABB submits that it is not appropriate that there be a regulatory requirement for ABB to provide information that is not relevant to the provision of the services.²³⁶ ABB submits that its intention is to provide all reasonable assistance to enable customers to apply for, and enter into, Access Agreements.²³⁷ However ABB may form the view that a request is unduly onerous or disproportionate where:

- an information request goes beyond standard industry practice;
- the customer cannot justify why the information requested is necessary; and
- compliance with the request would be costly and time-consuming for ABB.²³⁸

(6) Discretion to cease negotiations

ABB notes that under clause 6.4(b)(i), it may only 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.²³⁹ ABB submits that in determining whether an access applicant has complied with the requirements and processes of the proposed Undertaking and whether or not any failure to do so is material, it will consider:

- the circumstances of any non-compliance;
- the impact of non-compliance on ABB and other users;

²³³ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 39.

²³⁴ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 39.

²³⁵ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 40.

²³⁶ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 40.

²³⁷ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 40.

²³⁸ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 40.

²³⁹ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 41.

- previous decisions (if any) to seek to ensure consistency of approach in determining whether a matter is ‘material.’²⁴⁰

ABB anticipates that in practice, cessation of negotiations under 6.4(b)(i) would be invoked in very few circumstances, given that both ABB and its customers have operated in the industry for many years.²⁴¹

ABB submits that clause 6.6(b)(iv) would be invoked only in very exceptional cases, and that demonstrating a lack of good faith (as distinct from differing commercial objectives) by another party would involve a relatively high threshold.²⁴² ABB submits it is necessary for commercial reasons for it to retain an ability to terminate vexatious and non-good faith negotiations.²⁴³ ABB notes that an access seeker can refer the matter to arbitration if dissatisfied with ABB’s decision to cease negotiations.²⁴⁴

In determining whether or not negotiations are progressing in good faith, ABB will consider the approach to negotiations adopted by the access applicant. ABB submits that 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, ‘it is possible that ABB would reasonably form the view that the access seeker is not progressing negotiations in good faith.’²⁴⁵

ABB submits that the reference to ‘three months’ in clause 6.6(b)(iii) provides a benchmark for what is a reasonable period of time, but in exceptional circumstances, ABB might seek to terminate negotiations earlier. ABB suggests that in order to address potential concerns, it 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).²⁴⁶

(7) Definition of dispute

ABB submits that, in relation to a dispute, ‘bona fide’ means ‘genuine,’ ‘real,’ ‘of substance’ and not frivolous or vexatious.²⁴⁷ ABB submits the definition is intended to ensure that only genuine disputes are escalated through the dispute resolution process in clause 7 of the Access Undertaking.²⁴⁸ 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.²⁴⁹

ABB submits that a dispute is likely to be bona fide where it:

²⁴⁰ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 41.

²⁴¹ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 41.

²⁴² ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 42.

²⁴³ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 42.

²⁴⁴ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 42.

²⁴⁵ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 42.

²⁴⁶ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, pp. 41-42.

²⁴⁷ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 43.

²⁴⁸ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 44.

²⁴⁹ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 44.

- 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.²⁵⁰

Conversely, if a dispute is unlikely to be bona fide where it:

- 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.²⁵¹

(8) Timing for dispute resolution in clause 7

ABB submits that the timeframes in the dispute resolution process seek to balance the need to reach a clear resolution to disputes in a timely manner, with an allowance for sufficient time for all parties to the dispute to make their case and for the correct outcome to be achieved.²⁵²

(9) Disputes under an Access Agreement

ABB submits that, in offering contracts to customers, it must comply with the non-discrimination provisions set out in the Undertaking.²⁵³ ABB submits that 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

²⁵⁰ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 44.

²⁵¹ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 44.

²⁵² ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 34.

²⁵³ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 45.

- under the dispute resolution procedure contained in clause 7 of the Undertaking.²⁵⁴

(10) Obligation to report ‘material’ disputes to the ACCC

ABB submits that clause 7.1(c), which contains the obligation to report ‘material’ disputes to the ACCC, is intended to be pragmatic and to reflect ABB’s expectation that to the extent disputes arise, the vast majority are likely to be resolved quickly by negotiations between operational and commercial managers.²⁵⁵ ABB assumes also that the Commission would not wish to be advised of all disputes, no matter how minor.²⁵⁶ ABB submits that a need or justification for regulatory oversight would only arise if a 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.²⁵⁷

ABB considers that a dispute is likely to be material 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; or
- the matter in dispute is likely to have a material impact on the business or operations of either ABB or the access seeker.²⁵⁸

ABB submits that, 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.²⁵⁹

ABB submits that 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.²⁶⁰

²⁵⁴ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 45.

²⁵⁵ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 45.

²⁵⁶ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 45.

²⁵⁷ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 45.

²⁵⁸ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, pp. 45-46.

²⁵⁹ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, pp. 45-46.

²⁶⁰ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 46.

(11) Involvement of the IAMA

ABB submits that it has not contacted IAMA directly to confirm that it would be prepared to appoint a mediator if requested by ABB or an Applicant.²⁶¹ ABB submits that in the unlikely event that IAMA could not provide the service, ABB would be prepared for the President of the Law Society of South Australia to appoint the mediator.²⁶²

(12) Arbitration

ABB submits that in determining a likely candidate for arbitrator, it proposes to discuss with IAMA which of their members would be likely to have the requisite experience (legal and, potentially, industry) to arbitrate the specific matter in dispute.²⁶³ ABB notes that if an Applicant disagreed with ABB's proposed arbitrator, the Applicant was free to propose an alternative which ABB would consider having regard to the proposed arbitrator's capability, experience and independence.²⁶⁴

ABB submits that it would notify the ACCC under clause 7.4(b) that a matter has been referred to arbitration at the same time it advises the ACCC of the appointment of an arbitrator under clause 7.5(b).²⁶⁵ ABB submits that it would also provide a copy of the Dispute Notice to the ACCC at that time.²⁶⁶

ABB submits that it would propose to advise the ACCC of the progress of the arbitration at any reasonable time requested by the ACCC, to provide the ACCC with a copy of the arbitrator's final determination by no later than 31 July.²⁶⁷

ABB submits that the duration and cost of an arbitration process would depend on:

- the number and complexity of the issues raised;
- the approach adopted by the parties in progressing the arbitration; and
- the availability and hourly rate of the arbitrator.²⁶⁸

ABB anticipates that many disputes would be capable of being resolved within 3-4 weeks from the time an arbitrator is appointed, while more complicated disputes may take longer.²⁶⁹

ABB submits that in relation to the question of who determines whether an Applicant has complied with a determination or direction of an arbitrator, in most cases it would be clear whether or not a party has complied with a determination or direction.²⁷⁰ ABB notes that if concerned that an Applicant had not complied with an arbitrator's

²⁶¹ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 46.

²⁶² ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 47.

²⁶³ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 47.

²⁶⁴ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 47.

²⁶⁵ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 47.

²⁶⁶ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 47.

²⁶⁷ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 48.

²⁶⁸ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 48.

²⁶⁹ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 48.

²⁷⁰ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 48.

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.²⁷¹ ABB submits the Applicant would have an opportunity to respond and to the extent there was 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.²⁷²

ABB additionally notes the wording of clause 7.9, and states that if it were not to comply with a direction or determination of an arbitrator it would be a breach of the Undertaking that the ACCC could enforce.²⁷³

8.3 Other submissions received

8.3.1 Australian Grain Exporters Association (AGEA)²⁷⁴

Price and non-price terms

AGEA submits that price and non-price terms should be a part of the proposed Undertaking and must be published in advance of the commencement of the proposed Undertaking (or the expiry of the current terms), and that port protocols should also be part of the undertakings.²⁷⁵

Timing for publication

AGEA submits that requirement to publish standard terms and reference prices does not provide certainty and transparency unless publication occurs well in advance of the commencement of the proposed Undertaking. AGEA also submits that users need to know the terms and conditions on which the services will be provided in order to assess the reliability of the service, plan, budget and generally compete in the market.²⁷⁶

AGEA submits that the proposed Undertaking contemplates that price and non-price terms can be unilaterally imposed by the bulk handler as late as 15 business days after commencement of the proposed Undertaking, when the bulk handler's storage and handling agreements are also scheduled to commence.²⁷⁷ AGEA notes that Australian wheat exporters (AWEs) enter into forward sale contracts well before 1 October, with the export season beginning in earnest about the time that both the new storage and handling contracts and the proposed Undertaking are proposed to commence. AGEA submits that the consequence of providing the price and non-price terms 15 business days after they are due to commence would be that:

²⁷¹ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 48.

²⁷² ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 48.

²⁷³ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 49.

²⁷⁴ AGEA provided three submissions to the ACCC: 11, 18 and 29 May 2009. This section largely draws upon the submission of 29 May 2009, which was the most substantial.

²⁷⁵ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 9.6, p. 24 & Schedule 1 Para F2, p. 42.

²⁷⁶ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 9.6, p. 24.

²⁷⁷ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 9.2, p. 23.

- a. AWEs would feel compelled to enter into contracts with the bulk handler without a proper opportunity to negotiate;
- b. AWEs will have to wait until they have negotiated access to the port terminal services before starting to look for export sales;
- c. grain marketers would be prevented from entering into wheat export sales contracts until the terms and conditions and pricing of port terminal services are provided, thus reducing the level of competition and the overall efficiency of the bulk wheat export market;
- d. alternatively to (b), AWEs must decide whether to take the commercial risk of entering into export sales contracts before knowing whether they will be able to perform the contracts, as the bulk handler may block access to port terminal services;
- e. further to (d), grain marketers could be forced to enter into export wheat sales contracts without knowing the price or level of service available at port (such as when vessels will be called to berth and the wheat load rate, exposing AWEs to extensive demurrage claims and possibly rendering them in default of wheat sales contracts) and the associated key bulk handling services which need to be priced into those contracts.²⁷⁸

AGEA also submits that standard terms and references prices must be published by least 1 September.²⁷⁹

Negotiating for access

AGEA submits that AWEs do not have a realistic alternative supplier of port terminal services and have little, if any bargaining power. AGEA submits that the imbalance in market power has resulted in bulk handlers refusing to negotiate, imposing unfair terms and prices and discriminating against AWEs who do not accept the bulk handlers' standard terms and conditions.²⁸⁰

AGEA submits that the proposed Undertaking does not provide a genuine framework for negotiations and exacerbate the imbalance in bargaining power because:

- a. the bulk handler not required to negotiate in good faith and reach agreement on the terms of access;
- b. the effect of offering terms and conditions immediately before 1 October is that AWEs know that if they do not execute the agreements, they will be denied access to bulk handling services;
- c. the application process and timeframes for conducting negotiations are slow and unwieldy;
- d. the dispute resolution mechanism does not provide for the speedy resolution of disputes; and

²⁷⁸ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 9.5, pp. 23-24.

²⁷⁹ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 12.1, p. 29.

²⁸⁰ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 11.1, p. 27.

- e. the bulk handler is allowed to ‘reserve the right to negotiate’, ‘refuse to negotiate’ and to ‘cease’ negotiations in various circumstances.²⁸¹

AGEA further submits that it is not appropriate that the proposed Undertaking includes such a number of grounds on which the bulk handler may cease negotiations with the Applicant because the dispute resolution process is lengthy and the right to cease negotiations could lead to AWEs incurring substantial losses over non-performance of sales contracts. AGEA submits that the bulk handler should be required to negotiate on reasonable terms with any person that is an accredited wheat exporter.²⁸²

AGEA suggests that with the ability for the bulk handler to publish terms and conditions as little as one day before or up to 15 business days after the proposed Undertaking takes effect, and no limitation on the additional information that can be requested in relation to receiving an access application, it would likely be mid-October before negotiations regarding terms of access would begin.²⁸³ AGEA also submits that the timeframe for acknowledgements was not appropriate and would slow the negotiation process.²⁸⁴

AGEA submits that the wheat season traditionally runs from 1 October to 30 September of each year and that negotiations for forward sales contracts begin well before this period. AGEA submits that AWEs must therefore decide whether to take the commercial risk of entering into export sales contracts before knowing whether they will be able to perform the contracts, as the bulk handler may otherwise block access to port terminal services. Alternatively, an AWE would have to wait until it has negotiated access to the port terminal services, before starting to look for export sales.²⁸⁵

AGEA submits that the definition of Prudential Requirements in the proposed Undertakings is neither appropriate nor necessary. AGEA submits that it is unnecessary for the bulk handler to require AWEs to satisfy additional ‘Prudential Requirements’ in the context of the requirements for accreditation as a wheat exporter under the WEMA.²⁸⁶ AGEA submits that once an AWE obtains accreditation under the WEMA, it should not be necessary for the bulk handler to enquire into the AWE’s financial standing.²⁸⁷

²⁸¹ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 11.2, p. 27.

²⁸² Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, Schedule 1, para H2 (iv), p. 44.

²⁸³ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 11.3, pp. 27-28.

²⁸⁴ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, Schedule 1, para H2 (ix), p. 45.

²⁸⁵ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, Schedule 1, para H2 (ix), p. 45.

²⁸⁶ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 11.5, p. 28.

²⁸⁷ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, Schedule 1, para H2 (v), p. 45.

Dispute Resolution

AGEA submits that the dispute resolution mechanism in the proposed Undertaking is inadequate as an effective mechanism for the speedy resolution of disputes.²⁸⁸ AGEA submits that for general disputes, the dispute resolution procedure must provide that:

- a. either party may notify the other party of a dispute;
- b. representatives of the parties must meet within 48 hours and endeavour to resolve the dispute;
- c. if the dispute cannot be resolved, either party may give notice to the ACCC that a dispute exists under the proposed Undertaking and may refer the dispute to arbitration, which is to be conducted by the ACCC;
- d. the arbitration must be conducted in accordance with arbitration rules to be specified in the proposed Undertaking, which must include an obligation to keep confidential any information disclosed during the arbitration;
- e. the arbitration must be heard and concluded within 14 days of the notice of referral to the ACCC and the ACCC must endeavour to make a determination within 14 days; and
- f. the bulk handler must take reasonable steps to mitigate loss, including continuing to provide port terminal services during, and pending the determination of, any dispute.²⁸⁹

AGEA also submits that the confidentiality provisions relating to dispute resolution do not sufficiently protect commercially sensitive information and that there should be an obligation on the parties and the arbitrator that the entire arbitration process is confidential, unless and only to the extent that both parties agree in writing otherwise.²⁹⁰

8.4 ACCC's consideration

8.4.1 Introduction

The ACCC has identified the following issues as arising for consideration in relation to the proposed publish-negotiate-arbitrate component of the proposed Undertaking:

- the appropriateness of the publish-negotiate-arbitrate approach without ex ante price regulation, and the form in which prices are published;
- the absence of an indicative access agreement as part of the proposed Undertaking;

²⁸⁸ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 13.1, p. 30 & Schedule 1, para J2 (i), p. 46.

²⁸⁹ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 13.2, p. 30.

²⁹⁰ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, Schedule 1, para J2, p. 46.

- the appropriateness of the timing for the publication of standard terms and reference prices;
- generally, the appropriateness of the timeframes proposed in various clauses and the degree of certainty and clarity provided in the drafting of various clauses;
- the appropriateness of the discretion afforded to ABB in the negotiation process;
- the appropriateness of the dispute resolution and arbitration processes, including for the selection of the arbitrator and conduct of the arbitration;
- the absence of appropriate ‘holding over’ arrangements.

Lack of consultation on rationale for various provisions

As a preliminary point, the ACCC notes that ABB did not provide comments in support of many of the clauses in the publish-negotiate-arbitrate component of the proposed Undertaking in its initial submission, and it was only in response to a request for information from the ACCC that ABB elaborated on why it considered its particular approach appropriate. ABB provided its public response to the ACCC’s information request on 30 June 2009, and consequently ABB’s further submissions have not yet been subject to public consultation.

The ACCC acknowledges that ABB’s further submission in some instances provides further explanation, and therefore clarity, as to how many of the proposed clauses are intended to operate. While this is beneficial, the ACCC considers it also highlights deficiencies in the drafting of many clauses as they currently appear in the proposed Undertaking.

8.4.2 Appropriateness of publish-negotiate-arbitrate approach

ABB has proposed a ‘publish-negotiate-arbitrate’ approach in its proposed Undertaking, under which it would be obliged to publish price and non-price terms for access to the service, provide those terms to access seekers on a non-discriminatory basis, and then be subject to dispute resolution and arbitration procedures in the event of a dispute with an access seeker during negotiations for access. This model is different to an ‘ex ante pricing’ model that has previously been put forward in an access undertaking to the ACCC for assessment,²⁹¹ where the undertaking sets a price or price methodology for the service to which it relates.

An issue for the ACCC is therefore whether the less prescriptive publish-negotiate-arbitrate approach put forward by the proposed Undertaking is by itself appropriate, or whether it is appropriate for the proposed Undertaking to include ex ante pricing regulation.

The ACCC notes that there is no requirement in Division 6 of Part IIIA that an access undertaking include price, and reiterates that the ACCC’s role is to decide whether or

²⁹¹ See for example the *ARTC 2002 Interstate Access Undertaking*, and the *ARTC 2008 Interstate Access Undertaking*.

not a proposed undertaking is appropriate, having regard to the matters in section 44ZZA(3).

In this particular case, there are some specific features of this industry at this time.

First, the ACCC reiterates its comments regarding the transitional state of the bulk wheat export industry. The ACCC acknowledges that in regulating the industry during a transitional phase there is a risk that regulation that is not appropriate may distort the effective development of that industry, and the ACCC considers that this risk is particularly pertinent to the regulation of prices. That is, the ACCC is mindful of the possibility that, despite best intentions, setting regulated prices for port terminal services at the current time may unnecessarily constrain the ability of the industry to develop and effectively respond to changing circumstances that are not foreseeable at the present, and that such an outcome would not be in the public interest. The ACCC also notes the planned Productivity Commission review of the WEMA, and statements by the government that it will monitor up-country developments.

Second, before the ACCC would consider a publish-negotiate-arbitrate framework appropriate, it would expect it to be underpinned by a robust set of mechanisms giving effect to the publication, negotiation and arbitration procedures. Given that ABB is vertically integrated, strong non-discrimination obligations and appropriate transparency measures would also be appropriate (see Non-Discrimination chapter).

It should be noted that the ACCC has expressed the view elsewhere in this draft decision that appropriate non-discrimination measures should prohibit ABB discriminating in favour of itself except to the extent that the cost of providing access to other operators is higher, as per s.44ZZCA of the TPA. As a transparency measure to support this, appropriate measures would require prices to be transparently specified for a standard set of port terminal services to all parties, including ABB, with any special requirements due to different origin being separately enumerated and priced.

These underpinning measures would allow access seekers to commercially negotiate with ABB in a framework where both parties know that prices, terms and conditions may be subject to arbitration by the ACCC or a private arbitrator, applying the pricing principles in s.44ZZCA of the TPA and general non-discrimination requirements.

Third, the proposed Undertaking is for a limited duration. ABB is subject to the threat of more prescriptive regulatory requirements in any future Undertaking should the publish-negotiate-arbitrate framework not be effective. ABB will have a strong incentive to ensure that prices are commercially reasonable and non-discriminatory to avoid more costly and intrusive regulation in future (such as cost modelling for all its port terminals, ex ante pricing and prescriptive ring-fencing).

Finally, the proposed Undertaking covers six port terminals, and the proposed Undertakings of all three bulk handlers cover 17 port terminals altogether. Given the transitional state of the industry, it would be a significant cost burden on the industry to require ex ante cost modelling of 17 port terminals if only a few may prove the subject of an arbitration that would warrant cost modelling.

Therefore the ACCC considers it is likely to be appropriate for the proposed Undertaking to adopt a publish-negotiate-arbitrate approach rather than an ex ante regulated price approach, provided that the mechanisms giving effect to the publish-negotiate-arbitrate approach are robust. In this regard the ACCC reiterates its previous comments regarding the need for the proposed Undertaking to be certain and clear, and to provide for ‘fair and transparent access’ to access seekers. The ACCC considers that it is in the interests of access seekers, and consistent with the WEMA, for the publish-negotiate-arbitrate mechanism to be robust.

The ACCC wishes to emphasise that in reaching this view it is not suggesting that the absence of ex ante regulation of prices for port terminal services is likely to be appropriate in all circumstances. The ACCC is instead acknowledging that it is appropriate for the proposed Undertaking not to provide for ex ante pricing regulation given the circumstances at this particular time. The ACCC wishes to expressly recognise the possibility that ex ante price regulation may be appropriate for port terminal services in certain circumstances, and takes no view on what may be appropriate in relation to any subsequent undertaking proposed by ABB following the expiry of the current proposed Undertaking.

The ACCC notes as a general comment that the publish-negotiate-arbitrate clauses in the proposed Undertaking are to a large extent modelled on clauses contained in the access undertaking submitted by the Australian Rail Track Corporation (ARTC), and accepted by the ACCC on 30 July 2008. The ACCC considers the fact that it accepted as appropriate particular clauses in the ARTC Interstate Access Undertaking provides little support for a conclusion that similar clauses in the current context are appropriate, as the circumstances of the current proposed Undertaking and the ARTC Access Undertaking are clearly distinguishable. Significantly, the ACCC notes that the ARTC Access Undertaking included a regulated access price. The ACCC therefore considers that, as a general matter, it is appropriate for the publish-negotiate-arbitrate mechanism in the current context to be, in a sense, more ‘prescriptive’ than that in the ARTC Access Undertaking.

8.4.3 Absence of an indicative access agreement

Please refer to the discussion of this issue below in the Indicative Access Agreement chapter. In summary, the ACCC considers it is not appropriate that the proposed Undertaking does not include an indicative access agreement.

8.4.4 Timing for publication of standard terms and reference prices

The proposed Undertaking states that ABB may publish Standard Terms and Reference Prices for the season by no later than 30 September of each year,²⁹² or within 15 Business Days of the commencement of the proposed Undertaking if not already published.²⁹³

In light of the ACCC’s view that the proposed Undertaking should include an indicative access agreement setting out non-price terms, the ACCC considers it likely

²⁹² ABB Grain Ltd, *Port Terminal Services Access Undertaking*, 16 April 2009, clause 5.1(a)

²⁹³ ABB Grain Ltd, *Port Terminal Services Access Undertaking*, 16 April 2009, clause 5.1(c).

to be appropriate that the obligation to publish be limited to an obligation only to publish prices.

The ACCC notes that GrainCorp and CBH have, in their supplementary submissions to the ACCC, proposed a revision whereby they would publish by no later 31 August in the relevant year. The ACCC refers to the discussion above regarding achieving a balance between the desirability of consistency in access regulation within a particular industry and ensuring regulation appropriately accounts for the particular circumstances of the regulated entity. The ACCC considers it may be appropriate for ABB to publish prices at the same time as the other bulk handlers, but notes that in its supplementary submission ABB states that the first receipt of wheat at port in South Australia typically occurs six weeks after 30 September, which is later than in Western Australia or the eastern states, and therefore the proposed timing for publication is appropriate.

The ACCC notes that ABB did not make any comments in relation to the timing for the publication of terms and conditions in its initial submission, and it was only in response to the ACCC's request for further information that ABB addressed this point. The ACCC therefore finds it difficult to reach a view on this point given it has not been subject to public consultation. The ACCC acknowledges that the proposed timing *may* be appropriate, but seeks submissions from interested parties on ABB's arguments. The ACCC considers though, that any time for publication must allow for sufficient opportunity for access seekers to negotiate access agreements, and in this regard also refers to the discussion below in relation to holding over arrangements.

In relation to the proposed obligation for ABB to publish within 15 Business Days of the commencement of the proposed Undertaking if it has not already published, the ACCC recognises that ABB may require 'a small degree of flexibility'²⁹⁴ at this time. The ACCC considers however that it is not appropriate for ABB to have 15 Business Days (that is, three weeks) to publish, particularly if non-price terms are to be already included in an indicative access agreement, as this creates uncertainty as to the prices that are to apply. The ACCC considers that a period of three Business Days is more likely to be appropriate.

8.4.5 General issues – negotiation, dispute resolution, arbitration

After the obligation to publish, the mechanism in the proposed Undertaking essentially contains three components, set out in clauses 6 and 7:

- a process for the negotiation of access agreement ('negotiation component');
- a dispute resolution procedure in the event of dispute between the access seeker and access provider during negotiations ('dispute resolution component'); and
- the ability for resolution of the dispute to be escalated to arbitration ('arbitration component').

The ACCC considers that two general issues arise in relation to these components:

²⁹⁴ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 36.

1. the specified timeframes are in some instances unnecessarily long, while in other instances are vague or non-existent, thereby providing scope for the negotiation, dispute resolution and arbitration processes to be frustrated or delayed; and
2. the drafting of numerous clauses lacks clarity and certainty.

(1) Timeframes

The ACCC considers that many of the timings proposed by ABB in clauses 6 and 7 are not appropriate. The ACCC considers that the timeframes are in some instances unnecessarily long, in others defined without sufficient clarity, while in other instances timeframes are absent altogether. The ACCC considers that this creates uncertainty, ambiguity and is not in the interests of access seekers or ABB.

In particular, the ACCC considers that:

- In relation to clause 6.4(a), the lack of any timeframes for the performance of obligations creates uncertainty and is not appropriate.
- In relation to clause 6.4(b)(iii), it is not appropriate that ABB may, at *any time, before or during the negotiation process*, require the Applicant to demonstrate that it can meet the Prudential Requirements. It is more likely to be appropriate that the proposed Undertaking specifies a particular point in time at which the Applicant must demonstrate that it can meet the Prudential Requirements, and a particular timeframe within which ABB must confirm that those requirements have or have not been met.
- In relation to clause 6.4(b)(v), it is not appropriate for ABB to have 10 Business Days to provide reasons for refusing to negotiate with an access seeker in the circumstances described. It is more likely to be appropriate for ABB to provide reasons to the access seeker at the time that ABB refuses to negotiate.
- In relation to clause 6.5(b)(i), it is not appropriate that ABB be permitted to take 5 Business Days to acknowledge receipt of an access application. The information contained in an application is specified in Schedule 1 to the proposed Undertaking and includes matters such as company name, address, contact details etc. The ACCC questions ABB's submission that it would need 5 Business Days to assess such information. The timings in clause 6.5(b)(iii) and (iv) are also not appropriate, although the ACCC acknowledges that ABB may in some circumstances require additional information from an access seeker (or clarification of information) in relation to the provision of access, particularly where access is sought on non-standard terms. The ACCC considers the timings in clause 6.5(b) are of particular concern as clause 6.6(b) provides that the 'Negotiation Period' under the proposed Undertaking – the 'official' period for negotiations – commences upon ABB acknowledging receipt of the Access Application. The discretion conferred pursuant to clause 6.5(b)(ii)-(iv) to seek further information/clarification therefore provides the access provider with the ability to delay the commencement of 'official' negotiation.
- In relation to clause 6.6(a), the reference to both parties commencing negotiations 'as soon as reasonably possible to progress towards an Access Agreement' lacks

certainty and is therefore not appropriate. It is more likely to be appropriate for the reference to be to a specified period of time.

- In relation to clause 6.6(b)(iv), the reference to ‘a reasonable time period’ lacks certainty and is therefore not appropriate.
- In relation to clause 6.7(c) and (d), the references to ‘as soon as reasonably practicable’ and ‘reasonable endeavours to comply with this clause as soon as practicable’ respectively are not appropriate. The ACCC considers it is not appropriate that the potential for delay be created once the parties have essentially reached agreement on terms of access but prior to execution of the access agreement. It is more likely to be appropriate for these clauses to include short, specified timeframes.
- In relation to clause 7.3(c), the reference to ‘10 Business Days’ is not appropriate. It is more likely to be appropriate for this clause to refer to 5 Business Days, to reduce unnecessary delay and to create incentives for parties to resolve disputes quickly. Further, as it is difficult to determine how long it may take the IAMA to appoint a mediator, and for that mediation to commence, it is more likely to be appropriate for timeframes leading up to that stage to be shorter.
- In relation to clause 7.3(d), it is not appropriate that there is no specified timeframe for the conduct of the mediation, as this creates uncertainty.
- In relation to clause 7.4(b), it is not appropriate that there is no specified timeframe within which ABB must notify the ACCC, as this creates uncertainty. Please refer, however, to the discussion below: **Arbitration component – further issues**.

(2) Lack of clarity and certainty

The ACCC considers that the drafting of numerous provisions in clauses 5-7 lack clarity and certainty, making those clauses not appropriate. The ACCC acknowledges that in some instances ABB may have intended certain provisions to recognise or address legitimate considerations, but considers that the drafting of those provisions does not appropriately give expression to those considerations, and instead results in ambiguity and uncertainty.

The ACCC considers that clauses 5.1(e), 5.2(a), 5.4, 5.5 and 6.7 create significant ambiguity and uncertainty as to how one of the most fundamental obligations in the proposed Undertaking – to offer access – is intended to operate. The ACCC considers that the drafting of these clauses is repetitious (particularly 6.7) and convoluted – for example clause 5.4 is expressed as subject to clause 5.5, then clause 5.4(a)(ii)(D) refers to ‘taking into account the matters set out in clause 5.5,’ then clause 6.7 – which on one interpretation appears merely to repeat matters in clause 5.4 – is expressed also to be subject to clauses 5.4 and 5.5. The ACCC considers that in other instances the drafting lacks clarity – for example, clause 5.4(a)(i) refers to an obligation to ‘offer’ the Standard Port Terminal Service, whereas clause 5.4(a)(ii) refers to an obligation to ‘not *provide access*,’ without any sense of what the difference (if any) entails. Further, the ACCC considers that various provisions in clause 5.5 are vague – for instance, ‘existing industry practices’ and ‘geographic and

seasonal variations.’ Further still, certain clauses appear to contain typographical errors that create further ambiguity and uncertainty – clause 5.4(a)(ii) is presumably missing the words ‘on terms’ before the words ‘which are different from.’

The ACCC therefore considers it is more likely to be appropriate for the proposed Undertaking to provide greater certainty and clarity in relation to this key obligation.

The ACCC also considers:

- In relation to clause 6.4 (a)(ii)(B) and (C), the references to ‘unduly onerous,’ ‘disproportionate to the benefit to be obtained from the information,’ ‘reasonable costs incurred’ and ‘information that is not ordinarily and freely available to the Port Operator’ are not appropriate. The ACCC notes the further explanation of the terms ‘unduly onerous’ and ‘disproportionate’ provided by ABB in response to the ACCC’s information request, and considers that these explanations provide some further clarity and certainty on the operation of the provision. The ACCC considers it is more likely to be appropriate if the drafting of those terms reflects what was suggested by ABB in its further submission, and if the other terms in this clause are also drafted with greater clarity and certainty.
- In relation to clause 6.4(b)(i), the reference to non-compliance that ABB believes is material is not appropriate because it appears to depend on ABB’s subjective view at its absolute discretion.
- In relation to clause 6.4(b)(v), it is not appropriate that ABB provide reasons for refusing to negotiate only in certain circumstances, and it is more likely to be appropriate that ABB provides reasons for ceasing or refusing to negotiate in all circumstances, at the same time as it ceases or refuses to negotiate.
- In relation to clause 6.5(a)(ii), it is not appropriate that the clause merely recognises the ability of the Applicant to *seek* a meeting with ABB, as there is no obligation on ABB actually to have the meeting sought.
- In relation to clause 6.6(b)(v), it is not appropriate that this clause essentially repeats the Prudential Requirements matter referred to in clause 6.4(b)(iii).
- In relation to clause 7.1(a), it is not appropriate that the clause refers to parties using reasonable endeavours to settle the Dispute as soon as is practicable, in light of the specified timeframes in clause 7.
- In relation to clauses 7.3(a)(ii) and 7.4(c), it is not appropriate that those clauses refer to providing a notice to the arbitrator, as it appears that in the circumstances contemplated by those clauses an arbitrator has not yet been appointed. Please refer, however, to the discussion below: **Arbitration component – further issues**.
- In relation to clause 7.3(c), it is not appropriate that the clause refers to a longer mediation period as is agreed ‘by each chief executive officer.’ It is more likely to be appropriate that this clause refers to agreement *between* the chief executive officers.

- It is more likely to be appropriate that it is clearly specified that clause 7.3(d) applies to formal mediation conducted either by a mediator appointed by agreement between the parties, or as appointed by the President of the SA chapter of the IAMA.
- It is more likely to be appropriate for the Access Application form in Schedule 1 to be amended in light of ABB's further submission (see above).

8.4.6 Negotiation component – further issues

Disproportionate discretion on ABB

The ACCC considers that the negotiation component does not achieve an appropriate balance between the interests of the access provider and access seekers in that there is disproportionate discretion on the part of the access provider to refuse to negotiate, or to cease negotiations, with the access seeker. The ACCC considers that this discretion creates the potential for the negotiation process to be delayed or frustrated, and therefore creates uncertainty. The ACCC also considers that this discretion undermines the robustness of the negotiate-arbitrate mechanism as a whole.

The ACCC in particular notes:

- In relation to clause 6.4(a)(ii), the discretion that ABB has to refuse a request for information from an Applicant, including where the Applicant does not agree to pay 'reasonable costs' incurred by ABB (which, as noted above, is itself not appropriate).
- In relation to clause 6.4(b)(i), the discretion that ABB has not to negotiate with an Applicant if ABB considers the Applicant does not materially comply with the requirements and processes set out in the proposed Undertaking.
- In relation to clause 6.4(b)(iii) & (iv), and clause 6.6(b)(v), the discretion that ABB has to at any time, before or during the negotiation process, to require the Applicant to demonstrate that it meets the Prudential Requirements, and to cease or refuse to commence negotiations if the Applicant does not meet those requirements (see further below).
- In relation to clause 6.4(b)(vii), the discretion that ABB has to refer an application to the arbitrator if ABB is of the view that the application is frivolous in nature or that the Applicant is not negotiating in good faith.
- In relation to clause 6.5(b), the discretion that ABB has in relation to the acknowledgement of an Access Application, and to request further information or clarification from an Applicant (see also above).
- In relation to clause 6.6(b)(iv), the discretion that ABB has to cease negotiations if ABB believes that the negotiations are not progressing in good faith towards the development of an Access Agreement within a reasonable time period;
- The discretions effectively created by the uncertain time periods in clauses 6.6(a), and 6.7(c) and (d) (see above).

The ACCC considers that timeframes that are not appropriate, and a lack of sufficient clarity and certainty, as described above, in some instances compound the problematic nature of certain of the areas of discretion set out above.

The ACCC notes that in some circumstances the proposed Undertaking permits the Applicant to refer a matter to the arbitrator if it believes ABB has exercised its discretion improperly, and allows for negotiations to recommence if the arbitrator finds ABB has acted improperly. The ACCC notes, however, that this avenue is expressly recognised in only some situations, not all, and even where it is provided, provides the access seeker only with the ability to continue negotiations at a future time if the arbitrator so orders. The ACCC considers it is more likely to be appropriate for the arbitrator to conclusively resolve the dispute if a matter is referred in this way, as requiring recommencement of negotiations creates opportunities for unnecessary delay.

Similarly, the proposed Undertaking provides few opportunities for the Applicant to refer a matter to the arbitrator if the Applicant is dissatisfied with the conduct of ABB.

