



Australian  
Competition &  
Consumer  
Commission

2 June 2009

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Dear Mr Poddar

**Re: ABB Grain Ltd (ABB) Port Terminal Service Access Undertaking**

I refer to the proposed access undertaking from ABB Grain Ltd (ABB) for its port terminal services at Port Adelaide, Outer Harbour, Port Giles, Wallaroo, Port Lincoln and Thevenard (the Undertaking) submitted to the ACCC on 16 April 2009 for consideration under Part IIIA of the *Trade Practices Act 1974* (the Act).

In order to facilitate the ACCC's assessment of the proposed Undertaking, the ACCC seeks the further information from ABB requested at **Attachment A**. Responses by ABB in relation to the requests at Attachment A are relevant to the ACCC's ability to assess whether to accept or reject the Undertaking having regard to the matters set out in section 44ZZA(3) of the Act.

There are two parts to the information request at Attachment A. The first part relates to various statements made by ABB in its supporting submission to the Undertaking relating to issues such as the competition provided by other grain terminals, the possibility of new port entry and the countervailing power of customers. The ACCC notes that a number of these assertions have not been backed up by detailed supporting submissions and would like to give ABB the opportunity to substantiate the claims. In addition, the ACCC considers that this information will assist the ACCC to form a view about whether it would be appropriate to accept the Undertaking, having regard to the matters set out in section 44ZZA(3), in particular, the objects of Part IIIA of the Act, the legitimate business interests of the provider, the public interest, including the public interest in having competition in markets and the interests of persons who might want access to the service.

The second part of the information request relates to the ACCC gaining an understanding of the rationale for, workability and appropriateness of specific clauses of the Undertaking. The ACCC requires this information in order to assess whether the Undertaking, as provided by ABB, will operate to provide access to the port terminal services in a manner considered by the ACCC to be appropriate pursuant to section 44ZZA(3).

The ACCC therefore seeks ABB's co-operation in responding to the questions at Attachment A in a timely fashion.

The ACCC understands that ABB intends to provide a submission to the ACCC responding to the ACCC's issues paper dated 29 April 2009 (Issues Paper) as well as to submissions provided by interested parties. The ACCC is amenable to ABB providing its response to the Issues Paper and to submissions by interested parties in conjunction with its response to this information request. It is recognised that ABB may have intended that some of the information requested in this information request would be provided in its response to the Issues Paper – and accordingly, the ACCC is open to an approach that minimises duplication.

ABB's response to this information request, as well any submissions it proposes to make in response to the Issues Paper and submissions from interested parties, are requested to be provided to the ACCC no later than close of business on **23 June 2009**.

Under section 44ZZBC of the Act, the ACCC must use its best endeavours to complete its assessment of the Undertaking within six months from the date it was submitted. However, as noted in my letter of 17 April 2009, this is likely to be dependent on ABB providing complete information in response to ACCC information requests. A prompt response to this request will assist the ACCC in its timely assessment of the Undertaking.

Please also note that the attached questions should not be interpreted as indicative of all the matters the ACCC may wish to have regard to in its assessment of the Undertaking, and the ACCC may make further information requests at a later stage.

Please contact me on (03) 9290 1804, or Sarah Sheppard on (03) 9290 1992, if you have any questions in relation to the above.

Yours sincerely



Anthony Wing  
General Manager  
Transport & General Prices Oversight

## Attachment A

### Part A – Matters raised in ABB’s supporting submission

#### *‘Competition from other grain terminals’*

1. Paragraph 5.17 of ABB’s supporting submission to its proposed undertaking, dated 16 April 2009 (**the ABB submission**), notes that ABB’s port terminal at Port Adelaide competes with GrainCorp’s port terminals at Geelong and Portland and to a lesser extent Australian Bulk Alliance’s (**ABA**) Melbourne Port terminal. In this regard, please elaborate on the following:
  - a. What impact, if any, has this had upon terms and conditions of access to ABB’s Port Adelaide terminal? Please provide any relevant documents/materials to support your response.
  - b. Does ABB consider that any of ABB’s other port terminals compete with port terminals owned by parties other than ABB?
  - c. Is there any difference between the price and non-price terms offered to marketers exporting out of different ABB terminals in South Australia?
  - d. What proportion of South Australian grain is exported via Victorian ports? Please provide estimates for the past 3 calendar years.
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?

