



Australian
Competition &
Consumer
Commission

ABB Grain Limited

Port Terminal Services Access Undertaking

Further Draft Decision

23 September 2009



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Glossary

ABB	ABB Grain Ltd
ACCC	Australian Competition and Consumer Commission
AGEA	Australian Grain Exporters Association
AWE	accredited wheat exporters
BHC	bulk handling company
CBH	Cooperative Bulk Handling Ltd
Draft Decision	ACCC Draft Decision on ABB's proposed Undertaking (6 August 2009)
ETA	estimated time of arrival
GrainCorp	GrainCorp Operations Ltd
GTA	Grain Trade Australia
Issues Paper	ACCC Issues Paper (29 April 2009)
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 (Cth)</i>
WEA	Wheat Exports Australia
WEMA	<i>Wheat Export Marketing Act 2008 (Cth)</i>

1 Executive Summary

This Further Draft Decision is the second of two draft decisions published by the Australian Competition and Consumer Commission (ACCC) in relation to its assessment of a proposed undertaking lodged by ABB Grain Ltd (ABB) on 16 April 2009 (the **proposed Undertaking**) for consideration under Division 6 of Part IIIA of the *Trade Practices Act 1974* (Cth) (TPA). The purpose of publication of this Further Draft Decision is to set out the ACCC's final views – following public consultation – on the type of wheat port access undertakings that would be likely to be accepted by the ACCC pursuant to section 44ZZA(3) of the TPA in order to assist ABB in preparing a revised undertaking for re-lodgement with the ACCC.

The first Draft Decision of 6 August 2009 sought public consultation on:

- The ACCC's draft view that it would not accept ABB's proposed Undertaking in its current form; and
- The ACCC's draft views on the type of grain port access arrangements that would be likely to be accepted by the ACCC pursuant to section 44ZZA(3) of the TPA.

Following public consultation, this Further Draft Decision confirms the view, consistent with the view set out in the ACCC's Draft Decision on 6 August 2009, that the ACCC would not accept ABB's proposed Undertaking in its current form.

As noted above this Further Draft Decision also sets out the ACCC's final views on the type of wheat port access undertakings that would be likely to be accepted by the ACCC pursuant to section 44ZZA(3) of the TPA in order to assist ABB in preparing a revised undertaking for re-lodgement with the ACCC.

Given that ABB is obliged to have access arrangements in place by 1 October 2009 in order for its trading operation to retain accreditation to export bulk wheat under the *Wheat Export Marketing Act 2008* (Cth) (WEMA), the ACCC will endeavour, where possible, to assess any revised undertaking before 1 October. This will depend on how swiftly ABB is able to lodge any revised undertaking.

Release of this Further Draft Decision follows:

- lodgement of a proposed undertaking by ABB on 16 April 2009 for consideration under Division 6 of Part IIIA of the TPA and consultation on that proposed Undertaking;
- release of a Draft Decision by the ACCC on 6 August 2009 to not accept the proposed Undertaking in its current form and consultation on that Draft Decision; and
- consultation in August/September 2009 on a proposed indicative access agreement and proposed port loading protocols (PLPs) submitted by ABB to the ACCC.

The last phase of consultation was carried out because one of the ACCC's views set out in the ACCC's Draft Decision was that ABB should include an indicative access agreement and PLPs as part of its undertaking.¹

Upon request by the ACCC, 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 published on the ACCC's website. This document was not originally provided to the ACCC as part of ABB's April Undertaking. The ACCC annexed this document to its Draft Decision and sought submissions on whether it would form an appropriate basis for an indicative access agreement. Also, ABB included an initial version of its PLPs to its April Undertaking and provided a revised version of the PLPs on 19 August 2009. The ACCC therefore circulated the revised PLPs for comment in August 2009.

Accordingly, this Further Draft Decision sets out:

- the ACCC's final views on the proposed Undertaking and detailed suggestions on ways that ABB could address the issues identified (taking into account all of the public submissions received to date);
- the ACCC's final views on whether ABB's proposed indicative access agreement circulated to interested parties for comment in August 2009 would likely form an appropriate indicative access agreement if annexed to a revised undertaking submitted by ABB; and
- the ACCC's final views on whether ABB's proposed PLPs circulated to interested parties for comment in August 2009 would likely form appropriate PLPs if annexed to a revised undertaking submitted by ABB.

ABB's proposed Undertaking

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.

¹ It is noted that ABB did in fact include port loading protocols as part of its 16 April 2009 proposed Undertaking, but that these protocols were 'outdated' by the time of the ACCC's Draft Decision on ABB's proposed Undertaking.

ABB's 16 April 2009 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, this Further Draft Decision covers the following issues relevant to the ACCC's assessment of ABB's 16 April 2009 proposed Undertaking:

- Background, Objectives, Structure;
- Term and variation;
- Scope;
- Publish/negotiate/arbitrate;
- Indicative Access Agreement;
- Non-discrimination;
- Ring-fencing;
- Capacity management; and
- Publication of Information.

The ACCC reviewed all sections of ABB's 16 April 2009 proposed Undertaking and assessed whether, overall, the proposed Undertaking was likely to be appropriate, having regard to the matters set out in section 44ZZA of the 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 (including submissions in response to the ACCC's Draft Decision dated 6 August 2009); and
- the ACCC's own research as referenced in this Further Draft Decision document.

ACCC Further Draft Decision

The ACCC has reached a view, consistent with the view set out in its 6 August 2009 Draft Decision, that it would not accept ABB's proposed Undertaking in its current

form. The following discussion summarises the key issues considered in this Further 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.

Following public consultation, the ACCC has also reached final views on the type of wheat port access undertakings that would be likely to be accepted by the ACCC pursuant to section 44ZZA(3) of the TPA. In all cases, the ACCC has made detailed suggestions about ways that ABB could address the issues identified.

Relevance of the context in which the proposed Undertaking has been assessed

The specific clauses of the 16 April 2009 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, 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 WEMA, 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 state 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 section 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 so 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,² 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.

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.³

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'.⁴ 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.

² Other than the first two matters, which the ACCC considers are relevant pursuant to section 44ZZA(3)(e) of the TPA.

³ Explanatory Memorandum, *Wheat Export Marketing Bill 2008*, p. 13.

⁴ 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.⁵

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. The ACCC notes that the question of whether the access test should be extended up-country is a question of policy for government and notes, as set out above, that the Federal Government has stated that it will monitor developments in the up-country stages of the grain 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.

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

⁵ House of Representatives, *Votes and Proceedings, Hansard*, Thursday 29 May 2009, pp. 76-77.

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 genuinely and verifiably 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 loading 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 loading 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 medium term 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, 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 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)); and
- The reference to using ‘reasonable endeavours’ to procure (clause 2.3).

Commencement, term and variation

Commencement

The commencement clause is not appropriate pursuant to section 44ZZA(3) given it does not make it clear the date upon which ABB undertakes to comply with the obligations in the Undertaking, given that for the purposes of the WEMA an undertaking comes into operation at the time when the ACCC publishes its decision to accept the undertaking.⁶

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.

⁶ *Wheat Export Marketing Act 2008*, s 24(3).

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 ABB's proposed Undertaking applies only to wheat (rather than all grains).

In the present circumstances, it is also 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'; and
- it would be appropriate for clause 4.4(d) (regarding sharing of efficiency savings) to be removed given its lack of clarity.

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 but notes that the proposed Undertaking is an undertaking focusing on providing access to port terminal services to accredited wheat exporters. It is not an undertaking specifically to provide access to employees of superintendence companies.

Publish, negotiate, arbitrate mechanism

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 dated 16 April 2009 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 by the beginning of September for the 2010/2011 season;
- provide measures to ensure that the negotiation, dispute resolution and arbitration mechanisms are applicable to Access Agreements for the 2009/2010 season;
- provide appropriate 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 otherwise arbitrated by a private arbitrator;
- 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.

Indicative Access Agreement

Inclusion of an indicative access agreement

One of the recommendations of the ACCC's Draft Decision dated 6 August 2009 was that ABB should include an indicative access agreement as part of its undertaking.

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 ABB would be required to offer the indicative access agreement to access seekers who seek to obtain access to ABB's port terminal services on the basis of the standard terms provided under that agreement. For the avoidance of doubt, however, 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).

Upon request by the ACCC, ABB provided a draft copy of its 2009-10 Port Terminal Services Agreement for Standard Port Terminal Services on 22 May 2009. This document was published on the ACCC's website. This document was not originally provided to the ACCC as part of ABB's April Undertaking. The ACCC annexed this document to its Draft Decision and sought submissions on whether it would form an appropriate basis for an indicative access agreement. This document is therefore referred to as the "**August Indicative Access Agreement.**"

August Indicative Access Agreement not appropriate

The ACCC does not consider that the August Indicative Access Agreement would form an appropriate basis for an indicative access agreement as it is currently drafted.

The ACCC considers that, in order to be appropriate, improvements would need to be made to ensure that:

- The indicative access agreement includes a robust dispute resolution process that balances the legitimate business interests of ABB with the interests of access seekers;
- Any ability of ABB to unilaterally vary the terms of an executed indicative access agreement can only be exercised in specified circumstances and be subject to the negotiation and arbitration provisions of the undertaking; and

- The terms and conditions of the indicative access agreement provide for sufficient certainty and clarity in their terms, effect and operation.

The ACCC notes submissions from a number of interested parties raising concerns about whether a number of the terms of the indicative access agreement are acceptable, based on the commercial considerations and circumstances of those interested parties. The ACCC notes however, that the standard terms provided under the an indicative access agreement are intended to be the minimum terms and conditions of access to ABB's port terminal services, and that access seekers will have the ability to negotiate (or arbitrate) non-standard terms that vary from any of those standard terms that they consider to be unacceptable, based on their own particular commercial considerations and circumstances. Accordingly, in this Further Draft Decision, the ACCC has not found it necessary to form views about whether the particular terms and conditions of the August Indicative Access Agreement would be acceptable to particular parties (given likely differences between the commercial considerations and circumstances of specific access seekers).

Variation of the indicative access agreement

ABB's approach in its proposed Undertaking of 16 April 2009 of retaining discretion to unilaterally vary its "standard terms" (i.e. the price and non-price related terms which are intended to be included in ABB's 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.

Non-discrimination

It is appropriate that ABB's proposed Undertaking dated 16 April 2009 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 and no hindering access clauses does not ensure that they will protect against ABB discriminating in favour of its own trading business.

The ACCC has made recommendations about changes that could be made to the non-discrimination 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).

Further, in order for the ACCC to be able to monitor compliance with the non-discrimination clause, the ACCC considers it would be appropriate for ABB's proposed Undertaking to allow the ACCC to request an audit be undertaken to assess compliance with the non-discrimination clause (but no more than twice in every twelve months).

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 loading 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 loading protocols and an indicative access agreement (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, as explained in the Publication of Information chapter), 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 state of the industry and the possibility that any ring-fencing measures that were implemented at this point in time may need to be revised in the medium term 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.

That said, the ACCC is cognisant of calls by a number of interested parties for robust ring-fencing measures to be included in the Undertaking and 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

Port protocols must be part of the Undertaking

Port Loading Protocols (PLPs) set out the key process by which ABB allocates port terminal capacity. For this reason the ACCC notes that the inclusion of the PLPs in ABB's proposed Undertaking is appropriate.

Procedure for variation of port protocols can be flexible

The variation mechanism set out in ABB's proposed Undertaking of 16 April 2009 is not appropriate because it provides too much discretion to ABB and insufficient certainty for access seekers.

That said, 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 PLPs (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 provisions in the Undertaking (see further below). Further, any revised PLPs must contain an expeditious dispute resolution mechanism.

Substance of the port protocols

The ACCC considers that the PLPs attached to ABB's 16 April 2009 proposed Undertaking are not appropriate because they provide too much discretion to ABB and insufficient certainty for access seekers.

The ACCC notes that ABB has revised its PLPs. The ACCC commenced consultation on the revised PLPs (received on and dated 19 August 2009) on 20 August 2009.

Even though the 19 August 2009 PLPs were not a part of ABB's 16 April 2009 Undertaking, the ACCC has nevertheless set out the relevant submissions from interested parties on the 19 August 2009 PLPs and the ACCC's views as to whether the proposed amendments to the PLPs, if included as part of a revised Undertaking, are likely to address the concerns raised in the Draft Decision.

In light of this, the ACCC's view is that, while the 19 August 2009 PLPs adopt the majority of the ACCC's recommendations set out in its Draft Decision, it nevertheless considers that minor amendments would be necessary in order for them to be considered appropriate. Specifically, a number of clauses would need to be amended to provide for greater certainty, transparency and clarity.

The ACCC notes submissions by interested parties suggesting amendments to the August PLPs in addition to those recommended by the ACCC. The ACCC notes that its approach to the assessment of the PLPs has given weight to 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 ACCC further notes that the robust non-discrimination clause and no-hindering access clause that would be appropriate in a revised Undertaking (the particulars of which are contained in the Non-Discrimination chapter) are intended to constrain the ability of ABB to exercise discretion under its PLPs in an anti-competitive manner.

Publication of Information

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.

Specifically, it would be appropriate for this obligation to require publication (on ABB's website) of information on stocks at port of bulk wheat as compared to non-wheat grains, on a monthly basis. The ACCC considers that this would provide a level of transparency over whether ABB was restricting access to port by exhausting the port terminal's capacity in favour of other grains, whilst not risking the imposition of onerous reporting requirements that are not appropriate at a time when the industry is newly liberalised and in transition.

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, 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.

Specifically, 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 (i.e. the next business day). 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 whilst not imposing unduly prescriptive regulation on ABB. 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 (on ABB's website) 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. However, the ACCC does not intend this to be an onerous obligation. In the context of a newly liberalised industry, the obligation should not (in this particular context) require the collation of data that ABB does not already collect as part of its normal commercial practice.

Conclusion

In relation to the proposed Undertaking given to the ACCC by ABB on 16 April 2009, the ACCC's further draft view is that, having regard to the matters listed in s.44ZZA(3) of the TPA, it would not be appropriate to accept the proposed Undertaking.

As a result, the ACCC's further draft decision is that it should not accept the proposed Undertaking in its current form.

The ACCC has provided the reasons for its further draft decision throughout this document, including views on provisions that would not be appropriate, and alternatives that would likely be appropriate.

2 Procedural Overview

Summary

Publication of this Further Draft Decision follows:

- Lodgement of ABB's proposed Undertaking on 16 April 2009 for consideration under Division 6 of Part IIIA of the TPA and consultation on the proposed Undertaking (including stakeholder meetings with wheat farmers, exporters and industry bodies around the country);
- Release of a Draft Decision by the ACCC on 6 August 2009 not to accept the proposed Undertaking in its current form and consultation on the ACCC's views set out in that Draft Decision; and
- Consultation on a proposed indicative access agreement and proposed port loading protocols submitted by ABB to the ACCC.

This Further Draft Decision now sets out the ACCC's final views on the type of grain port access arrangements that would be likely to be accepted by the ACCC pursuant to section 44ZZA(3) of the TPA. Given the extensive consultation process that the ACCC has engaged in to date, the ACCC is not calling for any further submissions.

Given that ABB is obliged to have access arrangements in place by 1 October 2009 in order for its trading operation to retain accreditation to export bulk wheat under the WEMA, the ACCC will endeavour, wherever possible, to assess any revised undertaking before 1 October. This will depend on how swiftly ABB is able to lodge their revised undertaking.

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 further 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.
- On 3 September 2009 ABB provided a submission in response to issues raised in the ACCC's Draft Decision.

2.3 Public consultation process to date

The TPA provides that the ACCC may invite public submissions on an access undertaking application.⁷

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
- 11 & 12 May 2009: Sydney

⁷ *Trade Practices Act 1974 (Cth) s 44ZZBD(1).*

- 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, 29 May and 3, 15 September 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.⁸

SGS Agricultural Services (SGS) – 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.⁹

Victorian Farmers Federation (VFF) – submissions received 28 May and 3 September 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.¹⁰

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.¹¹

Grain Industry Association of Victoria (GIAV) – 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

⁸ <http://www.agea.com.au/default.asp?ID=223>.

⁹ http://www.au.sgs.com/agriculture_au?lobId=17163.

¹⁰ http://www.vff.org.au/main/index.php?option=com_content&task=view&id=22&Itemid=68.

¹¹ Intertek, *Submission in relation to proposed access undertakings*, 29 May 2009, p. 6.

bulk handling companies, seed specialists, grain transport operators and container packers.¹²

New South Wales Farmers Association – submission received 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.¹³

South Australian Farmers Federation (SAFF) – submissions received 3 July and 3 September 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.¹⁴

Grain Trade Australia (GTA) – submission received 25 August 2009

GTA, through its Committee system, develops and publishes Trade Rules for grain contracts. In conjunction with other industry organisations, GTA also develops and publishes grain standards yearly.

GTA also provides an arbitration service for the resolution of contractual disputes, based on the GTA Trade Rules and the Dispute Resolution Rules.¹⁵

Shipping Australia Limited (SAL) – submission received 1 September 2009

Shipping Australia is a shipowner body representing the interests of a significant number of Australian and foreign shipping companies and shipping agents in the provision of shipping services to and from Australia.¹⁶

Port of Portland (POPL) – submission received 3 September 2009

POPL owns the Port of Portland (a regional port in South-West Victoria), which is located between the capital city ports of Melbourne and Adelaide.

The Grain and Feed Trade Association (GAFTA) – submission received 7 September 2009

GAFTA is an international body representing the trade in grain, pulses and feed materials transacted worldwide. GAFTA has around 1200 members in 85 countries.¹⁷

¹² Grain Industry Association of Victoria, *Submission in relation to proposed access undertakings*, 1 June 2009, p. 1.

¹³ NSW Farmers Association, *Submission in relation to proposed access undertakings*, June 2009, p. 1.

¹⁴ South Australian Farmers Federation Grains Industry Committee, *covering letter*, 3 July 2009.

¹⁵ See <http://www.nacma.com.au/>.

¹⁶ Shipping Australia Ltd, *Submission in relation to Draft Decision on ABB Access Undertaking*, 1 September 2009.

¹⁷ See <http://www.gafta.com/>.

Submissions alleging anti-competitive conduct

The ACCC notes that several submissions 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 allegations relating to restrictions on anti-competitive conduct in Part IV of the TPA, these matters are being assessed by the ACCC's Enforcement and Compliance Division.

2.4 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.¹⁸ In the current context, however, limited weight was given to confidential submissions made on this process. The ACCC notes that the information provided to it on a confidential basis did not raise any new relevant issues that had not already been raised in public submissions to the ACCC.

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, or within any further, extended period if the ACCC so decides.¹⁹ The ACCC is therefore obliged to use its best endeavours to make a final decision on the 16 April 2009 proposed Undertaking by 16 October 2009, or such further period as the ACCC decides.

Given that ABB is obliged to have access arrangements in place by 1 October 2009 in order for its trading operation to retain accreditation to export bulk wheat under the WEMA, the ACCC will endeavour, wherever possible, to assess any revised undertaking before 1 October. This will depend on how swiftly ABB is able to lodge any revised undertaking.

2.6 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.accc.gov.au by following the links to 'For regulated industries' and 'Wheat Export,' or via the following link:
<http://www.accc.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 Further Draft Decision, please contact:

¹⁸ *Trade Practices Act 1974* (Cth) s 44ZZBD(5).

¹⁹ *Trade Practices Act 1974* (Cth) s 44ZZBC(1).

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 Background

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,²⁰ 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.

²⁰ 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.²¹

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

²¹ *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.'²²

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.²³ 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:

²² Explanatory Memorandum, *Wheat Export Marketing Act 2008* (Cth), p. 3.

²³ *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.²⁴

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:

²⁴ *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.²⁵

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.’²⁶ 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.’²⁷

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.’²⁸ 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.’²⁹

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

²⁵ Explanatory Memorandum, *Wheat Export Marketing Act 2008* (Cth), pp. 12-13.

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

²⁷ 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.

²⁸ 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.

²⁹ 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.³⁰

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.³¹

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.³²

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.’³³

³⁰ Explanatory Memorandum, *Wheat Export Marketing Act 2008* (Cth), p. 8 & 13.

³¹ Explanatory Memorandum, *Wheat Export Marketing Act 2008* (Cth), p. 8.

³² Explanatory Memorandum, *Wheat Export Marketing Act 2008* (Cth), p. 13.

³³ 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...’³⁴

‘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.’³⁵

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:

³⁴ ABB Grain Ltd, *Submission to the ACCC*, 16 April 2009, para 2.1(b), emphasis in original.

³⁵ 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.³⁶

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...’³⁷

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.³⁸

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.’³⁹

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.

³⁶ *Trade Practices Act 1974* (Cth) s 44AA.

³⁷ ABB Grain Ltd, *Submission to the ACCC*, 16 April 2009, para 2.11(a), p. 4.

³⁸ ABB Grain Ltd, *Submission to the ACCC*, 16 April 2009, para 8.4, p. 28.

³⁹ 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.⁴⁰ 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.

⁴⁰ 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.’⁴¹

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

⁴¹ 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 wheat⁴²

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.’⁴³

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.’⁴⁴ Further, ABB submits that the proposed Undertaking ‘...may be only a transitional measure while the industry adapts to deregulation.’⁴⁵

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.

⁴² ABB Grain Ltd, *Submission to the ACCC*, 16 April 2009, para 8.12-8.13, p. 30.

⁴³ ABB Grain Ltd, *Submission to the ACCC*, 16 April 2009, para 8.15, p. 30.

⁴⁴ ABB Grain Ltd, *Submission to the ACCC*, 16 April 2009, para 2.5, p. 5.

⁴⁵ 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.⁴⁶

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.

⁴⁶ 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.’⁴⁷

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:

⁴⁷ 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.⁴⁸

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’.⁴⁹

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.⁵⁰

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.

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

⁴⁹ Revised Explanatory Memorandum, *Trade Practices Amendment (National Access Regime) Bill 2006* (Cth), p. 64.

⁵⁰ 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.⁵¹

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.⁵² The ACCC may accept the code, if it thinks it appropriate to do so having regard to matters set out in section 44ZZAA(3).⁵³ 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.⁵⁴

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.

⁵¹ Revised Explanatory Memorandum, *Trade Practices Amendment (National Access Regime) Bill 2006* (Cth), p. 67.

⁵² *Trade Practices Act 1974* (Cth) s 44ZZAA(1).

⁵³ *Trade Practices Act 1974* (Cth) s 44ZZAA(3).

⁵⁴ *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.⁵⁵

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.⁵⁶

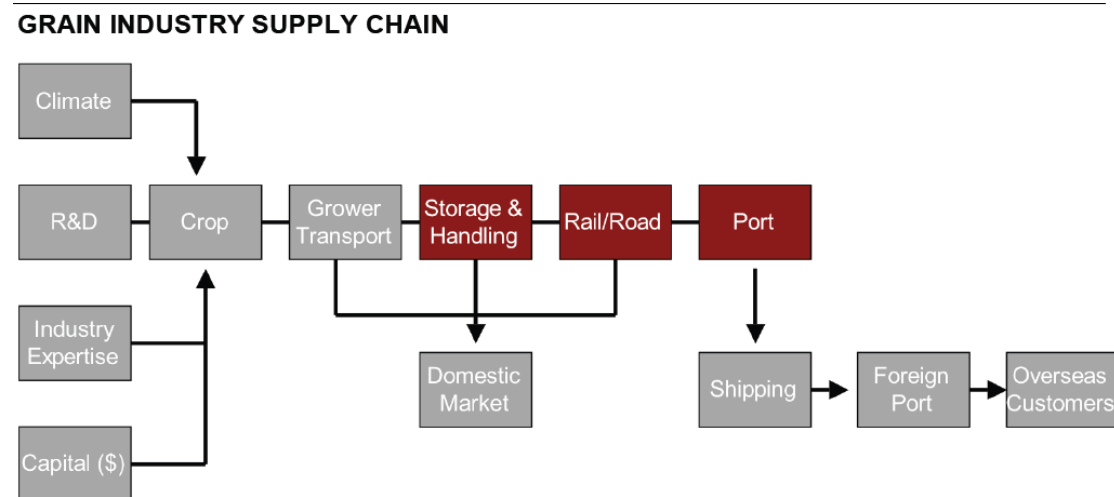
Figure 1.2.1 sets out the grain supply chain for South Australia and includes primary inputs (climate, research and development, industry expertise and capital), grain production, transportation (road, rail and ship), storage and handling and the domestic and foreign markets.⁵⁷

⁵⁵ Allen Consulting Group (2008) *Competition in the Export Grain Supply Chain*, March, p. 68.

⁵⁶ 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

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

Figure 4.2.1: 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.⁵⁸

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 2007-08.⁵⁹ 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.⁶⁰

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

⁵⁸ 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

⁵⁹ ABARE (2009) *Australian Crop Report*, report no. 150, June 2009.

⁶⁰ 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.⁶¹

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 2005-06.⁶²

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.⁶³ Individual country sites range in capacity from less than 10 000 tonnes to more than 440 000 tonnes.⁶⁴

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).⁶⁵ 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.

⁶¹ ABB Grain Ltd, *Port Terminal Service Access Undertaking, Submission to the ACCC*, 16 April 2009, p. 13.

⁶² Allen Consulting Group (2008) *Competition in the Export Grain Supply Chain*, March, p. 11.

⁶³ ABB Grain Ltd (2009) *Who We Are*, accessed on 21 July 2009, at: <http://www.abb.com.au/AboutABB/WhoWeAre.aspx>.

⁶⁴ ABB (2009) *Operational Services*, accessed on 21 July 2009, at: <http://www.abb.com.au/StorageHandling/StorageHandlingServices.aspx>.

⁶⁵ ABB (2009) *Operational Services*, accessed on 21 July 2009, at: <http://www.abb.com.au/StorageHandling/StorageHandlingServices.aspx>.

Figure 4.2.2: 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.⁶⁶

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.⁶⁷

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.⁶⁸

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.⁶⁹ The majority of ABB grain receival sites are now not

⁶⁶ Genesee & Wyoming Inc (2009) *GWI Worldwide—Who We Are*, accessed on 21 July 2009, at: <http://gwiweb.gwrr.com>.

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

⁶⁸ Allen Consulting Group (2008) *Competition in the Export Grain Supply Chain*, March, p. 11.

⁶⁹ 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.⁷⁰

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.⁷¹

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.⁷²

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.⁷³

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.⁷⁴ 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, cement/cement clinker,

⁷⁰ Single Vision Grains Australia, *Transport Infrastructure Issues paper One—Network Review for the Australian Grains Industry*, January 2007, p. 23.

⁷¹ Single Vision Grains Australia, *Transport Infrastructure Issues paper One—Network Review for the Australian Grains Industry*, January 2007, p. 23.

⁷² Single Vision Grains Australia, *Transport Infrastructure Issues paper One—Network Review for the Australian Grains Industry*, January 2007, p. 23.

⁷³ Single Vision Grains Australia, *Transport Infrastructure Issues paper One—Network Review for the Australian Grains Industry*, January 2007, p. 23.

⁷⁴ ABB notes at page 9 of its 16 April 2009 submission to the ACCC that Port Pirie and Ardrossan no longer export bulk wheat.

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

- Outer Harbor—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.⁷⁵
 - *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.⁷⁶

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.⁷⁷

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

⁷⁵ ABB Grain Ltd, *Port Terminal Services Access Undertaking*, 16 April 2009.

⁷⁶ For the current list of accredited bulk wheat exporters, see: <http://www.wea.gov.au/WheatExports/RegisterOfAccreditedWheatExporters.htm>.

⁷⁷ 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

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.⁷⁸

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
- 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

⁷⁸ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, pp. 14-19.

- ensure that disputes about access are subject to an appropriate dispute resolution process.⁷⁹

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.⁸⁰

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.

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

⁷⁹ *Maritime Services (Access) Act 2000* (SA), Section 3.

⁸⁰ Essential Services Commission of South Australia, <http://www.escosa.sa.gov.au/site/page.cfm?u=70>, accessed 26 July 2009.

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.⁸¹

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.⁸²

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 2009.⁸³

⁸¹ Essential Services Commission of South Australia, *2007 Ports Pricing and Access Review Final Report*, September, p. 36.

⁸² Essential Services Commission of South Australia, *2007 Ports Access and Pricing Review, Final Report*, September 2007, p. 40.

⁸³ 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)); and
- The reference to using ‘reasonable endeavours’ to procure (clause 2.3).

5.1 ABB’s proposed Undertaking dated 16 April 2009

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:
 - A) the person to comply with the continuous disclosure rules in relation to a port terminal service; and
 - B) 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:
 - A) any variations to the general Port Terminal Services provided by means of a Port Terminal Facility; and
 - B) 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 submissions in support of its 16 April 2009 proposed Undertaking

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 when it submits a revised undertaking to the ACCC.⁸⁴

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.⁸⁵

5.3 Submissions received in response to Issues Paper

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'.⁸⁶ 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,

⁸⁴ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 68.

⁸⁵ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 52.

⁸⁶ 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’.⁸⁷

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.⁸⁸

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’.⁸⁹

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:

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.⁹⁰

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).⁹¹

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.⁹²

⁸⁷ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, p. 16.

⁸⁸ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, p. 16.

⁸⁹ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, p. 17.

⁹⁰ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, p. 17.

⁹¹ South Australian Farmers Federation Grains Industry Committee, *Submission in relation to proposed ABB access undertaking*, May 2009, p. 3.

⁹² South Australian Farmers Federation Grains Industry Committee, *Submission in relation to proposed ABB access undertaking*, May 2009, p. 4.

5.4 Submissions in response to Draft Decision

5.4.1 ABB

ABB did not make any submissions in response to the ACCC's Draft Decision regarding the ACCC's views on Background, Objectives and Structure.

5.4.2 Interested Parties

5.4.2.1 Australian Grain Exporters Association

The Australian Grain Exporters Association submitted the following in relation to the ACCC's views as set out in its Draft Decision on the Objectives section of ABB's proposed Undertaking:

The Objectives section ties into key clauses and is critical to the working of the proposed Undertakings.

BHCs

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.

The ACCC is of the view that the objective of balancing the legitimate interests of the BHCs with the interests of access seekers is more likely to be appropriate pursuant to section 44ZZA(3) of the TPA if the word 'efficient' is substituted for 'reasonable'. AGEA accepts that a reference to "efficient" costs, instead of "reasonable" costs, would be consistent with the pricing principles at section 44ZZCA of the TPA. However, AGEA is concerned that there will continue to be uncertainty as to the proper application and meaning of this clause as "efficient" costs cannot be objectively determined unless there is proper transparency and non-discrimination.

AGEA agrees with the ACCC's decision that the interpretation of ...ABB clause 1.2(e)(i)(D) (which refers to the "Port Operator's ability to meet its own or its Trading Division's reasonably anticipated requirements for Port Terminal Services") 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.

As noted by the ACCC, one interpretation of the clause could be that BHCs intend to reserve and set aside their own or their Trading Division's 'reasonably anticipated requirements' for port capacity and then provide access to third parties for the remaining capacity.

For the reasons given in AGEA's original submission, AGEA remains concerned that BHCs' Objectives clause makes the undertaking circular and biased in favour of BHCs by allowing BHCs to make decisions which are consistent with the objectives of the undertaking, when the objectives of the undertakings provide the opportunity for BHCs to favour their own interests. The problems created by the Objectives clause are exacerbated by weak ring-fencing policies and an overall lack of transparency in relation to BHCs' operational decisions and costs and charges.

As long as one of BHCs' stated Objectives is biased in favour of their own interests, the ACCC should continue to reject BHCs' Undertakings.