The ACCC considers that the proposed Undertaking does not appropriately recognise the ability of an access seeker to re-apply for access in circumstances where negotiations may cease and an Access Agreement has not been executed (for example, at the expiry of the 'Negotiation Period'). The ACCC notes ABB's submission that an Applicant would be able to submit a new application for access in the event that the Negotiation Period ceases,²⁹⁵ and the ACCC considers that it is more likely to be appropriate for the proposed Undertaking to reflect this so as to provide greater clarity and certainty for access seekers.

The ACCC considers as a general matter that where the proposed Undertaking provides ABB with a discretion to refuse to negotiate, or cease or potentially otherwise delay or hinder negotiations, such discretion should be drafted with sufficient clarity and certainty to minimise the possibility of that discretion being misused. The ACCC also considers that any such discretion is more likely to be appropriate where it balances the interests of ABB with the interests of access seekers.

The ACCC considers that the clauses are not appropriate for the reasons stated, but acknowledges that ABB may have intended the discretions to recognise or address legitimate considerations. In particular, in relation to the Prudential Requirements, the ACCC acknowledges that it is likely to be appropriate for the proposed Undertaking to include some form of recognition that an access seeker must meet prudential requirements in order to obtain access, but that such a requirement should be drafted with greater certainty, and to better balance the interests of the access provider and access seekers. The ACCC considers in particular that clauses 6.4(b)(iv)(B) and (C) as currently drafted are not appropriate, as they create too wide a discretion for ABB, lack clarity and create uncertainty.

Appropriate clauses

The ACCC considers that it is appropriate for the proposed Undertaking to include an obligation on ABB to negotiate in good faith, as recognised in clause 6.1. The ACCC

²⁹⁵ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 43.

would also expect that access seekers utilising the process in the proposed Undertaking would also act in good faith.

The ACCC also considers it appropriate that the proposed Undertaking provides a mechanism for dealing with confidential information that may be relevant to the negotiation, dispute resolution and arbitration process, as somewhat recognised by clauses 6.2, 6.3(b) and 7.8(d). The ACCC considers however that reiterating the obligation in clause 6.2 at clause 6.3(b) and then 7.8(d) creates unnecessary confusion and it is more likely to be appropriate that the proposed Undertaking contains a single clause dealing with confidentiality during the negotiation, dispute resolution and arbitration process. The ACCC considers it is also likely to be appropriate for the proposed Undertaking to provide for disclosure of confidential information to the mediator and arbitrator as relevant, and to the ACCC.

The ACCC considers it is appropriate for the proposed Undertaking to include clause 6.3(a), or something similar, to provide guidance on how the negotiation, dispute resolution and arbitration processes are intended to operate, as this provides clarity.

8.4.7 Dispute resolution component – further issues

Pre-condition to invoking dispute resolution mechanism

The ACCC notes that clause 6.3(c) of the proposed Undertaking provides that if, at any time during the negotiation process, a dispute arises between the parties which, after reasonable negotiation, the parties are unable to resolve to their mutual satisfaction, then either party may seek to resolve the dispute in accordance with the Dispute resolution process in clause 7.

The ACCC considers that clause 6.3(c) is not appropriate, as it effectively imposes a ‘pre-condition’ on the invocation of the dispute resolution mechanism by requiring the parties to engage in ‘reasonable negotiation’ prior to invoking clause 7. The ACCC considers that the term ‘reasonable negotiation’ lacks certainty and that clause 6.3(c) could potentially allow either the access seeker or the access provider to unnecessarily delay the timely resolution of the dispute.

Definition of dispute

The ACCC notes that the definition of ‘Dispute’ in clause 11.1 refers to a ‘bona fide’ dispute. The ACCC also notes that in its supplementary submission ABB explained that ‘bona fide’ means genuine, real, of substance and not frivolous or vexatious, and included examples of what it believed did and did not constitute a bona fide dispute.²⁹⁶

The ACCC considers that it is likely to be appropriate for ‘Dispute’ to be defined to mean a ‘bona fide’ dispute, as this is a widely-known term, the use of which here is intended to prevent either the access seeker or the access provider invoking the dispute resolution process in relation to a frivolous or vexatious disputes.

The ACCC considers it is not appropriate, however, for ABB to have discretion to decide what is and what is not a bona fide dispute, as this does not adequately balance

²⁹⁶ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, pp. 43-44.

the legitimate business interests of ABB and the interests of access seekers. The ACCC therefore does not accept that the definition of ‘Dispute’ would necessarily incorporate, or be interpreted to mean, the matters described by ABB in its supplementary submission,²⁹⁷ as these matters limit the scope of the dispute resolution mechanism.

Dispute resolution mechanism in the access agreement

The ACCC notes that clause 7.1(b) of the proposed Undertaking provides that any disputes in relation to an executed access agreement will be dealt with pursuant to the provisions of that agreement; similarly, the definition of ‘Dispute’ in clause 11.1 excludes any disputes in relation to an executed Access Agreement.

The ACCC considers it is appropriate that these clauses limit the scope of the dispute resolution mechanism to ‘Disputes’ that arise during the negotiation of an Access Agreement. Once the parties have an access agreement, they have direct rights of enforcement in contract and need not revert to the Undertaking. The ACCC notes ABB’s submission that any dispute in relation to alleged discriminatory conduct could be raised under the mechanism in clause 7.²⁹⁸

The ACCC cannot, however, reach a view on whether it is appropriate for disputes in relation to an executed Access Agreement to be dealt with under that Agreement, as such an agreement does not form part of the proposed Undertaking, and the ACCC therefore cannot reach a view on the appropriateness of the dispute resolution mechanism within it. Similarly, the ACCC considers that it cannot reach a view on the appropriateness of clause 7.1(c), which obliges ABB to report ‘material disputes’ in relation to an Access Agreement to the ACCC, without an indicative agreement forming part of the proposed Undertaking.

The ACCC notes, however, that ABB is proposing to include an indicative access agreement as part of a revised Undertaking, and a copy of that agreement is annexed to this draft decision. The ACCC is therefore seeking submissions on whether the agreement, and the dispute resolution mechanism it proposes, are appropriate.

8.4.8 Arbitration component – further issues

Selection of the arbitrator

The ACCC considers that clause 7.5 is not appropriate having regard to the public interest.

The ACCC considers it is more likely to be appropriate for the ACCC to have a role as arbitrator. The ACCC considers that clear public interest considerations arise in relation to the proposed Undertaking, and which may also arise in relation to certain Disputes between an access seeker and an access provider. In this regard the ACCC notes again the effect of the WEMA in reforming the arrangements for the export of bulk wheat from Australia via the introduction of competition, as well as the transitional state of the industry at present. The ACCC considers it would be better placed than a private arbitrator to have regard to these matters in arbitrating a dispute

²⁹⁷ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 44.

²⁹⁸ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 45.

which raises such matters, particularly due to its experience in economic regulation and in arbitrating matters with public interest considerations.

The ACCC also considers that if the ACCC had a role as arbitrator in the proposed Undertaking, then that consideration would support the appropriateness of the overall publish-negotiate-arbitrate approach proposed by ABB. That is, if it were possible for the ACCC to arbitrate certain Disputes, the ACCC would thereby maintain an additional degree of oversight in relation to the proposed Undertaking, thereby enhancing the robustness of the dispute resolution mechanism.

The ACCC notes, however, the likelihood that not every Dispute that may arise in relation to the proposed Undertaking will warrant arbitration by the ACCC. While it is not possible for the ACCC predict, at this stage, the particular Disputes upon which it may or may not choose to arbitrate, it is possible that purely commercial or technical disputes with no public interest considerations may more appropriately be arbitrated by a private arbitrator.

The ACCC therefore considers it more likely to be appropriate for the proposed Undertaking to provide:

- that when a Dispute is referred to arbitration, it is referred to the ACCC in the first instance;
- a mechanism by which the ACCC may consider whether or not it wishes to arbitrate the Dispute; and
- for the Dispute to be arbitrated by the ACCC if it so chooses, or for the Dispute to be arbitrated by a private arbitrator if the ACCC so chooses.

The ACCC notes, of course, that the proposed Undertaking does not remove the ability of parties to resolve disputes to their mutual satisfaction by mediation or arbitration without recourse to the mechanism in the proposed Undertaking, if they agree to take that course.

Conduct of the arbitration

The ACCC considers that clause 7.7(a) is not appropriate as it lacks clarity and certainty, and to some extent replicates matters in clause 7.7(b). The ACCC considers it is nonetheless likely to be appropriate for the arbitration component to include the matters acknowledged in clause 7.7(a)(iv) and (v).

The ACCC considers that, in light of its view that it is more likely to be appropriate for the ACCC to have a role as arbitrator, it is also more likely to be appropriate for the arbitration component to provide for differences in the circumstances depending on whether the arbitrator is the ACCC or a private arbitrator. In particular, the ACCC considers that it is more likely to be appropriate for the proposed Undertaking:

- to require a private arbitrator to keep the ACCC informed of the progress of the arbitration, including timelines and processes for making submissions;
- to allow the ACCC to make submissions in its absolute discretion in relation to an arbitration conducted by a private arbitrator (the current drafting of the proposed

Undertaking is unclear as to upon whose request the ACCC may make submissions); and

- to permit the ACCC to conduct an arbitration adopting the processes and having regard to the matters set out in Part IIIA of the TPA if it chooses to be the arbitrator.

The ACCC also considers that these matters would also support the appropriateness of the overall publish-negotiate-arbitrate approach proposed by ABB.

Appropriate clauses

The ACCC considers it is appropriate to allow either party unilaterally to refer the dispute to arbitration, as this provides a ‘check’ on the ability of either party to delay or frustrate the dispute resolution process. The ACCC also considers it appropriate for the arbitrator to take into account the matters listed in clause 7.6(d) as a check on the ability of either party improperly to refer a matter to arbitration.

8.4.9 Holding over arrangements

Clause 5.2(b) provides that access to a Standard Port Terminal Service²⁹⁹ will be offered for a period expiring no later than 30 September of the year following the year in which the Standard Terms were first published, subject to appropriate ‘holding over’ provisions. In response to a question from the ACCC asking what constitutes ‘appropriate holding over provisions,’ ABB explained:

‘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.’³⁰⁰

The ACCC considers that the publish-negotiate-arbitrate mechanism is not appropriate as it does not adequately provide ‘holding over’ arrangements, being arrangements whereby an access seeker may obtain access to the service without an executed access agreement while they are negotiating for an access agreement pursuant to the proposed Undertaking. The ACCC considers that holding over arrangements are an important aspect of the negotiate-arbitrate approach and that it is not appropriate for an access seeker to be delayed in obtaining access because they are engaging in the negotiation process in the proposed Undertaking, including where the dispute resolution and arbitration processes are invoked. The ACCC considers that such an outcome creates uncertainty, is not in the interests of access seekers, and is unlikely to ensure that the proposed Undertaking provides fair and transparent access.

The ACCC considers that ABB’s construction is not apparent on the face of the proposed Undertaking (and it is uncertain as to what ‘certain steps’ need to be taken), and that it is more likely to be appropriate that the proposed Undertaking specifies with greater clarity and certainty the circumstances in which ‘holding over’ arrangements will apply, and how they will apply. The ACCC considers that ABB’s

²⁹⁹ And ABB’s obligation to enter into an Access Agreement for that/those service/s.

³⁰⁰ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 37.

comments that a 'holding over' mechanism will not eliminate flexibility in the negotiation of individual access agreements, nor '...predetermine the contents of those agreements prior to their being entered into,'³⁰¹ provide some additional certainty that may likely be appropriate if reflected in the proposed Undertaking.

The ACCC also considers it not appropriate for the proposed Undertaking to contain clause 3.7 as currently drafted. Clause 3.7 provides that the proposed Undertaking applies only to the negotiation of new Access Agreements (and the negotiation of access in addition to that already the subject of an Access Agreement), and that nothing in the proposed Undertaking can require a party to an existing Access Agreement to vary a term or provision of that agreement.

The ACCC considers that, on its face, this clause potentially prevents the application of the proposed Undertaking to Access Agreements for the 2009/10 season, on the basis that access seekers could sign agreements prior to the commencement of the proposed Undertaking, and then, by virtue of clause 3.7, be precluded from negotiating non-standard terms or prices. The ACCC considers that this would be an unacceptable outcome, as it would essentially render the negotiate-arbitrate mechanism redundant for the first season.

The ACCC consider it is more likely to be appropriate for the proposed Undertaking to include a mechanism that ensures that the negotiate-arbitrate process is available to access seekers who wish to negotiate non-standard terms or prices for the 2009/10 season. The ACCC considers that an option in this regard could be the inclusion of a clause that obliges ABB to negotiate, as per the negotiate-arbitrate mechanism, variations to Access Agreements entered into prior to the commencement of the proposed Undertaking. Such a clause would not be intended to create commercial uncertainty for ABB through the potential variation of multiple contracts, but rather to create an incentive for ABB to negotiate access agreements as if the proposed Undertaking were in effect, and thereby avoid the problem of the potential circumvention of the negotiate-arbitrate mechanism.

8.4.10 Conclusion in relation to publish-negotiate-arbitrate component

The ACCC considers it is appropriate for the proposed Undertaking to adopt a publish-negotiate-arbitrate approach, and not provide ex ante price regulation, if the publish-negotiate-arbitrate component is robust. The ACCC considers, however, that the publish-negotiate-arbitrate component of the proposed Undertaking is not appropriate for the following reasons:

- The proposed publish-negotiate-arbitrate component lacks clarity and certainty. The ACCC considers that the drafting of numerous clauses is either vague, ambiguous, confusing or unnecessarily broad or restrictive, which is of itself not appropriate and which also creates uncertainty as to how the mechanism will operate in practice.
- The proposed publish-negotiate-arbitrate component does not appropriately address the interests of access seekers. The ACCC considers that many clauses of the proposed mechanism provide too great a discretion on the access provider to

³⁰¹ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 37.

refuse to negotiate, or to cease negotiations once commenced, which has the potential to delay or frustrate the overall access application process. The opportunity for delay and frustration creates further uncertainty as to how the mechanism will operate in practice. The lack of certainty and clarity described above, and the absence of appropriate holding over arrangements are also not in the interests of access seekers.

- The proposed publish-negotiate-arbitrate component is not in the public interest. The ACCC considers it is not in the public interest to accept an access undertaking that lacks certainty and clarity, and that does not appropriately address the interests of access seekers. Further, the ACCC considers that the arbitration component in particular does not appropriately recognise public interest considerations, as outlined above.
- The proposed publish-negotiate-arbitrate component is not appropriate in the context established by the WEMA. The ACCC considers that the lack of clarity and certainty and failure to address the interests of access seekers are unlikely to ensure fair and transparent access to port terminal services.

The ACCC considers it is more likely to be appropriate for the proposed Undertaking to:

- include an indicative access agreement setting standard terms for access to the service;
- require ABB to publish a single set of prices for port terminal services, which may include differentiated prices for particular circumstances (i.e., for different processes for testing of grain depending on where it has been stored – but *only* where these processes are justifiable with regard to hygiene, quality or associated factors), provided those circumstances are transparently stated and the pricing differences are justified on the basis of different costs;
- require ABB to publish prices within a timeframe that allows sufficient opportunity for access seekers to negotiate non-standard terms and prices;
- provide appropriate holding over arrangements to ensure access seekers are not delayed in obtaining access by reason of engaging in a negotiation with ABB on non-standard terms or prices, or by reason of resolving a dispute with ABB pursuant to the processes in the proposed Undertaking;
- address the issues identified by the ACCC in the discussion above regarding the timeframes and lack of clarity and certainty in the drafting of the proposed Undertaking, as well as the disproportionate discretion of the access provider;
- not include a ‘pre-condition’ to invoking the dispute resolution process, as currently included in clause 6.3(c);
- provide that when a Dispute is referred to arbitration, it is referred to the ACCC in the first instance;

- provide a mechanism by which the ACCC may consider whether or not it wishes to arbitrate the Dispute;
- provide for the Dispute to be arbitrated by the ACCC if it so chooses, or for the Dispute to be arbitrated by a private arbitrator if the ACCC so chooses;
- permit the ACCC to conduct an arbitration adopting the processes and having regard to the matters set out in Part IIIA of the TPA if it chooses to be the arbitrator;
- require a private arbitrator, if appointed, to keep the ACCC informed of the progress of the arbitration, including timelines and processes for making submissions; and
- allow the ACCC to make submissions in its absolute discretion in relation to an arbitration conducted by a private arbitrator.

9 Indicative Access Agreement

Summary

Inclusion of an Indicative Access Agreement

ABB's approach of not including an Indicative Access Agreement in its proposed Undertaking is not appropriate. It results in a lack of certainty and clarity for potential access seekers and is, therefore, not in the interest of person who might want access to the service.

Including an Indicative Access Agreement in the proposed Undertaking would:

- provide a clear starting point for negotiations between an access seeker and ABB (and is therefore critical to ensuring access seekers can effectively negotiate with ABB); and
- ensure that the costs of negotiation and/or arbitration are not excessive.

It is important to note that inclusion of an indicative access agreement in the proposed Undertaking does *not* mean that access seekers and ABB are precluded from negotiating around the Indicative Access Agreement (either by commercial agreement or by utilising the Negotiation and/or Arbitration provisions in the proposed Undertaking).

The ACCC is seeking submissions on whether ABB's 2009–10 Port Terminal Services Agreement for Standard Port Terminal Services provided to the ACCC on 22 May 2009 and annexed to this draft decision at Annexure A would form an appropriate basis for an Indicative Access Agreement.

Variation of an Indicative Access Agreement

ABB's approach of retaining discretion to unilaterally vary its "Standard Terms" (i.e. which are likely to be similar to an Indicative Access Agreement) is not appropriate. It results in a lack of certainty and clarity for potential access seekers and undermines the benefits of inclusion of an Indicative Access Agreement in the proposed Undertaking.

It would be more appropriate for the variation provisions in section 44ZZA(7) of the TPA to apply to any variations of the Indicative Access Agreement. This does not preclude parties from negotiating non-standard terms that vary from those in the Indicative Access Agreement.

9.1 ABB's proposed Undertaking

ABB does not include its proposed standard terms and conditions of access to port terminal services (otherwise known as an Indicative Access Agreement) as part of its Undertaking.

The obligations on ABB to publish its Standard Terms are set out in the Publish, Negotiate, Arbitrate chapter.

In relation to variation of Standard Terms, clause 5.6 provides:

Variation to Reference Prices and Standard Terms

- (a) the Port Operator may vary the Reference Prices or the Standard Terms;
- (b) Any variation under clause 5.6(a) must be published at least 30 days prior to the date on which it is to become effective in the same locations as it publishes its Reference Prices and Standard Terms;
- (c) The Port Operator must provide the ACCC with copies of variations to the Reference Prices and Standard Terms promptly following publication[;]
- (d) To avoid doubt, any variations to the Reference Prices or Standard Terms does not automatically override the terms of existing access agreements.

9.2 ABB's supporting submissions

ABB submits that its intention is to be bound by the terms and conditions at the time of publishing for the term of the agreement, and not to vary them. However, ABB submits that it is possible that the terms and conditions would need to be varied during the course of an agreement. ABB submitted that reasons for such a change could 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.³⁰²

In response to a question by the ACCC about the role of bulk wheat exporters in ABB's proposed variation process:

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

³⁰² ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 35.

Undertaking and, if dissatisfied with the terms of access, seek binding arbitration in accordance with clause 7 of the Access Undertaking.³⁰³

9.3 Other submissions received

Australian Grain Exporters Association (AGEA)

AGEA submits that the proposed Undertaking contemplates that the price and non-price terms can be unilaterally varied by ABB without negotiation with its customers. AGEA argues that the terms and conditions of access to port terminal facilities must comply with and, if not incorporated in the proposed Undertaking, be subordinate to the proposed Undertaking where necessary.³⁰⁴ AGEA also argued for the inclusion of a list of particular terms to be included as part of the undertaking.³⁰⁵

AGEA argued that ABB should not be able to vary price and non-price terms except in clearly defined circumstances (such as a material adverse change) and provided both parties agree to the proposed changes. AGEA submits that the implementation of the amended terms should only take effect after six months' notice, in order to give wheat exporters time to adjust.³⁰⁶

9.4 ACCC's views

9.4.1 Inclusion of an Indicative Access Agreement as part of the proposed Undertaking

The ACCC considers that the approach taken by ABB of not including an Indicative Access Agreement in the proposed Undertaking results in a lack of certainty and clarity for potential access seekers and is, therefore, not appropriate having regard to the matters set out in section 44ZZA(3) of the TPA.

Indicative Access Agreements are a common inclusion in access undertakings.³⁰⁷ They assist access seekers (through the negotiation and arbitration framework discussed in the Publish, Negotiate, Arbitrate chapter of this draft decision) to conclude a set of agreed access terms and conditions with the access provider. These terms and conditions are then embodied in a contractual relationship between the access provider and an access seeker (i.e. an Access Agreement).

Including an Indicative Access Agreement in the proposed Undertaking would provide a clear starting point for negotiations and is therefore crucial to ensure access seekers can effectively negotiate with ABB. Another key benefit of inclusion of the

³⁰³ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 36.

³⁰⁴ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, p. 23.

³⁰⁵ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, pp. 12-13.

³⁰⁶ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, p. 24.

³⁰⁷ See, for example, the access undertaking submitted by the Australian Rail Track Corporation (ARTC), and accepted by the ACCC on 30 July 2008.

Indicative Access Agreement is to ensure that the costs of negotiation and/or arbitration are not excessive.

For the avoidance of doubt, it is important to note that inclusion of an indicative access agreement in the proposed Undertaking does *not* mean that access seekers and ABB are precluded from negotiating around the Indicative Access Agreement. There is nothing to stop ABB agreeing to different terms and conditions with access seekers, either by commercial agreement or via the negotiation/ arbitration framework in the proposed Undertaking. Nevertheless, an indicative access agreement serves the function of operating as a ‘minimum offer’ by the access provider.

Submissions sought

On 13 May 2009 the ACCC requested that ABB provide the ACCC with its proposed standard terms of access for the 2009/2010 export season.

ABB provided a draft copy of its 2009–10 Port Terminal Services Agreement for Standard Port Terminal Services to the ACCC on 22 May 2009. This document was *not* provided to the ACCC as part of ABB’s proposed Undertaking and has not been subject to public consultation.

The ACCC is seeking submissions on whether ABB’s 2009–10 Port Terminal Services Agreement for Standard Port Terminal Services provided to the ACCC on 22 May 2009 and annexed to this draft decision at Annexure A would form an appropriate basis for an Indicative Access Agreement.

9.4.2 Variation of Standard Terms or Reference Prices

It is the ACCC’s view that ABB’s approach to variation of the “Standard Terms” is not appropriate.

As noted above, the ACCC considers that it would be more appropriate for ABB’s proposed Undertaking to include an Indicative Access Agreement as part of its Undertaking.

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 understands that the standard terms and conditions upon which ABB offers grain exporters do not vary greatly from year to year. The ACCC also understands that, in relation to standard terms and conditions of access, there is not as great a need for flexibility as is the case in relation to the port loading protocols (see the Capacity Management chapter). Further, the ACCC notes that the parties are able to negotiate non-standard terms that vary from those in the Indicative Access Agreement.

For these reasons, and given the short term of the proposed 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.

10 Non-discrimination

Summary

It is appropriate that ABB's proposed Undertaking includes non-discrimination and no hindering access clauses.

However, the precise non-discrimination and no hindering access clauses proposed by ABB are not appropriate given the lack of clarity about their interpretation. Further, the drafting of the non-discrimination clauses does not ensure that they will prohibit ABB from discriminating in favour of its own trading business.

The ACCC has made recommendations in this chapter about changes that could be made to the non-discrimination clauses and no hindering access clauses to make them sufficiently robust to protect against anti-competitive self-preferential treatment by ABB. For the avoidance of doubt, the non-discrimination clause should protect against (amongst other matters) the ability of ABB to anti-competitively discriminate between wheat exporters on the basis of where grain was stored (ie. whether it was stored in ABB's up-country storage and handling network, a third party storage network or on-farm).

The ACCC seeks submissions on whether it would be appropriate for ABB's proposed Undertaking to provide for an annual audit procedure of compliance with the Undertaking's non-discrimination clause.

10.1 ABB's proposed Undertaking

The following are ABB's non-discrimination provisions within its proposed Undertaking:³⁰⁸

5.4 Non-discriminatory access

- (a) Subject to clause 5.5:
 - (i) if an Applicant requests a Standard Port Terminal Service at a Port Terminal, the Port Operator must offer the Standard Port Terminal Service at the Reference Prices applicable from time to time for that Standard Port Terminal Service for that Port Terminal in accordance with clause 6; and
 - (ii) the Port Operator must not provide access to Applicants or Users (including its own Trading Division) which are different from:
 - (A) in the case of Standard Port Terminal Services, the Reference Prices or Standard Terms; or
 - (B) in all cases, the price and non-price terms offered to another Applicant or User,

³⁰⁸ ABB Grain Ltd, *Port Terminal Services Access Undertaking*, 16 April 2009, clause 5.4.

unless such different terms are:

- (C) consistent with the objectives of this Undertaking set out in clause 1.2;
 - (D) commercially justifiable taking into account the matters set out in clause 5.5; and
 - (E) offered on an arms length commercial basis.
- (b) The Port Operator must not discriminate against an Applicant in breach of this Undertaking where the terms and conditions are different to those offered to another User or the Trading Division for providing like Port Terminal Services and the differentiation is for the purpose of substantially damaging a competitor or conferring upon the Port Operator or its Trading Division any unfair competitive advantage over a competitor in the marketing of Bulk Wheat.

The non-discriminatory access clause set out above is expressed to be subject to the 'Price and non-price terms' provisions outlined in clause 5.5. Clause 5.5 sets out the basis upon which the price and non-price terms for the provision of access to Port Terminal Services might differ between different access seekers. Clause 5.5 states:

For the purposes of this Undertaking, the price and non-price terms for the provision of access to Port Terminal Services to different Applicants or Users will be determined by having regard to:

- (a) the Port Operator's legitimate business interests and investment in the Port Terminal Services, Port Terminal Facilities and the Port Terminal;
- (b) all costs that the Port Operator incurs or may incur in providing access, including any costs of extending the Port Terminal Services, but not costs associated with losses arising from increased competition in upstream or downstream markets;
- (c) the economic value to the Port Operator of any additional investment that the Applicant or Port Operator has agreed to undertake;
- (d) the interests of all persons who have rights to use the Port Terminal;
- (e) the operational and technical requirements necessary for the safe and reliable operation of the Port Terminal Services, the Port Terminal Facilities and the Port Terminal;
- (f) the economically efficient operation of the Port Terminal Services, the Port Terminal Facilities and the Port Terminal;
- (g) any differences in the costs of providing access to Port Terminal Services to different Applicants or Users;
- (h) the opportunity cost of accommodating the requirements of one Applicant or User compared to the requirements of one or more other Applicants or Users;
- (i) the provision of quality related services reasonably required by the Port Operator in respect of some Applicants or Users, but not others including security of Bulk Wheat integrity, testing of Bulk Wheat or Bulk Wheat classification, fumigation and protection requirements for Bulk Wheat;
- (j) the relative risk related to storing and handling different Bulk Wheat segregations for Applicants and Users;
- (k) available Port Terminal capacity, including receipt, handling, storage and cargo accumulation capacity;
- (l) differences in types and grades of Applicants' or Users' Bulk Wheat;

- (m) differences in Applicants' or Users' Bulk Wheat volumes;
- (n) differences in periods of time during which access to Port Terminal Services is required by Applicants or Users;
- (o) differences in levels of Applicants' or Users' usage of Port Terminal Services;
- (p) differences in modes of receipt, storage or outturn including different transport modes to receive Bulk Wheat and different ship configurations;
- (q) geographic and seasonal variations;
- (r) minimisation of demurrage at the port over a given period;
- (s) maximisation of throughput of Bulk Wheat and other commodities at the port over a given period;
- (t) unless the Port Operator is offering segregated services at a Port Terminal, the ability to mix the same grade of Bulk Wheat owned by different owners and / or mix different grades of Bulk Wheat owned by the same or different owners;
- (u) the credit risk of an Applicant or User; and
- (v) existing industry practices.³⁰⁹

The non-discrimination clause in ABB's proposed Undertaking is also linked to the 'Objectives' provisions set in clause 1.2. For instance, the Port Operator can provide access to Applicants or Users (including its own Trading Division) on terms which differ from the Reference Prices or Standard Terms if those different terms are consistent with the objectives of the Undertaking set out in clause 1.2 (as well as commercially justifiable taking into account the matters set out in clause 5.5 and offered on an arms length basis), which are as follows:

1.2 Objectives

The Undertaking has the following objectives:

- (a) providing a framework to manage negotiations with Applicants for access to services provided by certain facilities at the Port Terminals in relation to export of Bulk Wheat;
- (b) establishing a workable, open, non-discriminatory and efficient process for lodging and processing Access Applications;
- (c) providing a non-discriminatory approach to pricing under which the Port Operator publishes reference prices and terms and conditions for the provision of certain standard services annually;
- (d) operating consistently with the objectives and principles in Part IIIA of the TPA and the Competition Principles Agreement;
- (e) reaching an appropriate balance between:
 - (i) the legitimate business interests of the Port Operator, including:

³⁰⁹ ABB Grain Ltd, *Port Terminal Services Access Undertaking*, 16 April 2009, clause 5.5.

- (A) the recovery of all reasonable costs associated with the granting of access to the Port Terminal Services;
 - (B) a fair and reasonable return on the Port Operator's investment in the Port Terminal Facility commensurate with its commercial risk;
 - (C) the Port Operator's business interests relating to the export of grain other than Bulk Wheat and to the export of non-grain commodities using the Port Terminal Facilities;
 - (D) the Port Operator's ability to meet its own or its Trading Divisions' reasonably anticipated requirements for Port Terminal Services; and
- (ii) the interest of the public, including:
 - (A) ensuring efficient use of resources; and
 - (B) the promotion of economically efficient investment, use and operation of the Port Terminals; and
 - (iii) the interests of Applicants wanting access to the Port Terminal Services, including providing access to the Port Terminal Services:
 - (A) on non-discriminatory price and non-price terms; and
 - (B) in a transparent, open, efficient and non-discriminatory manner;
- (f) providing an efficient, effective and binding dispute resolution process in the event that the Port Operator and the Applicant are unable to negotiate a mutually acceptable Access Agreement; and
 - (g) in accordance with the objective in s44AA(b) of the TPA, providing for a uniform approach to access to the Port Terminal Services at the different Port Terminals to the extent practicable having regard to the different characteristics of the Port Terminals.³¹⁰

ABB also includes a non-discrimination clause at 8.3, in the 'Capacity Management' section of the proposed Undertaking, which deals with discrimination in the context of 'Operational Decisions'. ABB's proposed Undertaking states that Operational Decisions has the following meaning:

[...] decisions made in the course of providing the Port Terminal Services including day to day decisions concerning scheduling, cargo accumulation decisions and ship loading.³¹¹

The following is the non-discrimination clause at 8.3:

8.3 Non-discrimination

Subject to clause[s] 5.4 and 8.4, the Port Operator undertakes not to discriminate between Users or in favour of its Trading Division in providing Port Terminal Services.³¹²

Clause 8.4 of ABB's proposed Undertaking sets out a list of factors it will consider in making Operational Decisions. At clause 8.4(c) of its proposed Undertaking, ABB states that 'it will make such decisions based on objective commercial criteria and

³¹⁰ ABB Grain Ltd, *Port Terminal Services Access Undertaking*, 16 April 2009, clause 1.2.

³¹¹ ABB Grain Ltd, *Port Terminal Services Access Undertaking*, 16 April 2009, clause 8.4(a).

³¹² ABB Grain Ltd, *Port Terminal Services Access Undertaking*, 16 April 2009, clause 8.3.

will adopt practices and policies to promote fair, reasonable and non-discriminatory Operational Decision making'.³¹³

At clause 8.4(d) ABB states that it may, in making Operational Decisions:³¹⁴

- (i) give priority to vessels based on the lead time given between nomination and vessel ETA and likely availability of sufficient Bulk Wheat at the Port Terminal prior to vessel ETA necessary to make a nominated vessel's nominated cargo tonnage;
- (ii) take into account in particular, the objectives of:
 - (A) minimising demurrage at the Port Terminal over a given period;
 - (B) maximising throughput of Bulk Wheat and other commodities at the Port Terminal over a given period;
- (iii) vary a cargo assembly plan or queuing order for vessels as a result of:
 - (A) insufficient Bulk Wheat at the Port Terminal accumulated by the User necessary to make a User's nominated vessel's nominated cargo tonnage;
 - (B) variations in vessel arrival times;
 - (C) failure of vessels to pass surveys;
 - (D) stability and ship worthiness inspections;
 - (E) vessel congestion;
 - (F) variation in cargo requirements;
 - (G) lack of performance of freight providers;
 - (H) equipment failure;
 - (I) maintenance outages;
 - (J) contamination of accumulated cargoes or contamination of loads;
 - (K) a User not working a vessel or accumulating a cargo on a 24 hour/7 day basis where another User is able to do so.

ABB's proposed Undertaking, at clause 8.5, also includes a 'No hindering access' provision, which states:

8.5 No hindering access

The Port Operator must not engage 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.

10.2 ABB's submissions

ABB states that its proposed Undertaking includes non-discriminatory access clauses which prohibit it from 'discriminating in favour of its own business'.³¹⁵ ABB submits that its proposed non-discriminatory access clauses, 'together with a binding dispute resolution process, ensure that ABB will continue to provide access at prices that generate expected revenue that is at least sufficient to meet the efficient costs of

³¹³ ABB Grain Ltd, *Port Terminal Services Access Undertaking*, 16 April 2009, clause 8.4(c).

³¹⁴ ABB Grain Ltd, *Port Terminal Services Access Undertaking*, 16 April 2009, clause 8.4(d).

³¹⁵ ABB Grain Ltd, *Submission to the ACCC*, 16 April 2009, para 8.8, p. 29.

providing access to the Port Terminal Services including a return on investment commensurate with risk'.³¹⁶

In relation to the day-to-day provision of port terminal services, ABB states:

Operationally, the Undertaking recognises that decisions must be taken that will necessarily advantage one user over another in the context of that decision alone. However, the Undertaking provides a mechanism for preventing preferential self-dealing and ensuring decisions are made on the basis of objectively verifiable commercial factors.³¹⁷

ABB submits that, in accordance with its proposed 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'.³¹⁸

Regarding clause 5.4(b), ABB submits that this clause:

[...] 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.³¹⁹

In relation to the additional fees it charges wheat exporters for wheat received from outside of its up-country network, ABB submits that this fee has been the subject of a binding independent arbitration process which resulted in a determination that the fee was 'both reasonable and justifiable (having regard to the relevant non-discrimination criteria)'.³²⁰

10.3 Submissions received from interested parties

10.3.1 Australian Grain Exporters Association (AGEA)

AGEA states that the provisions within ABB's non-discriminatory access clause at clause 5.4 have the effect of providing a justification for discrimination (rather than ensuring against discrimination).³²¹

AGEA notes the link between ABB's non-discriminatory access clause and the 'objectives' clause of the Undertaking. In this regard, AGEA submits that:

³¹⁶ ABB Grain Ltd, *Submission to the ACCC*, 16 April 2009, para 8.8, p. 29.

