SUBMISSION TO ACCC ON ABB GRAIN LIMITED PORT TERMINAL SERVICES ACCESS UNDERTAKING

Responses from the South Australian Farmers Federation Grains Industry Committee ("SAFF").

General Response

PREAMBLE

1. The *Wheat Export Marketing Act 2008* (WEM Act) provides for the accreditation of companies as accredited wheat exporters (refer Section 8).

2. The Wheat Export Accreditation Scheme by which companies are accredited as accredited wheat exporters provides that a company is not eligible for accreditation unless (inter alia) if the company (or an associated entity) is the provider of one or more port terminal services Wheat Exports Australia is satisfied that the company (or associated entity, as the case may be) passes the *access test* in relation to each of those services. (Refer Section 13).

3. An "access test" for the purposes of the WEM Act has the meaning given by Section 24 WEM Act (refer Section 5).

4. Section 24 of the WEM Act provides that a person passes the *access test* at a particular time if:

    4.1. that time is on or after the 1st October 2009; and

    4.2. at that time the person complies with the continuous disclosure rules in relation to the port terminal services (referred to in subsection 4); and

    4.3. at that time there is in operation under Division 6 of Part IIIA of the *Trade Practices Act* an access undertaking relating to the provision of accredited wheat exporters of access to the port terminal services for purposes relating to the export of wheat.

5. Section 5 of the WEM Act defines a port terminal facility as:

    5.1. a ship loader that is:

        5.1.1. at a port; and

        5.1.2. capable of handling wheat in bulk;

    and includes any of the following facilities:

        5.1.3. an intake/receiver facility;

        5.1.4. a grain storage facility;

        5.1.5. a weighing facility;

        5.1.6. a shipping belt;

    that is:

        5.1.7. at the port; and

        5.1.8. associated with the shop loader;

        5.1.9. capable of dealing with wheat in bulk.

6. Section 5 of the WEM Act defines a "*port terminal service*" as being a service (within the meaning of Part IIIA of the *Trade Practices Act 1974 as amended* provided by means of a port terminal facility and includes the use of a port terminal facility.

7. Section 44ZZA of the *Trade Practices Act 1974 as amended* (TPA) provides a mechanism by which providers of a service may give a written undertaking to the Commission in connection with the provision of access to the service.

8. The Commissioner has a discretion under TPA Section 44ZZA to accept the undertaking having regard to certain matters including:

   8.1. the objects of the Part;

   8.2. the pricing principals specified in TPA Section 44ZZCA;

   8.3. the legitimate business interests of the provider;

   8.4. the public interest including the public interest in having competition in markets (whether or not in Australia);

   8.5. the interests of persons who might want to access the service;

   8.6. whether the undertaking is in accordance with an access code that applies to the service;

   8.7. any other matter the Commission thinks is relevant.

9. TPA Section 44ZZCA provides pricing principals for access undertakings. Those principals include the following:

   9.1. To generate expected revenue for a regulated service or services that is at least sufficient to meet the efficient cost of providing access; and

   9.2. Include a return on investment commensurate with the regulatory and commercial risks involved;

   9.3. Allow multi part pricing and price discrimination when it aids efficiency;

   9.4. 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 the other operators is higher;

   9.5. That access pricing regimes should provide incentives to reduce costs or otherwise improve productivity.

10. The Commissioner must have regard to these principals in making a final determination under Division 3 in deciding whether or not to accept an access undertaking.

SAFF SUBMISSION

1. SAFF submits that there are various business practices undertaken by ABB Grain Limited (ABB) which should be taken into account by the Commission in determining whether the Commission will accept the port terminal services access undertaking submitted by ABB.

2. SAFF submits that the undertaking submitted by ABB should be amended so that the business practices referred to below are eliminated.

3. SAFF submits that the business practices described below:

3.1. do not aid efficiency for wheat growers and wheat traders;

3.2. contribute to inefficiency of wheat growers and wheat traders;

3.3. discriminate in favour of downstream operations of ABB;

3.4. do not provide incentives to reduce costs or otherwise improve productivity;

3.5. are disincentives to reduce cost or otherwise improve productivity.

