

# Port Terminal Services Access Undertaking

by

**GrainCorp Operations Limited** (ABN 52 003 875 401) of Tower 1, Level 17, 201 Sussex Street, Sydney, NSW, 2000 ("**GrainCorp**")

in favour of

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

15 April 2009

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# Port Terminal Services Access Undertaking

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# Port Terminal Services Access Undertaking

## General terms

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### 1 Background

#### 1.1 Introduction

- (a) GrainCorp operates the Port Terminal Facilities at the Port Terminals.
- (b) The Port Terminal Facilities provide services relating to the export of Bulk Wheat and other commodities.
- (c) GrainCorp has historically provided access to services provided by the Port Terminals to third parties under open access policies.
- (d) GrainCorp has applied to become an Accredited Wheat Exporter under the *Wheat Export Marketing Act 2008* (Cth).
- (e) Under section 24 of the WEMA, a person who is also the provider of one or more port terminal services (as defined under that Act) must satisfy the 'access test' to be eligible for accreditation to export bulk wheat.
- (f) The 'access test' under the WEMA requires:
  - (i) the person to comply with the continuous disclosure rules in relation to a port terminal service; and
  - (ii) either there is:
    - (A) an access undertaking in operation (under Division 6 Part IIIA of the Trade Practices Act 1974) relating to the provision to Accredited Wheat Exporters of access to the port terminal service for purposes relating to export of Bulk Wheat; or
    - (B) a decision in force that a regime established by a State or Territory for access to the port terminal service is an effective access regime (under Division 2A Part IIIA of the TPA) and under that regime Accredited Wheat Exporters have access to the port terminal service for purposes relating to the export of Bulk Wheat.
- (g) GrainCorp has submitted this Undertaking to the ACCC for approval under Part IIIA of the TPA for the purpose of satisfying the 'access test'.

## 1.2 Objectives

The Undertaking has the following objectives:

- (a) providing a framework to manage negotiations with Applicants for access to services provided by certain facilities at the Port Terminals in relation to export of Bulk Wheat;
- (b) establishing a workable, open, non-discriminatory and efficient process for lodging and processing Access Applications;
- (c) providing a non-discriminatory approach to pricing under which GrainCorp publishes reference prices and terms and conditions for the provision of certain standard services annually;
- (d) operating consistently with the objectives and principles in Part IIIA of the TPA and the Competition Principles Agreement;
- (e) reaching an appropriate balance between:
  - (i) the legitimate business interests of GrainCorp, including:
    - (A) the recovery of all reasonable costs associated with the granting of access to the Port Terminal Services;
    - (B) a fair and reasonable return on GrainCorp's investment in the Port Terminal Facility commensurate with its commercial risk;
    - (C) GrainCorp's business interests relating to the export of grain other than Bulk Wheat and to the export of non-grain commodities using the Port Terminal Facilities;
    - (D) GrainCorp's ability to meet its own or its Trading Divisions' reasonably anticipated requirements for Port Terminal Services; and
  - (ii) the interest of the public, including:
    - (A) ensuring efficient use of resources; and
    - (B) the promotion of economically efficient investment, use and operation of the Port Terminals; and
  - (iii) the interests of Applicants wanting access to the Port Terminal Services, including providing access to the Port Terminal Services:
    - (A) on non-discriminatory price and non-price terms; and
    - (B) in a transparent, open, efficient and non-discriminatory manner;

- (f) providing an efficient, effective and binding dispute resolution process in the event that GrainCorp and the Applicant are unable to negotiate a mutually acceptable Access Agreement; and
- (g) in accordance with the objective in s44AA(b) of the TPA, providing for a uniform approach to access to the Port Terminal Services at the different Port Terminals to the extent practicable having regard to the different characteristics of the Port Terminals.

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## **2 Structure**

### **2.1 Components**

This Undertaking applies in relation to access to Port Terminal Services provided by means of Port Terminal Facilities at a number of Port Terminals (listed in Schedule 1). The Port Terminal Facilities are geographically separate and have different physical and operating characteristics and modes of operation.

### **2.2 Priority**

The terms of a Schedule will prevail over the General Terms to the extent of any inconsistency between them.

### **2.3 Obligation to procure**

If the performance of an obligation under this Undertaking requires a Related Body Corporate of GrainCorp to take some action or refrain from taking some action, GrainCorp must use reasonable endeavours to procure that Related Body Corporate to take that action or refrain from taking that action.

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## **3 Term and variation**

### **3.1 Commencement Date**

This Undertaking commences on 1 October 2009.

### **3.2 Expiry**

This Undertaking expires on the earlier of:

- (a) 30 September 2011; or
- (b) the day the ACCC consents to GrainCorp withdrawing the Undertaking in accordance with Part IIIA of the TPA (including under clause 3.3).

### **3.3 Early withdrawal of the Undertaking**

GrainCorp may seek the approval of the ACCC to the withdrawal of this Undertaking on the occurrence of any of the following events:

- (a) GrainCorp or a Related Body Corporate ceases to be an Accredited Wheat Exporter under the WEMA; or

- (b) the WEMA is amended such that an Accredited Wheat Exporter is no longer required to have in place an access undertaking under Part IIIA of the TPA in relation to access to any of the Port Terminal Services for the purposes of obtaining or maintaining accreditation under that Act.

### **3.4 Variation for a particular Port Terminal**

GrainCorp may seek the approval of the ACCC to the variation of this Undertaking by removing the Port Terminal Services provided at a particular Port Terminal on the occurrence of any of the following events:

- (a) the Port Terminal is disposed of to a person who is not a Related Body Corporate of GrainCorp and GrainCorp ceases to operate or control the Port Terminal Facilities at that Port Terminal; or
- (b) there is in force under Division 2A Part IIIA of the TPA a regime established by a State or Territory for access to services provided at the Port Terminal and under that regime Accredited Wheat Exporters have access to Port Terminal Services (or services substantially similar to the Port Terminal Services) for purposes relating to the export of Bulk Wheat.

### **3.5 Other variations**

- (a) If, during the term of the Undertaking, GrainCorp is of the opinion that circumstances have changed such that this Undertaking:
  - (i) is no longer commercially viable for GrainCorp or becomes inconsistent with the objectives set out in clause 1.2; or
  - (ii) is no longer consistent with the Continuous Disclosure Rules as a result of changes to the WEMA,

GrainCorp may seek the approval of the ACCC to vary this Undertaking.

- (b) Prior to seeking the approval of the ACCC under clause 3.5(a), GrainCorp will first consult with counterparties to Access Agreements and Applicants regarding the proposed variation.

### **3.6 Extension**

- (a) At least three months before the expiry of this Undertaking, GrainCorp will submit to the ACCC a written statement outlining whether or not it intends to submit a new undertaking to the ACCC for its consideration.
- (b) If GrainCorp intends to submit a new undertaking to the ACCC for its consideration, GrainCorp will also apply to the ACCC for an extension of the expiring Undertaking.
- (c) The application for extension would include a proposed extension period which, in GrainCorp's view, reasonably estimates the time it

would take for GrainCorp to formulate a new undertaking and have that undertaking take effect following approval by the ACCC.

- (d) If GrainCorp does not propose to submit to the ACCC a new undertaking then paragraphs (a) to (c) are not applicable.
- (e) Nothing in this clause prevents GrainCorp from submitting a new undertaking to the ACCC at any time during the term of this Undertaking.

### **3.7 Existing agreements**

- (a) This Undertaking applies only to the negotiation of new Access Agreements and the negotiation of access in addition to that already the subject of an Access Agreement.
- (b) Nothing in this Undertaking can require a party to an existing Access Agreement to vary a term or provision of that agreement.

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## **4 Scope**

### **4.1 Meaning of Port Terminal Services**

- (a) This Undertaking applies only to access to Port Terminal Services.
- (b) “**Port Terminal Services**” means the services described in Schedule 2 in relation to Bulk Wheat provided by means of a Port Terminal Facility, and includes the use of a Port Terminal Facility.