³¹⁷ ABB Grain Ltd, *Submission to the ACCC*, 16 April 2009, n 1, p. 4.

³¹⁸ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 31.

³¹⁹ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 36.

³²⁰ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, Attachment 2, p. 63.

³²¹ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 10.1, p. 25.

'ABB/GrainCorp clause 5.4 [CBH clause 6.4] gives BHCs complete discretion to decide whether discrimination is consistent with the objectives of the undertaking and therefore justified. The objectives of the undertaking include reaching an appropriate balance between factors including BHCs' own "*legitimate business interests*", "*recovery of all [of their] reasonable costs*" and their "*ability to meet [their] own or [their] Trading Divisions' reasonably anticipated requirements for Port Terminal Services*". BHCs' conflict of interest would inevitably result in BHCs deciding to discriminate in its price and non-price terms in favour of its own interests or its Trading Divisions'.³²²

AGEA submits that clause 5.4(b) of ABB's submission has the effect of removing protection from port users in that 'it would be 'impossible to prove a subjective requirement that the discrimination was "*for the purpose of substantially damaging a competitor or conferring upon the Port Operator or its Trading Division any unfair competitive advantage*"'.³²³

In relation to the way in which ABB has linked the non-discriminatory access clause at 5.4 to clause 5.5, AGEA submits that clause 5.5 provides a 'non-exhaustive list of factors justifying discrimination on the price and non-price terms on which access to port terminal services will be provided. The factors set out in clause 5.5 [...] lack certainty and allow BHCs to favour their own interests'.³²⁴

The following paragraphs are AGEA's views on the list of considerations found at clause 5.5 of ABB's proposed Undertaking:

- (a) ABB at clause 5.5(a) refer to BHCs' "*legitimate business interests and investment*" and provides a self-serving justification to adjust price and non-price terms in favour of its own interests;
- (b) ABB at clause 5.5(d) refer to "*the interests of all person which have rights to use the Port Terminal*", but there is no obligation for all rights to be afforded equal weight;
- (c) ABB at clause 5.5(f) refer to "*the economically efficient operation of the Port Terminal Services, the Port Terminal Facilities and the Port Terminal*", but it is unclear what this means: it may be impossible to show that an act of discrimination made a difference to the "*economically efficient operation of the Port Terminal Services*";
- (d) ABB at clause 5.5(k) refer to "*available Port Terminal capacity, including receipt, handling, storage and cargo accumulation capacity*": in most cases, BHCs control all of these elements and BHCs should not be entitled to discriminate on the occurrence of elements that it controls;
- (e) ABB at clause 5.5(p) refer to "*differences in modes of receipt, storage or outturn including different transport modes to receive Bulk Wheat and different ship configuration*", which suggests that discrimination may occur in the event that non-BHC services are used;
- (f) ABB at clause 5.5(r) refer to "*minimisation of demurrage at the port over a given period*": this clause suggests that discrimination and the calling of vessels to berth out of order might be permitted according to which vessel has the highest demurrage rate. It is unclear how this clause would operate because demurrage rates ordinarily are confidential between the parties to the vessel charterparty and BHCs should not be privy to vessel demurrage rates. In any event, a AWE's

³²² Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 10.2, p. 25.

³²³ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 10.3, p. 25.

³²⁴ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 10.4, p. 25.

ability to negotiate a low demurrage should not result in that AWE being penalised by having another vessel being given priority at berthing, because it has a higher demurrage rate;

(g) ABB at clause 5.5(v) refers to "existing industry practices": what constitutes industry practice to ABB may be very limited and self-serving given its dominant position in South Australia.³²⁵

AGEA submits that ABB's proposed Undertaking must contain a complaints and audit procedure which:

- (a) allows complaints in relation to actual or suspected breaches of the undertaking to be made to an independent person who must investigate the complaint and report to the ACCC on the outcome of the investigation;
- (b) requires BHCs to engage an independent auditor to undertake an audit of BHCs compliance with the undertaking at such times as the ACCC may reasonably direct, but at least once in any 12 month period;
- (c) allows the ACCC to investigate any matters arising out of or relating to complaints or the audit.³²⁶

AGEA submits that ABB discriminates in the provision of port terminal services depending whether the wheat is received from ABB's up-country facilities or via services provided by third parties.³²⁷ AGEA states 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' and that these fees are not based on additional costs incurred by ABB, but 'merely act as a penalty (or disincentive) in the event that...[access seekers]...do not use certain BHCs' services'.³²⁸

Regarding ABB's non-discrimination clause at 8.3 of ABB's proposed Undertaking – which relates to discrimination in the making of Operational Decisions – AGEA states:³²⁹

The BHCs' discretion to make Operational Decisions is too wide and subjective. AWEs need the certainty of knowing shipping slots will be available. The Port Protocols should clearly define the obligations to accept vessel nominations. If AWEs fail to get wheat to port by the load date, AWEs forfeit the booking fee and BHCs' interests are protected.

ABB clause 8.4(b) provides that in making "Operational Decisions", ABB must "*balance the conflicts of interests of users of the Port Terminals*". This clause does not provide any transparency or benchmarks to show that the Operational Decisions are made to ensure that fair access is provided to all AWEs.

ABB clause 8.4(d)(i) entitles BHCs to make Operational Decisions to give priority to vessels based on the "*lead time given between nomination and vessel ETA and likely availability of*

³²⁵ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 10.4, pp. 25-26.

³²⁶ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 10.5, p. 26.

³²⁷ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 3.13, p. 5.

³²⁸ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 3.24, p. 8.

³²⁹ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 15.1-15.6, pp. 33-34.

sufficient Bulk Wheat at the Port Terminal prior to vessel ETA". BHCs control the movement and accumulation of wheat at port.

ABB clause 8.4(d)(ii) provides opportunities for BHCs to restrict access to port terminal services and is vague and uncertain.

(a) In relation to ABB clause 8.4(d)(ii)(A), in the normal course of events, BHCs are not aware of the AWE's vessel demurrage rate. In any event, a AWE's ability to negotiate a low demurrage should not result in that AWE being penalised by having another vessel being given priority at berthing, because it has a higher demurrage rate.

(b) In relation to ABB clause 8.4(d)(ii)(B), as BHCs controls the movement and accumulation of wheat at port, it is within its means to show that the throughput of bulk wheat is maximised by loading its vessels in priority to other AWEs.

ABB clause 8.4(d)(iii) provides BHCs with very broad entitlements to vary a cargo assembly plan or queuing order of a vessel. BHCs control the movement and accumulation of wheat at port facility (ABB clause 8.4(d)(iii)(A)). BHCs should not be entitled to vary a cargo assembly plan or queuing order as a result of vessel congestion (ABB clause 8.4(d)(iii)(A)).

10.3.2 South Australian Farmers Federation (SAFF)

SAFF submit that clauses 5.4 and 5.5 of ABB's proposed Undertaking are 'probably the most important clauses in the Undertaking'³³⁰ and that '[w]hether these can be met will need to be assessed by ACCC and then closely monitored on a regular basis'.³³¹

In this regard SAFF states:

At the moment there is discriminatory access backed up by price penalties. Upcountry service providers face penalty charges if they do not use ABB Grain services and facilities. Under ABB Grain's Export Select program, other bulk wheat exporters are virtually held to ransom as they must use ABB's transport arrangements.³³²

10.3.3 Grain Industry Association of Victoria (GIAV)

The GIAV submits that wheat exporters are currently discriminated against when delivering grain to ABB's ports from 'private/third party upcountry facilities'.³³³

On this issue, GIAV submits:

While recognising that section 24 of the Wheat Export Marketing Act is only directed at port terminal services, this should not be deflect the underlying commercial reality that both upstream and port terminal services are provided by the same entity or related entities.

The BHCs' have demonstrated in their agreements, pricing and discussion that they intend to leverage their position at the ports to protect their upcountry system. This is evidenced by the fact that both ABB and [GrainCorp's] tariffs for handling grain from their own up-country network is different to that coming from 3rd party storages. ABB and [GrainCorp] charge a

³³⁰ South Australian Farmers Federation Grains Industry Committee, *Submission in relation to proposed ABB access undertaking*, May 2009, p. 8.

³³¹ South Australian Farmers Federation Grains Industry Committee, *Submission in relation to proposed ABB access undertaking*, May 2009, p. 8.

³³² South Australian Farmers Federation Grains Industry Committee, *Submission in relation to proposed ABB access undertaking*, May 2009, p. 8.

³³³ Grain Industry Association of Victoria, *Submission in relation to proposed access undertakings*, 1 June 2009, p. 2.

higher fee for handling grain from third parties, shippers must obtain ABB approval in advance, and they must adhere to a separate and additional set of terms and conditions.³³⁴

10.3.4 NSW Farmers Association

The NSW Farmers Association submits that ABB charges more at its ports if ‘the grain has not come from a related up-country storage facility’.³³⁵ On this issue, the NSW Farmers Association states:

There appears to be a growing potential for dominant vertically integrated business models to create a lack of incentive for investment in alternative bulk storage and logistic paths to port for both themselves or others who are forced to use ‘their loading facilities and therefore ‘voluntar[il]ly’ meet ‘ their access conditions.’³³⁶

10.3.5 Victorian Farmers Federation (VFF)

The VFF submits that there is ‘much anecdotal evidence throughout industry regarding actions taken by port operators to restrict movement of grain from up-country storages not in their control’.³³⁷ On this issue, the VFF submits that:

The VFF acknowledge there are some practical reasons for these restrictions in terms of grain hygiene. However, the VFF is concerned it is also a way of forcing growers to deliver to particular up country storage facilities and of forcing non-port operating marketers to use specific up-country facilities.³³⁸

10.4 ACCC’s views

Appropriate to include a non-discrimination clause in the proposed Undertaking

The ACCC is of the view that it is appropriate that ABB’s proposed Undertaking includes a non-discriminatory access clause obligating it to not discriminate against access seekers in favour of its affiliated trading business.

A robust non-discriminatory access clause is an important regulatory tool that can be used to constrain the behaviour of a vertically integrated owner of a key infrastructure facility. This is because many of the benefits of access to infrastructure can be lost if measures are not put into place to control potential anti-competitive leverage into related markets.

While a number of interested parties providing submissions on this process have raised allegations of current or past discriminatory conduct by ABB in favour of its trading arm, it is important to note that the ACCC, in its assessment of ABB’s proposed Undertaking, has not formed any views on the legitimacy or otherwise of

³³⁴ Grain Industry Association of Victoria, *Submission in relation to proposed access undertakings*, 1 June 2009, pp. 1-2.

³³⁵ NSW Farmers Association, *Submission in relation to proposed access undertakings*, June 2009, p. 5.

³³⁶ NSW Farmers Association, *Submission in relation to proposed access undertakings*, June 2009, p. 5.

³³⁷ Victorian Farmers Federation, *Submission in relation to proposed access undertakings*, 28 May 2009, p. 3.

³³⁸ Victorian Farmers Federation, *Submission in relation to proposed access undertakings*, 28 May 2009, p. 3.

these claims. To the extent that claims have raised concerns under restrictions on anti-competitive conduct in Part IV of the TPA, these matters are being assessed by the ACCC's Enforcement and Compliance Division.

In the current process assessing the appropriateness of the proposed Undertaking pursuant to section 44ZZA(3) of the TPA, the need for a robust non-discriminatory access clause is highlighted by examining the intent of the WEMA. Clause 24 of the Explanatory Memorandum to the WEMA states:

This clause is intended to ensure that accredited exporters that own, operate or control port terminal facilities provide fair and transparent access to their facilities to other accredited exporters. The test aims to avoid regional monopolies unfairly controlling infrastructure necessary to export wheat in bulk quantities, to the detriment of other accredited exporters. All accredited exporters should have access to these facilities while allowing the operators of the facility to function in a commercial environment.³³⁹

As set out in the Legislative Framework chapter, the ACCC is of the view that, in the current context, 'fair' access ought largely to be equated with non-discriminatory access, reflecting the desirability of ensuring that access to port terminal services is, on the whole, provided on a non-discriminatory basis except where there is a legitimate reason for differential treatment.

In this regard, the ACCC recognises that a service provider may engage in price discrimination where it aids efficiency.³⁴⁰ In fact, price discrimination may be an essential tool to enable a network owner to recover the legitimate costs of its investment. It is likely to promote the following objectives:

- ensuring efficient use of the network;
- reducing the average price on the network; and
- minimising the risk-adjusted cost of capital.

This is recognised in the pricing principles specified in section 44ZZCA of the TPA, which provides as follows:

'The pricing principles relating to the price of access to a service are:

- (a) that regulated access prices should
 - (i) be set so as to generate expected revenue for a regulated service or services that is at least sufficient to meet the efficient costs of providing access to the regulated service or services; and
 - (ii) include a return on investment commensurate with the regulatory and commercial risks involved; and
- (b) that the access price structures should:
 - (i) allow multi-part pricing and price discrimination when it aids efficiency; and

³³⁹ Explanatory Memorandum, *Wheat Export Marketing Act 2008* (Cth), p. 31.

³⁴⁰ *Trade Practices Act 1974* (Cth) s 44ZZCA(b)(i).

- (ii) not allow a vertically integrated access provider to set terms and conditions that discriminate in favour of its downstream operations, except to the extent that the cost of providing access to other operators is higher; and
- (c) that access pricing regimes should provide incentives to reduce costs or otherwise improve productivity.³⁴¹

However, as set out in the Legislative Framework chapter, the ACCC is of the view that, while there is a place for price discrimination, this should only occur in specified circumstances, that is, where the cost of providing access to other operators is higher. Therefore, price discrimination in favour of ABB's trading operations should not occur except to the extent that the cost of provision of services to other users is higher than provision of the service to itself.

The particular non-discrimination clauses proposed by ABB are not appropriate

Clauses 5.4 (and 5.5)

As the ACCC explains in the Indicative Access Agreement chapter, the ACCC considers that it is not appropriate that ABB's proposed Undertaking does not include in its proposed Undertaking the minimum standard terms and conditions upon which it undertakes to offer access to its port terminal services.

As set out in the Indicative Access Agreement chapter, the ACCC considers that it would be appropriate for this standard terms and conditions to form a part of ABB's proposed Undertaking.

With minimum standard terms in the Undertaking, these terms will be binding and therefore the scope for discrimination in offering port terminal services via access agreement negotiations will be significantly reduced.

Nevertheless, the ACCC considers that it is still appropriate that ABB has included a non-discrimination clause that applies in relation to 'non-standard' terms and conditions of access, to ensure that such terms and conditions comply with the principles of non-discriminatory access.

However, the ACCC considers that the particular non-discrimination clause put forward by ABB at clause 5.4 is not appropriate having regard to the matters in section 44ZZCA(3). A simpler non-discrimination clause (as set out later in this chapter) is likely to be more appropriate.

Clause 5.4 is to be read subject to clause 5.5, which provides a wide range of caveats on the non-discrimination obligation. Read together, the ACCC is of the view that this non-discrimination clause will not achieve the objective of (in ABB's own words) prohibiting ABB from 'discriminating in favour of its own business'.³⁴²

³⁴¹ *Trade Practices Act 1974* (Cth) s 44ZZCA.

³⁴² ABB Grain Ltd, *Submission to the ACCC*, 16 April 2009, para 8.8, p. 29.

In particular, the ACCC is of the view that the following provisions at clause 5.5 are not appropriate and do not constitute legitimate grounds for discrimination:

- (b) *all costs that the Port Operator incurs or may incur in providing access, including any costs of extending the Port Terminal Services, but not costs associated with losses arising from increased competition in upstream or downstream markets;*

The ACCC considers that the reference to ‘all costs’ is not appropriate given that the pricing principles at section 44ZZCA make reference to ‘efficient costs’ rather than ‘all costs’.

- (c) *the economic value to the Port Operator of any additional investment that the Applicant or Port Operator has agreed to undertake;*

The ACCC is of the view that this clause lacks clarity and is therefore not appropriate. For instance, it is not clear what type of investment this clause relates to. In addition, it is not clear what type of investment an ‘Applicant’ would agree to undertake.

- (h) *the opportunity cost of accommodating the requirements of one Applicant or User compared to the requirements of one or more other Applicants or Users;*

The ACCC does not agree that opportunity cost (what is foregone by employing resources in their current use rather than the most valuable alternative use) is a relevant commercial justification for ABB to discriminate. As ABB notes, ports operated by ABB generally have substantial excess capacity³⁴³ and therefore capacity can be allocated without any substantive opportunity cost to ABB.

Further, it is possible that ‘opportunity cost’ considerations by ABB might allow it to charge for the opportunity cost of wheat received via an alternative up-country storage and handling facility. This would clearly constitute an unreasonable justification for discrimination and is contrary to the objective of the WEMA of promoting competition in the wheat export industry.

- (j) *the relative risk related to storing and handling different Bulk Wheat segregations for Applicants and Users;*

The ACCC believes that it would be standard commercial practice to include the cost of risk in the standard terms and conditions of access.

Non-discrimination clauses should be designed to proscribe anti-competitive conduct which favours an affiliated entity of the service provider. This type of clause is not appropriate to be included in a non-discrimination clause.

- (n) *differences in periods of time during which access to Port Terminal Services is required by Applicants or Users;*

The ACCC considers that this clause is not appropriate because it is likely that ABB would have significant discretion over the ‘periods of time’ during which access

³⁴³ ABB Grain Ltd, *Submission to the ACCC*, 16 April 2009, para 2.5(c), p. 5.

seekers can access port terminal services. As a result, it is difficult to see how this clause could form legitimate grounds for discrimination. The ACCC is of the view that this clause does not appropriately balance the legitimate business interests of the provider with the interests of persons who might want access to the service.

(p) differences in modes of receipt, storage or outturn including different transport modes to receive Bulk Wheat and different ship configurations;

The ACCC is of the view that this clause is not appropriate. This clause, as currently drafted, lacks clarity and provides ABB with scope to discriminate based on subjective determinations on why different modes of receipt, storage and outturn would necessitate discrimination.

(q) geographic and seasonal variations;

The ACCC considers that this clause is not appropriate as it lacks clarity. For instance, it is unclear what criteria would ABB use in applying this clause.

(r) minimisation of demurrage at the port over a given period

The ACCC is of this view that this clause is also not appropriate as it lacks clarity. For instance, it is unclear who this clause refers to, and why, as AGEA notes in its submission, a wheat exporter who negotiates a lower demurrage rate should be penalised for this.

(s) maximisation of throughput of Bulk Wheat and other commodities at the port over a given period;

The ACCC considers that this clause is not appropriate as it lacks sufficient clarity and provides ABB with a level of discretion that is not appropriate. For instance, it is unclear how ABB would determine that discriminating against access seekers would in effect maximise throughput. Further, there is a lack of clarity around what the term 'over a given period' refers to.

(u) the credit risk of an Applicant or User;

The ACCC is of the view that clauses relating to 'the credit risk of an Applicant or User' are more appropriately included in section 6 of ABB's proposed Undertaking – 'Negotiating for Access'. Credit risk matters are an ex ante consideration and generally would be dealt with in relation to negotiation for access. It is unclear why it would need to be used as a justification for discriminating against particular Applicants or Users.

(v) existing industry practices.

The ACCC considers that this provision is not appropriate as it does not provide any level of certainty for access seekers and provides scope for ABB to make subjective determinations. For instance, it is unclear what industry practices ABB is referring to. This clause, in the ACCC's view, is not likely to appropriately balance the legitimate business interests of the access provider with the interests of persons who might want access to the service.

In relation to the other matters within 5.5:

- (a) the Port Operator's legitimate business interests and investment in the Port Terminal Services, Port Terminal Facilities and the Port Terminal;
- (d) the interests of all persons who have rights to use the Port Terminal;
- (e) the operational and technical requirements necessary for the safe and reliable operation of the Port Terminal Services, the Port Terminal Facilities and the Port Terminal;
- (f) the economically efficient operation of the Port Terminal Services, the Port Terminal Facilities and the Port Terminal;
- (g) any differences in the costs of providing access to Port Terminal Services to different Applicants or Users;
- (i) the provision of quality related services reasonably required by the Port Operator in respect of some Applicants or Users, but not others including security of Bulk Wheat integrity, testing of Bulk Wheat or Bulk Wheat classification, fumigation and protection requirements for Bulk Wheat;
- (k) available Port Terminal capacity, including receipt, handling, storage and cargo accumulation capacity;
- (l) differences in types and grades of Applicants' or Users' Bulk Wheat;
- (m) differences in Applicants' or Users' Bulk Wheat volumes;
- (o) differences in levels of Applicants' or Users' usage of Port Terminal Services; and
- (t) unless the Port Operator is offering segregated services at a Port Terminal, the ability to mix the same grade of Bulk Wheat owned by different owners and / or mix different grades of Bulk Wheat owned by the same or different owners;

it is unclear to the ACCC why ABB considers it is necessary for them to be expressly mentioned as caveats to the non-discrimination clause. These factors appear to relate to normal commercial reasons for differentiating between services provided to different access seekers (although the precise meaning of some of the factors is unclear).

As noted above, a robust non-discrimination clause aims to prevent discrimination by the bulk handler against access seekers *in favour* of its affiliated businesses (except to the extent that the cost of provision of services by ABB to other access seekers is higher than provision of the service to itself).

Treating access seekers differently purely because of legitimate commercial factors will *not* be caught by a properly drafted non-discrimination clause.

Clauses 8.3 (and 8.4) – Non-discrimination in making Operational Decisions

The ACCC is of the view that it is appropriate for ABB to include a non-discrimination clause in relation to its operational decisions.

However, this obligation against non-discrimination is said to be “subject to” clauses 5.4 and 8.4.

Clause 5.4 (explained above) is the clause that provides a list of caveats upon the obligation not to discriminate.

Similar to clause 5.4, clause 8.4 provides a range of justifications for prioritising vessels and varying cargo assembly plans.

The ACCC is of the view that, read together with clauses 5.4 and 8.4, the non-discrimination clause in 8.3 would not achieve the objective of prohibiting ABB from ‘discriminating in favour of its own business’.

This is because, as explained above, clause 5.4 sets out an inappropriately broad and unclear list of caveats to the non-discrimination clause. Further, clause 8.3 also sets out a number of other justifications for prioritising vessels.

As a general point (without commenting on the appropriateness of the factors in clause 8.3), the ACCC considers that it is not appropriate that clause 8.3 contains provisions relating to prioritising vessels and varying cargo assembly plans. Similar provisions are set out in ABB’s Port Loading Protocols. For the sake of clarity, all provisions regarding capacity management should be set out in the Port Loading Protocols (which the ACCC, as noted in the Capacity Management chapter, considers should be annexed to the proposed Undertaking).

Clauses 8.3 and 8.4 of ABB’s proposed Undertaking are discussed further in the Capacity Management chapter of this draft decision.

A more appropriate non-discrimination clause

The ACCC notes that non-discrimination clauses applicable in other regulated industries tend to be significantly less complex than the non-discrimination clauses set out in ABB’s proposed Undertaking.

For instance, in relation to regulated gas pipelines, the National Gas Law states that a covered service provider providing light regulation services must not engage in price discrimination other than price discrimination ‘that is conducive to efficient service provision’.³⁴⁴

The ACCC considers that non-discrimination obligations would be better addressed via a single clause. That is, the ACCC takes the view that it would be more appropriate that clauses 5.4 and 8.3 be combined to create a single non-discriminatory access clause.

In addition, the ACCC is of the view that a clearer and more concise non-discriminatory access clause is more likely to be appropriate. For example, for the

³⁴⁴ *National Gas (South Australia) Act 2008 (SA)*, Schedule 1, National Gas Law, clause 136.

reasons set out above, the ACCC is more likely to consider appropriate the following type of non-discrimination clause:

ABB must not discriminate in providing port terminal services

In providing access to Port Terminal Services, ABB must not discriminate between different Applicants or Users (including its own Trading Division) in favour of its own Trading Division except to the extent that the cost of providing access to other Applicants or Users is higher.

For the avoidance of doubt, the non-discrimination clause should protect against (amongst other matters) the ability of ABB to anti-competitively discriminate between wheat exporters on the basis of where grain was stored (ie. whether it was stored in ABB's up-country storage and handling network, a third party storage network or on-farm).

No hindering access clause on its current terms is not appropriate

In relation to the 'No hindering access' clause at 8.5, the ACCC considers that it is appropriate that such a clause be included in ABB's proposed Undertaking. Such a clause is consistent with the objective of the WEMA of ensuring that vertically integrated bulk handling companies provide fair and transparent access to their facilities to other accredited exporters.

However, the ACCC is of the view that the drafting of clause 8.5 is not appropriate as the terms of the clause would likely prove difficult to interpret. In particular, the ACCC considers that the phrase 'in the exercise of a reasonable right of access' is ambiguous and the implications of the phrase for the operation of the clause are unclear.

The ACCC notes that clause 8.5 of ABB's proposed Undertaking partially reflects s44ZZ of the Act – 'Prohibition on hindering access to declared services', which states:

Prohibition on hindering access to declared services

- (1) The provider or a user of a service to which a third party has access under a determination, or a body corporate related to the provider or a user of the service, must not engage in conduct for the purpose of preventing or hindering the third party's access to the service under the determination.
- (2) A person may be taken to have engaged in conduct for the purpose referred to in subsection (1) even though, after all the evidence has been considered, the existence of that purpose is ascertainable only by inference from the conduct of the person or from other relevant circumstances. This subsection does not limit the manner in which the purpose of a person may be established for the purposes of subsection (1).
- (3) In this section, a user of a service includes a person who has a right to use the service.³⁴⁵

The ACCC notes that s44ZZ(2) explains the concept of 'for the purpose of preventing or hindering the third party's access'. In order to promote certainty and clarity for access seekers, the ACCC considers that clause 8.5 of ABB's proposed Undertaking would be more appropriate if it reflected the terms of s44ZZ of the Act.

³⁴⁵ *Trade Practices Act 1974* (Cth), s 44ZZ.

Enforcement of non-discrimination commitments

The ACCC notes AGEA's submission that it would be appropriate for ABB's proposed Undertaking to provide for an annual audit procedure of compliance with the Undertaking's non-discrimination clause.

The ACCC agrees that such a procedure would assist in the enforcement of the non-discrimination provision and seeks submissions on whether such a procedure would be appropriate taking into account the matters in section 44ZZA(3).

11 Ring-fencing

Ring-fencing is one tool that can be used, in conjunction with robust non-discrimination and no hindering access clauses, fair and transparent port terminal protocols and an indicative access agreement to ensure against anti-competitive discrimination.

The ACCC's view is that the weak ring-fencing rules in ABB's proposed Undertaking would not, in their current form, serve as an effective safeguard against anti-competitive discrimination in the provision of port terminal services.

However, were ABB's proposed Undertaking amended to contain robust non-discrimination and no hindering access clauses, fair and transparent port terminal protocols and indicative access agreements (as well as measures to deal with the potential for information about port terminal services to be used to the advantage of ABB's wheat exporting arm), then, in the circumstances, it would not be necessary for ring-fencing measures to be included in ABB's undertaking at this particular point in time.

In forming this view, the ACCC has taken into account the transitional nature of the industry and the possibility that any ring-fencing measures that were implemented at this point in time could need to be revised in the near future in accordance with any regulatory changes (either to extend or reduce the regulation to which ABB is subject). The ACCC considers that this would be an undesirable outcome in that it could impose unnecessary regulatory costs during a time of industry transition.

The ACCC has also taken into account the short duration of ABB's proposed Undertaking (two years) and will closely monitor the effectiveness of its undertaking in ensuring against anti-competitive discrimination during its operation.

The ACCC notes that, once the regulatory framework to which ABB is subject to is more certain, that any future undertaking submitted by ABB may need to include robust ring-fencing rules (significantly more robust than the weak ring-fencing measures offered by ABB to the ACCC in its proposed Undertaking).

It is important to note that the ACCC's approach taken to ring-fencing in assessing this particular access undertaking is not indicative of the approach to ring-fencing that the ACCC would be likely to take in relation to other regulated industries. The approach taken on this occasion reflects the factors outlined above, and in particular, that the industry is still transitioning from having a single desk responsible for the export of wheat in mid 2008 to the current situation of having 23 wheat exporters accredited to export wheat from Australia; and that the arrangements can be revisited in two years.

11.1 ABB's proposed undertaking

ABB's proposed Undertaking includes a set of Ring Fencing Rules at Schedule 2, which cover the following areas:³⁴⁶

Financial Records

Clause 1 states:

The Port Operator must make the financial records relating to its provision of access to and the provision of the Port Terminal Services available to the independent auditor appointed by the ACCC when requested to do so by notice in writing given by the ACCC.

Restricted Information

Clause 2 states:

(a) The Port Operator must not use or disclose Restricted Information other than for the purpose of providing access to Port Terminal Services in compliance with the terms of this Undertaking.

(b) "**Restricted Information**" means Confidential Information received from a User in respect of:

(i) an Intention Notice or a Cargo Nomination Application until the date on which it is accepted by the Port Operator, including information on:

- (A) the expected date of arrival of the ship at the nominated Port;
- (B) a Cargo Assembly Plan; and
- (C) the destination of nominated ships;

(ii) an order to load a ship including any amendments to the loading order.

Prohibited Information

Clause 3 states:

Subject to clause 5 of this Schedule, the Port Operator shall not:

(a) disclose Restricted Information to:

(i) its Trading Divisions; or

(ii) other entities, including its own Related Bodies Corporate, their agents or employees who are involved in trading Bulk Wheat;

(b) access or use Restricted Information for the purpose of substantially damaging a competitor or conferring upon it or its Related Bodies Corporate any unfair competitive advantage over a competitor in the marketing of Bulk Wheat; or

(c) allow its Trading Divisions or other entities, including its own Related Bodies Corporate, their agents or employees who are involved in trading Bulk Wheat to have access to Restricted Information in The Port Operator's possession or control.

³⁴⁶ ABB Grain Ltd, *Port Terminal Services Access Undertaking*, 16 April 2009, Schedule 2, pp. 36-38.

Permitted Information Flows

Clause 4 states:

The Port Operator may disclose:

- (a) to an Applicant or User any Restricted Information that solely relates to the Bulk Wheat owned by that Applicant or User; and
- (b) to any person, information concerning the grade, quality, quantity, location or attributes of Bulk Wheat received by The Port Operator (“**Receival Specific Information**”), provided that the Receival Specific Information is aggregated to such an extent that a third party recipient of that aggregated information without access to the Receival Specific Information would not be capable of identifying information specific to any particular User.

Compliance

Clause 5 states:

- (a) The Port Operator’s employees will be made aware:
 - (i) that a failure to comply with the obligations under this Schedule may constitute a disciplinary offence and expose both the individual and the Port Operator to penalties for a breach of the TPA or WEMA;
 - (ii) they should contact the legal department if they have any concerns in relation to this policy, adherence to its objects by officers, employees or agents or its application to any particular conduct.
- (b) The Port Operator will provide information and guidance to its officers, employees and agents to ensure so far as is practicable that they are made aware of their obligations under this Undertaking.
- (c) The Port Operator will provide training to its officers, employees and agents who:
 - (i) in dealing directly with Applicants or Users or potential Applicants or Users;
 - (ii) are involved directly in the provision of access to Port Terminal Services to Applicants and Users; and
 - (iii) have access to the Port Operator’s Receival Specific Information;

to ensure so far as is practicable that they are made aware of their obligations under the terms of this Undertaking.³⁴⁷

- (d) If any Port Operator officer, employee or agent is responsible for, or knowingly involved in conduct in breach of this clause, or any specific process created to implement this clause then, without prejudice to any other action that the Port Operator may be required by law to take or shall otherwise think appropriate:
 - (i) the conduct of that employee will be taken into account in relation to that person’s performance appraisal and remuneration review; and
 - (ii) the relevant person shall receive training as determined by the Port Operator’s compliance manager.

³⁴⁷ ABB Grain Ltd, *Port Terminal Services Access Undertaking*, 16 April 2009, Schedule 2, p. 37.

(d) The Port Operator will make employees aware that engaging in deliberate conduct in repeated or serious breach of this Schedule may be grounds for dismissal.

Audit

Clause 6 states:

(a) The Port Operator's compliance with this clause (and its related processes and procedures) must be independently audited by an independent auditor at such times as the ACCC may direct but in event not more than once in any 12 month period.

(b) The auditor ("Compliance Auditor") will be selected by the Port Operator but must be approved by the ACCC.

(c) The Compliance Auditor shall review:

(i) records of any complaints;

(ii) the Port Operator's compliance with this clause;

(iii) records held by the compliance officer;

(iv) any relevant policies or procedures that implement or otherwise relate to this clause; and

(v) any other issues relevant to the Port Operator's compliance with the principles and obligations stated in this clause.

(d) The Compliance Auditor's report, which shall include:

(i) recommendations for any improvements in the Port Operator's policies or processes; and

(ii) a report on the Port Operator's past compliance with any recommendations previously made by a Compliance Auditor.

must be provided to the ACCC

11.2 ABB's submissions

ABB submits that it does not have a significant level of commercially sensitive information about its competitors 'that is not already publicly available, or readily observable by any person experienced in the grain industry'.³⁴⁸

ABB further submits:

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)

³⁴⁸ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, para 1.5, p. 65.

provide ABB with any visibility of the exporters' customers, sale prices, future tenders or contracts, or wider global trading operations or trading position.³⁴⁹

In terms of its organisational structure, ABB submits that it 'conducts its Port Terminal Service through its National Supply Chain (NSC) division and its wheat accumulation and marketing activities through its Marketing division'.³⁵⁰ In relation to the physical location of these two divisions, ABB submits that:

The NSC Division and the Marketing Division are located on different floors of ABB's offices in Adelaide, have different staff and report to different ABB Executive General Managers. The ring-fencing provisions offered by ABB in the Undertaking also seek to formalise disciplines (reinforced by clear audit protocols) whereby certain information relating to applications for access to port and execution of those applications will be restricted to NSC staff and not made available to Marketing Staff.³⁵¹

ABB submits that, as part of its ring fencing obligations, it has agreed to introduce new policies and procedures, capture auditable arm's 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. However, ABB submits that concerns about anti-competitive use of competitors' information 'are overstated in the context of access to export port terminals and do not justify the significant cost and disruptive burden, lack of flexibility and inefficiency that would result from a requirement to physically separate ABB's NSC and Marketing divisions and systems'.³⁵²

ABB submits that the Undertaking's non-discrimination, ring-fencing and binding dispute resolution procedures all address any perception that ABB can gain a competitive advantage from having access to the confidential information of its competitors.

ABB submits that it:

...considers that the ring-fencing provisions contained in the Undertaking represent a reasonable balance between the need for NSC customer confidentiality and the desirability of avoiding incurring significant costs on structural separations to address concerns with little substance and which would impose significant inefficiency costs on industry (and, ultimately, growers).³⁵³

In relation to the auditing provisions within its ring-fencing arrangements, ABB submits that it will be a matter for the independent auditor what is included in the audit report to the commission. However, ABB submits that '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'.³⁵⁴

³⁴⁹ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, para 1.5, p. 65.