AGEA submitted the following in relation to the ACCC's views as set out in its Draft Decision on the Structure section of ABB's proposed Undertaking:

Specific terms and conditions in the Port Schedules

AGEA agrees that the structure of the proposed Undertaking is not appropriate given the proposed reference to terms and conditions in the "Port Schedule" (even with the statement that terms in the "Port Schedule" will prevail over the General Terms). All of the proposed terms and conditions of access should be clearly set out in the standard port terminal services agreement offered to accredited wheat exporters. Having other or further terms and conditions in the "Port Schedules" is likely to create confusion and uncertainty.

5.5 ACCC's views

5.5.1 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).

5.5.2 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';⁹³
- the second non-discriminatory access clause (8.3) provides that ABB undertakes not to 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;⁹⁴

The ACCC considers that the objectives section, as a whole, is not appropriate having regard to matters in 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))

⁹³ ABB Grain Ltd, *Port Terminal Services Access Undertaking*, 16 April 2009, clause 5.4(a)(ii)(C).

⁹⁴ ABB Grain Ltd, *Port Terminal Services Access Undertaking*, 16 April 2009, clause 8.2(b)(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 clause does not appropriately balance the legitimate business interests of ABB with the interests of access seekers, and the ambiguity of the clause raises concerns about the certainty and clarity of 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’.

The ACCC notes AGEA’s concern that even with this change, the meaning of ‘efficient costs’ may remain uncertain. The ACCC, however, considers that the term ‘efficient costs’ is appropriate in a regulatory setting having regard to the matters at section 44ZZA(3). The term ‘efficient costs’ is commonly used in regulated industries.

“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.

This ambiguity raises concerns about the certainty and clarity of the terms of the proposed Undertaking.

5.5.3 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 clauses:

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.

6 Term of, and variation to, the proposed Undertaking

Summary

Commencement

The commencement clause is not appropriate pursuant to section 44ZZA(3) given it does not make it clear the date upon which ABB undertakes to comply with the obligations in the Undertaking, given that for the purposes of the WEMA an undertaking comes into operation at the time when the ACCC publishes its decision to accept the undertaking.⁹⁵

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 dated 16 April 2009

6.1.1 Commencement and Term

The proposed Undertaking is expressed to commence on 1 October 2009.⁹⁶

The proposed Undertaking provides for expiration on the earlier of 30 September 2011, or when the ACCC consents to ABB withdrawing the Undertaking in

⁹⁵ *Wheat Export Marketing Act 2008*, s 24(3).

⁹⁶ ABB Grain Ltd, *Port Terminal Services Access Undertaking*, 16 April 2009, clause 3.1.

accordance with Part IIIA of the TPA, including under clause 3.3 of the Undertaking (which provides for ‘early withdrawal,’ as described below).⁹⁷

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.⁹⁸

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.⁹⁹

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.¹⁰⁰

The proposed Undertaking also provides that, prior to seeking the approval of the ACCC for a variation of this kind,¹⁰¹ ABB will first consult with counterparties to Access Agreements and Applicants regarding the proposed variation.¹⁰²

⁹⁷ ABB Grain Ltd, *Port Terminal Services Access Undertaking*, 16 April 2009, clause 3.2.

⁹⁸ ABB Grain Ltd, *Port Terminal Services Access Undertaking*, 16 April 2009, clause 3.3.

⁹⁹ ABB Grain Ltd, *Port Terminal Services Access Undertaking*, 16 April 2009, clause 3.4.

¹⁰⁰ ABB Grain Ltd, *Port Terminal Services Access Undertaking*, 16 April 2009, clause 3.5.

¹⁰¹ 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.

¹⁰² ABB Grain Ltd, *Port Terminal Services Access Undertaking*, 16 April 2009, clause 3.5(b).

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:

- 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.'¹⁰³

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.¹⁰⁴ 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.¹⁰⁵

6.2 ABB's supporting submissions to the proposed Undertaking dated 16 April 2009

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.'¹⁰⁶

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.'¹⁰⁷

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;

¹⁰³ ABB Grain Ltd, *Port Terminal Services Access Undertaking*, 16 April 2009, clause 3.6(c).

¹⁰⁴ ABB Grain Ltd, *Port Terminal Services Access Undertaking*, 16 April 2009, clause 3.6(d).

¹⁰⁵ ABB Grain Ltd, *Port Terminal Services Access Undertaking*, 16 April 2009, clause 3.6(e).

¹⁰⁶ ABB Grain Ltd, *Submission to the ACCC*, 16 April 2009, para 2.3, p. 4.

¹⁰⁷ ABB Grain Ltd, *Submission to the ACCC*, 16 April 2009, para 2.4, p. 5.

- 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
- providing feedback to parties and ‘making a decision,’ and providing reasons for its decision.¹⁰⁸

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.¹⁰⁹

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.’¹¹⁰

6.3 Submissions from interested parties in response to ACCC Issues Paper

6.3.1 Australian Grain Exporters Association

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.’¹¹¹

¹⁰⁸ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, pp. 31-32.

¹⁰⁹ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 32.

¹¹⁰ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, pp. 68-69.

¹¹¹ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 7.1, p. 18.

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.¹¹²

Early withdrawal and variation

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

- a. the circumstances in which ABB may seek to vary the proposed Undertaking are broader than the TPA;¹¹³
- b. the provider of an access undertaking is adequately protected by section 44ZZA(7) of the TPA,¹¹⁴ 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;¹¹⁵
- 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;¹¹⁶ 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.¹¹⁷

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.'¹¹⁸

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,

¹¹² Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, Schedule 1, para D2(i), 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, para 7.2, p. 18.

¹¹⁵ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, Schedule 1, para D2(iii), p. 40.

¹¹⁶ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 7.2, p. 18.

¹¹⁷ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, Schedule 1, para D2(iv), p. 40.

¹¹⁸ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 7.3, p. 18.

and to submit a new undertaking not less than six months before the expiry of the existing Undertaking.¹¹⁹

6.4 Submissions in response to ACCC Draft Decision

6.4.1 ABB

ABB submits that it proposes to submit a revised undertaking to the ACCC which ‘constructively addresses each of the matters raised in the Draft Decision.’¹²⁰

6.4.2 Australian Grain Exporters Association

AGEA agrees with the ACCC's Draft Decision that the proposed Undertaking should be for a term of two years.¹²¹

6.5 ACCC's views

6.5.1 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:
 - (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:

- (2) 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:

¹¹⁹ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 7.4, p. 18.

¹²⁰ ABB Grain Limited, *Submission in relation to Draft Decision on ABB Access Undertaking*, 3 September 2009, p. 2.

¹²¹ Australian Grain Exporters Association, *Submission in relation to Draft Decisions on Port Terminal Services Access Undertakings*, 3 September 2009, para 6.1.

...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.

6.5.2 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).¹²²

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.

6.5.3 Extension

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

¹²² *Trade Practices Act 1974* (Cth) s 44ZZA(7).

- (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.¹²³

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.

¹²³ *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 also 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'; and
- it would be appropriate for clause 4.4(d) (regarding sharing of efficiency savings) to be removed given its lack of clarity.

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 but notes that the proposed Undertaking is an undertaking focusing on providing access to port terminal services to accredited wheat exporters. It is not an undertaking specifically to provide access to employees of superintendence companies.

7.1 ABB's proposed Undertaking dated 16 April 2009

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.¹²⁴

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

- (a) intake and receival services;

¹²⁴ ABB Grain Ltd, *Port Terminal Services Access Undertaking*, 16 April 2009, clause 4.1.

- (b) storage and handling services;
- (c) ship nomination, acceptance, booking, cancellation and cargo accumulation; and
- (d) ship loading.¹²⁵

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.¹²⁶

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

¹²⁵ ABB Grain Ltd, *Port Terminal Services Access Undertaking*, 16 April 2009, clause 4.3.

¹²⁶ ABB Grain Ltd, *Port Terminal Services Access Undertaking*, 16 April 2009, clause 4.2.

- (v) to wheat which is not Bulk Wheat.¹²⁷

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:

- Receiving;
- Storage;
- Weigher services; and
- Ship loading services.¹²⁸

7.2 ABB submissions in support of its 16 April 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.¹²⁹

ABB states that there is no requirement under the WEMA to include services which are not Port Terminal Services in its proposed Undertaking.¹³⁰ 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.¹³¹

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;

¹²⁷ ABB Grain Ltd, *Port Terminal Services Access Undertaking*, 16 April 2009, clause 4.4(b).

¹²⁸ ABB Grain Ltd, *Port Terminal Services Access Undertaking*, 16 April 2009, Schedules A–F.

¹²⁹ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 67.

¹³⁰ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 8.

¹³¹ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 68.

- Schedule 2 (which contains the Port Schedules for each Port Terminal)¹³² 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.¹³³

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

- the need to provide a description of the relevant services; and
- the need to avoid over-prescription by including an exhaustive list.¹³⁴

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.¹³⁵

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.¹³⁶ 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.¹³⁷

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.

¹³² 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.

¹³³ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 67.

¹³⁴ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 68.

¹³⁵ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 68.

¹³⁶ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 29.

¹³⁷ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, pp. 28-29.

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.¹³⁸

7.3 Submissions from interested parties in response to Issues Paper

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 currently the port operator provides both port services and upstream services under a single contract.¹³⁹ 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.¹⁴⁰

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.¹⁴¹

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'.¹⁴² 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.¹⁴³ 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.¹⁴⁴

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

¹³⁸ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 28.

¹³⁹ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, p. 4.

¹⁴⁰ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, p. 9.

¹⁴¹ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, p. 10.

¹⁴² Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, p. 19.

¹⁴³ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, p. 19.

¹⁴⁴ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, p. 20.

- 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;
- 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.¹⁴⁵

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

¹⁴⁵ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, pp. 19-20.

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.”¹⁴⁶

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).

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.¹⁴⁷

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.¹⁴⁸ 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.¹⁴⁹

GIAV states that the BHCs charge a higher fee for handling grain from third parties.¹⁵⁰ 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.¹⁵¹

¹⁴⁶ South Australian Farmers Federation Grains Industry Committee, *Submission in relation to proposed ABB access undertaking*, May 2009, p. 4.

¹⁴⁷ South Australian Farmers Federation Grains Industry Committee, *Submission in relation to proposed ABB access undertaking*, May 2009, pp. 5-6.

¹⁴⁸ Grain Industry Association of Victoria, *Submission in relation to proposed access undertakings*, 1 June 2009, p. 1.

¹⁴⁹ Grain Industry Association of Victoria, *Submission in relation to proposed access undertakings*, 1 June 2009, p. 1.

¹⁵⁰ Grain Industry Association of Victoria, *Submission in relation to proposed access undertakings*, 1 June 2009, p. 2.

¹⁵¹ Grain Industry Association of Victoria, *Submission in relation to proposed access undertakings*, 1 June 2009, p. 2.

7.3.4 New South Wales Farmers Association

The NSW Famers 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’.¹⁵²

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.¹⁵³

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 companies need access to maintain a chain of custody on samples; and conduct testing and monitor the quality of cargo during loading.¹⁵⁴ 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.¹⁵⁵

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’.¹⁵⁶ 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’.¹⁵⁷

7.4 Submissions in response to Draft Decision

7.4.1 ABB

ABB reiterated its position in relation to the coverage of its proposed Undertaking, stating that:

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

“If ABB were to offer bundled services including Port Terminal Services, the Access Undertaking would apply to the component of that bundle which involves the provision of Port Terminal Services. All provisions of the Access

¹⁵² NSW Farmers Association, *Submission in relation to proposed access undertakings*, June 2009, p. 5.

¹⁵³ Victorian Farmers Federation, *Submission in relation to proposed access undertakings*, 28 May 2009, p. 1.

¹⁵⁴ Intertek, *Submission in relation to proposed access undertakings*, 29 May 2009, p. 5.

¹⁵⁵ Intertek, *Submission in relation to proposed access undertakings*, 29 May 2009, p. 5.

¹⁵⁶ SGS Australia, *Submission in relation to proposed access undertakings*, 26 May 2009, p. 1.

¹⁵⁷ SGS Australia, *Submission in relation to proposed access undertakings*, 26 May 2009, p. 2.

Undertaking (including the negotiate/arbitrate process) would apply to the Port Terminal Services component of the bundled offer. The Access Undertaking would not apply to the non-Port Terminal Services component of any bundled offer.

Put another way, ABB does not consider that it is possible to avoid the application of the Access Undertaking to Port Terminal Services, by bundling those services with other services. Conversely, the Access Undertaking will not apply to services which are not Port Terminal Services". Naturally, if an Applicant sought to unbundle a package of services or seek a customised contract involving particular aspects of the bundle, this may involve additional costs for ABB.¹⁵⁸

7.4.2 Interested Parties

7.4.2.1 Australian Grain Exporters Association

The Australian Grain Exporters Association (AGEA) submits the following in relation to the ACCC's views as set out in its Draft Decision on the Scope section of ABB's proposed Undertaking:

AGEA does not agree with the ACCC's draft decision to limit the scope of the proposed Undertaking to wheat and to port terminal services (rather than including up-country services)...

AGEA agrees that the drafting of the definition of "Port Terminal Services" in the proposed Undertakings lack clarity and is therefore not appropriate pursuant to section 44ZZA(3).

AGEA agrees with the ACCC that the BHCs' definition should be substituted with the following definition proposed by the ACCC:

"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."

AGEA also agrees with the ACCC that the BHCs' definition of "port terminal services" must be amended to make it clear that the lists of port terminal services in the Port Schedules or definitions are not exhaustive. The definition of "port terminal services" must include all services provided by means of the port terminal facilities to which the proposed Undertaking applies, as well as the use of the port terminal facilities...

AGEA further submits that the definition of "Port Terminal Services" should be the same across the proposed Undertaking, the port terminal services agreement and the port loading protocol...

The ACCC is of the view that it is not necessary for the BHCs' proposed Undertaking to expressly provide for access to port terminals by employees of superintendence companies submissions. AGEA believes that there must be an obligation on the BHCs to allow an AWEs' superintendent (or independent third person nominated by the AWEs) access to the port to sample AWEs' wheat and inspect the loading of AWEs' stock onto vessels.

¹⁵⁸ ABB Grain Limited, *Submission in relation to Draft Decision on ABB Access Undertaking*, 3 September 2009, p. 18.

This is essential to protect the AWEs' interests as regards any issues with the condition of the ship, that of the cargo being loaded on board the vessel and relevant sales terms.

It is a common term under international sales contracts for both buyers and sellers to be entitled to have a representative present during the loading of the vessel. Certain markets require this, if the weight and quality is to be final at loadport.¹⁵⁹

7.4.2.2 South Australian Farmers Federation (SAFF)

SAFF submits the following in relation to the ACCC's view as set out in its Draft Decision on the scope section of ABB's proposed Undertaking:

...SAFF Grains does have concerns with the ACCC finding that in the present circumstances, it is appropriate that ABB Grains' proposed undertaking should only apply to port terminal services rather than including up-country services... As ABB Grains up-country services are linked to its port terminal services it is not possible to separate these in any meaningful transparent way that would give the rest of the grains industry in South Australia any confidence.¹⁶⁰

7.4.2.3 Late submissions

The ACCC notes that it also received two late submissions from SGS Australia and The Grain and Feed Trade Association (GAFTA) which largely reiterate the earlier SGS submission of 26 May 2009.

7.5 ACCC's views

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

7.5.1 Scope of the proposed service definition

7.5.1.1 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 notes AGEA's submission that ABB's undertaking should not be limited to wheat. In this regard, the ACCC maintains its view that it is appropriate that the 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

¹⁵⁹ Australian Grain Exporters Association, *Submission in relation to Draft Decisions on Port Terminal Services Access Undertakings*, 3 September 2009, p.11.

¹⁶⁰ South Australian Farmers Federation Grains Industry Committee, *Submission in relation to Draft Decision on ABB Access Undertaking*, 3 September 2009, p. 1.

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 loading protocols could apply for wheat than apply for other grains.

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.¹⁶¹

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 Publication of Information 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.

7.5.1.2 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 notes interested parties' submissions that ABB's undertaking should not be limited to services at port. In this regard, the ACCC maintains its view that it is appropriate that the undertaking applies only to port terminal services. 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.

¹⁶¹ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, p. 10.

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.¹⁶²

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'.¹⁶³ 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.¹⁶⁴

Nevertheless, the ACCC is cognisant of the submissions to both the Issues Paper and Draft Decision 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 that the question of whether the access test should be extended up-country is a question of policy for government.

¹⁶² Explanatory Memorandum, *Wheat Export Marketing Bill 2008*, p. 13.

¹⁶³ Explanatory Memorandum, *Wheat Export Marketing Bill 2008*, p. 14.

¹⁶⁴ House of Representatives, *Votes and Proceedings, Hansard*, Thursday 29 May 2009, pp. 76-77.

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.

7.5.1.3 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.¹⁶⁵

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
- (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.¹⁶⁶

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.¹⁶⁷ ABB states that it has structured the service definition to

¹⁶⁵ *Wheat Export Marketing Act 2008* (Cth) s 5.

¹⁶⁶ *Wheat Export Marketing Act 2008* (Cth) s 5.

¹⁶⁷ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 68.

strike a balance between the need to describe the relevant services and the risk of over-prescription by including an exhaustive list.¹⁶⁸

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.

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.

¹⁶⁸ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 68.

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.

7.5.1.4 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. That said, 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).

The ACCC further notes that failure to allow access to an employee of a superintendence company may, in some circumstances, have the potential to breach the non-discrimination obligations that the ACCC considers are appropriate for inclusion in a revised undertaking.

7.5.1.5 Access undertaking applies to all port terminal services regardless of whether they are bundled with other services

The ACCC's notes ABB's comments that state that the access undertaking applies to all users of port terminal services, regardless of whether they acquire port terminal services bundled with any other product:

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.¹⁶⁹

The ACCC agrees that the access undertaking must apply to all port terminal service users and notes that there are several legitimate ways to achieve this under a revised undertaking submitted by ABB. Firstly, the undertaking could attach an Indicative Access Agreement that applied to both the bundled offer and the stand alone port terminal service. Alternatively, the undertaking could attach an Indicative Access Agreement for the stand alone port terminal service and make it clear which

¹⁶⁹ ABB Grain Limited, *Submission in relation to Draft Decision on ABB Access Undertaking*, 3 September 2009, p. 18.

components of the bundled offer relate to port terminal services. In these circumstances, Applicants and users would also need to be made aware of the ability to negotiate and arbitrate on the port terminal service components of the bundled offer. The ACCC notes that ABB has informed it that its revised undertaking will adopt the latter approach.

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 dated 16 April 2009 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 by the beginning of September for the 2010/2011 season;
- provide measures to ensure that the negotiation, dispute resolution and arbitration mechanisms are applicable to Access Agreements for the 2009/2010 season;
- provide appropriate 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 otherwise arbitrated by a private arbitrator;

- 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.

8.1 ABB's proposed Undertaking dated 16 April 2009

The proposed Undertaking dated 16 April 2009 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 terms¹⁷⁰ 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.¹⁷¹

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

¹⁷⁰ 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.'

¹⁷¹ ABB Grain Ltd, *Port Terminal Services Access Undertaking*, 16 April 2009, clause 6.7.

Confidential Information to the extent necessary for the provision of advice from legal 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.¹⁷² 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.¹⁷³

¹⁷² ABB Grain Ltd, *Port Terminal Services Access Undertaking*, 16 April 2009, clause 6.6(a).

¹⁷³ ABB Grain Ltd, *Port Terminal Services Access Undertaking*, 16 April 2009, clause 6.6(b).

Negotiation, ‘pre-conditions’ to negotiation and ceasing negotiation

Clause 6.4(b) provides that:

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).¹⁷⁴

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,¹⁷⁵ 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.

¹⁷⁴ ABB Grain Ltd, *Port Terminal Services Access Undertaking*, 16 April 2009, clause 7.4(a).

¹⁷⁵ 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:¹⁷⁶
 - 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

¹⁷⁶ 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’;¹⁷⁷
- 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.¹⁷⁸ ABB will comply

¹⁷⁷ ABB Grain Ltd, *Port Terminal Services Access Undertaking*, 16 April 2009, clause 7.7(a)(ii).

¹⁷⁸ 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.¹⁷⁹

8.2 ABB submissions received in support of its 16 April 2009 Undertaking

8.2.1 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.¹⁸⁰ 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.’¹⁸¹

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.’¹⁸² 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.’¹⁸³

ABB submits that the proposed Undertaking ‘...represents an appropriate balance for an industry transitioning from one wheat exporter to multiple sophisticated exporters’,¹⁸⁴ 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.’¹⁸⁵

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...’¹⁸⁶

¹⁷⁹ ABB Grain Ltd, *Port Terminal Services Access Undertaking*, 16 April 2009, clause 7.9(c).

¹⁸⁰ ABB Grain Ltd, *Submission to the ACCC*, 16 April 2009, para 8.8, p. 29.

¹⁸¹ ABB Grain Ltd, *Submission to the ACCC*, 16 April 2009, para 8.8, p. 29.

¹⁸² ABB Grain Ltd, *Submission to the ACCC*, 16 April 2009, para 8.9, p. 29.

¹⁸³ ABB Grain Ltd, *Submission to the ACCC*, 16 April 2009, para 8.9, p. 29.

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 2.10(a), 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'¹⁸⁷ because:

- ABB has a history of providing open access to third party exporters;¹⁸⁸
- ABB does not have any incentive or ability to monopoly price or deny access, as its incentive is to maximise throughput¹⁸⁹ at its terminals, which currently operate below capacity;¹⁹⁰
- ABB is subject to competition from Victorian grain terminals and there is a threat of entry by a competing terminal operator;¹⁹¹
- the customers using ABB's terminals have 'countervailing' and/or 'bargaining' power;¹⁹² and
- ABB is subject to regulatory oversight, and there is the threat of heavier-handed regulation.¹⁹³

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.¹⁹⁴ 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.'¹⁹⁵ 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.¹⁹⁶ 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.¹⁹⁷

(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

¹⁸⁶ ABB Grain Ltd, *Submission to the ACCC*, 16 April 2009, para 2.11(b), p. 7.

¹⁸⁷ ABB Grain Ltd, *Submission to the ACCC*, 16 April 2009, para 7.2, p. 25.

¹⁸⁸ ABB Grain Ltd, *Submission to the ACCC*, 16 April 2009, para 2.5, pp. 5-6 & paras 5-4 -5.6, p. 17.

¹⁸⁹ ABB Grain Ltd, *Submission to the ACCC*, 16 April 2009, para 2.5, pp. 5-6.

¹⁹⁰ ABB Grain Ltd, *Submission to the ACCC*, 16 April 2009, para 5.8, p. 18.

¹⁹¹ ABB Grain Ltd, *Submission to the ACCC*, 16 April 2009, para 5.8, p. 18.

¹⁹² ABB Grain Ltd, *Submission to the ACCC*, 16 April 2009, para 2.5, pp. 5-6.

¹⁹³ ABB Grain Ltd, *Submission to the ACCC*, 16 April 2009, para 2.5, pp. 5-6.

¹⁹⁴ ABB Grain Ltd, *Submission to the ACCC*, 16 April 2009, para 8.6, p. 28 & para 8.12, p. 30.

¹⁹⁵ ABB Grain Ltd, *Submission to the ACCC*, 16 April 2009, para 5.4-5.5, p. 17.

¹⁹⁶ ABB Grain Ltd, *Submission to the ACCC*, 16 April 2009, para 7.3, p. 25.

¹⁹⁷ ABB Grain Ltd, *Submission to the ACCC*, 16 April 2009, para 5.6, p. 17.

terminals.¹⁹⁸ Further, ABB states that has neither the desire nor the financial capacity to purchase the entire South Australian wheat crop.¹⁹⁹ ABB submits that this incentive is not affected by its vertical integration as port operator and bulk wheat exporter.²⁰⁰

(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.²⁰¹

ABB submits that it has constructed upcountry storage facilities in Victoria and the Outer Harbor terminal in Adelaide, to attract grain from Victoria.²⁰²

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.²⁰³

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;

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

¹⁹⁹ ABB Grain Ltd, *Submission to the ACCC*, 16 April 2009, para 5.14, p. 20.

²⁰⁰ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 27.

²⁰¹ ABB Grain Ltd, *Submission to the ACCC*, 16 April 2009, para 5.17, p. 20.

²⁰² ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 14.

²⁰³ 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.²⁰⁴

(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.’²⁰⁵ 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.²⁰⁶

The ACCC also notes ABB’s comments that there is significant excess capacity at each of its port terminals.²⁰⁷

(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.’²⁰⁸

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

²⁰⁴ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, pp. 17-19.

²⁰⁵ ABB Grain Ltd, *Submission to the ACCC*, 16 April 2009, para 5.21, p. 21.

²⁰⁶ ABB Grain Ltd, *Submission to the ACCC*, 16 April 2009, para 9.2, p. 31 & para 5.19, p. 21.

²⁰⁷ ABB Grain Ltd, *Submission to the ACCC*, 16 April 2009, para 5.8, p. 18.

²⁰⁸ 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.²⁰⁹

(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.²¹⁰

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.²¹¹ ABB also notes that the regime has not been certified as an effective regime under Division 2A of Part IIIA of the TPA.²¹²

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 2009.²¹³

(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’²¹⁴ 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.’²¹⁵

8.2.2 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.

²⁰⁹ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, pp. 25-26.

²¹⁰ 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.

²¹¹ ABB Grain Ltd, *Submission to the ACCC*, 16 April 2009, para 8.2, p. 28.

²¹² ABB Grain Ltd, *Submission to the ACCC*, 16 April 2009, para 4.16, 4.18-4.19, pp. 15-16.

²¹³ ABB Grain Ltd, *Submission to the ACCC*, 16 April 2009, para 4.22 & 4.24, p. 16.

²¹⁴ ABB Grain Ltd, *Submission to the ACCC*, 16 April 2009, para 7.2, p. 25.

²¹⁵ 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.²¹⁶

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;²¹⁷
- 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;²¹⁸
- 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;²¹⁹
- 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),²²⁰ and bulk wheat exporters are required to make estimates on various input costs on a regular basis;²²¹
- 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;²²²
- 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.²²³

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.²²⁴ 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

²¹⁶ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 10.

²¹⁷ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 10.

²¹⁸ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 10.

²¹⁹ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 10.

²²⁰ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 11.

²²¹ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 33.

²²² ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 32.

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.

these meetings was reflected in the final terms released by 30 September 2008.²²⁵ 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.²²⁶

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.²²⁷

(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.²²⁸

(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 5.4.²²⁹ 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.²³⁰

(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.²³¹ 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

²²⁵ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 33.

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. 31.

²²⁸ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 35.

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. 33.

Applicant provides sufficient time for the Applicant to address any deficiencies and respond or re-apply;²³²

- 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;²³³
- the 3 month negotiation period set out in clause 6.6(b)(iii) represents a reasonable ‘negotiation window.’²³⁴

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).²³⁵ 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.²³⁶ 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.²³⁷

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.²³⁸ 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.²³⁹

(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 1.²⁴⁰ 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.²⁴¹

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

²³² ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 33.

²³³ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 33.

²³⁴ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 32.

²³⁵ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 38.

²³⁶ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 38.

²³⁷ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 37.

²³⁸ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 43.

²³⁹ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 43.

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. 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.²⁴² 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.²⁴³

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.²⁴⁴

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.²⁴⁵ ABB submits that its intention is to provide all reasonable assistance to enable customers to apply for, and enter into, Access Agreements.²⁴⁶ 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.²⁴⁷

(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.²⁴⁸ 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;

²⁴² ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 39.

²⁴³ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 39.

²⁴⁴ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 40.

²⁴⁵ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 40.

²⁴⁶ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 40.

²⁴⁷ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 40.

²⁴⁸ 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.’²⁴⁹

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.²⁵⁰

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.²⁵¹ ABB submits it is necessary for commercial reasons for it to retain an ability to terminate vexatious and non-good faith negotiations.²⁵² ABB notes that an access seeker can refer the matter to arbitration if dissatisfied with ABB’s decision to cease negotiations.²⁵³

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.’²⁵⁴

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).²⁵⁵

(7) Definition of dispute

ABB submits that, in relation to a dispute, ‘bona fide’ means ‘genuine,’ ‘real,’ ‘of substance’ and not frivolous or vexatious.²⁵⁶ 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.²⁵⁷ 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.²⁵⁸

ABB submits that a dispute is likely to be bona fide where it:

²⁴⁹ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 41.

²⁵⁰ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 41.

²⁵¹ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 42.

²⁵² ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 42.

²⁵³ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 42.

²⁵⁴ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 42.

²⁵⁵ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, pp. 41-42.

²⁵⁶ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 43.

²⁵⁷ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 44.

²⁵⁸ 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.²⁵⁹

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.²⁶⁰

(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.²⁶¹

(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.²⁶² 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

²⁵⁹ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 44.

²⁶⁰ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 44.

²⁶¹ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 34.

²⁶² 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.²⁶³

(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.²⁶⁴ ABB assumes also that the Commission would not wish to be advised of all disputes, no matter how minor.²⁶⁵ 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.²⁶⁶

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.²⁶⁷

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.²⁶⁸

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.²⁶⁹

²⁶³ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 45.

²⁶⁴ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 45.

²⁶⁵ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 45.

²⁶⁶ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 45.

²⁶⁷ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, pp. 45-46.

²⁶⁸ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, pp. 45-46.

²⁶⁹ 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.²⁷⁰ 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.²⁷¹

(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.²⁷² 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.²⁷³

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).²⁷⁴ ABB submits that it would also provide a copy of the Dispute Notice to the ACCC at that time.²⁷⁵

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.²⁷⁶

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.²⁷⁷

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.²⁷⁸

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.²⁷⁹ ABB notes that if concerned that an Applicant had not complied with an arbitrator's

²⁷⁰ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 46.

²⁷¹ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 47.

²⁷² ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 47.

²⁷³ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 47.

²⁷⁴ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 47.

²⁷⁵ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 47.

²⁷⁶ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 48.

²⁷⁷ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 48.

²⁷⁸ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 48.

²⁷⁹ 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.²⁸⁰ 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.²⁸¹

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.²⁸²

8.3 Submissions received from interested parties in response to ACCC Issues Paper

8.3.1 Australian Grain Exporters Association (AGEA)²⁸³

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.²⁸⁴

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.²⁸⁵

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.²⁸⁶ 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

²⁸⁰ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 48.

²⁸¹ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 48.

²⁸² ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 49.

²⁸³ 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.

²⁸⁴ 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.

²⁸⁵ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 9.6, p. 24.

²⁸⁶ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 9.2, p. 23.

submits that the consequence of providing the price and non-price terms 15 business days after they are due to commence would be that:

- 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.²⁸⁷

AGEA also submits that standard terms and references prices must be published by least 1 September.²⁸⁸

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.²⁸⁹

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;

²⁸⁷ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 9.5, pp. 23-24.

²⁸⁸ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 12.1, p. 29.

²⁸⁹ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 11.1, p. 27.

- 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
- e. the bulk handler is allowed to ‘reserve the right to negotiate’, ‘refuse to negotiate’ and to ‘cease’ negotiations in various circumstances.²⁹⁰

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.²⁹¹

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.²⁹² AGEA also submits that the timeframe for acknowledgements was not appropriate and would slow the negotiation process.²⁹³

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.²⁹⁴

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.²⁹⁵ AGEA submits that once an AWE obtains accreditation under

²⁹⁰ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 11.2, p. 27.

²⁹¹ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, Schedule 1, para H2 (iv), p. 44.

²⁹² Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 11.3, pp. 27-28.

²⁹³ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, Schedule 1, para H2 (ix), p. 45.

²⁹⁴ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, Schedule 1, para H2 (ix), p. 45.

