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Co-operative Bulk Handling Limited

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# Port Terminal Services Access Undertaking

[Amended version – 16 August 2011](#)

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## Port Terminal Services Access Undertaking

by

**Co-operative Bulk Handling Limited** ABN 29 256 604 947 of 30 Delhi Street, West Perth, Western Australia (**Port Operator**)

in favour of

**Australian Competition and Consumer Commission** being a body corporate established under section 6A of the *Competition and Consumer Act 2010* (Cth) (**ACCC**)

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## Background

- A The Port Operator operates the Port Terminal Facilities.
- 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 Terminal Facilities to third parties under open access policies.
- D The Port Operator or its 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 an Accredited Wheat Exporter.
- 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:
    - (i) an access undertaking is in operation (under Division 6 Part IIIA of the CCA) relating to the provision to Accredited Wheat Exporters of access to the port terminal service for purposes relating to export of Bulk Wheat; or
    - (ii) a decision is 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 CCA) and under that regime Accredited Wheat Exporters have access to the port terminal service for purposes relating to the export of Bulk Wheat.

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- G The ACCC approved an undertaking from the Port Operator under Part IIIA of the CCA which satisfied the 'access test' (**Original Undertaking**). The Original Undertaking will expire on 30 September 2011.
- H The Port Operator has submitted this Undertaking to the ACCC for approval under Part IIIA of the CCA to replace the Original Undertaking once it expires for the purpose of satisfying the 'access test'.

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## Agreed terms

### 1 Interpretation

#### 1.1 Definitions

In this Undertaking unless the context otherwise requires:

**Access Agreement** means an agreement containing provisions requiring the Port Operator to supply Port Terminal Services to a party, whether made before, on or after the Commencement Date.

**Access Agreement Variation** is defined in **clause 4.3(a)**.

**Access Application** is defined in **clause 7.3(a)**.

**Accredited Wheat Exporter** means a person having accreditation as an accredited wheat exporter under the WEAS.

**Applicant** means the person seeking access to Port Terminal Services under **clause 7**.

**Auction Rules** means the Auction Rules set out in **Schedule 1** to the Port Terminal Rules (or as varied under **clause 10.2**).

**Bulk Wheat** means wheat for export from Australia other than wheat that is exported in a bag or a container that is capable of holding not more than 50 tonnes of wheat.

**Business Day** means a day which is not a Saturday, Sunday or public or bank holiday in Western Australia.

**CCA** means the *Competition and Consumer Act 2010* (Cth).

**Commencement Date** means the date specified in **clause 4.1**.

**Competition Principles Agreement** means the agreement entered into by the Commonwealth of Australia and each State and Territory of Australia in 1995 to implement the national competition policy of Australia.

**Confidential Information** means information of the Port Operator or an Applicant or a User (or any of their nominated representatives) in relation to the business of any of those persons that:

- (a) is by its nature confidential;

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- (b) is specified to be confidential by the person who supplied it; or
- (c) is known, or ought to be known, by a person using or supplying it to be confidential or commercially valuable,

but excludes information that:

- (d) is comprised solely of the name, address and contact details of a person; or
- (e) was in the public domain at the time when it was supplied; or
- (f) subsequently becomes available other than through a breach of confidence or breach of this Undertaking; or
- (g) was in lawful possession of the recipient of the information prior to being provided by the other party; or
- (h) must be disclosed by law, including under the Continuous Disclosure Rules under the WEMA; or
- (i) ceases to be confidential in nature by any other lawful means.

**Continuous Disclosure Rules** means the continuous disclosure rules as defined in subsection 24(4) of the WEMA.

**Credit Support** means either:

- (a) a Parent Guarantee; or
- (b) Security.

**Dispute** means a dispute between an Applicant and the Port Operator in relation to access to the Port Terminal Services under this Undertaking and includes disputes arising in the course of the negotiation process in **clause 7** but does not include:

- (a) disputes in relation to an executed Access Agreement;
- (b) the terms of the initial Standard Port Terminal Terms or the Standard Port Terminal Terms applying at the time of the Access Application; or
- (c) a decision by the Port Operator to vary the prices at which Port Terminal Services are provided to reflect changes to the Perth (All Groups) Consumer Price Index.

**Dispute Notice** is defined in **clause 8.1(b)**.

**Draft PTR Variation Notice** is defined in **clause 10.4**.

**Eligibility Requirements** means the requirements prescribed in **clause 7.4(b)**.

**Effective Date** is defined in **clause 10.4(f)(ii)(E)**.

**Exceptional Circumstances** means circumstances in which urgent variation/s to the Port Terminal Rules are necessary to prevent or reduce systemic or technical deficiencies or errors in the process or rules for the conduct of capacity auctions.

**Exceptional Circumstances Variation Notice** is defined in **clause 10.5(a)**.

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**Final PTR Variation Notice** is defined in **clause 10.4(f)**.

**Government Agency** means any applicable Western Australian or Australian Federal Government department, authority, instrumentality or agency having jurisdiction in respect of any matter affected by this Undertaking.

**IAMA** is defined in **clause 8.3(a)(i)**.

**Legislative Requirements** means present and future obligations arising under:

- (a) applicable laws, statutes, regulations, by-laws, orders, ordinances, proclamations and decrees; or
- (b) any binding requirement, instruction, direction or order of a Government Agency.

**Material Default** means any breach of a fundamental or essential term of, or repeated breaches of any of the terms of:

- (a) an Access Agreement; or
- (b) any agreement for the provision of services by the Port Operator or a Related Body Corporate of the Port Operator.

**Negotiation Period** is defined in **clause 7.6(c)**.

**Original Access Application** is defined in **clause 7.8(a)**.

**Original Undertaking** is defined in **Background clause G**.

**Parent Guarantee** means a guarantee given by the ultimate holding company of the Applicant or User, or other such body as is acceptable to the Port Operator (acting reasonably), who has an investment grade credit rating or is otherwise acceptable to the Port Operator.

**Port** means the ports of:

- (a) Albany;
- (b) Esperance;
- (c) Geraldton; and
- (d) Kwinana.

**Port Schedules** means **schedules 4 to 7**.

**Port Terminal Facility** is defined in **clause 5.2(a)**.

**Port Terminal Rules** means the rules, policies and procedures in **Schedule 3** (or as varied under **clause 10.2**) and includes the Auction Rules.

**Port Terminal Services** is defined in **clause 5.1**.

**Reference Prices** means the prices referred to in clause 6.1(a), as may be varied in accordance with clause 6.1(c), for the services published pursuant to clause 12.5(a).

**Related Body Corporate** has the meaning given to Related Body Corporate in the *Corporations Act 2001* (Cth).

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**Season** means the period commencing 1 October of one year and ending on 30 September the next year (inclusive).

**Security** means an unconditional and irrevocable bank guarantee, letter of credit, performance or insurance bond issued by a bank holding an Australian banking licence or such other reputable person or institution accepted by the Port Operator and which is in a form reasonably satisfactory to the Port Operator.

**Solvent** means that, in the last five years:

- (a) the Applicant has been able to pay all its debts as and when they become due and has not failed to comply with a statutory demand under section 459F(1) of the *Corporations Act 2001* (Cth);
- (b) a meeting has not been convened to place the Applicant in voluntary liquidation or to appoint an administrator;
- (c) an application has not been made to a court for the Applicant to be wound up without that application being dismissed within one month;
- (d) a controller (as defined in the *Corporations Act 2001* (Cth)) of any of the Applicant's assets has not been appointed; or
- (e) the Applicant has not proposed to enter into or entered into any form of arrangement with its creditors or any of them, including a deed of company arrangement.

**Standard Access Terms** is defined in **clause 6.1(a)**.

**Standard Amendment Process** means the process for amending Port Terminal Rules set out in **clause 10.4**.

**Standard Port Terminal Terms** means the standard terms and conditions for the supply of Port Terminal Services by the Port Operator as may be amended in accordance with this Undertaking and initially as set out in Schedule 2.

**Trading Business** means a:

- (a) business unit or division of the Port Operator; or
- (b) Related Body Corporate of the Port Operator, or any business unit or division of the Related Body Corporate,

which has responsibility for the trading and marketing of Bulk Wheat.

**Transition Agreement** is defined in **clause 7.8(c)**.

**User** means a party being supplied with, or with a right to be supplied with Port Terminal Services under an Access Agreement.

**Varied Terms of Access** is defined in **clause 4.3(d)**.

**WEAS** means the Wheat Export Accreditation Scheme 2008.

**WEMA** means the *Wheat Export Marketing Act 2008* (Cth).

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## 1.2 Interpretation

In this Undertaking, unless the context otherwise requires:

- (a) singular words will also have their plural meaning and vice versa;
- (b) a reference to a person includes companies and associations;
- (c) a reference to a consent of a party means the prior written consent of that party;
- (d) headings are for convenient reference only and do not affect the interpretation of this Undertaking;
- (e) a reference to a clause or a schedule is a reference to a clause, or schedule of this Undertaking;
- (f) a reference to an item in a schedule is a reference to the items in that schedule;
- (g) a reference to a party includes its successors and permitted assigns;
- (h) notices that are required to be given in writing to Port Operator may, if so agreed by Port Operator, be provided in electronic form;
- (i) a reference to any Act includes all statutes, regulations, codes, by-laws or ordinances and any notice, demand, order, direction, requirement or obligation under that Act (and vice versa) and unless otherwise provided in that Act includes all consolidations, amendments, re-enactments or replacements from time to time of that Act and a reference to "law" includes a reference to any Act and the common law;
- (j) the words "including", "for example" or "such as" when introducing an example, does not limit the meaning of the words to which the example relates to that example or examples of a similar kind; and
- (k) a reference to \$ and dollars is to Australian currency.

## 1.3 ACCC

- (a) The ACCC monitors compliance of undertakings accepted under Part IIIA of the CCA.
- (b) The ACCC may approve a Member of the ACCC to exercise a decision making function under this Undertaking on its behalf and that approval may be subject to any conditions which the ACCC may impose.

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## 2 Objectives

This Undertaking has the following objectives:

- (a) providing a framework to manage negotiations with Applicants for access to services provided by the Port Terminal Facilities in relation to the export of Bulk Wheat;
- (b) establishing a workable, transparent, non-discriminatory and efficient process for lodging and processing Access Applications;

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- (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 the Competition Principles Agreement and Part IIIA of the CCA;
- (e) reaching an appropriate balance between:
  - (i) the legitimate business interests of the Port Operator, including:
    - (A) the recovery of efficient 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; and
    - (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;
  - (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 Terminal Facilities; 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 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 CCA, providing for a uniform approach to access to the Port Terminal Services at the different Port Terminal Facilities to the extent practicable having regard to the different characteristics of the Port Terminal Facilities.

## 3 Structure

### 3.1 Components

This Undertaking comprises this document and all its schedules. The Undertaking will only apply to the Port Terminal Services provided by means of each Port Terminal Facility as specifically set out in the relevant schedule.

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### 3.2 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 procure that Related Body Corporate to do so.