### **4.2 Meaning of Port Terminal Facility**

“**Port Terminal Facility**” means a ship loader that is:

- (a) at a Port Terminal; and
  - (b) capable of handling Bulk Wheat;
- and includes any of the following facilities:
- (c) an intake/receival facility;
  - (d) a grain storage facility;
  - (e) a weighing facility;
  - (f) a shipping belt;

that is:

- (g) at the Port Terminal; and
- (h) associated with the ship loader; and
- (i) capable of dealing with Bulk Wheat.



The Port Terminal Facilities at each Port Terminal are described in Schedule 1.

#### **4.3 Nature of Port Terminal Services**

Subject to Schedule 2, the Port Terminal Services may include:

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

#### **4.4 What this Undertaking does not cover**

- (a) The grain supply chain comprises the following activities:
  - (i) intake and receival services;
  - (ii) grain storage and handling (inland);
  - (iii) transportation (from inland facilities to at port facilities);
  - (iv) services at port terminals (at port); and
  - (v) shipping services (at port).
- (b) To avoid doubt, this Undertaking does not apply:
  - (i) to access to services not being Port Terminal Services provided by GrainCorp in relation to Bulk Wheat; or
  - (ii) in relation to other facilities owned by GrainCorp which are part of the grain supply chain such as up country receival and accumulation facilities; or
  - (iii) to the transportation of Bulk Wheat to port; or
  - (iv) to grains which are not wheat; or
  - (v) to wheat which is not Bulk Wheat.
- (c) Nothing in this Undertaking prevents GrainCorp from agreeing with an Applicant or User to provide access to port terminal services for grains other than Bulk Wheat and other services related to Port Terminal Services.
- (d) Nothing in this Undertaking requires GrainCorp or Related Body Corporate to share efficiency savings or benefits from the operation of a separate integrated supply chain service whether or not the integrated supply chain service utilises the Port Terminal Facilities.

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## **5 Price and non-price terms**

### **5.1 Obligation to publish price and non-price terms**

- (a) By no later than 30 September of each year, GrainCorp must, for access to each Standard Port Terminal Service, publish on GrainCorp's website:
  - (i) reference prices ("**Reference Prices**"); and
  - (ii) standard offer terms and conditions ("**Standard Terms**").
- (b) Unless varied in accordance with clause 5.6, the Reference Prices and Standard Terms must apply for a period not ending before 30 September of the next year.
- (c) If GrainCorp has not already complied with clause 5.1(a) at the commencement of this Undertaking, then it must do so within 15 Business Days of its commencement.
- (d) GrainCorp must give the ACCC copies of Reference Prices and Standard Terms promptly following publication.
- (e) If an Applicant seeks access to non-standard Port Terminal Services, GrainCorp and the Applicant may negotiate prices and non-price terms that are different from the Reference Prices and Standard Terms.

### **5.2 Access to Standard Port Terminal Services**

- (a) The Standard Port Terminal Services for each Port Terminal are set out in Schedule 2.
- (b) Access to a Standard Port Terminal Service (and GrainCorp's obligation to enter into an Access Agreement for them) will only be offered for a term expiring no later than 30 September of the year following the year in which the Standard Terms were first published (subject to appropriate 'holding over' provisions).

### **5.3 Standard Terms**

- (a) The Standard Terms offered to an Applicant must include the Port Terminal Services Protocols.
- (b) Nothing in this Undertaking prevents the parties agreeing to include terms relating to access to the Port Terminal Services in an agreement also applying to access to other services provided by GrainCorp but, to avoid doubt, this Undertaking (including clauses 6, 7 and 9) will only apply to the terms relating to the provision of access to Port Terminal Services.

### **5.4 Non-discriminatory access**

- (a) Subject to clause 5.5:

- (i) if an Applicant requests a Standard Port Terminal Service at a Port Terminal, GrainCorp must offer the Standard Port Terminal Service at the Reference Prices applicable from time to time for that Standard Port Terminal Service for that Port Terminal in accordance with clause 6; and
- (ii) GrainCorp must not provide access to Applicants or Users (including its own Trading Division) which are different from:
  - (A) in the case of Standard Port Terminal Services, the Reference Prices or Standard Terms; or
  - (B) in all cases, the price and non-price terms offered to another Applicant or User,
 unless such different terms are:
  - (C) consistent with the objectives of this Undertaking set out in clause 1.2;
  - (D) commercially justifiable taking into account the matters set out in clause 5.5; and
  - (E) offered on an arms length commercial basis.
- (b) GrainCorp must not discriminate against an Applicant in breach of this Undertaking where the terms and conditions are different to those offered to another User or the Trading Division for providing like Port Terminal Services and the differentiation is for the purpose of substantially damaging a competitor or conferring upon GrainCorp or its Trading Division any unfair competitive advantage over a competitor in the marketing of Bulk Wheat.

## 5.5 Price and non-price terms

For the purposes of this Undertaking, the price and non-price terms for the provision of access to Port Terminal Services to different Applicants or Users will be determined having regard to:

- (a) GrainCorp's legitimate business interests and investment in the Port Terminal Services, Port Terminal Facilities and the Port Terminal;
- (b) all costs that GrainCorp incurs or may incur in providing access, including any costs of extending the Port Terminal Services, but not costs associated with losses arising from increased competition in upstream or downstream markets;
- (c) the economic value to GrainCorp of any additional investment that the Applicant or GrainCorp has agreed to undertake;
- (d) the interests of all persons who have rights to use the Port Terminal;

- (e) the operational and technical requirements necessary for the safe and reliable operation of the Port Terminal Services, the Port Terminal Facilities and the Port Terminal;
- (f) the economically efficient operation of the Port Terminal Services, the Port Terminal Facilities and the Port Terminal;
- (g) any differences in the costs of providing access to Port Terminal Services to different Applicants or Users;
- (h) the opportunity cost of accommodating the requirements of one Applicant or User compared to the requirements of one or more other Applicants or Users;
- (i) the provision of quality related services reasonably required by GrainCorp in respect of some Applicants or Users, but not others including security of Bulk Wheat integrity, testing of Bulk Wheat or Bulk Wheat classification, fumigation and protection requirements for Bulk Wheat;
- (j) the relative risk related to storing and handling different Bulk Wheat segregations for Applicants and Users;
- (k) available Port Terminal capacity, including receipt, handling, storage and cargo accumulation capacity;
- (l) differences in types and grades of Applicants' or Users' Bulk Wheat;
- (m) differences in Applicants' or Users' Bulk Wheat volumes;
- (n) differences in periods of time during which access to Port Terminal Services is required by Applicants or Users;
- (o) differences in levels of Applicants' or Users' usage of Port Terminal Services;
- (p) differences in modes of receipt, storage or outturn including different transport modes to receive Bulk Wheat and different ship configurations;
- (q) geographic and seasonal variations;
- (r) minimisation of demurrage at the port over a given period;
- (s) maximisation of throughput of Bulk Wheat and other commodities at the port over a given period;
- (t) unless GrainCorp is offering segregated services at a Port Terminal, the ability to mix the same grade of Bulk Wheat owned by different owners and / or mix different grades of Bulk Wheat owned by the same or different owners; and
- (u) the credit risk of an Applicant or User.

## 5.6 Variation to Reference Prices and Standard Terms

- (a) GrainCorp may vary the Reference Prices or the Standard Terms from time to time.
- (b) Any variation under clause 5.6(a) must be published at least 30 days prior to the date on which it is to become effective in the same locations as it publishes its Reference Prices and Standard Terms.
- (c) GrainCorp must provide the ACCC with copies of variations to the Reference Prices and Standard Terms promptly following publication.
- (d) To avoid doubt, any variations to the Reference Prices or Standard Terms does not automatically override the terms of existing access agreements.