²⁹⁵ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 11.5, p. 28.

the WEMA, it should not be necessary for the bulk handler to enquire into the AWE's financial standing.²⁹⁶

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.²⁹⁷ 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.²⁹⁸

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.²⁹⁹

8.4 Submissions received on ABB's publish-negotiate-arbitrate model in the 16 April 2009 Undertaking in response to ACCC Draft Decision

The following submissions on the publish-negotiate-arbitrate model were received in response to the ACCC's Draft Decision.

8.4.1 ABB

ABB has made submissions in relation to:

²⁹⁶ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, Schedule 1, para H2 (v), p. 45.

²⁹⁷ 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.

²⁹⁸ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 13.2, p. 30.

²⁹⁹ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, Schedule 1, para J2, p. 46.

- the conduct of the arbitration if the ACCC is the arbitrator; and
- the inclusion of a new clause to limit the period within which an Applicant may raise a dispute in relation to the terms and conditions on which ABB is offering access to the Port Terminal Services.

Conduct of the arbitration if the ACCC is arbitrator

ABB submits that:

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

However, ABB considers that there are a number of powers or procedural matters set out in Division 3 of Part IIIA of the TPA which should not apply to any arbitration by the Commission in accordance with the Access Undertaking.³⁰⁰

...

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

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

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

³⁰⁰ ABB Grain Limited, *Submission in relation to Draft Decision on ABB Access Undertaking*, 3 September 2009, p. 7.

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

- (c) *sections 44V(2)(d) or (da)* - ABB considers that, in the context of an Access Undertaking which is intended to ensure that Applicants have access to the standard, basic or minimum services necessary to export Bulk Wheat from ABB's Port Terminal Facilities, it is not appropriate that the Commission might be able -- in arbitrating any dispute concerning the negotiation of access to those standard or minimum services -- to require ABB to extend its facilities or allow third party interconnections. In this regard, provision of the Standard Port Terminal Services by ABB at each Port Terminal (as set out in the Port Schedules) is already sufficient to enable exporters to export Bulk Wheat. There is no need for any expansions to enable grain exporters to export Bulk Wheat from Port Terminals operated by ABB.

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

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

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

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

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

ABB respectfully requests the Commission to consider these matters. ABB naturally believes that these provisions (and arbitration powers) should not

extend to arbitration by any other party. They are not matters which are appropriate in any commercial arbitration.³⁰¹

Further proposals regarding publish/negotiate/arbitrate

ABB also submits it wishes to make further changes to the proposed Undertaking to facilitate the operation of the publish/negotiate/arbitrate model. ABB submits that:

Following the Commission's comments in its Draft Decision, ABB proposes to make a number of changes to the Access Undertaking to clarify the operation of the negotiate / arbitrate provisions. ABB also proposes to amend the Access Undertaking to make it clear that it will offer access to the Standard Port Terminal Services to all Applicants (who meet the Prudential Requirements) on the Standard Terms and at the Reference Prices, with an ability to effect a backwards adjustment once an Access Agreement is concluded.³⁰²

ABB also submits that it wishes to include a new clause to place a time limitation upon the ability of an Applicant in certain circumstances to invoke the dispute resolution processes in the proposed Undertaking. ABB submits that:

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

- (a) operate on the basis of the Standard Terms (possibly without signing any formal agreement with ABB);
- (b) not actively progress negotiations with ABB, and only notify ABB of a dispute in relation to the negotiation of its agreement very late in, or after the end of, the season; and
- (c) then seek to have any commercially agreed or arbitrated prices applied from the beginning of the harvest season.

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

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

³⁰¹ ABB Grain Limited, *Submission in relation to Draft Decision on ABB Access Undertaking*, 3 September 2009, pp. 7-8.

³⁰² ABB Grain Limited, *Submission in relation to Draft Decision on ABB Access Undertaking*, 3 September 2009, p. 15.

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

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

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

ABB also notes that the requirement is not onerous. Applicants need only issue the Dispute Notice. It is not necessary that the Dispute is resolved within that time period. In addition, ABB will continue to offer access to the Standard Port Terminal Services on the Standard Terms. Applicants can also submit a new Access Application. The only consequence is that any agreed terms will only be backdated to the date the new Access Application is submitted. This is intended to remove any incentive for Applicants to issue multiple Access Applications and trigger a dispute about the terms of supply only late in the season.³⁰³

8.4.2 Submissions from interested Parties

8.4.2.1 Australian Grain Exporters Association (AGEA)

AGEA provided a submission in relation to all bulk handling companies (**BHCs**).

(1) General comments on the publish negotiate arbitrate approach

AGEA agrees that the proposed publish-negotiate-arbitrate framework needs to be underpinned by a robust set of mechanisms giving effect to the publication, negotiation and arbitration procedures.³⁰⁴

(2) Timing for publication of standard terms and reference prices

AGEA notes that the ACCC did not require prices to be part of the proposed Undertaking. AGEA submits that, in light of this position, it agrees with the ACCC that proposed prices must be published within a sufficient time for access seekers to

³⁰³ ABB Grain Limited, *Submission in relation to Draft Decision on ABB Access Undertaking*, 3 September 2009, pp. 15-16.

³⁰⁴ Australian Grain Exporters Association, *Submission in relation to Draft Decisions on Port Terminal Services Access Undertakings*, 3 September 2009, 1.1

negotiate access agreements before those prices come into force.³⁰⁵ AGEA submits that BHCs have historically published prices as late as mid-October, 'which is not acceptable.'³⁰⁶

AGEA submits that:

The BHCs have provided proposed port terminal services agreement (which may be revised), but have not published prices. AGEA is concerned that the BHCs will delay publishing prices until after 1 October 2009, as they have done in the past.

AGEA submits that:

- (a) BHCs should also be required to publish the prices of those port terminal services before the ACCC decides whether to accept the Undertaking and, subsequently, by no later than 31 August of the relevant year;
- (b) the published prices should include standard and non-standard services offered by the BHCs;
- (c) the published prices should provide transparency in relation to BHCs' costs of providing the service to ensure prices are based on actual costs and are not discriminatory;
- (d) prices should be sufficiently transparent so that it can be determined whether services are being provided in return for the prices paid;
- (e) the published prices should not be subject to change during the term of the port terminal services agreement;
- (f) alternatively to sub-paragraph (e), the opportunity to amend published prices should be limited to the same circumstances in which a variation of the Undertaking is permitted.³⁰⁷

AGEA also submits that:

BHCs should be required to publish price and non-price terms *before* the Undertakings commence to ensure there is transparency in relation to price and non-price terms, that prices reflect the BHCs' cost of providing the service and there is no opportunity to discriminate. The requirement to publish prices before the Undertakings commence will also provide a benchmark against which to measure any proposed change in price to again ensure there is transparency and that any increase in price reflects an increase in BHCs' cost of providing the service.³⁰⁸

AGEA submits that unless prices are published before the ACCC accepts the proposed Undertakings, there will be no real opportunity to ensure that BHCs do not

³⁰⁵ Australian Grain Exporters Association, *Submission in relation to Draft Decisions on Port Terminal Services Access Undertakings*, 3 September 2009, 8.2-8.3.

³⁰⁶ Australian Grain Exporters Association, *Submission in relation to Draft Decisions on Port Terminal Services Access Undertakings*, 3 September 2009, 8.2.

³⁰⁷ Australian Grain Exporters Association, *Submission in relation to Draft Decisions on Port Terminal Services Access Undertakings*, 3 September 2009, 8.4-8.5.

³⁰⁸ Australian Grain Exporters Association, *Submission in relation to Draft Decisions on Port Terminal Services Access Undertakings*, 3 September 2009, 1.4-1.5.

hinder access to port terminal services or discriminate through the charges imposed.³⁰⁹ AGEA submits that it is very concerned that the BHCs have not published prices and there will not be a proper opportunity to negotiate before the proposed Undertakings are due to take effect on 1 October 2009.³¹⁰

Specifically in relation to the proposed timing for ABB to publish its Reference Prices, AGEA submits that:

...The ACCC has specifically sought submissions from interested parties on ABB's intention to not publish prices until 30 September, the day before the terms and prices are to come into effect. This is not indicative of a robust publish-negotiate-arbitrate framework, as one day is not allow enough time to properly consider and negotiate the proposed prices.

Contrary to ABB's assertions, historically, ABB has delayed releasing its terms and prices, let alone negotiate on them, until after they are due to come into force.

ABB has advised that it may be 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, (page 31 *ABB Supplementary Submission* dated 23 June 2009).

It is unclear what is meant. However, it is not appropriate or necessary for ABB's prices to be delayed (or possibly altered) depending upon whether its proposed Undertaking is accepted by the ACCC. It is not clear whether ABB is trying to gain some advantage from publishing its prices last or after the proposed Undertaking is accepted. In the interest of transparency and fairness, BHCs' prices should all be published at the same time (AGEA refers to paragraph 1.5 above).

Prices should have been published by 31 August of each year, including the 2009/2010 season. AWEs must know the proposed charges, so that they are able to properly plan for the upcoming wheat season.³¹¹

(3) Timeframes

AGEA agrees with the ACCC's Draft Decision that, in general, the timeframes proposed by ABB in clauses 6 and 7 are not appropriate.³¹² Specifically, AGEA submits that:

- (i) In relation to ... [clause 6.4(a)], the lack of any timeframes for the performance of obligations creates uncertainty and is not appropriate.
- (ii) 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.

³⁰⁹ Australian Grain Exporters Association, *Submission in relation to Draft Decisions on Port Terminal Services Access Undertakings*, 3 September 2009, 8.6.

³¹⁰ Australian Grain Exporters Association, *Submission in relation to Draft Decisions on Port Terminal Services Access Undertakings*, 3 September 2009, 8.7.

³¹¹ Australian Grain Exporters Association, *Submission in relation to Draft Decisions on Port Terminal Services Access Undertakings*, 3 September 2009, 8.8-8.12.

³¹² Australian Grain Exporters Association, *Submission in relation to Draft Decisions on Port Terminal Services Access Undertakings*, 3 September 2009, 8.17.

If the ACCC accepts that the BHCs can impose Prudential Requirements, it is more appropriate that the proposed Undertaking specifies a particular point in time at which the AWEs must demonstrate that it can meet the Prudential Requirements, and a particular timeframe within which [BHCs] must confirm that those requirements have or have not been met. [BHCs] should be required to respond within 3 business days.

- (iii) In relation to ...[clause 6.4(b)(v)], it is not appropriate for the BHCs to have 10 Business Days to provide reasons for refusing to negotiate with AWEs in the circumstances described.

The BHCs should provide reasons to the AWEs at the time the BHCs refuse to negotiate, i.e. within 2 business days.

- (iv) In relation to ... [clause 6.5(b)(i)], it is not appropriate that the BHCs be permitted to take 5 Business Days to acknowledge receipt of an access application. This should only take 2 business days.
- (v) The timings in ...[clause 6.5(b)(iii) and (iv)] are also not appropriate. Five business day should suffice, particularly for [clause 6.5(b)(iv)].
- (vi) [In relation to clause 6.6(a), ABB] should be required to be ready to negotiate within 1 business day.
- (vii) [Clause 6.6(b)(iv)] is inappropriate. It has the effect of entitling the BHC to cease negotiations at their discretion.
- (viii) ...ABB clause 6.7(c)...should require the BHC to provide a final access agreement within 1 business day of the terms being agreed.
- (ix) [ABB] must be required to comply with clause ...[6.7(d)] as all times, not just ..."*as soon as reasonably practicable*"....
- (x) [ABB's clause 7.3]... does not acknowledge the serious nature of access disputes and the urgency with which they must be dealt.
- (xi) For general disputes, the dispute resolution procedure must provide for authorised representatives to meet immediately, with the senior representatives of the parties to otherwise meet within 48 hours of notification of a dispute and endeavour to resolve the dispute;
- (xii) If the above negotiation is not successful and mediation is to take place, AGEA believes that the dispute should be referred to Grain Trade Australia ("**GTA**") within 72 hours of the dispute notice. It is possible for GTA to agree to perform the mediation within defined terms and time limits to be set out in a predetermined dispute resolution agreement. As such, it is possible to specify that each party is to provide each other and the mediator with their summary of the dispute within 7 business days of the reference to GTA with the mediation to take place within a further 7 business days.³¹³

³¹³ Australian Grain Exporters Association, *Submission in relation to Draft Decisions on Port Terminal Services Access Undertakings*, 3 September 2009, 8.17. Please note that this section of AGEA's submission referred to the relevant clauses of the ABB, CBH and GrainCorp proposed Undertakings. The extract here has been edited to refer only to the ABB clauses.

(4) Clarity and certainty

AGEA agrees with the ACCC's Draft Decision that clauses 5 to 7 of the proposed Undertaking lack clarity and certainty.³¹⁴ In particular, AGEA submits that:

- (i) In relation to ...[ABB clauses 6.4(a)(ii)(B)-(C)], where the applicant agrees to pay the reasonable costs, the BHC must be required to provide the information.
- (ii) ...[ABB clause 6.4(b)(i)] is not appropriate as it entitles the BHCs to cease negotiations as its discretion. The clause should be deleted.
- (iii) AGEA agrees that the BHCs must provide reasons for ceasing or refusing to negotiate under any circumstances ...[ABB clause 6.4(b)(v)]. Reasons should be provided within 1 business days.
- (iv) ...[ABB clause 6.4(a)(i)] should be amended to require the BHCs to attend any meeting requested within 1 business day.
- (v) AGEA agrees that ...[ABB clause 6.4(b)(v)] is not appropriate, as it essentially repeats the Prudential Requirements matter referred to in ...[clause 6.4(b)(iii)].³¹⁵

(5) Discretion of bulk handlers

AGEA agrees with the ACCC's Draft Decision that the negotiation component of the proposed Undertaking 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, which undermines the possibility of a robust negotiate-arbitrate mechanism.'³¹⁶ Specifically, AGEA submits that:

- (i) In relation to ... [ABB clause 6.4(a)(ii)], the discretion that the BHCs have to refuse a request for information from an Applicant, including where the Applicant does not agree to pay 'reasonable costs' incurred by the BHCs (which, as noted above, is itself not appropriate).
- (ii) In relation to ... [ABB clause 6.4(b)(i)], the discretion that BHCs have not to negotiate with an Applicant if the BHC considers the Applicant does not materially comply with the requirements and processes set out in the proposed Undertaking.
- (iii) In relation to ... [ABB clauses 6.4(b)(iii) & (iv) and clause 6.6(b)(v)], the discretion that the BHCs have to at any time, before or during the negotiation process, to require the AWEs to demonstrate that it meets the Prudential Requirements, and to cease or refuse to commence negotiations if the Applicant does not meet those requirements

³¹⁴ Australian Grain Exporters Association, *Submission in relation to Draft Decisions on Port Terminal Services Access Undertakings*, 3 September 2009, 8.21.

³¹⁵ Australian Grain Exporters Association, *Submission in relation to Draft Decisions on Port Terminal Services Access Undertakings*, 3 September 2009, 8.21. Please note that this section of AGEA's submission referred to the relevant clauses of the ABB, CBH and GrainCorp proposed Undertakings. The extract here has been edited to refer only to the ABB clauses.

³¹⁶ Australian Grain Exporters Association, *Submission in relation to Draft Decisions on Port Terminal Services Access Undertakings*, 3 September 2009, 8.22.

- (iv) In relation to ... [ABB clause 6.4(b)(vii)], the discretion that the BHCs have to refer an application to the arbitrator if the BHC is of the view that the application is frivolous in nature or that the Applicant is not negotiating in good faith, and for BHCs to seek reasonable costs.
- (v) In relation to ... [ABB clause 6.5(b)], the discretion that the BHCs have in relation to the acknowledgement of an Access Application, and to request further information or clarification from AWEs.
- (vi) In relation to ... [ABB clause 6.6(b)(iv)], the discretion that the BHCs have to cease negotiations if the BHCs believe that the negotiations are not progressing in good faith towards the development of an Access Agreement within a reasonable time period;
- (vii) The discretions effectively created by the uncertain time periods in ... [ABB clauses 6.6(a) and 6.7(c) and (d)].³¹⁷

(6) Prudential Requirements

In relation to the requirement in the proposed Undertaking that an access seeker must satisfy 'Prudential Requirements', AGEA submits that:

An accredited AWE must comply with WEA's stringent accreditation scheme, which includes having regard to the "*financial resources available to the company*" (s.13(1)(c)(i) of the WEM Act). It is unacceptable that after AWEs obtain accreditation, BHCs can still seek to impose Prudential Requirements upon AWEs that are not reasonable....

If the ACCC accepts that the BHCs are entitled to impose reasonable Prudential Requirements, it is essential that there be a dispute resolution mechanism in place to deal with disputes arising out of the BHCs' application and decisions based on their Prudential Requirements.³¹⁸

(7) Timeliness of dispute resolution process

AGEA submits that:

Disputes can arise at various times on a number of issues, such as:

- (a) securing capacity or determining load position, which is allocated by BHCs in advance of the vessel's estimated time of arrival ("ETA") at their discretion with reference to "operational efficiencies" that are not transparent to access seekers;
- (b) at the time of loading, in relation to insect infestation, late changes in load order, operational changes at port and so on.

It is critical that dispute resolution and arbitration is efficient and timely. Certain disputes such as the substitution of vessels in shipping stems or any dispute affecting the timing of a vessel's loading require a resolution by an umpire within 24 hours and the umpire's decision must be binding. Longer

³¹⁷ Australian Grain Exporters Association, *Submission in relation to Draft Decisions on Port Terminal Services Access Undertakings*, 3 September 2009, 8.22. Please note that this section of AGEA's submission referred to the relevant clauses of the ABB, CBH and GrainCorp proposed Undertakings. The extract here has been edited to refer only to the ABB clauses.

³¹⁸ Australian Grain Exporters Association, *Submission in relation to Draft Decisions on Port Terminal Services Access Undertakings*, 3 September 2009, 8.13-8.14.

issues should be resolved by "fast track" mediation or arbitration. The referring must party to act reasonably when determining whether to invoke this dispute resolution process. The umpire could be chosen from a panel that is either agreed each year between the BHCs and AWEs, or in the alternative appointed by the ACCC.³¹⁹

(8) Involvement of Grain Trade Australia (GTA) in dispute resolution

In relation to the conduct of the mediation and arbitration processes under the proposed Undertaking, AGEA submits that:

It is AGEA's preference for there to be only one body to whom mediations are referred. AGEA would prefer mediations (and arbitrations) to be referred to GTA as it has the requisite industry experience to conduct mediations (and arbitrations).

GTA must be required to enforce a strict policy to ensure that any mediator, arbitrator or umpire does not have a conflict of interest in the matter. That would include any nominated person that is also employed or retained as an agent advisor or legal representative of parties that could have an interest in the outcome.

The local State laws must apply to the dispute resolution process and the right to appeal on an error of law must be preserved.³²⁰

(9) Selection of the arbitrator and arbitration process

In relation to the involvement of the ACCC in the arbitration of certain disputes under the proposed Undertaking, AGEA submits:

AGEA note that the ACCC considers that ... ABB clause 7.5 is not appropriate having regard to the public interest and that the ACCC considers it is more likely to be appropriate for the ACCC to have a role.

If the dispute cannot be resolved by expedited negotiation or mediation, AGEA agrees that the ACCC should have some involvement in any arbitration process.....³²¹

AGEA also submits, in relation to the process for an arbitration:

To be effective, any arbitration must be conducted in accordance with arbitration rules to be specified in the proposed Undertakings, which must include an obligation to keep confidential any information disclosed during the arbitration.

The arbitration rules must require both parties to serve relevant materials including evidence within 7 days and the dispute be heard and concluded within 14 days of the notice of referral to the ACCC. The ACCC must endeavour to make a determination within 14 days.

³¹⁹ Australian Grain Exporters Association, *Submission in relation to Draft Decisions on Port Terminal Services Access Undertakings*, 3 September 2009, 8.15-8.16.

³²⁰ Australian Grain Exporters Association, *Submission in relation to Draft Decisions on Port Terminal Services Access Undertakings*, 3 September 2009, 8.23-8.25.

³²¹ Australian Grain Exporters Association, *Submission in relation to Draft Decisions on Port Terminal Services Access Undertakings*, 3 September 2009, 8.26-8.27.

Where arbitration is to be conducted by private arbitration, the dispute should be referred to GTA, with a copy of all materials, including the award, to be provided to the ACCC....

At all times during any dispute resolution process, BHCs must continue to negotiate access agreements and provide full access to port terminal services.³²²

(10) 'Holding over' arrangements

In relation to 'holding over' arrangements – by which an access seeker may obtain access pending the conclusion of negotiation of an access agreement or pending the resolution of a dispute – AGEA submits that:

It is essential that AWEs are able to access to port terminal services during the period that they are negotiating access and also during any periods of dispute.

The BHCs proposed Undertakings apply where AWEs are negotiating access to the port terminals.

As such, holding over arrangements are an important aspect of the negotiate-arbitrate approach and 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.

This must apply to all port access negotiations, whether they be under the standard terms offered by the BHCs or any variations.³²³

(11) Indicative Access Agreement

AGEA agrees that the non-inclusion of 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.³²⁴

(12) Appropriate clauses

AGEA acknowledges that certain clauses in the proposed Undertaking are appropriate:

AGEA agrees either party must be able to unilaterally refer a dispute to arbitration. AGEA also considers that throughout the dispute resolution process, all parties must be obliged to act in good faith.

³²² Australian Grain Exporters Association, *Submission in relation to Draft Decisions on Port Terminal Services Access Undertakings*, 3 September 2009, 8.26-8.33.

³²³ Australian Grain Exporters Association, *Submission in relation to Draft Decisions on Port Terminal Services Access Undertakings*, 3 September 2009, 8.37-8.40.

³²⁴ Australian Grain Exporters Association, *Submission in relation to Draft Decisions on Port Terminal Services Access Undertakings*, 3 September 2009, 9.1.

The proposed undertaking should require that all information relevant for the negotiate-arbitrate processes should be protected by robust confidentiality requirements that protect both the BHC and the AWEs.³²⁵

8.4.2.2 Grain Trade Australia

Grain Trade Australia (GTA) provided a submission explaining its role in arbitrating contractual disputes in the grain industry:

As part of its role, GTA provides an arbitration service for the resolution of contractual disputes, based on the GTA Trade Rules and the Dispute Resolution Rules (which include a set of “Fast Track” Rules for the expeditious resolution of disputes).

GTA has conducted approximately 150 arbitrations over the last 20 years. GTA relies on volunteers from within the industry to act as arbitrators. Currently GTA has 100 arbitrators on its list. GTA arbitrations are conducted in accordance with the *Commercial Arbitration Acts* in place in the various States. Any challenges to GTA arbitration to date have been dismissed by the Courts who have up-held the GTA process.³²⁶

GTA also submits that it is able to offer its expertise in administration of dispute resolution in relation to the proposed Undertakings of the bulk handlers:

It is envisaged that disputes would broadly concern

1. the Access Application process, and
2. the Access Agreement (inc Standard Terms and Shipping Protocols).

While the terms of the process are open to negotiation, GTA would propose;

1. An expedited process producing a legally binding award within 3-5 days of commencement of the process, or sooner (i.e. hours) if the parties require;
2. Specialist trained arbitrators drawn from the current GTA list to deal with Access Application and Access Agreement disputes.

The parties would be encouraged to agree on an arbitrator from the GTA list. If the parties cannot agree, the GTA CEO would be empowered to make an appointment (which would be subject to a parties right to object on the grounds of apprehended or actual bias).

It is anticipated that an “unreasoned” award could be produced within 3-5 days with a fully reasoned award to be produced shortly thereafter.

It is not anticipated that the process would provide for appeals (other than to the Courts) unless the parties so desire. Similarly enforcement of awards would ultimately be a matter for the Courts, or perhaps the ACCC if appropriate.

³²⁵ Australian Grain Exporters Association, *Submission in relation to Draft Decisions on Port Terminal Services Access Undertakings*, 3 September 2009, 8.35-8.36.

³²⁶ Grain Trade Australia, *Memorandum re ACCC Access Undertaking Dispute Resolution Process*, 25 August 2009, p. 1.

Fees would be in-line with current GTA arbitration fees, estimated at \$7,000 each party, perhaps subject to the time taken and complexity of the dispute.³²⁷

8.4.2.3 Shipping Australia Limited

Shipping Australia submits, in relation to dispute resolution:

We would recommend the establishment of an Industry Monitoring Panel similar to the current “Port Adelaide Container Terminal Monitoring Panel” established by the State Government and Chaired by the independent South Australian Freight Council Inc (SAFC), which has some legislative powers and involves representatives of key stakeholders along the supply chain. We would also recommend that any “Grain Monitoring Panel” again be Chaired by SAFC. This body could be charged with developing measures and monitoring the comparative performance for both ABB and non-ABB cargoes/chartered vessels, with the following points:

- Vessels failing survey (type, delay caused including time taken to re-enter the shipping stem/loading cargo/sailing).
- Throughput/Stock on Hand at Port (by Grade).
- Time taken to accumulate cargoes / Load In Rates (road and rail).
- Access to loaders.
- Changes to vessel loading slots (and reason).
- Load out rates and charges.
- Any other delays.³²⁸

8.4.2.4 South Australian Farmers’ Federation (SAFF)

In relation to the dispute resolution mechanism in the proposed Undertaking, SAFF submits that:

An independent dispute resolution service is required that is both transparent and timely (with a process leading to an outcome within two to three days).

Grain Trade Australia already has a dispute resolution procedure in place for contracts, and would be an ideal organisation to run this independent dispute resolution service.

It is noted that the ACCC is suggesting that it should be involved in the dispute resolution process. This is necessary to ensure that there is competitive tension and transparency throughout the supply chain, and to make sure that monopolistic behaviour and extreme market power is not abused.³²⁹

³²⁷ Grain Trade Australia, *Memorandum re ACCC Access Undertaking Dispute Resolution Process*, 25 August 2009, pp. 1-2.

³²⁸ Shipping Australia Ltd, *Submission in relation to Draft Decision on ABB Access Undertaking*, 1 September 2009, p. 4.

³²⁹ South Australian Farmers Federation Grains Industry Committee, *Submission in relation to Draft Decision on ABB Access Undertaking*, 3 September 2009, pp. 2-3.

SAFF also appears to submit that in the long term a pricing model may be an appropriate form of regulation:

Ideally what is required in the long term is a pricing model that has the following attributes:

- Flexibility
- Transparency
- Fairness
- Inclusiveness
- Predictability
- Sustainability

SAFF Grains have examined the pricing model used in the telecommunications industry. While this model is not appropriate for the grains industry it shows what can be developed.

A pricing model that suits the needs of the grains industry needs to be put in place to prevent pricing exploitation. The return on capital needs to be taken over the longer term and not on up-front replacement costs.

ABB Grain currently is a monopoly and with the potential to exploit its position, regulatory control is needed. Even if the wheat marketing legislation sunsets, ongoing supervision by the ACCC is required while the monopoly or this extreme market power is in place.

Bulk handlers should be subject to sanctions, such as the removal of export licences, to make sure they abide by their undertakings. The bulk handlers should be required to undertake this process every five years.³³⁰

8.5 ACCC view

8.5.1 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;
- the appropriateness of the timing for the publication of standard terms and reference prices;

³³⁰ South Australian Farmers Federation Grains Industry Committee, *Submission in relation to Draft Decision on ABB Access Undertaking*, 3 September 2009, p. 3.

- 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.

The ACCC notes that AGEA’s submission in relation to the Draft Decision broadly supported the ACCC’s view on these issues.

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.

8.5.2 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,³³¹ 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

³³¹ See for example the *Australian Rail Track Corporation (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 Further 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 notes SAFF’s submission that in the long term a pricing model may be an appropriate form of regulation.³³² 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.

8.5.3 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.

8.5.4 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,³³³ or within 15 Business Days of the commencement of the proposed Undertaking if not already published.³³⁴

³³² South Australian Farmers Federation Grains Industry Committee, *Submission in relation to Draft Decision on ABB Access Undertaking*, 3 September 2009, p. 3.

³³³ ABB Grain Ltd, *Port Terminal Services Access Undertaking*, 16 April 2009, clause 5.1(a)

³³⁴ ABB Grain Ltd, *Port Terminal Services Access Undertaking*, 16 April 2009, clause 5.1(c).

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 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. As part of its consultation on the Draft Decision, the ACCC sought submissions from interested parties on ABB's arguments supporting publication by 30 September, and the ACCC notes the comments made by AGEA (see above).

ABB has subsequently informed the ACCC that it now proposes to publish Reference Prices by no later than:

- in the case of the 2009/2010 season, 24 September 2009; and
- in the case of each subsequent season for which the proposed Undertaking applies, 1 September.

The ACCC considers 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. The ACCC considers that publication of Reference Prices by 1 September for subsequent seasons is consistent with this view, and also brings ABB's proposed Undertaking substantially in line with those of CBH and GrainCorp, which are proposing publication by 31 August.

In relation to publication of Reference Prices for the 2009/2010 season, ABB has informed the ACCC that it proposes to revise its proposed Undertaking to allow access seekers to negotiate pursuant to the Undertaking in relation to access agreements for the 2009/2010 season. ABB has informed the ACCC that it will not execute any access agreement in respect of any period from 1 October 2009 until after the commencement of the proposed Undertaking. Consequently, access seekers may take advantage of the processes in the proposed Undertaking (if accepted) to negotiate prices with ABB in relation to the current season.

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’³³⁵ 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.

8.5.5 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:

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.

³³⁵ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 36.

- 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).

8.5.6 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,³³⁶ 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. ABB has also informed the ACCC that a dispute in relation to Prudential Requirements may be the subject of the dispute resolution and arbitration provisions of the proposed Undertaking.

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 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.

³³⁶ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 43.

8.5.7 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.³³⁷

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 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,³³⁸ as these matters limit the scope of the dispute resolution mechanism.

Time limitation on ability to raise a Dispute

The ACCC notes ABB’s proposal to place a limitation on the period of time within which an access seeker may issue a Dispute Notice regarding a Dispute that arises in relation to the terms and conditions on which ABB is offering access to the Port Terminal Services.

The ACCC considers that ABB’s proposal is appropriate. The ACCC considers that the proposal addresses an issue that may inadvertently arise from the operation of the proposed Undertaking (as described above), and which may adversely effect ABB’s legitimate business interests. The ACCC considers that the proposal recognises the

³³⁷ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, pp. 43-44.

³³⁸ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 44.

interests of access seekers by allowing a sufficient period (90 days) within which applicants may *invoke* the dispute resolution process (rather than requiring 90 days for *resolution* of the dispute).

Involvement of GTA (or another independent body) in dispute resolution

The ACCC notes the submissions from third parties in response to the Draft Decision that it may be appropriate for an independent third party to have a role in relation to the dispute resolution processes in the proposed Undertaking, and the submissions that such a party could be Grain Trade Australia (GTA).

The proposed Undertaking provides that a Dispute may be referred to a mediator agreed upon by both parties, and therefore there is no apparent obstacle to the parties agreeing to have the Dispute mediated by GTA. Similarly in relation to an arbitration to be conducted by a private arbitrator (see further below), the parties may agree to have the Dispute arbitrated by GTA.

The ACCC considers it appropriate, as proposed by ABB, that if the parties cannot agree, the President of IAMA appoint a mediator to mediate the Dispute, as this provides a 'back stop' to the process if the parties cannot agree. The ACCC acknowledges that while GTA may also be able to perform this function, it could not be considered inappropriate under section 44ZZA(3) for this function to be performed by the President of IAMA.

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 7.³³⁹

Subject to ABB addressing the matters referred to in the Indicative Access Agreement chapter, the ACCC considers it is likely to be appropriate for:

- disputes in relation to an executed Access Agreement to be dealt with pursuant to that Agreement; and
- for ABB by 31 July each year to provide a report to the ACCC on any material disputes in relation to an Access Agreement.