### 3.3 Application of terms

- (a) To the extent of any inconsistency between the Standard Port Terminal Terms and this Undertaking, the terms of this Undertaking will prevail but only to the extent of any inconsistency.
- (b) To the extent a provision in this Undertaking is capable of two or more constructions that are consistent with the purpose of the Undertaking then the construction which does not provide for any ambiguity, inconsistency, or conflict between the provisions of the Undertaking and the Standard Port Terminal Terms is to be preferred.

## 4 Term and variation

### 4.1 Commencement Date

The Commencement Date for the purposes of section 24 of the WEMA is 1 October 2011 and the Port Operator will comply with this Undertaking on and from that date.

### 4.2 Expiry

This Undertaking expires on the earlier of:

- (a) 30 September 2014;
- (b) the date this Undertaking is replaced in accordance with Part IIIA of the CCA; and
- (c) the day the ACCC consents to the Port Operator withdrawing this Undertaking in accordance with Part IIIA of the CCA.

### 4.3 Variation of Access Agreements

- (a) A User or the Port Operator may seek a variation to the provisions of an Access Agreement relating to the supply of Port Terminal Services (**Access Agreement Variation**).
- (b) A User's request for an Access Agreement Variation will be dealt with as a new application for access to the Port Terminal Services, to which the process in this Undertaking will apply.
- (c) The Port Operator's request for an Access Agreement Variation will be dealt with as a request for negotiation of an Access Agreement and the provisions of **clause 7.6** will apply.
- (d) Upon the Port Operator and the User agreeing the terms of the Access Agreement Variation or the terms being determined in accordance with **clause 8 (Varied Terms of Access)**, the provisions of the Access

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Agreement relating to the supply of Port Terminal Services will be replaced by the Varied Terms of Access on and from the date specified in the Varied Terms of Access.

- (e) For the avoidance of doubt, the provisions of the existing Access Agreement relating to the supply of Port Terminal Services will continue to apply until the Port Operator and the User agree the Varied Terms of Access or the Access Arrangement expires or is terminated.

## 5 Scope

### 5.1 Meaning of Port Terminal Services

**Port Terminal Services** means the services provided by means of the Port Terminal Facilities which enable an Accredited Wheat Exporter to export Bulk Wheat through the Port Terminal Facilities, including:

- (a) unloading and receipt by the Port Operator of a User's Bulk Wheat at the Port Terminal Facilities, for the purpose of loading onto a vessel scheduled to arrive at the Port Terminal Facility;
- (b) sampling by the Port Operator of a User's Bulk Wheat received and out-turned, to check for visible evidence of the presence of chemical residue, insect activity, live insects or other contaminants, and providing the User with a composite shipping sample of the User's Bulk Wheat;
- (c) weighing by the Port Operator of a User's Bulk Wheat received and out-turned, using the Port Operator's weighing facilities, and providing the User with a weighbridge ticket or other statement certifying the weight and quantity of Bulk Wheat delivered;
- (d) storage by the Port Operator of a User's Bulk Wheat at the Port Terminal Facility for the purpose of export accumulation in a restricted time period and loading onto vessels at the Port Terminal Facility;
- (e) fumigation in response to evidence of insect infestation;
- (f) accumulating and assembling Bulk Wheat for the purpose of loading cargo onto a vessel scheduled to arrive at the Port Terminal Facility;
- (g) administrative and logistics services required for shipping nomination, acceptance, booking and cancellation;
- (h) access to inspectors from the Australian Quarantine and Inspection Service, for inspection of the User's Bulk Wheat received and held at the Port Terminal Facilities; and
- (i) out-turning by the Port Operator of a User's Bulk Wheat received at the Port Terminal Facility, and loading onto the User's nominated vessel.

### 5.2 Meaning of Port Terminal Facility

- (a) **Port Terminal Facility** means the facilities for each Port set out in the schedule relating to that Port which generally comprise a ship loader and associated infrastructure that is:

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- (i) at a Port;
  - (ii) capable of handling Bulk Wheat; and
  - (iii) owned, operated and controlled by the Port Operator,
- including:
- (iv) an intake/receival facility;
  - (v) a grain storage facility;
  - (vi) a weighing facility; and
  - (vii) a shipping belt.

### 5.3 What this Undertaking does not cover

This Undertaking does not apply to:

- (a) the negotiation of any agreement which will have a commencement date after the expiry of this Undertaking; or
- (b) access to services provided by the Port Operator or a Related Body Corporate of the Port Operator which are not Port Terminal Services; or
- (c) services provided by facilities owned by the Port Operator or a Related Body Corporate of the Port Operator which are not Port Terminal Facilities, such as up country receival and accumulation facilities; or
- (d) fumigation of grain by the Port Operator as a preventative measure; or
- (e) the transportation by the Port Operator of Bulk Wheat to port; or
- (f) grains which are not wheat; or
- (g) wheat which is not Bulk Wheat.

### 5.4 Obligation to offer access

- (a) The Port Operator must offer access to the Port Terminal Services in accordance with the provisions of this Undertaking.
- (b) Access is available by means of the following obligations:
  - (i) if required to do so by an eligible Applicant in accordance with **clause 7.5(a)**, the Port Operator is obliged by **clause 7.5(a)** to execute an Access Agreement in the form of the Standard Access Terms;
  - (ii) if required to do so by an eligible Applicant in accordance with **clause 7.5(b)**, the Port Operator is obliged by **clause 7.5(b)** to negotiate in good faith under the process in **clause 7.6** for terms that differ from the Standard Access Terms; and
  - (iii) by determination under **clause 8**.

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## 6 Access terms

### 6.1 Obligation to publish standard access terms

- (a) The Port Operator must publish on its website:
- (i) a single set of reference prices (**Reference Prices**) and, subject to clause 6.1(c), the period to which they apply; and
  - (ii) a set of standard terms and conditions for the supply of Port Terminal Services (**Standard Port Terminal Terms**),
- which, subject to **clause 6.1(b) and clause 6.1(c)**, will apply to access to the Port Terminal Services (together the **Standard Access Terms**).
- (b) The Port Operator may vary the Standard Port Terminal Terms with approval from the ACCC in accordance with the procedure in Division 6 of Part IIIA of the CCA. The Port Operator must publish notice of any approved variation on its website within three Business Days of the ACCC's approval.
- (c) The Port Operator may vary the Reference Prices from time to time, provided that it publishes notice of such fact on its website and sends a copy of the revised Reference Prices to the ACCC within three Business Days of publication. Any variation to Reference Prices under this clause must be published at least 30 days prior to the date on which the variation is to become effective.
- (d) The Standard Access Terms and any variation of the Standard Access Terms must be consistent with **clause 6.2** and the objectives set out in **clause 2**.
- (e) **Schedule 2** sets out the initial Standard Port Terminal Terms applicable under this Undertaking.

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### 6.2 Non-discriminatory access

- (a) Subject to **clause 6.2(b)**, in providing access to the Port Terminal Services, the Port Operator must not discriminate between different Applicants or Users (including its own Trading Business) in favour of its own Trading Business including discrimination based on the location or identity of the storage custodian, handler or transporter of the Applicants' or Users' Bulk Wheat.
- (b) The Port Operator will not be in breach of its obligation under **clause 6.2(a)** where in providing access to the Port Terminal Services the Port Operator differentiates between different Applicants or Users (including its own Trading Division) on the basis that the cost of providing access to an Applicant or User is higher than the cost of providing access to other Applicants or Users.
- (c) Within five Business Days of executing an Access Agreement with its own Trading Business, the Port Operator must provide to the ACCC a copy of that Access Agreement.

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### 6.3 Audit

- (a) The ACCC may, by notice in writing to the Port Operator, no more than twice in each 12 month period, require the Port Operator to appoint an Auditor to provide a report in relation to the Port Operator's compliance with **clause 6.2**.
- (b) If the ACCC gives written notice to the Port Operator in accordance with **clause 6.3(a)** the provisions set out in **Schedule 8** will apply.
- (c) The ACCC may approve a Member of the ACCC to exercise any powers under **clause 6.3(a)** of this Undertaking on behalf of the ACCC.

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### 6.4 Request for information

- (a) The ACCC may, by written notice to the Port Operator, require the Port Operator to provide information or documents that are required by the ACCC to enable it to exercise its powers or functions in relation to this Undertaking.
- (b) The written notice must set out:
  - (i) in reasonable detail:
    - (A) the information or documents required by the ACCC; and
    - (B) the reasons why the ACCC requires the information or documents,
  - (ii) the form in which the information or documents must be provided; and
  - (iii) the deadline for the Port Operator to provide the information or documents, which must be no less than 14 days from the date of the Port Operator's receipt of the notice.
- (c) The Port Operator is not required to provide information or documents:
  - (i) that the Port Operator considers, acting reasonably, would be onerous or oppressive to provide;
  - (ii) not within the Port Operator's possession or control;
  - (iii) that are the subject of a legitimate claim of privilege; or
  - (iv) that are not necessary for the ACCC to exercise its powers or functions in relation to this Undertaking including, but not limited to, information or documents related to the matters specified in **clause 5.3**.

## 7 Application and negotiating for access

### 7.1 Framework

- (a) This **clause 7** outlines the process to be followed for an Applicant to gain access to the Port Terminal Services. It provides for:

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- (i) **Preliminary inquiry:** requests by the Applicant for information to enable an Access Application to be lodged (**clause 7.2**);
  - (ii) **Access Application:** submission of an Access Application by the Applicant (**clause 7.3**);
  - (iii) **Standard Access Agreements:** procedure where the Applicant wants the Port Terminal Services under the Standard Access Terms (**clause 7.5**); and
  - (iv) **Negotiation:** negotiations where an Applicant wants the Port Terminal Services under terms other than the Standard Access Terms (**clause 7.6**).
- (b) For the avoidance of doubt, if a Dispute arises at any time during the processes described in **clauses 7.2, 7.3 and 7.6**, either party may seek to resolve the Dispute in accordance with the process described in **clause 8**.
- (c) In order for the Port Operator to conduct the auctions specified under the Port Terminal Rules, any negotiations for Port Terminal Services (whether under **clause 7.5, clause 7.6 or clause 8**) must be completed, and an Access Agreement entered into, by 15 September in any given year.

## **7.2 Preliminary inquiry**

- (a) An Applicant may request the Port Operator to provide information reasonably required by the Applicant to formulate and lodge its application for access to the Port Terminal Services.
- (b) Within five Business Days of receiving a request for information under **clause 7.2(a)**, the Port Operator must, subject to **clause 7.2(c)**, provide the Applicant with the requested information.
- (c) In responding to a request for information under **clause 7.2(a)**, the Port Operator is not required to disclose any:
- (i) Confidential Information;
  - (ii) information not within the Port Operator's possession or control; or
  - (iii) information which the Port Operator considers, acting reasonably, is not necessary for the Access Application, the provision of Port Terminal Services or would be onerous or oppressive to provide.
- (d) Before submitting an Access Application under **clause 7.3(a)**, an Applicant may give written notice to the Port Operator requesting a preliminary meeting to:
- (i) seek clarification of the processes described in this **clause 7.2** and **clauses 7.3 and 7.6**, particularly the required form of the proposed Access Application under **schedule 1**; and
  - (ii) discuss the proposed Access Application.

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- (e) The Port Operator must be available to meet with the Applicant within five Business Days of receiving a notice under **clause 7.2(d)**.