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## 6 Negotiating for access

### 6.1 Good faith negotiation

GrainCorp will negotiate with an Applicant for the provision of access to Port Terminal Services in good faith in accordance with the terms of this Undertaking.

### 6.2 Confidentiality

- (a) Subject to clause 6.2(b), if a party provides Confidential Information to the other party as part of the negotiation process for access 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 and not use that Confidential Information for any purpose other than the provisions of this Undertaking allow.
- (b) A party is permitted to disclose Confidential Information to the extent necessary for the provision 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).

### 6.3 Framework

- (a) This part of the Undertaking outlines the process to be followed for an Applicant to gain access to the Port Terminal Services. It provides for:
  - (i) **Preliminary inquiry** - preliminary exchanges of information and meeting to enable an Access Application to be lodged;
  - (ii) **Access Application** - submission of a formal Access Application by the Applicant;
  - (iii) **Negotiation** - negotiating an Access Agreement;

- (iv) **Access Agreement** – acceptance and execution of an Access Agreement.
- (b) GrainCorp and the Applicant must comply with the confidentiality obligations under clause 6.2 in relation to Confidential Information provided during this process.
- (c) If, at any time during the process, a dispute arises between the parties which, after reasonable negotiation, the parties are unable to resolve to their mutual satisfaction, then either party may seek to resolve the dispute in accordance with the Dispute resolution process outlined in clause 7.

#### **6.4 Preliminary inquiry**

##### **(a) Provision of information**

- (i) Subject to clause 6.4(a)(ii), GrainCorp will, if requested by an Applicant, provide information related to access to the Port Terminal Services to Applicants to assist with negotiations that may be reasonably required by the Applicant in relation to the Access Application.
- (ii) GrainCorp's obligation under clause 6.4(a)(i) is subject to:
  - (A) GrainCorp not disclosing any information which would breach a confidentiality obligation binding on it or which it considers is commercially sensitive in relation to its own operations; and
  - (B) GrainCorp being able to refuse the request if:
    - (aa) it is unduly onerous; or
    - (ab) the expense and resources required to provide the information is disproportionate to the benefit to be obtained from the information; and
  - (C) the Applicant agreeing to pay the reasonable costs incurred by GrainCorp in obtaining information that is not ordinarily and freely available to GrainCorp.

##### **(b) Parties to Negotiation**

- (i) GrainCorp reserves the right to negotiate only with an Applicant who complies with the requirements and processes set out in this Undertaking. If an Applicant does not comply with the relevant obligations and processes, and GrainCorp considers that such non-compliance is material, GrainCorp will not be obliged to continue negotiations regarding the provision of access for that Applicant.
- (ii) The Applicant must be an Accredited Wheat Exporter. It is the responsibility of the Applicant to ensure that they are in

compliance with the relevant legal requirements for wheat export as set out in WEMA and the WEAS.

- (iii) At any time, before or during the negotiation process, GrainCorp may require the Applicant to demonstrate to GrainCorp that it is able to meet the Prudential Requirements. In the event the Applicant cannot meet the Prudential Requirements, GrainCorp may refuse to commence negotiations or may cease negotiations with that Applicant.
- (iv) For the purposes of clause 6.4(b)(iii) the Applicant will be required to meet the following Prudential Requirements:
  - (A) the Applicant must be Solvent; and
  - (B) the Applicant, or a Related Body Corporate of the Applicant, must not be currently, or have been in the previous two years, in Material Default of any agreement with GrainCorp; and
  - (C) the Applicant must be able to demonstrate to GrainCorp that it has a legal ownership structure with a sufficient capital base and assets of value to meet the actual or potential liabilities under an Access Agreement, including timely payment of access charges and payment of insurance premiums and deductibles under the required policies of insurance or otherwise provides Credit Support acceptable to GrainCorp (acting reasonably).
- (v) If GrainCorp refuses to negotiate for any reasons as described in clauses 6.4(b)(i) or 6.4(b)(iii), it will, within 10 Business Days of the decision to refuse to negotiate, explain in writing to the Applicant the reasons for such refusal.
- (vi) If the Applicant considers that GrainCorp has unreasonably refused to commence, unreasonably delayed or unreasonably ceased, negotiations under clause 6.4(b) or clause 6.6(c), then the Applicant may refer the matter to the arbitrator in accordance with clause 7. If the arbitrator determines that GrainCorp has unreasonably refused to commence, unreasonably delayed or unreasonably ceased negotiations, GrainCorp will recommence negotiations immediately.
- (vii) If at any time, GrainCorp is of the view that an Applicant's request for access is frivolous in nature or the Applicant is not negotiating in good faith, GrainCorp may refer the request to the arbitrator in accordance with clause 7 for determination. If the arbitrator determines that the request is in fact frivolous, then GrainCorp will be entitled to cease negotiations and will not be obliged to comply with this Undertaking in respect of the request.

## **6.5 Access Application**

### **(a) Application process**

- (i) Requests for access to the Port Terminal Services are to be submitted to GrainCorp in the form of an Access Application and in accordance with the requirements of Schedule 4.
- (ii) Prior to submitting an Access Application, an Applicant may seek initial meetings with GrainCorp to discuss the Access Application and to seek clarification of the process as outlined in this Undertaking and in particular, the information requirements set out in Schedule 4.

### **(b) Acknowledgment**

- (i) Upon receiving an Access Application from an Applicant, GrainCorp will acknowledge receipt of the Access Application in writing (or electronically) to the Applicant within five Business Days of its receipt, or such longer period in accordance with clause 6.5(b)(iii).
- (ii) Prior to acknowledging the Access Application, GrainCorp may seek:
  - (A) additional information; or
  - (B) clarification of the information that has been provided in the Access Application.
- (iii) If GrainCorp seeks additional information or clarification in accordance with clause 6.5(b)(ii), it will advise the Applicant of the additional information or the clarification required within five Business Days of receipt of the Access Application.
- (iv) Upon receiving the required information or clarification from the Applicant, GrainCorp will provide written acknowledgment of the receipt of the completed Access Application within five Business Days.

## **6.6 Negotiation of Access Agreement**

- (a) Following GrainCorp's acknowledgment under clause 6.5(b), both parties will commence negotiations as soon as reasonably possible to progress towards an Access Agreement.
- (b) The Negotiation Period ("**Negotiation Period**") will commence upon GrainCorp acknowledging the Access Application under clause 6.5(b) and will cease upon any of the following events:
  - (i) execution of an Access Agreement in respect of access sought by the Applicant;



- (ii) written notification by the Applicant that it no longer wishes to proceed with its Access Application;
  - (iii) the expiration of three months from the commencement of the Negotiation Period, or if both parties agree to extend the Negotiation Period, the expiration of the agreed extended period;
  - (iv) if GrainCorp believes that the negotiations are not progressing in good faith towards the development of an Access Agreement within a reasonable time period; or
  - (v) if GrainCorp receives evidence confirming that the Applicant no longer satisfies the Prudential Requirements on receiving such evidence GrainCorp will advise the Applicant of such evidence and issue a notice of intent to end the negotiation period, to become effective 10 Business Days after the issue of the notice. If GrainCorp issues a notice of intent GrainCorp will provide to the Applicant written reasons for its decision to end the Negotiation Period.
- (c) Upon cessation of the Negotiation Period, GrainCorp will be entitled to cease negotiations with the Applicant.

## **6.7 Access Agreement**

- (a) The granting of access will be finalised by the execution of an Access Agreement. The parties to the Access Agreement will be GrainCorp and an Accredited Wheat Exporter.
- (b) Subject to clause 5.4 and 5.5 GrainCorp:
  - (i) must offer the Standard Terms to the Applicant where it requests access to a Standard Port Terminal Service subject to the Applicant satisfying the Prudential Requirements; or
  - (ii) may offer amended Standard Terms updated to reflect terms which GrainCorp considers reasonably necessary or desirable to accommodate a request for access to a non-standard Port Terminal Service; and
  - (iii) may agree changes to the Standard Terms requested by the Applicant.