ISSUES OF CONCERN:

1. Price Discrimination for Non-ESP Storage and Logistics

1.1. ABB organise up country silo storage and transport logistics through to a port terminal facility through a programme called the Export Select Programme **[ESP]**.

1.2. A farmer will sell wheat to a grain trader, which for the purpose of this submission will be referred to as "GT".

1.3. A grain trader such as GT will have a storage and handling agreement with ABB.

1.4. A trader will nominate a tonnage of grain to be delivered pursuant to that agreement.

1.5. A farmer who has sold wheat to a grain trader receives say, $300.00 per tonne.

1.6. However, the trader is required to pay various amounts up front to ABB if the trader participates in the ESP. These amounts are specified as follows:

Up country charge	**2007-2008 year**
Receivable service fee	$7.50
Storage and segregation fee	$1.85
Carrying fee until February	$0.60
Alternatively, carrying fee until July	$2.35
Shrinkage (based on $350.00 per tonne)	$2.10
Road rail out loading fee	$2.00
Volume variation	$1.00
Total up country charges (carry Feb)	$15.05
Total up country charges (carry July)	$16.80

Port Charges	2007-2008 year
Port in load fee	$2.54
Port Handling and shipping fee	$7.65
Ship loading fee	$2.00
Blending fee	$0.80
Volume variation	$1.00
Ship sampling fee	$0.15
Total port charges (carry July)	$14.14
Total charges (carry February)	$29.19
Total charges (carry July)	$30.94

1.7. Pursuant to the storage and handling agreement in place between the trader and ABB, these amounts are paid up front.

1.8. Freight is charged extra depending upon where the wheat is to be transported from.

1.9. ABB have a contract with train operator Genesee & Wyoming Incorporated to operate freight services by rail.

1.10. A farmer may choose to deposit wheat at a silo operated by a competitor, for example AWB Grain Flow **[AWB]**.

1.11. By way of example, assume the following:

1.11.1. A farmer lives near Pinnaroo, South Australia.

1.11.2. AWB operate silos in Pinnaroo.

1.11.3. The farmer sells a quantity of wheat to GT.

1.11.4. GT may contract with Genesee & Wyoming to transport wheat from its silo in Pinnaroo to Port Adelaide by rail.

1.12. Assuming this happens, AWB are using the same train service as is used by ABB themselves.

1.13. Because the farmer has chosen to deposit wheat in the AWB silo at Pinnaroo, he cannot access the ESP for logistics.

1.14. GT is charged an additional fee on delivery of the wheat to Port Adelaide via Genesee & Wyoming train from Pinnaroo. This additional fee is as follows:

1.14.1. An effective additional charge of $2.70 per tonne. This charge arises because the delivery of wheat to Port Adelaide from a non-ABB site does not qualify for a discount offered to traders who deliver from an ABB site.

1.14.2. Plus an additional $1.05 shrinkage fee;

1.14.3. Plus an additional port inturn fee from a non ABB site of $2.50;

1.14.4. Total = $6.25 per tonne.

1.15. In other words, GT is charged an additional $6.25 per tonne if the load of wheat originates from a non-ABB silo even if it is transported by a Genesee & Wyoming train which also transports wheat from ABB silos.

1.16. If GT choses to contract with Genesee & Wyoming, the additional charge would be $6.25 per tonne because the wheat has not originated from an ABB silo.

1.17. This is a disincentive for GT to use the AWB silo.

1.18. ABB may argue that they are entitled to levy this charge because they do not have access to the full history of the grain because it has not originated from an ABB silo. So much is stated on page 9 of the Supplementary Submission to the Australian Competition & Consumer Commission dated 23 June 2009.

1.19. On page 9 of the Supplementary Submission ABB state, inter alia, that:

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

1.20. SAFF's response to this further submission is as follows:

1.20.1. When wheat is loaded into an ABB silo, the following testing occurs:

1.20.1.1. a visual test;

1.20.1.2. a probe for moisture, protein;

1.20.1.3. a measurement for screenings to make sure that there is not more than 5% screenings present;

1.20.1.4. a weight test.

1.20.2. When wheat out flows from an ABB silo, the same tests are repeated.

1.20.3. The identical tests take place when wheat is loaded into a silo operated by AWB Grain Flow and when it out flows from that silo.