### 7.3 Access Application

- (a) An Applicant's request for access to the Port Terminal Services must be submitted to the Port Operator in the form prescribed in **schedule 1 (Access Application)**.
- (b) Within two Business Days of receiving an Access Application, the Port Operator must provide the Applicant with written notice acknowledging receipt of the Access Application and:
  - (i) confirming that it contains sufficient information to enable the Port Operator to properly consider the Access Application; or
  - (ii) requiring the Applicant to provide the Port Operator with such:
    - (A) additional information; and
    - (B) clarification of any information provided in the Access Application,as is reasonably necessary for the Port Operator to properly consider the Access Application.
- (c) Within five Business Days of receiving a notice under **clause 7.3(b)(ii)**, the Applicant must provide the requested additional information or clarification.
- (d) Within two Business Days of receiving the additional information or clarification under **clause 7.3(c)**, the Port Operator must provide the Applicant with written notice confirming whether the additional information or clarification enables the Port Operator to properly consider the Access Application.
- (e) If the additional information or clarification is insufficient to enable the Port Operator to properly consider the Access Application, the process in **clauses 7.3(b)(ii), 7.3(c) and 7.3(d)** will be repeated until:
  - (i) the Applicant provides the information and clarifications required to enable the Port Operator to properly consider the Access Application; or
  - (ii) the Applicant or the Port Operator serves a Dispute Notice in relation to the Access Application; or
  - (iii) the Applicant withdraws the Access Application.

### 7.4 Eligibility

- (a) In this Undertaking, **eligible Applicant** means:
  - (i) an Applicant that:
    - (A) has lodged an Access Application; and

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- (B) has received notice from the Port Operator that the Access Application contains sufficient information to enable the Port Operator to properly consider the Access Application, and
  - (ii) if requested by the Port Operator, has demonstrated that it meets the Eligibility Requirements.
- (b) The Port Operator may, by written notice to the Applicant, at the Applicant's cost, require the Applicant to demonstrate to the Port Operator's reasonable satisfaction, that:
  - (i) the Applicant is Solvent;
  - (ii) the Applicant and its Related Bodies Corporate are not currently in, and in the previous two years have not been in Material Default;
  - (iii) the Applicant:
    - (A) 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 the ability to pay access charges and insurance premiums when they fall due; or
    - (B) provides Credit Support as specified by the Port Operator; and
  - (iv) the Applicant is an Accredited Wheat Exporter.
- (c) The following information may be regarded as sufficient information for the Port Operator to determine solvency for the purpose of this **clause 7.4**:
  - (i) the information required to be provided on a CBH credit application form; and
  - (ii) the Applicant's audited financial statements for the last financial year, including an audited statement of profit and loss and an audited statement of assets and liabilities; and
  - (iii) credit check from an independent credit reporting agency.
- (d) The Port Operator may give a written request to the Applicant to demonstrate that it satisfies the Eligibility Requirements:
  - (i) within five Business Days of the Port Operator receiving the Applicant's Access Application; and
  - (ii) after that time, within five Business Days of the Port Operator becoming aware of any credible grounds which, in the Port Operator's opinion, give rise to a reasonable assumption that the Applicant may no longer satisfy the Eligibility Requirements.
- (e) The Applicant must demonstrate that it meets the Eligibility Requirements within seven Business Days of a written request by the Port Operator. If the Applicant does not provide information or sufficient information to the Port Operator within this time then the Applicant will be

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deemed to have failed or no longer satisfy the Eligibility Requirements (as the case may be).

- (f) The Port Operator's obligations under this Undertaking to:
  - (i) negotiate or continue negotiating with an Applicant under this Undertaking; and
  - (ii) enter into an Access Agreement,is subject to the Applicant demonstrating that it meets the Eligibility Requirements.
- (g) If the Port Operator decides that under this Undertaking it is entitled to refuse or cease to negotiate with the Applicant for any reason, including because the Applicant fails or ceases to satisfy the Eligibility Requirements, within two Business Days of that decision the Port Operator must give written notice of that fact to the Applicant, including the reasons for its decision.
- (h) If after receiving a notice under **clause 7.4(g)** the Applicant disagrees that the Port Operator is entitled under this Undertaking to refuse or cease to negotiate with the Applicant, then that matter will constitute a Dispute and the Applicant may within ten Business Days of receiving the notice refer the Dispute to arbitration under **clause 8.4**. Subject to any other directions by the arbitrator, if the arbitrator determines that the Port Operator is not entitled under this Undertaking to refuse or cease to negotiate with the Applicant:
  - (i) the Port Operator must commence or recommence negotiations immediately; and
  - (ii) where the Negotiation Period had commenced before the Port Operator ceased negotiations, the Negotiation Period will be deemed to have been suspended from the date of the notice under **clause 7.4(g)** until the date of the arbitrator's determination.

## 7.5 Standard Access Agreement

- (a) If an eligible Applicant requires the Port Terminal Services to be provided under the terms offered in the Standard Access Terms, then:
  - (i) when the Applicant submits its Access Application, or at any time after submitting its Access Application, the Applicant may give the Port Operator written notice of that fact; and
  - (ii) subject to **clause 7.5(b)**, within five Business Days of the Port Operator receiving a notice under **clause 7.5(a)(i)**, the Port Operator and the Applicant must execute an Access Agreement in the form of the Standard Access Terms.
- (b) The time period in **clause 7.5(a)(ii)** will:
  - (i) be suspended for any period:

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- (A) taken by the Applicant to demonstrate that it satisfies the Eligibility Requirements pursuant to **clause 7.4(e)**; and
- (B) taken to resolve a Dispute referred to in **clause 7.4(h)**, and
- (ii) cease on 15 September each year, the obligation on the Port Operator and the Applicant to execute an Access Agreement will cease to apply and **clause 7.7** will apply.
- (c) If an eligible Applicant requires the Port Terminal Services to be provided under terms other than those offered in the Standard Access Terms, then the Port Operator and the Applicant must comply with the negotiation procedures under **clause 7.6**.

## **7.6 Negotiation of Access Agreement**

- (a) This **clause 7.6** applies only when:
  - (i) the eligible Applicant requires the Port Terminal Services to be provided under terms other than those offered in the Standard Access Terms; or
  - (ii) the Port Operator seeks an Access Agreement Variation.
- (b) Each of the Port Operator and the eligible Applicant must negotiate for the Applicant's access to the Port Terminal Services or the Port Operator's request for an Access Agreement Variation in good faith and in accordance with this **clause 7.6**.
- (c) The period during which the Port Operator and the eligible Applicant must negotiate the Applicant's Access Application or the Port Operator's request for an Access Agreement Variation (**Negotiation Period**):
  - (i) commences on the later date of:
    - (A) a notice under **clause 7.3(b)(i)**;
    - (B) a notice under **clause 7.3(d)** confirming that the additional information or clarification provided by the eligible Applicant enables the Port Operator to properly consider the Access Application; or
    - (C) a request for an Access Agreement Variation by the Port Operator under **clause 4.3**; and
  - (ii) ceases on the earlier of:
    - (A) execution of an Access Agreement in respect of the Access Application or execution of Varied Terms of Access in respect of an Access Agreement Variation;
    - (B) written notification by the Applicant that it no longer wishes to proceed with its Access Application;
    - (C) written notification by the Port Operator that it no longer wishes to proceed with an Access Agreement Variation;
    - (D) 15 September each year; or

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- (E) the expiration of three months from the commencement of the Negotiation Period, or if both parties agree to extend the Negotiation Period, then the expiration of the agreed extended period.
- (d) Subject to **clause 7.6(e)**, upon cessation of the Negotiation Period the obligation of the parties to negotiate will cease.
- (e) Without limiting the definition of Dispute:
- (i) if the eligible Applicant has complied with **clause 7.6(b)** throughout the Negotiation Period but the parties do not execute an Access Agreement before the conclusion of the Negotiation Period; or
  - (ii) If the Negotiation Period commences after 15 June, the eligible Applicant has complied with **clause 7.6(b)** but at any time during the Negotiation Period in the Eligible Applicant's reasonable opinion the Port Operator is not complying with **clause 7.6(b)**; or
  - (iii) if the Port Operator has complied with **clause 7.6(b)** throughout the Negotiation Period but the parties do not execute Varied Terms of Access before the conclusion of the Negotiation Period,
- that matter will constitute a Dispute which either the Port Operator or the Applicant may refer to arbitration under **clause 8.4**.

#### **7.7 15 September deadline – Auctions**

Where the Port Operator and the Applicant have not executed an Access Agreement whether pursuant to **clause 7.5**, **clause 7.6** or **clause 8** and the reason for the failure to execute is that the deadline of 15 September was reached prior to execution of an Access Agreement, the Applicant may resubmit its application at any time after the conclusion of the auction process and the resubmitted application will be dealt with as a new application for access to the Port Terminal Services, to which the process in **clause 7.5** or **clause 7.6** (as the case may be) will apply.

#### **7.8 Transitional arrangements**

- (a) Where person lodged an Access Application under the Original Undertaking seeking access to port terminal services (**Original Access Application**) and the person:
- (i) commenced negotiations with the Port Operator prior to the Commencement Date; or
  - (ii) is in a Dispute (as that term is defined in the Original Undertaking) with the Port Operator concerning access to port terminal services pursuant to the Original Undertaking,
- but has not executed an Access Agreement prior to the Commencement Date, then, unless otherwise agreed by the parties, and notwithstanding anything in the Original Undertaking, the Port Operator will be entitled to:
- (iii) terminate the negotiations; and

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- (iv) terminate the Dispute with each party being liable for its own costs and one half of the arbitrator's costs.
- (b) The Port Operator must, within two Business Days of the Commencement Date, notify a person referred to in **clause 7.8(a)** in writing:
  - (i) of the termination of the negotiation or Dispute;
  - (ii) of the person's rights to enter into a Transition Agreement pursuant to this clause; and
  - (iii) of the Eligibility Requirements (if the Port Operator is not already satisfied, acting reasonably, that the person meets the Eligibility Requirements) and the date by which the person must demonstrate the Eligibility Requirements, being no earlier than seven Business Days from the date of the notice.
- (c) Within two Business Days of the later of the date of notice referred to in **clause 7.8(b)** or the person demonstrating that it meets the Eligibility Requirements, the Port Operator must offer to provide access to the equivalent Port Terminal Services requested in the Original Access Application under a "**Transition Agreement**" being an Access Agreement in the form of the Standard Access Terms for the relevant Port Terminal Services. The Port Operator's offer must remain open for at least five Business Days from the date of the notice.
- (d) If the person accepts the Port Operator's offer to provide access to the Port Terminal Services under a Transition Agreement, the parties must execute the Transition Agreement within three Business Days of the person's acceptance.
- (e) The execution of the Transition Agreement does not prevent the parties from entering into an Access Agreement under **clause 7**.
- (f) The Transition Agreement will terminate on the earlier of:
  - (i) the date on which an Access Agreement is entered into pursuant to **clause 7** (whether by agreement or determination by an arbitrator); and
  - (ii) 31 October 2012.