A negotiated Access Agreement will, unless otherwise agreed between GrainCorp and the Applicant at least address the essential elements set out in Schedule 3.

- (c) Once the Applicant has notified GrainCorp that it is satisfied with the terms and conditions of the Access Agreement as drafted, GrainCorp will, as soon as reasonably practicable, provide a final Access Agreement (or, if applicable, an amendment to an existing Access Agreement) to the Applicant for execution.

- (d) If GrainCorp offers an Access Agreement and the Applicant accepts the terms and conditions offered in that Access Agreement, both GrainCorp and the Applicant will execute the Access Agreement. The parties will use reasonable endeavours to comply with this clause as soon as practicable.

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## **7 Dispute resolution**

### **7.1 Disputes**

- (a) Any Dispute will, unless otherwise expressly agreed to the contrary by both parties, be resolved in accordance with this clause 7 and either party may give to the other party to the Dispute Notice in writing ("**Dispute Notice**") specifying the Dispute and requiring it to be dealt with in the manner set out in this clause 7. The parties will use reasonable endeavours acting in good faith to settle the Dispute as soon as is practicable.
- (b) Any disputes in relation to an Access Agreement once executed will be dealt with in accordance with the provisions of that Access Agreement.
- (c) GrainCorp will by 31 July of each year provide a report to the ACCC on any material disputes in relation to an Access Agreement and any Disputes raised by Applicants or Users or GrainCorp in the last 12 months (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 resolution and the status of unresolved matters.

### **7.2 Negotiation**

Within five Business Days of a party giving the other party a Dispute Notice, senior representatives from each party will meet and use reasonable endeavours acting in good faith to resolve the Dispute by joint discussions.

### **7.3 Mediation**

- (a) If the Dispute is not resolved under clause 7.2 within 10 Business Days after the date of the Dispute Notice then:
  - (i) if the parties agree, they will attempt to resolve the Dispute by mediation pursuant to this clause 7.3; or
  - (ii) if the parties do not wish to resolve the Dispute by mediation, either party may by notice in writing to the other and the arbitrator, refer the Dispute to be determined by arbitration under clause 7.4.
- (b) If the parties agree to attempt to resolve the Dispute by mediation, the Dispute will be referred to the chief executive officers of both parties who will attempt to resolve the Dispute, including by informal mediation.

- (c) If the Dispute is not resolved within 10 Business Days after being referred to the chief executive officers under clause 7.3(b), the Dispute will be referred to formal mediation in New South Wales to be mediated by a single mediator appointed by agreement of the parties or if they fail to agree within 10 Business Days, a mediator appointed by the President of the New South Wales Chapter of the Institute of Arbitrators and Mediators of Australia (“**IAMA**”) acting on the request of either party.
- (d) Unless the parties agree otherwise:
  - (i) the mediation will be conducted by a mediator under the IAMA Mediation Rules (whether or not the mediator is a legal practitioner);
  - (ii) the parties may appoint a person, including a legally qualified person to represent it or assist it in the mediation;
  - (iii) each party will bear their own costs relating to the preparation for and attendance at the mediation; and
  - (iv) the costs of the mediator will be borne equally by the parties.

#### **7.4 Referral to arbitration**

- (a) If the Dispute is not resolved under clause 7.2, or at any time after the appointment of the mediator (if any) under clause 7.3(c), either party may by notice in writing to the other and to the mediator terminate the mediation proceedings and give notice of a Dispute that is to be referred to arbitration under this clause 7.4.
- (b) GrainCorp must notify the ACCC of the details of any Dispute which has been referred to arbitration and the progress of the arbitration. GrainCorp must provide the arbitrator’s final determination to the ACCC.
- (c) If the Applicant serves notice on the arbitrator under clause 7.4(a), that notice will also include an agreement by that Applicant to:
  - (i) pay any amounts determined in accordance with clause 7.10; and
  - (ii) indemnify the arbitrator from any claims made against the arbitrator arising in connection with the performance by the arbitrator of its duties under clause 7, such indemnity excluding circumstances where the conduct of the arbitrator constitutes wilful negligence, dishonest or unlawful conduct.
- (d) GrainCorp must pay any amounts determined in accordance with clause 7.10 and will indemnify, the arbitrator from any claims made against it arising in connection with the performance by the arbitrator of its duties under clause 7, such indemnity excluding circumstances where the conduct of the arbitrator constitutes wilful negligence, dishonest or unlawful conduct.

## **7.5 Selection of arbitrator**

- (a) The arbitration is to be conducted by an arbitrator appointed by agreement of the parties.
- (b) If the parties fail to agree an arbitrator within 10 Business Days, of the referral under clause 7.4(a), either party may request the ACCC to appoint an arbitrator.
- (c) The arbitrator will not proceed with the arbitration unless and until the Applicant has agreed to pay the arbitrator's costs as determined under clause 7.10.

## **7.6 Arbitration procedure**

- (a) Subject to the involvement of and disclosures to the ACCC, unless GrainCorp and the Applicant agree otherwise, the arbitration must be conducted in private.
- (b) A party may appoint a person, including a legally qualified person, to represent it or assist it in the arbitration.
- (c) The arbitrator will when conducting the arbitration:
  - (i) observe the rules of natural justice but is not required to observe the rules of evidence;
  - (ii) proceed as quickly as is possible and consistent with a fair and proper assessment of the matter;
  - (iii) while having the right to decide on the form of presentations, encourage a written presentation by each party with exchange and with rebuttal opportunities and questioning by the arbitrator;
  - (iv) call on any party the arbitrator believes necessary to give evidence;
  - (v) permit the ACCC, on request, to make submissions to the arbitrator on matters relevant to the Dispute;
  - (vi) decide how to receive evidence and submissions and consider the need to keep evidence and submissions confidential and the need to protect the confidentiality of the arbitration process;
  - (vii) present their determination in a draft form to the parties and hear argument from the parties before making a final determination; and
  - (viii) hand down a final determination in writing which includes all their 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.

- (d) The arbitrator may at any time terminate 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
  - (iii) the party who notified the Dispute has not engaged in negotiations in good faith.

## **7.7 Matters which arbitrator must take into account**

- (a) In deciding a Dispute the arbitrator will take into account:
  - (i) the principles, methodologies and provisions set out in this Undertaking, in particular clauses 5.4 and 5.5;
  - (ii) the objectives and principles in Part IIIA of the TPA and the Competition Principles Agreement;
  - (iii) the benefit to the public from having competitive markets;
  - (iv) any guidance published by the ACCC;
  - (v) any submissions provided by the ACCC;
  - (vi) any other matters that the 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 TPA;
  - (ii) will not make a determination that would have any of the effects described in section 44W of the TPA; 7
  - (iii) will take into account the matters referred to in section 44X of the TPA.

## **7.8 Confidentiality**

- (a) The arbitrator must take all reasonable steps to protect the confidentiality of information that a party has identified is confidential or commercially sensitive.
- (b) The 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 arbitrator may make confidential and non-confidential versions of its determination and limit access to the confidential versions to specific individuals.
- (d) For the purpose of clarity, the entire dispute resolution process outlined in this clause 7 remains subject to clause 6.2.

## **7.9 Effect of arbitrator's decision**

- (a) The determination of the 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, if an Applicant does not comply with a determination or direction of the arbitrator, then GrainCorp will no longer be obliged to continue negotiations regarding the provision of access for that Applicant.
- (c) Except where the determination or direction is subject to a review by a court of law, GrainCorp will comply with the lawful directions or determinations of the arbitrator.