#### *‘Possibility of entry’*

3. Paragraph 5.19 of the ABB submission notes that ‘ABB regards the threat of new port development or new export grain facilities, as more than theoretical.’ Please elaborate on this comment, and in relation to a possible new bulk wheat grain export terminal:
  - a. What capacity (intake, shipping bin and ship loading) would a new terminal need to be competitive?
  - b. What is the likely cost of construction?
  - c. What would be likely locations for a new terminal, and what would be required to obtain/utilise those locations?
  - d. What would be the minimum level of volume required for the terminal to operate successfully?
  - e. Would it be possible to obtain sufficient volumes for the terminal to operate successfully?
  - f. Who would be likely to pursue development of a new terminal?
  - g. What regulatory or other approvals (such as approval from the port authority) would it be necessary to obtain in order to commence construction?
  - h. Could an existing terminal be converted to export bulk wheat?

- i. What would be the likely timeframe for constructing and commissioning a new port terminal?
4. Paragraph 5.13 of ABB's submission notes that there is significant excess capacity at each of ABB's port terminals.
  - a. In light of this excess capacity, why did ABB decided to invest in further capacity at the Outer Harbour terminal?
  - b. What has been the total cost of the Outer Harbour development? Please provide a breakdown of fixed and variable costs.
5. What were the total upfront capital costs incurred for each of ABB's grain terminals (other than Outer Harbour, which is dealt with above at question 4)? (for terminals that were purchased rather than built, please provide the purchase price for that terminal).
6. For each of ABB's grain terminals, what were the annual total operating costs for the grain terminal for financial years 2005/06, 2006/07 and 2007/08?

*'Power of customers'*

7. Paragraph 5.11 of the ABB submission suggests that ABB's export terminal customers have a level of countervailing power that will operate as a 'powerful constraint' on ABB. Please elaborate on this comment:
  - a. If a port terminal customer (i.e., a bulk wheat exporter) was dissatisfied with proposed access terms, what alternatives for equivalent services are currently available in Australia, and what would be the typical costs (monetary and otherwise) to the customer in switching to such alternatives? Further, what would be the costs (monetary and otherwise) to ABB of losing the customer to such alternatives?
  - b. Please provide examples of the ways in which an export terminal customer (i.e., a bulk wheat exporter) could use bargaining power in its negotiations with ABB in relation to the provision of port terminal services at a given terminal.
  - c. Currently, what options are available to an export terminal customer (i.e., a bulk wheat exporter) in the event it believes that ABB had engaged in discriminatory conduct in relation to the provision of port terminal services? In particular, would the customer have any recourse under contractual arrangements with ABB?

*'Incentive to maximise throughput'*

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

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

*Information flows and ring-fencing*

9. Paragraph 6.7 of the ABB submission states:

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

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

*Other*

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

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

The clause references in the following questions are to clauses in ABB's proposed undertaking. Words capitalised as proper nouns (e.g., Trading Division, Access Agreement) are as defined in the proposed undertaking, unless otherwise stated.

*General*

11. How, if at all, will the proposed undertaking impact on the export of grains other than bulk wheat at ABB's terminals? How will areas of potential overlap between wheat and non-wheat areas be dealt with? For example, will the shipping stem include vessels for wheat and other grains?
12. To the extent that ABB proposes to offer bundled services (i.e. port terminal services plus up-country services), does ABB envisage that the proposed undertaking (both in general, and specifically in relation to the negotiate/arbitrate process) will apply to those bundled offers?
13. To the extent that there are any differences between the port terminal services offered under the proposed undertaking, and the port terminal services that are offered under any bundled offer, please set out these differences.
14. Outline the basis on which ABB will provide access to port terminal services to its Trading Division. That is, will such access be at ‘arms length?’ If so, how will this be

effected? Will it be on the same terms of access as offered to other bulk wheat exporters?

15. Clause 3.5 (b) contains an obligation to 'consult' with various parties prior to seeking the ACCC's consent to vary the proposed undertaking. What, specifically, does the obligation to 'consult' on a proposed variation include?
16. In relation to the timeframes specified in clauses 5, 6 and 7 of the proposed undertaking, please provide an explanation as to why those timeframes are appropriate.