## 8 Dispute resolution

### 8.1 Disputes

- (a) Any Dispute must, unless otherwise expressly agreed by both parties, be resolved in accordance with this **clause 8**.
- (b) Either party may give to the other party to the Dispute a notice in writing (**Dispute Notice**) specifying the Dispute and requiring it to be dealt with in the manner set out in this **clause 8**. The parties must act in good faith and attempt to resolve the Dispute as soon as is practicable.

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- (c) Any disputes in relation to an executed Access Agreement will be dealt with in accordance with the provisions of that Access Agreement.
- (d) The Port Operator will no later than 2 weeks after, 31 July of each year provide a report to the ACCC on any disputes in relation to an Access Agreement and any Disputes in the period from 1 August in the previous year to 31 July (except for the first year in which case the report will apply to the period from the commencement of this Undertaking) including the details of any resolutions and the status of unresolved matters.

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## 8.2 Negotiation

Within five Business Days of a party giving the other party a Dispute Notice, senior representatives from each party will meet and negotiate in good faith to resolve the Dispute.

## 8.3 Mediation

- (a) If the Dispute is not resolved under **clause 8.2** within five Business Days after the date of the Dispute Notice then:
  - (i) if the parties agree, they will attempt to resolve the Dispute by formal mediation conducted by a mediator appointed by agreement between the parties or as appointed by the President of the Western Australian Chapter of the Institute of Arbitrators and Mediators of Australia (**IAMA**); or
  - (ii) if the parties do not agree to resolve the Dispute by mediation, either party may by notice in writing to the other refer the Dispute to be determined by arbitration under **clause 8.4**.
- (b) Unless the parties agree otherwise:
  - (i) any mediation will be conducted by a mediator under the IAMA Mediation Rules (whether or not the mediator is a legal practitioner);
  - (ii) any mediation must be conducted within ten Business Days of the appointment of the mediator;
  - (iii) each party may appoint a person, including a legally qualified person to represent it or assist it in a mediation;
  - (iv) each party will bear their own costs relating to the preparation for and attendance at a mediation; and
  - (v) the costs of the mediator will be borne equally by the parties.

## 8.4 Referral to arbitration

- (a) If the Dispute is not resolved under **clause 8.3** either party may by notice in writing to the other party and to any appointed mediator terminate any negotiation or mediation proceedings and give notice that the Dispute must be referred to arbitration under this **clause 8.4**.

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- (b) Where a Dispute is referred to arbitration, it must be referred to the ACCC at the address specified in **clause 11(c)** in the first instance.
- (c) Upon referral to the ACCC of the Dispute:
  - (i) within five Business Days of receipt of the referral notice, the ACCC may give notice to the parties as to whether the Dispute must be arbitrated by the ACCC or referred to a private arbitrator; and
  - (ii) if the ACCC does not give a notice under **clause 8.4(c)(i)**, the ACCC will be deemed to have given notice to the parties confirming that the Dispute be referred to a private arbitrator.
- (d) The ACCC may approve a Member to exercise the power to:
  - (i) determine whether a Dispute must be arbitrated by the ACCC or referred to a private arbitrator; and
  - (ii) give a notice under **clause 8.4(c)(i)**.
- (e) Where the ACCC determines that it will conduct the arbitration such arbitration must be conducted by the ACCC in accordance with the arbitration provisions of Part IIIA of the CCA. The ACCC may not make a determination which would have the effect of setting the terms and conditions of access to a Port Terminal Service in respect of any period following the expiry of this Undertaking.
- (f) Where either party serves notice under **clause 8.4(a)**, that notice must include:
  - (i) the contact details for the parties to the Dispute;
  - (ii) whether the parties have agreed or are likely to agree upon a private arbitrator if the ACCC does not arbitrate the Dispute; and
  - (iii) an agreement by that party in the case of referral by the ACCC of the Dispute to a private arbitrator to:
    - (A) pay any amounts determined in accordance with **clause 8.9**; and
    - (B) indemnify the private arbitrator from any claims made against the private arbitrator arising in connection with the performance by the private arbitrator of its duties, such indemnity excluding circumstances where the conduct of the private arbitrator constitutes wilful negligence, or is dishonest or unlawful conduct.

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## 8.5 Arbitration procedure – private arbitrator

- (a) If a Dispute is referred to a private arbitrator, the parties must act in good faith and attempt to agree upon a suitably qualified person to act as arbitrator.
- (b) If the parties fail to agree an arbitrator within ten Business Days of the ACCC giving a notice under **clause 8.4(c)(i)** referring the Dispute to a

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private arbitration, or the ACCC being deemed to give a notice under **clause 8.4(c)(ii)**, either party may request the President of the Western Australian Chapter of the IAMA to appoint an arbitrator, such appointment to be made within five Business Days of the request to IAMA.

- (c) Subject to the involvement of, and disclosures to, the ACCC, unless the Port Operator and the Applicant agree otherwise, the arbitration by a private arbitrator must be conducted in private.
- (d) A party may appoint a person, including a legally qualified person, to represent it or assist it in the arbitration.
- (e) The private arbitrator will, when conducting the arbitration:
  - (i) keep the ACCC informed of the progress of the arbitration, including timelines and processes for making submissions;
  - (ii) observe the rules of natural justice but is not required to observe the rules of evidence;
  - (iii) proceed as quickly as is possible and consistent with a fair and proper assessment of the matter;
  - (iv) have the right to decide on the form of presentations;
  - (v) encourage a written presentation by each party with exchange and rebuttal opportunities and questioning by the private arbitrator;
  - (vi) call on any party the private arbitrator believes necessary to give evidence;
  - (vii) permit the ACCC, on its request, to make submissions to the private arbitrator on matters relevant to the Dispute;
  - (viii) decide how to receive evidence and consider the need to keep evidence confidential and the need to protect the confidentiality of the arbitration process;
  - (ix) present its determination in a draft form to the parties and hear argument from the parties before making a final determination;
  - (x) hand down a final determination in writing which includes all its reasons for making the determination and findings on material questions of law and fact, including references to evidence on which the findings of fact were based; and
  - (xi) provide a copy of the final determination to the ACCC at the time of handing down the final determination.
- (f) The private arbitrator may at any time terminate the arbitration (without making an award) if it thinks that:
  - (i) the notification of the Dispute is vexatious;
  - (ii) the subject matter of the Dispute is trivial, misconceived or lacking in substance; or

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- (iii) the party who notified the Dispute has not engaged in negotiations in good faith.
- (g) The *Commercial Arbitration Act 1985 (WA)* will apply to an arbitration conducted by a private arbitrator. Subject to law, to the extent of any inconsistency between that Act and the provisions of this Undertaking, the provisions of this Undertaking will prevail.

## **8.6 Matters which private arbitrator must take into account**

- (a) In deciding a Dispute the private arbitrator will take into account:
  - (i) the principles, methodologies and provisions set out in this Undertaking;
  - (ii) the provisions of Part IIIA of the CCA;
  - (iii) any relevant guidelines published by the ACCC;
  - (iv) any submissions provided by the ACCC; and
  - (v) any other matters that the private arbitrator thinks are appropriate to have regard to.
- (b) In making its determination, the arbitrator:
  - (i) may deal with any matters referred to in section 44V of the CCA;
  - (ii) will not make a determination that would have any of the effects described in section 44W of the CCA; and
  - (iii) will take into account the matters referred to in section 44X of the CCA.
- (c) The arbitrator may not make a determination which would have the effect of setting the terms and conditions of access to a Port Terminal Service in respect of any period following the expiry of this Undertaking.

## **8.7 Confidentiality – private arbitration**

- (a) The private arbitrator must take all reasonable steps to protect the confidentiality of information that a party has identified as confidential or commercially sensitive.
- (b) The private arbitrator may require the parties to comply with rules and orders aimed at protecting the confidentiality of information provided by the parties, including:
  - (i) requiring each party to give confidentiality undertakings to the other party and their external advisers; and
  - (ii) limiting access to confidential information to specified individuals subject to confidentiality undertakings provided by those individuals.
- (c) The private arbitrator may make confidential and non-confidential versions of its determination and limit access to the confidential versions to specific individuals.

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- (d) Nothing in this **clause 8.7** prevents a private arbitrator from, or limits the extent to which a private arbitrator may, provide information to the ACCC.

#### **8.8 Effect of private arbitrator's determination**

- (a) The determination of the private arbitrator will be final and binding, subject to any rights of review by a court of law.
- (b) Except where the determination or direction is subject to a review by a court of law:
  - (i) if an Applicant does not comply with a determination or direction of the private arbitrator, then the Port Operator will no longer be obliged to continue negotiations regarding the provision of access for that Applicant; and
  - (ii) the Port Operator will comply with the lawful directions or determinations of the private arbitrator.

#### **8.9 Private arbitrator's costs**

The private arbitrator's costs and the costs of the parties to the arbitration will be borne by the parties in such proportions as the private arbitrator determines. Each party may make submissions to the private arbitrator on the issue of costs at any time prior to that determination.

#### **8.10 Backdating of arbitration determination**

Subject to **clause 8.11**, the ACCC and a private arbitrator (as the case may be) have the discretion to determine that an arbitration determination takes effect from the:

- (a) date of the determination (provided such date is within the term of this Undertaking); or
- (b) date on which the Dispute Notice was served; or
- (c) date on which the relevant Access Application was submitted.

#### **8.11 Absolute deadline for Disputes, arbitration or mediation**

Notwithstanding anything else in this **clause 8**, any Dispute, mediation or arbitration must be concluded and, if applicable, a determination handed down, by 15 September (regardless when the Dispute, mediation or arbitration commenced). If the Dispute, mediation or arbitration is not concluded and, if applicable, a determination handed down, by such date:

- (a) the Dispute, mediation or arbitration will be automatically terminated with each party being liable for its own costs and one half of the arbitrator's costs (if applicable); and
- (b) the provisions of **clause 7.7** will apply.

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## 9 Confidentiality

- (a) Subject to **clause 9(b)**, if a party provides Confidential Information to the other party as part of the negotiation or dispute resolution or arbitration processes under this Undertaking, the receiver of the Confidential Information will treat that Confidential Information as secret and confidential and the property solely of the provider of the Confidential Information and not use that Confidential Information for any purpose other than that which the provisions of this Undertaking allow.
- (b) A party is permitted to disclose Confidential Information to the extent necessary for the provision of information:
  - (i) to a mediator or arbitrator or to the ACCC as provided for under the provisions of this Undertaking; and
  - (ii) for the purposes of advice from legal advisors, financiers, accountants or other consultants (provided they are under a legal obligation not to disclose the Confidential Information to any third party).
- (c) Nothing in this **clause 9** prevents a party or a private arbitrator from providing, or limits the extent to which a party or a private arbitrator may provide, information to the ACCC.

## 10 Capacity management

### 10.1 Compliance with Port Terminal Rules

- (a) The Port Terminal Rules must be, and continue to be, a comprehensive statement of the Port Operator's policies and procedures for managing demand for Port Terminal Services.
- (b) The Port Terminal Rules set out the methods for allocating capacity at the Port Terminal Facilities, including by an auction system. If the Port Operator intends to amend the Port Terminal Rules to significantly amend the capacity allocation system the Port Operator will seek a variation to the Undertaking pursuant to section 44ZZA(7) of the CCA.
- (c) The Port Operator must comply with the Port Terminal Rules when providing or accessing the Port Terminal Services under an Access Agreement.
- (d) The Port Operator may require an Applicant to agree to comply with the Port Terminal Rules as a condition of acquiring Port Terminal Services.
- (e) The Port Operator must publish the Port Terminal Rules on its website.