## **7.10 Arbitrator's costs**

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

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# **8 Capacity management**

## **8.1 Continuous Disclosure Rules**

- (a) GrainCorp must, as a condition of this Undertaking, comply with the Continuous Disclosure Rules under the WEMA from time to time, which at the commencement of this Undertaking is to publish on its website in relation to Port Terminal Services:
  - (i) a statement setting out GrainCorp's policies and procedures for managing demand for the port terminal service (including GrainCorp's policies and procedures relating to the nomination and acceptance of ships to be loaded using the port terminal service) ("**Port Terminal Services Protocols**"); and
  - (ii) a Shipping Stem (to be updated each Business Day) setting out:
    - (A) the name of each ship scheduled to load grain using a port terminal service;

- (B) for each ship referred to in paragraph (A) — the date when the ship was nominated to load grain using a port terminal service;
- (C) for each ship referred to in paragraph (A) — the date when the ship was accepted as a ship scheduled to load grain using a port terminal service;
- (D) for each ship referred to in paragraph (A) — the quantity of grain to be loaded by the ship using a port terminal service;
- (E) for each ship referred to in paragraph (A) — the estimated date on which grain is to be loaded by the ship using a port terminal service.

The Shipping Stem is available at [www.graincorp.com.au](http://www.graincorp.com.au).

## **8.2 Port Terminal Services Protocols**

- (a) As at the commencement date of this Undertaking, the Port Terminal Services Protocols which GrainCorp will offer to include in its Access Agreements are set out in Schedule 3.
- (b) GrainCorp may vary the Port Terminal Services Protocols from time to time subject to the following conditions:
  - (i) any variations to the Port Terminal Services Protocols must be consistent with:
    - (A) the objectives of this Undertaking set out in clause 1.2;
    - (B) GrainCorp's obligations to provide non-discriminatory access in accordance with clause 5.4;
  - (ii) the Port Terminal Services Protocols must include an expeditious dispute resolution mechanism for dealing with disputes relating to GrainCorp's rejection of Cargo Nomination Applications;
  - (iii) any variation must be published at least 30 days prior to the date on which it is to become effective in the same locations as it publishes its Port Terminal Services Protocols.
- (c) GrainCorp must provide the ACCC with copies of variations to the Port Terminal Services Protocols promptly following publication.
- (d) The Port Terminal Rules (as varied from time to time) are available at [www.graincorp.com.au](http://www.graincorp.com.au).
- (e) To avoid doubt, any variations to the Port Terminal Services Protocols do not automatically override the terms of existing access agreements.

### 8.3 Non-discrimination

Subject to clause 5.4 and 8.4, GrainCorp undertakes not to discriminate between Users or in favour of its Trading Division in providing Port Terminal Services.

### 8.4 Operational Decisions

- (a) “**Operational Decisions**” means decisions made in the course of providing the Port Terminal Services including day to day decisions concerning scheduling, cargo accumulation decisions and ship loading.
- (b) In making Operational Decisions relating to the provision of access to the Port Terminal Services, GrainCorp must balance conflicts of interests of users of the Port.
- (c) GrainCorp’s obligations under clause 8.4(b) will be read subject to the qualification that many Operational Decisions made relating to the provision of Port Terminal Services will necessarily involve conflicts of interests of users of the Port. Particularly when viewed in isolation, some decisions necessarily confer a relative disadvantage on one user of the Port Terminal and an advantage on others. GrainCorp will make such decisions based on objective commercial criteria and will adopt practices and policies to promote fair, reasonable and non-discriminatory Operational Decision making.
- (d) Without limiting paragraph (c) or clause 5.5, GrainCorp may in making Operational Decisions:
  - (i) give priority to vessels based on the lead time given between nomination and vessel ETA and likely availability of sufficient Bulk Wheat at the Port Terminal prior to vessel ETA necessary to make a nominated vessel’s nominated cargo tonnage;
  - (ii) take into account in particular, the objectives of:
    - (A) minimising demurrage at the Port Terminal over a given period;
    - (B) maximising throughput of Bulk Wheat and other commodities at the Port Terminal over a given period;
  - (iii) vary a cargo assembly plan or queuing order for vessels as a result of:
    - (A) insufficient Bulk Wheat at the Port Terminal accumulated by the User necessary to make a User’s nominated vessel’s nominated cargo tonnage;
    - (B) variations in vessel arrival times;
    - (C) failure of vessels to pass surveys;



- (D) stability and ship worthiness inspections;
- (E) vessel congestion;
- (F) variation in cargo requirements;
- (G) lack of performance of freight providers;
- (H) equipment failure;
- (I) maintenance outages;
- (J) contamination of accumulated cargoes or contamination of loads;
- (K) a User not working a vessel or accumulating a cargo on a 24 hour/7 day basis where another User is able to do so.

### **8.5 No hindering access**

GrainCorp must not engage in conduct having a purpose of hindering access to the Port Terminal Services by any other User in the exercise of a reasonable right of access.

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## **9 Ring fencing**

GrainCorp must comply with the ring fencing rules set out in Schedule 5.

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## **10 Contact details**

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

General Manager, Ports and New Business  
GrainCorp Operations Limited  
Level 17, Tower 1  
201 Sussex Street  
Sydney NSW 2000

- (b) Applicants are also encouraged to review GrainCorp's web site at [www.graincorp.com.au](http://www.graincorp.com.au) which includes information relevant to the Port Terminal Services including:
  - (i) storage capacity;
  - (ii) shipping berths; and
  - (iii) terms and conditions on which the Port Terminal Services are provided.

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## 11 Definitions

### 11.1 Definitions

“**Access Agreement**” means an agreement between a User and GrainCorp for the provision of Port Terminal Services;

“**Access Application**” means an application for Port Terminal Services as described in clause 6.5;

“**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 6;

“**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 Sydney, except that if used in relation to a specific Port Terminal means the State or Territory in which the relevant Port Terminal is located;

“**Cargo Assembly Plan**” means a document or documents recording, among other things, the agreed approximate tonnage of Bulk Wheat to be delivered and accumulated by the User at each loading Port Terminal submitted by the User and accepted, subject to GrainCorp’s final determination, by GrainCorp;

“**Cargo Nomination Application**” means a document by which a User notifies GrainCorp of its intention to nominate a vessel to be loaded at a Port Terminal in accordance with the Port Terminal Services Protocols;

“**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 exchanged between GrainCorp and an Applicant or User in relation to the business of those persons that:

- (a) is by its nature confidential;
- (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 provision; or
- (g) was in lawful possession of the a party prior to being provided by the party; or
- (h) must be disclosed 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 WEMA;

**“Credit Support”** means either:

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

**“Dispute”** means a bona fide dispute between an Applicant or User and GrainCorp arising under this Undertaking but excludes any disputes in relation to an Access Agreement once executed;

**“Dispute Notice”** means a written notice provided by an Applicant or User to GrainCorp or by GrainCorp to an Applicant or User specifying the Dispute and requiring the Dispute to be dealt with in the manner set out in clause 7.1;

**“ETA”** means estimated time of arrival;

**“Intention Notice”** means a document by which a User notifies GrainCorp of its intention to nominate a vessel, which is not an official Vessel Nomination Application but will be used by GrainCorp to develop a forward vessel plan;

**“Material Default”** means any breach of a fundamental or essential term or repeated breaches of any of the terms of the agreements referred to in clause 6.4(b)(iv);

**“Negotiation Period”** means the period during which negotiation in relation to a final Access Agreement is undertaken as specified in clause 6.6(b);

**“Operational Decisions”** has the meaning given 8.4(a);

**“Parent Guarantee”** means a guarantee given by a Related Body Corporate of the Applicant or User who has an investment grade credit rating or is otherwise acceptable to GrainCorp (acting reasonably);

**“Port Terminals”** mean:

- (a) Carrington Terminal
- (b) Fisherman Island Terminal;
- (c) Geelong Terminal;

- (d) Gladstone Terminal;
- (e) Mackay Terminal;
- (f) Port Kembla Grain Terminal;
- (g) Portland Terminal;

**“Port Terminal Facility”** has the meaning given in clause 4.2;

**“Port Terminal Service”** has the meaning given in clause 4.1;

**“Port Terminal Services Protocols”** means the policies and procedures published by GrainCorp from time to time in accordance with the Continuous Disclosure Rules and clause 8.2. The Port Terminal Services Protocols as at the commencement date of this Undertaking are set out in Schedule 3;

**“Prudential Requirements”** means the requirements specified in clause 6.4(b)(iv);

**“Reference Prices”** means the reference prices described in clause 5.1(a)(i), or as varied in accordance with clause 5.6;

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

**“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 GrainCorp and which is in a form reasonably satisfactory to GrainCorp;

**“Shipping Stem”** has the meaning given in clause 8.1(a)(ii);

**“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 it 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 enters into any form of arrangement with its creditors or any of them, including a deed of company arrangement.