³⁵⁰ ABB Grain Ltd, *Submission to the ACCC*, 16 April 2009, para 6.1, p. 22.

³⁵¹ ABB Grain Ltd, *Submission to the ACCC*, 16 April 2009, para 6.2, p. 22.

³⁵² ABB Grain Ltd, *Submission to the ACCC*, 16 April 2009, para 6.6, p. 22.

³⁵³ ABB Grain Ltd, *Submission to the ACCC*, 16 April 2009, para 6.9, p. 24.

³⁵⁴ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 47.

ABB submits that the costs involved in the implementation, operation and maintenance of an accounting separation regime would be significant. As a result, ABB states that it 'does not propose to implement a system involving full accounting separation between its National Supply Chain Division ("NSC") and Marketing Division'.³⁵⁵

11.3 Submissions received from third parties

11.3.1 Australian Grain Exporters Association

AGEA submits that ring-fencing arrangements are 'critical to a fair and transparent access regime' but submits that ABB's proposed ring-fencing rules are inadequate.³⁵⁶ AGEA makes the following comments about ABB's ring-fencing rules:

ABB undertake to not use or disclose "*Restricted Information*" other than for the purposes of "*providing access to Port Terminal Services in compliance with the terms of this Undertaking*". The definition of "*Restricted Information*" is extremely narrow, falls well below the usual standards applied to such levels of commercially sensitive information and arguably protects only the information provided by a User in respect of an Intention Notice or Vessel Nomination Application until the date on which it is accepted by ABB.

ABB clause 3 prohibits ABB from disclosing "*Restricted Information*" to its Trading Divisions or other entities involved in trading Bulk Wheat. The prohibition should apply to *any* disclosure to *any* entity.

ABB clause 3(b) is inadequate as it arguably limits ABB's obligation under clause 2(a) by incorporating a subjective element that entitles ABB to access or use Restricted Information so long as it is not "*for the purpose of substantially damaging a competitor or conferring upon it or its related bodies corporate any unfair competitive advantage over a competitor in the market in bulk wheat*". Such purpose would be very difficult to prove.

Under ABB clause 4(b), ABB retain the sole discretion to pass on to "*any person*" information concerning grade, quality, quantity, location or attributes of bulk wheat received by ABB, provided that the information is aggregated. That the information is aggregated does not render it useless and, in fact, providing that information may confer an unfair advantage on the BHC to the detriment of the applicant or user. AWEs must give forward nomination of a vessel in order to load wheat. AWEs have a limited amount of time to transport wheat to port for accumulation. If BHCs' Trading Division is aware of this, they will immediately start to buy stock knowing the AWE might need it to load the vessel which is on its way. On occasions, BHCs have delayed or refused to supply freight to move stock that is owned by a AWE to port, so as to apply additional pressure on the AWE to buy stock from the BHC's Trading Division on unfavourable terms.

Additionally information concerning warehouse stocks provide a lot of value to the BHCs Trading Divisions as it entitles them to assess the risks associated with additional sales programs.³⁵⁷

AGEA disputes ABB's assertion that information about who is holding what grain in the BHC's system is publicly available. Further, contrary to ABB's claim, AGEA submits that this information is valuable to the trading divisions of BHCs.³⁵⁸

³⁵⁵ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 48.

³⁵⁶ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 16.1, p. 34.

³⁵⁷ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 16.2-16.5, pp. 34-35.

AGEA also submits that accounting separation should be implemented ‘to ascertain whether BHCs’ trading divisions are required to make the very substantial payments which AWEs are required to make for port terminal services, or whether there are merely book entries between the trading and operating divisions’.³⁵⁹

11.3.2 South Australian Farmers Federation (SAFF)

On ABB’s ring-fencing rules, SAFF submits:

SAFF is not sure if accounting separation, restricting information flows, policing staff or auditing will assist in attempting to keep various parts of the same organisation separate. What is really required is to remove the monopoly control from the one company. Until then it is impossible to ring fence.³⁶⁰

11.4 ACCC’s views

Ring-fencing is one tool that can be used, in conjunction with robust non-discrimination and no hindering access clauses, fair and transparent port terminal protocols and an indicative access agreement to ensure against anti-competitive discrimination.

The ACCC’s view is that the weak ring-fencing rules in ABB’s proposed Undertaking would not, in their current form, serve as an effective safeguard against anti-competitive discrimination in the provision of port terminal services. However, it may be more appropriate at this point in time to rely on other safeguards against non-discrimination.

The ACCC’s view is that, were ABB’s proposed Undertaking amended to contain robust non-discrimination and no hindering access clauses, fair and transparent port terminal protocols and indicative access agreements, then, in the circumstances, it would not be necessary for ring-fencing measures to be included in ABB’s undertaking at this particular point in time.

In addition, it would be necessary for ABB’s revised Undertaking to include measures to deal with the potential for information about port terminal services to be used to the advantage of ABB’s wheat exporting arm. Such appropriate measures are discussed in the Other Issues chapter.

In forming this view, the ACCC has taken into account the transitional nature of the industry and the possibility that any ring-fencing measures that were implemented at this point in time could need to be revised in the near future in accordance with any regulatory changes (either to extend or reduce the regulation to which ABB is

³⁵⁸ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 4.15, p. 12.

³⁵⁹ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, Schedule 1, para L2(i), p. 49.

³⁶⁰ South Australian Farmers Federation Grains Industry Committee, *Submission in relation to proposed ABB access undertaking*, 3 July 2009, p. 12.

subject).³⁶¹ The ACCC considers that this would be an undesirable outcome in that it could impose unnecessary regulatory costs during a time of industry transition.

The ACCC has also taken into account the short duration of ABB's proposed Undertaking (two years) and will closely monitor the effectiveness of its undertaking in ensuring against anti-competitive discrimination during its operation.

It is important to note that the ACCC's approach taken to ring-fencing in assessing this particular access undertaking is not indicative of the approach to ring-fencing that the ACCC would be likely to take in relation to other regulated industries. The approach taken on this occasion reflects the factors outlined above, and in particular, that the industry is still transitioning from having a single desk responsible for the export of wheat in mid 2008 to the current situation of having 23 wheat exporters accredited to export wheat from Australia; and that the arrangements can be revisited in two years.

The ACCC notes that, once the regulatory framework to which ABB is subject to is more certain, that any future undertaking submitted by ABB may need to include robust ring-fencing rules (significantly more robust than the weak ring-fencing measures offered by ABB to the ACCC in its proposed Undertaking).

Such ring-fencing rules may include the following:

Accounting Separation

A robust accounting separation framework would include:

- Identification of the costs and revenue of port terminal services;
- Identification of the direct and common costs of port terminal services. (Direct costs are those that can be solely attributed to a particular service. These are incremental costs that would be avoided if the service was not provided. By contrast, common costs are costs shared between regulated and unregulated services);
- Allocation of common costs between port terminal services and other services in accordance with predefined cost allocation rules; and
- An explanation of the basis or methodology used in measuring cost elements (including the valuation of assets) and allocating costs.

Creation or designation of discrete organisational divisions

This would require ABB's ports operations, and the information obtained in the provision of port terminal services, to be logistically ring-fenced from its trading arm.

³⁶¹ For example, the ACCC notes the planned Productivity Commission review of the WEMA and statements by the Federal Government that it will monitor developments in the up-country stages of the grain supply chain

This would require ABB's port operations, and the information obtained in the provision of port terminal services, to have separate business systems which assign control over necessary infrastructure, operational support systems and information systems (eg accounting systems) to its trading arm.

In addition, line of sight business restrictions would need to be imposed to prevent other affiliates replicating the functions that have been ring-fenced.

Governance arrangements

This would require ABB's ports business to employ separate staff from its trading arm.

That is, there would be no sharing of staff between ABB's trading arm and its other business units.

Each business unit would be required to occupy separate premises with direct reporting lines to senior management for ring-fenced divisions. In addition, remuneration and incentives (including short-term incentive schemes such as annual bonuses as well as long-term incentive and remuneration schemes) for all staff in ring-fenced divisions be on unit performance and independently of whole-of-business performance.

Strong governance arrangements would include oversight by a body internal to the firm to report on ABB's compliance with its ring-fencing obligations.

Compliance

Robust compliance measures would include, at a minimum, an obligation to provide training to its officers, employees and agents who are involved in the provision of access to port terminal services.

Independent audits

Independent audits to be conducted twice in any 12-month period. Further, an audit clause would contain an option for a third party to lodge a complaint, and then for the ACCC to direct a 'spot' audit if it considers it is warranted taking in to consideration the nature of that complaint. The auditor's reports would be made available to the ACCC.

NB. This is not an exhaustive list.

12 Capacity Management

Summary

Given that the Port Loading Protocols set out the key process by which ABB will allocate port terminal capacity, the inclusion of the PLPs in the proposed Undertaking is appropriate.

However, the substance of the PLPs as proposed by ABB in its Undertaking are not appropriate for the reason that they lack sufficient clarity, certainty and transparency and allow ABB a level of discretion in making key decisions about capacity management and variation that is not appropriate.

The ACCC considers it desirable that ABB have the flexibility to run its operations in an efficient manner. However, access seekers must have a sufficient degree of notice about amendments and it should be made clear that any variations will be subject to the non-discrimination clauses in the Undertaking. It is also desirable that the PLPs include a swift dispute resolution mechanism.

In the interests of retaining flexibility and efficiency, the ACCC would be prepared for the variation mechanism to be based on a robust industry consultation process rather than a formal ACCC consultation process. The ACCC will, however, closely monitor the success of this variation method and will take its findings into account in any future review of access undertakings.

To ensure that the PLPs that have been varied can be enforced, a provision should be included in the Undertaking that obliges ABB to comply with the Port Loading Protocols (as varied from time to time). In addition, a provision should be included in the Undertaking that states that any variations to the PLPs are subject to the non-discrimination provision in the Undertaking.

ABB has advised that it proposes to provide the ACCC with revised PLPs by mid-August 2009. Upon receipt, the ACCC will post these revised PLPs on its website and seek submissions from interested parties on the appropriateness of their inclusion in a revised undertaking from ABB.

12.1 ABB's proposed Undertaking as submitted on 16 April 2009

12.1.1 Obligation to publish Port Loading Protocols

ABB's proposed Undertaking states that ABB must, as a condition of the Undertaking, comply with the Continuous Disclosure Rules set out in section 24(4) of the Wheat Export Marketing Act (WEMA)³⁶²:

*24(4) For the purposes of this Act, a person complies with the **continuous disclosure rules** in relation to a port terminal service at a particular time if:*

³⁶² ABB Grain Ltd, *Port Terminal Services Access Undertaking*, 16 April 2009, clause 8.1, 11.1.

(a) at that time, there is available on the person's Internet site a current statement setting out the person's policies and procedures for managing demand for the port terminal service (including the person's policies and procedures relating to the nomination and acceptance of ships to be loaded using the port terminal service); and

(b) at that time, there is available on the person's Internet site a current statement setting out:

(i) the name of each ship scheduled to load grain using the port terminal service; and

(ii) for each ship referred to in subparagraph (i)—the time when the ship was nominated to load grain using the port terminal service; and

(iii) for each ship referred to in subparagraph (i)—the time when the ship was accepted as a ship scheduled to load grain using the port terminal service; and

(iv) for each ship referred to in subparagraph (i)—the quantity of grain to be loaded by the ship using the port terminal service; and

(v) for each ship referred to in subparagraph (i)—the estimated date on which grain is to be loaded by the ship using the port terminal service ...

These provisions are paraphrased in the Undertaking at clauses 8.1(a) to 8.1(a)(ii)(E).

Clause 8.1(b) provides that ABB will publish the 'Port Loading Protocols'³⁶³ and the 'Shipping Stem'³⁶⁴ on its website at www.abb.com.au.

12.1.2 The substance of the Port Loading Protocols

The Undertaking refers to ABB's policies and procedures for managing demand for the Port Terminal Services as Port Loading Protocols (PLP).³⁶⁵ These PLPs are set out in Schedule 3 to the Undertaking and are alternatively referred to as either the 'Initial Port Loading Protocols' or 'ABB Grain Shipping Protocols'.³⁶⁶ As the PLPs are included in a Schedule to the Undertaking, these PLPs form part of the Undertaking.³⁶⁷

The PLPs do not contain numbered clauses. The elements of the PLPs are explained under a number of headings and are explained here in the order they are set out in the Undertaking.

³⁶³ ABB Grain Ltd, *Port Terminal Services Access Undertaking*, 16 April 2009, clause 8.1(a)(i), 11.1.

³⁶⁴ ABB Grain Ltd, *Port Terminal Services Access Undertaking*, 16 April 2009, clause 8.1(a)(ii), 11.1.

³⁶⁵ ABB Grain Ltd, *Port Terminal Services Access Undertaking*, 16 April 2009, clause 8.1(a), 11.1.

³⁶⁶ ABB Grain Ltd, *Port Terminal Services Access Undertaking*, 16 April 2009, clause 8.2(a).

³⁶⁷ ABB Grain Ltd, *Port Terminal Services Access Undertaking*, 16 April 2009, clause 2.1(b)(i), 11.2(e).

Further, the PLPs refer to a party seeking to export through ABB's ports as a 'Client'. A 'Client' is not a defined term in the Undertaking. It is assumed for the purposes of this discussion that a 'Client' is an 'Applicant', as defined in the Undertaking, who has entered into an 'Access Agreement' with ABB.

12.1.2.1 Status of the PLPs

ABB has advised that it proposes to provide the ACCC with revised PLPs by mid-August 2009. Upon receipt, the ACCC will post these revised PLPs on its website and seek submissions from interested parties on the appropriateness of their inclusion in a revised undertaking from ABB.

It is clear, therefore, that the PLPs included in ABB's proposed Undertaking are outdated. The ACCC has nevertheless assessed the PLPs in ABB's proposed Undertaking in relation to the matters at section 44ZZA(3) of the TPA as the resulting guidance may still be of assistance. The ACCC's views on whether these original PLPs are appropriate with regard to section 44ZZA(3) of the TPA is set out below.

12.1.2.2 Export options

The PLPs state that unless otherwise agreed with ABB, a Client must choose one of two export options (either Export Select or Export Standard) for 'every vessel' using ABB's 'standard nomination form' (which ABB states is available from www.abb.com.au).³⁶⁸

The differences between the Export Select and Export Standard mechanisms are explained in the Undertaking in Port Schedules A to F.

Export Select is explained as a process where '[u]sers commit stock to Export Select in an upcountry position and receive stock back in a notional port position. ABB Logistics manages the planning, up country accumulation and transport to port process. ABB operates two rail assets and has a number of agreements with road transport operators to meet the logistics requirements for shipping to [the relevant port]. Export Select charges are published on the ABB website'.³⁶⁹

³⁶⁸ It is not clear whether the reference to the 'standard nomination form' is a reference to an Intention Notice or a Vessel Nomination Application.

³⁶⁹ Export Select is also defined in ABB's Storage and Handling Agreement 2008/09 (which is not part of the proposed Undertaking) as 'a system of storage and handling under which the Client elects to buy grain at a Receiving Station in a Port Zone and to have the grain outturned by [ABB] to the Client at the Port Terminal for that Port Zone' - ABB, 2008/09 Storage and Handling Agreement for the period 1 October 2008 to 30 September 2009, p. 6; and in ABB's Draft 2009/2010 Season Port Terminal Services Agreement for Standard Port Terminal Services, p. 8, (which is not part of the proposed Undertaking) as 'the bundled system operated by [ABB] under which the Client elects to buy grain at, or deliver grain to, [an ABB] Facility in a Port Zone and to have equivalent grain (but not necessarily the same grain) Outturned by [ABB] to the Client at the Port Terminal Facility for that Port Zone.'

Under Export Standard '[u]sers arrange their own accumulation plan and transport to port. Additionally, ABB Freight Services can provide transport options and the Client Services department may facilitate grain swaps to assist Users if requested'.³⁷⁰

12.1.2.3 Fees

The PLPs note that the port handling and shipping fee and vessel nomination fees that are charged to the Applicant will vary depending on the:

- (i) port being used;
- (ii) nominated export option;
- (iii) date of commitment of tonnes to the Export Select option; and
- (iv) timing of nomination.

The Client must pay a 'deposit' at the time of an accepted nomination.

The PLPs also note that ABB's 'current storage and handling charges' should be referred to 'for further information.'

12.1.2.4 Access to ABB port terminals

The PLPs state that before 'being able to access port terminal services', an Applicant must:

- (i) enter into and comply with the terms and conditions of ABB's storage and handling agreement³⁷¹;
- (ii) be 'creditworthy', as assessed by ABB³⁷²; and

³⁷⁰ Export Standard is not a defined term in ABB's Storage and Handling Agreement 2008/09 (which is not part of the proposed Undertaking). However, the 2008/09 Agreement notes (at p. 30) that if an Applicant nominates Export Standard:

'then the Client will be responsible for the assembly of its stock for outturn to a vessel. The Client is responsible for nominating sites (to be drawn from), organising their own freight arrangements (and meeting [ABB] requirements/demonstrating transport capacity for vessel accumulations), organising movements, contacting [ABB] for stock swaps (fees will apply and subject to counterparty consent ...) and coordinating their movements with other bulk handlers (where applicable). This fee includes stevedoring services at the base rate only. The Client may still request individual services under this option but that will not entitle the Client to the Export Select fee. Export Standard applies to grain from non-Company facilities. Outturn conditions apply to grain out-turned from up-country sites for Export under this option ...'

Export Standard is also defined in ABB's Draft 2009/2010 Season Port Terminal Services Agreement for Standard Port Terminal Services, p. 8, (which is not part of the proposed Undertaking), as 'an unbundled system of receipt, storage, handling and Outturn of the Client's grain.'

³⁷¹ The PLPs state that the terms and conditions of this agreement will be published in the September preceding each season and unless otherwise negotiated, the terms and conditions will be standard.

³⁷² No further information is given in the PLPs on what is required to be deemed 'creditworthy' or the assessment process that will be undertaken in this regard.

- (iii) be accredited to export bulk wheat under WEMA, and hold ‘all other licences and permits required by regulation for the export of the commodity to be shipped.’

12.1.2.5 Vessel Nomination

The PLPs state that acceptance of an Applicant’s nomination of a vessel is at ABB’s discretion. No further information is provided in relation to the exercise of ABB’s discretion in this section of the PLPs.

Upon acceptance of a nomination, the access seeker will be allocated an estimated load date based on ‘the ability’ of ABB (if using Export Select) or the Applicant (if using Export Standard) ‘to accumulate the cargo.’

12.1.2.6 Allocation of Estimated Load Date(s)

ABB will allocate estimated load dates based on ‘accumulation priority’.

ABB states that, to provide ‘fair port access’, it will take the following into account in ‘allocating resources’ and thus determining accumulation priority:

- (i) ‘[v]essels already nominated’;
- (ii) ‘[a]vailable transport resources, port space and available upcountry stock’;
- (iii) ‘Client’s ability to provide transport resources if using Export Standard’;
- (iv) ‘[l]ead time provided on nomination’;
- (v) ‘[o]wnership / changes to ownership of cargo’;
- (vi) ‘[s]pecific quality requests’;
- (vii) ‘[i]mpact on terminal efficiencies’;
- (viii) ‘[c]hanges to Vessel ETAs’;
- (ix) ‘Client’s willingness to accept overtime costs and / or purchase additional accumulation capacity’;
- (x) ‘[s]pecific supply chain efficiencies including the ability to fully utilise available transport resources’;
- (xi) ‘[s]tock already positioned in port’;
- (xii) ‘[i]f any vessel / cargo changes constitute a new nomination’;
- (xiii) ‘Client’s ability to provide proof of ownership or transfers (if applicable)’.

12.1.2.7 Estimated load dates may change for one or more of the following reasons

It appears that the PLPs allow the estimated load date to be changed for any reason. This is because the PLPs provide what ABB terms ‘a non-exhaustive list’ of reasons for which ABB may change an estimated load date.

These reasons include:

- (i) '[a]ccumulation Issues – [l]ack of performance of freight providers’;
- (ii) '[f]ailure of vessel to pass customary port surveys’;
- (iii) '[u]nable to provide accurate ETA’;
- (iv) '[q]uality problems identified during accumulation for Client’s vessel or other vessels already in the queue’;
- (v) '[v]ariation in cargo requirements’;
- (vi) '[w]eather’;
- (vii) '[t]erminal Efficiencies’;
- (viii) '[c]hanging ETA’s of your vessel or others in the queue’;
- (ix) '[a]cceptance of late nomination’;
- (x) '[c]ancelled Vessels’;
- (xi) ‘Client’s authority to load or otherwise’;
- (xii) ‘Flinders Ports SA Port Rules section 4.12 Grain Berth Loading Priorities’;
- (xiii) '[a]bility to utilise cargo already at port’;
- (xiv) '[p]ayments received’;
- (xv) '[v]essel delayed at discharge port’; and
- (xvi) ‘[d]elays at first port which impact on second port ETA’.

At the end of this list ABB states ‘[t]his is not an exhaustive list’.

12.1.2.8 Vessel Nomination Form

The PLPs state that a specified Vessel Nomination form ‘must be completed prior to acceptance and allocation of an estimated load date(s)’ [ABB’s emphasis].

‘Vessel nomination forms must contain’:

- (i) '[n]ame and details of vessel’;
- (ii) '[c]urrent location of vessel’;
- (iii) '[s]hip broker (or internal sea freight manager) contact details’;
- (iv) '[e]xpected ETA 1st load Port’;
- (v) ‘[l]oad grades and information regarding specific quality parameters’;

- (vi) 'Nominated Load Port(s)';
- (vii) '[i]nformation regarding the intake of stock from any 3rd party sites'; and
- (viii) '[i]n the case of Export Standard, a site accumulation and transport plan.'

12.1.2.9 Load Grades and Specific Quality Parameters

ABB will not accept or allocate an estimated load date for an Applicant's vessel until:

- (i) the client 'holds ownership in their name to cover the requirements'; or
- (ii) 'are able to demonstrate remaining ownership in other Company approved third party bulk handlers and the grain is available; or transfers will occur prior to accumulation commencing'.

If the Applicant seeks 'tighter standards for outturn' than the 'normally agreed standards', the PLPs states ABB and the Applicant 'must agree on the costs and liability applicable for 'meeting the tighter specifications prior to outturn.'

12.1.2.10 When a vessel substitution or variation may be treated as a new nomination

ABB may treat a vessel substitution or variation as a new nomination where:

- (i) 'the nominated vessel is delayed from the original ETA by more than three (3) days;
- (ii) 'a vessel is substituted and the ETA varies by more than three (3) days from the original ETA';
- (iii) 'the Client changes load ports';
- (iv) 'the Client changes grades to be loaded';
- (v) 'the Client changes specifications of the grade to be loaded'.

ABB also 'reserves the right to allocate new load dates' (presumably to these new nominations, although this is not specified).

It is unclear whether when a substitution or variation is considered to be a new nomination, the Applicant will be required to go through ABB's nomination procedure and pay associated fees and charges.

12.1.2.11 Estimated load dates are calculated on the following operating conditions unless otherwise negotiated with the Client

ABB will calculate estimated load dates based on the following (unless otherwise negotiated with an Applicant):

- (i) 'The Company provides outturn and intake services provided on a 5 day a week (normal operating hours) basis for a standard shift provided sufficient notice was received for nomination (21 days)';

- (ii) ‘The Company will use reasonable endeavours to provide the following rail transport capacity for Export Select Accumulations in addition to road capacity: 2 trains for Port Lincoln and Inner/Outer Harbor [s]subject to receiving sufficient notice for nomination (21 days).’
- (iii) ‘A Client’s willingness to pay shift penalties for extra labour or purchase additional transport capacity’;
- (iv) ‘Specific supply chain efficiencies including the ability to fully utilise available transport resources, other site(s) conflicting movements and available up-country labour restrictions’.

12.1.2.12 Notification prior to Vessel Nomination & Company Acceptance

ABB states:

‘Any notification prior to the Vessel Nomination (and subsequent Company acceptance) is not considered a Nomination and the Company will not be required to commence grain movements for a vessel accumulation.’

‘However, the Company may commence accumulation into port subject to port space, where there are no nominated vessels or for supply chain efficiencies purposes.’

‘It is unlikely that pre-accumulations would commence into Outer Harbor due to limited port space.’

‘If the Company is required to prioritise accumulations due to conflicting accumulation plans or vessel ETAs then the Company will prioritise the accumulation for the earlier nominated vessel (unless, in the Company’s discretion there are over-riding reasons to alter that priority, refer “Guiding Principles for determining Accumulation Priority and therefore allocation of Estimated Load Date(s)” below).’

‘The Company will however make reasonable endeavours to commence mobilising upcountry resources to make stock available.’

12.1.2.13 Guiding Principles for determining Accumulation Priority and therefore allocation of Estimated Load Date(s)

ABB state that:

‘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:

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

- 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
 - 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.'

12.1.2.14 Berthing Priority

ABB state that:

'The 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 is in position and the vessel not load ready, Client must vacate the berth if there is another vessel waiting to berth and can load stock.'

12.1.2.15 Vessel Substitution / Cancellation

ABB state that if a vessel is cancelled (within 21 days of the original ETA) without substitution or the substituted vessel is delayed from the original ETA by more than three days, a vessel variation fee will apply.

Where Export Select is used, ABB may mitigate the costs by using the cargo for another Export Select client 'provided it does not negatively affect other Client accumulations'. ABB reserves the right to treat this as a new nomination.

The vessel variation fee does not limit ABB's right to seek further costs from the Applicant.

12.1.2.16 Vessel Repositioning

Where an Applicant's cargo is partly or fully positioned at port as a result of a vessel nomination, and the vessel is cancelled or delayed from the original ETA by more than three days, shipping repositioning or variation fees may apply where the port terminal is blocked and delays other clients with 'firm vessel nomination[s]'.

Where Export Select is used, ABB may mitigate the costs by using the cargo for another Export Select client 'provided it does not negatively affect other Client accumulations'.

At Outer Harbor, in the circumstances above and in addition to ship repositioning fees, Applicants will be invoiced for freight costs between Inner and Outer Harbor if ABB has to clear cells at Outer Harbor for another vessel accumulation. The PLPs note that this may occur where 'the vessel fails survey significantly'.

12.1.2.17 Limitation of Liability

ABB may cease loading if it forms the view that continued loading may result in 'breaches of any safety or environmental requirements'.

To the extent permitted by law, ABB excludes itself from liability for 'any losses' suffered by clients due to lack of cargo availability or inability to commence ship loading by the estimated load dates.

12.1.2.18 Disputes

If an Applicant disputes ABB's compliance with the PLPs, the following procedure applies:

- (i) Applicant must notify ABB of the dispute and the nature of the non-compliance in writing;
- (ii) ABB must respond to the Applicant in writing within five working days setting out whether the claim is accepted or not and the reasons for the decision;
- (iii) If not satisfied, the Applicant may serve an escalation notice on ABB within 5 working days;
- (iv) On receipt of the notice, ABB must 'make all reasonable endeavours' to arrange a meeting within five working days between ABB's 'Executive General Manager National Supply Chain' and the Applicant to 'provide an opportunity for the [Applicant] to air its grievances'.

There are no further stages in the dispute resolution process in the PLPs.

12.1.2.19 Variation of Protocols

ABB state that '[i] the event that the Company wishes to vary these Protocols, it will:'

- (i) 'consult beforehand with major clients (clients that have shipped over 20,000 tonnes of a commodity in the past 2 years) to assess the impact of the proposed changes';

- (ii) 'provide all clients with 30 calendar days written notice of the variations; and'
- (iii) 'post the amended Protocols on the Company's web site.'

It is relevant to note that clause 8.2 of ABB's proposed Undertaking sets out a process for varying the PLPs (described at 1.1.3 below), but that this process is slightly different to the one contained in the PLPs themselves.

12.1.3 Varying the Port Loading Protocols

In accordance with the Undertaking, ABB may vary the PLPs subject to any variation being consistent with: (i) the objectives set out in clause 1.2 of the Undertaking; and (ii) ABB's obligation to provide non-discriminatory access under clause 5.4. The obligation to provide non-discriminatory access in clause 5.4 is subject to the exceptions contained in clause 5.5.³⁷³

ABB must also comply with the following obligations when varying the PLPs:³⁷⁴

- (i) '14 days prior to implementing' any proposed variation, ABB must 'consult with Major Users';³⁷⁵
- (ii) '30 days prior to the date on which' a variation to a PLP 'is to become effective' the variation must be published by ABB on its website;³⁷⁶
- (iii) the PLPs must contain an 'expeditious' dispute resolution mechanism for dealing with disputes over compliance with the PLPs;³⁷⁷
- (iv) ABB must give the ACCC a copy of the varied PLPs 'promptly' after they are published on ABB's website.³⁷⁸

Clause 8.2(d) states that the varied PLPs do not automatically override the terms of any existing access agreements that parties have previously entered into.³⁷⁹

12.1.4 Operational Decisions

In making decisions relating to the provision of access to the Port Terminal Services, the Undertaking notes that ABB is likely to make 'Operational Decisions'.³⁸⁰

Operational Decisions are defined in the Undertaking as 'decisions made in the course of providing the Port Terminal Services'.³⁸¹

³⁷³ ABB Grain Ltd, *Port Terminal Services Access Undertaking*, 16 April 2009, clause 8.2(b).

³⁷⁴ ABB Grain Ltd, *Port Terminal Services Access Undertaking*, 16 April 2009, clause 8.2(b)(iii).

³⁷⁵ Major Users means 'Users ... that, as at the date of the proposed variation ... have shipped more than 20,000 tonnes of Bulk Wheat through the Port Terminals in the past 2 years'

³⁷⁶ ABB Grain Ltd, *Port Terminal Services Access Undertaking*, 16 April 2009, clause 8.2(b)(iii).

³⁷⁷ ABB Grain Ltd, *Port Terminal Services Access Undertaking*, 16 April 2009, clause 8.2(b)(ii).

³⁷⁸ ABB Grain Ltd, *Port Terminal Services Access Undertaking*, 16 April 2009, clause 8.2(c).

³⁷⁹ ABB Grain Ltd, *Port Terminal Services Access Undertaking*, 16 April 2009, clause 8.2(d).

³⁸⁰ ABB Grain Ltd, *Port Terminal Services Access Undertaking*, 16 April 2009, clause 8.4 and 11.1.

³⁸¹ ABB Grain Ltd, *Port Terminal Services Access Undertaking*, 16 April 2009, clause 8.4(a).

The Undertaking provides a list of the kinds of areas Operational Decisions will cover, such as: ‘scheduling, cargo accumulation decisions and ship loading’.³⁸² This list is not exhaustive.

In arriving at an Operational Decision relating to the provision of access to the Port Terminal Services, the Undertaking requires that ABB ‘must balance conflicts of interests of users of the Port Terminals’³⁸³.

This ‘obligation’ is subject to the qualification in 8.4(c) that some Operational Decisions will ‘necessarily confer a relative disadvantage on one user of the Port Terminal and an advantage on others’.

The Undertaking obliges ABB to make Operational Decisions ‘based on objective commercial criteria’.³⁸⁴ ABB will also ‘adopt practices and policies to promote fair, reasonable and non-discriminatory Operational Decision making.’³⁸⁵ No further information is given in relation to the ‘objective commercial criteria’ or the ‘practices and policies’ referred to.

Without limiting the qualifications in clause 8.4(c) (set out above) or the matters that ABB can have regard to in determining the price and non-price terms for the provision of access to Port Terminal Services for different ‘Applicants or Users’ (as set out in clause 5.5),³⁸⁶ ABB may, in making Operational Decisions:

- (i) give priority to particular vessels based on ‘lead time given between nomination and vessel ETA and likely availability of sufficient Bulk Wheat at the Port Terminal prior to vessel ETA necessary to make a nominated vessel’s nominated cargo tonnage’³⁸⁷;
- (ii) take into account the objectives of³⁸⁸:
 - a. ‘minimising demurrage at the Port Terminal over a given period’;
 - b. ‘maximising throughput ... at the Port Terminal over a given period’;
- (iii) ‘vary a cargo assembly plan’³⁸⁹ or ‘queuing order for vessels’ as a result of:³⁹⁰
 - a. ‘insufficient Bulk Wheat at the Port Terminal accumulated by the User necessary to make a User’s nominated vessel’s nominated cargo tonnage’;

³⁸² ABB Grain Ltd, *Port Terminal Services Access Undertaking*, 16 April 2009, clause 8.4(a).

³⁸³ ABB Grain Ltd, *Port Terminal Services Access Undertaking*, 16 April 2009, clause 8.4(b).

³⁸⁴ ABB Grain Ltd, *Port Terminal Services Access Undertaking*, 16 April 2009, clause 8.4(c).

³⁸⁵ ABB Grain Ltd, *Port Terminal Services Access Undertaking*, 16 April 2009, clause 8.4(c).

³⁸⁶ ABB Grain Ltd, *Port Terminal Services Access Undertaking*, 16 April 2009, clause 8.4(d).

³⁸⁷ ABB Grain Ltd, *Port Terminal Services Access Undertaking*, 16 April 2009, clause 8.4(d)(i).

³⁸⁸ ABB Grain Ltd, *Port Terminal Services Access Undertaking*, 16 April 2009, clause 8.4(d)(ii).

³⁸⁹ Defined in clause 11.1 of the Undertaking as ‘a document or documents recording, among other things, the agreed approximate tonnage of Bulk Wheat to be delivered and accumulated by the User at each loading port submitted by the User and accepted, subject to the Port Operator’s final determination, by the Port Operator’.

³⁹⁰ ABB Grain Ltd, *Port Terminal Services Access Undertaking*, 16 April 2009, clause 8.4(d)(iii).

- b. 'variations in vessel arrival times';
- c. 'failure of vessels to pass surveys';
- d. 'stability and ship worthiness inspections';
- e. 'vessel congestion';
- f. 'variation in cargo requirements';
- g. 'lack of cargo requirements';
- h. 'equipment failure';
- i. 'maintenance outages';
- j. 'contamination of accumulated cargoes or contamination of loads';
- k. 'a User not working a vessel or accumulating a cargo on a 24 hour / 7 day basis where another User is able to do so'.

12.1.5 Other matters

ABB will include the PLPs in its Access Agreements.³⁹¹

ABB 'undertakes not to discriminate between Users or in favour of its Trading Division in providing Port Terminal Services' subject to ABB's obligation to provide non-discriminatory access under clause 5.4 – which is subject to the exceptions contained in clause 5.5, and clause 8.4, which sets out ABB's obligations when making 'Operational Decisions'.³⁹²

ABB must not engage 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'.³⁹³

12.2 ABB's supporting submission to the proposed Undertaking as submitted on 16 April 2009

This section summarises the arguments in ABB's supporting submission that expand on or otherwise explain the approach taken in relation to Capacity Management (Clause 8) and the Initial Port Loading Protocols (Schedule 3) in the proposed Undertaking as submitted on 16 April 2009.