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### 10.2 Variation of Port Terminal Rules

- (a) The Port Terminal Rules may be varied by the Port Operator provided that:
  - (i) the variation is consistent with this Undertaking and in particular **clauses 6.2 and 10.8**;

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- (ii) the Port Operator complies with:
  - (A) the process in **clause 10.3** for typographical, formatting or grammatical errors;
  - (B) the process in **clause 10.4** for standard amendments; or
  - (C) the process in **clause 10.5** for exceptional circumstances.
- (b) The Port Terminal Rules must always include an expeditious dispute resolution mechanism for dealing with disputes over compliance with the Port Terminal Rules or the Auction Rules.

### **10.3 Typographical, formatting and grammatical amendment process**

- (a) The Port Operator may amend any typographical, formatting or grammatical error that is apparent on the face of the text of the relevant rule or rules in the Port Terminal Rules.
- (b) If the Port Operator amends a typographical, formatting or grammatical error, it must publish on its website within one Business Day of making the amendment:
  - (i) a notice listing the paragraph or paragraphs to which amendments were made; and
  - (ii) a marked-up version of the Port Terminal Rules showing the amendments.
- (c) An amendment under this **clause 10.3** takes effect when the Port Operator publishes the information in accordance with **clause 10.3(b)** or other such later date as the Port Operator specifies.

### **10.4 Standard amendment process**

If the Port Operator wishes to make an amendment other than to correct an error under **clause 10.3** or in exceptional circumstances under **clause 10.5**, the Port Operator must:

- (a) publish a notice (**Draft PTR Variation Notice**) on the Port Operator's website containing or annexing the following:
  - (i) a copy of the relevant part of the Port Terminal Rules with the proposed variation shown in mark-up;
  - (ii) a statement of the Port Operator's reasons for the variation;
  - (iii) a request that interested parties provide written responses in relation to the proposed changes. The deadline for responses must be no earlier than ten Business Days from the date of publication of the Draft PTR Variation Notice;
  - (iv) a contact name and address for written responses to be addressed to the Port Operator;
  - (v) an invitation for interested parties to request a meeting to discuss the proposed amendment; and

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- (vi) the proposed date on which the variation is proposed to take effect, which must be no less than thirty Business Days after publication of the Draft PTR Variation Notice.
- (b) within one Business Day of publishing the Draft PTR Variation Notice, send copies to all Users and the ACCC;
- (c) publish copies of all non-confidential responses received on the Port Operator's website and provide copies to all Users and the ACCC within two Business Days of receipt of each response provided that the Port Operator is not required to publish on the Port Operator's website nor provide copies to Users of any written submission which is offensive, abusive or inappropriate for publication;
- (d) if requested to do so by any User or the ACCC, conduct a meeting to discuss the proposed variation with interested parties no later than ten Business Days after publication of the Draft PTR Variation Notice. At the Port Operator's discretion, separate meetings may be held between the Port Operator and individual parties with confidential interests;
- (e) review and consider in good faith any written responses and discussions with Users and the ACCC in relation to the proposed changes; and
- (f) the Port Operator must publish, on its website a **Final PTR Variation Notice** which:
- (i) may
- (A) withdraw any amendment proposed in the Draft PTR Variation Notice; or
- (B) amend any amendment proposed in the Draft PTR Variation Notice; or
- (C) confirm any or all of the variations stated in the Draft PTR Variation Notice,
- (ii) must contain or annex the following:
- (A) a copy of the relevant part of the Port Terminal Rules with the proposed variation shown in mark-up;
- (B) a statement of the Port Operator's reasons for the variations to be made;
- (C) a report summarising any views expressed by interested parties in relation to the Draft PTR Variation Notice;
- (D) a statement of the Port Operator's reasons for any withdrawal or amendment of a variation proposed in the Draft PTR Variation Notice;
- (E) the date on which the variation will take effect, which must be no less than twenty Business Days after publication of the Final PTR Variation Notice (**Effective Date**). For the avoidance of doubt, the Effective Date may differ from the date specified in the Draft PTR Variation Notice.

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## 10.5 Variation in Exceptional Circumstances

- (a) In Exceptional Circumstances, the Port Operator may amend the Port Terminal Rules on two Business Days notice, provided that the Port Operator publishes a notice (**Exceptional Circumstances Variation Notice**) on the Port Operator's website containing or annexing the following:
  - (i) a copy of the relevant part of the Port Terminal Rules with the proposed variation shown in mark-up;
  - (ii) the Port Operator's reasons for the variation, including the facts and matters that establish the existence of Exceptional Circumstances.
- (b) After amending the Port Terminal Rules in accordance with **clause 10.5(a)**, the Port Operator must follow the Standard Amendment Process as set out in **clause 10.4**, to allow Users an opportunity to make submissions on the amendments made in Exceptional Circumstances. For the avoidance of doubt, after following the Standard Amendment Process the Port Operator may, after taking into account responses received from interested parties, withdraw, amend or confirm the proposed variation to the Port Terminal Rules specified in the Exceptional Circumstances Variation Notice.

## 10.6 Objection notice

- (a) If the Port Operator seeks to vary the Port Terminal Rules in accordance with **clause 10.4** or **clause 10.5**, the ACCC may object to the proposed variation (or part thereof). If the ACCC objects to a proposed variation (or part thereof), it must issue a notice to the Port Operator stating that it objects to the proposed variation and providing reasons for its objection. The ACCC will publish any notice issued under this **clause 10.6(a)** on the ACCC's website.
- (b) Any notice issued under **clause 10.6(a)** must be issued at least ten Business Days prior to the date on which the variation is proposed to become effective.
- (c) At least five Business Days before issuing a notice under **clause 10.6(a)**, the ACCC must provide the Port Operator with a draft notice stating that it objects to the proposed variation and providing reasons for its objection.
- (d) The ACCC may only issue a draft notice under **clause 10.6(c)** or a final notice under **clause 10.6(a)**, where the ACCC considers, acting reasonably, that the proposed variation amounts to a breach of the anti-discrimination provision in **clause 6.2** or the no hindering access provision in **clause 10.8**.
- (e) The ACCC may withdraw a draft notice under **clause 10.6(c)** or a final notice under **clause 10.6(a)** if in all the circumstances it becomes aware that the reasons specified in the draft notice issued under **clause 10.6(c)** or the notice issued under **clause 10.6(a)** no longer exist.

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- (f) If the ACCC issues a notice under **clause 10.6(a)**, the Port Operator will, within three Business Days:
- (i) withdraw the proposed variation and commence a new variation process by placing a notice to that effect in a prominent place on the Port Operator's website and notifying the ACCC in writing; [or](#)
  - (ii) withdraw the proposed variation and confirm the status of the existing Port Terminal Rules by publishing a notice in a prominent place on the Port Operator's website and notifying the ACCC in writing.

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## 10.7 Transitional measures

- (a) All activities performed in accordance with the Port Terminal Rules prior to the Effective Date of any variation will remain valid notwithstanding any subsequent variation of the Port Terminal Rules.
- (b) Unless the User and the Port Operator agree otherwise, the nomination of vessels in accordance with the Port Terminal Rules will be governed in accordance with the Port Terminal Rules published at the time of nomination notwithstanding any subsequent variation of the Port Terminal Rules.
- (c) Vessels nominated after the Effective Date of any variation of the Port Terminal Rules will be required to be nominated under the Port Terminal Rules as varied.

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<#>the provisions of **clause 8.5** to **clause 8.11** (inclusive) will apply with the following modifications:¶  
<#>the ACCC will be one party and the Port Operator will be the other party;¶  
<#>the references to the date of the ACCC giving notice in **clause 8.5(b)** will be the date on which the Port Operator notifies the ACCC that it disputes the ACCC's objection;¶  
<#>**clause 8.5(c)** will not apply. The arbitration will be conducted in private unless the parties otherwise agree; and¶  
<#>**clause 8.5(e)(i), clause 8.5(e)(vii), clause 8.5(e)(xi), clause 8.6(a)(iv) and clause 8.7(d)** will not apply.¶  
<#>If the Port Operator disputes the ACCC's objection and refers the matter to arbitration in accordance with **clause 10.6(f)**, the proposed variation to the Port Terminal Rules:¶  
<#>will come into effect on the date determined by the arbitrator (if any); unless,¶  
<#>the proposed amendment was due to Exceptional Circumstances in which case the proposed variation to the Port Terminal Rules will remain in effect unless and until modified by the arbitrator's determination.¶

## 10.8 No hindering

- (a) The Port Operator and its Related Bodies Corporate must not engage in conduct for the purpose of preventing or hindering access to the Port Terminal Services by an Applicant or User.
- (b) A person may be taken to have engaged in conduct for the purpose referred to in **clause 10.8(a)** 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 clause does not limit the manner in which the purpose of a person may be established.

## 11 Contact details

- (a) Persons wishing to contact the Port Operator for further information or to apply for access to the Port Terminal Services should contact the Port Operator at the following address:

Customer Account Manager  
Grain Operations  
Co-operative Bulk Handling Limited  
Gayfer House, 30 Delhi Street  
West Perth WA 6005

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- (b) Applicants are also encouraged to review the Port Operator's web site at [www.cbh.com.au](http://www.cbh.com.au) which includes information relevant to the Port Terminal Services.
- (c) Persons wishing to contact the ACCC in relation to this Undertaking should contact the ACCC at the following address:
- General Manager  
Transport and General Prices Oversight  
Australian Competition and Consumer Commission  
Level 35, 360 Elizabeth Street  
Melbourne VIC 3000  
Fax (03) 9663 3699

## 12 Publication of key information

### 12.1 Stocks at port

- (a) Subject to clause 12.1(b), each week during the term of the Undertaking, the Port Operator will publish in a prominent place on its website a statement of:
- (i) the total amount of Bulk Wheat situated at each of the Port Terminal Facilities;
  - (ii) the total amount of grain other than Bulk Wheat situated at each of the Port Terminal Facilities; and
  - (iii) the three grades of Bulk Wheat contributing the largest tonnage at each of the Port Terminal Facilities.
- The Port Operator must use reasonable endeavours to ensure that the statement is accurate within + / - 5%.
- (b) The Port Operator will not be obliged to publish any of the information referred to in clause 12.1(a) where the Port Operator, acting reasonably, considers that the disclosure of such information may:
- (i) enable particulars relating to any person to be ascertained; or
  - (ii) adversely affect the interests of a User or the Port Operator.

### 12.2 Vessel nominations

By the close of the Business Day following the Business Day on which the Port Operator receives a vessel nomination from a User (including its Trading Business), the Port Operator will publish the nomination on the shipping stem and in a prominent place on its website. Vessel nominations received after 4.00pm on a Business Day, or on a non-Business Day will be deemed to be received at 8.00am on the next Business Day.