**“Standard Port Terminal Service”** means a Port Terminal Service specified as such in Schedule 2;

**“Standard Terms”** means the standard terms and conditions described in clause 5.1(a)(ii), or as varied in accordance with clause 5.6;

**“TPA”** means the *Trade Practices Act 1974* (Cth);

**“Trading Division”** means a business unit or division of GrainCorp or its Related Bodies Corporate which have responsibility for the trading and marketing of Bulk Wheat;

**“User”** means a person who has entered into an Access Agreement with a GrainCorp in relation to Bulk Wheat;

**“WEAS”** means the Wheat Export Accreditation Scheme 2008;

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

## **11.2 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, Part or a Schedule is a reference to a clause, Part or Schedule of this Undertaking;
- (f) a reference to a party includes its successors and permitted assigns;
- (g) notices that are required to be given in writing to GrainCorp may, if so agreed by GrainCorp, be provided in electronic form;
- (h) 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;
- (i) 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
- (j) a reference to \$ and dollars is to Australian currency.

# Port Terminal Services Access Undertaking

## Schedule 1 – Port Terminals

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### **1 Fisherman Island**

#### **1.1 Location**

The Fisherman Island Port Terminal is located at the Port of Brisbane, in Queensland.

The Port of Brisbane is overseen by the Port of Brisbane Corporation and consists of 27 operating berths.

#### **1.2 Port Terminal Facilities**

The Fisherman Island Terminal facilities handle products including wheat, barley, sorghum, chickpeas, cottonseed, sugar, and woodchips.

The following facilities are located at the Fisherman Island Terminal:

- intake/receival facility
- grain storage facility
- weighing facility
- shipping belt
- ship loader

The facilities do not include the berths at the Port Terminal.

#### **1.3 Additional published protocols and information**

The Port of Brisbane is operated and managed by the Port of Brisbane Corporation, a Government Owned Corporation Company under the State of Queensland's Government Owned Corporations Act 1993.

Port notices, including information relating to dangerous goods, tanker requirements and ship maintenance, are published at [www.portbris.com.au/operations/port\\_notices](http://www.portbris.com.au/operations/port_notices).

The Port Procedures Manual for the Port of Brisbane, which lists in detail all vessel-movement, restriction, communication, towage, pilotage, emergency, navigation, berth, channel, depth and swing-basin information, can be purchased from the Regional Harbour Master's office (e-mail: [msqmail@msq.qld.gov.au](mailto:msqmail@msq.qld.gov.au) or call 07 3860 3500).

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## **2 Gladstone Port Terminal**

### **2.1 Location**

GrainCorp's Gladstone Terminal is located on the Auckland Point No. 2 Wharf at the Port of Gladstone in Queensland.

It is one of 15 operating wharves at the Port of Gladstone overseen by the Gladstone Ports Corporation.

### **2.2 Port Terminal Facilities**

The Gladstone Terminal facilities currently handle products including wheat, sorghum, chickpeas, magnesia, oilseeds, maize and barley. The following facilities are located at the Gladstone Terminal:

- intake/receival facility
- grain storage facility
- weighing facility
- shipping belt
- ship loader

The facilities do not include the berths at the Port Terminal.

### **2.3 Additional published protocols and information**

The Port of Gladstone is managed and operated by the Gladstone Ports Corporation Limited, a Company Government Owned Corporation Company under the State of Queensland's Government Owned Corporations Act 1993.

Certain limited information in relation to shipping control and handling is provided in the Port Information Handbook at <http://www.cqpa.com.au/Pages/Publications/PortInfoBook/Port%20Information%20Handbook%202008.pdf>.

Port Notices in relation to berthing allocation, including the Central Queensland Port Authority's Port Rules, Priority of Ship Movements are available at <http://www.cqpa.com.au/Pages/Publications/Port%20Notice/Port%20Notice.pdf>

A copy of the Central Queensland Ports Authority Port Rules is available from the Central Queensland Ports Authority.

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## **3 Mackay Port Terminal**

### **3.1 Location**

The Mackay Terminal is located at Berth no. 5 of the Port of Mackay in Queensland.

The Port of Mackay is overseen by the Mackay Port Authority and comprises 5 berths.

### **3.2 Port Terminal Facilities**

The Mackay Terminal facilities handle products including wheat, sorghum, chickpeas, oilseeds and maize. The following facilities are located at the Mackay Terminal:

- intake/receival facility
- grain storage facility
- weighing facility
- shipping belt
- ship loader

The facilities do not include the berths at the Port Terminal.

### **3.3 Additional published protocols and information**

The Port of Mackay is owned and operated by Mackay Ports Limited, a Government Owned Corporation under the State of Queensland's Government Owned Corporations Act 1993.

For further information about the Port Rules, please refer to the Port Notices for the Port of Mackay that set out the relevant regulations in relation to shipping control, berthing and security arrangements as well as the terms and conditions of port access (amongst other matters) at the Port of Mackay. They can be found at [www.mackayports.com/seaport/downloads.php](http://www.mackayports.com/seaport/downloads.php)



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## **4 Port Kembla Port Terminal**

### **4.1 Location**

The Port Kembla Terminal is located at Berth 104 of the Port of Port Kembla in New South Wales. It is one of 18 berths overseen by the Port Kembla Port Corporation at the Port of Port Kembla.

### **4.2 Port Terminal Facilities**

The Port Kembla Terminal facilities manage products including wheat, barley, maize, oats, sorghum, legumes and oilseeds.

The following facilities are located at the Port Kembla Terminal:

- intake/receival facility
- grain storage facility
- weighing facility
- shipping belt
- ship loader

The facilities do not include the berths at the Port Terminal.

### **4.3 Additional published protocols and information**

The Port of Port Kembla is managed by the Port Kembla Port Corporation.

The Port Information Guide for the Port of Kembla provides information in relation to shipping control, pilotage, anchorage and some of the rules and regulations in relation to port access and security arrangements.

It can be found at

<http://www.kemblaport.com.au/system/files/f2/o639/New%20Replacement%20Marine%20Doc%202008%200808b.pdf>

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## **5 Carrington Port Terminal**

### **5.1 Location**

GrainCorp's Carrington Port Terminal (is located at Berth no. 3 at Carrington at the Port of Newcastle in New South Wales.

### **5.2 Port Terminal Facilities**

The Carrington Terminal facilities manage products including wheat, barley, oats, sorghum, canola, soya beans, sunflower, lupins and chickpeas.

The following facilities are located at the Carrington Terminal:

- intake/receival facility
- grain storage facility
- weighing facility
- shipping belt
- ship loader

The facilities do not include the berths at the Port Terminal or the Western Storage Facility.

### **5.3 Additional published protocols and information**

The Port of Newcastle is owned and operated by the Newcastle Port Corporation, a corporation owned by the New South Wales State government and established under the Ports Corporation and Waterways Management Act 1995.

The Ship Handling Safety Guidelines for the Port of Newcastle refer to relevant safety parameters in relation to shipping control and navigation at the Port of Newcastle. They can be found at <http://www.newportcorp.com/site/index.cfm?display=111674>.