³³⁹ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 45.

8.5.8 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 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;
- at the time a Dispute is referred to the arbitration and notified to the ACCC, for the parties to inform the ACCC whether they have agreed upon, or are likely to agree upon, a private arbitrator to arbitrate the Dispute;
- 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 - general

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.

Conduct of the arbitration if the ACCC is arbitrator

The ACCC notes ABB's further submission that there are a number of powers and procedural matters set out in Division 3 of Part IIIA of the TPA which it considers should not apply to any arbitration by the ACCC in accordance with the proposed Undertaking.³⁴⁰

The ACCC does not consider it appropriate for the proposed Undertaking to exclude sections 44U(c) and 44ZNA of the TPA in relation to the conduct of an arbitration (which relate to the joint hearing of arbitration matters). The ACCC considers that there are clear benefits in allowing the ACCC to hear arbitration matters jointly, potentially including reduced costs to ABB and access seekers, and a more timely and efficient resolution of disputes involving common issues.

The ACCC does not consider it appropriate for the proposed Undertaking to limit the scope of an interim determination that the ACCC may make, as various matters may arise that could appropriately be the subject of an interim determination.

The ACCC does not consider it appropriate for the proposed Undertaking to exclude sections 44V(2)(d) and (da) of the TPA in relation to the conduct of an arbitration (which relate to the extension of a facility and allowing third party interconnections).

³⁴⁰ ABB Grain Limited, *Submission in relation to Draft Decision on ABB Access Undertaking*, 3 September 2009, p. 7.

The ACCC considers that including recognition of these provisions ensures the ACCC has discretion to make an arbitration determination granting access to Port Terminal Services within the scope of the proposed Undertaking. The ACCC notes that the provision for extensions to a facility is not intended to allow arbitration determinations requiring ABB to provide services that it does not already provide, that is, that are outside the scope of the undertaking. Rather, it is intended to ensure that any facilities required for the provision of Port Terminal Services (as those services are described in the undertaking) may be extended, if necessary. In this regard, the ACCC also notes that it is proposed that the ACCC could not make a determination requiring ABB to bear some or all of the costs of extending the facility or maintaining extensions to the facility.³⁴¹

The ACCC also considers:

- it is appropriate that the criminal offences and penalties specified in sections 44ZG(5), 44ZI, 44ZJ and 44ZK of the TPA do not apply in relation to the arbitration, given that the arbitration arises under a voluntary access undertaking and that these provisions would be inoperative in the current context;
- in the interests of certainty and clarity, it is likely to be appropriate that the proposed Undertaking makes it clear that any determination is final and binding (subject to any rights of review) and has effect on and from the date specified by the arbitrator; and
- in light of the transitional state of the bulk wheat industry and the short duration of the proposed Undertaking, it is appropriate that the ACCC will not make a determination which would have the effect of setting the terms and conditions of access to a Port Terminal Service for more than one season.

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.

8.5.9 Holding over arrangements

Clause 5.2(b) provides that access to a Standard Port Terminal Service³⁴² 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

³⁴¹ The ACCC notes that this restriction mirrors s 44W(1)(e) of the TPA.

³⁴² And ABB’s obligation to enter into an Access Agreement for that/those service/s.

accept the new season Standard Terms and Reference Prices until an individual agreement is executed.³⁴³

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 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,'³⁴⁴ 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

³⁴³ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 37.

³⁴⁴ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 37.

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.

8.5.10 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 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 by the beginning of September;
- provide measures to ensure that the negotiation, dispute resolution and arbitration mechanisms are applicable to Access Agreements for the 2009/2010 season;
- provide appropriate 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

One of the recommendations of the ACCC's Draft Decision dated 6 August 2009 was that ABB should include an indicative access agreement as part of its undertaking.

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 ABB would be required to offer the indicative access agreement to access seekers who seek to obtain access to ABB's port terminal services on the basis of the standard terms provided under that agreement. For the avoidance of doubt, however, 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).

Upon request by the ACCC, ABB provided a draft copy of its 2009-10 Port Terminal Services Agreement for Standard Port Terminal Services on 22 May 2009. This document was published on the ACCC's website. This document was not originally provided to the ACCC as part of ABB's April Undertaking. The ACCC annexed this document to its Draft Decision and sought submissions on whether it would form an appropriate basis for an indicative access agreement. This document is therefore referred to as the "**August Indicative Access Agreement**" in this chapter.

August Indicative Access Agreement not appropriate

The ACCC does not consider that the August Indicative Access Agreement would form an appropriate basis for an indicative access agreement as it is currently drafted.

The ACCC considers that, in order to be appropriate, improvements would need to be made to ensure that:

- The indicative access agreement includes a robust dispute resolution process that balances the legitimate business interests of ABB with the interests of access seekers;
- Any ability of ABB to unilaterally vary the terms of an executed indicative access agreement can only be exercised in specified circumstances and be subject to the negotiation and arbitration provisions of the undertaking; and

- The terms and conditions of the indicative access agreement provide for sufficient certainty and clarity in their terms, effect and operation.

The ACCC notes submissions from a number of interested parties raising concerns about whether a number of the terms of the indicative access agreement are acceptable, based on the commercial considerations and circumstances of those interested parties. The ACCC notes however, that the standard terms provided under the an indicative access agreement are intended to be the minimum terms and conditions of access to ABB's port terminal services, and that access seekers will have the ability to negotiate (or arbitrate) non-standard terms that vary from any of those standard terms that they consider to be unacceptable, based on their own particular commercial considerations and circumstances. Accordingly, in this Further Draft Decision, the ACCC has not found it necessary to form views about whether the particular terms and conditions of the August Indicative Access Agreement would be acceptable to particular parties (given likely differences between the commercial considerations and circumstances of specific access seekers).

Variation of the indicative access agreement

ABB's approach in its proposed Undertaking of 16 April 2009 of retaining discretion to unilaterally vary its "standard terms" (i.e. the price and non-price related terms which are intended to be included in ABB's 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 dated 16 April 2009

In its proposed Undertaking dated 16 April 2009 ABB did not include an indicative access agreement setting out the standard terms and conditions of access to port terminal services as part of its Undertaking. Instead, it provided for an obligation to simply publish its standard terms and reference prices. Further details about the mechanism it proposed in its 16 April 2009 undertaking are set out in the Publish, Negotiate, Arbitrate chapter.

ABB's proposed Undertaking dated 16 April 2009 allowed ABB to vary its standard terms in accordance with the following procedure:

Variation to Reference Prices and Standard Terms

- (a) the Port Operator may vary the References 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 References 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.³⁴⁵

9.2 ABB's supporting submissions in relation to its 16 April 2009 Undertaking

In its submission in support of its 16 April 2009 proposed Undertaking, ABB submitted that its intention was 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 submitted that it was 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.³⁴⁶

In response to a question by the ACCC about the role of bulk wheat exporters in ABB's proposed variation process, ABB submitted:

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

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

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

In addition, if customers have not yet entered into an Access Agreement with ABB, they will have an opportunity to negotiate with ABB in accordance with clause 6 of the Access Undertaking and, if dissatisfied with the terms of access, seek binding arbitration in accordance with clause 7 of the Access Undertaking.³⁴⁷

³⁴⁵ Clause 5.6 of ABB's August Indicative Access Agreement.

³⁴⁶ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 35.

³⁴⁷ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 36.

9.3 Submissions received from interested parties in response to the ACCC Issues Paper

9.3.1 Australian Grain Exporters Association (AGEA)

AGEA submitted that the proposed Undertaking contemplates that the price and non-price terms can be unilaterally varied by ABB without negotiation with its customers. AGEA argued 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.³⁴⁸ AGEA also argued for the inclusion of a list of particular terms to be included as part of the undertaking.³⁴⁹

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 submitted that the implementation of the amended terms should only take effect after six months' notice, in order to give wheat exporters time to adjust.³⁵⁰

9.4 The ACCC's Draft Decision and consultation on the August Indicative Access Agreement

Upon request by the ACCC, 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 published on the ACCC's website. This document was not originally provided to the ACCC as part of ABB's April Undertaking. The ACCC annexed this document to its Draft Decision and sought submissions on whether it would form an appropriate basis for an indicative access agreement. This document is therefore referred to as the “**August Indicative Access Agreement**” in this chapter.

The ACCC does not intend to provide a detailed description of the provisions of the August Indicative Access Agreement in this Further Draft Decision. However, in summary, ABB's August Indicative Access Agreement includes provisions relating to the following matters concerning the supply of port terminal services by ABB to access seekers:

- definition of terms and interpretation;³⁵¹
- term and application of the agreement, including provisions in relation to commencement, duration, application, and continued application of the agreement;³⁵²

³⁴⁸ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, p. 23.

³⁴⁹ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, pp. 12-13.

³⁵⁰ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, p. 24.

³⁵¹ August Indicative Access Agreement, cl 1.

³⁵² August Indicative Access Agreement, cl 2.

- acknowledgement of limitations on the application of the agreement;³⁵³
- port terminal services, including provisions in relation to the primary obligations of ABB, availability of port terminal facilities, and capacity management undertakings;³⁵⁴
- wheat receival services, including provisions in relation to receival standards and classifications, acceptance of wheat from third parties on behalf of the access seeker, nominations for ownership of the wheat, weighing of wheat, contaminants, situations where there is no available capacity at the port terminal, and the reservation of wheat cells;³⁵⁵
- wheat storage services, including provisions in relation to common stock, title to common stock wheat, the interests of the access seeker, the right for ABB to move the access seeker's wheat, and treatment (e.g. fumigation) of wheat;³⁵⁶
- wheat ship loading services, including provisions in relation to shrinkage, dust and outturn entitlements, the obligation on access seekers to outturn, outturning standards, weighting, AQIS sampling, delays, cleanliness of vessels, the Port Loading Protocols, non-shipment issues, ABB's right to move the access seeker's wheat, transfer of title for wheat, security interests over wheat, acknowledgement of the presence of non-grain commodities at the port terminal, reconciliations and adjustments for any differences in access seeker wheat entitles and actual outturned volumes;³⁵⁷
- charges and payment, including provisions in relation to charges, invoicing, payment, no obligation on ABB to provide services until invoices paid in full, no set-offs for access seekers, transfer of liability for wheat with unpaid fees or charges, goods and services tax, default in payment, interest on late payments, and security from access seekers;³⁵⁸
- title to wheat, including provisions in relation to bailment, ABB's rights, ABB insolvency;³⁵⁹
- ABB's lien over wheat, including provisions in relation to the enforcement of ABB's lien in relation to common stock, retention of possession by ABB, and the outturn entitlement of an access seeker where ABB seeks to enforce a lien against another access seeker;³⁶⁰

353 August Indicative Access Agreement, cl 3.
354 August Indicative Access Agreement, cl 4.
355 August Indicative Access Agreement, cl 5.
356 August Indicative Access Agreement, cl 6.
357 August Indicative Access Agreement, cl 7.
358 August Indicative Access Agreement, cl 8.
359 August Indicative Access Agreement, cl 9.
360 August Indicative Access Agreement, cl 10.

- compliance with operational protocols, including provisions in relation to the obligations of the access seeker, and publication of operational protocols;³⁶¹
- information, including provisions in relation to information to be kept and provided by ABB, and information to be provided by access seekers;³⁶²
- ABB’s liability, including provisions in relation to access seeker acknowledgements, ABB’s non-excludable warranties, limitations on ABB liability, multiple caps on ABB liability, and mitigation processes;³⁶³
- insurance and risk, including provisions in relation to the maintenance of insurance by ABB, rights to inspect the insurance policy, risk issues, and when transfers of risk occur;³⁶⁴
- force majeure events, including provisions in relation to the definition of ‘force majeure events’, suspension of obligations, notices, minimisation of impacts, obligations to mitigate, payments, and labour disputes;³⁶⁵
- dispute resolution process for disputes arising under the executed access agreement, including provisions in relation to mediation, arbitration, and the maintenance of the agreement status quo during dispute periods;³⁶⁶
- termination, including provisions in relation to the right to terminate, effect of termination, termination by ABB, and the effect of ‘no prejudice’ for rights accrued prior to termination;³⁶⁷
- indemnity, including provisions in relation to an obligation for access seekers to indemnify ABB for certain matters, and application of the indemnity obligation;³⁶⁸
- miscellaneous other matters, including provisions in relation to notices³⁶⁹, no endorsement³⁷⁰, no assignment³⁷¹, waivers³⁷², no partnership³⁷³, governing law and jurisdiction³⁷⁴, sub-contracting³⁷⁵, severance³⁷⁶, and the entire agreement (including a mechanism for the amendment of the agreement)³⁷⁷;

³⁶¹ August Indicative Access Agreement, cl 11.

³⁶² August Indicative Access Agreement, cl 12.

³⁶³ August Indicative Access Agreement, cl 13.

³⁶⁴ August Indicative Access Agreement, cl 14.

³⁶⁵ August Indicative Access Agreement, cl 15.

³⁶⁶ August Indicative Access Agreement, cl 16.

³⁶⁷ August Indicative Access Agreement, cl 17.

³⁶⁸ August Indicative Access Agreement, cl 18.

³⁶⁹ August Indicative Access Agreement, cl 19.

³⁷⁰ August Indicative Access Agreement, cl 20.

³⁷¹ August Indicative Access Agreement, cl 21.

³⁷² August Indicative Access Agreement, cl 22.

³⁷³ August Indicative Access Agreement, cl 23.

³⁷⁴ August Indicative Access Agreement, cl 24.

³⁷⁵ August Indicative Access Agreement, cl 25.

³⁷⁶ August Indicative Access Agreement, cl 26.

³⁷⁷ August Indicative Access Agreement, cl 27.

- Schedule 1, which would set out the relevant reference prices for port terminal services under the executed agreement³⁷⁸; and
- Schedule 2, which would attach the ABB Port Terminal Services Protocols.³⁷⁹

In their submissions to the ACCC in response to the Draft Decision, interested parties made submissions about the appropriateness of the August indicative Access Agreement. These submissions are set out below.

9.5 Submissions from ABB in response to Draft Decision

ABB, in its submission on the ACCC's Draft Decision, does not make any submissions in support of its August Indicative Access Agreement.

It does, however, provide the following submissions on the issue of the appropriate mechanism by which the indicative access agreement (attached to the undertaking) could be varied. ABB submits that:

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

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

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

- (a) a requirement for ABB to notify the Commission of the proposed variation, and an ability for the Commission to object to that variation in its absolute discretion within 20 Business Days;
- (b) if the Commission objects to the proposed variation (for any reason in its absolute discretion), ABB would retain an ability to seek to vary the Standard Terms in accordance with the more formal procedure set out in section 44ZZA(7) of the TPA;

³⁷⁸ August Indicative Access Agreement, Schedule 1 (though the ACCC notes that Schedule 1 of the August Indicative Access Agreement was blank).

³⁷⁹ August Indicative Access Agreement, Schedule 2 (though the ACCC notes that Schedule 2 of the August Indicative Access Agreement was blank, though please see further the Capacity Management chapter.)

- (c) a requirement for any variations to be in accordance with the objectives of the Access Undertaking and ABB's obligations to provide non-discriminatory access;
- (d) a requirement for ABB to consult with "Major Users" in accordance with a specified and formal process, and provide a reasonable period of notice of any variation;
- (e) a requirement for ABB to publish any variation to the Standard Terms and notify the Commission of any variation within 2 Business Days; and
- (f) an express provision in the Access Undertaking stating that any variation to the Standard Terms will not override any Access Agreements which have been negotiated and concluded with Applicants.

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

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

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

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

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

ABB notes for completeness that the Commission has power to accept the proposed mechanism under section 44ZZA(6A) of the TPA.³⁸⁰

³⁸⁰ ABB Grain Limited, *Submission in relation to Draft Decision on ABB Access Undertaking*, 3 September 2009, pp. 9-10.

9.6 Submissions received from interested parties in response to Draft Decision

9.6.1 Australian Grain Exporters Association

Inclusion of an indicative access agreement in the proposed Undertaking

AGEA submits that the non-inclusion of an indicative access agreement in the proposed Undertaking would result 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.³⁸¹

Standard terms that should be included in the indicative access agreement

AGEA also submits that the indicative access agreements should ensure:

- (a) transparency in relation to port stocks (for wheat and other grains), accumulation plans (including incoming rail/road slots) and ship load order; and
- (b) accountability of BHCs, for example, in relation to demurrage/despatch and port inload spots.³⁸²

AGEA further submits that the indicative access agreements should include prices (for standard and non-standard services) and be binding, or require bulk handlers to publish prices (for standard and non-standard services) by 31 August at the latest.³⁸³

In relation to the proposed standard terms of the indicative access agreement, AGEA submits that the following elements should be included:

- (a) the prices for the services;
- (b) clearly specified circumstances in which higher charges (e.g., overtime) may apply, subject to AWEs being given an option to unload in peak times and BHCs providing documentary proof that overtime charges were incurred and why they were necessary;
- (c) certainty of term, so that the price and non-price terms are binding for the duration of the contract; it is inappropriate for the BHCs to be in a position to unilaterally alter the contractual terms;
- (d) limited opportunity to vary price and non-price terms (for example, only in the event of a material adverse change with reference to the Council of Australian Government's Competition and Infrastructure Reform Agreement pricing principles, i.e. that pricing must be based on the cost to the BHCs of providing the service, plus a reasonable commercial margin), and only if both parties agree to the changes, provided also that

³⁸¹ Australian Grain Exporters Association, *Submission in relation to Draft Decisions on Port Terminal Services Access Undertakings*, 3 September 2009, para 9.1.

³⁸² Australian Grain Exporters Association, *Submission in relation to Draft Decisions on Port Terminal Services Access Undertakings*, 3 September 2009, para 9.2.

³⁸³ Australian Grain Exporters Association, *Submission in relation to Draft Decisions on Port Terminal Services Access Undertakings*, 3 September 2009, para 9.3. For AGEA's further submissions on the 'timing for publication of standard terms and reference prices', refer to the Publish Negotiate Arbitrate chapter.

the varied price or non-price terms will only take effect after a minimum 6 months' notice to AWEs;

- (e) provisions which require the terms and conditions to be applied to wheat of specific grades or quality specifications which require segregation from other parcels throughout the port terminal facility;
- (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 receipt 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.
- (g) an effective right for AWEs to recover their loss and damage against BHCs if BHCs breach the terms and conditions of the port terminal services;
- (h) a shipping protocol which provides:
 - i. that if AWEs pay the vessel nomination fee and are allocated an estimated load date, BHCs must provide the necessary services to allow AWEs to load the vessel (within a three day spread), failing which BHCs will be liable for any loss or damage AWEs may suffer;
 - ii. transparency as to how the BHCs accept vessel nominations and provided 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; in order to be effective, this will require decisions to be made within 24 hours of one party notifying the other of a dispute;
- (i) an obligation on BHCs to provide AWEs with information relating to weight, quality and AQIS compliance and all other necessary information to assess whether BHCs have met the performance criteria within 24 hours of the information being available;
- (j) an obligation on BHCs to allow AWEs' superintendent (or independent third person nominated by AWEs) access to the port to sample AWEs' wheat and inspect the loading of AWEs' stock onto vessels;
- (k) an obligation on BHCs to provide AWEs with 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;
- (l) an obligation on BHCs to take running samples (for testing in relation to quality and specifications) as the grain is loaded onboard vessels;
 - (m) an obligation on BHCs to notify AWEs promptly if there is a problem or BHCs expect that they might not be able to perform their obligations;
 - (n) a complaints procedure to an independent body;
 - (o) a requirement that BHCs 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;
 - (p) an entitlement on the part of the ACCC to investigate any matters arising out of or relating to any complaints or the audit;
 - (q) a dispute resolution mechanism which allows for the speedy resolution of disputes, including a mechanism to refer any disputes under the undertaking to arbitration by the ACCC.³⁸⁴

Specific comments on the standard terms of the August Indicative Access Agreement

In relation to the standard terms to be included in an indicative access agreement, AGEA submits the following in relation to specific provisions of ABB's August Indicative Access Agreement:

1. Clause 1.3 Discretions and Approvals:

First, it is unnecessary and inconsistent with the port loading protocols (which set out the manner in which ABB is to make certain decisions) for the port terminal services agreement to deal with the manner in which ABB is to make decisions regarding access to port terminal services.

Secondly, where the port terminal services agreement or the port loading protocols provides that ABB is required to make a decision, the factors that ABB may take into account in making that decision should be specifically set out and should not be able to be capable of being qualified, contradicted or overridden by a general discretion of the kind in clause 1.3.

Thirdly, there is an imbalance between the objective manner in which the Client is required to make decisions and the subjective manner in which ABB is able to make decisions.

"(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".

³⁸⁴ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 4.17.

ABB is not required to comply with the above standards. Instead:

"(b) In making any decision pursuant to this Agreement the Company shall have regard to the efficient running of the relevant Port Terminal Facility and balancing of all users of that Port Terminal Facility.

(c) Any refusal 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 Grain export market as a whole."

The above criteria pursuant to which ABB is held to account is vague, opaque and uncertain.

It is not appropriate that ABB's subjective view is the basis of its absolute discretion whether or not to refuse a request to provide services.

2. Clause 2.1 Commencement, duration and application

"(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."

The above is contrary to a "publish/negotiate/arbitrate model".

3. Clause 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;"

ABB's definition of Port Terminal Services does not comply with WEM Act. ABB is not entitled to narrow the services that are encompassed by the proposed Undertaking. ABB's definition of Port Terminal Services must include all services that are provided and must be consistent with the definition in the Undertaking. AGEA agrees with the ACCC's proposed definition (see p. 75 of the ACCC's draft decision on ABB's port terminal services access undertaking).

4. Clause 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."

This clause provides ABB with a discretion whether or not to provide port terminal services. The purpose of the proposed Undertaking is to provide access to port terminal services. The obligation to provide access is subject to certain constraints (such as vessel nominations) which will be specified in the port terminal services agreement and the port loading protocol. Clause 4.2 is contrary to ABB's obligation to provide access. Further, there is no transparency regarding the availability (or lack thereof) of the port terminal facility and therefore no basis for determining whether it is a valid justification for not providing access to port terminal services.

If there are events which justifiably excuse a [bulk handler] from providing access to port terminal services, those events can be clearly specified in the agreement and protocols and the [bulk handler]s will be protected.

5. Clause 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 receipt 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."

There is no transparency as to:

- (a) what is meant by ABB assessing and classifying the wheat;
- (b) when the above will be completed;
- (c) what results will determine whether ABB will accept the wheat.

6. Clause 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.."*

As ABB determines whose and how much grain will be allowed into port, without full transparency as to how port capacity is utilised, it will not be possible to determine whether fair access is being provided to AWEs.

By way of general comment, the port terminal services agreement should also contain a right for access seekers to nominate a person to inspect the wheat and any records made by ABB in relation to the weight, variety, quality, grade and contamination of the wheat.

7. Clause 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)."*

ABB fails to provide any transparency as to how it will exercise its discretion to reserve a Cell in which AWEs can store grain.

Nor does ABB provide any transparency as to whether it will exercise its discretion to charge a fee for the Cell. The price to be charged for this and any other service offered by the [bulk handler]s must be included in the price list to be published by [bulk handler]s.

8. Clause 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)."*

ABB has an unfettered discretion to move AWEs' grain out of the port terminal to any of ABB's facilities, including those that are up-country. The discretion may be exercised by reference to matters that are not objectively ascertainable and there is no transparency in relation to the decision making process.

ABB will then charge the AWEs for the cost of moving the grain, using the freight rates published by ABB.

That results in ABB possibly manipulating stock positions for its own advantage and making a profit from unilaterally moving AWEs' grain, as ABB is not charging the freight at a cost rate.

The above is not consistent with fair and transparent access to port terminal services.

9. Clause 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....*

- (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."*

ABB retains the discretion whether to apply a charge for the above service.

There is no transparency provided as to what the charge might be and when the charge may be applied. These charges and charges for other services to be provided by [bulk handler]s should be included in the price list to be published by [bulk handler]s.

10. Clause 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."

ABB has listed various events which are meant to excuse it from responsibility to perform a task for which it has been paid.

Of the factors listed, failure to pass quarantine, stability and ship worthiness inspections should have no impact upon when the vessel will actually arrive at the port.

ABB should only be entitled to be excused for non-performance for failure to accumulate cargo where there is a breach by the AWEs that is not causative of the failure to accumulate.

11. Clause 7.8 Cleanliness

- (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."*

It is not appropriate that ABB is able to exercise a discretion to reject a vessel as being unfit. AMSA and AQIS inspect the vessels and are responsible for determining cleanliness. It is unnecessary for ABB to take on this role if the vessel has already passed the customary surveys. Clause 7.8 might be intended to provide further justification for rejecting or delaying vessels to change the vessel line-up to suit ABB. If it wishes to take on that role, it must be fully responsible for the consequences. It should not be entitled to be indemnified for exercising the discretion.

No transparency is provided as how ABB will exercise its discretion.

12. Clause 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."

ABB has an unfettered discretion to move AWEs' grain out of the port terminal to any of ABB's facilities, including those that are up-country.

ABB may move the wheat to a new location that will be "not freight advantaged to the Port Terminal".

ABB has not provided any transparency as to when and why it will move AWEs' wheat.

The above is not consistent with fair and transparent access to port terminal services.

13. Clause 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."

[Bulk handler]s should be required to publish prices before the ACCC decides whether to accept the Undertaking and, subsequently, by no later than 31 August of the relevant year.

The published prices should include standard and non-standard services offered by the [bulk handler]s.

The published prices should provide transparency in relation to BHCs' costs of providing the service to ensure prices are based on actual costs and are not discriminatory.

The published prices should not be subject to change during the term of the port terminal services agreement. Alternatively, the opportunity to amend published prices should be limited to the same circumstances in which a variation of the Undertaking is permitted.

[14]. Clause 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."

Including as a term of the access agreement a clause which gives ABB the right to demand payment for disputed monies is not consistent with fair access to port terminal services. There is no transparency as to whether ABB has the same requirement for its trading division. It is neither necessary nor appropriate that a "set off" clause be contained in the minimum terms and conditions in an access agreement. It is open to ABB to negotiate a clause of this kind with access seekers.

[15]. Clause 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."*

ABB's discretion is unfettered. Regardless of its obligation to provide access and how minor the amount is claimed by ABB to be owed (the amount may be disputed), ABB is entitled to demand payment of all invoices and may "in its absolute discretion" refuse to provide port terminal services.

[16]. Clause 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)."*

The security requirements are excessive. An accredited AWE must comply with WEA's stringent accreditation scheme, which includes having regard to the "*financial resources available to the company*" (s.13(1)(c)(i) of the WEM Act). It is unacceptable that ABB can unilaterally and without reference to any benchmarks, require any such security, especially from shareholders of an accredited wheat exporter.

[17]. Clause 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, "

As ABB may have co-ownership of wheat in a co-mingled stack, there must be stringent port terminal protocol and ring-fencing policies in place to ensure that ABB does not "cherry pick" higher quality of wheat from co-mingled stacks.

ABB has failed to provide any transparency as to how ABB will exercise its right to identify any particular quantity.

[18]. Clause 10.1 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."

It is not appropriate that ABB has the discretion to exercise a lien for all monies owing to any ABB Group Company.

If ABB had a proper ring-fencing policy in place, it is unclear how it and its related bodies corporate would be aware of the various transactions that provide for the opportunity to exercise a lien.

[19]. Clause 11.2 Publication

It should be made clear that the policies, procedures and induction requirements in relation to the operation, management and control of ABB's facilities are not intended to amend the port loading protocols.

[20]. Clause 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 willful 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..."*

Liability terms and limits must reflect commercial reality and contain realistic limits on liability. Given the volume of stock ABB handles, ABB should not be able to exclude or limit liability (including consequential loss). Requiring BHCs to be responsible for loss or damage caused would improve efficiency.

Further, ABB has unjustifiably limited its liability for Accidental Loss or Damage to the proportion of insurance recovered by ABB.

[21]. Clause 15 Force Majeure

The force majeure clause is extensive and excessive. "Breakdown" should not be considered a force majeure event, particularly where breakdown might be the cause of mechanical maintenance within the control of ABB.

[22]. 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."*

ABB's dispute resolution process is slow and thus ineffectual.

AGEA refers to paragraphs 8.16, 8.17(xi)-(xii), 8.23 – 8.39 above.

[23]. Clause 18 Indemnity

The indemnity clause is unnecessarily extensive and excessive.³⁸⁵

In relation to liability clauses generally, AGEA submits that bulk handlers should not be allowed to cap their liability, exclude consequential loss claims or exclude liability unless caused by negligence (gross or otherwise) or wilful default.³⁸⁶

AGEA also submits that liability terms and limits must reflect commercial reality and contain realistic limits on liability. AGEA submits that, given the volume of stock bulk handlers deal with, they should not be able to exclude or limit liability. Further, AGEA submits that requiring bulk handlers to be responsible for loss or damage caused would improve efficiency.³⁸⁷

In relation to the issue of bulk handler liability under an indicative access agreement, AGEA submits that:

Bulk handlers should provide fair compensation if they fail to provide the services that they are paid to provide. The terms and conditions of most bulk handlers who control port facilities cap their liability to access seekers at extraordinarily low levels. The grain cargoes involved in bulk shipments are worth large sums of money and if bulk handlers fail to properly provide port-related services, they can cause exporters to suffer losses well above these caps.

For example, if a bulk handler negligently fails to load uncontaminated cargo within an allocated shipment time, a wheat exporter is exposed to potentially enormous losses including costs such as replacing a contaminated cargo and

³⁸⁵ Australian Grain Exporters Association, *Submission in relation to Draft Decisions on Port Terminal Services Access Undertakings*, 3 September 2009, 3 September 2009, Schedule 2.

³⁸⁶ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 12.2.

³⁸⁷ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, Schedule 1, para I2.

paying for sea freight to transport the replacement cargo to an export customer. Wheat exporters have to pay all these costs even if they arise solely due to bulk handler negligence. These liability caps should be removed so that bulk handlers are fully accountable if they fail to provide services.³⁸⁸

Variation of the indicative access agreement

AGEA submits that the bulk handlers' approach to variation of the standard terms is not appropriate. AGEA submits that the ability for the bulk handlers 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. AGEA notes that the proposed Undertakings are for a short period and submits that any variation of the indicative access agreement (and the port loading protocols, which should both form part of the proposed Undertakings) should be in accordance with the process under section 44ZZA(7) of the TPA. AGEA submits that the same should apply in relation to the bulk handlers' published prices.³⁸⁹

In relation to unilateral variations prices under an indicative access agreement, AGEA submits:

Bulk handling fee structures are also convoluted and contain elements that are subject to change without notice. If fee structures cannot be relied on because the bulk handler changes them without notice after exporters price their wheat export program, this causes wheat exporters to incur costs which cannot be recovered from customers. The lack of available alternative port facilities, combined with bulk handlers' refusal to negotiate, mean that exporters have little choice but to pay these increased fees. Noting that these contracts are only 12 months in duration, bulk handlers should be required to negotiate reasonable terms and conditions with grain marketers, then stick to them during the contract period. This would allow marketers to price their grain sales with certainty about bulk handlers' costs and level of service, without the risk that they will be exposed to unexpected financial losses or denial of port facilities, thereby reducing their competitiveness.³⁹⁰

9.6.2 New South Wales Farmers' Association

In relation to the issue of bulk handler liability under an indicative access agreement, the NSW Farmers' Association submits that:

Another example of substantial market power relates to the storage and handling terms and conditions of a port operator which limits their liability in relation to a claim, which is recognised by 'the bulk handler' to be valid and 'the bulk handler' agrees to compensate the Client or, in other event, where 'the bulk handler' is liable to compensate or indemnify the Client, then 'the bulk handler's' maximum liability in respect of a claim shall not exceed \$500,000 for grain out loaded onto any shipping vessel, and \$10,000 for grain out loaded onto rail or road truck on any one day for a site. In the situation where a ship haul can be worth in excess of \$25 million and the entire value

³⁸⁸ Australian Grain Exporters Association, *Submission on wheat export marketing access undertakings*, 18 May 2009, pp. 2-3.