### 12.3 Key indicators

- (a) Within the last three days of each of December, March, June and September, the Port Operator will publish in a prominent place on its

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website a statement of the key indicators of its performance of the Port Terminal Services at each Port Terminal Facility, including details of the:

- (i) average number of days between the ETA (as defined in the Port Terminal Rules) on original vessel nomination and the date of the presentation of the Notice of Readiness (as defined in the Port Terminal Rules);
  - (ii) average number of days between presentation of a Notice of Readiness and Commencement of Loading (as defined in the Port Terminal Rules) for vessels that arrive within their contracted Shipping Window (as defined in the Port Terminal Rules);
  - (iii) average number of days between presentation of a Notice of Readiness and Commencement of Loading for vessels that arrive outside their contracted Shipping Window;
  - (iv) number of vessels rejected in the year to date;
  - (v) number of vessels presenting a Notice of Readiness outside of the contracted Shipping Window in the year and month to date;
  - (vi) quantum of tonnes of wheat exported in the year and month to date; and
  - (vii) number of vessels loaded in the year and month to date.
- (b) The Port Operator will notify the ACCC within five Business Days of publication, that it has published a report on the Port Operator's website under **clause 12.3**.

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## 12.4 Capacity

- (a) The shipping stem will provide information about the total capacity in relation to the shipping windows available at each Port Terminal Facility and the amount of capacity currently allocated at each Port Terminal Facility.
- (b) Where the Port Operator varies capacity in relation to a shipping window available at a Port Terminal Facility by more than + / - 5% from the previously published capacity, it will publish the revised capacity on the shipping stem within 2 Business Days together with a brief explanation for the variation.

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## 12.5 Reference Services

- (a) The Port Operator must, throughout the term of this Undertaking, publish in a prominent place on its website (in the same location as the shipping stem) details in relation to:
- (i) the specific services covered by the charges set out in the Reference Prices including, where appropriate, the quantity and/or duration of those services; and
  - (ii) the criteria (if any) which must be satisfied in order to qualify for any charges set out in the Reference Prices.

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(b) For clarity:

- (i) an eligible Applicant may negotiate with the Port Operator in relation to the Reference Prices and the application of, or Port Terminal Services underpinning, those Reference Prices in accordance with **clause 7.6**. Any Dispute in relation to such negotiations may be resolved in accordance with **clause 8**; and
- (ii) the criteria referred to in **clause 12.5(a)(ii)** may include criteria for approved third party storage and/or transport.

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DATED the                      day of                      2011.

The common seal of Co-operative  
Bulk Handling Limited is affixed in  
the presence of:

.....  
Company Secretary/Director

.....  
Director

.....  
Name of Company Secretary/Director  
(print)

.....  
Name of Director (print)

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# Schedule 1

## Access Application information

### 1 Request details

#### 1.1 Season

#### 1.2 Applicant's Application Type

### 2 Applicant details

#### 2.1 Company name

#### 2.2 ABN/ACN

#### 2.3 Website

#### 2.4 Address

#### 2.5 Contact details

#### 2.6 Details of authorised company representative (including authorisation)

#### 2.7 Duration of the Access Agreement sought

### 3 Indicative Export Tonnage

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## Schedule 2

### Indicative Port Terminal Services Agreement

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# Schedule 3

## Port Terminal Rules

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## Schedule 4

### Port Terminal Facility - Geraldton

#### 1 Location

The Geraldton port terminal is located in the Western Australian city of Geraldton, which is approximately 428km north of Perth. The port terminal address is Corner Marine Terrace and Crowther Street, Geraldton WA 6530.

#### 2 Port Terminal Facilities

- (a) The Port Terminal Facilities consist of the conveyors, elevators, sample rooms, grids, batch weighers, ship loaders and site roads owned by the Port Operator and contained in the shaded areas below.



- (b) Grain receival

- (i) 1 x 200 tonne weighbridge and 2 x 120 tonne weighbridges (located at west end depot).
- (ii) 1 x 1,000 tonne per hour road receival bin and 4 x 500 tonne per hour road receival bins across the port facility.

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- (iii) 1 x 1,000 tonne per hour rail receival station with associated rail line.
- (iv) 17 dust control systems.
- (v) 55 grain conveyors with 7 associated grain elevators.
- (c) Grain storage
  - (i) The total grain storage capacity is 295,000 tonnes.
  - (ii) 24 x 2,200 tonne reinforced concrete vertical cells (current capacity is 1400 tonnes, until cell restoration is complete in 2011).
  - (iii) 14 x 500 tonne star cells with associated working house.
  - (iv) 14 x 10,000 tonne steel silos with self-discharging base and associated working house.
  - (v) 1 x 95,200 tonne capacity reinforced concrete horizontal storage cell.
- (d) Inload capacity
  - (i) Rail
    - (A) The port terminal has one rail receival station, which can also be used for road receivals when it is not being used by rail. The rail receival station is rated to receive grain at 1,000 tonnes per hour by rail or by road.
    - (B) The grid into which the grain is received can discharge at a minimum of 400 tonnes per hour, up to 1,000 tonnes per hour. The rate of discharge is dependent upon the silo to which the grain is to be discharged.
    - (C) Various factors reduce the ability of the rail receival station to receive grain at its rated capacity. These include:
      - (1) operational constraints and the need to handle multiple segregations, which adds time when changing between grains and grades;
      - (2) the physical configuration of rail wagons moving into the port terminal;
      - (3) external factors beyond the Port Operator's control, for example a rail provider's locomotive breakdown; and
      - (4) the Port Operator having to weigh grain on receipt using its batch weighers.
  - (ii) Road
    - (A) The port terminal has 5 road receival stations. One is rated to receive grain at 1,000 tonnes per hour. The other 4 receival stations are rated to receive grain at 500 tonnes per hour. In total, the Geraldton port terminal can receive grain by road at a maximum of 3,000 tonnes per hour.

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- (B) The 1,000 tonne per hour grid can discharge grain at a minimum of 400 tonnes per hour, up to 1,000 tonnes per hour. The other 4 receival stations operate on a grid valve system, and can discharge grain at between 400 and 450 tonnes per hour.

(e) Ship loading capacity

The Geraldton port terminal has 2 luffing ship loaders, each rated to a loading capacity of 1,000 tonnes per hour. The operational capacity of the ship loaders averages between 950 and 1,400 tonnes per hour, depending on the following factors:

- (i) hatch changes – changing from one hatch to another affects loading rates, because of the time required to raise, move and lower the ship loaders into the required hatch. Hatch changes are necessary to keep the vessel stable during loading;
- (ii) trimming hatches – loading rates are reduced to ‘half feed’ when the grain comes close to filling a hatch. This is to prevent over-filling and allow instead for hatches to be level filled;
- (iii) filling weep holes and bulkheads – loading rates are also reduced to half feed when filling weep holes to allow flow to fill these areas. Due to the relatively light weight of grain (as compared with iron ore, for example) hatches must be filled to the highest level to achieve the maximum weight, and ensure there is no wasted space in the hatch;
- (iv) ballast discharge – some ships are not designed to discharge stabilising water tanks at the same rate as the ship loaders can load grain. In these cases, grain loading stops to allow the ship time to discharge ballast;
- (v) draught surveys – towards the end of the ship loading, grain flow from the loaders is stopped to allow the ship’s captain to check the ship’s draught. This is to ensure that the tonnage being loaded will allow the ship to sail and arrive at the discharge port;
- (vi) initial loading of large ships – due to the steep angle and height of the ship loaders which is necessary when loading larger ships, there is a reduced feed rate to avoid spillage. As the ship loading continues and the ship becomes lower in the water, the ship loaders can be lowered and feed rates increased;
- (vii) grain changes and separations in hatches – when changing from loading one grain type to another, all weighers, belts and loaders must be cleaned before the second grain type can be loaded. Loading will also stop if a physical separation of grain is required in the ship’s hatches; and
- (viii) weather – grain cannot be loaded on ships in rain or high winds.

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- (f) Associated system control and communication networks, Site office, ablution and workshop facilities.
- (g) The port terminal is accredited to the international standard ISO 9001 and HACCP Codex Alimentarius.

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## Schedule 5

### Port Terminal Facility - Kwinana

#### 1 Location

The Kwinana port terminal is located in the Kwinana industrial area of Western Australia, approximately 40km south Perth. The port terminal address is Rockingham Beach Road, Kwinana Beach WA 6167.

#### 2 Port Terminal Facilities

- (a) The Port Terminal Facilities consist of the conveyors, elevators, sample rooms, grids, batch weighers, ship loaders and site roads owned by the Port Operator and contained in the shaded areas below. The rail loop is also included, but not the land surrounding the loop.



- (b) Grain receipt

- (i) 1 x 4,000 tonne per hour rail receipt station with associated rail loop.
- (ii) 76 grain conveyors with 14 associated grain elevators.
- (iii) 34 x dust control systems.

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- (iv) 1 x 160 tonne certified weighbridge.
- (c) Grain storage
  - (i) The total grain storage capacity is 1,013,900 tonnes.
  - (ii) 144 x 2,350 tonne reinforced concrete vertical cells with associated working house (due to high level sensors and purge capacity, the operational capacity of these cells is 2,200 tonnes each).
  - (iii) 104 x 500 tonne star cells with associated working house (due to high level sensors and purge capacity, the operational capacity of these cells is 450 tonnes each).
  - (iv) 1 x 285,800 tonne and 1 x 238,100 tonne capacity reinforced concrete horizontal storage cells with associated working house (the capacity of these cells is based on one grain type – when segregated, storage capacity in these cells is reduced).
  - (v) 4 x corrugated galvanised steel open bulkheads with a total capacity of 120,100 tonnes, comprised of:
    - (A) O1: 30,100 tonnes
    - (B) O2: 40,000 tonnes;
    - (C) O3: 23,000 tonnes;
    - (D) O4: 27,000 tonnes.
- (d) Inload capacity
  - (i) Rail
    - (A) The port terminal has 1 rail receival station, which is comprised of 2 receival grids. The rail receival grids can also be used for road receivals. When shipping demand requires, rail accumulation tonnage is supplemented with road receivals. The receival grids are rated to receive grain at 4,000 tonnes per hour by rail, and 700 tonnes per hour by road.
    - (B) Operational constraints and the need to handle multiple grain segregations severely impact the port terminal's ability to achieve the rated rail receival capacity of 4,000 tonnes per hour. For example, changing the receival facilities to swap between receiving two grades of wheat takes 15-30 minutes. The process involves emptying the receival grid, purging the receival lines and moving trippers in the seventh floor workhouse. Changing the receival facilities to swap from receiving wheat to lupins can take 20-40 minutes, as this process additionally requires the grid to be blown down and the receival elevators to be air blasted.
    - (C) The physical configuration of rail wagons for discharge can also affect the ability of the receival station to operate at maximum capacity. This is because the grain discharges

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from the wagons into the grid at a slower pace than the conveyors are able to remove it. The trains move slowly for set ups and the train must be stationary to allow the Port Operator to open wagons with the rail gun.

- (D) Various other factors reduce the ability of the rail receipt station to receive grain at its rated capacity. These include:
- (1) operational constraints and the need to handle multiple segregations, which adds time when changing between grains and grades;
  - (2) the physical configuration of rail wagons moving into the port terminal;
  - (3) external factors beyond the Port Operator's control, for example a rail provider's locomotive breakdown; and
  - (4) the Port Operator having to weigh grain on receipt using its batch weighers.