#### *Non-discrimination*

17. Clause 5.4 proposes a mechanism by which ABB may provide access to Applicants or Users, including its own Trading Division, on differentiated terms, provided such terms are consistent with the objectives of the proposed undertaking, taking into account the 22 matters set out in clause 5.5, and offered on an arms length commercial basis.
  - a. If in a given circumstance ABB considered that one of the matters listed in clause 5.5 provided a reason for providing access on differentiated terms, what information or evidence would ABB rely upon to demonstrate that such circumstances existed and different terms were appropriate?
  - b. How would ABB communicate the reason/s for such terms to the Applicant/User?
  - c. What measures will ABB implement to ensure that differentiated terms are offered on an arms length commercial basis to its own Trading Division?
18. What conduct would be viewed as 'substantially damaging a competitor' or 'conferring ... any unfair competitive advantage over a competitor' for the purposes of clause 5.4(b)?

#### *Publication of and variation to Reference Prices and Standard Terms*

19. In relation to clause 5.2(b), what does ABB envisage as 'appropriate "holding over" provisions'?
20. Under what circumstances would ABB envisage varying Standard Terms or Reference Prices pursuant to clause 5.6? Does ABB propose any limitations or restrictions on its ability to make such variations? How many times in a particular year would ABB be likely to vary Standard Terms or Reference Prices?
21. What is the role of bulk wheat exporters in the variation process set out in clause 5.6, if any? (Such as consultation prior to publication of new prices, or renegotiation of existing prices?)
22. In relation to the requirement to publish a variation at least 30 days prior to its effective date in clause 5.6(b), why is there no similar requirement in relation to the annual publication of Standard Terms and Reference Prices?

### *Negotiating for access*

23. Clause 5.1 provides that ABB must publish Reference Prices and Standard Terms by no later than 30 September of each year. Please elaborate on whether publication by this date allows sufficient time for an exporter to have an Access Agreement in place for the harvest season in a particular year.
24. What ability will bulk wheat exporters have to negotiate terms prior to the publication of Reference Prices and Standard Terms, given that ABB is required to publish by *no later than 30 September* in each year?
25. Under what terms and conditions will ABB provide access to its port terminal services to wheat exporters prior to execution of an Access Agreement (such as where parties are involved in a Dispute)?
26. In relation to clause 6.4(a)(ii)(B), what factors will ABB take into account in deciding if a request is 'unduly onerous' or 'disproportionate'?
27. In relation to clause 6.4(b)(i), why is it necessary for ABB to have discretion not to negotiate with the Applicant if ABB considers that the Applicant has not followed the process in the proposed undertaking? What factors will inform ABB's consideration that an Applicant has not followed the process?
28. In relation to clause 6.5 & Schedule 1 (on the proposed form requirements for an access application):
  - a. What is meant by 'Customer Application Type' and 'Business Category'?
  - b. Why is it necessary for the Applicant to have a website in order to seek access? If the Applicant does not have a website, will ABB refuse access?
29. In relation to clause 6.6(b)(iv), what factors would ABB take into account in deciding if the negotiations were not progressing in good faith towards the development of an Access Agreement within a reasonable time period?
30. What is meant by 'amended Standard Terms' in clause 6.7(b)(ii)? How does this clause interact with the ability of the ABB to offer different terms under clause 5.4? (That is, what, if any, is the difference between an 'amended Standard Term' and a 'different term'?)
31. If the Negotiation Period ceases, will the Applicant be entitled to make another application for access? How would any further application be dealt with?

### *Disputes*

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

33. Clause 7.1(b) proposes that any disputes in relation to an Access Agreement once executed will be dealt with in accordance with the provisions of that Access Agreement. Does this include disputes regarding claims of discriminatory conduct? What dispute resolution mechanism will be provided under the Access Agreement?
34. In relation to clause 7.1(c), why should the report to the ACCC only deal with 'material disputes'? What does ABB mean by a 'material' dispute? What does ABB consider to be a non-material dispute? Are material disputes different to bona fide disputes? If so, how?
35. In relation to clause 7.3(c), has ABB confirmed with the Institute of Arbitrators and Mediators of Australia (IAMA) that its involvement as a mediator, as contemplated by the proposed undertaking, is workable? Please provide copies of any correspondence between ABB and the IAMA to this effect.

#### *Arbitration*

36. Who does ABB envisage as likely candidates for Arbitrator, especially considering the matters set out in clauses 7.6 – 7.9?
37. In relation to clause 7.4(b), how soon after referral to arbitration must ABB notify the ACCC of the details of the dispute?
38. What does ABB estimate as the likely duration and cost of an arbitration process?
39. In relation to clause 7.9(b), who determines whether an Applicant does not comply with a determination or direction of the Arbitrator? What is the basis for reaching a conclusion that non-compliance has occurred?