³⁸⁹ Australian Grain Exporters Association, *Submission in relation to Draft Decisions on Port Terminal Services Access Undertakings*, 3 September 2009, 9.5-9.9

³⁹⁰ Australian Grain Exporters Association, *Submission on wheat export marketing access undertakings*, 18 May 2009, p. 4.

of its contents can be placed in jeopardy if the ship fails to leave the port, it would seem to the Association that ‘the bulk handler’s’ liability is unusually conservative.³⁹¹

In relation to specific provisions of the standard terms of an indicative access agreement, the NSW Farmers’ Association submits that:

There are concerns that many of the fees and charges set by bulk handlers who are port operators, at their port facilities, are not a fair representation of the usual commercial rates. For example interest on overdue accounts is outlined as follows in ‘the bulk handler’s’ Storage and Handling Agreement Clause 3.9. “*the interest rate applicable under this Clause 3.9 is the rate which is 6% above the bank bill buying rate for bills with a tender of 90 days quoted from time to time by National Australia Bank.*” The Association understands that in most industries the commercially accepted rate is 2% above the 90 day bank bill. The Association feels that many of the fees set by the port operators and for that matter the upcountry grain storage and handling facilitators (as they often represent an extension of the port facilities business model), are not representative of a truly competitive market place nor is the environment conducive to the introduction of competition. For a competitor to survive it would seem necessary to closely monitor the fees set by port operators until such time as adequate competition is available to regulate this situation in the market place. Furthermore policy makers should give serious consideration toward how the industry is to achieve improved competition within regional areas of the nation in particular within the natural geographic and infrastructure created monopolies surrounding ports and port zones.³⁹²

9.7 ACCC’s views

9.7.1 Necessary for undertaking to include an indicative access agreement

The ACCC considers that the approach taken by ABB in its proposed Undertaking of 16 April 2009 of not including an indicative access agreement 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.³⁹³ They assist access seekers (through the negotiation and arbitration framework discussed in the Publish, Negotiate, Arbitrate chapter of this Further 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 indicative

³⁹¹ NSW Farmers’ Association, *Submission on port terminal services access undertakings*, 10 June 2009, p. 4.

³⁹² NSW Farmers’ Association, *Submission on port terminal services access undertakings*, 10 June 2009, p. 4.

³⁹³ See, for example, the access undertaking submitted by the Australian Rail Track Corporation (ARTC), and accepted by the ACCC on 30 July 2008.

access agreement is to ensure that the costs of negotiation and/or arbitration are not excessive.

The ACCC notes that ABB would be required to offer the indicative access agreement to access seekers who seek to obtain access to ABB's port terminal services on the basis of the standard terms provided under that agreement. For the avoidance of doubt, however, 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.

9.7.2 Revisions required to August Indicative Access Agreement

The ACCC does not consider that the August Indicative Access Agreement would form an appropriate basis for an indicative access agreement as it is currently drafted.

The ACCC considers that, in order to be acceptable to the ACCC, improvements would need to be made to ensure that:

- The indicative access agreement includes a robust dispute resolution process that balances the legitimate business interests of ABB with the interests of access seekers;
- Any ability of ABB to unilaterally vary the terms of an executed indicative access agreement can only be exercised in appropriate circumstances; and
- The terms and conditions of the indicative access agreement provide for sufficient certainty and clarity in their terms, effect and operation.

These three areas are discussed in detail below.

The ACCC notes submissions from a number of interested parties raising concerns about whether a number of the terms of the indicative access agreement are acceptable, based on the commercial considerations and circumstances of those interested parties. The ACCC notes however, that the standard terms provided under the an indicative access agreement are intended to be the minimum terms and conditions of access to ABB's port terminal services, and that access seekers will have the ability to negotiate (or arbitrate) non-standard terms that vary from any of those standard terms that they consider to be unacceptable, based on their own particular commercial considerations and circumstances. Accordingly, in this Further Draft Decision, the ACCC has not found it necessary to form views about whether the particular terms and conditions of the August Indicative Access Agreement would be acceptable to particular parties (given likely differences between the commercial considerations and circumstances of specific access seekers).

Dispute Resolution

A key feature of an effective indicative access agreement is a robust dispute resolution process. The ACCC is concerned with ensuring fair and transparent access

to port terminal services and that includes ensuring that the dispute resolution process fairly balances the legitimate business interests of ABB with the interests of access seekers.

The dispute resolution process provided under clause 16 of ABB's August Indicative Access Agreement is set out below:

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 and Industrial Awards 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.

The ACCC considers that the dispute resolution provisions at clause 16 of ABB's August Indicative Access Agreement (set out above) would require a number of

revisions in order to be considered appropriate for inclusion in the undertaking. This is because the relevant processes and timeframes that must be followed for the resolution of disputes have not been drafted with a sufficient level of clarity and detail.

The ACCC notes that ABB has informed the ACCC that its revised indicative access agreement, to be attached to a revised undertaking, will provide a greater level of clarity and detail in relation to the specific processes and timeframes that must be followed for the resolution of disputes.

Unilateral variation of terms of an executed indicative access agreement

The ACCC is of the view that ABB's approach to the variation of agreed non-price related terms under an executed access agreement is appropriate. This is because, under the August Indicative Access Agreement, variations to agreed non-price related terms is only allowed to occur with the written agreement of both parties to that agreement under clause 27.3, which states that "[t]his 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."

In relation to variation of price terms under the August Indicative Access Agreement, it is unclear whether it is envisaged that prices could be unilaterally varied by ABB under an executed indicative access agreement. In this regard, the ACCC notes that clause 8.1 of the August Indicative Access Agreement provides that "[t]he 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." The ACCC notes that Schedule 1 was blank as at the time of consultation on the August Indicative Access Agreement.

Regardless of the intention of the August Indicative Access Agreement, the ACCC notes that it would not be appropriate for ABB to have an unrestricted ability to unilaterally vary either the agreed price or non-price related terms under an executed access agreement (which may include agreed standard terms or non-standard terms), since this would result in a lack of certainty and clarity for access seekers with such an executed access agreement in place.

The ACCC considers that the ability to vary the agreed price and non-price terms under an executed access agreement should only be permitted in the following circumstances:

- for non-price related agreed terms, variations should only be permitted to occur with the written agreement of all relevant parties to the executed access agreement; and
- for price related agreed terms, variations should only be permitted to occur with the written agreement of all relevant parties to the executed access agreement, or by ABB (on a unilateral basis) under a limited range of clearly defined circumstances (for example, where there is a new law, or change to an existing law, which results in an increase in the cost to ABB of providing a particular port terminal service).

The ACCC notes that it would be appropriate for any unilateral price rises under the second scenario set out above to still be subject to the negotiation and arbitration provisions in the undertaking in the event that an access seeker did not accept ABB's decision to vary prices.

Certainty and clarity

The ACCC is concerned that a number of the clauses in ABB's August Indicative Access Agreement do not provide for sufficient certainty and clarity in its terms, effect and operation. It is important that an indicative access agreement is sufficiently clear and certain given that the intention of an indicative access agreement is to provide a clear starting point for negotiations between an access seeker and ABB (and clarity is therefore critical to ensuring access seekers can effectively negotiate with ABB) and to ensure that the costs of negotiation and/or arbitration are not excessive.

In particular, the ACCC's views on particular clauses are as follows:

- in relation to clause 1.3(c), which provides:

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.

It is not appropriate for ABB to have the broad discretion to refuse to supply access seekers with port terminal services based on the subjective decision criteria set out in this provision. The ACCC considers it appropriate for this provision to be removed or redrafted to provide a more objective basis for the exercise of such discretion.

- in relation to clause 5.6(b), which states that:

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 product a new sample for testing prior to any further deliveries.

This clause is not appropriate since it does not clearly specify whether the prohibition on delivery by an access seeker relates only to the delivery load that is found to be contaminated, or to all subsequent deliveries from that access seeker. It is also not appropriate that there is no clear process under which the access seeker is able to provide independent verification that there is no further risk of contamination. The ACCC considers it appropriate for this provision to be more clearly drafted to avoid uncertainty.

- in relation to clause 7.4(b), which states that:

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 receipt or are an inherent component of the Bulk Wheat which deteriorates with time based storage.

The inclusion of this provision is not appropriate since it is not clear what the term “*stringent standard*” would mean, nor what charge would be applied for the relevant service. The ACCC considers it appropriate for this provision to be clarified or removed altogether.

- in relation to clause 13, which states that:

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 is not liable for Accidental Loss or Damage to the Client's Bulk Wheat.*
- (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 (i.e. Bulk Wheat that does 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.

The current drafting of the provisions in this clause (regarding limitations on ABB's liability under the August Indicative Access Agreement) is not sufficiently clear and certain. The ACCC considers it appropriate for the provisions of this clause to be redrafted to provide greater clarity and certainty as to the specific limitations on ABB liability, and the extent to which ABB will not be able to exclude its liability (for example, where an act or omission by ABB has caused or contributed to the relevant loss or damage).

- in relation to clause 18.1(d), which states that:

...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.

The current drafting of this provision (regarding limitations on ABB's liability for the admixture of other commodities, also loaded by ABB at the relevant port terminal, with the access seeker's bulk wheat) is not sufficiently clear and certain and is, therefore, not appropriate. The ACCC considers appropriate for this provision to be redrafted with greater clarity and detail, and (to the extent possible) for a reasonable admixture 'materiality' threshold to be included.

9.7.3 Variation of the indicative access agreement

ABB's approach in its proposed Undertaking of 16 April 2009 of retaining discretion to unilaterally vary its "standard terms" (i.e. the price and non-price related terms which are intended to be included in ABB's 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.

As set out in the ACCC's Draft Decision, it would be 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.

The ACCC understands that the standard terms upon which ABB offers grain exporters do not vary greatly from year to year. The ACCC also understands that, in relation to standard terms 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.

The ACCC notes that ABB, in its submission in response to the ACCC's Draft Decision, submitted that the ACCC should consider allowing ABB to include what it terms a "parallel variation mechanism" in relation to the standard terms contained in its August Indicative Access Agreement, which would operate in conjunction with the variation procedure set out in section 44ZZA(7)³⁹⁴ (see the above section "1.4 ABB's

³⁹⁴ ABB Grain Limited, *Submission in relation to Draft Decision on ABB Access Undertaking*, 3 September 2009, pp. 9-10.

submissions on its 16 April 2009 Undertaking in response to the ACCC's Draft Decision"). This proposed "parallel variation mechanism" appears to be based on the prices notification regime provided under Part VIIA of the TPA.

The ACCC considers that the inclusion of such a "parallel variation mechanism" would not be appropriate. This is because the inclusion of the access test under the WEMA demonstrates a clear intention by Parliament for port terminal services to be subject to the undertakings regime under Part IIIA of the TPA. Accordingly, the inclusion of a mechanism under providing for variations to the standard terms of the August Indicative Access Agreement (that is, based on the prices notification regime under Part VIIA of the TPA rather than being subject to the variation mechanism in Part IIIA of the TPA) is not appropriate in these circumstances. Additionally, the inclusion of ABB's proposed "parallel variation mechanism", although it does not allow for ABB to unilaterally vary its standard terms, would also be likely result in a lack of certainty and clarity for potential access seekers.

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 dated 16 April 2009 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 and no hindering access clauses does not ensure that they will protect against ABB 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 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).

Further, in order for the ACCC to be able to monitor compliance with the non-discrimination clause, the ACCC considers it would be appropriate for ABB's proposed Undertaking to allow the ACCC to request an audit be undertaken to assess compliance with the non-discrimination clause (but no more than twice in every twelve months).

10.1 ABB's proposed Undertaking dated 16 April 2009

The following are ABB's non-discrimination provisions within its proposed Undertaking, dated 16 April 2009:

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,

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.³⁹⁵

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;

³⁹⁵ ABB Grain Ltd, *Port Terminal Services Access Undertaking*, 16 April 2009, clause 5.4.

- (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.³⁹⁶

The non-discrimination clause in ABB's proposed Undertaking is also linked to the 'Objectives' provisions set in clause 1.2. For instance, ABB 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;

³⁹⁶ ABB Grain Ltd, *Port Terminal Services Access Undertaking*, 16 April 2009, clause 5.5.

- (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 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.³⁹⁷

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.³⁹⁸

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.³⁹⁹

³⁹⁷ ABB Grain Ltd, *Port Terminal Services Access Undertaking*, 16 April 2009, clause 1.2.

³⁹⁸ ABB Grain Ltd, *Port Terminal Services Access Undertaking*, 16 April 2009, clause 8.4(a).

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 will adopt practices and policies to promote fair, reasonable and non-discriminatory Operational Decision making'.⁴⁰⁰

At clause 8.4(d) ABB states that it may, in making Operational Decisions:

- (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.⁴⁰¹

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.⁴⁰²

³⁹⁹ ABB Grain Ltd, *Port Terminal Services Access Undertaking*, 16 April 2009, clause 8.3.

⁴⁰⁰ ABB Grain Ltd, *Port Terminal Services Access Undertaking*, 16 April 2009, clause 8.4(c).

⁴⁰¹ ABB Grain Ltd, *Port Terminal Services Access Undertaking*, 16 April 2009, clause 8.4(d).

⁴⁰² ABB Grain Ltd, *Port Terminal Services Access Undertaking*, 16 April 2009, clause 8.5.

10.2 ABB's submissions in support of its April Undertaking

ABB states that its proposed Undertaking includes non-discriminatory access clauses which prohibit it from 'discriminating in favour of its own business'.⁴⁰³ 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 providing access to the Port Terminal Services including a return on investment commensurate with risk'.⁴⁰⁴

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.⁴⁰⁵

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'.⁴⁰⁶

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.⁴⁰⁷

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)'.⁴⁰⁸

⁴⁰³ ABB Grain Ltd, *Submission to the ACCC*, 16 April 2009, para 8.8, p. 29.

⁴⁰⁴ ABB Grain Ltd, *Submission to the ACCC*, 16 April 2009, para 8.8, p. 29.

⁴⁰⁵ ABB Grain Ltd, *Submission to the ACCC*, 16 April 2009, n 1, p. 4.

⁴⁰⁶ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 31.

⁴⁰⁷ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 36.

⁴⁰⁸ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, Attachment 2, p. 63.

10.3 Submissions received from interested parties in response to ACCC Issues Paper dated 29 April 2009

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).⁴⁰⁹

AGEA notes the link between ABB's non-discriminatory access clause and the 'objectives' clause of the proposed Undertaking. In this regard, AGEA submits that:

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.⁴¹⁰

AGEA submits that clause 5.4(b) of ABB's proposed Undertaking 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*"'.⁴¹¹

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'.⁴¹²

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;

⁴⁰⁹ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 10.1, p. 25.

⁴¹⁰ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 10.2, p. 25.

⁴¹¹ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 10.3, p. 25.

⁴¹² Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 10.4, p. 25.

- (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 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.⁴¹³

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.⁴¹⁴

AGEA submits that ABB discriminates in the provision of port terminal services depending on whether the wheat is received from ABB's up-country facilities or via services provided by third parties.⁴¹⁵ 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

⁴¹³ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 10.4, pp. 25-26.

⁴¹⁴ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 10.5, p. 26.

⁴¹⁵ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 3.13, p. 5.

ABB, but ‘merely act as a penalty (or disincentive) in the event that...[access seekers]...do not use certain BHCs’ services’.⁴¹⁶

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:

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 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)).⁴¹⁷

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’⁴¹⁸ and that ‘[w]hether these can be met will need to be assessed by ACCC and then closely monitored on a regular basis’.⁴¹⁹

In this regard SAFF states:

⁴¹⁶ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 3.24, p. 8.

⁴¹⁷ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 15.1-15.6, pp. 33-34.

⁴¹⁸ South Australian Farmers Federation Grains Industry Committee, *Submission in relation to proposed ABB access undertaking*, May 2009, p. 8.

⁴¹⁹ South Australian Farmers Federation Grains Industry Committee, *Submission in relation to proposed ABB access undertaking*, May 2009, p. 8.

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.⁴²⁰

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'.⁴²¹

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 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 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.⁴²²

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'.⁴²³ 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]y' meet 'their access conditions'.⁴²⁴

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'.⁴²⁵ 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

⁴²⁰ South Australian Farmers Federation Grains Industry Committee, *Submission in relation to proposed ABB access undertaking*, May 2009, p. 8.

⁴²¹ Grain Industry Association of Victoria, *Submission in relation to proposed access undertakings*, 1 June 2009, p. 2.

⁴²² Grain Industry Association of Victoria, *Submission in relation to proposed access undertakings*, 1 June 2009, pp. 1-2.

⁴²³ NSW Farmers Association, *Submission in relation to proposed access undertakings*, June 2009, p. 5.

⁴²⁴ NSW Farmers Association, *Submission in relation to proposed access undertakings*, June 2009, p. 5.

⁴²⁵ Victorian Farmers Federation, *Submission in relation to proposed access undertakings*, 28 May 2009, p. 3.

particular up country storage facilities and of forcing non-port operating marketers to use specific up-country facilities.⁴²⁶

10.3.6 ABB's submissions in response to ACCC's Draft Decision

In response to the views set out in the ACCC's Draft Decision regarding non-discrimination, ABB submits:

Non-Discriminatory Access

Introduction

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

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

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

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

(a) take or pay arrangements provided by ABB's Trading Division (which clearly lessen the cost of business risks faced in the provision of infrastructure services); and

(b) other practices put in place by ABB Marketing which had the effect of lessening the risks assumed (or costs faced) by ABB in relation to the provision of infrastructure services.

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

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

Consequences of breach and commercial disincentives created by uncertainty

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

⁴²⁶ Victorian Farmers Federation, *Submission in relation to proposed access undertakings*, 28 May 2009, p. 3.

could form a different view to that formed by ABB in calculating cost-based savings, notwithstanding that ABB had implemented a methodology and determined a quantum in good faith.

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

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

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

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

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

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

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

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

- (b) ***Revised Access Undertaking involves increased scrutiny*** – following commencement of the Access Undertaking, ABB will be subject to a very high level of scrutiny of its compliance with the Access Undertaking, both on an internal and external basis. In particular, ABB’s compliance with the objectives and requirements

of the Access Undertaking (including the non-discriminatory access provisions) will be monitored by way of:

- (i) a high degree of transparency and information, including through:
 - (A) the Shipping Stem (updated daily);
 - (B) ABB's proposal to publish certain information about wheat at port and vessel nominations; and
 - (C) ABB's proposal to satisfy regular reporting requirements in relation to performance standards. Collectively, this information will ensure that access seekers, the Commission and other interested parties will have up to date and extensive knowledge about the operation of ABB's Port Terminals, the provision of Port Terminal Services and compliance with the terms of the Access Undertaking;
- (ii) access seekers negotiating for access to Port Terminal Services will monitor ABB's compliance with the Access Undertaking generally, and the non-discrimination provisions particularly. In the event that an access seeker considers that ABB is noncompliant, it will be entitled to refer the matter to arbitration in accordance with the process in clause 7 of the Access Undertaking, or investigation by the Commission;
- (iii) following any reference to arbitration, the arbitrator (which may be the Commission) will assess ABB's compliance with the Undertaking, including whether ABB has provided access on non-discriminatory terms; and
- (iv) internal procedures and processes designed to ensure compliance with ABB's obligations pursuant to the Access Undertaking, and assessment of ABB's compliance with those procedures and processes.

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

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

- (a) audits will only be conducted at the direction of the Commission;
- (b) the Commission will not require audits more than once in any 12 month period; and
- (c) where an audit has been prepared for WEA in accordance with the WEMA during the six month period prior to an audit requested by the Commission, the Commission will have regard to that audit, in the interests of preventing the unnecessary duplication of work.⁴²⁷

10.3.7 Submissions from interested parties in response to Draft Decision

10.3.7.1 Australian Grain Exporters Association (AGEA)

In response to the views set out in the ACCC's Draft Decision regarding non-discrimination, AGEA submits:

⁴²⁷ ABB Grain Limited, *Submission in relation to Draft Decision on ABB Access Undertaking*, 3 September 2009, pp. 3-6.

It is imperative that the BHCs proposed Undertakings include robust and enforceable non-discrimination and no hindering access clauses. BHCs' compliance with these clauses should be subject to an annual audit by an independent third party.

The non-discrimination and no hindering access clauses proposed by the BHCs are not appropriate given the lack of clarity about their interpretation. The BHCs' non-discrimination clauses do not ensure the BHCs will be prohibited from discriminating in favour of their own marketing arm.

Specifically, the BHCs must not be able to discriminate between AWEs on any basis, including where grain was stored (i.e. whether it was stored in the BHCs' up-country storage and handling network, a third party storage network or on-farm) or how it was transported to the BHCs' facilities.

The non-discrimination no hindering access clauses must be wide enough to encompass all forms discrimination and hindrance, such as but not limited to, the prices charged and delays in obtaining access to the port terminal facilities.⁴²⁸

AGEA further submits:

(a) Appropriate to include a non-discrimination clause in the proposed Undertaking

(A) AGEA agrees that it is appropriate for the BHCs proposed Undertakings to include a non-discriminatory access clause obliging it to not discriminate against access seekers in favour of its affiliated trading business.

(B) The anti-discrimination clause must be robust in order to avoid regional monopolies unfairly controlling infrastructure necessary to export wheat in bulk quantities, to the detriment of other accredited exporters.

(C) AGEA agrees with the ACCC's proposed non-discrimination clause, which is straightforward and clear. As the ACCC suggests, price discrimination should only be permitted where it aids efficiency and therefore should be limited to circumstances where the cost of providing access to other access seekers is higher. If price discrimination is permitted in circumstances where the cost of providing access is higher, there must also be transparency in relation to such costs so that access seekers know the differential in price is justified.

(D) [...]

(E) The ACCC has stated that price discrimination in favour of BHCs' 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.

(F) However, unless there is transparency in relation to BHCs' operational decisions and costs and charges and binding terms and conditions of access, including binding indicative pricings for their standard and non-standard services which are published in advance of the commencement of the Undertakings, it will not be possible to determine whether discrimination has taken place. To ensure fair and transparent access to port terminal services, BHCs' compliance with the non-discrimination clause, ring-fencing policies and the proposed Undertaking generally must be the subject of an annual audit by an independent third party.

Non-discrimination in making Operational Decisions

⁴²⁸ Australian Grain Exporters Association, *Submission in relation to Draft Decisions on Port Terminal Services Access Undertakings*, 3 September 2009, p. 6.

(G) Although there should be a general umbrella obligation of non-discrimination in the negotiation and provision of port terminal services, AGEA accepts the ACCC's position that it is appropriate for BHCs to include a non-discrimination clause in relation to its operational decisions. However, AGEA agrees with the ACCC's reasons for rejecting proposed CBH clause 9.2(b)(ii) and 9.2(d) (GrainCorp/ABB clause 8.3 and 8.4) which makes the ability to discriminate in relation to operational decisions 'subject to' other clauses, the combined effect of which would not achieve the objective of prohibiting BHCs from discriminating in favour of its own business.

A more appropriate non-discrimination clause

(H) AGEA agrees with the ACCC's proposed non-discrimination clause, save that the requirement to not discriminate must also extend to the negotiation process of the provision of port terminal services and the dispute resolution process.⁴²⁹

10.4 ACCC's views

10.4.1 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 these claims. To the extent that claims have raised allegations relating to 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 s44ZZA(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

⁴²⁹ Australian Grain Exporters Association, *Submission in relation to Draft Decisions on Port Terminal Services Access Undertakings*, 3 September 2009, pp. 22-23.

accredited exporters should have access to these facilities while allowing the operators of the facility to function in a commercial environment.⁴³⁰

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.⁴³¹ 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 s44ZZCA 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
 - (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.⁴³²

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.

⁴³⁰ Explanatory Memorandum, *Wheat Export Marketing Act 2008* (Cth), p. 31.

⁴³¹ *Trade Practices Act 1974* (Cth) s44ZZCA(b)(i).

⁴³² *Trade Practices Act 1974* (Cth) s44ZZCA.

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.

10.4.2 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 these standard terms and conditions to form a part of ABB's proposed Undertaking.

With minimum standard terms in the Undertaking, 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 s44ZZCA(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'.⁴³³

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 s44ZZCA make reference to 'efficient costs' rather than 'all costs'.

⁴³³ ABB Grain Ltd, *Submission to the ACCC*, 16 April 2009, para 8.8, p. 29.

(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 capacity⁴³⁴ 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 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.

⁴³⁴ ABB Grain Ltd, *Submission to the ACCC*, 16 April 2009, para 2.5(c), p. 5.

(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 ABB would 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 necessary for these 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.

10.4.3 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’.⁴³⁵

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 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 (i.e. whether it was stored in

⁴³⁵ *National Gas (South Australia) Act 2008 (SA)*, Schedule 1, National Gas Law, clause 136.

ABB's up-country storage and handling network, a third party storage network or on-farm).

The ACCC notes the submissions from AGEA that the non-discrimination clause should extend beyond the act of provision of access to the negotiation and dispute resolution process. In this regard, the ACCC is of the view that AGEA has adopted an unduly narrow interpretation of the meaning of the words 'in providing access to Port Terminal Services'. The non-discrimination clause will extend to all matters relating to, and necessary for, the provision of access including setting the terms and conditions of access. This is evident from ABB's own submissions, which relevantly refer to 'take or pay arrangements' provided by its own trading division – such arrangements clearly falling within the scope of terms of conditions upon which access is provided. Moreover, in relation to dispute resolution, the April undertaking provided that an arbitrator must take into account the non-discrimination clause. Therefore, the operation of the clause will extend to the negotiation and dispute resolution processes, where relevant.

The ACCC notes ABB's submission that the non-discriminatory access clause proposed by the ACCC in its Draft Decision has the potential to act as a 'substantial disincentive for ABB to actively pursue cost-based efficiencies'.⁴³⁶ In response to this submission, the ACCC notes:

- The ACCC's proposed non-discrimination clause is based on the pricing principles set out in s44ZZCA of the TPA. These principles provide that access price structures should 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.⁴³⁷
- Given ABB's vertically integrated structure, discrimination by ABB in favour of its own trading business by way of different price and/or non-price terms and conditions of access, is only appropriate where these different terms and conditions reflect differences in the underlying costs of providing access to different access seekers.
- The ACCC's view is that 'the cost of providing access' in respect of this proposed Undertaking would be viewed relatively broadly in the sense that 'costs' would be viewed as all genuine and verifiable costs of providing a particular service to different access seekers. 'Costs' in this context should not be limited to (although they would include) explicit cash costs. 'Costs' would likely include, amongst other things, all verifiable accounting costs, operating and capital, of providing the service in question.
- Further, the ACCC is mindful that investments in improved production processes that generate genuine productive efficiencies should be encouraged, not discouraged. As a general principle, where ABB has generated improved

⁴³⁶ ABB Grain Limited, *Submission in relation to Draft Decision on ABB Access Undertaking*, 3 September 2009, p. 4.

⁴³⁷ See *Trade Practices Act* s 44ZZCA(b)(ii), (emphasis added).

efficiencies in a production process that give rise to verifiable lower costs (e.g. per-unit costs) in respect of a certain service provided by that process, ABB should be permitted to pass through the cost differences generated by those efficiencies in the form of lower access charges to those access seekers using that service, provided that all access seekers reasonably have the non-discriminatory ability to use that service if they choose, whether or not they in fact choose to use it.

The ACCC notes ABB's interpretation of the types of differentiation which would be permitted under the sample clause advanced by the ACCC in its Draft Decision – specifically, ABB's statements regarding 'take or pay' contracts and 'other practices put in place by ABB Marketing which had the effect of lessening the risks assumed (or costs faced) by ABB in relation to the provision of infrastructure services'.⁴³⁸ On this issue, it is important to note that, in the absence of evidence about whether these arrangements would give rise to verifiable lower costs, the ACCC has not formed a view on whether these practices would constitute acceptable forms of differentiation.

10.4.4 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 TPA – '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.⁴³⁹

⁴³⁸ ABB Grain Limited, *Submission in relation to Draft Decision on ABB Access Undertaking*, 3 September 2009, p. 4.

⁴³⁹ *Trade Practices Act 1974* (Cth), s 44ZZ.

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 TPA.

10.4.5 Enforcement of non-discrimination commitments

The ACCC notes that, under s44ZZJ of the TPA, if the ACCC thinks that the provider of an access undertaking has breached any of its terms, the ACCC may apply to the Federal Court to enforce the access undertaking. The Court may make orders directing the provider to comply with the undertaking, directing the provider to compensate any other person who has suffered loss or damage as a result of the breach, or any other order that the Court thinks appropriate. The enforcement of the terms of the access undertaking would include the non-discrimination clause.

The ACCC notes ABB’s submission that the publication requirements of its Undertaking, discussed in the Publication of Information chapter, should provide for sufficient transparency around whether discriminatory conduct is occurring. The ACCC does not accept this submission. As set out in the Publication of Information chapter, the publication requirements are not intended to be onerous and address very specific concerns by the ACCC – i.e. the potential to block out port capacity in favour of non-wheat grains and the potential for the port operator to use information obtained from vessel nominations in a self-preferential way for the time period between receipt of the nominations and publication on the shipping stem. The publication requirements are not intended to expose all possible ways in which a port operator could engage in self-preferential treatment.

In order to assist the ACCC to monitor compliance with the non-discrimination clause and assist in ensuring access to port terminal services is fair and transparent, the ACCC considers that it would be appropriate for ABB’s revised Undertaking to provide for an annual audit of compliance with the non-discrimination clause.

However, the ACCC is cognisant of ABB’s view that the introduction of such an audit procedure is not required given that it is already subject to audit obligations under the WEMA and that any introduction of an additional audit requirement would simply ‘add to and replicate aspects of ABB’s existing regulatory burden without any clear justification’.⁴⁴⁰

In this regard, the ACCC considers that in order to avoid the undesirability of imposing regulation that is not appropriate at a time when the industry is newly liberalised and in transition, it would be appropriate that:

- rather than prescribing a mandatory audit, the audit would only need to be carried out at the direction of the ACCC (which may occur, for example, in response to allegations of discrimination); and
- the audit not be carried out more than twice in every twelve months (to keep down costs on ABB of conducting the audit).

⁴⁴⁰ ABB Grain Limited, *Submission in relation to Draft Decision on ABB Access Undertaking*, 3 September 2009, p. 5.

Further, the ACCC recognises that it may be the case that a WEA-directed audit report may satisfy ABB's compliance with its obligations to provide the ACCC with an audit of compliance with its non-discrimination clause. In this regard, the ACCC notes that if the WEA's audit processes cover areas in which the ACCC also seeks an audit report, then it is likely that the WEA-directed audit would provide sufficient information for the ACCC's purposes. The ACCC notes, however, that this would only be appropriate if the WEA-directed audit report, if provided to the ACCC by ABB, was conducted within 3 months of the request made by the ACCC (rather than the 6-month period proposed by ABB).

The ACCC further notes, however, that it would require the discretion to determine whether the WEA-directed audit did indeed satisfy the ACCC's request for an audit of compliance with the non-discrimination clause.