(ii) Road

The Port Terminal operates one road receipt station consisting of 4 road receipt grids each rated at 750 tonnes per hour. As a result of the configuration of the receipt grids discharging generally only occurs on 2 grids and is limited to two (2) grain types at any time. In practice, the road receipt station does not achieve aggregate receipt rates in excess of 1500 tonnes per hour.

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(e) Ship loading capacity

(i) Ship loading occurs between 0730 and 2230, because :

- (A) ships need time to empty their ballast. Due to the fast loading rate at Kwinana, some ships cannot empty their ballast tanks fast enough, so they are allocated time from 2230 and 0730 to catch up; and
- (B) as part of the Port Operator's environmental commitments to keep dust and noise to a minimum for residents, the Port Operator does not load ships at the port terminal 24 hours per day.

**Deleted:** The port terminal does not have permanent dedicated road inloading facilities but may employ temporary drive-over grids in dry weather. Road receipts made through the rail receipt station reduce rail discharge rates by 25% to 50%. As a result of reducing the available discharge conveyors for the discharge of rail, they are discharged using the same conveyor belts and cannot be run together.

- (ii) 4 x 2,500 tonne per hour travelling and luffing ship loaders (only 2 can be used simultaneously) with associated batch weighing and sampling systems. The ship loaders are fed by 4 conveyor belts, each with a loading capacity of 1,250 tonnes per hour. Because the ship loaders are dual fed (that is, 2 conveyors feed 1 loader), ships can be loaded at full capacity through less infrastructure.
- (iii) 291 metre long ship loading berth with associated access jetty.

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- (iv) A number of factors influence the port terminal's ability to achieve its maximum shipping capacity of 5,000 tonnes per hour. These include:
- (A) hatch changes – changing from one hatch to another affects loading rates, because of the time required to raise, move and lower the ship loaders into the required hatch. Hatch changes are necessary to keep the vessel stable during loading;
  - (B) trimming hatches – loading rates are reduced to 'half feed' when the grain comes close to filling a hatch. This is to prevent over-filling and allow instead for hatches to be level filled;
  - (C) filling weep holes and bulkheads – loading rates are also reduced to half feed when filling weep holes to allow flow to fill these areas. Due to the relatively light weight of grain (as compared with iron ore, for example) hatches must be filled to the highest level to achieve the maximum weight, and ensure there is no wasted space in the hatch;
  - (D) ballast discharge – some ships are not designed to discharge stabilising water tanks at the same rate as the ship loaders can load grain. In these cases, grain loading stops to allow the ship time to discharge ballast;
  - (E) draught surveys – towards the end of the ship loading, grain flow from the loaders is stopped to allow the ship's captain to check the ship's draught. This is to ensure that the tonnage being loaded will allow the ship to sail and arrive at the discharge port;
  - (F) initial loading of large ships – due to the steep angle and height of the ship loaders which is necessary when loading larger ships, there is a reduced feed rate to avoid spillage. As the ship loading continues and the ship becomes lower in the water, the ship loaders can be lowered and feed rates increased;
  - (G) grain changes and separations in hatches – when changing from loading one grain type to another, all weighers, belts and loaders must be cleaned before the second grain type can be loaded. Loading will also stop if a physical separation of grain is required in the ship's hatches; and
  - (H) weather – grain cannot be loaded on ships in rain or high winds.
- (f) Associated system control and communication networks, Site office, ablution and workshop facilities.
- (g) The port terminal is accredited to the international standard ISO 9001 and HACCP Codex Alimentarius.

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## Schedule 6

### Port Terminal Facility - Albany

#### 1 Location

The Albany port terminal is located in the Western Australian city of Albany, which is approximately 420km south east of Perth. The port terminal address is Princess Royal Drive, Albany WA 6330.

#### 2 Port Terminal Facilities

- (a) The Port Terminal Facilities consist of the conveyors, elevators, sample rooms, grids, batch weighers, ship loaders and site roads owned by the Port Operator and contained in the shaded areas below. The sample sheds related to harvest activity are within the shaded area, but are not included in the Port Terminal Facilities.



- (b) Grain receival
- (i) 2 x 140 tonne weighbridges with associated hut.
  - (ii) 2 x 700 tonne per hour and 3 x 400 tonne per hour road receival grids.
  - (iii) 1 x 700 tonne per hour road receival grid (which only services one particular 113,000 tonne capacity storage cell).

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- (iv) 1 x 2000 tonne per hour rail receival station with associated rail line.
- (v) 12 x dust control systems.
- (vi) 59 grain conveyors with 16 associated grain elevators (some are task specific, such as for discharging by rail or shipping).
- (c) Grain storage
  - (i) The port terminal's total storage capacity is 474,000 tonnes.
  - (ii) 2 x 2,200 tonne and 5 x 1300 reinforced concrete vertical cells and 6 x 500 tonne star cells with associated working house.
  - (iii) 24 x 2,300 tonne reinforced concrete vertical cells.
  - (iv) 12 x 500 tonne star cells.
  - (v) 10 x 10,000 tonne reinforced concrete silos with bottom rake discharge.
  - (vi) 10 x 6,000 tonne steel silos with self discharge base.
  - (vii) 1 x 120,000 tonne and 1 x 113,000 tonne capacity reinforced concrete horizontal storage cells.
- (d) Inload capacity
  - (i) Rail
    - (A) The port terminal has 1 rail receival station, which can also be used for road receivals (when not in use for rail receivals). The rail receival station is rated to receive grain at 2,000 tonnes per hour by rail, and 1,000 tonnes per hour by road.
    - (B) To receive grain by rail at 2,000 tonnes per hour, the rail receival station must have two lines and two storage cells available for use. Additional staff are also required to discharge at this maximum rate. The rate of discharge is also dependent upon the silo to which the grain is to be discharged. For example, if the grain is to be discharged to either the 500 or 2,000 tonne cells, the discharge rate from the rail receival station is only 400 tonnes per hour. On average, wheat is discharged from the rail receival station at around 1,300 tonnes per hour
    - (C) Various factors reduce the ability of the rail receival station to receive grain at its rated capacity. These include:
      - (1) operational constraints and the need to handle multiple segregations, which adds time when changing between grains and grades;
      - (2) the physical configuration of rail wagons moving into the port terminal;

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- (3) external factors beyond the Port Operator's control, for example a rail provider's locomotive breakdown; and
- (4) the Port Operator having to weigh grain on receipt using its batch weighers.

(ii) Road

- (A) The port terminal has 6 road receival stations. There are 2 stations rated to receive grain at 700 tonnes per hour, 3 stations rated to receive grain at 400 tonnes per hour and 1 station rated to receive grain at 700 tonnes per hour (this station is at Annexe 2, which is a different area of the port).
- (B) The number of grids that can be used simultaneously largely depends on the rail, shipping and transferring activities being carried out at the same time. The control system only allows a set number of grain flows to be set up at once. For example, if shipping a 4-way blend of grain, 8 flows are required (4 flowing into the weigher, 4 flowing out) leaving only 4 flows for other activities.
- (C) Once storage space begins to reach its capacity, both storage options and flow path options reduce. The number of road pits available for use may also reduce. Segregating grain will increase the likelihood of this.
- (D) The rail grid is rated at 1000 tonnes per hour for road discharge. The 3 road grids are rated at 700 tonnes per hour. However, the actual discharge rate achieved is around 500 tonnes per hour, which is the maximum rate at which a truck can discharge 3 trailers.

(e) Ship loading capacity

- (i) The Albany port terminal has 3 luff and swing ship loaders with associated batch weighing and sampling systems, each with a rated loading capacity of 1,000 tonnes per hour. While any 2 ship loaders can be used simultaneously, the actual load rate achieved is on average 1,500 tonnes per hour.
- (ii) A number of factors influence the port terminal's ability to achieve its maximum shipping capacity of 2,000 tonnes per hour. These include:
  - (A) hatch changes – changing from one hatch to another affects loading rates, because of the time required to raise, move and lower the ship loaders into the required hatch. Hatch changes are necessary to keep the vessel stable during loading;
  - (B) trimming hatches – loading rates are reduced to 'half feed' when the grain comes close to filling a hatch. This is to

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prevent over-filling and allow instead for hatches to be level filled;

- (C) filling weep holes and bulkheads – loading rates are also reduced to half feed when filling weep holes to allow flow to fill these areas. Due to the relatively light weight of grain (as compared with iron ore, for example) hatches must be filled to the highest level to achieve the maximum weight, and ensure there is no wasted space in the hatch;
  - (D) ballast discharge – some ships are not designed to discharge stabilising water tanks at the same rate as the ship loaders can load grain. In these cases, grain loading stops to allow the ship time to discharge ballast;
  - (E) draught surveys – towards the end of the ship loading, grain flow from the loaders is stopped to allow the ship's captain to check the ship's draught. This is to ensure that the tonnage being loaded will allow the ship to sail and arrive at the discharge port;
  - (F) initial loading of large ships – due to the steep angle and height of the ship loaders which is necessary when loading larger ships, there is a reduced feed rate to avoid spillage. As the ship loading continues and the ship becomes lower in the water, the ship loaders can be lowered and feed rates increased;
  - (G) grain changes and separations in hatches – when changing from loading one grain type to another, all weighers, belts and loaders must be cleaned before the second grain type can be loaded. Loading will also stop if a physical separation of grain is required in the ship's hatches; and
  - (H) weather – grain cannot be loaded on ships in rain or high winds.
- (f) Associated system control and communication networks, Site office, ablution and workshop facilities.
  - (g) The port terminal is accreditation to the international standard ISO 9001 and HACCP Codex Alimentarius.

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# Schedule 7

## Port Terminal Facility - Esperance

### 1 Location

The Esperance port terminal is located in the Western Australian city of Esperance, which is approximately 721km south-east of Perth. The port terminal address is Corner Harbour Road and Esplanade, Esperance WA 6450.

### 2 Port Terminal Facilities

- (a) The Port Terminal Facilities consist of the conveyors, elevators, sample rooms, grids, batch weighers, ship loaders and site roads owned by the Port Operator and contained in the shaded area in figure 1 below.
- (b) The weighbridge and access roads at Chadwick, approximately 3km from the Esperance port terminal, also form part of the Port Terminal Facilities, and are contained in the shaded area in figure 2 below.