12.2.1.1 ABB submit that the Undertaking provides an appropriate balance, ensures certainty and transparency

ABB submits that the Undertaking achieves 'an appropriate balance between the legitimate interests of ABB as a provider of Port Terminal Services and the need for

³⁹¹ ABB Grain Ltd, *Port Terminal Services Access Undertaking*, 16 April 2009, clause 8.2(a).

³⁹² ABB Grain Ltd, *Port Terminal Services Access Undertaking*, 16 April 2009, clause 8.3.

³⁹³ ABB Grain Ltd, *Port Terminal Services Access Undertaking*, 16 April 2009, clause 8.5.

certainty and transparency of access for exporters of wheat using ABB's export terminals as required under the WEMA and TPA.³⁹⁴

12.2.1.2 ABB submit that its incentive is to maximise throughput and it has no ability to deny access

ABB submits that the company 'does not have any incentive or ability to ... deny access. Rather its primary incentive is to maximise throughput at ports (which each operate below maximum capacity) ... When taken with the non-discrimination and binding dispute resolution provisions [amongst other matters in the Undertaking] ... this is a powerful safeguard and constraint.'³⁹⁵

ABB submits that 'together with the WEMA, provisions providing for the operation of the shipping nomination and queuing processes and the availability of shipping stem information [is sufficient] to enable monitoring of compliance.'³⁹⁶

12.2.1.3 ABB submits that there are current and future regulatory constraints on its ability or incentive to deny or hinder access

ABB submits that the current level of regulatory oversight 'by Wheat Export Australia under the WEMA, the Commission under the Undertaking and, in 2010, a Productivity Commission review ... and the implicit threat of further regulatory intervention ... operates as a significant constraint on any ability or incentive for ABB to ... deny or hinder access.'³⁹⁷

12.2.2 Port Loading Protocols

12.2.2.1 ABB submits that the transparency of the shipping stem, port rules and PLPs prevents discrimination

ABB submits that its ability to discriminate in favour of its own trading arm is 'very significantly constrained by the transparency of the shipping stem (updated daily), the rules of the port and ABB's own loading protocols which are (and will continue to be) applied on a transparent, objective and non-discriminatory basis'.³⁹⁸

ABB submits that 'any advantage which may have accrued in the past by being able to jump shipping queues has been obviated by the transparency of publication of the shipping stem'.

12.2.2.2 ABB submits that it does not have sole control over the order in which ships are loaded

ABB submits that it 'does not have sole control over the order in which ships arrive and are loaded.'³⁹⁹ It is submitted that the order of loading ships on berth is determined by the shipping stem, the rules of the port operator and ABB's port loading protocols.

³⁹⁴ ABB Grain Ltd, *Submission to the ACCC*, 16 April 2009, para 1.4, p. 1.

³⁹⁵ ABB Grain Ltd, *Submission to the ACCC*, 16 April 2009, para 2.5(c), p. 5 and para 9.1(f), p. 31.

³⁹⁶ ABB Grain Ltd, *Submission to the ACCC*, 16 April 2009, para 2.10(c), p. 7.

³⁹⁷ ABB Grain Ltd, *Submission to the ACCC*, 16 April 2009, para 2.5(e), p. 6.

³⁹⁸ ABB Grain Ltd, *Submission to the ACCC*, 16 April 2009, para 3.12, p. 11 and para 9.1(h), p. 31.

³⁹⁹ ABB Grain Ltd, *Submission to the ACCC*, 16 April 2009, para 3.11, p. 10.

12.2.3 Operational Decisions

12.2.3.1 ABB submits that operational discretion must be applied in a non-discriminatory manner.

ABB submits that to the extent it has operational discretion, the Undertaking ‘requires that ABB exercises that discretion in a non-discriminatory manner’.⁴⁰⁰

ABB submits that ‘the Undertaking provides a mechanism for preventing preferential self-dealing and ensuring decisions are made on the basis of objectively verifiable commercial factors’.⁴⁰¹

12.3 ABB’s supplementary submission to the proposed Undertaking as submitted on 16 April 2009

This section summarises the arguments in ABB’s supplementary submission, dated 30 June 2009, that expands on or otherwise explains the approach taken in relation to Capacity Management (Clause 8) and the Initial Port Loading Protocols (Schedule 3) in the proposed Undertaking as submitted on 16 April 2009.

ABB’s supplementary submission responds to matters raised in the ACCC’s Issues Paper, Information Request and the public submissions received from interested parties.

12.3.1 Responses to general comments on ABB’s proposed Undertaking

12.3.1.1 ABB submits that transparency, clarity, certainty, and fair and open access are provided by the terms of the Undertaking

ABB submit that any potential issues relating to “transparent terms”, “[c]lear and certain commercial terms” and “fair and open access” 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.’⁴⁰²

12.3.2 Responses to general comments on ABB’s proposed PLPs

12.3.2.1 ABB submits that it has no ability or incentive to discriminate in favour of its own trading division (in relation to ABB’s management of the shipping slots and accumulation at port) and if such an incentive did exist, it is dealt with by provisions in the Undertaking in combination with the transparency imposed by the WEMA and the proposed Undertaking

ABB submits that even if there is an incentive to discriminate in favour of its own trading division in its management of the shipping slots and accumulation at port (which it does not accept it the ability to do), this incentive is ‘clearly addressed in the

⁴⁰⁰ ABB Grain Ltd, *Submission to the ACCC*, 16 April 2009, para 3.13, p. 11.

⁴⁰¹ ABB Grain Ltd, *Submission to the ACCC*, 16 April 2009, n 1, p. 4.

⁴⁰² ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 12.

Undertaking’ with ‘provisions relating to non-discrimination and arms length dealings’ and an ability of access seekers to refer disputes to ‘binding arbitration’.⁴⁰³

Further, ABB submit that when ‘examined together, the WEMA and Access Undertaking provide a high level of transparency’ in relation to ABB’s management of the shipping stem and accumulation at port because:

- (i) the ‘Undertaking sets out transparent terms of access;’
- (ii) ‘the shipping stem is public;’
- (iii) ‘the port rules under which access is provided are public;’
- (iv) ‘ABB provides substantial information on its website’; and
- (v) the proposed Undertaking ‘sets out a clear regime dealing with the provision of access, with provisions relating to non-discrimination and arms length dealings.’⁴⁰⁴

Further, ABB submits that the PLPs ‘adequately balance the competing demands of users’ with the PLPs setting out ‘transparent and objective criteria and procedures for the provision of access to Port Terminal Services.’⁴⁰⁵ ABB also submit that that the PLPs ‘will apply to ABB Marketing in the same way that they apply to all other bulk wheat export customers.’⁴⁰⁶

12.3.2.2 ABB submits that it is not in complete control of the ability of access seekers to get stock to port and could not intentionally block or delay access without incurring substantial losses, which could be identified by audit

ABB submits that it has does not have complete control over the ability of access seekers to get stock to port and accumulation as to assert otherwise ‘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.’⁴⁰⁷

Further ABB submit that it ‘could not intentionally block or delay access to Port Terminal Services [by stating that that delays were encountered in getting stock to port or insufficient stock was accumulated] without incurring substantial losses’, which could be seen in ABB’s financial records, which are auditable under the proposed Undertaking.⁴⁰⁸

⁴⁰³ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 64.

⁴⁰⁴ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 64.

⁴⁰⁵ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, pp. 72-73.

⁴⁰⁶ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 50.

⁴⁰⁷ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 73.

⁴⁰⁸ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 73.

12.3.2.3 ABB submits that the PLPs are intended to apply to all grains

ABB submits that the PLPs ‘will apply to all grains shipped through ABB’s port terminals’ as it ‘would be impractical to operate different Port Loading Protocols and different shipping stems for different grains’.⁴⁰⁹

12.3.3 Responses to specific comments on ABB’s proposed PLPs

12.3.3.1 ABB submits that Part IIIA of the Act does not require all non-price terms of access (such as those in the PLPs) to be included in the Undertaking

ABB notes that Part IIIA of the Trade Practices Act ‘does not prescribe the matters that must be included in an access undertaking’. Rather, ABB note that section 44ZZA of the Act states that ABB may give an access undertaking to the ACCC ‘in connection with the provision of access to the service’.⁴¹⁰

ABB submits 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.’⁴¹¹

ABB argues that it is ‘not appropriate or reasonable for the access undertaking to provide prescriptive and exhaustive detail of all aspects of Port Terminal Services’ – such as the ‘all commercial and operational terms’.⁴¹²

ABB submits that the minimum terms proposed by AGEA are not required in order for the proposed Undertaking to meet the statutory test in Part IIIA but that in any event, the Undertaking already contains ‘clear and comprehensive Shipping Protocols’.⁴¹³

12.3.3.2 ABB submits that its discretion in accepting a vessel nomination will be exercised in accordance with the pre-conditions in the PLPs, the ability of the access seeker to show sufficient ‘entitlement’ to available grain prior to accumulation, ABB’s ability to accumulate the required stock, and there being sufficient port capacity available

ABB submits that in exercising its discretion to accept a vessel nomination (making a final decision ‘within the timeframe required for customers to order vessels and manage their export commitments’), an access seeker needs to satisfy the following pre-conditions:⁴¹⁴

- (i) ‘enter into and comply with the terms of ... a "Port Terminal Services Agreement for Standard Port Terminal Services"’
- (ii) ‘be creditworthy (including with no materially outstanding invoices)’;
- (iii) ‘be accredited within the meaning of the WEMA;’

⁴⁰⁹ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 29.

⁴¹⁰ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 6.

⁴¹¹ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 7.

⁴¹² ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 7, 63.

⁴¹³ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, pp. 63-64.

⁴¹⁴ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 55, 73-74.

- (iv) 'hold all other license and permits required'; and
- (v) 'hold ownership in their name or ... demonstrate remaining ownership in an ABB-approved ... bulk handler facility' and 'that the grain is [or will be] available ... prior to accumulation commencing'.

If these conditions are met, ABB submits that it also needs to ensure:

- (i) it 'has the stock to meet the customer's requirements ... i.e. that the grain can be physically out turned' from upcountry sites'; and
- (ii) it 'has sufficient transport and port capacity (including having regard to any port scheduled maintenance).'⁴¹⁵

ABB submits that in practice, 'unless the customer does not have ownership or the cargo is not available', ABB manages port capacity 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)'.⁴¹⁶

ABB submits that if a vessel nomination application is rejected on these criteria 'it continues to work in good faith to find a mutually acceptable solution.'⁴¹⁷

12.3.3.3 ABB submits that the criteria used to allocate estimated load dates are transparent and objective, a number are outside ABB's control and regardless, ABB's incentive is to maximise throughput

ABB submits that the 'criteria which make up the accumulation priority under which vessels will be allocated space at port are transparent and objective.'⁴¹⁸

ABB submit that a number of factors are outside its control as they 'rely heavily on the movement and operations of third parties upstream or downstream' including:

If these conditions are met, ABB submits that it also needs to ensure:

- (i) 'the availability of transport resources';
- (ii) 'quality requests';
- (iii) 'changes to vessel estimated arrival times'; and
- (iv) 'the access seeker's ability to provide proof of ownership or transfers'.⁴¹⁹

ABB also submits that regardless, this would not affect the provision of Port Terminal Services as it has a 'clear incentive to maximise throughput'.⁴²⁰

⁴¹⁵ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 55.

⁴¹⁶ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 55.

⁴¹⁷ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 55.

⁴¹⁸ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 74.

⁴¹⁹ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 74.

⁴²⁰ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 74.

12.3.3.4 ABB submits that certain criteria that can be used to change an estimated load date are not directly within ABB's control and regardless, ABB's incentive is to maximise throughput

ABB submit that a 'number of the factors which determine when estimated load dates may change are not directly within ABB's control' including:

- (i) 'the ability of a vessel to pass port surveys';
- (ii) 'a customer's variation in cargo requirements';
- (iii) 'weather events';
- (iv) 'cancellation of vessels'; or
- (v) 'inability to provide payment in a timely manner'.

ABB submits that in any event, its incentive is to 'maximise throughput'.⁴²¹

12.3.3.5 ABB submits that the requirement for a named vessel beyond 21 days is being considered as part of the current review of the shipping protocols

ABB submits that the 'requirement for a named vessel beyond 21 days is currently being considered ... as part of its review of shipping protocols.'⁴²²

However, ABB submits that this is not a hindrance as '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.'⁴²³

12.3.3.6 ABB submits that the objective and transparent criteria on which ABB can commence accumulation of stock at port allows ABB to utilise excess capacity subject to port space and there being no conflicting or outstanding Vessel Nominations to be serviced

ABB submits that the PLPs provide 'commercially practical, transparent and objective criteria' enabling 'ABB to commence accumulation of grain to port, with movements subject to port space', 'affording ABB the necessary flexibility to utilise excess capacity and maximise grain throughput ... where there are no conflicting or outstanding Vessel Nominations to be serviced.'⁴²⁴

ABB submits that this process is transparent as the shipping stem requires publication of all changes made to estimated load dates and the 'Guiding Principles for determining accumulation will apply in circumstances where there is a conflicting accumulation'.⁴²⁵

⁴²¹ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 74.

⁴²² ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 74.

⁴²³ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 74.

⁴²⁴ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 75.

⁴²⁵ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 75.

12.3.3.7 ABB submits that the Guiding Principles set out clear and objective criteria for managing accumulation priority and gives all parties commercial certainty

ABB submits that the ‘Guiding Principles set out clear and objective criteria for managing accumulation priority and access to Port Terminal Services ... are designed primarily on a ‘first come, first served’ basis ... and give all parties commercial certainty.’⁴²⁶

ABB also submits that it reasonable and appropriate that ABB should prioritise ‘the earlier nominated vessel in the event of a conflict in vessel arrivals or demand for Port Terminal Services’ with the PLPs providing for contingencies ‘in circumstances in which the ‘first come, first served’ principles cannot be applied’.⁴²⁷

12.3.3.8 ABB submits that the vessel substitution and cancellation provisions do not display a preference for Export Select customers

ABB submits that the PLPs do not display ‘any preference for wheat exporters who choose to utilise ABB's bundled services’, rather they articulate ‘commercial reality’ – that if ABB can substitute physical grain to account for variations in the shipping stem it will.⁴²⁸

12.3.3.9 ABB submits that the ‘Variation’ fees are not unwarranted, they are used to recover costs incurred by ABB in repositioning vessels for reasons outside of its control

ABB submits that it is ‘entirely reasonable’ that they 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’.⁴²⁹

12.3.3.10 The consultation process that will apply when ABB varies the PLPs

ABB submits that its obligation ‘to "consult with Major Users" regarding any proposed variation to the Port Loading Protocols involves ABB:

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

⁴²⁶ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 75.

⁴²⁷ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 75.

⁴²⁸ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 76.

⁴²⁹ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 76.

- (v) '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'
- (vi) 'providing reasons for the decision'.

ABB submits that the 'precise timeline for a consultation process will reflect the individual circumstances ... with Major Users given longer to consider material changes, but less time ... to consult on minor changes.'⁴³⁰

12.3.3.11 ABB submits that the shipping re-positioning fee is only charged if moving cargo would assist in mitigating customer delays

ABB submits that in relation to vessel repositioning at Outer Harbor, it '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.'⁴³¹

12.3.3.12 ABB submits that it will cease loading in order to comply with all safety and environment requirements

ABB submits that it 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.'⁴³²

Where loading has ceased for these reasons, ABB submits that they 'will work as quickly as possible to address the issue and recommence operations.'⁴³³

12.3.3.13 ABB submits that the dispute resolution process is quick and provides a commercially focused procedure for resolving disputes.

ABB submits that the dispute resolution process in the PLPs is 'transparent and swift, and is designed to provide a commercially focused procedure for resolving disputes.'

ABB also submits that while the procedure allows for a dispute to be resolved in as little as 12 working days, 'in reality, operational decisions are made (and disputes resolved) in a much shorter period of time, given the commercial incentives for efficiency'.⁴³⁴

Further, ABB submits (in response to AGEA's argument - see below) that it 'does not agree that the dispute resolution process is defective, or in any way biased in favour of ABB.'⁴³⁵

⁴³⁰ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, pp. 51-52.

⁴³¹ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 56.

⁴³² ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 57, 76.

⁴³³ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 57.

⁴³⁴ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 76.

⁴³⁵ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 77.

12.3.3.14 ABB submits that as disputes under the PLPs may have an impact on other port users, ABB requires flexibility to be able to make the final decision

ABB submits that because decisions made under the PLPs may have an impact on other port users, ‘it is important that ABB has the flexibility to make any final decision’ as to what is appropriate, having regard to:

- (i) ‘the customer’s requirements;’
- (ii) ‘the requirements of other users;’
- (iii) ‘ABB's requirements for the efficient and safe operation of the port terminal; and’
- (iv) ‘the short period within which most operational decisions need to be made.’

ABB submits that in making any decision, ABB ‘must ensure that its decision is consistent with the Undertaking and, in particular ... clause 8.3’ (the non-discrimination clause).⁴³⁶

12.3.4 Responses to general comments on proposed clause 8.4 – ‘Operational Decisions’

12.3.4.1 ABB submits that Operational Decisions require the exercise of discretion and the provisions in the proposed Undertaking set out transparent and objective principles for the execution of these decisions.

ABB submits that the ‘provision of Port Terminal Services necessarily requires ABB to make operational decisions’ and that ‘it is entirely appropriate that ABB retains discretion’ to do this.⁴³⁷

ABB submits that clause 8.4 is ‘not intended to provide a definitive list of all elements that ABB must take into account when making operational decisions’ but rather ‘provides a transparent and objective framework for making operational decisions.’⁴³⁸

ABB notes that it is prohibited by clause 8.5 from ‘engaging in “conduct having a purpose of hindering access ... by any other User in the exercise of a reasonable right of access”’.⁴³⁹

ABB submits that clause 8.5, ‘in conjunction with clauses 8.5 and 1.2 ... it is clear that clause 8.4 sets out transparent and objective principles for the ... execution of operational decisions’.⁴⁴⁰

⁴³⁶ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, pp. 54-55.

⁴³⁷ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 77.

⁴³⁸ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 77.

⁴³⁹ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 77.

⁴⁴⁰ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 77.

12.3.5 Responses to specific comments on proposed clause 8.4 – 'Operational Decisions'

12.3.5.1 ABB submits that the 'objective commercial criteria' on which Operational Decisions will be made include: those criteria set out in the PLP; and where not expressly addressed in the PLP, based on factors that will maximise terminal efficiencies and throughput

ABB submits that the basis for its Operational Decisions are 'in large part, set out in the Port Loading Protocols'.⁴⁴¹

Where the PLPs 'do not expressly address an issue ... ABB submits it will make the decision independently 'based on what is required to maximise terminal efficiencies and maximise the total tonnage that is shipped through the relevant port terminal.'⁴⁴²

ABB submits that where access seekers' interests conflict, ABB may give priority to:

- (i) 'loading consecutive "same cargos" rather than swap in between commodities;'
- (ii) 'utilising all or a proportion of existing stock that is already at port (due to harvest receivals; export select stock);'
- (iii) 'making actual port space available for accumulation;'
- (iv) 'decisions which maximise specific supply chain efficiencies (including the ability to fully utilise available transport resources);'
- (v) 'maximising use of a mix of sites and the availability / capacity of those sites in relation to a cargo accumulation; and'
- (vi) 'decisions which minimise the operating costs of the terminal (subject to customers' willingness to accept overtime costs and/or purchase additional accumulation capacity).'⁴⁴³

ABB submits that other relevant factors when ABB makes an Operational Decision where access seekers interests conflict include:

- (i) 'ABB's commercial and contractual commitments, for example by prioritising commitments by reference to which agreement was executed first;'
- (ii) 'the impact of ABB's Operational Decisions on its provision of services to all port users;'⁴⁴⁴

⁴⁴¹ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 52.

⁴⁴² ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 53.

⁴⁴³ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 53.

⁴⁴⁴ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 53.

- (iii) 'the costs of making, or failing to make, certain Operational Decisions, with the goal of minimising cost to customers and, where appropriate, to ABB;'
- (iv) 'the operational, technical or other (e.g. safety) implications of making certain Operational Decisions; and
- (v) 'ABB's compliance with the remainder of the Access Undertaking in taking certain Operational Decisions.'⁴⁴⁵

ABB submits its '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.'⁴⁴⁶

ABB notes that 'it may be necessary to document more fully the objective criteria on which it may make its Operational Decisions', which would 'merely reflect the existing practices implemented'.⁴⁴⁷

12.3.6 ABB's response to SAFF's submission to ACCC received on 3 July 2009

12.3.6.1 ABB submits that the shipping stem will contain information about all grains

ABB submits that 'SAFF states that the shipping stem requires more information to be provided on it ... ABB does not agree with SAFF's arguments.' ABB submits that following the introduction of the Undertaking 'it will be impractical to operate different shipping stems for different grains, which means that information about all grains exported through ABB's ports will be available on the shipping stem'.⁴⁴⁸

12.3.6.2 ABB submits that it is untenable for the shipping stem to be managed by an independent body

ABB submits that it 'does not accept that' SAFF's submission that the shipping stem needs to be managed by an independent body and be made fully transparent 'is reasonable' as it 'would be untenable to separate the management of the shipping stem from the Port Terminal Operator. Such a separation would create confusion, hinder responsiveness and not be in the interests of bulk wheat exporters.' Further, ABB also submit that 'that the shipping stem and other information provisions are sufficiently transparent'.⁴⁴⁹

⁴⁴⁵ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 54.

⁴⁴⁶ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 54.

⁴⁴⁷ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 54.

⁴⁴⁸ ABB Grain Ltd, *Supplementary submission to the ACCC* in response to the South Australian Farmers Federation submission, 15 July 2009, p. 6.

⁴⁴⁹ ABB Grain Ltd, *Supplementary submission to the ACCC* in response to the South Australian Farmers Federation submission, 15 July 2009, p. 7.

12.3.6.3 ABB submits that it does not have incentives to manipulate times of loading to increase overtime costs

ABB submits that it ‘does not agree that it has incentives to “manipulate times of loading” to increase overtime costs’ as its ‘clear incentive is to maximise throughput volumes’ as discussed in its previous submissions.⁴⁵⁰

12.4 Submissions received from interested parties to the proposed Undertaking as submitted on 16 April 2009

This section summarises the arguments put forward in public submissions by interested parties in response to ABB’s proposed Undertaking and supporting submission in relation to Capacity Management (Clause 8) and the Initial Port Loading Protocols (Schedule 3) in the proposed Undertaking as submitted on 16 April 2009.

12.4.1 Australian Grain Exporters Association (AGEA)

12.4.1.1 AGEA’s general comments on ABB’s proposed Undertaking

AGEA submits that ‘[f]air and transparent access requires ... an ... undertaking which has clarity, certainty and transparency. The rules must be detailed and clear ... [and] be capable of objective application. Discretionary or subjective decisions must be kept to the absolute minimum. Decisions and the reasons for them must be disclosed in a timely way and open to effective and timely review.’⁴⁵¹

AGEA also submits that unless the proposed access undertakings provide transparency in relation to BHC’s decisions⁴⁵², ‘BHCs will be able to manipulate logistics, substitute vessels and/or vary the shipping stem to confer preferential treatment on themselves’.⁴⁵³

12.4.1.2 AGEA’s general comments on ABB’s proposed PLPs

1. *Transparency and certainty required in the application of the PLPs and shipping stem*

AGEA submits that the proposed PLPs do not provide transparency ‘in relation to the management and operation of BHCs’ port terminals and shipping stem. The Port Protocols provide the BHCs with wide discretions and lack objective criteria for the

⁴⁵⁰ ABB Grain Ltd, *Supplementary submission to the ACCC in response to the South Australian Farmers Federation submission*, 15 July 2009, p. 7.

⁴⁵¹ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, p. 2.

⁴⁵² It should be noted that AGEA’s submissions on the proposed Undertakings (including the proposed port protocols) are, unless otherwise specified, comments relating to the proposed Undertaking and proposed port protocols of all three bulk handling companies (ABB, GrainCorp and CBH).

⁴⁵³ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 4.12, p. 10.

allocation of shipping slots'.⁴⁵⁴ AGEA further submit that the PLPs 'do not contain clearly defined rules which are capable of objective application.'⁴⁵⁵

AGEA also submits that 'there is no transparency in relation to the shipping stems', bringing into question 'the ability of the BHCs to manipulate the shipping stem to their commercial advantage'.⁴⁵⁶

AGEA also submits that '[t]ransparency should ensure that port protocols are applied to BHCs ... and AWEs on a 'no less favourable' basis. This does not occur at present.'⁴⁵⁷

In addition, AGEA submits that the access provider's need for flexibility and the access seeker's need for transparency and certainty can be balanced by 'clearly specifying the obligations of the BHCs'.⁴⁵⁸

2. *Conflict of interest means BHC will discriminate against other users*

AGEA submits that 'BHCs' conflict of interest make it inevitable that BHCs will give preferential treatment to their Trading Divisions and make operational decisions that allow them to maximise profits [for example, in the allocation of overtime and other expenses], to the detriment of other users of the port and competition in the bulk wheat export market.'⁴⁵⁹

To mitigate against these risks AGEA states that 'a clearly defined shipping protocol and transparency in relation to BHCs' decision-making is required.'⁴⁶⁰

3. *Certainty of reserved shipping slots and limited re-ordering of shipping slots*

AGEA submits that access seekers must have 'the certainty of knowing that if they book a spot for a vessel on a particular day, the service will be delivered or they will be adequately compensated.'⁴⁶¹ 'At present ... BHCs have the discretion to change booking slots and do not incur any liability if they fail to deliver.'⁴⁶²

⁴⁵⁴ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 14.1, p. 31.

⁴⁵⁵ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, Schedule 1, para K2(iii), p. 48.

⁴⁵⁶ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 14.6, p. 32.

⁴⁵⁷ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 14.7, p. 32.

⁴⁵⁸ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, Schedule 1, para K2(ii), p. 48.

⁴⁵⁹ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 14.2, p. 31.

⁴⁶⁰ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 14.2, p. 31.

⁴⁶¹ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 14.3, p. 31.

⁴⁶² Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 14.3, p. 31.

AGEA also submits that '[r]eordering of the load order of vessels in the shipping stem should only be allowed in certain ... circumstances and with full transparency in the decision-making process.' The reason proposed for this is that '[o]therwise, BHCs may assert that delays were encountered in getting stock to port or insufficient stock was accumulated, but AWEs would never know if that was the case.'⁴⁶³

4. *Entitlement should not be a basis on which an ability to export is determined*

AGEA submits that the 'ability to export stock should not be subject to BHC being satisfied that AWEs have stock available because':

- (i) 'BHCs control the ability of AWEs to get stock to port and accumulation.'
- (ii) 'BHCs can allow their stock to sit in port, taking up accumulation space ... [and] therefore have the ability to manipulate the logistics of getting stock to port to serve their own interests'; and
- (iii) 'AWEs enter into forward sale contracts' under which they have legal title to wheat 'but this would not be apparent from BHCs' system'.⁴⁶⁴

5. *The capacity allocation process should be completely transparent*

AGEA submits that there 'must be complete transparency in relation to capacity allocation or an independent person should be appointed to make decisions about capacity allocation.'⁴⁶⁵

AGEA submits that capacity could be allocated by way of an auction process whereby:

'AWEs can bid for capacity by port, for any month at ... the export out-loading charge ... The initial tender should take place as early as possible, with the full annual capacity put up for tender. In each tender, AWEs can bid for a maximum of 25% capacity in each port. The tender should be operated by an independent third party ... Tenders for under-subscribed capacity could then be held at intervals to be determined. Where a tender is oversubscribed, the capacity should be issued on a pro-rated basis ...

*Where storage capacity at port is limited ... capacity should be allocated on the basis that a port user has access to storage facilities for [an appropriate] ... period ... to allow the user to accumulate and ship their vessel.'*⁴⁶⁶

6. *Dispute resolution process for operational matters*

AGEA submits that the PLPs must 'contain a clear dispute resolution mechanism whereby disputes [in relation to the PLPs] may be referred to an independent umpire

⁴⁶³ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 14.5, p. 31.

⁴⁶⁴ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 14.4, p. 31.

⁴⁶⁵ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 14.8, p. 32.

⁴⁶⁶ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 14.8, p. 32 & para 14.10, p. 33.

for a binding decision to be made within 24 hours'. The reason proposed for this is that '[i]f a dispute is not resolved within 24 hours, the opportunity to export stock may be lost because a slot may have been allocated to another party.'⁴⁶⁷

7. *Varying the PLPs*

AGEA submits that the access provider's right to unilaterally vary the PLPs 'is inconsistent with the requirement of clarity and certainty' and notes that BHCs 'are only required to "consult" with AWEs before implementation of the varied terms and conditions.'⁴⁶⁸

12.4.1.3 Specific comments on ABB's proposed PLPs

1. *PLPs must contain certain provisions*

AGEA submits that the PLPs must provide:⁴⁶⁹

- (i) that if the access seekers 'pay the vessel nomination fee and are allocated an estimated load date, BHCs must provide the necessary services to allow ... load[ing of] the vessel (within a three day spread), failing which BHCs will be liable for any loss or damage' suffered;
- (ii) 'transparency as to how the BHCs accept vessel nominations and provide vessel slots';
- (iii) 'mutual rights to terminate on the grounds of force majeure';
- (iv) 'a dispute resolution mechanism whereby disputes may be referred to an independent 'umpire' for a binding and timely decision' within 24 hours.

2. *Acceptance of vessel nominations should not be at ABB's discretion'*⁴⁷⁰

AGEA submits that '[i]t is not appropriate for [vessel nomination] acceptance to be at ABB's discretion', 'the exercise of a discretion can be arbitrary' and that ABB can exercise this discretion so that an access seeker has 'no access to export bulk wheat' from ABB's ports.'⁴⁷¹

3. *Allocation of estimated load dates is based on factors within ABB's control*

⁴⁶⁷ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 14.11, p. 33.

⁴⁶⁸ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, Schedule 1, para K2(vii), p. 48.

⁴⁶⁹ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 4.17(h), p. 14.

⁴⁷⁰ AGEA's comments in headings 2 to 11 are specific to ABB and do not apply to other bulk handling companies.

⁴⁷¹ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, Schedule 2, p. 51.

AGEA submits that the PLPs ‘provide that vessels will be allocated estimated load dates based on accumulation priority’ but that these factors are mostly ‘within ABB’s complete control’.⁴⁷²

A factor AGEA gives as an example being within ABB’s control is ‘the ability of the Company [ABB] ... to accumulate the cargo’. AGEA submits that ABB ‘controls the accumulation of cargo.’⁴⁷³

4. *ABB can change an estimated load date for reasons within its control - allowing too much flexibility and not enough certainty*

AGEA submits that the reasons ABB can ‘change estimated load dates are directly within its control and allow ABB too much flexibility and no certainty for AWEs.’⁴⁷⁴

Examples given by AGEA of the reasons that they view as allowing ABB too much flexibility include:

- (v) ‘accumulation issues’;
- (vi) ‘lack of performance of freight providers’;
- (vii) ‘ability to utilise cargo already at port’ (AGEA submits that ABB’s ability to accumulate should not affect an access seeker’s opportunity to accumulate); and
- (viii) ‘quality problems identified during accumulation’ in relation to the access seekers’ and other vessels in the queue.⁴⁷⁵

5. *Requirement to provide name and details of a vessel 21 days prior to arrival is uncommercial*

AGEA submits that it ‘is not commercial to require the name and details of a vessel 21 days prior to its arrival.’⁴⁷⁶

6. *ABB’s right to accumulate stock at port for ‘supply chain efficiencies purposes’ can be used to discriminate against access seekers*

AGEA note that under the PLPs, ABB can ‘commence accumulation into port subject to port space ... for supply chain efficiencies purposes’.⁴⁷⁷

⁴⁷² Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, Schedule 2, p. 51.

⁴⁷³ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, Schedule 2, p. 51.

⁴⁷⁴ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, Schedule 2, p. 51.

⁴⁷⁵ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, Schedule 2, p. 51.

⁴⁷⁶ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, Schedule 2, p. 51.

⁴⁷⁷ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, Schedule 2, p. 51.

As there is no definition of ‘supply chain efficiencies’, AGEA submits that in most cases, this ‘will be impossible to prove’ and therefore, ‘it will not be possible to show that ABB’s real purpose ... is to allow ABB to accumulate its own grain.’⁴⁷⁸

7. *ABB has discretion to prioritise conflicting accumulations (and therefore the allocation of estimated load dates) in line with the ‘Guiding Principles’. The Guiding Principles lack transparency and allow discrimination.*

AGEA submit that ABB has ‘sole discretion to alter the priority of accumulation’.⁴⁷⁹

It is assumed that AGEA’s makes this submission because the PLPs state that ABB will ‘prioritise the accumulation for [an] earlier nominated vessel (unless, in [ABB’s] discretion there are over-riding reasons to alter that priority, refer “Guiding Principles”’.⁴⁸⁰

In light of this, AGEA identify the following issues with the ‘Guiding Principles’:

- (i) Under clause 1(a) AGEA states that ‘ABB reserves the right to place a vessel in front of an earlier nominated vessel in the event that ABB “deems it can manage the impact of accepting the second nomination”’.⁴⁸¹ AGEA submits in response that:⁴⁸²
 - a. ‘[t]here is no requirement on ABB to determine whether there will be a negative impact upon the first nominated vessel’;
 - b. ‘there is no transparency as to what is meant by “can manage the impact”’ (and asks on whom the impact would rest);
 - c. ‘ABB does not undertake to indemnify the ... exporter for the additional demurrage and losses ... caused by ABB’s ... decision.’
- (ii) In relation to clause 1(b), AGEA submits that ‘it is unclear how ABB would incur significant costs that it could not charge to the AWE’ and ‘the expression “port efficiencies being negatively impacted” is also uncertain and biased in favour of ABB.’⁴⁸³
- (iii) Under clause 3, AGEA submits that ‘ABB reserves the right “not to fully accumulate a vessel cargo into Outer Harbor to maximise all Client vessel

⁴⁷⁸ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, Schedule 2, p. 52.

⁴⁷⁹ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, Schedule 2, p. 52.

⁴⁸⁰ ABB Grain Ltd, *Port Terminal Services Access Undertaking*, 16 April 2009, Schedule 3.

⁴⁸¹ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, Schedule 2, p. 52.

⁴⁸² Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, Schedule 2, p. 52.