The Tide Chart and Information Handbook sets out terms and conditions of access to the Port of Newcastle and relevant regulations in relation to security requirements, environmental obligations, shipping navigation and management. It can be found at [http://www.newportcorp.com/client\\_images/769195.pdf](http://www.newportcorp.com/client_images/769195.pdf) ..

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## **6 Geelong Port Terminal**

### **6.1 Location**

The Geelong Terminal is located at the Port of Geelong in Victoria.

### **6.2 Port Terminal Facilities**

The Geelong Terminal facilities handles products including wheat, barley, oats, rice, legumes, oilseeds and woodchips.

The following facilities are located at the Geelong Terminal:

- intake/receival facility
- grain storage facility
- weighing facility
- shipping belt
- ship loader

The facilities do not include the berths at the Port Terminal or the Corio storage and receival facility.

### **6.3 Other information**

GrainCorp will pass through to Users the Geelong Terminal Wharf Hire Fee.

### **6.4 Additional published protocols and information**

The Port of Geelong is owned by Ports Pty Ltd. However the Port is managed by three separate entities. Geelong Port Pty Ltd leases the Port's land based assets from Port Pty Ltd and is the principal manager of piers and wharfs at the Port of Geelong. GrainCorp manages the storage, logistics and marketing facilities for free flowing bulk products at the Port of Geelong. The statutory corporation, the Victorian Regional Channels Authority manages the navigable waters around the Port of Geelong.

The Geelong Port Standards and Procedures for Geelong Port outline the general duties of Port Users, the general terms and conditions in relation to use of facilities and equipment and the rules and regulations of the Port in relation to navigation, vessel management, cargo and berth management, emergencies, access and security and conduct at the port.

It is found at <http://www.geelongport.com.au/downloads/PortStandProc.pdf>

Geelong Port Standards and Procedures should be followed in conjunction with the directions of the Harbour Master in relation to a variety of matters including shipping control, channel management and the provision of navigation aids as set out in the Victorian Regional Channels Authority 2009 Port Operating Handbook.

This is found at

[http://www.regionalchannels.vic.gov.au/index.php?option=com\\_content&task=view&id=129&Itemid=144](http://www.regionalchannels.vic.gov.au/index.php?option=com_content&task=view&id=129&Itemid=144).

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## **7 Portland Port Terminal**

### **7.1 Location**

The Portland Terminal is located at K.S. Anderson Wharf Berths No. 1 and No. 2.

### **7.2 Port Terminal Facilities**

The Portland Terminal facilities manage products including wheat, barley, legumes and oilseeds and woodchips.

The following facilities are located at the Portland Terminal:

- intake/receival facility
- grain storage facility
- weighing facility
- shipping belt
- ship loader

The facilities do not include the berths at the Port Terminal. There is an additional fee for a shunting service provided at the Port of Portland which will be passed through to Users at cost.

### **7.3 Additional published protocols and information**

The Port of Portland is currently vested in two funds managed by Hastings Funds Management - the publicly listed Australian Infrastructure Fund and a Utilities Trust of Australia. The statutory corporation, the Victorian Regional Channels Authority manages the navigable waters around the Port of Geelong.

Shipping services, including pilotage, towage, mooring and stevedoring provided by the Port of Portland are described at

[http://www.portofportland.com.au/index.php?option=com\\_content&task=view&id=36&Itemid=49](http://www.portofportland.com.au/index.php?option=com_content&task=view&id=36&Itemid=49).

Berthing protocols that outline procedures in relation to berth allocation are provided at

[http://www.portofportland.com.au/index.php?option=com\\_content&task=view&id=41&Itemid=54](http://www.portofportland.com.au/index.php?option=com_content&task=view&id=41&Itemid=54)

Regulations and permits set out by the Port of Portland in relation to use of Port terminal facilities are set out at

[http://www.portofportland.com.au/index.php?option=com\\_content&task=view&id=66&Itemid=79](http://www.portofportland.com.au/index.php?option=com_content&task=view&id=66&Itemid=79)

# Port Terminal Services Access Undertaking

## Schedule 2 - Standard Port Terminal Services

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### **1 Intake of wheat at Port Terminals ex GrainCorp country sites**

#### **1.1 Services included**

GrainCorp will provide the following services for the intake of wheat outloaded from GrainCorp country sites in accordance with the relevant published price and non-price terms and in accordance with the relevant Port Terminal Protocols:

- (a) Unloading of rail and road trucks into the Terminal during the hours and days as specified by GrainCorp;
- (b) Sampling and classification on delivery;
- (c) Weighing on delivery;
- (d) Transfer of wheat to storage cells;
- (e) Recording and provision of delivery information;
- (f) Wheat hygiene and quality management;
- (g) Elevation to outloading paths;
- (h) Shipping stem maintenance;
- (i) Insurance for all general physical risk (ie. fire, flood, storm, etc).

#### **1.2 Services excluded**

The Standard Port Terminal Services for intake of wheat at Port Terminals ex GrainCorp country sites do not include:

- (a) all Port Terminals - stevedoring costs; and
- (b) Geelong Terminal - wharfage.

#### **1.3 Conditions**

These services are provided as per the shift hours listed in the Port Terminal Protocols and relevant Access Agreement. Overtime fees and other conditions will apply for intake and unloading outside of those shift hours.

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### **2 Intake of wheat at Port Terminals ex other Approved Bulk Handling Company Sites**

#### **2.1 Other Approved Bulk Handling Company Sites**

“Other Approved Bulk Handling Company Sites” means those sites, not operated by GrainCorp, that, in GrainCorp’s absolute opinion, have relevant

grain quality procedures and consistently meet export quality standards on outloading.

## **2.2 Services included - treated wheat**

GrainCorp will provide the following services for the intake of wheat outloaded from Other Approved Bulk Handling Company Sites in accordance with the relevant published price and non-price terms and in accordance with the relevant Port Terminal Services Protocols:

- (a) Unloading of rail and road trucks into the Terminal during the hours and days as specified by GrainCorp;
- (b) Sampling and classification on delivery;
- (c) Weighing on delivery;
- (d) Transfer of wheat to storage cells;
- (e) Recording and provision of delivery information;
- (f) Wheat hygiene and quality management;
- (g) Elevation to outloading paths;
- (h) Shipping stem maintenance;
- (i) Insurance for all general physical risk (ie. fire, flood, storm, etc).

## **2.3 Services excluded**

The Standard Port Terminal Services for intake of wheat at Port Terminals ex GrainCorp country sites do not include:

- (a) all Port Terminals - stevedoring costs; and
- (b) Geelong Terminal – wharfage.

## **2.4 Conditions**

- (a) These services are provided as per the shift hours listed in the Port Terminal Protocols and relevant Access Agreement. Overtime fees and other conditions will apply for intake and unloading outside of those shift hours.
- (b) GrainCorp will only provide the direct to port intake service under section 2.2:
  - (i) where the deliveries of wheat by the User, when added to existing commitments for nominated shipments, do not exceed GrainCorp's capacity to store the required cargoes in vertical Port Terminal storage;
  - (ii) for deliveries of wheat by customers who meet the following terms:

- (A) a minimum of 500 tonnes per day delivery by road or 1,000 tonnes by rail during normal Port Terminal receival hours, on normal business days as advised by the Port Terminal from time to time;
  - (B) deliveries are to be in accordance with a delivery program agreed to between the parties;
  - (C) a minimum parcel of 5,000 tonnes for a specific nominated vessel;
  - (D) all cargo to be delivered within an agreed period prior to the nominated date of arrival of the vessel. Such period will be a maximum of 21 business days and will be dependent on the storage capacity allocated for that accumulation;
  - (E) deliveries not to commence prior to nomination of a vessel to GrainCorp, where such nomination is to include as a minimum the name of vessel, estimated date of arrival of the vessel and grades and quantities of grain to be loaded;
  - (F) the customer will provide proof of prior treatment before rail is directed to the Port Terminal;
  - (G) no wheat protection (pesticide or fumigation) to be provided by GrainCorp;
  - (H) the customer allows GrainCorp to inspect the wheat in store before outloading to the Port Terminal;
  - (I) delivery inspection to consist of check for infestation (infested loads will be rejected), obvious contamination and moisture content (loads exceeding maximum tolerances will be rejected) only; and
  - (J) other terms and conditions included in the Access Agreement or Port Terminal Services Protocols.
- (c) Requests for services which do not meet the criteria above do not constitute a request for Standard Port Terminal Services and will be quoted and applied on a case by case basis depending on the services required. This includes a failure by a User to meet any of the above criteria during the delivery period or after delivery.