11 Ring Fencing

Summary

Ring-fencing is one tool that can be used, in conjunction with robust non-discrimination and no hindering access clauses, fair and transparent port loading 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 loading protocols and an indicative access agreement (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, as explained in the Publication of Information chapter), 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 state of the industry and the possibility that any ring-fencing measures that were implemented at this point in time may need to be revised in the medium term 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.

That said, the ACCC is cognisant of calls by a number of interested parties for robust ring-fencing measures to be included in the Undertaking and 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 dated 16 April 2009

ABB's proposed Undertaking includes a set of Ring Fencing Rules at Schedule 2, which cover the following areas:⁴⁴¹

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.

Permitted Information Flows

⁴⁴¹ ABB Grain Ltd, *Port Terminal Services Access Undertaking*, 16 April 2009, Schedule 2, pp. 36-38.

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:
 - in dealing directly with Applicants or Users or potential Applicants or Users;
 - are involved directly in the provision of access to Port Terminal Services to Applicants and Users; and
 - 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.⁴⁴²
- (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.
- (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.

⁴⁴² ABB Grain Ltd, *Port Terminal Services Access Undertaking*, 16 April 2009, Schedule 2, p. 37.

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 in response to ACCC's Issues Paper

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'.⁴⁴³

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) provide ABB with any visibility of the exporters' customers, sale prices, future tenders or contracts, or wider global trading operations or trading position.⁴⁴⁴

⁴⁴³ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, para 1.5, p. 65.

⁴⁴⁴ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, para 1.5, p. 65.

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’.⁴⁴⁵ 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.⁴⁴⁶

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’.⁴⁴⁷

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).⁴⁴⁸

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’.⁴⁴⁹

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

⁴⁴⁵ ABB Grain Ltd, *Submission to the ACCC*, 16 April 2009, para 6.1, p. 22.

⁴⁴⁶ ABB Grain Ltd, *Submission to the ACCC*, 16 April 2009, para 6.2, p. 22.

⁴⁴⁷ ABB Grain Ltd, *Submission to the ACCC*, 16 April 2009, para 6.6, p. 22.

⁴⁴⁸ ABB Grain Ltd, *Submission to the ACCC*, 16 April 2009, para 6.9, p. 24.

⁴⁴⁹ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 47.

separation between its National Supply Chain Division (“NSC”) and Marketing Division’.⁴⁵⁰

11.3 Submissions received from Interested Parties in response to ACCC’s Issues Paper

11.3.1 Australian Grain Exporters Association (AGEA)

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.⁴⁵¹ 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.⁴⁵²

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.⁴⁵³

⁴⁵⁰ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 48.

⁴⁵¹ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 16.1, p. 34.

⁴⁵² Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 16.2-16.5, pp. 34-35.

⁴⁵³ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 4.15, p. 12.

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’.⁴⁵⁴

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.⁴⁵⁵

11.3.3 ABB’s submissions in response to ACCC Draft Decision

In response to the ACCC’s Draft Decision, ABB did not make a submission on the ACCC’s conclusion that it is not necessary for ring-fencing measures to be included in its Undertaking at this time.

11.3.4 Submissions from Interested Parties in response to ACCC’s Draft Decision

11.3.4.1 Australia Grain Exporters Association (AGEA)

In response to the views set out in the ACCC’s Draft Decision regarding ring-fencing, AGEA submits:

Ring-fencing

AGEA believes that the ACCC should not discard the need for robust and enforced ring-fencing policies (with a requirement for an annual audit as to compliance with the ring-fencing provisions) even if the BHCs’ Undertakings contain a robust non-discrimination and no hindering access clause. The respective histories of the BHCs suggest that without ACCC intervention, the BHCs will not provide ring-fencing policies that are adequate and they will in any event, be discarded when convenient to that BHC. Removing ring-fencing policies will take away any protection against the BHCs providing confidential information to their marketing arm. The result will be a complete failure of operators being required to provide “*fair and transparent access*” to their port terminal services to AWEs (see paragraphs 11.1 – 11.11 below).⁴⁵⁶

AGEA further submits:

The ACCC considers, and AGEA agrees, that the BHCs’ current ring-fencing rules are not an effective safeguard against anti-competitive discrimination in the provision of port terminal services.

⁴⁵⁴ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, Schedule 1, para L2(i), p. 49.

⁴⁵⁵ South Australian Farmers Federation Grains Industry Committee, *Submission in relation to proposed ABB access undertaking*, 3 July 2009, p. 12.

⁴⁵⁶ Australian Grain Exporters Association, *Submission in relation to Draft Decisions on Port Terminal Services Access Undertakings*, 3 September 2009, p. 7

However, AGEA does not agree with the ACCC's view that if the BHCs' proposed Undertakings are amended to contain “*robust non-discrimination and no hindering access clauses, fair and transparent port terminal protocols and an indicative access agreement (as well as measures to deal with the potential for information about port terminal services to be used to the advantage of [the BHCs'] wheat exporting arm), then, in the circumstances, it would not be necessary for ring-fencing measures to be included in [the BHCs'] undertaking at this particular point in time.*”

As is clear from the above, the BHCs are not offering to provide access to terminal services in accordance with the above principles. As such, and for the further reasons set out immediately below, a robust ring-fencing policy is essential to ensure BHCs provide fair and transparent access to port terminal services to all AWEs.

The ACCC has taken the above view due to transitional nature of the industry and the short duration of the proposed Undertaking.

AGEA recognises that the duration of the Undertaking may be considered to be short. However, in an industry that is in transition and now involves 23 companies that are accredited to AWEs, it is essential that robust ring-fencing rules are out in place.

The substantial number of failings identified by the ACCC in the BHCs proposed Undertakings which require wholesale rectification is telling.

The BHCs have shown that they will not provide fair and transparent access to port terminal facilities to AWEs, unless required to do so under the risk that their trading arm losing export accreditation.

As noted by the ACCC, some BHCs have drawn out this proposed Undertaking process. They have not been open and frank. Each revised submission has in reality, been an attempt to have the ACCC accept their proposed Undertakings with as little as possible monopolistic advantages surrendered.

The majority of the BHCs' submissions to the ACCC have been timed so as to exclude the possibility of those submissions being subjected to proper public scrutiny and consultation before the ACCC provided its draft decisions.

Twenty three newly accredited companies have been identified by WEA as being worthy of exporting bulk wheat from Australia. At the same time that these newly accredited AWEs are trying to gain a foothold in the Australian bulk wheat market, the BHCs should not be allowed the opportunity to provide port terminal services without robust ring-fencing rules being part of their proposed Undertakings.

History has shown that the information exchange between BHCs and their respective trading arms is impossible to deter. To avoid the opportunity for discrimination, quality and quantity data on receipts and other stock information should be publicly available information and should be updated daily.⁴⁵⁷

11.3.4.2 South Australian Farmers Federation (SAFF)

In response to the views set out in the ACCC's Draft Decision regarding ring-fencing, SAFF submits:

⁴⁵⁷ Australian Grain Exporters Association, *Submission in relation to Draft Decisions on Port Terminal Services Access Undertakings*, 3 September 2009, p. 24.

As ABB Grains up-country services are linked to its port terminal services it is not possible to separate these in any meaningful transparent way that would give the rest of the grains industry in South Australia any confidence. It is for this reason that SAFF Grains also considers that ring-fencing would not work, even if ABB Grains' undertaking was amended as suggested by ACCC (Chapter 11 Ring-fencing).⁴⁵⁸

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 loading 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 loading 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 Publication of Information chapter. These measures require publication of key port terminal information (such as vessel nomination applications) on the shipping stem a short time after its receipt by ABB (i.e. the next business day). This would increase transparency of nominations that have been made and lessen the opportunity for ABB's marketing arm to anti-competitively misuse key port terminal information relating to other wheat exporters whilst not imposing unduly prescriptive regulation on ABB. 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.

In forming the view that ring-fencing measures are not required at this time, the ACCC has taken into account the transitional state 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 medium term in accordance with any regulatory changes (either to extend or reduce the regulation to which ABB is subject).⁴⁵⁹ The ACCC considers that this would be an undesirable outcome in that it could impose unnecessary regulatory

⁴⁵⁸ South Australian Farmers Federation Grains Industry Committee, *Submission in relation to Draft Decision on ABB Access Undertaking*, 3 September 2009, p. 1.

⁴⁵⁹ 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

costs during a time of industry transition, particularly given the short duration of ABB's proposed Undertaking (two years).

That said, the ACCC is cognisant of calls by a number of interested parties for robust ring-fencing measures, and notes that it will closely monitor the effectiveness of ABB's Undertaking in ensuring against anti-competitive discrimination during its operation. Should the Undertaking not prove effective, the ACCC may impose ring-fencing in future regulatory arrangements.

It is important to note that the ACCC's approach 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 is more certain, 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 (noting that this is not an exhaustive list):

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.

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 (e.g. 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 would 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.

11.4.1.1 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.

11.4.1.2 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.

12 Capacity Management

Summary

Port protocols must be part of the Undertaking

Port Loading Protocols (PLPs) set out the key process by which ABB allocates port terminal capacity. For this reason the ACCC notes that the inclusion of the PLPs in ABB's proposed Undertaking is appropriate.

Procedure for variation of port protocols can be flexible

The variation mechanism set out in ABB's proposed Undertaking of 16 April 2009 is not appropriate because it provides too much discretion to ABB and insufficient certainty for access seekers.

That said, 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 PLPs (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 provisions in the Undertaking (see further below). Further, any revised PLPs must contain an expeditious dispute resolution mechanism.

ABB has informed the ACCC that its revised Undertaking will include a robust industry consultation process and include a clause obliging ABB to comply with the PLPs (as varied from time to time).

Substance of the port protocols

The ACCC considers that the PLPs attached to ABB's 16 April 2009 proposed Undertaking are not appropriate because they provide too much discretion to ABB and insufficient certainty for access seekers.

The ACCC notes that ABB has revised its PLPs. The ACCC commenced consultation on the revised PLPs (received on and dated 19 August 2009) on 20 August 2009.

Even though the 19 August 2009 PLPs were not a part of ABB's 16 April 2009 Undertaking, the ACCC has nevertheless set out the relevant submissions from interested parties on the 19 August 2009 PLPs and the ACCC's views as to whether the proposed amendments to the PLPs, if included as part of a revised Undertaking, are likely to address the concerns raised in the Draft Decision.

In light of this, the ACCC's view is that, while the 19 August 2009 PLPs adopt the majority of the ACCC's recommendations set out in its Draft Decision, it nevertheless considers that minor amendments would be necessary in order for them to be considered appropriate. Specifically, a number of clauses would need to be amended to provide for greater certainty, transparency and clarity.

The ACCC notes submissions by interested parties suggesting amendments to the August PLPs in addition to those recommended by the ACCC. The ACCC notes that its approach to the assessment of the PLPs has given weight to 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 ACCC further notes that the robust non-discrimination clause and no-hindering access clause that would be appropriate in a revised Undertaking (the particulars of which are contained in the Non-Discrimination chapter) are intended to constrain the ability of ABB to exercise discretion under its PLPs in an anti-competitive manner.

12.1 ABB's proposed Undertaking dated 16 April 2009

12.1.1 Obligation to publish Port Loading Protocols

ABB's proposed Undertaking dated 16 April 2009 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)⁴⁶⁰:

*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:*

(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

⁴⁶⁰ ABB Grain Ltd, *Port Terminal Services Access Undertaking*, 16 April 2009, clause 8.1, 11.1.

(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’⁴⁶¹ and the ‘Shipping Stem’⁴⁶² on its website at www.abb.com.au.

12.1.2 The substance of the Port Loading Protocols

The 16 April 2009 Undertaking refers to ABB’s policies and procedures for managing demand for the Port Terminal Services as Port Loading Protocols (PLP).⁴⁶³ 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’.⁴⁶⁴ As the PLPs are included in a Schedule to the Undertaking, these PLPs form part of the 16 April 2009 Undertaking.⁴⁶⁵

These 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.

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 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).⁴⁶⁶

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

⁴⁶¹ ABB Grain Ltd, *Port Terminal Services Access Undertaking*, 16 April 2009, clause 8.1(a)(i), 11.1.

⁴⁶² ABB Grain Ltd, *Port Terminal Services Access Undertaking*, 16 April 2009, clause 8.1(a)(ii), 11.1.

⁴⁶³ ABB Grain Ltd, *Port Terminal Services Access Undertaking*, 16 April 2009, clause 8.1(a), 11.1.

⁴⁶⁴ ABB Grain Ltd, *Port Terminal Services Access Undertaking*, 16 April 2009, clause 8.2(a).

⁴⁶⁵ ABB Grain Ltd, *Port Terminal Services Access Undertaking*, 16 April 2009, clause 2.1(b)(i), 11.2(e).

⁴⁶⁶ It is not clear whether the reference to the ‘standard nomination form’ is a reference to an Intention Notice or a Vessel Nomination Application.

transport operators to meet the logistics requirements for shipping to [the relevant port]. Export Select charges are published on the ABB website'.⁴⁶⁷

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'.⁴⁶⁸

12.1.2.2 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.'

⁴⁶⁷ 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 Receival 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.'

⁴⁶⁸ 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 receival, storage, handling and Outturn of the Client's grain.'

12.1.2.3 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 agreement⁴⁶⁹;
- (ii) be ‘creditworthy’, as assessed by ABB⁴⁷⁰; and
- (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.’

12.1.2.4 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.’

12.1.2.5 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’;

⁴⁶⁹ 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.

⁴⁷⁰ 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.

- (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)'.

12.1.2.6 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'.

12.1.2.7 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.’

12.1.2.8 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.’

12.1.2.9 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.

12.1.2.10 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'.

12.1.2.11 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.'

12.1.2.12 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.'

12.1.2.13 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.'

12.1.2.14 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.

12.1.2.15 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'.

12.1.2.16 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.

12.1.2.17 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.

12.1.2.18 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 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 5.5.⁴⁷¹

ABB must also comply with the following obligations when varying the PLPs:⁴⁷²

- (i) ‘14 days prior to implementing’ any proposed variation, ABB must ‘consult with Major Users’;⁴⁷³
- (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;⁴⁷⁴
- (iii) the PLPs must contain an ‘expeditious’ dispute resolution mechanism for dealing with disputes over compliance with the PLPs;⁴⁷⁵
- (iv) ABB must give the ACCC a copy of the varied PLPs ‘promptly’ after they are published on ABB’s website.⁴⁷⁶

⁴⁷¹ ABB Grain Ltd, *Port Terminal Services Access Undertaking*, 16 April 2009, clause 8.2(b).

⁴⁷² ABB Grain Ltd, *Port Terminal Services Access Undertaking*, 16 April 2009, clause 8.2(b)(iii).

⁴⁷³ 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’

⁴⁷⁴ ABB Grain Ltd, *Port Terminal Services Access Undertaking*, 16 April 2009, clause 8.2(b)(iii).

⁴⁷⁵ ABB Grain Ltd, *Port Terminal Services Access Undertaking*, 16 April 2009, clause 8.2(b)(ii).

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.⁴⁷⁷

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’.⁴⁷⁸

Operational Decisions are defined in the Undertaking as ‘decisions made in the course of providing the Port Terminal Services’.⁴⁷⁹

The Undertaking provides a list of the kinds of areas Operational Decisions will cover, such as: ‘scheduling, cargo accumulation decisions and ship loading’.⁴⁸⁰ 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’.⁴⁸¹

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’.⁴⁸² ABB will also ‘adopt practices and policies to promote fair, reasonable and non-discriminatory Operational Decision making’.⁴⁸³ 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),⁴⁸⁴ 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’⁴⁸⁵;
- (ii) take into account the objectives of⁴⁸⁶:

⁴⁷⁶ ABB Grain Ltd, *Port Terminal Services Access Undertaking*, 16 April 2009, clause 8.2(c).

⁴⁷⁷ ABB Grain Ltd, *Port Terminal Services Access Undertaking*, 16 April 2009, clause 8.2(d).

⁴⁷⁸ ABB Grain Ltd, *Port Terminal Services Access Undertaking*, 16 April 2009, clause 8.4 and 11.1.

⁴⁷⁹ ABB Grain Ltd, *Port Terminal Services Access Undertaking*, 16 April 2009, clause 8.4(a).

⁴⁸⁰ ABB Grain Ltd, *Port Terminal Services Access Undertaking*, 16 April 2009, clause 8.4(a).

⁴⁸¹ ABB Grain Ltd, *Port Terminal Services Access Undertaking*, 16 April 2009, clause 8.4(b).

⁴⁸² ABB Grain Ltd, *Port Terminal Services Access Undertaking*, 16 April 2009, clause 8.4(c).

⁴⁸³ ABB Grain Ltd, *Port Terminal Services Access Undertaking*, 16 April 2009, clause 8.4(c).

⁴⁸⁴ ABB Grain Ltd, *Port Terminal Services Access Undertaking*, 16 April 2009, clause 8.4(d).

⁴⁸⁵ ABB Grain Ltd, *Port Terminal Services Access Undertaking*, 16 April 2009, clause 8.4(d)(i).

⁴⁸⁶ ABB Grain Ltd, *Port Terminal Services Access Undertaking*, 16 April 2009, clause 8.4(d)(ii).

- 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 plan⁴⁸⁷ or 'queuing order for vessels' as a result of:⁴⁸⁸
 - 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 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.⁴⁸⁹

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'.⁴⁹⁰

⁴⁸⁷ 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'.

⁴⁸⁸ ABB Grain Ltd, *Port Terminal Services Access Undertaking*, 16 April 2009, clause 8.4(d)(iii).

⁴⁸⁹ ABB Grain Ltd, *Port Terminal Services Access Undertaking*, 16 April 2009, clause 8.2(a).

⁴⁹⁰ ABB Grain Ltd, *Port Terminal Services Access Undertaking*, 16 April 2009, clause 8.3.

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’⁴⁹¹.

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 to its 16 April 2009 Undertaking 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 General

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 certainty and transparency of access for exporters of wheat using ABB’s export terminals as required under the WEMA and TPA.’⁴⁹²

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.’⁴⁹³

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.’⁴⁹⁴

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.’⁴⁹⁵

⁴⁹¹ ABB Grain Ltd, *Port Terminal Services Access Undertaking*, 16 April 2009, clause 8.5.

⁴⁹² ABB Grain Ltd, *Submission to the ACCC*, 16 April 2009, para 1.4, p. 1.

⁴⁹³ ABB Grain Ltd, *Submission to the ACCC*, 16 April 2009, para 2.5(c), p. 5 and para 9.1(f), p. 31.

⁴⁹⁴ ABB Grain Ltd, *Submission to the ACCC*, 16 April 2009, para 2.10(c), p. 7.

⁴⁹⁵ ABB Grain Ltd, *Submission to the ACCC*, 16 April 2009, para 2.5(e), p. 6.

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’.⁴⁹⁶

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.’⁴⁹⁷ 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.

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’.⁴⁹⁸

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’.⁴⁹⁹

12.3 ABB’s supplementary submission in support of the 16 April 2009 proposed Undertaking

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.

⁴⁹⁶ ABB Grain Ltd, *Submission to the ACCC*, 16 April 2009, para 3.12, p. 11 and para 9.1(h), p. 31.

⁴⁹⁷ ABB Grain Ltd, *Submission to the ACCC*, 16 April 2009, para 3.11, p. 10.

⁴⁹⁸ ABB Grain Ltd, *Submission to the ACCC*, 16 April 2009, para 3.13, p. 11.

⁴⁹⁹ ABB Grain Ltd, *Submission to the ACCC*, 16 April 2009, n 1, p. 4.

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.’⁵⁰⁰

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 Undertaking’ with ‘provisions relating to non-discrimination and arms length dealings’ and an ability of access seekers to refer disputes to ‘binding arbitration’.⁵⁰¹

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.’⁵⁰²

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.’⁵⁰³ ABB also submit that the PLPs

⁵⁰⁰ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 12.

⁵⁰¹ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 64.

⁵⁰² ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 64.

⁵⁰³ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, pp. 72-73.

‘will apply to ABB Marketing in the same way that they apply to all other bulk wheat export customers.’⁵⁰⁴

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 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.’⁵⁰⁵

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.⁵⁰⁶

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’.⁵⁰⁷

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’.⁵⁰⁸

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.’⁵⁰⁹

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’.⁵¹⁰

⁵⁰⁴ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 50.

⁵⁰⁵ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 73.

⁵⁰⁶ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 73.

⁵⁰⁷ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 29.

⁵⁰⁸ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 6.

⁵⁰⁹ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 7.

⁵¹⁰ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 7, 63.

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’.⁵¹¹

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:⁵¹²

- (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;’
- (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).’⁵¹³

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)’.⁵¹⁴

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.’⁵¹⁵

⁵¹¹ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, pp. 63-64.

⁵¹² ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 55, 73-74.

⁵¹³ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 55.

⁵¹⁴ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 55.

⁵¹⁵ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 55.

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.'⁵¹⁶

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'.⁵¹⁷

ABB also submits that regardless, this would not affect the provision of Port Terminal Services as it has a 'clear incentive to maximise throughput'.⁵¹⁸

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'.⁵¹⁹

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'.⁵²⁰

⁵¹⁶ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 74.

⁵¹⁷ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 74.

⁵¹⁸ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 74.

⁵¹⁹ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 74.

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.’⁵²¹

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.’⁵²²

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’.⁵²³

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.’⁵²⁴

ABB also submits that it is 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’.⁵²⁵

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.⁵²⁶

⁵²⁰ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 74.

⁵²¹ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 74.

⁵²² ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 75.

⁵²³ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 75.

⁵²⁴ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 75.

⁵²⁵ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 75.

⁵²⁶ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 76.

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’.⁵²⁷

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;’
- (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.’⁵²⁸

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.’⁵²⁹

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

⁵²⁷ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 76.

⁵²⁸ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, pp. 51-52.

⁵²⁹ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 56.

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.⁵³⁰

Where loading has ceased for these reasons, ABB submits that they ‘will work as quickly as possible to address the issue and recommence operations.’⁵³¹

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’.⁵³²

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.’⁵³³

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).⁵³⁴

⁵³⁰ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 57, 76.

⁵³¹ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 57.

⁵³² ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 76.

⁵³³ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 77.

⁵³⁴ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, pp. 54-55.

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.⁵³⁵

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.’⁵³⁶

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”’.⁵³⁷

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’.⁵³⁸

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’.⁵³⁹

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.’⁵⁴⁰

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);’

⁵³⁵ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 77.

⁵³⁶ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 77.

⁵³⁷ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 77.

⁵³⁸ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 77.

⁵³⁹ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 52.

⁵⁴⁰ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 53.

- (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).’⁵⁴¹

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;’⁵⁴²
- (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.’⁵⁴³

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.’⁵⁴⁴

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’.⁵⁴⁵

⁵⁴¹ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 53.

⁵⁴² ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 53.

⁵⁴³ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 54.

⁵⁴⁴ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 54.

⁵⁴⁵ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 54.

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'.⁵⁴⁶

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'.⁵⁴⁷

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.⁵⁴⁸

12.4 Submissions received from interested parties in response to the ACCC Issues Paper dated 29 April 2009 on the 16 April 2009 proposed Undertaking

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 ...

⁵⁴⁶ ABB Grain Ltd, *Supplementary submission to the ACCC* in response to the South Australian Farmers Federation submission, 15 July 2009, p. 6.

⁵⁴⁷ ABB Grain Ltd, *Supplementary submission to the ACCC* in response to the South Australian Farmers Federation submission, 15 July 2009, p. 7.

⁵⁴⁸ ABB Grain Ltd, *Supplementary submission to the ACCC in response to the South Australian Farmers Federation submission*, 15 July 2009, p. 7.

[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.⁵⁴⁹

AGEA also submits that unless the proposed access undertakings provide transparency in relation to BHC's decisions⁵⁵⁰, 'BHCs will be able to manipulate logistics, substitute vessels and/or vary the shipping stem to confer preferential treatment on themselves'.⁵⁵¹

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 allocation of shipping slots'.⁵⁵² AGEA further submit that the PLPs 'do not contain clearly defined rules which are capable of objective application'.⁵⁵³

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'.⁵⁵⁴

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'.⁵⁵⁵

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'.⁵⁵⁶

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

⁵⁴⁹ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, p. 2.

⁵⁵⁰ 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).

⁵⁵¹ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 4.12, p. 10.

⁵⁵² Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 14.1, p. 31.

⁵⁵³ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, Schedule 1, para K2(iii), p. 48.

⁵⁵⁴ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 14.6, p. 32.

⁵⁵⁵ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 14.7, p. 32.

⁵⁵⁶ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, Schedule 1, para K2(ii), p. 48.

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.⁵⁵⁷

To mitigate against these risks AGEA states that ‘a clearly defined shipping protocol and transparency in relation to BHCs’ decision-making is required.’⁵⁵⁸

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.’⁵⁵⁹ ‘At present ... BHCs have the discretion to change booking slots and do not incur any liability if they fail to deliver.’⁵⁶⁰

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.’⁵⁶¹

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’.⁵⁶²

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.’⁵⁶³

⁵⁵⁷ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 14.2, p. 31.

⁵⁵⁸ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 14.2, p. 31.

⁵⁵⁹ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 14.3, p. 31.

⁵⁶⁰ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 14.3, p. 31.

⁵⁶¹ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 14.5, p. 31.

⁵⁶² Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 14.4, p. 31.

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.'*⁵⁶⁴

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 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.'⁵⁶⁵

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.'⁵⁶⁶

12.4.1.3 **Specific comments on ABB's proposed PLPs**

1. *PLPs must contain certain provisions*

AGEA submits that the PLPs must provide:⁵⁶⁷

- (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';

⁵⁶³ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 14.8, p. 32.

⁵⁶⁴ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 14.8, p. 32 & para 14.10, p. 33.

⁵⁶⁵ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 14.11, p. 33.

⁵⁶⁶ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, Schedule 1, para K2(vii), p. 48.

⁵⁶⁷ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 4.17(h), p. 14.

- (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'*⁵⁶⁸

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.⁵⁶⁹

3. *Allocation of estimated load dates is based on factors within ABB's control*

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'.⁵⁷⁰

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'.⁵⁷¹

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'.⁵⁷²

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.⁵⁷³

⁵⁶⁸ AGEA's comments in headings 2 to 11 are specific to ABB and do not apply to other bulk handling companies.

⁵⁶⁹ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, Schedule 2, p. 51.

⁵⁷⁰ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, Schedule 2, p. 51.

⁵⁷¹ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, Schedule 2, p. 51.

⁵⁷² Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, Schedule 2, p. 51.

⁵⁷³ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, Schedule 2, p. 51.

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.’⁵⁷⁴

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’.⁵⁷⁵

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.’⁵⁷⁶

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’.⁵⁷⁷

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”’.⁵⁷⁸

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”’.⁵⁷⁹ AGEA submits in response that:⁵⁸⁰
 - 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);

⁵⁷⁴ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, Schedule 2, p. 51.

⁵⁷⁵ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, Schedule 2, p. 51.

⁵⁷⁶ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, Schedule 2, p. 52.

⁵⁷⁷ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, Schedule 2, p. 52.

⁵⁷⁸ ABB Grain Ltd, *Port Terminal Services Access Undertaking*, 16 April 2009, Schedule 3.

⁵⁷⁹ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, Schedule 2, p. 52.

⁵⁸⁰ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, Schedule 2, p. 52.

- 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.'⁵⁸¹
- (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 turnarounds where multiple vessels are arriving in a short time frame."⁵⁸² 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.'⁵⁸³
- (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.'⁵⁸⁴
- 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"⁵⁸⁵
- (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."⁵⁸⁶
- 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.'⁵⁸⁷

⁵⁸¹ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, Schedule 2, p. 52.

⁵⁸² Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, Schedule 2, p. 52.

⁵⁸³ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, Schedule 2, p. 52.

⁵⁸⁴ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, Schedule 2, p. 52.

⁵⁸⁵ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, Schedule 2, p. 52.

⁵⁸⁶ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, Schedule 2, p. 52.

⁵⁸⁷ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, Schedule 2, p. 52.

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.’⁵⁸⁸

9. *The charges and manner in which the 'vessel variation', 'freight costs' and 'Shipping Re-positioning' fees are applied are lacking transparency.*

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”.’⁵⁸⁹

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’.⁵⁹⁰

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.”’⁵⁹¹

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.⁵⁹²

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.’⁵⁹³

⁵⁸⁸ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, Schedule 2, p. 53.

⁵⁸⁹ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, Schedule 2, p. 53.

⁵⁹⁰ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, Schedule 2, p. 53.

⁵⁹¹ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, Schedule 2, p. 53.

⁵⁹² Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, Schedule 2, p. 53.

⁵⁹³ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, Schedule 2, p. 53.

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’.⁵⁹⁴

2. *The criteria ABB can take into account when making Operational Decisions are largely subjective and create uncertainty*

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.’⁵⁹⁵

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.⁵⁹⁶

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”’.⁵⁹⁷

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.⁵⁹⁸

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”’.⁵⁹⁹

⁵⁹⁴ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 15.1, p. 33.

⁵⁹⁵ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 15.2, p. 33.

⁵⁹⁶ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 15.2, p. 33.

⁵⁹⁷ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 15.3, p. 33.

⁵⁹⁸ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 15.3, p. 33.

⁵⁹⁹ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 15.4, p. 33.

AGEA submits that ABB controls ‘the movement and accumulation of wheat at port.’⁶⁰⁰

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.⁶⁰¹ In particular, AGEA submits that:

- (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.’;⁶⁰² 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.⁶⁰³

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.’⁶⁰⁴ 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’;⁶⁰⁵ and
- (ii) with regard to the criterion in clause 8.4(d)(iii)(E), ‘vessel congestion’ is not appropriate as a ground.⁶⁰⁶

⁶⁰⁰ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 15.4, p. 33.

⁶⁰¹ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 15.5, p. 33.

⁶⁰² Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 15.5(a), p. 34.

⁶⁰³ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 15.5(b), p. 34.

⁶⁰⁴ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 15.6, p. 34.

⁶⁰⁵ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 15.6, p. 34.

⁶⁰⁶ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 15.6, p. 34.

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.’⁶⁰⁷

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 have shipped more than 20,000 tonnes in the past two years) about any proposed variation to the Port Loading Protocols.’⁶⁰⁸

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.’⁶⁰⁹

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.’⁶¹⁰

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.’⁶¹¹

⁶⁰⁷ South Australian Farmers Federation Grains Industry Committee, *Submission in relation to proposed ABB access undertaking*, May 2009, p. 3.

⁶⁰⁸ South Australian Farmers Federation Grains Industry Committee, *Submission in relation to proposed ABB access undertaking*, May 2009, p. 11.

⁶⁰⁹ South Australian Farmers Federation Grains Industry Committee, *Submission in relation to proposed ABB access undertaking*, May 2009, p. 11.

⁶¹⁰ South Australian Farmers Federation Grains Industry Committee, *Submission in relation to proposed ABB access undertaking*, May 2009, p. 11.

⁶¹¹ South Australian Farmers Federation Grains Industry Committee, *Submission in relation to proposed ABB access undertaking*, May 2009, p. 11.

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.’⁶¹²

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.’⁶¹³

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.’⁶¹⁴

12.5 Revised PLPs dated 19 August 2009

At the same time as releasing its Draft Decision on ABB’s 16 April 2009 Undertaking the ACCC noted that ABB had informed the ACCC that it would provide the ACCC with revised PLPs by early to mid-August that the ACCC would then consult on. The ACCC received the revised PLPs on 19 August 2009 and commenced consultation on 20 August 2009.

⁶¹² South Australian Farmers Federation Grains Industry Committee, *Submission in relation to proposed ABB access undertaking*, May 2009, pp. 11-12.

⁶¹³ South Australian Farmers Federation Grains Industry Committee, *Submission in relation to proposed ABB access undertaking*, May 2009, p. 12.