Figure 1

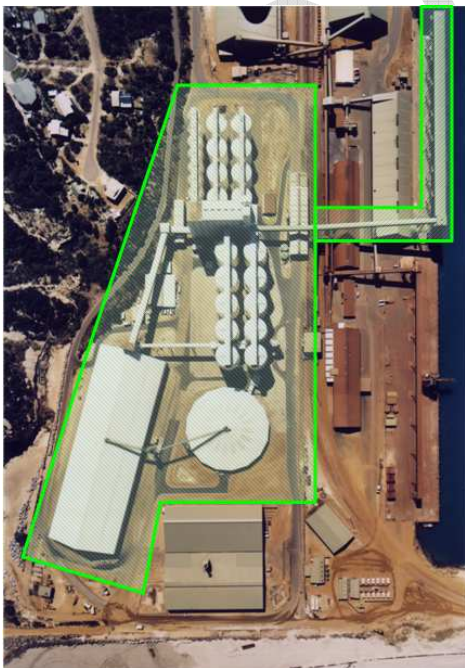


Figure 2



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- (c) Grain receipt
- (i) 5 road receipt bins:
    - (A) 2 x 800 tonne per hour;
    - (B) 2 x 200 tonne per hour; and
    - (C) 1 x 500 tonne per hour.
  - (ii) 1 x 800 tonne per hour rail receipt station with associated rail line.
  - (iii) 15 dust control systems.
  - (iv) 47 grain conveyors with 12 associated grain elevators,
  - (v) 1 x 180 tonne weighbridge located at the Chadwick depot.
- (d) Grain storage
- (i) The port terminal's total storage capacity is 249,400 tonnes.
  - (ii) 8 x 5,000 tonne steel silos.
  - (iii) 8 x 2,100 tonne concrete silos.
  - (iv) 10 x 6,000 tonne steel silos with self discharging base and associated working house.
  - (v) 101,600 tonne capacity reinforced concrete horizontal storage cell.
  - (vi) 31,000 tonne capacity corrugated galvanized steel circular storage cell.
- (e) Inload capacity
- (i) Rail
    - (A) The port terminal has 1 rail receipt grid, which can also be used for road receipts. The rail receipt grid is rated to receive grain at 800 tonnes per hour by rail and by road.
    - (B) The operational capacity of the rail receipt grid, and the rate at which it is able to receive grain, depends upon the type of grain being received and the destination silo of that grain. The following rates are based on wheat receipts:
      - (1) 800 tonnes per hour when grain moving to 10 x 6,000 tonne cells;
      - (2) 400 tonnes per hour when grain moving to 8 x 5,000 tonne cells;
      - (3) 250 tonnes per hour when grain moving to 8 x 2,100 tonne cells;
      - (4) 500 tonnes per hour when grain moving to horizontal storage; and
      - (5) 500 tonnes per hour when grain moving to circular storage.

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(C) Various factors reduce the ability of the rail receival station to receive grain at its rated capacity. These include:

- (1) operational constraints and the need to handle multiple segregations, which adds time when changing between grains and grades;
- (2) the physical configuration of rail wagons moving into the port terminal;
- (3) external factors beyond the Port Operator's control, for example a rail provider's locomotive breakdown; and
- (4) the Port Operator having to weigh grain on receipt using its batch weighers.

(ii) Road

(A) The port terminal has 5 road receival stations:

- (1) Grids 1 & 2 can receive grain at 800 tonnes per hour;
- (2) Grids 3 & 4 can receive grain at 200 tonnes per hour; and
- (3) Grid 5 can receive grain at 500 tonnes per hour.

(B) The road receival grids are limited to servicing specific storages within the port terminal:

- (1) Grids 1 & 2 fill can fill anywhere within the terminal and are used as the main discharge grids;
- (2) Grids 3 & 4 are used to fill the small concrete cells and annexe; and
- (3) Grid 5 fills part of the annexe and circular storage.

(f) Ship loading capacity

(i) The Esperance port terminal has 7 fixed shipping spouts, with a combined total rated loading capacity of 2,500 tonnes per hour, with associated batch weighing and sampling systems. The port terminal has the ability to load ships using 2 spouts loading into 2 hatches simultaneously, with each being able to load 1,250 tonnes per hour (depending on grain type and cargo position in the terminal). The Port Operator endeavours to position cargo so that ships can be loaded at the maximum rate. However, vessel requirements and weather delays must be taken into account. Given these restrictions, the port terminal aims to achieve an overall 1,800 tonnes per hour loading rate.

(ii) Ship loading rates at the port terminal are affected by the following factors:

(A) hatch changes – changing from one hatch to another affects loading rates, because of the time required to raise, move and lower the ship loaders into the required hatch. Hatch

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changes are necessary to keep the vessel stable during loading;

- (B) trimming hatches – loading rates are reduced to ‘half feed’ when the grain comes close to filling a hatch. This is to prevent over-filling and allow instead for hatches to be level filled;
  - (C) filling weep holes and bulkheads – loading rates are also reduced to half feed when filling weep holes to allow flow to fill these areas. Due to the relatively light weight of grain (as compared with iron ore, for example) hatches must be filled to the highest level to achieve the maximum weight, and ensure there is no wasted space in the hatch;
  - (D) ballast discharge – some ships are not designed to discharge stabilising water tanks at the same rate as the ship loaders can load grain. In these cases, grain loading stops to allow the ship time to discharge ballast;
  - (E) draught surveys – towards the end of the ship loading, grain flow from the loaders is stopped to allow the ship’s captain to check the ship’s draught. This is to ensure that the tonnage being loaded will allow the ship to sail and arrive at the discharge port;
  - (F) initial loading of large ships – due to the steep angle and height of the ship loaders which is necessary when loading larger ships, there is a reduced feed rate to avoid spillage. As the ship loading continues and the ship becomes lower in the water, the ship loaders can be lowered and feed rates increased;
  - (G) grain changes and separations in hatches – when changing from loading one grain type to another, all weighers, belts and loaders must be cleaned before the second grain type can be loaded. Loading will also stop if a physical separation of grain is required in the ship’s hatches; and
  - (H) weather – grain cannot be loaded on ships in rain or high winds.
- (g) Associated system control and communication networks, Site office, ablution and workshop facilities.
  - (h) The port terminal is accreditation to the international standard ISO 9001 and HACCP Codex Alimentarius.

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## Schedule 8– Auditor

### 1 Appointment of Auditor

- (a) If, at any time during the term of this Undertaking, the ACCC issues a notice under **clause 6.3(a)** of the Undertaking, the Port Operator must, within five Business Days, advise the ACCC in writing of the identity of the person that it proposes to appoint as the Auditor, together with such information or documents (including the proposed terms of engagement) that the ACCC requires to assess the skill and independence of the Auditor.
- (b) The Proposed Auditor must be a person who has the relevant skill to perform the role of Auditor and is independent of the Port Operator. Without limitation, an Auditor is not independent if he or she:
- (i) is a current employee or officer of the Port Operator or a Related Body Corporate of the Port Operator;
  - (ii) has been an employee or officer of the Port Operator or a Related Body Corporate of the Port Operator in the past 36 months;
  - (iii) in the opinion of the ACCC, holds an interest in the Port Operator or a Related Body Corporate of the Port Operator;
  - (iv) has within the past 36 months been a professional adviser to the Port Operator or a Related Body Corporate of the Port Operator;
  - (v) has a contractual relationship, or is an employee or contractor of a firm or company that has a contractual relationship, with the Port Operator or a Related Body Corporate of the Port Operator;
  - (vi) is a supplier, or is an employee or contractor of a firm or company that is a supplier, of the Port Operator or a Related Body Corporate of the Port Operator; or
  - (vii) is a customer, or is an employee or contractor of a firm or company that is a customer, of the Port Operator or a Related Body Corporate of the Port Operator,

save that an Auditor that has been appointed by the Port Operator for the purposes of preparing an audit report to WEA (to comply with a requirement by WEA) or for the purposes of preparing an audit report to the ACCC (to comply with the audit requirements in respect of the exclusive dealing notification N93439 lodged by the Port Operator) will not be considered as being not independent by reason of having been so appointed or having prepared such audit reports.

- (c) If, within five Business Days of receipt by the ACCC of the information or documents from the Port Operator referred to in **paragraph 1(a)** of this **Schedule 8**, or such further period as required by the ACCC and notified to the Port Operator:

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- (i) the ACCC does not object to the Proposed Auditor, the Port Operator must appoint the Proposed Auditor as Auditor as soon as practicable thereafter (but in any event within five Business Days) on terms approved by the ACCC and consistent with the performance by the Auditor of its functions under this Undertakings and forward to the ACCC a copy of the executed terms of appointment of the Auditor; or
- (ii) the ACCC does object to a Proposed Auditor, the Port Operator must as soon as practicable (but in any event within five Business Days) appoint a person identified by the ACCC at its absolute discretion as the Auditor on terms approved by the ACCC and consistent with the performance by the Auditor of its functions under this Undertaking.

## 2 Scope of the audit

- (a) The Port Operator must, within thirty Business Days of the date on which the Auditor is appointed in accordance with **paragraph 1(c)** of this **Schedule 8**, provide to the ACCC a written report from the Auditor in relation to the Port Operator's compliance with its obligations under **clause 6.2(a)** of the Undertaking.
- (b) The Port Operator must provide to the Auditor any information or documents requested by the Auditor that the Auditor reasonably considers necessary and relevant for fulfilling its obligations in relation to compliance by the Port Operator with its obligations under **clause 6.2** of the Undertaking or for reporting to or otherwise advising the ACCC.
- (c) The Port Operator must procure the Auditor to provide information or documents or access to the ACCC, as required by the ACCC to ensure compliance with the Undertaking.
- (d) In complying with the obligations in **paragraph 2** of this **Schedule 8**, the Port Operator must:
  - (i) take any steps reasonably directed by the ACCC in relation to any matter arising from the report of the Auditor referred to in **paragraph 2(a)** of this **Schedule 8** within ten Business Days of being so directed (or such longer period agreed with the ACCC);
  - (ii) direct its personnel, including directors, managers, officers, employees and agents to act in accordance with the obligations set out in this **paragraph 2** of this **Schedule 8** and ensure such personnel are aware of the Auditor and its role; and
  - (iii) provide access, information and/or documents required by the Auditor.
- (e) The Port Operator must maintain and fund the Auditor's reasonable costs and must indemnify the Auditor for reasonable expenses and any loss,

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claim or damage arising from the proper performance by the Auditor of functions required to be performed by the Auditor under this Undertaking.

### 3 Limits on the audit process

- (a) If:
- (i) within the period of 3 months prior to the date on which the ACCC issues any notice under **clause 6.3** of the Undertaking, the Port Operator has submitted an audit report to WEA (to comply with a requirement by WEA) ("WEA Audit Report") or to the ACCC (to comply with the compliance audit requirements in respect of the exclusive dealing notification N93439 lodged by the Port Operator) ("**Compliance Audit Report**");
  - (ii) the Compliance Audit Report was prepared by a person that satisfies the criteria for independence set out in **paragraph 1(b)** of this **Schedule 8**; and
  - (iii) the Compliance Audit Report addresses the Port Operator's compliance with its obligations under **clause 6.2** of the Undertaking,
- the Port Operator may provide the Compliance Audit Report to the ACCC, and the ACCC will may accept a Compliance Audit Report in satisfaction of the requirement for the Port Operator to provide an audit report to the ACCC in accordance with **paragraph 2(a)** of this **Schedule 8**.
- (b) For the avoidance of doubt, the ACCC will not be required to accept the Compliance Audit Report in satisfaction of the requirement for the Port Operator to provide an audit report to the ACCC in accordance with **paragraph 2(a)** of this **Schedule 8** if the ACCC (acting reasonably) considers that the matters set out in **paragraphs 3(a)(i)-(iii)** of this **Schedule 8** are not satisfied in respect of the Compliance Audit Report.

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