1.20.4. These tests are industry standards.

1.20.5. No test is done either on in flow or out flow to a silo for pesticides, GMO's or treatment resistant insects. Therefore, if pesticides, GMO's or treatment resistant insects exist, they could just as easily contaminate wheat loaded into an ABB silo as they could contaminate wheat loaded into an AWB Grain Flow silo.

1.20.6. In other words, ABB accept just as much risk with wheat being delivered to their own silos as would be accepted if what was delivered to an AWB Grain Flow silo and then sent by freight to Port Adelaide.

1.20.7. Bear in mind that in each instance the same train operator is transporting the wheat from the silo to Port Adelaide and if contamination took place in the train, this contamination could just as easily take place if the wheat originated from the ABB silo as could take place if the wheat originated from an AWB silo.

1.21. About 90% of the state's wheat crop pass through the ABB system. It is assumed that the vast majority of this crop passes through the ESP. The reason for this is that to opt out of the ESP incurs an additional cost of $6.25 per tonne. It is submitted that this additional cost breaches pricing principles required for the access undertaking.

1.22. SAFF submits that this is an increase cost which is not justified and amounts to price discrimination for the purpose of forcing traders to operate within the ESP and not opt out of it.

1.23. The port represents a bottleneck through which all export grain (whether from a non ABB site or an ABB site) must pass through. ABB discriminates against non-ABB sites at the port so as to create a disincentive for traders to use non-ABB sites.

2. Rail Spur to Outer Harbour Facility

2.1. A new port terminal facility is to open at Outer Harbour in approximately September 2009. This facility is referred to in Port Schedule B – Outer Harbour to the Access Undertaking. The port terminal facilities include intake facilities for road and rail.

2.2. There is a length of rail approximately 4 km long leading into the facility. This is on land held by ABB on Ground Lease or on some other basis.

2.3. There is a risk that ABB will levy an additional charge for the use of this 4 km of track by a train operated by an operator other than Genesee & Wyoming. Any access undertaken should include a requirement that no additional charge be levied against a train operator seeking to use this track to promote competition in rail freight services. Because the port and in particular the rail link going into the port represents a bottleneck ABB are able to discriminate against train operators other than Genesee & Wyoming so as to effectively exclude those operators from accessing the port.

2.4. This is an additional disincentive to use any other train operator except Genesee & Wyoming.

2.5. As described above, there is also a disincentive to use a competitor's silo (that is, opt out of the ESP) even if a trader still used a Genesee & Wyoming train.

3. Regrading

3.1. In some circumstances it is necessary to regrade wheat which is old season.

3.2. By way of example assume the following:

3.2.1. A farmer delivers wheat to an ABB silo in November 2006.

3.2.2. In September 2007 the wheat becomes "*old season*". This assumes that the farmer still owns the wheat and has not sold it to a trader for his own commercial reasons. Some of these reasons may be tax driven.

3.3. In order to sell old season wheat it is necessary for the wheat to be "*regraded*" as new season. If a farmer after September 2007 decides to sell his wheat to the ABB trading arm then regrading takes place for no charge.

3.4. If however the farmer decides to sell his wheat to a trader like GT (or some other trader who is not the ABB trading arm) then ABB will charge GT $3.50 per tonne as a regrading fee.

3.5. In some circumstances the physical wheat deposited by the farmer has actually left the silo.

3.6. There is no actual regrading which takes place as such. Regrading takes place by way of an alteration to the records of ABB.

3.7. GT will know that old season wheat will need to be regraded and that a charge of $3.50 per tonne will be charged by ABB for this process to be undertaken. Therefore, in order to be compensated for this, GT must pay $3.50 per tonne more than the ABB trading arm (who do not pay this regrading fee) would be prepared to pay.

3.8. This is a disincentive for a farmer to sell old season wheat to anyone but the ABB trading arm.

3.9. The regrading fee is not in consideration of any additional service other than an alteration of records and even if some testing took place, it should not be a fee per tonne but a fee per test which actually occurs.

Dated Third day of July 2009

South Australian Farmers Federation Grains Industry Committee

Chairman (Michael Schaefer)