⁴⁸³ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, Schedule 2, p. 52.

turnarounds where multiple vessels are arriving in a short time frame.”⁴⁸⁴
AGEA submits that:

- a. ‘This ... will not ensure fair access where a vessel that is nominated earlier is only part loaded and then moved from berth to allow other vessels to load out of turn.’ AGEA submits that there is ‘no transparency as to how this policy’ will operate.⁴⁸⁵
- (iv) Under clause 4, AGEA submits that ‘ABB reserves the right to allocate load dates in reliance on “Specific supply chain efficiencies including an ability to fully utilise available resources’. AGEA notes that this may result in vessels loading out of arrival order based on an ability to fully position enough stock at port.⁴⁸⁶
 - a. AGEA submits that under this clause, ‘ABB retains the right to act in its own interests and make decisions regarding allocation of load dates or accumulation in port under the guise of “supply chain efficiencies”’.⁴⁸⁷
- (v) Under clause 5, AGEA submits that ABB notes that ‘if “a Client is willing to work outside of the standard operating conditions or increase accumulating capacity the vessel may receive accumulation priority if the initial prioritised client rejects a similar offer.”⁴⁸⁸
 - a. AGEA submits that this appears to mean that ‘if a AWE is willing to pay ABB additional fees, its vessel will be loaded out of turn.’⁴⁸⁹
8. *The vessel substitution and cancellation provisions favour those access seekers utilising ‘Export Select’ (ABB’s bundled product).*

AGEA note the PLPs state that ““where export select option is taken, [ABB] may be able to mitigate the cost by utilising this cargo for another export select Client””. AGEA submits that this displays ‘a preference for clients which choose its bundled services.’⁴⁹⁰

9. *The charges and manner in which the ‘vessel variation’, ‘freight costs’ and ‘Shipping Re-positioning’ fees are applied are lacking transparency.*

⁴⁸⁴ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, Schedule 2, p. 52.

⁴⁸⁵ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, Schedule 2, p. 52.

⁴⁸⁶ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, Schedule 2, p. 52.

⁴⁸⁷ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, Schedule 2, p. 52.

⁴⁸⁸ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, Schedule 2, p. 52.

⁴⁸⁹ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, Schedule 2, p. 52.

⁴⁹⁰ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, Schedule 2, p. 53.

AGEA notes that ‘ABB retains the discretion to apply “[vessel] variation fees” where a nominated vessel is cancelled or delayed from its original ETA by more than 3 days’ and that the PLPs refer to ‘various costs such as “freight cost” and a “Shipping Re-positioning fee”’.⁴⁹¹

AGEA submits that there ‘is no transparency’ as to how the vessel variation fees are quantified or are to be applied and, that the freight costs and shipping re-positioning fees ‘are neither explained nor the prices provided’.⁴⁹²

10. *ABB can unreasonably cease loading a ship if ABB is of the opinion that continued loading may breach any safety or environmental requirements*

AGEA notes that ‘ABB “reserves the right to cease loading if, in its opinion, continued loading may result in breaches of any safety or environmental requirements.”’⁴⁹³

AGEA submits that this right ‘is not tempered with a requirement that ABB act reasonably. Nor are there any guidelines provided for how this decision will be made.’ AGEA also submits that ABB ‘seeks to exclude liability for any losses’ that result from this decision.⁴⁹⁴

11. *The dispute resolution process in the PLPs are too slow and do not protect the access seeker’s interests*

AGEA submits that by the time a client has the opportunity to serve an escalation notice under the dispute resolution process in the PLP, the ‘client will most likely have lost its spot’. Therefore, the ‘dispute mechanism does not protect the interests of clients by providing a speedy mechanism for resolving disputes.’⁴⁹⁵

12.4.1.4 General comments on proposed clause 8.4 – ‘Operational Decisions’

1. *The arguments raised in relation to the PLPs are also relevant to the clauses on Operational Decisions*

AGEA submits that its arguments in relation to the PLPs (as set out below) are also relevant to the clauses in the Undertaking dealing with ‘Operational Decisions’.⁴⁹⁶

2. *The criteria ABB can take into account when making Operational Decisions are largely subjective and create uncertainty*

⁴⁹¹ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, Schedule 2, p. 53.

⁴⁹² Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, Schedule 2, p. 53.

⁴⁹³ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, Schedule 2, p. 53.

⁴⁹⁴ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, Schedule 2, p. 53.

⁴⁹⁵ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, Schedule 2, p. 53.

⁴⁹⁶ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 15.1, p. 33.

AGEA submits that ABB's discretion in making Operational Decisions 'is too wide and subjective' and that access seekers 'need the certainty of knowing shipping slots will be available'.⁴⁹⁷

AGEA propose that this could be achieved by having PLPs that 'clearly define the obligations to accept vessel nominations', whereby if the access seeker 'fails to get wheat to port by the load date' they 'forfeit the booking fee', which would protect ABB's interests.⁴⁹⁸

12.4.1.5 Specific comments on proposed clause 8.4 – 'Operational Decisions'

1. *The requirement on ABB to 'balance conflicts of interest' between users does not ensure fair access for all access seekers*

AGEA note that clause 8.4(b) 'provides that in making "Operational Decisions", ABB must "balance the conflicts of interest of users of the Port Terminals"'.⁴⁹⁹

AGEA submits that this does not provide 'any transparency or benchmarks' to show that the Operational Decisions are made to ensure that 'fair access' is provided to all access seekers.⁵⁰⁰

2. *ABB can determine priority of a particular vessel based on factors within its control*

AGEA note that clause 8.4(d)(i) 'entitles BHCs to make Operational Decisions to give priority to vessels based on the "lead time given between nomination and vessel ETA and likely availability of sufficient Bulk Wheat at the Port Terminal prior to vessel ETA"'.⁵⁰¹

AGEA submits that ABB controls 'the movement and accumulation of wheat at port'.⁵⁰²

3. *The objectives ABB can take into account when making Operational Decisions are vague and provide opportunities for ABB to restrict access*

AGEA submits that clause 8.4(d)(ii) 'provides opportunities for BHCs to restrict access to port terminal services' and are uncertain.⁵⁰³ In particular, AGEA submits that:

⁴⁹⁷ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 15.2, p. 33.

⁴⁹⁸ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 15.2, p. 33.

⁴⁹⁹ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 15.3, p. 33.

⁵⁰⁰ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 15.3, p. 33.

⁵⁰¹ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 15.4, p. 33.

⁵⁰² Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 15.4, p. 33.

⁵⁰³ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 15.5, p. 33.

- (i) under clause 8.4(d)(ii)(A), ABB would not normally be ‘aware of the AWE’s vessel demurrage rate’ and regardless, an access seeker’s ‘ability to negotiate a low demurrage should not result in ... another vessel being given priority ... because it has a higher demurrage rate.’;⁵⁰⁴ and
- (ii) under clause 8.4(d)(ii)(B), as ABB ‘controls the movement and accumulation of wheat at port, it is within its means to show that the throughput of bulk wheat is maximised by loading its vessels in priority’ to other access seeker’s vessels.⁵⁰⁵

4. *The factors on which ABB can vary a cargo assembly or queuing order are broad and some are within ABB’s control*

AGEA submits that clause 8.4(d)(iii) provides ABB with ‘very broad entitlements to vary a cargo assembly plan or queuing order of a vessel.’⁵⁰⁶ In particular, AGEA submits that:

- (i) with regard to the criterion in clause 8.4(d)(iii)(A), ABB ‘control[s] the movement and accumulation of wheat at port facility’;⁵⁰⁷ and
- (ii) with regard to the criterion in clause 8.4(d)(iii)(E), ‘vessel congestion’ is not appropriate as a ground.⁵⁰⁸

12.4.2 South Australian Farmers Federation (SAFF)

12.4.2.1 SAFF submits that certain definitions in the proposed Undertaking are confusing

SAFF submit that certain definitions used in the proposed Undertaking are ‘confusing’ – noting that as an example ‘the definitions state that for “*shipping stem*” see the meaning in clause 8.1(a)(ii) which in turn refers to the Port Loading Protocols and the Shipping Stem at www.abb.com.au. But on checking the ABB Grain website it is called “Port Access and Shipping Protocols.”’⁵⁰⁹

12.4.2.2 SAFF submits that is appropriate that the PLPs be included in the Undertaking and that consultation must take place on variations to the PLPs

SAFF submit that the inclusion of the PLPs in the Undertaking is ‘welcomed’ and that it ‘is pleasing that the Port Operator must also consult with “Major Users” (those who

⁵⁰⁴ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 15.5(a), p. 34.

⁵⁰⁵ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 15.5(b), p. 34.

⁵⁰⁶ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 15.6, p. 34.

⁵⁰⁷ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 15.6, p. 34.

⁵⁰⁸ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 15.6, p. 34.

⁵⁰⁹ South Australian Farmers Federation Grains Industry Committee, *Submission in relation to proposed ABB access undertaking*, May 2009, p. 3.

have shipped more than 20,000 tonnes in the past two years) about any proposed variation to the Port Loading Protocols.’⁵¹⁰

12.4.2.3 SAFF submits that the shipping stem needs to contain more detail

SAFF submits that on ‘the shipping stem, there needs to be more detail on the commodity, particularly the type of grain and grade. ABB Grain on its shipping schedule does now list grain as ‘wheat’ and ‘other’, rather than just as ‘grain’ as in the shipping schedule provided with the ABB Grain submission. This now needs to be expanded to list all. With an independent shipping stem, such details would be provided without fear of vested interests.’⁵¹¹

12.4.2.4 SAFF submits that a report to the ACCC in the dispute resolution provisions would provide an extra safeguard

SAFF submits that in relation to the dispute resolution provisions in the PLP, ‘the need to report to ACCC would add an extra safeguard for both sides.’⁵¹²

12.4.2.5 SAFF submits that entitlement to grain ‘in stock’ to be able to book a ship is not appropriate

SAFF submits that ‘Grain exporters should not need to have the tonnes in stock to be able to book a ship’, they ‘should only need to ensure that ABB Grain have sufficient time to accumulate the nominated tonnage. In any case, the risk of short loading is with the exporter.’⁵¹³

12.4.2.6 SAFF submits that there needs to be transparency around the management of the shipping stem with an ability to signify an intent to book a ship

SAFF submits that ‘it is essential that there at least be transparency’ in relation to the shipping stem. SAFF also ‘would argue that the shipping stem needs to be managed by an independent body so that all exporters, including ABB Grain, are seen to be treated equally. There would be true transparency with an independent operator.’ Further, ABB submit that the ‘intent to book a ship also needs to be allowed.’⁵¹⁴

12.4.2.7 SAFF submits that ABB can discriminate in favour of its trading arm in the allocation of costs

SAFF submits that there ‘is no control on overtime’. Further, SAFF submits that ‘the monopoly situation gives ABB Grain the opportunity to manipulate times of loading to suit its own business requirements. There needs to be demurrage penalties put on ABB Grain without these being passed onto their clients.’⁵¹⁵

⁵¹⁰ South Australian Farmers Federation Grains Industry Committee, *Submission in relation to proposed ABB access undertaking*, May 2009, p. 11.

⁵¹¹ South Australian Farmers Federation Grains Industry Committee, *Submission in relation to proposed ABB access undertaking*, May 2009, p. 11.

⁵¹² South Australian Farmers Federation Grains Industry Committee, *Submission in relation to proposed ABB access undertaking*, May 2009, p. 11.

⁵¹³ South Australian Farmers Federation Grains Industry Committee, *Submission in relation to proposed ABB access undertaking*, May 2009, p. 11.

⁵¹⁴ South Australian Farmers Federation Grains Industry Committee, *Submission in relation to proposed ABB access undertaking*, May 2009, pp. 11-12.

⁵¹⁵ South Australian Farmers Federation Grains Industry Committee, *Submission in relation to proposed ABB access undertaking*, May 2009, p. 12.

12.4.2.8 SAFF submits that the variation process for the PLPs is appropriate and sufficiently detailed but the grounds for variation should be limited

SAFF submits that the variation process for the PLPs is appropriate and sufficiently detailed but ‘this should not allow ABB Grain to pass on the risk and costs when the need to vary is due to their own faults.’⁵¹⁶

12.5 ACCC’s Assessment of Issues

12.5.1 Introduction

The ACCC has identified the following issues as arising for consideration in relation to the proposed ‘Capacity Management’ and the PLP components of the proposed Undertaking:

1. the nature of the inclusion of the PLPs in the proposed Undertaking and Access Agreements;
2. the need for the inclusion of the PLPs in the proposed Undertaking given the disclosure requirements under WEMA;
3. whether the PLPs provide an appropriate balance between providing access seekers with sufficient certainty and clarity as to their terms, effect and operation; and ABB with sufficient flexibility in their management of the Port Terminal Services;
4. the process to be applied in varying the PLPs;
5. interaction of the Operational Decisions clause with the PLPs; and
6. whether the Operational Decisions clause provides an appropriate balance between providing access seekers with sufficient certainty and clarity as to their terms, effect and operation; and ABB with sufficient flexibility in their management of the Port Terminal Services.

The ACCC considers it important that the proposed Undertaking provides for sufficient certainty and clarity in its terms, effect and operation in order to enable the access provider and access seekers to be adequately aware of their respective rights and obligations, and thereby avoid unnecessary costs, monetary or otherwise, when utilising the processes set by the proposed Undertaking.

The ACCC considers that an undertaking that achieves these aims is in the public interest, would promote the interests of persons who might want access to the service, while also protecting the legitimate business interests of the provider, and would allow for an enforceable undertaking.

⁵¹⁶ South Australian Farmers Federation Grains Industry Committee, *Submission in relation to proposed ABB access undertaking*, May 2009, p. 12.

Inability to consult on rationale for various provisions

As a preliminary point, the ACCC notes that ABB did not provide comments in support of many of the clauses in the ‘Capacity Management’ and the PLP components of the proposed Undertaking in its initial submission, and it was only in response to a request for information from the ACCC and submissions from interested parties that ABB elaborated on why it considered its particular approach appropriate. ABB provided its public response to the ACCC’s information request on 30 June 2009, and consequently ABB’s submissions outlining the reasons for its approach have not been subject to public consultation.

The ACCC acknowledges that ABB’s further submission in some instances provides further explanation, and therefore clarity, as to how many of the proposed clauses are intended to operate. While this is beneficial, the ACCC considers it also highlights deficiencies in the drafting of many clauses as they currently appear in the proposed Undertaking. These are addressed in the following sections of this chapter.

12.5.2 Nature of the inclusion of the PLPs in the proposed Undertaking and Access Agreements

12.5.2.1 PLPs form part of the proposed Undertaking

ABB’s PLPs are set out in Schedule 3 to the Undertaking.⁵¹⁷ The PLPs are included in a Schedule to the Undertaking and therefore form part of the Undertaking.⁵¹⁸

Given the PLPs set out the key process by which ABB will allocate port terminal capacity, it is the ACCC’s view that the inclusion of the PLPs in the proposed Undertaking is appropriate.

12.5.2.2 PLPs will be offered as part of the Access Agreements

ABB undertakes to include the initial PLPs set out in Schedule 3 in its Access Agreements.⁵¹⁹

As the ACCC understands this proposal, the initial PLPs would form part of the contractual terms and conditions that ABB agrees to provide to access seekers for the term of the Access Agreement. However, under the proposed Undertaking, ABB can also vary the PLPs subject to the terms in the Undertaking during the term of the Access Agreement.

In the ACCC’s view, the practical result of this provision does not provide for sufficient certainty and clarity in its terms, effect and operation of the proposed Undertaking because:

- (i) the PLPs set out ABB’s policies and procedures for managing demand for the Port Terminal Services and as a result, there should only be one version of the PLPs that applies to bulk wheat;

⁵¹⁷ ABB Grain Ltd, *Port Terminal Services Access Undertaking*, 16 April 2009, clause 8.2(a).

⁵¹⁸ ABB Grain Ltd, *Port Terminal Services Access Undertaking*, 16 April 2009, clause 2.1(b)(i) & clause 11.2(e).

⁵¹⁹ ABB Grain Ltd, *Port Terminal Services Access Undertaking*, 16 April 2009, clause 8.2(a).

- (ii) for example, if ABB enters into an Access Agreement with an access seeker with the PLPs in the form they exist in the proposed Undertaking in January – then in March ABB varies the PLPs, and then in May enters into an Access Agreement with a second access seeker offering a different version of the PLPs – unless the first access seeker agrees to a contractual change, ABB will be contractually obliged to comply with two, possibly competing, versions of the PLPs.

In light of this, the ACCC’s view is that clause 8.2(a) is likely not to be appropriate in its current form.

The ACCC is of the view that while it is appropriate that the PLPs be part of the Undertaking (as currently offered), a provision should be included in the Standard Terms that obliges ABB to comply with the PLPs when providing the Port Terminal Services on the terms contained in the PLPs that are in existence at the date the access undertaking came into operation or, if relevant, as varied from time to time in accordance with the variation methodology in the Undertaking (discussed further below).

When combined with the recommendation in relation the variation methodology (set out below), it is the ACCC’s preliminary view that this approach is more likely to be appropriate as it would maintain a flexible and pragmatic approach to variations of the PLPs – allowing ABB to respond to operational concerns – while providing access seekers with sufficient certainty and clarity in its terms, effect and operation of the proposed PLPs.

12.5.3 The substance of the proposed PLPs

The ACCC has considered two issues. Firstly, whether the provisions in the Undertaking and the transparency provisions in the WEMA and the proposed Undertaking are sufficient to adequately deal with capacity management issues, and if not, whether or not the PLPs provide for sufficient certainty and clarity in its terms, effect and operation in order to enable the access provider and access seekers to be adequately aware of their respective rights and obligations, and thereby avoid unnecessary costs, monetary or otherwise, when utilising the processes set by the proposed PLPs and Undertaking.

12.5.3.1 Need for the PLPs to be included in the Undertaking given the requirements of the WEMA

With regard to the first consideration, the ACCC notes that the very premise behind the requirements under WEMA for Bulk Handlers to provide an access undertaking to the ACCC is that these bulk handlers are vertically integrated and an access undertaking is required to provide a level of constraint against the potential for discrimination in the provision of port terminal services. Further, the transparency provided by publication of certain information in relation to the shipping stem does not, in the ACCC’s view by itself provide satisfactory protection against the ability for ABB to discriminate in favour of its own trading arm.

12.5.3.2 Whether the PLPs provide an appropriate balance between providing access seekers with sufficient certainty and clarity as to their terms, effect and

operation and ABB with sufficient flexibility in their management of the Port Terminal Services.

With regard to the second consideration, on the one hand, given the PLPs form part of key processes by which ABB will allocate port terminal capacity, the ACCC considers it relevant that the proposed Undertaking provides for sufficient certainty and clarity in its terms, effect and operation in order to enable ABB and access seekers to be adequately aware of their respective rights and obligations.

In light of this, the ACCC also recognises that the process of vessel nomination, acceptance and rejection and overall capacity management is an evolving process. This is (at least in part) due to the existence of a range of possible exogenous developments which can precipitate a change to any previously stated plan. As a result, the ACCC recognises that the maintenance of a flexible and pragmatic approach is required to maintain the overall efficiency of the system.

On balance, the ACCC's view is that the proposed PLPs are, on the whole, unlikely to be appropriate because they are unclear and outdated. The following comments on the particular provisions of the PLPs are however made in recognition of the challenge of balancing access seekers' interests and ABB's legitimate business interests, and are made under the headings used in the PLPs.

1. *Fees*

The ACCC's preliminary view is that the provision as currently drafted is not appropriate for the following reasons:

- (i) the quantum of the deposit referred to is unclear;
- (ii) the reference to the 'current storage and handling charges' is inconsistent with the wording in the Undertaking (the Undertaking uses the term 'Reference Prices').

2. *Access to ABB port terminals*

The ACCC's preliminary view is that the provision as currently drafted is not appropriate for the following reasons:

- (i) the reference to the requirement to enter into a 'storage and handling agreement' is outdated. The ACCC notes that ABB has agreed to amend this provision to refer to a 'Port Terminal Services Agreement for Standard Port Terminal Services'. The PLP and Undertaking needs to be consistent.
- (ii) the criteria used and the process to be applied in the assessment as to whether or not an access seekers is 'creditworthy' is unclear.

3. *Vessel Nomination*

The ACCC's preliminary view is that the provision as currently drafted is not appropriate for the following reasons:

- (i) the criteria used and the process to be applied in the exercise of ABB's discretion as to the acceptance or rejection of a vessel nomination application is unclear. The ACCC notes that ABB has outlined details in

relation to the criteria and processes it applies in exercising this discretion in its supplementary submission. This could form the basis of an amended provision.

4. *Allocation of estimated load dates*

The ACCC's preliminary view is that the provision as currently drafted is not appropriate for the following reasons:

- (i) certain criteria that are within ABB's control or require subjective determinations by ABB in the allocation of estimated load dates are unclear and require further explanation (for example, 'ability to provide transport resources', the 'impact on terminal efficiencies', and 'specific supply chain efficiencies').

5. *Estimated load dates may change for one or more of the following reasons*

The ACCC's preliminary view is that the provision as currently drafted is not appropriate for the following reasons:

- (i) certain criteria that are within ABB's control or require subjective determinations by ABB in changing estimated load dates are unclear and require further explanation (such as, accumulation issues, an 'accurate' ETA, quality problems).
- (ii) the list is stated to be 'non-exhaustive'. In the circumstances, this provides apparently unlimited discretion for ABB and insufficient certainty for access seekers.

6. *Load Grades and Specific Quality Parameters*

The ACCC's preliminary view is that the provision as currently drafted is not appropriate for the following reasons:

- (i) the reference to 'cover the requirements' is unclear and the requirement to demonstrate ownership / transfers prior to accumulation into 'Company approved third party bulk handlers' is unlikely to be in the interests of persons who might want access to the service given the pre-existing financial exposure of access seekers to demurrage and the existence of booking and nomination fees. The ACCC is of the view that a financial incentive exists for access seekers to ensure that they have, or can, acquire required cargo and have robust assembly plans.
- (ii) the references to 'tighter standards for outturn' and 'normally agreed standards' are unclear, as is the process that will apply in coming to an agreement (given the terms of the proposed Undertaking).

7. *When a vessel substitution or variation may be treated as a new nomination*

The ACCC's preliminary view is that the provision as currently drafted is not appropriate for the following reasons:

- (i) the lack of clarity about the circumstances under which an access seeker is liable for associated fees.

8. ***Estimated load dates are calculated on the following operating conditions unless otherwise negotiated with the Client***

The ACCC's preliminary view is that the provision as currently drafted is not appropriate for the following reasons:

- (i) the criteria used and the process to be applied in the assessment of an applicant's 'willingness' to pay additional fees is unclear.
- (ii) the criteria that are within ABB's control or require subjective determinations by ABB in the calculation of estimated load dates are unclear and require further explanation (for example, specific supply chain efficiencies)

9. ***Notification prior to Vessel Nomination & Company Acceptance***

The ACCC's preliminary view is that the provision as currently drafted is not appropriate for the following reasons:

- (i) the criteria that are within ABB's control or require subjective determinations by ABB when commencing accumulation into port are unclear and require further explanation (namely, specific supply chain efficiencies). The ACCC notes that ABB has submitted that it can only commence accumulation at port 'where there are no conflicting or outstanding Vessel Nominations to be serviced'.⁵²⁰ The current wording of the provision does not reflect this explanation as it allows ABB to 'commence accumulation into port, subject to port space, where there are no nominated vessels or for supply chain efficiencies purposes' [emphasis added].

10. ***Guiding Principles for determining Accumulation Priority and therefore allocation of Estimated Load Date(s)***

The ACCC's preliminary view is that the provision as currently drafted is not appropriate for the following reasons:

- (i) the criteria that are within ABB's control or require subjective determinations by ABB when altering accumulation priority in line with the Guiding Principles are unclear and require further explanation (for example, 'deems it can manage the impact of accepting the second nomination', 'port efficiencies being negatively impacted', 'short timeframe', 'specific supply chain efficiencies', and 'willing to work outside if the standard operating conditions'). In the circumstances, the

⁵²⁰ ABB, Port Terminal Services Access Undertaking, Supplementary Submission to the ACCC, 30 June 2009, p. 75.

current drafting provides excessive flexibility for ABB and insufficient certainty for access seekers.

11. *Disputes*

The ACCC's preliminary view is that the provision as currently drafted is not appropriate for the following reasons:

- (i) the current drafting of the dispute resolution process 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 the 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 recommendations in the Non-Discrimination chapter for a clearer non-discrimination provision in the Undertaking are accepted.

12. *Variation of Protocols*

The ACCC's preliminary view is that the provision as currently drafted is not appropriate for the following reasons:

- (i) the process to be applied in the PLPs when seeking a variation of the PLPs provides too much discretion to ABB and insufficient certainty for access seekers. Given the PLPs form part of key processes by which ABB will allocate port terminal capacity, their variation should only take place with the consultation with the port users (see below for further detail). For example, the current wording of the variation provision in the PLPs does not set out what consultation will entail. The ACCC notes that ABB has set out more detail on what ABB's obligation to consult entails at pages 51-52 of its supplementary submission. In addition, the PLP variation process needs to be consistent in both the PLPs and the proposed Undertaking (or, as recommended below, only contained in the proposed Undertaking).

13. *General comments*

There are a number of terms used in the PLP and the Undertaking that are not defined in the PLP or the proposed Undertaking (for example, 'Client' is used in the PLP but not defined in either the PLP or the Undertaking), or are used inconsistently (for example, the PLPs refer to a 'standard nomination form' – which is not defined – whereas the Undertaking refers to a Vessel Nomination Application). The lack of consistency (or reference to outdated terms) can lead to confusion as to the operation of the PLPs and the Undertaking for access seekers and for ABB and should be remedied.

12.5.4 Varying the Port Loading Protocols

It is the ACCC's preliminary view that the process to be applied in the proposed Undertaking when seeking a variation of the PLPs provides too much discretion to

ABB and insufficient certainty for access seekers. Given the PLPs form part of the key processes by which ABB will allocate port terminal capacity, their variation should only, by and large, take place after consultation with the port users. The ACCC's view is that the PLP variation process should only be included in the proposed Undertaking.

As discussed above, the ACCC has recommended that the initial PLPs should be part of the Undertaking (as currently offered by ABB).

In order to vary the PLPs under the proposed Undertaking, a provision should be included in the Standard Terms that obliges ABB to comply with the terms in the PLPs when providing the Port Terminal Services as the PLPs existed on the date the access undertaking came into operation or, if relevant, as varied from time to time in accordance with the variation methodology in the Undertaking. In addition, a provision should be included in the undertaking that states that any variations to the PLPs must be made in accordance with, and are subject to the non-discrimination provisions in the undertaking.

The variation methodology for the PLPs in the Undertaking would require:

- (i) an adequate consultation process (the proposed methodology set out at pages 51-52 of ABB's supplementary submission could be used as a base) where access seekers are given a sufficient degree of notice about amendments, with the PLPs as varied from time to time being required to be published on its website and provided to the ACCC within 5 days.
- (ii) in recognition of the fact that parties may not respond to ABB's communications regarding proposed changes, in certain specifically defined circumstances (i.e. force majeure situations) that are set out clearly in the Undertaking, the amendments may be implemented unilaterally.
- (iii) and a clause would be included in the Undertaking obligating ABB to comply with the PLPs (as amended from time to time).

The ACCC notes that this proposal leaves ABB with the flexibility to vary the PLPs and lies somewhere in the middle of the spectrum of possible PLP variation mechanisms that could be included in the Undertaking. On one end would be the mechanism to allowing ABB the flexibility to amend the PLPs at will, and at the other, the mechanism of only allowing amendments to the PLPs in accordance with the formal variation mechanism in section 44ZZA(7) of the Act.

While the ACCC recognises that the recommended 'model' has some risks (given that the ACCC will not review all proposed amendments to determine their appropriateness) it is the ACCC's view that this risk is mitigated by: (i) the inclusion of a robust consultation mechanism; (ii) the inclusion of a provision allowing the ACCC to treat a breach of the amended PLPs as a breach of the Undertaking; (iii) the recommendation for a clearer non-discrimination provision and the inclusion of a provision that any variation to the PLPs must be made in accordance with and are subject to the non-discrimination provisions in the Undertaking; and (iv) the fact that if there are issues with this particular model, the term of the Undertaking is relatively short and the variation mechanism could be strengthened in any future Undertaking.

It is the ACCC's preliminary view that this approach is more likely to be appropriate as it would maintain a flexible and pragmatic approach to variations of the PLPs – allowing ABB to respond to operational concerns without having to formally vary the Undertaking itself – while providing access seekers with sufficient certainty and clarity in its terms, effect and operation of the key processes by which ABB will allocate port terminal capacity as provided by the PLPs.

To ensure that the ACCC can enforce PLPs that have been varied, a provision should be included in the Undertaking that obliges ABB to comply with the Port Loading Protocols (as varied from time to time).

12.5.5 Operational Decisions

12.5.5.1 Interaction of the Operational Decisions clause and the PLPs

Under the proposed Undertaking, 'Operational Decisions' constitute all decisions made in the course of providing the Port Terminal Services.

The ACCC notes that as a result of the definition of Operational Decisions, there is significant potential overlap with the provisions in the PLPs. From this point of view, the interaction between the PLPs and the Operational Decisions component of the proposed Undertaking is unclear. The ACCC's preliminary view is that it is more likely to be appropriate that the provisions under clause 8.4 are included in the PLPs. See the Non-Discrimination chapter for more detail.

12.5.5.2 Whether the Operational Decisions clause provides an appropriate balance between providing access seekers with sufficient certainty and clarity as to their terms, effect and operation and ABB with sufficient flexibility in their management of the Port Terminal Services

The ACCC considers it to be important that the proposed Undertaking provides for sufficient certainty and clarity in its terms, effect and operation in order to enable ABB and access seekers to be adequately aware of their respective rights and obligations.

However, the ACCC also recognises that the process of making Operational Decisions in the provision of Port Terminal Services – namely overall capacity management – is an evolving process. This is (at least in part) due to the existence of a range of possible exogenous developments which can precipitate a change to any previously stated plan. As a result, the ACCC recognises that the maintenance of a flexible and pragmatic approach is required to maintain the overall efficiency of the system.

The ACCC's following comments on the particular provisions of the Operational Decisions clause are made in recognition of both sets of challenges.

1. The ACCC's preliminary view is that clause 8.4(b) and 8.4(c) as currently drafted are not appropriate for the following reasons:
 - (i) the requirement to 'balance conflicts of interests of users' provides excessive flexibility to ABB and insufficient certainty for access seekers given this balance is qualified by ABB being able to make decisions based

on objective commercial criteria and ‘will adopt practices and policies to promote fair, reasonable and non-discriminatory Operational Decision making’. A clause that expands on these objective commercial criteria would be more likely to be appropriate. The ACCC notes that ABB has recognised it ‘may be necessary to document more fully the objective criteria on which it may make its Operational Decisions’.⁵²¹

2. The ACCC’s preliminary view is that clause 8.4(d)(i) as currently drafted is not appropriate because the criteria used and the process to be applied in ABB’s assessment of the ‘likely availability of sufficient Bulk Wheat’ is unclear.
3. The ACCC’s preliminary view is that clause 8.4(d)(ii)(A) and 8.4(d)(ii)(B) as currently drafted are not appropriate. The reasons for this are that the criteria that are within ABB’s control or require subjective determinations by ABB when determining whether the objective of minimising demurrage or maximising throughput ‘over a given period’ is unclear and require further explanation. For example, ABB could determine that an objective when making an Operational Decision to maximise throughput ‘over a given period’, with that given period to be 12 months. Clauses that remove the ‘over a given period’ qualifiers would be more likely to be appropriate.
4. The ACCC’s preliminary view is that clause 8.4(d)(iii) as currently drafted is not appropriate. The reasons for this is that the criteria that are within ABB’s control or require subjective determinations by ABB when varying a cargo assembly plan or queuing order for vessels are unclear and require further explanation (for example, ‘vessel congestion’, ‘lack of performance of freight providers’).
5. The ACCC’s preliminary view is that clause 8.5 as currently drafted is not appropriate. See the Non-Discrimination chapter for more detail on this issue.

⁵²¹ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 54.

13 Other issues

Summary

Publication of stocks of grain at port

It is not appropriate that ABB's proposed Undertaking does not include an obligation to publish stocks of grains at port.

Such an obligation would address concerns raised by interested parties that port operators have the potential to restrict access to port for bulk wheat services by exhausting the port terminal's capacity in favour of other grains.

For the avoidance of doubt, this obligation would not extend to publication of up-country information. This is because, as set out in the Scope chapter of this draft decision, it is the ACCC's view that ABB's approach of limiting its proposed Undertaking to port terminal services (and by extension, information about its port operations) is appropriate in the circumstances.

Publication of key port terminal information

As set out in the Ring-Fencing chapter, the ACCC considers that it is appropriate that arrangements be provided for in the proposed Undertaking to address the potential for ABB's marketing arm to misuse port terminal information to its advantage.

The ACCC considers that the appropriate approach to dealing with this issue would be for the proposed Undertaking to require publication of key port terminal information (such as vessel nomination applications) on the shipping stem a short time after its receipt by ABB. This would increase transparency of nominations that have been made and lessen the opportunity for ABB's marketing arm to misuse key port terminal information. It is important to note that any such discriminatory conduct would be prohibited by a robust non-discrimination clause, such as that recommended by the ACCC in the Non-Discrimination chapter.

Publication of key service standards

It is not appropriate that ABB's proposed Undertaking does not include an obligation to report on a number of key service standards.

Such reporting would provide a degree of transparency around the level of service being provided to wheat exporters and assist potential access seekers in assessing the appropriateness of the price offered for a service.

Part IIIA of the TPA does not prescribe what must be included in an access undertaking. Therefore, a potential access provider has a degree of discretion in how to structure its proposed Undertaking and what it includes in the undertaking. However, the ACCC notes that acceptance of an Undertaking by the ACCC precludes that service from being declared under Part IIIA (see section 44H(3)) of the TPA. In

these circumstances, it is appropriate that the range of terms and conditions of access be sufficient to give access seekers certainty regarding the service subject of the undertaking, and the terms and conditions upon which that service will be provided.

This chapter address the need for additional clauses to those proposed in ABB's proposed Undertaking.

13.1 Publication of information

13.1.1 ABB's proposed Undertaking

ABB's proposed Undertaking does not include an obligation to publish any information about stocks held in storage either in its ports or in its up-country storage and handling network.

13.2 ABB's supporting submissions

ABB's initial submission of 16 April 2009 stated at paragraph 6.7:

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...⁵²²

In response to a question in the ACCC's information request 2 June 2009 that asked ABB to expand on the above comment, ABB submitted:

... 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.⁵²³

⁵²² ABB Grain Ltd, *Submission to the ACCC*, 16 April 2009, p. 22.

⁵²³ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 28.

In response to AGEA's claims that there is a critical imbalance between the information available to bulk handlers as port operators and the information available to other bulk wheat exporters, ABB states:

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.⁵²⁴

13.3 Submissions from interested parties

13.3.1 Australian Grain Exporters Association

AGEA submits that the BHCs have the ability to discriminate against other traders through manipulating other grain stocks at port. They submit:

The proposed access undertakings do not provide transparency in relation to BHCs' management of shipping slots and accumulation at port. Unless the proposed access undertakings provide transparency in relation to BHCs' decisions, BHCs will be able to manipulate logistics, substitute vessels and/or vary the shipping stem to confer preferential treatment on themselves of their Trading Division.⁵²⁵

Further, AGEA submits:

BHCs can allow their stock to sit in port, taking up accumulation space from other AWEs. BHCs therefore have the ability to manipulate the logistics of getting stock to port to serve their own interests (or the interests of their Trading Division).⁵²⁶

AGEA also submits on the overall information available to ABB because of its vertically integrated nature:

There is a critical imbalance between the information available to BHCs as port operators and the information available to AWEs. BHCs control inventory movements, quality profile, transportation and capacity at ports and have within their control information relating to logistics of stock into port. BHCs know who is transporting stock into port, what stock is coming into port, how much stock is in the port and when and how much stock is due to leave the port. BHCs could refuse to allow AWEs to accumulate stock on the basis that the port is full, but no-one would know if that is the case.