⁶¹⁴ South Australian Farmers Federation Grains Industry Committee, *Submission in relation to proposed ABB access undertaking*, May 2009, p. 12.

12.5.1 ABB’s proposed Port Loading Protocols dated 19 August 2009 (August PLPs)

12.5.1.1 Introduction

The August PLPs state that “[t]hese Port Loading Protocols ... are intended to be a guide to the pathway for the export of commodities out of ABB’s Port Terminals and set out the principles by which ABB will order and manage vessels for loading.”⁶¹⁵

The PLPs apply to all commodities exported from ABB’s Port Terminals. In the case of Bulk Wheat, the PLPs also form part of the Access Undertaking provided by ABB to the ACCC.⁶¹⁶

ABB states that the PLPs apply equally to all Clients, including ABB’s Trading Division.⁶¹⁷ In addition, in order to become a client of ABB, an exporter must first enter into a Port Terminal Services Agreement and/or a Storage & Handling Agreement with ABB.⁶¹⁸

12.5.1.2 Slot Booking Process

The Client must book a Slot on ABB’s Shipping Stem in order to establish a load date and Terminal Services Priority for a vessel in accordance with the PLPs.⁶¹⁹

The Slot Booking Process runs as follows:⁶²⁰

- The Client books a Slot on ABB’s Shipping Stem for either a named or to be named vessel by submitting ABB’s booking form with all the mandatory fields completed and otherwise in compliance with Table A of the PLPs.
- On receipt of a completed Booking Form, ABB places the Client’s booking in “Pending” Status on the Shipping Stem when the Shipping Stem is next updated.⁶²¹
- Once the Client’s booking is accepted by ABB (as outlined under clause 3), the Shipping Stem will be amended at the next update to reflect the acceptance.

The Shipping Stem is updated each business day.⁶²² Bookings accepted by ABB are allocated personally to the Client and are not transferable.⁶²³

12.5.1.3 Acceptance of Booking and Ongoing Compliance

Before a booking is accepted by ABB, the following conditions must be satisfied:⁶²⁴

⁶¹⁵ ABB Grain Ltd, *Port Loading Protocols*, Clause 1.1.

⁶¹⁶ ABB Grain Ltd, *Port Loading Protocols*, Clause 1.2.

⁶¹⁷ ABB Grain Ltd, *Port Loading Protocols*, Clause 1.3.

⁶¹⁸ ABB Grain Ltd, *Port Loading Protocols*, Clause 1.4.

⁶¹⁹ ABB Grain Ltd, *Port Loading Protocols*, Clause 2.1.

⁶²⁰ ABB Grain Ltd, *Port Loading Protocols*, Clause 2.2-2.4.

⁶²¹ The “Pending” status does not mean the booking is accepted.

⁶²² ABB Grain Ltd, *Port Loading Protocols*, Clause 2.5.

⁶²³ ABB Grain Ltd, *Port Loading Protocols*, Clause 2.6.

⁶²⁴ ABB Grain Ltd, *Port Loading Protocols*, Clause 3.1-3.3.

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

12.5.1.4 Advice of Acceptance or Non-Acceptance

On receiving a fully completed Booking Form, ABB will reply to the Client within 2 business days informing them of:⁶²⁵

- acceptance of the Client's 'to be named' booking nomination; or
- acceptance of the Client's 'named vessel' booking nomination; or
- non-acceptance of the Client's booking nomination, including the reasons for non-acceptance; or

Where ABB cannot fully satisfy the Client's booking due to operational factors (including a lack of available capacity or existing commitments to other export shippers), they will provide a proposal of alternative arrangements including:⁶²⁶

- an alternative Slot;
- acceptance of non-standard service levels and associated costs; and/or
- alternative port arrangements, stock swaps or load grades.

ABB does not guarantee acceptance of a booking within 2 business days where ABB and the Client have entered into discussions and/or negotiations in relation to the booking Slot. Where this occurs, the vessel will remain on the Shipping Stem in a "pending" status until the relevant issues are resolved.⁶²⁷

12.5.1.5 Allocation of Load Date⁶²⁸

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

12.5.1.6 Notification of Changes in Slots and Load Dates

ABB will endeavour to ensure that the Client's Slot and Load Date will be held for the Client.

ABB may make changes to the Slot or Load Date for the following reasons:⁶²⁹

⁶²⁵ ABB Grain Ltd, *Port Loading Protocols*, Clause 4.1-4.3.

⁶²⁶ ABB Grain Ltd, *Port Loading Protocols*, Clause 4.4.

⁶²⁷ ABB Grain Ltd, *Port Loading Protocols*, Clause 4.5.

⁶²⁸ ABB Grain Ltd, *Port Loading Protocols*, Clause 5.

⁶²⁹ ABB Grain Ltd, *Port Loading Protocols*, Clause 6.1.

- if the cargo is not in an export ready and shippable position by the relevant Load Date;
- if a Force Majeure event occurs;
- if there is a change of Terminal Services Priority in accordance with the PLPs (see clauses 7-8);
- if a vessel fails to pass customary port surveys;
- if poor or dangerous weather reasonably requires the scheduled Slot or Load date to be delayed in the interests of safety;
- to ensure that the booking does not expose ABB to undue Performance Risk or Slot hoarding by a Client;
- if there is a change to the ETAs of the Client’s vessel or others in the queue (see clause 8);
- if there is a delay receiving the Client’s authority to load;
- if it is necessary to reflect the impact of any changes to Flinders Ports SA Port rules for Grain Berth Loading Priorities at the relevant port;
- if the Client fails to pay any storage or handling charges due and payable to ABB when they are due (and not the subject of a genuine dispute); or
- if the Client ceases to comply with the requirements under Table A.

In the event of a change in the Client’s Slot or Load Date, ABB will provide notification to the Client via the Shipping Stem on the ABB website. The Shipping Stem is available to all Clients.⁶³⁰

When a Slot is vacated (for example, because of a failure to adhere to the requirements under Table A) the Shipping Stem will be updated and Clients may apply to book the vacated Slot on a “first come, first served” basis.⁶³¹

12.5.1.7 Guiding Principles for determining Terminal Services Priority

ABB will follow the following principles in determining the priority of terminal services at port for the loading of vessels on the Shipping Stem.⁶³²

- ABB will ensure that terminal services at the nominated Port Terminal are in an order consistent with the allocated order of vessels booked for that Port Terminal on the Shipping Stem.
- Named vessels currently on the Shipping Stem will receive priority over to be named vessels (even if the to be named vessel has an earlier booking slot).
- Where named vessels are estimated to arrive at around the same time, priority of terminal services will be awarded to the vessel which was named first to ABB.

⁶³⁰ ABB Grain Ltd, *Port Loading Protocols*, Clause 6.2.

⁶³¹ ABB Grain Ltd, *Port Loading Protocols*, Clause 6.3.

⁶³² ABB Grain Ltd, *Port Loading Protocols*, Clause 7.1.

- In order to maximise Port Terminal capacity utilisation, ABB may accept a new booking on the Shipping Stem only where ABB, acting reasonably, has an objective and reasonable basis to believe that the new booking will not unduly prejudice existing bookings.
- ABB may load Client's vessels out of arrival order where the required stock is either available at the Port Terminal or can be made available without unduly prejudicing vessels initially prioritised over another and ABB has reasonable grounds to believe that the overall speed and efficiency of the Port Terminal will be enhanced on an objective and ascertainable basis.
- At Port Terminals, where the Client occupies the berth and has stock available but will not work the vessel on a 24 hour / 7day basis, and another client has stock available and is willing to work the vessel on a 24 hour / 7 day basis, the Client must either work the vessel on a 24 hour / 7 day basis or vacate the berth for the other Client.
- If a Client's vessel fails to pass marine or AQIS surveys, then ABB may re-prioritise terminal services.
- Where the grain berth is congested, all vessels will be required to perform marine survey at anchor where possible.

Terminal Services Priority may be impacted by the berthing requirements of the Flinders Ports SA Port Rules for Grain Berth Loading Priorities in force from time to time for each Port. ABB may vary Terminal Service Priority to the extent necessary to address these external requirements.⁶³³

12.5.1.8 Changes to Nominations and Failure to meet Table A requirements

Where a Client does not meet the timeframes set out within Table A, then a new nomination will be deemed to have occurred, a new booking fee will be payable and the vessel will be re-prioritised in accordance with the PLPs.⁶³⁴

Where the arrival of the vessel varies from ETA by greater than 3 days or is outside of the last declared booking Slot, ABB may re-prioritise terminal services.⁶³⁵

12.5.1.9 Demonstrating Stock Entitlement

Table A requires the Client to demonstrate its entitlement to stock at various points of time.⁶³⁶

The Client may demonstrate stock entitlement by providing:⁶³⁷

- the details of the commodity held by the Client at ABB sites that meets the Client's nomination;

⁶³³ ABB Grain Ltd, *Port Loading Protocols*, Clause 7.2.

⁶³⁴ ABB Grain Ltd, *Port Loading Protocols*, Clause 8.1.

⁶³⁵ ABB Grain Ltd, *Port Loading Protocols*, Clause 8.2.

⁶³⁶ ABB Grain Ltd, *Port Loading Protocols*, Clause 9.1.

⁶³⁷ ABB Grain Ltd, *Port Loading Protocols*, Clause 9.2.

- the details of the commodity held at Third Party Sites (refer to clause 10) that meets the Client’s nomination;
- adequate evidence of forward purchases and sales commitments going to meeting the Client’s nomination; and
- any other form of evidence of entitlement which shows that the Client will have sufficient stock to load the Client’s vessel at the load dates indicated by the vessel’s priority on the Shipping Stem.

12.5.1.10 Stock at Third Party Sites

In order to qualify for stock entitlement for the purposes of Table A, commodities held at a Third Party Site will only be taken into account if:⁶³⁸

- the Third Party Site has been approved by ABB having regard to appropriate industry standards (eg hygiene and quality);
- the Third Party Site is adequately serviced by road or rail;
- upon request by ABB, the Client promptly provides: the most recent treatment history of the commodity; a valid fumigation certificate for the stock to be exported through an ABB Port Terminal; and the Third Party Site operator confirms in writing within two Business Days of ABB’s request both the Client’s entitlement and that the Client’s stock is available for outturn at the start of the Client’s slot.

12.5.1.11 Export Standard Requirements

In the event that a Client selects Export Standard for the accumulation of the commodity the subject of a booking, the Client must provide ABB with Site Assembly and Transport Plans that are complete for the purposes of the export of stock.⁶³⁹

The Client must provide the plans no later than 18 days prior to the opening of the first day of the Slot. If the Client fails to do this, ABB may re-prioritise the Client’s vessel on the Shipping Stem.⁶⁴⁰

12.5.1.12 Performance Risk/Anti-hoarding

ABB may decide not to accept a booking if it considers (acting reasonably and in good faith) that the booking, taken in aggregate with other Slots of the Client (collectively, the “Nominations”) involves an attempt by the Client to reserve Slots in excess of its reasonably anticipated requirements in order to prevent the Client’s competitors from obtaining access to Slots at any of ABB’s Port Terminals or limit throughput at the Port Terminal.⁶⁴¹

In forming its opinion pursuant to clause 12.1, ABB must have regard to:⁶⁴²

⁶³⁸ ABB Grain Ltd, *Port Loading Protocols*, Clause 10.1.

⁶³⁹ ABB Grain Ltd, *Port Loading Protocols*, Clause 11.1.

⁶⁴⁰ ABB Grain Ltd, *Port Loading Protocols*, Clause 11.2.

⁶⁴¹ ABB Grain Ltd, *Port Loading Protocols*, Clause 12.1.

⁶⁴² ABB Grain Ltd, *Port Loading Protocols*, Clause 12.2.

- the quantity or grade of the Nominations relative to the forecast quantity or grade of the relevant commodity in the relevant port zone;
- the share of the market for the relevant commodity accumulated by the Client in the previous three years;
- any previous failures of the Client within the preceding three calendar years to perform to its Nominations;
- where available in published annual reports and accounts readily available from the Client’s corporate website, the Client’s profit and annual revenue in the preceding financial year relative to the quantity of the Nominations;
- the availability of transport to port;
- the extent of economic damage to ABB’s investment in infrastructure and the supply chain which could be caused by non-performance (e.g. a reduction in efficient throughput); and
- any other information provided to ABB by the Client.

12.5.1.13 Dispute Resolution

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

- The Client must notify ABB in writing of the dispute, the reasons for the dispute and the resolution which the Client requests (“Dispute Notice”).⁶⁴³
- In the case of a dispute regarding rejection of a booking, the dispute notice must be received by ABB by 16:00 Australian Central Standard Time on the next business day following receipt of the notice from ABB that it does not intend to accept the booking (see clause 4.3).⁶⁴⁴
- ABB must use its best endeavours to respond to the Client within one business day of receiving the dispute notice (ABB response). The ABB response must notify the Client whether ABB will change its decision and, if not, it must provide an explanation or basis for ABB’s decision.⁶⁴⁵
- If the Client is not satisfied by the ABB response, or if ABB fails to respond to the Dispute Notice within one business day of its receipt, the Client may serve written notice to ABB within one business day of receipt of the ABB response, or within one business day of when the ABB Response was due (Escalation Notice).⁶⁴⁶
- ABB must use all reasonable endeavours to arrange a meeting between ABB’s Executive General Manager National Supply Chain and the Client within two business days of receiving the Escalation Notice. Where ABB’s Executive General Manager National Supply Chain is unavailable for such a meeting within that timeframe, ABB will make available a suitable alternative authorised

⁶⁴³ ABB Grain Ltd, *Port Loading Protocols*, Clause 13.1.

⁶⁴⁴ ABB Grain Ltd, *Port Loading Protocols*, Clause 13.2.

⁶⁴⁵ ABB Grain Ltd, *Port Loading Protocols*, Clause 13.3.

⁶⁴⁶ ABB Grain Ltd, *Port Loading Protocols*, Clause 13.4.

representative to meet with the Client. To enable the quick resolution of disputes, the meeting can take place either face to face or by telephone.⁶⁴⁷

- At the meeting, ABB's Executive General Manager National Supply Chain (or Alternate) and the Client will discuss the subject of the Dispute Notice and ABB Response and use all reasonable endeavours to reach an agreed outcome. Where such agreed outcome cannot be achieved, given the need for clarity, efficiency and certainty in this dispute resolution process, ABB's Executive General Manager National Supply Chain (or Alternate) will make a final decision in relation to the Dispute Notice and notify that decision in writing to the Client within one business day of the meeting ("Decision Notice")⁶⁴⁸
- In reaching the final decision set out in the Decision Notice, ABB's Executive General Manager National Supply Chain (or Alternate), acting on behalf of ABB, must take into account the circumstances of the dispute and the details set out in the Dispute Notice and, acting reasonably and in good faith, reach a decision that is consistent with the wording, or if that is unclear, the intent of the Protocols (and in the case of Bulk Wheat, the Access Undertaking). ABB's Executive General Manager National Supply Chain (or Alternate) may also have regard to the objectives of:⁶⁴⁹
 - maximising the efficient operation of the Port Terminal;
 - maximising export throughput at the Port Terminal;
 - ensuring the non-discriminatory treatments of Clients; and
 - ensuring consistency of decisions.

12.5.1.14 Review of the Protocols

ABB may vary the PLPs from time to time in accordance with clause 14.2 provided that, in the case of Bulk Wheat, while the Access Undertaking is in force.⁶⁵⁰

- the variations are consistent with the Access Undertaking; and
- the PLPs include an expeditious dispute resolution mechanism for dealing with disputes over compliance with the PLPs.

ABB may vary the PLPs at any time if it:⁶⁵¹

- commences consultation with Major Users in relation to the proposed variation at least 30 days before the variation takes effect; and
- provides Major Users with written notice of the proposed variation (Variation Notice) at least 10 business days before the proposed variation takes effect (which for the avoidance of doubt, can be given before or after the expiry of the 30 day period set out in clause 14.2.1) by publishing the Variation Notice in a prominent place on its website.

⁶⁴⁷ ABB Grain Ltd, *Port Loading Protocols*, Clause 13.5.

⁶⁴⁸ ABB Grain Ltd, *Port Loading Protocols*, Clause 13.6.

⁶⁴⁹ ABB Grain Ltd, *Port Loading Protocols*, Clause 13.7.

⁶⁵⁰ ABB Grain Ltd, *Port Loading Protocols*, Clause 14.1.

⁶⁵¹ ABB Grain Ltd, *Port Loading Protocols*, Clause 14.2.

For the purposes of clause 14.2.1, consultation with Major Users will involve ABB:⁶⁵²

- providing a written consultation notice to Major Users setting out the nature of, and reasons for, the proposed variation, and inviting comments from interested persons (“Consultation Notice”);
- publishing the consultation notice in a prominent place on its website (with a reference to the publication of the Consultation Notice on the Shipping Stem);
- providing a reasonable period (and, in any event, not less than 10 business days) for interested parties to provide their comments (if any) in relation to the proposed variation;
- meeting with interested parties if requested to discuss the proposed variations and for the interested parties to provide feedback to ABB, if any. Such meetings can be conducted with one or more interested parties, and may be conducted by telephone;
- considering the issues raised (if any) by Major Users and any other interested parties and, where necessary, seeking clarification and further details from relevant parties and/or making any modifications to the variation proposal to reflect the feedback (if any) received from interested parties.

ABB will have satisfied its obligation to consult with Major Users in clause 14.2.1 if it complies with the requirements set out in clause 14.3, even if no Major User or other interested party provides any response to the Consultation Notice issued by ABB.⁶⁵³

ABB will publish an updated copy of these PLPs in a prominent place on its website within 3 business days of any variation to the PLPs taking effect.⁶⁵⁴

12.5.1.15 Booking Process set out in Table A of the Protocols

ABB sets out, in Table A of the PLPs, the booking process they will apply and the requirements that access seekers must comply with at various points in time during the nomination and accumulation process.

Greater than 60 days prior to Slot Commencing

‘Greater than than 60 days prior to Slot commencing’, the vessel can be To Be Named (‘TBN’), the contract/load details must include ‘load port, commodity, tonnage, tolerance, sales, specifications, treatment, requirements, destination’ for all shipping parcels, the shipping period is a ‘30 day Slot’, charges are a ‘Non-Refundable Booking Fee (as described in Schedule A of the Handling Agreements), export ‘licence not required at this point’, and current stock entitlement ‘not required at this point’.⁶⁵⁵

⁶⁵² ABB Grain Ltd, *Port Loading Protocols*, Clause 14.3.

⁶⁵³ ABB Grain Ltd, *Port Loading Protocols*, Clause 14.4.

⁶⁵⁴ ABB Grain Ltd, *Port Loading Protocols*, Clause 14.5.

⁶⁵⁵ ABB Grain Ltd, *Port Loading Protocols*, Table A.

No later than 60 days prior to the opening of the Slot

‘No later than 60 days prior to the opening of the Slot’, the vessel can be ‘TBN’, the contract/load details must include ‘load port, commodity, tonnage, tolerance, sales, specifications, treatment, requirements, destination’ for all shipping parcels including ‘load grades by tonnage’, the shipping period is a ‘30 day Slot’, charges are a ‘Non-Refundable Booking Fee (as described in Schedule A of the Handling Agreements), export ‘licence not required at this point’, and current stock entitlement ‘not required at this point’.⁶⁵⁶

No later than 30 days prior to first day of the Slot commencing

‘No later than 30 days prior to first day of the Slot commencing’, the vessel can be ‘TBN’, the contract/load details must include ‘load port, commodity, tonnage, tolerance, sales, specifications, treatment, requirements, destination’ for all shipping parcels including ‘load grades by tonnage’, the shipping period ‘Slot to be reduced to a 15 day period. This period must be within original specified Slot’, charges are a ‘Non-Refundable Booking Fee (as described in Schedule A of the Handling Agreements), export ‘licence not required at this point’, and current stock entitlement ‘not required at this point’.⁶⁵⁷

No later than 18 days prior to the opening of the first day of the booked Slot

‘No later than 18 days prior to the opening of the first day of the booked Slot’, the vessel can be ‘TBN’, the contract/load details must include ‘load port, commodity, tonnage, tolerance, sales, specifications, treatment, requirements, destination’ for all shipping parcels including ‘load grades by tonnage’, the shipping period ‘Slot to be reduced to a 15 day period. This period must be within original specified Slot’ if required, ‘port handling and shipping feeds to be prepaid’, evidence of export licence may be requested by ABB, and must be able to ‘demonstrate ability to meet vessel load requirements’ in relation to the current stock entitlement.⁶⁵⁸

No later than 18 days prior to vessel ETA

‘No later than 18 days prior to vessel ETA’, the ‘[n]amed vessel required and all associated mandatory fields completed on booking form’, the contract/load details must include ‘load port, commodity, tonnage, tolerance, sales, specifications, treatment, requirements, destination’ for all shipping parcels including ‘load grades by tonnage’ and ‘completion of blending options on booking form’, the ‘ETA required’, the applicable charges are ‘as per Handling Agreements’, the export licence ‘required’, and must be able to ‘demonstrate ability to meet vessel load requirements’ in relation to the current stock entitlement.⁶⁵⁹

The PLPs also state that:

⁶⁵⁶ ABB Grain Ltd, *Port Loading Protocols*, Table A.

⁶⁵⁷ ABB Grain Ltd, *Port Loading Protocols*, Table A.

⁶⁵⁸ ABB Grain Ltd, *Port Loading Protocols*, Table A.

⁶⁵⁹ ABB Grain Ltd, *Port Loading Protocols*, Table A.

- ‘In the event that the Client requests a booking Slot later than that required in accordance with Table A, the Client must satisfy all of it’s cumulative obligations owing and required under Table A for ABB to accept the booking’⁶⁶⁰; and
- ‘ABB will consider that a new booking has been requested by the Client, if the Client changes, alters or modifies any information already provided to ABB. Accordingly any fees or obligations required for a new booking will be payable and owed by the Client to ABB.’⁶⁶¹

12.5.2 ABB’s submissions in response to the Draft Decision and in relation to the 19 August 2009 PLPs

ABB made the following submissions in response to the ACCC’s Draft Decision and in relation to the 19 August 2009 Port Loading Protocols:⁶⁶²

5.1 The Commission’s Draft Decision

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

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

The ACCC’s preliminary view is that the provision would be more likely to be appropriate if the process was not open ended, reasons for decision were required to be given and set timeframes for final decisions to be made and the recommendation in the Non-Discrimination chapter for a clearer non-discrimination provision in the Undertaking are accepted”.

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

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

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

⁶⁶⁰ ABB Grain Ltd, *Port Loading Protocols*, Table A.

⁶⁶¹ ABB Grain Ltd, *Port Loading Protocols*, Table A.

⁶⁶² ABB Grain Limited, *Submission in relation to Draft Decision on ABB Access Undertaking*, 3 September 2009, pp. 10-13.

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

(a) a breach of the Port Loading Protocols (either one-off or systematic) would be a breach of the Access Undertaking; and

(b) the operation of the Port Loading Protocols will be subject to the non-discrimination clauses set out in the Access Undertaking.

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

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

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

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

In relation to the expeditious resolution of disputes, ABB has substantially amended clause 13 of the Port Loading Protocols. There are now clear timeframes for each step, a number of which involve a response the following business day. For example, ABB must use its best endeavours to advise the other party to the dispute whether or not it proposes to change its decision (with reasons) within one business day, and if the other party issues an Escalation Notice, it must be dealt with by the ABB Executive General Manager National Supply Chain (or delegate) within 2 business days. Although individual matters may be dealt with more quickly, it is difficult to see how the process set out in an Access Undertaking could be further expedited.

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

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

ABB also notes that many of the types of operational decisions required under the Port Loading Protocols involve relatively quick judgments, based on requirements for the efficient, consistent and non-discriminatory

operation of the port. It is inherent in any dispute that the immediate outcome may be more beneficial to one party than another.

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

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

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

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

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

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

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

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

Additionally, ABB made the following submission on the definition of “Major Users” in the proposed Undertaking and under the Port Loading Protocols:

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

Following the Commission’s Draft Decision, ABB has substantially amended its Port Loading Protocols, including the process for varying those protocols (see the new version of the Port Loading Protocols provided to the Commission on 19 August 2009). Under the variation mechanism, ABB is required to consult with “Major Users” (in accordance with a specified procedure and specified timeframes) and notify them of the variations.

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

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

On this basis, ABB proposes to change the definition of “Major Users” in the Access Undertaking to mean users who have shipped an average of 50,000 tonnes of commodity through the Port Terminals in each of the preceding two years. ABB does not consider that this in any way undermines the intention or effectiveness of the consultation obligation. Rather, it better focuses the consultation on users who have knowledge of the operation of the port, and who are well placed to understand and provide feedback on the implications of any variation proposal.⁶⁶³

12.5.3 Submissions received from interested parties in response to the Draft Decision and the 19 August 2009 PLPs

12.5.3.1 AGEA

AGEA made the following submissions on capacity management generally:

1.22 It is not appropriate that the BHCs proposed Undertakings do not include binding indicative policies and procedures for managing demand for the port terminal services (ie port loading protocols), as these documents set out the key processes by which the BHCs will allocate and manage port terminal capacity.

AGEA understands from the materials provided by the BHCs that ABB’s port terminal services protocols will be part of its proposed Undertaking and GrainCorp’s port terminal services protocols will be part of its access agreement.

⁶⁶³ ABB Grain Limited, *Submission in relation to Draft Decision on ABB Access Undertaking*, 3 September 2009, pp. 16-17.

However, CBH's port terminal services protocols will not be part of the proposed Undertaking or the access agreement. This needs to be addressed and consistency across the BHCs requires that the protocols be part of the proposed [undertakings].

1.23 AGEA notes that the ACCC considers it desirable that the BHCs have flexibility to run their operations in an efficient manner.

1.24 The BHCs have been operating their business for a significant period of time... There are likely to be very few, if any, events that will be unforeseen or of a material adverse nature, when the contract period only runs for 12 months.

1.25 The standard terms and conditions run for 12 months. The BHCs should not be permitted to vary prices or standard terms or the Port Loading Protocols during that 12 month period. If an amendment is required, the BHCs can rely upon section 44ZZA(7).

1.26 If the ACCC accepts that BHCs should be able to amend the port loading protocols during the 12 month term and that the circumstances in which amendment should be allowed should not be limited to section 44ZZA(7), then any variation must be strictly in accordance with a mechanism to be specified in the port loading protocols whereby:

- (a) A robust industry consultation process must take place.
- (b) The BHC must provide the AWEs at least 3 months notice of the proposed change, in order for the AWEs to consider the proposal and enter into meaningful negotiations with the BHC and if necessary, to give AWEs time to adjust.
- (c) Any dispute in relation to variations may be referred to mediation or arbitration;
- (d) Any variations must also be subject to the non-discrimination clauses in the proposed Undertaking.⁶⁶⁴

AGEA made the following further submissions on capacity management:

12.1 The port loading protocols are not appropriate for the reason that they lack sufficient clarity, certainty and transparency in relation to decision making about capacity management. Intake capacity at all ports is known. BHCs should be accountable for intake delays, which it is within their capacity to manage and control.

... ABB accepts intake from third party shippers. For ABB, the intake needs to be carefully controlled to ensure efficient utilisation of port capacity. This could be achieved by ABB being held accountable at the time accumulation starts.

12.2 The port loading protocols do not make BHCs accountable. Transport is pre-booked and confirmed with BHCs to meet their schedule. Late arrivals or transport delays are penalised, thereby minimising the risk of delays. BHCs should be held accountable for stocks, which are within their control at port, and delays.

12.3 Any adjustment in the shipping stem has the potential to expose AWEs to demurrage. Accordingly, the shipping stem must not be subject to change

⁶⁶⁴ Australian Grain Exporters Association, *Submission in relation to Draft Decisions on Port Terminal Services Access Undertakings*, 3 September 2009, 1.22-1.26, p. 7.

except in certain, specified circumstances and with full transparency in the decision-making process. To ensure BHCs are accountable for shipping performance and the efficient operation of the facilities, AWEs should be compensated for delays caused by BHCs including vessel demurrage.

Conversely, BHCs should be entitled to be rewarded by way of a share in despatch rates if vessels are unloaded at a faster than expected rate. The BHCs' exposure to demurrage, (and conversely right to despatch), should be calculated by reference to the vessel loading window which is provided by the BHCs and the demurrage rate linked to the Baltic Exchange.

Nature of the inclusion of the PLPs in the proposed Undertaking and Access Agreements

12.4 As the port terminal protocols set out the key process by which the BHCs will allocate port terminal capacity, they must be included in the proposed Undertakings and in a form that is binding. Certainty and clarity in the provision of access to port terminal services cannot be achieved without this as the minimum requirement. For similar reasons, the port terminal services agreement must also be included in and form part of the proposed Undertakings.

Varying the Port Terminal Protocols

12.5 As the port terminal protocols must form part of the key processes by which the BHCs will allocate port terminal capacity and form part of the proposed Undertakings, the opportunity to amend the protocols must be limited to the circumstances in which amendment of the proposed Undertakings is permitted (ie. in accordance with section 44ZZA(7)).

12.6 Alternatively, any variation of the port loading protocols must only take place after consultation with the port users and within strict binding confines of terms that form part of the proposed Undertaking.

12.10 The discretion is such that the proposed Undertaking does not in any way ensure fair and transparent access to port terminal services.

12.11 AGEA agrees that any proposed Undertaking should include a provision allowing the ACCC to treat a breach of the amended port terminal protocols as a breach of the Undertaking

Interaction of the Operational Decisions clause and the PLPs

12.12 As 'Operational Decisions' are stated to constitute all decisions made in the course of providing the Port Terminal Services, they must form part of the proposed Undertaking.

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 the BHCs with sufficient flexibility in their management of the Port Terminal Services

12.13 AGEA agrees with the ACCC's position.

12.14 Additionally, AGEA makes the following comments:

(i) ABB clauses 8.4(b) and (c) do not provide any transparency or benchmarks to show that the Operational Decisions are made to ensure that fair access is provided to all AWEs.

(ii) ABB clause 8.4(d)(i): it is the BHCs that control the movement and accumulation of wheat at port.⁶⁶⁵

In relation to ABB's revised Port Loading Protocols, AGEA submits:

"1. Clause 3 Acceptance of Booking and Ongoing Compliance

The ABB booking process is vague and unworkable. Further, there is no transparency and the factors which ABB can take into account in deciding whether to honour a booking are not objectively ascertainable.

AWEs must be able to access a port slot in a shorter period than 60 days. It is unlikely that AWEs ... will have the following details more than 60 days before they wish to export wheat.

Additionally, it is not clear what is meant in Table A by the requirement to provide details on "sales".

Under the protocol, ABB is entitled to charge a new booking fee for any minor change to details that are provided 60 days in advance of shipment, such as destination, regardless of the cost incurred by ABB by reason of the change. Unless ABB is able to provide transparency in relation to the costs incurred as a result of changes to any details required, ABB should not be entitled to require payment of new booking fees (see Note to Table A(2)).

2. Clause 4.4 Advice of Acceptance or Non-Acceptance

ABB has stated that its determination whether to accept a nomination is based on "*operational factors (including a lack of available capacity or existing commitments to other shippers)*". This clause is vague and there is no certainty provided to exporters – the so-called "operational factors" upon which ABB can base its decision are not objectively ascertainable and there is no transparency as to how the discretion will be exercised.

3. Clause 4.5 Advice of Acceptance on Non-Acceptance

Clause 4.5 provides that by entering into discussions and/or negotiations, ABB does not have to comply with any time frame within which to advise the AWEs whether a booking enquiry will be accepted.

Again, this is vague and not transparent. There is no obligation on ABB to make a decision and no certainty for access seekers as to how the matter should proceed and be resolved.