#### *Ring fencing*

40. Will the Compliance Auditor's report, referred to in clause 6(d) of Schedule 2 to the proposed undertaking, be required to identify potential breaches (if any) of the Ring Fencing Rules set out in Schedule 2?
41. In relation to clause 1 of Schedule 2, how does ABB define 'financial records'? Please list the type of records and/or accounts which will be made available to the independent auditor.
42. Will the provision of financial records pursuant to clause 1 of Schedule 2 require the implementation of an accounting separation regime? If so, what would be the costs of implementing such a regime, and what cost allocation methodology would ABB propose to use in allocating costs to different business areas?

#### *Service standards*

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



*Capacity management/Port protocols*

44. How many (by number and tonnage) of ABB's customers use Export Select to export bulk wheat compared to the percentage that use Export Standard? What does ABB believe are the main considerations for a customer when deciding which option to choose?
45. Clause 1.2(e)(i)(D) of the proposed undertaking refers to reaching an appropriate balance between the interests of various parties, including the legitimate business interests of ABB in meeting its own or its Trading Division's 'reasonably anticipated requirements' for Port Terminal Services.
- a. Does this objective mean that ABB intends to reserve and set aside its own or its Trading Division's 'reasonably anticipated requirements' and then provide access to third parties for the remaining capacity? If setting aside capacity for itself or its Trading Division, what criteria will ABB use to assess 'reasonably anticipated requirements'?
  - b. If ABB does intend to set aside capacity for itself or its Trading Division, how does this interact with the relevant ring-fencing obligations?
  - c. How does ABB otherwise propose to balance the port capacity requirements of itself or its own Trading Division with third party bulk wheat exporters?
46. Clause 8.2(b)(iii) of the proposed undertaking contains an obligation on ABB to consult with Major Users in relation to any proposed variation to the Port Loading Protocols in Schedule 3 of the proposed undertaking (**the PLP**). Based on the previous two years of operations, what are the names of the parties that would come within the definition of a Major User? In addition, what will consultation on a proposed variation to the PLP specifically entail?
47. In relation to clause 8.4(c) what are the 'objective commercial criteria' that ABB will use to make Operational Decisions that involve conflicts of interests between users of the Port?
48. Under the proposed dispute resolution mechanism set out in the PLP, how is a dispute ultimately resolved once the parties have progressed through the four stages described?
49. The PLP states that 'Acceptance of a nomination of a vessel will be at the discretion of [ABB].'<sup>1</sup> What criteria will be used to assess whether or not a nomination will be accepted or rejected? What is the timeframe in which a decision will be made? Are the reasons for the decision given to the access seeker? Is there an appeals process from the ABB's decision?

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<sup>1</sup> Please note that the PLP does not include paragraph numbers or page numbers. This sentence appears immediately under the heading 'Vessel Nomination.'

50. The PLP states that the allocation of estimated load date(s) will be based on the ability of the 'Client' to accumulate the cargo.<sup>2</sup> What is the acceptable evidence that a Client must provide to show that it has the ability to accumulate a cargo? What are the differences in evidence required when the wheat is inside ABB's storage and handling facilities as compared to when the wheat is inside the storage and handling facilities of an '[ABB] approved third party bulk handler'?<sup>3</sup>
51. The PLP proposes that 'Clients' may be invoiced for a certain cost and fee if ABB has to clear cells at Outer Harbour for another vessel accumulation, including where a vessel 'fails survey significantly.'<sup>4</sup> What is meant by a vessel failing survey 'significantly,' and what is a non-significant survey failure?
52. The PLP proposes that ABB may cease loading if, in its opinion, continued loading may result in breaches of any safety or environmental requirements.<sup>5</sup> What are the 'safety and environmental requirements' to which the PLP refers? What are the specific documents (legislation, regulations etc) from which these requirements are derived?

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<sup>2</sup> See second paragraph under heading 'Vessel Nomination.'

<sup>3</sup> See point 1 under heading 'Load Grades and Specific Quality Parameters.'

<sup>4</sup> See third paragraph under heading 'Vessel Repositioning.'

<sup>5</sup> See first sentence under heading 'Limitation of Liability.'