This imbalance in information is exacerbated in situations where, as is the case here, the BHCs provide upstream and downstream services. The result is that the BHCs possess a great deal of information about the trading activities of the AWEs (their competitors) and are consequently in a position to advantage the BHCs' related entities, or to disadvantage

⁵²⁴ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 65.

⁵²⁵ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 4.12, p. 10.

⁵²⁶ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 14.4, p. 31.

the AWEs. The undertakings do not ensure that AWEs obtain access to the same information that is available to BHCs.⁵²⁷

To overcome some of these issues, AGEA submits that the following information should be published by ABB on a timely basis:

- (a) port capacity;
- (b) stock on hand at port;
- (c) daily receivals by grade;
- (d) the accumulation programme at port;
- (e) stock movements;
- (f) allocation and changes to vessel loading slots;
- (g) weight, quality and AQIS compliance;
- (h) all other necessary information for AWEs to assess whether BHCs have met the performance criteria.⁵²⁸

AGEA also submits that ABB should provide daily updates on:

- (i) stock on hand at port;
- (ii) daily receivals by grade into port;
- (iii) the port's capacity;
- (iv) wheat accumulation;
- (v) unloading from upcountry transporters into port;
- (vi) stock movements.⁵²⁹

13.3.2 New South Wales Farmers Association

The NSW Farmers Association submits that there is a lack of transparency of information relating to the grain supply chain. It states:

It is widely known within the industry that Australian storage and handlers have information readily available to them relating to stocks on hand, which can be updated on a daily basis. In fact WEA may be within its rights to request this information, if it believes this is appropriate. Therefore if WEA were directed it might provide an additional

⁵²⁷ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 4.13 & 4.14, pp. 11-12.

⁵²⁸ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 4.16, p. 12.

⁵²⁹ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 4.17(k), p. 14.

and useful service to the wider industry in receiving and publishing the relevant information.⁵³⁰

13.3.3 South Australian Farmers Federation

SAFF submits that there is a lack of information available within Australia's grain industry and refers to the USA system as an example of an efficient system. It states:

There is a need for a set of principles in which the industry presents its production and stock reporting, so everybody involved in the industry has available the same information so the market place can work efficiently.

At the moment there is a massive failure within the Australian grain market because of the lack of information on production and stocks. The information is held by three regional bulk handling companies for their own commercial gain at the expense of all others in the chain. The lack of transparent market information presents large risks for farmers, traders and end-users who reflect this risk in reduced pricing for growers.

Going forward, there is a need for a flow of information much as there is in the United States. This is provided by the USDA in a timely and efficient manner.

A trusted government body for not just wheat but the whole grain industry needs to be able to provide a similar information service to that currently provided by the USDA.

Production estimates need to be provided monthly not quarterly as ABARE is currently doing. Forecasts for the new season should commence in June each year, based on early planted acreage estimates.

Export sales as in the United States need mandatory reporting of all sales within one week of the sales being made. This needs to detail the type of grain, tonnage, destination, and new crop verses old crop.

Export shipments as the grain is actually shipped needs to be reported on a weekly basis so that all in the industry can work out what has been sold against what has actually been shipped.

Harvest receival data should be reported weekly by commodity and grade by major storage providers (NACMA-accredited) to ensure that the industry has transparent data. The consequent stock levels on hand by grade also need to be reported by all major storage providers (that is, receivals less domestic out-turns less exports).

It needs to be mandatory that all major storage providers are made to disclose the level of grower warehouse stocks so all buyers have access to grain stocks opportunities.

With full information flow in a timely manner, all players in the grains industry can make fully informed decisions. This would stop everybody been at the mercy of the three regional bulk handling companies. And more importantly, allow the grain industry to mature and move forward for everybody's benefit.

There needs to be mandatory reporting of the production and stock information, in a timely fashion. This could be over seen by Grain Trade Australia. For any bulk handler wishing to export, failure to comply with these reporting requirements should lead to their license being revoked.

⁵³⁰ NSW Farmers Association, *Submission in relation to proposed access undertakings*, June 2009, p. 5.

Without rules in place, large companies with complete supply chain monopolies have the ability to wipe out any potential competition.

Growers need to have confidence to be able to do business with credible marketers and bulk handling companies. The grains industry should not be put in a position where if the only avenue to export markets is cut off by one sole marketer, that may put the credibility of Australian growers at risk. The grain industry needs to create an environment so as to encourage competition between exporters to ensure market efficiency.⁵³¹

13.4 ACCC's views

The ACCC considers that it is not appropriate that ABB's proposed Undertaking does not include a requirement to publish information about stock held at port.

The ACCC notes the submission made by AGEA that, given the proposed Undertaking relates only to wheat, port operators have the potential to restrict access to port by exhausting the port terminal's capacity in favour of other grains.⁵³²

While the ACCC does not have evidence to suggest that such behaviour has occurred, the ACCC recognises that providing a greater level of transparency over stocks at port would assist to alleviate the potential for port operators to engage in this behaviour. Accordingly, the ACCC considers that it would be appropriate for ABB's proposed Undertaking to state that it will publish information relating to the stocks held at port on a regular basis.

However, the ACCC considers ABB's approach of not including an obligation to publish stocks held *up-country*, is appropriate in the circumstances.

The ACCC recognises that, as ABB has submitted, it is clear that the intention of the WEMA is that the proposed Undertakings should apply only to services offered at port.

In this regard, the ACCC notes that the Explanatory Memorandum to the WEMA responded to calls to extend the access test to cover up-country services, stating that:

Up-country facilities do not display natural monopoly characteristics as they have low barriers to entry and there are already a number of competitors in the industry who provide up-country storage services.⁵³³

The Explanatory Memorandum goes on to note that an extension of the access arrangements to up-country storage facilities would 'impose an excessive regulatory burden'.⁵³⁴ Further, the Second Reading Speech of the WEMA provides:

The Senate inquiry also identified concerns in relation to the potential for bulk-handling companies to restrict access to up-country storage facilities in a similar manner to concerns in relation to port facilities.

⁵³¹ South Australian Farmers Federation Grains Industry Committee, *Submission to the ACCC on market failure because of the existence of a monopoly in the South Australian Grains Industry*, May 2009, p. 5.

⁵³² Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 4.9, p. 10.

⁵³³ Explanatory Memorandum, *Wheat Export Marketing Bill 2008*, p. 13.

⁵³⁴ Explanatory Memorandum, *Wheat Export Marketing Bill 2008*, p. 14.

It is unclear from the evidence presented to the Senate inquiry whether the problem would necessarily arise, and if so, the extent of legislation that would be required to correct it.

If the highest level of regulation were to be imposed on the more than 500 up-country facilities, there is no doubt that this would create increased compliance costs which would almost certainly be directly passed back to growers.

The government will, therefore, continue to monitor the ability of exporters to access up-country storage facilities.

Let me say here, if any problems are identified then the government will take steps to remedy the situation including, if necessary, the development of a code of conduct.⁵³⁵

Nevertheless, the ACCC is cognisant of the submissions made calling for the publication of information in relation to stocks held in ABB's up-country storage and handling facilities. Further, the ACCC considers that it is likely that this information *does* potentially give ABB's trading arm a competitive advantage over other wheat exporters.

However, given the clear express intention of the WEMA, and having regard to the risk and undesirability of imposing regulation that is not appropriate at a time when the industry is newly liberalised and in transition, the ACCC considers that it is appropriate pursuant to section 44ZZA(3) of the TPA that ABB's proposed Undertaking does not include a requirement to publish stocks held in its up-country network.

13.5 Publication of key port terminal information

As set out in the Ring-Fencing chapter, the ACCC considers that it is appropriate that arrangements be provided for in the proposed Undertaking to address the potential for ABB's marketing arm to misuse port terminal information to its advantage.

The ACCC considers that the appropriate approach to dealing with this issue would be for the proposed Undertaking to require publication of key port terminal information (such as cargo nomination applications) on the shipping stem a short time after its receipt by ABB.

This would increase transparency of nominations that have been made and lessen the opportunity for ABB's marketing arm to misuse key port terminal information. It is important to note that any such discriminatory conduct would be prohibited by a robust non-discrimination clause, such as that recommended by the ACCC in the Non-Discrimination chapter.

13.6 Port performance indicators

13.6.1 ABB's proposed Undertaking

ABB's proposed Undertaking does not place any obligation on it to maintain and publish performance indicators.

⁵³⁵ House of Representatives, *Votes and Proceedings, Hansard*, Thursday 29 May 2009, pp. 76-77.

13.7 ABB's supporting submissions

ABB provided the ACCC with a list of internal key performance indicators. This list, however, was submitted on a confidential basis and accordingly has not been the subject of public consultation.⁵³⁶

13.8 Submissions from interested parties

13.8.1 Australian Grain Exporters Association

AGEA calls for the following minimum performance criteria to be included in the standard terms:

- (f) the specification of minimum performance criteria which BHCs are required to meet including:
 - i) acceptance of vessel nominations regardless of stock entitlements within 24 hours;
 - ii) changes to vessel slots and cargo accumulation;
 - iii) unloading of trains/road transport within six hours;
 - iv) load rates and time to count as per Austwheat 2008 charter party (as amended from time to time);
 - v) benchmark criteria for grading, fumigation, weighing, compliance with AQIS requirements, loading to receival standards. The grain loaded to the ship should be of a standard not less than that delivered to the port terminal by or on behalf of the exporter. The terminal should provide running samples and/or analysis during loading so that any deviation from the required quality is known by the exporter prior to the completion of loading.
 - vi) settling despatch demurrage at the applicable vessel rate.⁵³⁷

13.9 ACCC's views

The ACCC considers 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 to wheat exporters and assist potential access seekers in assessing the appropriateness of the price offered for a service.

While not seeking to prescribe what service performance indicators should be included in an undertaking, the ACCC notes the following possible indicators:

- 7. Ship rejections;

⁵³⁶ ABB Grain Ltd, Supplementary submission to the ACCC, 23 June 2009, p. 49.

⁵³⁷ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, p. 13.

8. Cargo assembly times;
9. Transport queuing times;
10. Port blockouts;
11. Overtime charged;
12. Demurrage.

The ACCC notes that including obligations to report on service standards is an obligation that has been included in other access undertakings.⁵³⁸

⁵³⁸ See, for example, the access undertaking submitted by the Australian Rail Track Corporation (ARTC), and accepted by the ACCC on 30 July 2008.

14 Draft Decision on ABB's access Undertaking

Summary

The ACCC's draft decision is that it should not accept the Access Undertaking given to the ACCC by ABB on 16 April 2009.

14.1 Draft Decision on ABB's Access Undertaking

In relation to the Access Undertaking given to the ACCC by ABB on 16 April 2009, the ACCC's draft finding is that, having regard to the matters listed in s.44ZZA(3) of the TPA, it would not be appropriate to accept the Undertaking.

As a result, the ACCC's draft decision is that it should not accept the Undertaking in its current form.

The ACCC has provided its draft views throughout on provisions that would not be appropriate, and alternatives that might be more appropriate.

Annexure A: Proposed Indicative Access Agreement

Draft: May 2009

draft

2009/2010 Season Port Terminal Services Agreement for Standard Port Terminal Services

AusBulk Limited (Company)

[] (Client)

2009/2010 Season Port Terminal Services Agreement for Standard Port Terminal Services

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Schedule 1 - Charges and Fees

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Signing page

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draft

Details

Date

2009

Parties

Name **AusBulk Limited**
 ABN 88 007 556 256
 Short form name **Company**
 Address Grain House 124 –130 South Terrace, Adelaide, SA 5000

Name [REDACTED]
 ABN [REDACTED]
 Short form name **Client**
 Address [REDACTED]

Background

- A The Company is:
- (i) the operator of the Port Terminal Facilities;
 - (ii) the provider of Port Terminal Services; and
 - (iii) an Associated Entity of ABB Grain.
- B ABB Grain is an Accredited Wheat Exporter.
- C For ABB Grain to be an Accredited Wheat Exporter, ABB Grain was required to provide the Access Undertaking.
- D Pursuant to the Access Undertaking:
- (i) access to Port Terminal Services is required to be provided to Accredited Wheat Exporters; and
 - (ii) that access is required to be offered on standard terms and conditions (**Standard Terms**).
- E This Agreement is the Standard Terms.
- F The Client, being an Accredited Wheat Exporter, wishes to be provided by the Company with Port Terminal Services on the Standard Terms, and the Parties have accordingly entered into this Agreement.

Agreed terms

1. Defined terms & interpretation

1.1 Defined terms

In this Agreement:

ABB Grain means ABB Grain Ltd (ABN 59 084 962 130).

ABB Group Companies means ABB Grain, Ausmalt Pty Ltd ACN 096 519 658, Southern Wharf Services Pty Ltd ACN 094 879 508, ABB Grain Export Ltd ACN 084 962 112, Joe White Malting Pty Ltd ACN 004 287 352, other Associated Entities and Related Bodies Corporate and, where applicable, their successors and permitted assigns.

ACCC means the Australian Competition and Consumer Commission.

Access Undertaking means the undertaking provided by ABB Grain to the ACCC pursuant to the WEMA and Part IIIA of the TPA dated [*insert date*] and available on the ACCC website at [*insert reference*].

Accidental Loss or Damage means loss or damage to the Client's Bulk Wheat caused or occasioned by events not reasonably within the control of the Company.

Accredited Wheat Exporter has the meaning given to that term in the Access Undertaking.

Agreement means this agreement and all schedules, annexures and attachments.

Approved Third Party Store means a grain storage and handling facility owned by a person other than the Company or an ABB Group Company, which has been approved by the Company for the purposes of this Agreement.

AQIS means Australian Quarantine Inspection Services.

Associated Entity has the meaning given to that term by the Corporations Act.

Binned Grade means the Grade of Bulk Wheat stored in a Cell.

Bulk Wheat has the meaning given to that term in the Access Undertaking.

Business Day means a day that is not a Saturday, Sunday or gazetted public holiday in South Australia.

Cell means a single unit of storage of Bulk Wheat.

Client's Bulk Wheat means that quantity of Bulk Wheat held by the Company on behalf of the Client within a Port Terminal Facility, as adjusted for Shrinkage and other matters allowed or required under this Agreement.

Commencement Date has the meaning given to that term in clause 2.1.

Common Stock has the meaning given to that term in clause 6.2.

Company Facility means any facility owned or operated by the Company or any ABB Group Company for the receipt and storage of grain, and may include a Port Terminal Facility.

Corporations Act means the *Corporations Act 2001* (Cth).

Damaged Bulk Wheat means Bulk Wheat that has been damaged in an unusual incident or event to such an extent that it can no longer be classified by any Receival (Classification) Standards and is only of salvage value or suitable for disposal.

Dust means Bulk Wheat dust attributable to the Client's Bulk Wheat extracted from dust collection plants in the Company's Facilities, but excluding Damaged Bulk Wheat. Dust is not included as part of Shrinkage.

Expiry Date has the meaning given to that term in clause 2.1.

Export Select means the bundled system operated by the Company under which the Client elects to buy grain at, or deliver grain to, a Company Facility in a Port Zone and to have equivalent grain (but not necessarily the same grain) Outturned by the Company to the Client at the Port Terminal Facility for that Port Zone.

Export Select Grain means, at any time, grain that is the subject of a written election by the Client to participate in Export Select that has not been revoked by notice in writing to the Company at that time.

Export Standard means an unbundled system of receipt, storage, handling and Outturn of the Client's grain.

Force Majeure has the meaning given to that term in clause 15.1.

Grade means a grade of grain of a given Season specified in the Receipt (Classification) Standards and Outturn standards of that same Season, or any other grade agreed by the Parties.

Gross Negligence means conduct (by act or omission) which falls outside the generally applicable practices of Bulk Wheat handlers in Australia and allowing for the limitations of the age, nature and state of the equipment and storage premises available for use by the Company at the time of storing and handling the Client's Bulk Wheat.

Grower means any person involved in the growing of wheat, the contact details for whom have been registered by the Client or the Company or a national grower register.

GST Legislation means *A New Tax System (Goods and Services Tax) Act 1999 (Cth)* and any related tax imposition act (whether imposing tax as a duty of customs excise or otherwise) and includes any legislation which is enacted to validate recapture or recoup the tax imposed by any of such acts.

Indirect or Consequential Loss means indirect, consequential or remote loss or any loss in the nature of compensation for loss of production, loss of profit, loss of opportunity, loss of markets, loss of use of money, goods or other property or loss of goodwill or business reputation, including any losses that the Client may suffer in the event that the ability to resell Bulk Wheat is adversely affected.

Insolvency Event means, in relation to a Party:

- (a) a receiver, receiver and manager, administrator, trustee or similar official is appointed over the whole or a substantial part of the assets or undertaking of the Party and is not removed within 30 days;
- (b) the Party suspends payment of its debts generally;
- (c) the Party is insolvent within the meaning of the Corporations Act;
- (d) the Party enters into or resolves to enter into any arrangement, composition or compromise with, or assignment for the benefit of, its creditors or any class of them;
- (e) an application (other than a vexatious application) or order is made for the winding up or dissolution of, or the appointment of a provisional liquidator to, the Party or a resolution is passed or steps are taken to pass a resolution for the winding up or dissolution of the Party otherwise than for the purpose of an amalgamation or reconstruction which has the prior

written consent of the other Party and, in the case of an application, the application is not withdrawn or dismissed within 60 days; or

- (f) an administrator is appointed under Division 2 of Part 5.3A of the Corporations Act and, except in the case of an appointment by the Party or its directors, is not withdrawn or removed within 14 days.

In-Store Transfer means the transfer of ownership of Bulk Wheat held at a Port Terminal Facility from the Client to another person, or vice versa, as recorded in the Company's stock systems.

Other Client means a person that is provided with a storage service at a Port Terminal Facility (other than a Grower). For avoidance of doubt, the Company, both in its own capacity and as the custodian of Export Select wheat, may be an Other Client.

Outturn means to cause Bulk Wheat to physically leave the custody of the Company at a Port Terminal Facility, and is taken to occur when the Bulk Wheat exits the delivery spout into a shipping vessel at which point physical custody of the Bulk Wheat passes from the Company to the Client or a third party authorised by the Client.

Outturn Entitlement has the meaning given to that term in clause 7.2.

Party means, depending on the context, the Company or the Client.

Port Terminal means, depending on the context, the Company's seaboard terminal at:

- (a) Port Adelaide, South Australia;
- (b) Outer Harbour, South Australia;
- (c) Port Giles, South Australia;
- (d) Wallaroo, South Australia;
- (e) Port Lincoln, South Australia; or
- (f) Thevenard, South Australia.

Port Loading Protocols means the 'Port Loading Protocols' as defined in the Access Undertaking, as amended from time to time in accordance with the procedures prescribed by the Access Undertaking.

Port Schedules has the meaning given to that term in the Access Undertaking.

Port Terminal Facility, in respect of a Port Terminal, means those facilities listed and described in the applicable Port Schedule in the Access Undertaking as being the 'Port Terminal Facility' for that Port Terminal.

Port Terminal Services, in relation to a Port Terminal, means those of the Wheat Reveal Services, Wheat Storage Services and Wheat Ship Loading Services that the Company provides by using one or more of the Port Terminal Facilities at that Port Terminal.

Port Zone means a geographical grouping of Company Facilities that includes a Port Terminal Facility as nominated and published by the Company for each Season. For clarification the Port Zone may, at the Company's discretion, include Company Facilities that are not freight advantaged to the Port Terminal Facility in that Port Zone.

Purchase Options means the various alternative products offered or to be offered to Growers by the Client for the purchase of Bulk Wheat as submitted to and displayed by the Company, subject to and in accordance with such procedures and requirements as the Company may, in its sole discretion, produce and publish from time to time.

Receival (Classification) Standards means standards that either:

- (a) accord with the industry benchmarks established for Bulk Wheat and published by the Company prior to the receival of that Bulk Wheat into a Company Facility, or
- (b) are otherwise agreed with the Client.

Related Bodies Corporate has the meaning given to that term in the Corporations Act.

Reserve a Cell means prohibiting the Company, without the Client's consent, from moving the quantity of Bulk Wheat owned by the Client in a Cell specified by the Client in a notice of Cell reservation provided all applicable charges have been paid.

Season means the period in which most of the Bulk Wheat is harvested and delivered to Company Facilities, typically commencing in November in one year and going through to the February of the following year.

Segregation means the physical separation of the storage of Bulk Wheat by type, Grade, variety or such other distinguishing quality as may be determined by the Company.

Shipping Stem has the meaning given to that term in the Access Undertaking.

Shrinkage means loss in the normal storage and handling process, including loss of mass through changes in moisture content, loss in handling, and Waste. Shrinkage however, does not include Bulk Wheat lost as Dust.

Tax Invoice has the meaning given in the GST Legislation.

Taxable Supply has the meaning given in the GST Legislation.

TPA means the *Trade Practices Act 1974 (Cth)*.

Up-Country Receival Facility has the meaning given to that term in clause 3.

Waste means Bulk Wheat that, as a result of the normal handling process, has been downgraded to Bulk Wheat of no commercial value (for example mouldy Bulk Wheat, or Bulk Wheat mixed with dirt and stones).

WEMA means the *Wheat Export Marketing Act 2008 (Cth)*.

Wheat Receival Services means the receival of Bulk Wheat for export from Australia at a Port Terminal by using one or more of the Port Terminal Facilities at that Port Terminal, and involves:

- (a) sampling, testing and classification on delivery;
- (b) weighing on delivery;
- (c) tipping and inward elevation;
- (d) Segregation;
- (e) placing into storage; and
- (f) recording of relevant information.

Wheat Ship Loading Services means the Outturn of Bulk Wheat to a shipping vessel at a Port Terminal for export from Australia by using one or more of the Port Terminal Facilities at that Port Terminal and involves:

- (a) monitoring quality against the Outturn standard;
- (b) blending;
- (c) weighing;

- (d) outward elevation to the ship loader; and
- (e) recording of relevant information.

Wheat Storage Services means the storage of Bulk Wheat for export from Australia at a Port Terminal by using one or more of the Port Terminal Facilities at that Port Terminal and involves:

- (a) storage;
- (b) standard grain protection and maintenance;
- (c) dis-infestation; and
- (d) recording of relevant information.

1.2 Interpretation

Headings are for convenience only and do not affect interpretation. The following rules apply unless the context requires otherwise.

- (a) The singular includes the plural, and the converse also applies.
- (b) A gender includes all genders.
- (c) If a word or phrase is defined, its other grammatical forms have a corresponding meaning.
- (d) A reference to a *person* includes a corporation, trust, partnership, unincorporated body or other entity, whether or not it comprises a separate legal entity.
- (e) A reference to a clause is a reference to a clause of this Agreement.
- (f) A reference to an agreement or document (including a reference to this Agreement) is to the agreement or document as amended, supplemented, novated or replaced.
- (g) A reference to writing includes any method of representing or reproducing words, figures, drawings or symbols in a visible and tangible form but excludes a communication by electronic mail.
- (h) A reference to a party to this Agreement or another agreement or document includes the party's successors, permitted substitutes and permitted assigns (and, where applicable, the party's legal personal representatives).
- (i) A reference to legislation or to a provision of legislation includes a modification or re-enactment of it, a legislative provision substituted for it and a regulation or statutory instrument issued under it.
- (j) A reference to conduct includes an omission, statement or undertaking, whether or not in writing.
- (k) A reference to an *agreement* includes any undertaking, deed, agreement and legally enforceable arrangement, whether or not in writing, and a reference to a *document* includes an agreement (as so defined) in writing and any certificate, notice, instrument and document of any kind.
- (l) A reference to *dollars* and \$ is to Australian currency.
- (m) Mentioning anything after *includes, including, for example*, or similar expressions, does not limit what else might be included.
- (n) A reference to time is a reference to the local time in Adelaide, South Australia (unless otherwise stated).

- (o) Where any matter or thing is required to be attended to or done on a day which is not a Business Day, it will be attended to or done on the next Business Day.
- (p) Measurements of physical quantities are in Australian legal units of measurement within the meaning of the *National Measurement Act 1960 (Cth)*.
- (q) Nothing in this Agreement is to be interpreted against a Party solely on the ground that the Party put forward this Agreement or a relevant part of it.

1.3 Discretions and Approvals

- (a) Whenever the Client is required to form an opinion, give approval, exercise a discretion or perform any act under this Agreement, it must be done reasonably in the circumstances and based on reasonable grounds, and not capriciously, or arbitrarily refused or unduly delayed.
- (b) In making any decision pursuant to this Agreement, the Company will have regard to the efficient running of the relevant Port Terminal Facility and the balancing of the interests of all users of that Port Terminal Facility.
- (c) Any refusal by the Company to accept a request for a Port Terminal Service will not be a breach of this Agreement for making a decision which in its reasonable opinion is in the best interests of the overall performance of the Port Terminal Facility and the Bulk Wheat export market as a whole.

2. Term and application of Agreement

2.1 Commencement, duration and application

- (a) This Agreement:
 - (i) commences on 1 October 2009 (**Commencement Date**);
 - (ii) unless terminated earlier under clause 17, but subject to clause 2.2, ends on 30 September 2010 (**Expiry Date**); and
 - (iii) applies to all Port Terminal Services provided, or deemed to have been provided, by the Company under this Agreement.
- (b) If the Client:
 - (i) is provided with any Port Terminal Services on or after the Commencement Date; but
 - (ii) has not executed this Agreement,
 the Client will be deemed to have:
 - (iii) accepted the terms and conditions set out in this Agreement; and
 - (iv) all such Port Terminal Services will be deemed to have been provided by the Company under this Agreement.

2.2 Continued application

- (a) If the Company continues to provide Port Terminal Services to the Client after the Expiry Date, then the terms and conditions of this Agreement will continue to apply until this Agreement is cancelled by either Party. If the Company issues the Client with a new agreement for the provision of Port Terminal Services for the Season following the Expiry Date, then the date of issuing the new agreement will be the effective date of the Company's notice of cancellation of this Agreement. Further, any such new agreement

issued by the Company after the Expiry Date will also apply to Bulk Wheat of prior Seasons remaining within the Company's Port Terminal Facilities.

- (b) For the avoidance of doubt, if Bulk Wheat of Seasons prior to the 2009/2010 Season is held in the Company's storage facilities as at the Commencement Date, the terms and conditions in this Agreement will apply to the prior Seasons' Bulk Wheat unless the context requires otherwise or until these terms and conditions are replaced in accordance with clause 2.2(a).
- (c) This Agreement supersedes any previous agreement between the Company and the Client for the provision of Port Terminal Services.

3. Acknowledgement of limited application

Despite anything to the contrary contained in, or which in the absence of this clause 3 may be implied into, this Agreement:

- (a) this Agreement applies only to the provision of Port Terminal Services in respect of Bulk Wheat and to the extent regulated by the Access Undertaking;
- (b) where Bulk Wheat is received by the Company at a Company Facility that is not a Port Terminal Facility (**Up-Country Receival Facility**), the services provided by the Company in respect of that Bulk Wheat before it reaches the Port Terminal Facility will not be governed by this Agreement;
- (c) if the Client elects to have Export Select in respect of Bulk Wheat that is received by the Company at an Up-Country Receival Facility, then for the purposes of determining when this Agreement applies, the Bulk Wheat will be taken to have been received at the applicable Port Terminal Facility on the day following either:
 - (i) the day on which it is received at the Up-Country Receival Facility; or
 - (ii) the day on which the Client makes the election,
 whichever is the later; and
- (d) if, for any Season, the Client engages the Company to provide receival, transport, storage or outturn services that are not Port Terminal Services (whether because those services are not provided at a Port Terminal Facility, or because they are provided at a Port Terminal Facility but in respect of grain that is not Bulk Wheat) (**Unregulated Services**), then the Unregulated Services will be provided either:
 - (i) under any separate agreement that the Company and the Client make for the provision of the Unregulated Services; or
 - (ii) otherwise, under the standard terms and conditions that are published by the Company for the provision of Unregulated Services for that Season.

4. Port Terminal Services

4.1 Primary obligation of the Company

The Company will provide such of the Port Terminal Services at those of the Port Terminals as the Client may require, on and subject to:

- (a) the terms and conditions of this Agreement;
- (b) the Port Loading Protocols; and
- (c) the Shipping Stem.

4.2 Availability

Subject to clause 4.3, the Company's obligation to provide a particular Port Terminal Service at a Port Terminal at a point in time is subject to the availability of the Port Terminal Facility required for that Port Terminal Service at that time.

4.3 Capacity management undertakings

In managing demand for, and in making operational decisions in the course of providing, Port Terminal Services, the Company will comply with the capacity management undertakings set out in clause 8 of the Access Undertaking.

5. Wheat Receiving Services

5.1 Application of clause

This clause 5 applies in relation to the provision of Wheat Receiving Services.

5.2 Receiving standards and classification

All Bulk Wheat that is to be received and stored by the Company for the Client must comply with the Receiving (Classification) Standards. If Bulk Wheat has characteristics for which a receiving standard is neither published nor agreed, the Company may refuse to receive that Bulk Wheat. The Company will make available the 2009/2010 Commodity Classification Manual to the Client via www.ezigrain.com.au.

5.3 Acceptance of Bulk Wheat from third parties on behalf of the Client

- (a) Before accepting Bulk Wheat at a Port Terminal Facility from a third party for sale to the Client and subsequent storage at the Port Terminal Facility on the Client's behalf, the Company will assess and classify the Bulk Wheat and require the person who has tendered the Bulk Wheat to sign a receiving docket setting out, amongst other things, the origin, weight, variety, quality, payment grade, the Purchase Option selected by the person and (if applicable) the price payable by the Client.
- (b) The Company is entitled to treat Bulk Wheat to which clause 5.3(a) applies, as the property of the person who tendered it and has no obligation to the Client in respect of it until the person who has tendered the Bulk Wheat has signed or otherwise signified acceptance of the receiving docket.

5.4 Nomination

- (a) The Client must ensure that, whenever Bulk Wheat is delivered by a third party on behalf of the Client, the third party nominates the Client as the owner of the Bulk Wheat and acknowledges that all the third party's right, title and interest to and in the Bulk Wheat is transferred to the Client. The nomination and acknowledgement must be made in writing at the time of the delivery and, once made, it binds the Client and the third party.
- (b) Thereafter, on production of the original of the weighnotes upon which is entered the name of the Client, the Company will enter the name of the Client in its records as owner of the Bulk Wheat without any enquiry as to the title of the Client and will hold the Bulk Wheat for the Client subject to the terms of this Agreement.

5.5 Weighing

- (a) For receiving from road transport at a Port Terminal Facility, the Client authorises the Company to use Company weighbridges to determine the receiving tonnage.
- (b) For receiving from rail transport at a Port Terminal Facility, the Client authorises the Company to use the Company's or the rail service provider's weighbridges (if available), to determine the receiving tonnage.

- (c) The Company will use the receival weights of site to site movements on all stock records of the Client.
- (d) The Client is bound by the determinations made under clauses 5.5(a) and 5.5(b), and the records of those determinations.

5.6 Contaminants

- (a) The Client must ensure that all of its suppliers are advised that Bulk Wheat known or suspected to contain chemical contaminants or residues or both must not be delivered to any Port Terminal Facility.
- (b) If any load of Bulk Wheat is found to be contaminated, the Client will not be permitted to deliver to the Port Terminal facility until the Client has provided the Company with evidence in the form of independent expert verification that there is no further risk of contamination. If the contaminant is manageable and removed then the Client must produce a new sample for testing prior to any further deliveries.
- (c) Where Bulk Wheat of any person other than the Client is affected by a contaminant or residue but is nevertheless delivered to a Port Terminal Facility (**Contaminated Delivery**), the Company will not be liable to the Client or to any other person for any loss (including Indirect or Consequential loss), cost, damage or expense suffered or incurred directly or indirectly as a result of that Contaminated Delivery.

5.7 No capacity

Subject to its obligations under clause 4.3, the Company may decline to receive Bulk Wheat for storage on behalf of the Client in a Port Terminal Facility if:

- (a) the capacity in that Port Terminal Facility allocated to a particular Binned Grade fills; and
- (b) the Client is unable to make additional space available for that Binned Grade by either movement of the Bulk Wheat to another Company Facility or by Outturn of the Bulk Wheat.

5.8 Reservation of Cell

- (a) Subject to prior Company approval and agreement between either the Company's Logistics Manager or the Company's Client Services Manager (or their nominated delegate) and the Client, the Client may request the Company to Reserve a Cell.
- (b) The Company has no obligation to accede to a request to Reserve a Cell for the Client, but if it does, then the Company is entitled to charge the Client a Cell reservation fee (with price on application).

6. Wheat Storage Services

6.1 Application of clause

This clause 6 applies in relation to the provision of Wheat Storage Services.

6.2 Common stock

Unless specifically agreed otherwise, the Company reserves the right to mix (**Common Stock**) the whole or any part of the Client's Bulk Wheat with wheat of the same specification stored on behalf of any Other Clients or other users in a Port Terminal Facility.

6.3 Title

- (a) Subject to clause 6.3(b), where the Client's Bulk Wheat is Common Stocked, title to the Common Stocked wheat is held jointly by the Client and the Other Clients and other users

whose wheat forms part of the Common Stocked wheat at the applicable Port Terminal Facility.

- (b) If and to the extent that the Client has committed Bulk Wheat to Export Select, title to the Export Select wheat in a Port Zone is held jointly by the Client and Other Clients and users whose wheat forms part of the Export Select wheat in that Port Zone.

6.4 Client's interest

- (a) For the purposes of clause 6.3(a), at any time the Client's interest in the Common Stocked wheat will be equal to that proportion which the quantity of the Client's Bulk Wheat at the time bears to the quantity of that Common Stocked wheat at that time.
- (b) For the purposes of clause 6.3(b), at any time the Client's interest in Export Select wheat will be equal to that proportion which the quantity of the Client's Export Select wheat at the time bears to the quantity of all Export Select wheat in the relevant Port Zone.
- (c) Subject to clause 9.3, the Client does not have the right to nominate any particular parcel or Cell of wheat that is Common Stocked, as being owned by the Client.

6.5 Right to move Bulk Wheat

- (a) The Company reserves the right to either move or swap Bulk Wheat either within a Port Terminal Facility or to another Company Facility if:
- (i) sufficient evidence exists to indicate the quality of the Bulk Wheat or Port Terminal Facility may be adversely affected if the Bulk Wheat remains in any particular location;
 - (ii) the Port Terminal Facility fills (or is expected to fill during the Season); or
 - (iii) the Company determines (in the Company's reasonable opinion) that it is operationally efficient to move the Bulk Wheat.
- (b) Any movements described in clause (a) will be at the expense of the Client. The Company will use freight rates published by the Company prior to the commencement of the Season in order to charge the Client for the movement (and fuel variations may apply).
- (c) Without limiting clause 6.5(a), the Company may, at its discretion, overflow Bulk Wheat from any Port Terminal Facility, or swap Bulk Wheat to an alternative Company Facility provided that the Client is compensated for any freight differential.