4. Clause 5 Allocation of Load Date

It is not clear how ABB will assess terminal services capacity and there is no transparency in relation to ABB's decision making process.

Additionally, ABB does not link the assessment with the actual allocation of vessel slots.

5. Clause 6.1 Notification of Changes in Slots and Load Dates

The protocol provides that ABB will merely "*endeavour*" to hold the vessel slot for the AWEs. Clause 6.1 is vague and non-binding. Clause 6.1 then states that the vessel slot may be changed for reasons that are within ABB's

⁶⁶⁵ Australian Grain Exporters Association, *Submission in relation to Draft Decisions on Port Terminal Services Access Undertakings*, 3 September 2009, 12.1-12.14, pp. 25-26.

control. For example "*the cargo is not in an export and shippable position*", "*change in Terminal Services Priority*". The effect of this clause could be to disadvantage access seekers for events which are within ABB's control without any right of recourse. Further, there is no obligation for ABB to provide the AWEs with any input as to the time of the amended vessel slot.

6. Clause 6.3 Notification of Changes in Slots and Load Dates

As ABB does not have a proper ring-fencing policy in place, ABB's trading arm will have access to the above information before AWEs.

7. Clause 7.1.5 Guiding Principles for determining Terminal Service Priority

Clause 7.1.5 permits ABB to load Clients' vessels out of arrival order where the required stock can be made available "*without unduly prejudicing vessels that were initially prioritised over another*" and "*ABB has reasonable grounds to believe that the overall speed and efficiency of the Port Terminal will be enhance on an objective and ascertainable basis.*"

Decision-making based on vague or subjective criteria (such as "*unduly prejudicing*" and "*reasonable grounds*") are not consistent with fair and transparent access to port terminal services. Decisions need to be based on objective criteria and subjective decisions need to be kept to a minimum. Even if the phraseology was acceptable, the lack of transparency means there is no benchmark and no means by which access seekers can be assured that access has been provided to the extent possible.

Further, ABB does not undertake to indemnify the accredited grain exporter for the additional demurrage and losses under the sales contract caused by ABB's unilateral decision.

8. Clause 8 Changes to Nomination and Failure to Meet Table A Requirements

Unless ABB provides transparency in relation to the costs incurred as a result of changes to any details required, ABB should not be entitled to require payment of new booking fees

9. Clause 9 Demonstrating Stock Entitlement

There is no reason why access seekers should be required to demonstrate stock entitlement. There is no prejudice or risk to ABB which is not compensated for by the forfeiture of the booking fee. The AWEs have assumed the risk and associated fees payable to ABB by booking a vessel slot. It is not in the interests of the AWEs to book a slot they do not require or fail to produce the wheat for loading. The AWEs will suffer financial loss if the wheat is not accumulated.

Additionally, the information required by ABB is commercially sensitive. As ABB does not have an adequate ring-fencing policy in place, ABB's trading arm will obtain valuable commercial information.

10. Clause 10 Stock at Third Party Sites

AGEA refers to its comments in relation to clause 9 above.

11. Clause 12 Performance Risk / Anti-hoarding

AGEA refers to its comments in relation to clause 9 above.

Subjective decision making of the kind proposed here is not consistent with fair access. Further, there is no transparency in relation to ABB's decision

making process. ABB is effectively taking on the role of determining who is able to export bulk wheat.

ABB does not suffer damage for any unused vessel slots (clause 12.1.6), as it receives payment up front. In fact, it is likely to enjoy a windfall, as it will not incur certain expenses that have been paid for by the AWEs. Clause 12 is not required to protect ABB's interests.

12. Clause 13 Dispute Resolution

ABB's dispute resolution process is vague and slow and as a result is ineffectual. AGEA refers to paragraphs 8.16, 8.17(xi)-(xii), 8.23 – 8.39 [in its further submission].

13. Clause 14 Review of these Protocols

The ABB Protocols should form part of the Undertaking and should not be varied or amended, except variation in the same circumstances permitted for variation or amendment of the Undertaking, that is, in accordance with section 44ZZA(7).

Alternatively, if variations are to be permitted, any variation must be strictly in accordance with a mechanism whereby:

- (a) A robust industry consultation process must take place.
- (b) The BHC must provide the AWEs at least 3 months notice of the proposed change, in order for the AWE to consider the proposal and enter into meaningful negotiations with the BHC and if necessary, to give AWEs time to adjust.
- (c) Any dispute in relation to variations may be referred to mediation or arbitration;
- (d) Any variations must also be subject to the non-discrimination clauses in the proposed Undertaking.⁶⁶⁶

12.6 ACCC's views

12.6.1 Introduction

The ACCC has identified the following issues as arising for consideration in relation to 'Capacity Management':

1. the nature of the inclusion of the PLPs in the proposed Undertaking and Access Agreements;
2. the process to be applied in varying the PLPs;
3. whether the substance of the PLPs provide an appropriate balance between providing access seekers with sufficient certainty and clarity as to

⁶⁶⁶ Australian Grain Exporters Association, *Submission in relation to Draft Decisions on Port Terminal Services Access Undertakings*, 3 September 2009, Schedule 1, pp. 47-52.

their terms, effect and operation; and ABB with sufficient flexibility in their management of the Port Terminal Services;⁶⁶⁷

4. 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.

12.6.2 Nature of the inclusion of the PLPs in the proposed Undertaking and Access Agreements

12.6.2.1 PLPs form part of the proposed Undertaking

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.

12.6.2.2 PLPs will be offered as part of the Access Agreements

In April 2009 ABB undertook to include the initial PLPs set out in Schedule 3 in its Access Agreements.⁶⁶⁸

As the ACCC understood 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 16 April 2009 proposed Undertaking, ABB could 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;
- (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

⁶⁶⁷ The ACCC has provided draft views on both the April PLPs and the August PLPs.

⁶⁶⁸ ABB Grain Ltd, *Port Terminal Services Access Undertaking*, 16 April 2009, clause 8.2(a).

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) of ABB's 16 April 2009 Undertaking is not 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 Undertaking 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 to the variation methodology (set out below), it is the ACCC's 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 relation to the terms, effect and operation of the proposed PLPs.

12.6.3 Varying the Port Loading Protocols

12.6.3.1 The variation process in the Undertaking

It is the ACCC's 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, in most circumstances, take place after consultation with the port users. The ACCC's view is that the PLP variation process should 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 Undertaking/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 to the Issues Paper dated

29 April 2009 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 undertaking variation mechanism in section 44ZZA(7) of the Act.

The ACCC notes AGEA's submission that, as an alternative to variation of the PLPs solely under section 44ZZA(7) of the TPA, variations to the PLPs must take place in accordance with a strict mechanism set out in the Undertaking, and that a provision should be included in the Undertaking that allows the ACCC to treat a breach of the amended port loading protocols as a breach of the Undertaking.

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:

- the inclusion of a robust consultation mechanism;
- the inclusion of a provision allowing the ACCC to treat a breach of the amended PLPs as a breach of the Undertaking (that is, clarifying that ABB will comply with the PLPs, as amended from time to time);
- the recommendation for a robust 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 provision 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, if necessary.

It is the ACCC's view that this approach is 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).

The ACCC considers that a consultation mechanism limited to and involving ‘Major Users’ as proposed by ABB in their 3 September 2009 submission on the ACCC’s Draft Decision⁶⁶⁹ would likely be considered appropriate in the circumstances.

Concerns about discrimination against smaller users are limited by the proposal that the Consultation Notice must be published in a prominent place on the ABB website (with reference on the Shipping Stem to the Notice’s publication) and the ability of interested parties (and not just Major Users) to provide comments on or meet to discuss the proposed variations.

12.6.3.2 The variation process contained in the PLPs

The ACCC’s view is that the provision in the PLPs in relation to variation of the PLPs is not appropriate because the process to be applied 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 after consultation with the port users. For example, the wording of the variation provision in the April PLPs did 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 and which has been reflected in the August PLPs.

12.6.4 The substance of the proposed April PLPs

The ACCC has considered two issues. Firstly, whether the provisions in the Undertaking and the transparency provisions in the WEMA 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.

12.6.4.1 Transparency provisions in 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.

⁶⁶⁹ ABB proposes to define ‘Major Users’ as users who have shipped an average of 50,000 tonnes of commodity through the Port Terminals in each of the preceding two years.

12.6.4.2 Whether the PLPs dated 16 April 2009 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 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.

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 dated 16 April 2009 are, on the whole, unlikely to be appropriate because they are unclear and outdated. The following comments on the particular provisions of the PLPs dated 16 April 2009 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 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 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 seeker is 'creditworthy' is unclear.

3. Vessel Nomination

The ACCC's view is that the provision as currently drafted is not appropriate because 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 view is that the provision as currently drafted is not appropriate because 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 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 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 view is that the provision as currently drafted is not appropriate because there is a 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 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 view is that the provision as currently drafted is not appropriate because 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'.⁶⁷⁰ 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 view is that the provision as currently drafted is not appropriate because 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 current drafting provides excessive flexibility for ABB and insufficient certainty for access seekers.

11. General comments

There are a number of terms used in the PLPs and the Undertaking that are not defined in the PLPs or the proposed Undertaking (for example, 'Client' is used in the PLPs but not defined in either the PLPs 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 ABB and should be remedied.

⁶⁷⁰ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 75.

12.6.5 The August PLPs

12.6.5.1 The ACCC's views

It is the ACCC's view that while the 19 August 2009 PLPs adopt a majority of the ACCC's recommendations set out in its Draft Decision on ABB's proposed Undertaking of 16 April 2009, in the interests of greater transparency and clarity, the PLPs require the following specific amendments in order for them to be considered, on balance, appropriate:

- The wording of clause 1.1 which sets out the purpose of the PLPs should be strengthened to clarify ABB's obligation to comply with the processes and procedures in the PLPs when ordering and managing vessels for loading.
- At clause 10.1.1, after "ABB" insert "*such approval not be unreasonably withheld*";
- At clause 13.6, after "*that decision*" insert "*and the reasons for that decision*";
- At clause 14.1.1, replace "*are consistent*" with "*in accordance*".

12.6.5.2 Submissions from interested parties

The ACCC notes that submissions by AGEA on the revised PLPs dated 19 August 2009 can be summarised as follows:

- (i) the meaning of certain terms are unclear;
- (ii) the circumstances in which particular provisions will operate are unclear;
- (iii) certain provisions are either not binding on ABB or are unduly burdensome on access seekers (for example, requiring the provision of commercial information or allowing ABB to take into account matters within its control);
- (iv) certain provisions are open-ended;
- (v) certain provisions lack transparency, provide insufficient guidance as to how ABB's discretion will be exercised or allow ABB to make subjective decisions;
- (vi) the dispute resolution process is ineffectual;
- (vii) the PLPs should only be able to be varied in specific circumstances.

The substance of AGEA's arguments is that there are certain terms and processes set out in the August PLPs that AGEA considers could be more clearly defined and / or could be spelt out in greater detail as to their applicability.

The ACCC agrees that as the PLPs form part of the key processes by which ABB will allocate and manage port terminal capacity, it is important that the proposed Undertaking provides sufficient certainty and clarity in its terms, effect and operation in order to enable ABB and access seekers to be aware of their respective rights and obligations.

However, 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 a flexible and pragmatic approach is required to maintain the overall efficiency of the system.

Therefore, the ACCC considers that the specific level of prescription suggested by AGEA in relation to the August PLPs is, at this particular point in time, unnecessary in light of the combined effect of the ACCC's recommendations in the Draft Decision for clearer and more transparent PLPs (which to a large extent reflect the substance of AGEA's comments on the August PLPs) and the specific recommendations in relation to the non-discrimination and no-hindering access provisions that were suggested in the Draft Decision on the proposed Undertaking dated 16 April 2009 – both of which should be reflected in any revised Undertaking submitted to the ACCC.

Expanding on this, the ACCC recommends that ABB's proposed revised Undertaking, in order to be considered appropriate by the ACCC, include robust non-discrimination and no-hindering access clauses, supported by the ability of the ACCC to request an audit of compliance with the non-discrimination clause.

These measures, together with the recommendations in relation to the Capacity Management provisions in the Undertaking, should achieve the objective of providing fair and transparent access to port terminal services for access seekers by providing 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 any proposed revised Undertaking.

Non-discrimination and specific provisions in the revised August PLPs

The ACCC notes that the robust non-discrimination provision and a no-hindering access provision that would be appropriate for inclusion in a revised undertaking (the particulars of which are contained in the Non-Discrimination chapter) are intended to constrain the ability of ABB to exercise discretion under its PLPs in an anti-competitive manner, including in relation to:

- Clause 4.5 - where this provision only applies in circumstances where ABB cannot fully satisfy the Client's booking due to operational factors;
- Clause 5 – when ABB assesses its terminal services capacity to determine a Load Date for a client's vessel;
- Clause 6.1 – when ABB is 'endeavour[ing] to ensure that [a] Client's Slot and Load Date will be held for the Client';
- Clause 6.3 – when ABB updates the Shipping Stem in the event that a Slot is vacated;
- Clause 7.1.4 – where ABB may accept a new booking on the Shipping Stem in order to maximise port terminal capacity utilisation;
- Clause 7.1.5 – where ABB may load Client's vessels out of arrival order; and

- Clause 12.1 – where ABB may decide not to accept a booking if it considers that the booking involves an attempt by the Client to reserve Slots in excess of its reasonably anticipated requirements.

The dispute resolution process in the PLPs

The ACCC's view, as set out in the Draft Decision, is that the provision in the April PLPs in relation to dispute resolution is not appropriate because the drafting of the dispute resolution process provides too much discretion to ABB and insufficient certainty for access seekers. This is for the reasons that 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 view is that the dispute resolution provisions in the August PLPs are (subject to minor amendments regarding clarity about the process and if the recommendations in the Non-Discrimination chapter for a clearer non-discrimination provision in the Undertaking are also accepted) would be appropriate as the process is not open ended, reasons for decision are required to be given and set timeframes are given for final decisions to be made.

The ACCC does not consider it necessary that disputes under the PLPs be able to be referred to an independent arbitrator at this particular point in time, as the requirement may inappropriately affect the legitimate business interests of ABB in being able to run their port terminal facilities with a sufficient degree of flexibility so as to maintain an efficient supply chain and may also impose significant costs on both ABB and access seekers. The ACCC also considers that to impose such a requirement could risk imposing regulation that is not appropriate at a time when the industry is newly liberalised and in transition.

12.6.6 Operational Decisions

12.6.6.1 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 view is that it would be appropriate that the provisions under clause 8.4 are included in the PLPs. See the Non-Discrimination chapter for more detail.

12.6.6.2 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 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 too much discretion 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'.⁶⁷¹
2. The ACCC's 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 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 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 view is that clause 8.5 as currently drafted is not appropriate. See the Non-Discrimination chapter for more detail on this issue.

⁶⁷¹ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 54.

13 Publication of Information

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.

Specifically, it would be appropriate for this obligation to require publication (on ABB's website) of information on stocks at port of bulk wheat as compared to non-wheat grains, on a monthly basis. The ACCC considers that this would provide a level of transparency over whether ABB was restricting access to port by exhausting the port terminal's capacity in favour of other grains, whilst not risking the imposition of onerous reporting requirements that are not appropriate at a time when the industry is newly liberalised and in transition.

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, 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.

Specifically, 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 (i.e. the next business day). 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 whilst not imposing unduly prescriptive regulation on ABB. 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 (on ABB's website) 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. However, the ACCC does not intend this to be an onerous obligation. In the context of a newly liberalised industry, the obligation should not (in this particular context) require the collation of data that ABB does not already collect as part of its normal commercial practice.

Introduction

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 addresses the need for additional clauses to those proposed in ABB's proposed Undertaking dated 16 April 2009.

13.1 Publication of stocks at port

13.1.1 ABB's proposed Undertaking dated 16 April 2009

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.

13.1.2 ABB's submissions in support of its proposed Undertaking dated 16 April 2009

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...⁶⁷²

In response to a question in the ACCC's information request dated 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;

⁶⁷² ABB Grain Ltd, *Submission to the ACCC*, 16 April 2009, p. 22.

- 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.⁶⁷³

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.⁶⁷⁴

13.1.3 Submissions from interested parties in response to ACCC Issues Paper dated 29 April 2009

13.1.3.1 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.⁶⁷⁵

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).⁶⁷⁶

AGEA also submits that:

⁶⁷³ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 28.

⁶⁷⁴ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 65.

⁶⁷⁵ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 4.12, p. 10.

⁶⁷⁶ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 14.4, p. 31.

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 the AWEs. The undertakings do not ensure that AWEs obtain access to the same information that is available to BHCs.⁶⁷⁷

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.⁶⁷⁸

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.⁶⁷⁹

⁶⁷⁷ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 4.13 & 4.14, pp. 11-12.

⁶⁷⁸ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 4.16, p. 12.

⁶⁷⁹ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 4.17(k), p. 14.

13.1.3.2 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 and useful service to the wider industry in receiving and publishing the relevant information.⁶⁸⁰

13.1.3.3 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

⁶⁸⁰ NSW Farmers Association, *Submission in relation to proposed access undertakings*, June 2009, p. 5.

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 overseen 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.

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.⁶⁸¹

13.1.4 ABB's submissions in response to Draft Decision

ABB made no submissions on the particular issue of publication of stocks at port other than to note that "ABB's compliance with the objectives and requirements of the Access Undertaking ... will be monitored by way of ... a high degree of transparency and information" including through "ABB's proposal to publish certain information about wheat at port."⁶⁸²

ABB submits that this information (in addition to other publication requirements) "will ensure that access seekers, the Commission and other interested parties will have up to date and extensive knowledge about the operation of ABB's Port Terminals, the provision of Port Terminal Services and compliance with the terms of the Access Undertaking".⁶⁸³

13.1.5 Submissions from interested parties in response to Draft Decision

13.1.5.1 VFF

The Victorian Farmers Federation submits that "at the least; stocks of grain at port should be published consistently by all providers of port terminal services."⁶⁸⁴

13.1.5.2 AGEA

AGEA submits that it was not appropriate that the BHCs' proposed Undertakings do not include an obligation to publish stocks of all grains at port.⁶⁸⁵ AGEA submits that the BHCs should provide port stocks "by grain and grade".⁶⁸⁶ AGEA submits that

⁶⁸¹ South Australian Farmers Federation Grains Industry Committee, *Submission in relation to proposed ABB access undertaking*, May 2009, p. 5.

⁶⁸² ABB Grain Limited, *Submission in relation to Draft Decision on ABB Access Undertaking*, 3 September 2009, p. 5.

⁶⁸³ ABB Grain Limited, *Submission in relation to Draft Decision on ABB Access Undertaking*, 3 September 2009, p. 6.

⁶⁸⁴ Victorian Farmers Federation, *Submission in relation to Draft Decisions on Port Terminal Services Access Undertakings*, 3 September 2009, p. 1.

⁶⁸⁵ Australian Grain Exporters Association, *Submission in relation to Draft Decisions on Port Terminal Services Access Undertakings*, 3 September 2009, 1.27.

⁶⁸⁶ Australian Grain Exporters Association, *Submission in relation to Draft Decisions on Port Terminal Services Access Undertakings*, 3 September 2009, 13.3(iii).

such an obligation “would address concerns ... 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.”⁶⁸⁷

AGEA also submits that the information provided should be broken down on a port by port level and updated every 24 hours.⁶⁸⁸

13.1.5.3 SAFF

The South Australian Farmers Federation submits that:

There needs to be transparency in providing details of the stock inventory for all Grain Trade Australia-recognised receival points, detailing for each commodity the variety, received tonnes, grades and quality, (stack averages). This must be provided for all commodities received at that receival point.⁶⁸⁹

13.1.6 ACCC’s views on publication of stocks at port

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.⁶⁹⁰

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. The ACCC also considers that it would be appropriate for ABB’s proposed Undertaking to require publication of that information in a prominent position on ABB’s website.

In relation to the regularity of publication and the type of information to be published the ACCC considers that a requirement to publish information on stocks at port of Bulk Wheat as compared to non-wheat grains, on a monthly basis, is likely to be appropriate. The ACCC considers this would provide a level of transparency over whether port operators were restricting access to port by exhausting the port terminal’s capacity in favour of other grains whilst not risking the imposition of onerous reporting requirements that are not appropriate at a time when the industry is newly liberalised and in transition.

⁶⁸⁷ Australian Grain Exporters Association, *Submission in relation to Draft Decisions on Port Terminal Services Access Undertakings*, 3 September 2009, 1.28.

⁶⁸⁸ Australian Grain Exporters Association, *Submission in relation to Draft Decisions on Port Terminal Services Access Undertakings*, 3 September 2009, 13.4.

⁶⁸⁹ South Australian Farmers Federation Grains Industry Committee, *Submission in relation to Draft Decision on ABB Access Undertaking*, 3 September 2009, p. 1.

⁶⁹⁰ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, para 4.9, p. 10.

In this regard, while the ACCC notes AGEA's further submission that port stocks by grain and grade should be broken down on a port by port basis and updated every 24 hours,⁶⁹¹ the ACCC considers that such reporting could be unduly prescriptive at this point in time. The ACCC also notes that breaking down stocks by grain and grade at every port could potentially compromise confidential information in relation to the stock position of smaller users of the port terminal.

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.⁶⁹²

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'.⁶⁹³ 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.⁶⁹⁴

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.

⁶⁹¹ Australian Grain Exporters Association, *Submission in relation to Draft Decisions on Port Terminal Services Access Undertakings*, 3 September 2009, 13.4.

⁶⁹² Explanatory Memorandum, *Wheat Export Marketing Bill 2008*, p. 13.

⁶⁹³ Explanatory Memorandum, *Wheat Export Marketing Bill 2008*, p. 14.

⁶⁹⁴ House of Representatives, *Votes and Proceedings, Hansard*, Thursday 29 May 2009, pp. 76-77.

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.

13.2 Publication of key port terminal information

13.2.1 ABB's proposed Undertaking dated 16 April 2009

ABB's proposed Undertaking does not include an obligation to publish key port terminal information.

13.2.2 ABB submissions in response to Draft Decision

In its submission in response to the ACCC's Draft Decision, ABB proposes to publish information in relation to vessel nominations on the shipping stem which ABB submits would (together with the publication of key service standards) "provide the [ACCC] and industry participants with substantial information in relation to the operation of the Port Terminals."⁶⁹⁵ ABB submits that "the information [that is proposed to be published] is currently available to [ABB] (which is consistent with the Commission's stated intention of not requiring ABB to collate additional data), and is also consistent with relevant performance standards referred to in ABB's response to Question 43 of the ACCC's information request of 2 June 2009, provided to the Commission on 23 June 2009."⁶⁹⁶

13.2.3 Submissions from interested parties in response to Draft Decision

13.2.3.1 AGEA

AGEA submits that the BHCs should provide the following information:

- Port intake capacity;
- Intake booking slots;
- Refusal of request for acceptance of cargo receipt;
- Refusal of request for cargo outturn;
- Acceptance of vessel nominations regardless of stock;
- Changes to vessel slots and cargo accumulation;
- Unloading of trains/road transport within six hours;
- Load rates and time to count as per Austwheat 2008 charterparty (as amended from time to time);
- Benchmark criteria for grading, fumigation, weighing;
- Compliance with AQIS requirements, loading to receipt 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

⁶⁹⁵ ABB Grain Limited, *Submission in relation to Draft Decision on ABB Access Undertaking*, 3 September 2009, p. 14.

⁶⁹⁶ ABB Grain Limited, *Submission in relation to Draft Decision on ABB Access Undertaking*, 3 September 2009, p. 14.

so that any deviation from the required quality is known by the exporter prior to the completion of loading;

- Settling despatch demurrage at the applicable vessel rate.⁶⁹⁷

AGEA also submits that the information provided should be broken down on a port by port level and updated every 24 hours.⁶⁹⁸

AGEA argue that it is appropriate for the proposed Undertaking to address the potential for the BHCs' marketing arm to misuse port terminal information to its advantage.⁶⁹⁹ AGEA also noted that they agreed with the ACCC's view that the appropriate approach to deal with the issue would be for the proposed Undertakings to require publication of key port terminal information (such as cargo nomination applications) on the shipping stem within a short time after it is received by the BHC, and suggested that the information should be provided within 24 hours.⁷⁰⁰

13.2.3.2 SAFF

As set out above, SAFF submits that:

There needs to be transparency in providing details of the stock inventory for all Grain Trade Australia-recognised receival points, detailing for each commodity the variety, received tonnes, grades and quality, (stack averages). This must be provided for all commodities received at that receival point.⁷⁰¹

SAFF also submits the following in relation to the shipping stem:

There needs to be processes in place which allows for information to be readily available on who has nominated ships, what vessels are pending, and the amount of grain shipped (which must include grain type, volume and grade). All this needs to be time stamped so that then there can not be allegations of anyone jumping the queue.

To nominate a vessel, it should not be necessary to have stock in the system before nominating. Three weeks before loading, the tonnage in the system owned by the trader should become the tonnage available for shipping.⁷⁰²

13.2.4 ACCC's view on 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.

⁶⁹⁷ Australian Grain Exporters Association, *Submission in relation to Draft Decisions on Port Terminal Services Access Undertakings*, 3 September 2009, 13.3.

⁶⁹⁸ Australian Grain Exporters Association, *Submission in relation to Draft Decisions on Port Terminal Services Access Undertakings*, 3 September 2009, 13.4.

⁶⁹⁹ Australian Grain Exporters Association, *Submission in relation to Draft Decisions on Port Terminal Services Access Undertakings*, 3 September 2009, 1.29.

⁷⁰⁰ Australian Grain Exporters Association, *Submission in relation to Draft Decisions on Port Terminal Services Access Undertakings*, 3 September 2009, 1.31-1.32.

⁷⁰¹ South Australian Farmers Federation Grains Industry Committee, *Submission in relation to Draft Decision on ABB Access Undertaking*, 3 September 2009, p 1.

⁷⁰² South Australian Farmers Federation Grains Industry Committee, *Submission in relation to Draft Decision on ABB Access Undertaking*, 3 September 2009, p. 2.

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.

The ACCC considers that a requirement to publish information about vessel nominations that are updated each business day is likely to be appropriate as it would appropriately balance the legitimate business interests of the provider and the interests of persons who might want access to the service by increasing the transparency of nominations that have been made and lessen the opportunity for ABB's marketing arm to misuse key port terminal information.

Therefore, while the ACCC notes the further submissions from AGEA and SAFF arguing for the publication of various categories of additional information about the port terminals, the ACCC is concerned that this would risk the undesirability of imposing onerous reporting requirements that are not appropriate at a time when the industry is newly liberalised and in transition.

The ACCC also notes that it considers that ABB's Undertaking, in order to be considered appropriate by the ACCC, would need to include robust non-discrimination and no-hindering access clauses, supported by the ability of the ACCC to request an audit of compliance with the non-discrimination clause. The ACCC considers that these measures, together with clear and transparent port loading protocols and a robust arbitration framework regarding access to port terminal services, is likely to achieve the objectives of providing fair and transparent access to port terminal services for wheat exporters (without the need to publish such extensive information sought by AGEA and others).

13.3 Port performance indicators

13.3.1 ABB's proposed Undertaking dated 16 April 2009

ABB's proposed Undertaking does not place any obligation on it to maintain and publish performance indicators.

13.3.2 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.⁷⁰³

13.3.3 Submissions from interested parties in response to ACCC Issues Paper dated 29 April 2009

13.3.3.1 AGEA

AGEA calls for the following minimum performance criteria to be included in the standard terms:

⁷⁰³ ABB Grain Ltd, *Supplementary submission to the ACCC*, 23 June 2009, p. 49.

- (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.⁷⁰⁴

13.3.4 ABB submissions in response to Draft Decision

ABB submits the following on the issue of publication of key service standards:

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

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

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

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

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

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

⁷⁰⁴ Australian Grain Exporters Association, *Submission in relation to proposed access undertakings*, 29 May 2009, p. 13.

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

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

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

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

ABB also proposes to publish its report to the Commission on its website within 5 Business Days of the date on which it provides it to the Commission.⁷⁰⁵

13.3.5 Submissions from interested parties in response to Draft Decision

1.3.5.1 AGEA

AGEA submits the following in relation to the publication of port performance indicators or key service standards:

13.1 AGEA agrees with the ACCC that it is not appropriate that the BHCs' proposed Undertakings do 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 AWEs and assist potential access seekers in assessing the appropriateness of the price offered for a service.

13.2 AGEA agrees with the ACCC that the BHCs should publish the following performance indicators below, which should be specified and included in the BHCs proposed Undertakings:

- (i) The shipping stem
- (ii) Ship rejections;

⁷⁰⁵ ABB Grain Limited, *Submission in relation to Draft Decision on ABB Access Undertaking*, 3 September 2009, 6.

- (iii) Cargo assembly times;
- (iv) Transport queuing times;
- (v) Port blockouts; and
- (vi) Overtime charged.

...

13.4 The above information in paragraphs 13.2 ... should be broken down on a port by port level and updated every 24 hours.

...

13.6 A further useful indicator as to whether non-discriminatory port terminal access is being provided, could be the percentage of vessel slots that are allocated to the BHCs' trading arms. Further guidance may be attained by determining the number of vessel slots that are subsequently traded by the BHCs' trading arms to AWEs.⁷⁰⁶

13.3.6 ACCC's views on port performance indicators

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 indicators.

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:

1. Ship rejections;
2. Cargo assembly times;
3. Transport queuing times;
4. Port block-outs;
5. Overtime charged;
6. Demurrage.

The ACCC notes that including obligations to report on service standards is an obligation that has been included in other access undertakings.⁷⁰⁷

The ACCC also notes that it does not intend the requirement to publish port performance indicators to be an onerous obligation and recognises that, in order to

⁷⁰⁶ Australian Grain Exporters Association, *Submission in relation to Draft Decisions on Port Terminal Services Access Undertakings*, 3 September 2009, 13.1-13.2, 13.4, 13.6, 1.34.

⁷⁰⁷ See, for example, the access undertaking submitted by the Australian Rail Track Corporation (ARTC), and accepted by the ACCC on 30 July 2008.

appropriately balance the legitimate business interests of the provider and the interests of persons who might want access to the service, the obligation should not (in this particular context) require the collation of data that ABB does not already collect as part of its normal commercial practice. To do so would risk the imposition of regulation that is not appropriate at a time when the industry is newly liberalised and in transition.

Given this, while the ACCC notes AGEA's further submission recommending that the BHCs be required to publish a significant number of specific performance indicators broken down on a port by port basis and updated every 24 hours, the ACCC considers that such reporting could be unduly prescriptive at this point in time.

The ACCC considers that the indicators proposed by ABB would be likely to be appropriate as they would:

- appropriately balance the legitimate business interests of the provider and the interests of persons who might want access to the service by providing 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.

The ACCC notes that, in the interests of transparency, it would be appropriate for ABB's proposed Undertaking to require publication of the performance indicators in a prominent position on ABB's website.

14 Further Draft Decision

Summary

The ACCC's further draft decision is that it should not accept the proposed Undertaking given to the ACCC by ABB on 16 April 2009.

14.1 Further Draft Decision on ABB's proposed Undertaking

In relation to the proposed Undertaking given to the ACCC by ABB on 16 April 2009, the ACCC's further draft view is that, having regard to the matters listed in s.44ZZA(3) of the TPA, it would not be appropriate to accept the proposed Undertaking.

As a result, the ACCC's further draft decision is that it should not accept the proposed Undertaking in its current form.

The ACCC has provided the reasons for its further draft decision throughout this document, including final views on provisions that would not be appropriate, and alternatives that would likely be appropriate.