

**PORT TERMINAL SERVICES ACCESS UNDERTAKING BY
ABB GRAIN LIMITED**

**AUSTRALIAN GRAIN EXPORTERS ASSOCIATION SUPPLEMENTARY
SUBMISSION**

AGEA

PORT TERMINAL SERVICES ACCESS UNDERTAKING BY ABB GRAIN LIMITED

SUPPLEMENTARY SUBMISSION TO THE AUSTRALIAN COMPETITION AND CONSUMER COMMISSION BY THE AUSTRALIAN GRAIN EXPORTERS ASSOCIATION

1. Introduction

Australian Grain Exporters Association ("AGEA") makes this supplementary submission in response to ABB's indication that:-

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

This proposal appears at item 9, under the heading of "Other Matters" on page 17 of the response of ABB Grain Ltd to issues raised in the Commission's Draft Decision.

2. ACCC's request for submissions on ABB's proposal that AusBulk Limited provide the proposed Undertaking in Substitution of ABB

The ACCC has requested AGEA's submissions on the following particular points, arising out of the above:

- A) Which entity does AGEA members historically contract with for the provision of bulk handling services? This includes payments for the services.
- B) Is Ausbulk able to perform all of the undertakings or should they be given by ABB?
- C) Does AGEA have any other concerns that it is now proposed Ausbulk will provide the proposed undertaking, in addition to B above.

3. AGEA's submissions responding to ACCC's request A

Historically, AGEA has entered into storage and handling agreements with AusBulk Limited (trading as ABB Grain Storage and Handling) (ABN 88 007 556 256).

4. AGEA's submissions responding to ACCC's request B-C

- 4.1 AGEA's concerns on ABB's proposal that AusBulk Limited provide the proposed Undertaking in substitution of ABB and whether AusBulk is able to perform all of the undertakings are as follows.

- 4.2 ABB has failed to explain why at such a late point in the ACCC access undertaking process, it has decided that Ausbulk should provide the proposed undertaking in substitution of ABB. ABB has not provided any information that enables AGEA or the ACCC to determine whether AusBulk is capable of performing all of the undertakings. There is no information about AusBulk, its financial position, the number of employees and so on. Notwithstanding that AGEA has entered into storage and handling agreements with AusBulk, staff handling aspects of the agreements have identified themselves as representatives of ABB. An example of this is contained in the attached schedule.
- 4.3 The ACCC and AGEA have already identified the weaknesses in ABB's ring fencing policies as regards the flow of commercially confidential and other forms of information between ABB and its trading arms. The same fundamental issues arise in the provision of the port terminal facilities. Both entities, ABB and AusBulk, have access to the information. Indeed, both entities appear to provide the port terminal facilities. However, it is not clear whether it is proposed that the ring fencing policies will apply to ABB and AusBulk.
- 4.4 As a result, it is simply not possible to know whether and when it is ABB, Ausbulk or both entities that are providing the port terminal facilities or whether AusBulk is capable of performing the undertakings.
- 4.5 For the above reasons, AGEA submits that both ABB and Ausbulk should provide the undertaking to the ACCC. Unless ABB is also a party to the undertaking, there is little or no incentive for ABB to use its control to ensure the access undertaking is adhered to. To ensure performance of the undertaking, to the extent that obligations under the undertaking are required to be performed by AusBulk, ABB should be a party to the undertaking **and** ABB should be required to procure that AusBulk perform the relevant obligation.

5 Summary of AGEA's response to ABB's proposal that AusBulk Limited provide the proposed Undertaking in Substitution of ABB

- 5.1 What the proposal means is that ABB is withdrawing its undertaking and ABB is asking ACCC to accept an undertaking from an entity that is not an accredited exporter.
- 5.2 Eligibility for accreditation under s 13 of WEMA includes that ..."if the company, or an associated entity, is the provider of one or more port terminal services - WEA is satisfied that the company, or the associated entity, as the case may be, passes the access test in relation to each of those services..."
- 5.3 If ABB has formed the view that it can be accredited without passing an access test on one level that is a matter entirely for ABB.
- 5.4 The final paragraph on page 17 is not capable, in these circumstances, of being taken at face value without substantial further justification, and the ACCC should raise this matter

with ABB. The last paragraph on page 17 reads:-

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

- 5.5 It is clear from the above, that ABB must provide the proposed undertaking to the ACCC. From the further materials provided by ABB, it appears that Ausbulk should also be a party to the undertaking.
- 5.6 The purpose of the WEM Act is to ensure access to port terminal services. In addition, to it being necessary that both ABB and Ausbulk be a party to the proposed undertaking, any disposal of a port terminal service or facility that is the subject of an access undertaking should be strictly on terms that access to those services or facilities continues.

Australian Grain Exporters Association
15 September 2009