6.6 Treated Bulk Wheat

The Company will advise the Client, in writing, by the last day of January 2010 of all Cells storing the Client's Bulk Wheat that have been treated with a contact insecticide and that cannot be subsequently fumigated in situ. The Company reserves the right to charge the Client for all costs incurred in undertaking either an intra or inter site movement of such Bulk Wheat, after 30 June 2010 in order to place that Bulk Wheat into a position for fumigation. If Bulk Wheat so notified by the Company is included in an In-Store Transfer, the Client agrees to advise the Other Client that purchases the Bulk Wheat that the Bulk Wheat may be subject to the additional intra or inter site movement charges.

7. Wheat Ship Loading Services

7.1 Application of clause

This clause 7 applies in relation to the provision of Wheat Ship Loading Services.

7.2 Shrinkage, Dust & Outturn Entitlement

- (a) The Client acknowledges and agrees that Bulk Wheat will always suffer Shrinkage and loss from Dust.
- (b) Subject to clause 13, the Client will be entitled to an Outturn expressed by weight of the quantity and grade of Bulk Wheat initially received on behalf of the Client (**Received Quantity**) after a deduction:
- (i) for Shrinkage, of:
- (A) 0.35% of the Received Quantity, where the Bulk Wheat was delivered to the Port Terminal Facility directly from an Approved Third Party Store after first having been received at that Approved Third Party Store; or
- (B) in any other case, a quantity equal to the Shrinkage Factor; and
- (ii) for Dust, of 0.1% of the Received Quantity after adjusting that Received Quantity for Shrinkage,

such net quantity being the **Outturn Entitlement**.

- (c) For the purposes of clause 7.2(b)(i)(B), the **Shrinkage Factor** is the amount determined as follows:

0.6% – AFS

where **AFS** is the standard allowance (expressed as a percentage) made for Shrinkage at a Company Facility in respect of the Received Quantity before it reached the Port Terminal Facility as set and published by the Company on an annual basis.

7.3 Client's obligation to Outturn

The Client must use its best endeavours to Outturn all Bulk Wheat from a Port Terminal Facility by no later than the 10th September following the date the Bulk Wheat was received at that Port Terminal Facility.

7.4 Outturn standards

- (a) Subject to clause 7.4(b), Bulk Wheat will be Outturned to the standards prescribed by the Receival (Classification) Standards.
- (b) The Company may agree to Outturn to a more stringent standard than the applicable outturn standard, but a charge may be applied for this service. The Company will not warrant that either Bulk Wheat Outturned to a more stringent standard than the applicable outturn standard or Bulk Wheat Outturned to the specifications of the Receival (Classification) Standards will meet any export standards imposed by AQIS or standards imposed by an importing country. At no time will the Company be required to meet any standards which are not measured by the Company at the time of receival or are an inherent component of the Bulk Wheat which deteriorates with time based storage.
- (c) Without limiting clause 18, the Client indemnifies the Company against all costs, losses, damages and expenses the Company or the Client incurs or sustains as a direct or indirect result of Bulk Wheat being Outturned by the Company which is a more stringent standard than the applicable outturn standard, yet fails to meet any export standards imposed by AQIS or standards imposed by an importing country.
- (d) If, at the request of the Client, the Company undertakes any classification testing at the time of Outturn which is over and above that normally conducted by the Company to ensure Outturned Bulk Wheat meets the minimum standard for the Binned Grade stored, the Company may charge the Client for that classification testing.

7.5 Weighing

- (a) The Client authorises the Company to use batch weighers at the Port Terminal Facility to determine the Outturned tonnage of Bulk Wheat.
- (b) The Client is bound by the determinations made under clause 7.5(a), and the records of those determinations.

7.6 AQIS sampling

Bulk Wheat will be made available for inspection by AQIS inspectors at the Client's cost prior to Outturning Bulk Wheat onto a nominated shipping vessel.

7.7 Delays

Factors outside the control of the Company (such as variation in vessel arrival times; failure of vessel to pass quarantine; stability and ship worthiness inspections; vessel congestion; variation in cargo requirements; lack of performance of freight providers) mean the Company cannot guarantee all of the Bulk Wheat will be available for loading when the vessel berths and is ready to commence loading. The Company will make reasonable efforts to ensure the Bulk Wheat is available to load without delay and will advise the Client of any potential delays.

7.8 Cleanliness

- (a) The Client is responsible for ensuring that all of its nominated vessels arrive at a Port Terminal Facility in a clean, empty and well maintained state free from any contaminants or residue.
- (b) The Company has no obligation to inspect any vessel for cleanliness, but if it does inspect, then the Company, acting reasonably at all times, is entitled to reject the vessel as unfit for the transportation of Bulk Wheat and to refuse to load the vessel.
- (c) The Company is not liable for any loss, cost, damage or expense (including Indirect or Consequential Loss) caused as a result of a rejection of the vessel.
- (d) The Client agrees to pay the Company for any costs incurred by the Company as a result of the rejection of a vessel by the Company, AQIS or a marine surveyor.
- (e) Vessels are not permitted to be cleaned at any Port Terminal Facility without the Company's prior written consent. If a vessel fails inspection, the Company may instruct a vessel to be removed from the berth if it is preventing another vessel from loading at the same berth.

7.9 Port Loading Protocols

- (a) The Port Loading Protocols apply to all nominated (or requested) Outturns of Bulk Wheat, and contain other information in relation to shipping services and requirements in relation to shipping nominations.
- (b) The Port Loading Protocols are available at www.abb.com.au.

7.10 Non-shipment

If Bulk Wheat is not shipped from a Port Terminal Facility as detailed in an accepted nomination (or request) for Outturn due to no fault on the part of the Company, the Client must pay:

- (a) all costs incurred by the Company to reposition Bulk Wheat within the Port Terminal Facility or to remove the Bulk Wheat from the Port Terminal Facility; and
- (b) all vessel variation or cancellation fees and all shipping re-positioning fees.

7.11 Company's right to move Bulk Wheat

Notwithstanding anything to the contrary contained in, or which in the absence of this clause would be implied into, this Agreement, the Company reserves the right to move any Export Select Grain within a Port Zone to any Company Facility within that Port Zone at any time and without the requirement for authorisation from the Client.

7.12 Transfers of title

- (a) The Client may elect, by prior written (or electronic) notice to the Company, to effect an In-Store Transfer of all or part of its Outturn Entitlement.
- (b) Subject to clause 7.13(c), the transferee under an In-Store Transfer of an Outturn Entitlement will be entitled to an Outturn without any further reduction for Shrinkage.
- (c) If an In-Store Transfer involves Bulk Wheat being pre-weighed as part of the transfer terms and conditions, an additional Shrinkage amount must be agreed between the parties involved prior to the Company processing the In-Store Transfer. That additional Shrinkage amount will be transferred to the Company's ownership.
- (d) For removal of doubt, the transferor under an In-Store Transfer will remain responsible for payment of all fees and charges in respect of Port Terminal Services provided up until the effective date of transfer.
- (e) The Company may require In-Store Transfers to take place at an individual weighnote level, thus allowing calculations of the value of the Bulk Wheat to be ascertained between the transferor and transferee.
- (f) The Company may refuse to process an In-Store Transfer if the In-Store Transfer results in the transferor's Outturn Entitlement going into a negative position at any particular Company Facility.
- (g) For the purposes of accepting or rejecting an In-Store Transfer, the Company is entitled to rely on orders/instructions:
 - (i) issued by e-mail transmitted from the Client's domain address and purporting to have been sent by an officer of the Client (or such named officers as the Client may from time to time advise the Company in writing); or
 - (ii) executed via the ezigrain™ web site as accessed through entry of the Client's security setting.
- (h) If the Company has acted in accordance with the protocols set out above in this clause 7.12, the Client releases and holds the Company harmless against any claim that a communication was not issued by the Client either at all or without authority and indemnifies the Company against any losses, costs, damages and costs arising therefrom.

7.13 Security interests

- (a) If the Company receives notice from a person claiming to hold a security interest over the Client's wheat, the Company is not required to Outturn that wheat until:
 - (i) the person holding the security interest has consented to that Outturn; or
 - (ii) the Company receives a court order requiring it to Outturn that affected wheat.
- (b) The Company reserves the right to charge the Client all reasonable costs associated with tracking and maintaining records related to security interests held (or claimed) over wheat.
- (c) The Client will indemnify the Company against all costs, losses, damages and expenses (including without limitation legal costs) the Company incurs or sustains as a result of a

claim made against the Company by any person holding a security interest over wheat held by the Company on behalf of the Client relating to that wheat.

7.14 Non-grain commodities

- (a) The Client acknowledges and accepts that the Company may load non-grain commodities at its Port Terminals using the same ship loading facilities as it uses to provide Wheat Ship Loading Services for Bulk Wheat.
- (b) The Company will use reasonable endeavours to ensure that contamination of Bulk Wheat does not occur.
- (c) The Client must liaise with the Company to nominate vessels to arrange for grain based commodities to load sequentially.

7.15 Reconciliation and adjustment

- (a) This clause 7.15 applies if, after the Outturn of all Bulk Wheat of a Season from all Company Facilities, there is a difference between the Client's Outturn Entitlement and the tonnage actually Outturned to the Client.
- (b) For all Bulk Wheat, unless otherwise agreed, a Season average price will be calculated based on weighted Season average cash prices posted by the Client and all Other Clients over harvest at all Company Facilities. If cash prices are not posted at particular Company Facilities, or are posted with such irregularity that they do not represent the market price (in the opinion of the Company in its sole discretion), then the Company will use the weighted average (major grade and average freight) estimated silo return (ESR) of three pool providers for the Season of delivery as its financial washout value.
- (c) If the actual tonnage Outturned to the Client exceeds the Client's Outturn Entitlement, the Client must pay the Company for the excess at the average price calculated under clause 7.16(b) (**Washout Price**).
- (d) If the actual tonnage Outturned to the Client is less than the Client's Outturn Entitlement, the Company may, at its discretion, either replace the physical Bulk Wheat shortfall in the Client's Outturn Entitlement, or pay the Client for the deficiency in the Outturn Entitlement at the Washout Price.

8. Charges and payment

8.1 Charges

The charges of the Company for the provision of Port Terminal Services will be as set out in, or as determined in the manner described in, Schedule 1.

8.2 Invoicing

The Company will invoice the Client for Port Terminal Services as follows:

- (a) for Wheat Ship Loading Services, in advance of providing those services; and
- (b) for all other Port Terminal Services, in arrears.

8.3 Payment

The Client must pay the Company the full amount of an invoice within 14 days after receipt of that invoice.

8.4 No obligation

Whether the amount of an invoice for Wheat Ship Loading Services has fallen due for payment under clause 8.3 or not, the Client is not entitled to be provided with those Wheat Ship Loading Services until that invoice is paid in full.

8.5 No set off

The Client is not entitled to withhold payment of any disputed amount the subject of an invoice issued by the Company, or to set off against the amount of an invoice any other claim that it has against the Company.

8.6 Transfer of liability

If the Client purchases Bulk Wheat which is already warehoused or is or has been stored, handled or treated by the Company, and there are unbilled and/or unpaid fees and charges in respect of the Bulk Wheat for any period or for anything done prior to the purchase, then the Client is liable for these fees and charges and must pay them to the Company, unless otherwise agreed with the Company.

8.7 GST

- (a) If GST is payable by the Company in respect of any Taxable Supply to the Client under this Agreement, the Client must pay any such GST (in addition to any other amounts payable under this Agreement).
- (b) The Company will provide the Client with a tax invoice that complies with the GST Legislation.
- (c) All fees and charges in this Agreement are expressed exclusive of GST.

8.8 Default in payment

If the Client fails to make payment of an invoice in accordance with this clause 8, then:

- (a) all existing invoices will become immediately due and payable; and
- (b) the Company may, in its absolute discretion, suspend the provision of any or all Port Terminal Services until such time as all outstanding invoices have been paid.

8.9 Interest on late payments

If default is made by the Client in the due payment of any monies payable under this Agreement, then although no demand for payment may have been made, the amount in respect of which such default is made or so much thereof as may from time to time remain unpaid, will bear simple interest at the rate of interest being 3% higher than the Commonwealth Bank's Corporate Overdraft Reference Rate from time to time, calculated on a daily basis from the due date to the date of actual payment in full.

8.10 Security

- (a) The Client will, if required by the Company:
 - (i) arrange for its directors and/or shareholders to personally guarantee the Client's performance under this Agreement by signing a written guarantee in a form and on conditions specified by the Company (**Guarantee**); or
 - (ii) obtain or deposit with the Company an unconditional bank guarantee or bond in a form and for an amount required, and given by a bank or insurer approved, by the Company by way of guarantee for the performance by the Client of its obligations under this Agreement (**Security**).
- (b) Any Guarantee or Security required by the Company must be established:

- (i) prior to the Company receiving Bulk Wheat from the Client; and
 - (ii) within 7 days after it has been requested by the Company.
- (c) If the Client defaults, the Company may call up, draw on, use, appropriate and apply the whole or part of the Security as may be necessary in the opinion of the Company to compensate the Company for loss or damage suffered by the Company by reason of the Client's default, and:
- (i) any use or appropriation of the Security by the Company does not operate to waive the default and does not affect the Company's other rights; and
 - (ii) if the Security or any part of it is used or appropriated by the Company, the Client must within 7 days from receipt of a request by the Company pay to or deposit with the Company new or additional security in a form and for an amount as specified by the Company.
- (d) On termination of this Agreement and if the Client has complied with this Agreement, the Security less any sums drawn on, used or appropriated by the Company and not reinstated by way of further security, must be refunded, returned or cancelled.

9. Title to Wheat

9.1 Bailment

Unless specifically agreed otherwise, the Company acts as a bailee of the Client's Bulk Wheat and does not have any title or ownership in that Bulk Wheat.

9.2 Company's right

Subject to clause 9.3, where the Client's Bulk Wheat is Common Stocked, the Company may nominate and identify any particular quantity of Bulk Wheat within a site comprising the Common Stocked Bulk Wheat as being the Client's Bulk Wheat for the purposes of this Agreement, including, for the purposes of Outturn at the direction of the Client, sale by the Company in exercise of its lien over the Bulk Wheat, allocation of Accidental Loss or Damage between the Client and Other Clients, and the payment of compensation for Accidental Loss or Damage.

9.3 Insolvency

- (a) Where the Company suffers an Insolvent Event the Client will be entitled, upon reasonable notice and subject to the provisions of this Agreement relating to Common Stock, to re-take possession of the Client's Bulk Wheat:
 - (i) if and to the extent that the Client has Bulk Wheat in Export Select, from the Export Select Grain at the Port Terminal in the relevant Port Zone, or if there is insufficient Bulk Wheat to satisfy the Client and all Other Clients of Export Select from the Export Select Grain at the Port Terminal, then from the Receival Station closest to the Port Terminal and if there is insufficient Export Select Grain at that Receival Station then from the next closest Receival Station and so on until the Client's entitlement is satisfied; and
 - (ii) in all other cases, from the site at which the Client's Bulk Wheat is located.
- (b) Nothing in this clause 9.3 will be taken as limiting the Client's rights to the Outturn of the Client's Bulk Wheat in accordance with this Agreement.

10. Lien

10.1 Company's lien

The Company will have a first and paramount lien on the Client's Bulk Wheat for all monies due and payable (on any account whatsoever) by the Client to the Company under this Agreement or otherwise, or to any other ABB Group Company.

10.2 Common stock

Where the Client's Bulk Wheat is Common Stocked with other wheat, the Company may nominate and identify any particular quantity of wheat comprising the Common Stocked wheat as being the Client's Bulk Wheat for the purposes of enforcing its lien.

10.3 Retention of possession

Subject to any requirement of law, the Company will be entitled, for the purpose of enforcing such lien, to retain possession of the whole or any part of the Client's Bulk Wheat until all amounts due and payable are paid, or to sell all or any of the Client's Bulk Wheat in such manner as it thinks fit (after giving the Client at least 7 days prior notice) whereupon the proceeds of such sale will be applied in or towards the satisfaction of the moneys due to the Company and the costs of effecting the sale, and the balance (if any) will be paid by the Company to the Client. Where the Company sells all or any of the Client's Bulk Wheat for the purpose of enforcing its lien, the Client irrevocably appoints the Company as its agent and attorney.

10.4 Enforcement against others

In enforcing a lien in respect of any Other Client's Bulk Wheat, the Company will ensure that its actions do not affect the right of the Client to receive the Outturn Entitlement under this Agreement.

11. Compliance with operational protocols

11.1 Obligation of Client

- (a) The Client must comply at all times with all policies, procedures and induction requirements published by the Company from time to time in respect of the operation, management and control of its facilities, including those in relation to:
- (i) health, safety and environment;
 - (ii) site rules;
 - (iii) labour ordering conditions for shipping;
 - (iv) operating conditions for the Company's rail facilities; and
 - (v) access and operating conditions for road movements at Company facilities,
- and must comply with all reasonable directions of the Company.
- (b) Whilst on a Company site, the Client (and its agents) must comply with all directions given by the Company's representative, and not create or bring on site any hazard or contamination.

11.2 Publication

For the purpose of clause 11.1, the Company may publish a policy, procedure or induction requirement, or any direction, by placing it on its website.

12. Information

12.1 Company's information

- (a) The Company will keep at its principal place of business proper complete and up to date records, books of account and documents relating to transactions in the Client's Bulk Wheat, and such books of account records and documents will be available for inspection by officers of the Client at any reasonable time upon request in writing. Nothing in this clause 12.1(a) will be taken as requiring the Company to disclose the identity, transactions or ownership interests of Other Clients.
- (b) All information provided to the Client will be treated as conclusive evidence of the correctness of the details set out in that information unless:
- (i) the Client notifies the Company in writing within 14 days of receipt of that information that there exists a bona fide dispute concerning the correctness of that information; or
 - (ii) it is demonstrated at any time that there is a clear and manifest error in that information.

A notice served by the Client under paragraph (i) above, must set out in detail the reasons why the Client believes the information is incorrect and the basis for holding that belief.

12.2 Client's information

- (a) The Client must provide the Company with all information that the Company reasonably requires for the Company to properly record the receipt of Bulk Wheat from, or to the account of, the Client, including information relating to:
- (i) origin, quality, quantity, weight, type and variety; and
 - (ii) anticipated time and place of delivery.
- (b) If required by the Company, the Client must provide the information in writing and in the form (if any) required by the Company.

13. Company's Liability

13.1 Acknowledgement

The Client acknowledges that the only warranties provided by the Company under or in respect of this Agreement are those expressly set out in this Agreement. To the maximum extent permitted by law, all other conditions implied by custom, general law or statute are excluded.

13.2 Non-excludable warranties

The Company's liability for breach of implied warranties or conditions not permitted at law to be excluded, will be limited to the cost of re-supplying the relevant service again.

13.3 Limitations on Company's liability

The Company's obligation to Outturn the Client's Bulk Wheat is modified by the following provisions of this clause:

- (a) the Company is only liable for damage, destruction or contamination by the Company of the Client's Bulk Wheat if caused by the Gross Negligence or wilful default of the Company or its employees, contractors or agents;
- (b) the liability of the Company to the Client for any such damage, destruction or contamination of Bulk Wheat, if caused by Gross Negligence will not exceed the sum of

\$250,000 (two hundred and fifty thousand dollars) per event or per series of related events;

- (c) the Company's liability to compensate the Client for Accidental Loss or Damage to the Client's Bulk Wheat (other than Export Select Grain) is limited to the Client's proportion (based on ownership of the Common Stock) of the proceeds of insurance recovered by the Company in respect of such event;
- (d) notwithstanding any other provision of this Agreement, but subject to any extraneous agreement in writing between the Parties to the contrary, the Company will not be liable for any of the following:
 - (i) claims for Indirect or Consequential Loss;
 - (ii) quality claims arising in respect of Bulk Wheat transferred into the Company's storage system from another storage system;
 - (iii) defects that:
 - (A) are required to be examined by the responsible authority under the provisions of the *Export Control Act 1982 (Cth)*; or
 - (B) the Client has taken responsibility for testing prior to shipment, and are not discovered until after the departure of the ship;
 - (iv) failure by the Company to detect toxic residues, other chemical residues, genetically modified Bulk Wheat or any other contamination, the tests for detection of which are not in general use by the Company or have been advised by the Company to be unreliable relative to the required tolerances;
 - (v) downgrading claims in respect of Bulk Wheat blended by the Company at the request of the Client, provided the quality meets the outturn standards of the lowest value grade represented in the blend;
 - (vi) quality or quantity claims in respect of a shipment arising upon outturn at a vessel's destination, if the claims are inconsistent with the records of quantity and quality at the load port and there is no conclusive evidence that such load port records are incorrect or, by exception, unreliable.

13.4 Multiple caps on liability

If the Company is liable to the Client in relation to an event or a series of related events in respect of which the Company's liability is capped:

- (a) under this Agreement; and
- (b) under one or more other agreements made between the Company and the Client,

then the Company's liability in aggregate under all of the agreements described in paragraphs (a) and (b) above (**Capped Agreements**) is capped at the greatest amount at which liability is capped under any one of the Capped Agreements.

13.5 Mitigation

The Company may, in its discretion, mitigate or satisfy any liability it may have to the Client in respect of downgraded Bulk Wheat (ie Bulk Wheat that does not meet the Outturn standard required under this Agreement) by whatever means the Company considers appropriate, including:

- (a) blending (at the Company's expense) a sufficient quantity of other wheat so as to upgrade the Client's Bulk Wheat to meet the Outturn standard; and/or

- (b) substituting (at the Company's expense) other wheat of the same quality and quantity; and/or
- (c) retaining the downgraded Bulk Wheat and providing for the claim as part of the Outturn adjustment under clause 7.15.

14. Insurance and Risk

14.1 Maintenance of insurance

The Company will at all times during the Term maintain an insurance policy covering the common insurable risks of Accidental Loss or Damage to Bulk Wheat in the Company's care and control.

14.2 Inspection

A summary of the policy and certification of currency will be available for inspection by the Client upon request.

14.3 Risk

- (a) For Bulk Wheat which is not Export Select Grain, the risk of Accidental Loss or Damage to the Client's Bulk Wheat to the extent that such risks are covered by the Company's insurance will be borne by the Company and all other risks of Accidental Loss or Damage to the Client's Bulk Wheat will be borne by the Client.
- (b) For the Client's Export Select Grain, the risk of Accidental Loss or Damage will be borne by the Company, irrespective of whether or not such risks are covered by the Company's insurance.

14.4 Transfer of Risk

Subject to clauses 13 and 14.3(a), the risk of loss or damage to Wheat is transferred to the Client at the point in time when the Wheat exits the Outturning spout of a Port Terminal Facility into a shipping vessel.

15. Force Majeure

15.1 Definition

For the purpose of this Agreement, a '**Force Majeure Event**' affecting a Party means anything outside that Party's reasonable control including the following events or circumstances (provided they are beyond the Party's reasonable control):

- (a) accident, fire, adverse weather conditions, flood, tidal conditions, earthquake, explosion, or like natural disasters, blockages of ports, civil commotion, outbreak of hostilities, terrorist act, declaration of war, war, invasion, rebellion, epidemic, or declarations of a state of emergency;
- (b) strikes, stopworks, lockouts, boycotts or any other form of industrial dispute or labour shortage;
- (c) breakdown, accidental or malicious damage or destruction of any of the Company's Port Terminal Facilities or other Company Facilities;
- (d) failure, disruption or delay in transportation;
- (e) executive or administrative order or act of either general or particular application of any Government or any official purporting to act under the authority of that Government, prohibitions or restrictions by domestic or foreign laws, regulations or policies, quarantine or custom restrictions or prohibitions on export; and

- (f) acts or omissions of any third party (including without limitation Governments, Government agencies, subcontractors or customers).

15.2 Suspension of Obligations

If a Party is wholly or partially precluded from complying in the normal manner required by this Agreement with its obligations under this Agreement by a Force Majeure Event (in this clause 14 called the **Affected Party**), then the Affected Party's obligations to perform in accordance with the terms of this Agreement will be suspended for the duration of the Force Majeure Event. (As per clause 15.6, the payment of money is not an obligation that can be suspended by a Force Majeure Event under this Agreement.)

15.3 Notice

As soon as possible after the Force Majeure Event arises, the Affected Party must notify the other Party of:

- (a) the nature of the Force Majeure Event;
- (b) the cause of the Force Majeure Event;
- (c) which obligations the Affected Party believes it is wholly or partially precluded from complying with as a result of the Force Majeure Event (in this clause 15 called the **Affected Obligations**);
- (d) the extent to which the Force Majeure Event precludes the Affected Party from performing the Affected Obligations;
- (e) the expected duration of the delay arising as a result of the Force Majeure Event;
- (f) the steps that are being taken to minimise the impact of the Force Majeure Event; and
- (g) the steps which would be taken (subject to the Parties reaching an agreement as to the payment of any additional costs involved) to minimise the impact of the Force Majeure Event.

15.4 Minimisation of Impact

Upon receiving a notice under clause 15.3 the Parties will meet to discuss and agree:

- (a) what action can be taken to minimise the effect of the Force Majeure Event on the performance by the Affected Party of the Affected Obligation;
- (b) whether the Affected Party is able to work around the Force Majeure Event either to prevent the delay in the performance of the Affected Obligations or to minimise the impact of that delay; and
- (c) what modifications or additions to the terms of this Agreement or any other agreements between the Parties (including without limitation any modifications or additions relating to the appointment of any additional costs) are required to give effect to any proposal to minimise the effect of the Force Majeure Event.

15.5 Obligation to Mitigate

The Affected Party must:

- (a) keep the other Party fully informed of its plans to minimise the effect of the Force Majeure Event; and
- (b) subject to reaching agreement concerning any modifications or additions required to give effect to any proposal to minimise the effect of the Force Majeure Event:

- (i) comply with all reasonable requests made by the other Party relating to the prevention or minimisation of the impact of the Force Majeure Event; and
- (ii) use all reasonable endeavours to resolve, and minimise the impact of, the Force Majeure Event.

15.6 Payments

An obligation to pay money is never excused by a Force Majeure Event.

15.7 Labour Disputes

The requirement to use all reasonable endeavours to resolve or minimise the impact of the Force Majeure Event will not require either Party to settle any strike, lockout, boycott or other dispute or claim, or any demand by a third party, on the terms contrary to the wishes of that Party.

16. Dispute Resolution

16.1 Endeavour to resolve

The Parties will endeavour to resolve between themselves any dispute concerning the terms of this Agreement (**Dispute**), including, where necessary, by escalating the dispute for negotiation between both Parties' chief executives. A Party must not start court proceedings in respect of the Dispute unless it has complied with this clause.

16.2 Arbitration

- (a) If the Parties cannot resolve a Dispute themselves within 30 days of one Party giving notice of the Dispute to the other Party, they will immediately:
 - (i) appoint an arbitrator to determine the dispute within the following 30 day period; or
 - (ii) if the Parties are unable to agree upon an arbitrator, either Party may refer the Dispute for arbitration by an arbitrator nominated by the then President of the Law Society of South Australia.
- (b) Any arbitration will be conducted in Adelaide in accordance with the *Commercial Arbitration Act 1986 (SA)* except that:
 - (i) the arbitrator must observe the rules of natural justice but is not required to observe the rules of evidence;
 - (ii) a Party may have legal representation; and
 - (iii) the arbitrator must apportion costs of the arbitration and each Party's costs of and incidental to the arbitration as the arbitrator sees fit.

16.3 Status quo

During any Dispute resolution process, the pre-dispute status quo will continue. Accordingly:

- (a) each Party will comply with its obligations, and may exercise its rights under this Agreement; and
- (b) the fact that a Party ceases to do anything in Dispute will not be taken to be an admission by that Party that it had breached, or had been in breach of, this Agreement.

17. Termination

17.1 Right to terminate

This Agreement may be terminated by either Party giving to the other at least 3 months prior written notice (**Notice**) in that regard.

17.2 Effect

- (a) Where a Notice is given by the Client, the Notice will not take effect unless and until the Client has:
- (i) Outturned all Bulk Wheat stored by the Company on behalf of the Client under this Agreement; and
 - (ii) paid all moneys payable by the Client to the Company under this Agreement.
- (b) Where a Notice is given by the Company and, as at that date the Notice is to take effect, the Client has not Outturned all Bulk Wheat stored by the Company on behalf of the Client under this Agreement, then the Company will be entitled to exercise the rights conferred on it by clause 10 of this Agreement.

17.3 By Company

- (a) The Company may terminate this Agreement immediately upon giving written notice in that regard to the Client if the Client causes an Insolvency Event to occur.
- (b) If the Client commits a serious or persistent breach or breaches of any terms of this Agreement, provided the Company presents the Client with a written notice specifying the breach or breaches and requires the Client to remedy it within a period of not less than 30 days, then if the Client does not remedy the breach or breaches within the time period stipulated in this clause, the Company may terminate this Agreement at any time by notice in writing to the Client.

17.4 No prejudice

Termination of this Agreement under this clause 17 is without prejudice to the rights of either Party that have accrued prior to the date of termination.

18. Indemnity

18.1 By Client

The Client will indemnify the Company and keep the Company indemnified from and against all actions, claims, demands, proceedings, losses, costs and expenses suffered or incurred by the Company arising directly or indirectly out of or in relation to:

- (a) any breach, non-observance or non-performance by the Client of any of its obligations under this Agreement;
- (b) any claim by a third party relating to the Bulk Wheat;
- (c) any claim by a third party relating to the operation of the Purchase Options or the involvement of the Company in relation to the Purchase Options, including claims arising out of the failure of the Client to provide information or the inaccuracy of information supplied by the Client in relation to the Purchase Options; or
- (d) any claim in relation to the admixture of Bulk Wheat with any other commodity loaded by the Company at any one of its Port Terminals where the Client has acknowledged and accepted that the Company will load non-grain commodities at its Port Terminals.

18.2 Application

Clause 18.1 will not apply where and to the extent that explicit written service guarantees have been given by the Company to the Client, or the losses or damages arose as a direct result of any negligence on the part of the Company or any wilful or deliberate failure by the Company to comply with its obligations under this Agreement.

19. Notices

19.1 How to Give a Notice

A notice, consent or other communication under this Agreement is only effective if it is:

- (a) in writing, signed by or on behalf of the Party giving it;
- (b) addressed to the Party to whom it is to be given; and
- (c) either:
 - (i) delivered or sent by pre-paid mail (by airmail, if the addressee is overseas) to that Party's address;
 - (ii) sent by fax to that Party's fax number and the machine from which it is sent produces a report that states that it was sent in full; or
 - (iii) by e-mail addressed to the person for the time being occupying the position with the receiving Party specified in clause 19.3.

19.2 When a Notice is Given

A notice, consent or other communication that complies with this clause is regarded as given and received:

- (a) if it is sent by mail, on the third Business Day after posting;
- (b) if it is delivered or sent by fax:
 - (i) by 5.00 pm (local time in the place of receipt) on a Business Day, on that day; or
 - (ii) after 5.00 pm (local time in the place of receipt) on a Business Day, or on a day that is not a Business Day, on the next Business Day; and
- (c) if it is sent by e-mail, on the day of receipt by the recipient and, if the recipient is absent from his or her usual place of work for more than one day after the date of transmission, the day that the recipient returns to work.

19.3 Address for Notices

A Party's address and fax number are those set out below, or as amended at any time by notice given in accordance with this clause 19:

Company

Address: Grain House 124 –130 South Terrace, Adelaide, SA 5000
 Postal: GPO Box 1169, Adelaide, SA 5001
 Fax Number: (08) 8212 1723
 Attention: Urgent: Client Services Manager

Client

Address: _____

Postal: _____

Fax Number: _____

Attention: _____

20. No endorsement**20.1 Prohibition**

The Client must not, without the prior written consent of the Company:

- (a) make any reference, comment or statement either written or oral, that could be construed as an endorsement by the Company of the Client or of the Client's products or services; or
- (b) refer to the Company or the services provided by the Company to the Client in any publication, promotional or advertising material.

20.2 Acknowledgements

The Client acknowledges that:

- (a) the Company will treat the obligation of the Client under clause 20.1 as a serious undertaking; and
- (b) it is aware that any breach of this serious undertaking may result in the Company suffering damage.

21. No assignment

The Client may not assign, transfer or otherwise dispose of all or any part of its rights or obligations under this Agreement without the prior written consent of the Company which, if given, may be given on such conditions as the Company considers to be appropriate.

22. Waiver**22.1 No impact**

The failure by either Party at any time to exercise or enforce any of its powers, remedies or rights under this Agreement will not constitute a waiver of those powers, remedies or rights or affect that Party's rights to exercise or enforce those powers, remedies or rights at any time.

22.2 Further exercise

Any single or partial exercise of any power, remedy or right does not preclude any other or further exercise or partial exercise of any other power, remedy or right under this Agreement.

23. No Partnership**23.1 Relationship**

This Agreement does not create a partnership, agency, fiduciary or any other relationship, except the relationship of contracting parties, between the Parties.

23.2 No liability

No Party is liable for an act or omission of another Party, except to the extent set out in this Agreement.

24. Governing Law and Jurisdiction

24.1 Governing law

This Agreement and the rights and liabilities of the Parties under this Agreement will be governed by the law of South Australia.

24.2 Jurisdiction

The courts of South Australia will possess territorial jurisdiction to hear and determine any cause of action arising under this Agreement.

25. Sub-Contracting

The Company may in its sole and absolute discretion:

- (a) sub-contract the provision of the whole or any part of the Port Terminal Services; or
- (b) otherwise engage any person to undertake the provision of any part of the Port Terminal Services on the Company's behalf,

without notice to the Client.

26. Severance

Any provision of this Agreement which is unenforceable or partly unenforceable is, where possible, to be severed to the extent necessary to make this Agreement enforceable, unless this would materially change the intended effect of this Agreement.

27. Entire agreement, etc

27.1 Entire agreement

This Agreement constitutes the entire Agreement between the Parties.

27.2 No representations, etc

Each Party warrants and covenants to the other that there are no written or oral statements, representations, undertakings, covenants or agreements between the Parties, express or implied, except as provided for in this Agreement.

27.3 Variations

This Agreement may only be amended or varied by agreement in writing signed by both Parties expressly amending this Agreement and unless the context otherwise requires, a reference to this Agreement will include a reference to this Agreement as amended or varied from time to time.

27.4 Guidelines, etc

Notwithstanding that the Company may from time to time produce operational guidelines to assist clients, nothing in those guidelines will be deemed to impliedly or expressly amend anything in this Agreement and if there is any inconsistency between any guidelines and a term of this Agreement, the terms of this Agreement will prevail.

Schedule 1 - Charges and Fees

draft

Signing page

EXECUTED as an agreement.

Signed for and on behalf of
AusBulk Limited by its authorised
representative in the presence of:

Witness

Authorised Representative

Name of witness (print)

Name of authorised representative (print)

Executed by [Client] ACN [xxx xxx xxx]
pursuant to section 127 of the *Corporations Act*
2001

Signature of director

Signature of director/company secretary
(Please delete as applicable)

Name of director (print)

Name of director/company secretary (print)