## **2.5 Infested wheat loads delivered by rail**

GrainCorp will provide, and the User is deemed to have requested, the following port intake services in relation to intake at the Port Terminal by rail from Other Approved Bulk Handling Company Sites of infested loads in accordance with the relevant published price and non-price terms and in accordance with the relevant Port Terminal Services Protocols:

- (a) rail receival path cleaning;



- (b) fumigation for the infested grain (where available) or removal of the grain from the terminal to a “hospital” facility for disinfestation.

These services will be provided in accordance with relevant AQIS biosecurity conditions.

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### **3 Intake of wheat at Port Terminals from Unapproved Sources / untreated wheat**

#### **3.1 Unapproved Sources**

If:

- (a) the wheat to be delivered to the Port Terminal:
  - (i) has not been treated to a level acceptable to GrainCorp within the last three months; or
  - (ii) is outloaded from sites not operated by GrainCorp and those sites cannot demonstrate relevant grain quality procedures and consistently meet export quality standards on outloading; or
  - (iii) the wheat is received directly ex farm; or(each an “**Unapproved Source**”)

- (b) a User is unable to provide proof of treatment of the wheat,

then GrainCorp will provide the services in clause 3.2 if the User and the wheat to be delivered complies with the Testing and Sampling procedures in the Access Agreement.

#### **3.2 Services included**

GrainCorp will provide the following services for the intake of untreated wheat or wheat from Unapproved Sources in accordance with the relevant published price and non-price terms and in accordance with the relevant Port Terminal Protocols:

- (a) Unloading of rail and road trucks into the Terminal during the hours and days as specified by GrainCorp;
- (b) Sampling and classification on delivery;
- (c) Weighing on delivery;
- (d) Transfer of wheat to storage cells;
- (e) Recording and provision of delivery information on Receipt Dockets;
- (f) Wheat hygiene and quality management;

- (g) Elevation to outloading paths;
- (h) Shipping stem maintenance;
- (i) Insurance for all general physical risk (ie. fire, flood, storm, etc).

### **3.3 Services excluded**

The Standard Port Terminal Services for intake of wheat at Port Terminals ex GrainCorp country sites do not include:

- (a) all Port Terminals - stevedoring costs; and
- (b) Geelong Terminal – wharfage.

### **3.4 Infested wheat loads delivered by rail**

GrainCorp will provide, and the User is deemed to have requested, the following port intake services in relation to intake at the Port Terminal by rail from Other Approved Bulk Handling Company Silos of infested loads in accordance with the relevant published price and non-price terms and in accordance with the relevant Port Terminal Protocols:

- (a) rail receipt path cleaning;
- (b) fumigation for the infested grain (where available) or removal of the grain from the terminal to a “hospital” facility for disinfestation.

These services will be provided in accordance with relevant AQIS biosecurity conditions.

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## **4 Ship loading services**

GrainCorp will provide the following services in accordance with the relevant published price and non-price terms and in accordance with the relevant Port Terminal Services Protocols:

- (a) Vessel nomination booking and re-nomination;
- (b) provision of a Shipping & Domestic Outturn Quality Certificate.

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## **5 Storage services**

GrainCorp will provide the following services in accordance with the relevant published price and non-price terms and in accordance with the relevant Port Terminal Services Protocols:

- (a) maintenance and provision of wheat stock records by terminal and grade;
- (b) pesticide and fumigation application as required during the storage period;
- (c) condition monitoring;

- (d) storage of residual wheat remaining in the Port Terminal after the completion of loading.

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## **6 Blending**

GrainCorp will provide the following services in accordance with the relevant published price and non-price terms and in accordance with the relevant Port Terminal Protocols:

- (a) blending of segregated grades in store or on outturn (including loading separately segregated wheat into ship's holds)
- (b) blending of grain to meet a customised grade ie any commodity specification that does not meet the standard grade, for example blending to increase protein, or blending to reduce screenings to meet contract specifications; and
- (c) pre-blending services where the exporter requires three or more segregated grades to be blended.

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## **7 Grain quality port sampling**

GrainCorp will provide the following services in accordance with the relevant published price and non-price terms and in accordance with the relevant Port Terminal Services Protocols:

- (a) storage unit sampling;
- (b) composite pre-shipment sampling;
- (c) parcel sampling;
- (d) hatch sampling.

These services do not include services by GrainCorp Technical Services (such as independent analysis).

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## **8 Miscellaneous services**

GrainCorp will provide the following services in accordance with the relevant published price and non-price terms and in accordance with the relevant Port Terminal Services Protocols:

- (a) truck marshalling at Portland;
- (b) buyer to buyer transfer services;
- (c) supply of User requested receipt;
- (d) pesticide residue free grain specific services;
- (e) pesticide residue restricted grain specific services.

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## **9 Additional services - Carrington**

GrainCorp will provide services provided by the Carrington Grading Plant at the Carrington Port Terminal.

# Port Terminal Services Access Undertaking

## Schedule 3 – Initial Port Terminal Services Protocols

### Application

If an exporter requests GrainCorp to load grain on a vessel at a port terminal owned by the GrainCorp (“**Port Terminal**”), the exporter must nominate a cargo for loading at a Port Terminal by submitting a cargo nomination application form (**Cargo Nomination Application**). The following procedures for nominating a cargo and accepting or declining a Cargo Nomination Application applies (“**Protocol**”).

#### 1 Intention to Nominate

An exporter may provide their forward shipping plan by submitting an intention to nominate a cargo(s) (“**Intention Notice**”). Lodgement of an Intention to Nominate is optional. If an exporter lodges an Intention to Nominate, the exporter must:

- 1.1 Provide GrainCorp a completed Intention Notice as early as practicable but not less than 28 days prior to the expected date of arrival of any of the nominated cargo(s); and
- 1.2 The Intention Notice must include:
  - 1.2.1 The load Port Terminal or port terminals (for a 2 port load vessel);
  - 1.2.2 The grain and grade of the cargo;
  - 1.2.3 The tonnage of the cargo;
  - 1.2.4 A 14 day arrival laycan period; and
  - 1.2.5 The proposed transport arrangement into the Port Terminal.

A notice of Intention to Nominate is not an official Cargo Nomination Application, but will be used by GrainCorp to develop a forward shipping program for planning purposes.

#### 2 Cargo Nomination Application Procedure

If an exporter requests GrainCorp to load grain on a vessel at a Port Terminal, the exporter must:

- 2.1 Provide GrainCorp a Cargo Nomination Application on a date not less than 28 days prior to arrival laycan of the vessel, using the relevant Cargo Nomination Application form or related online facility located at [www.graincorp.com.au](http://www.graincorp.com.au). (The exporter may nominate a cargo with an estimated time of arrival (“**ETA**”) of less than 28 days only at the discretion of GrainCorp);
- 2.2 The Cargo Nomination Application must include:
  - 2.2.1 The information in 1.2 above, if not provided in the Intention Notice or if different from the Intention Notice;
  - 2.2.2 The name of the vessel (if known);

- 2.2.3 A Cargo Assembly Plan that outlines the grain and grade for the nominated cargo, the location of the grain and grade (GrainCorp, approved or non-approved storage facilities), blending requirements and other grain services required by the exporter at the Port Terminal ("**CAP**");
- 2.2.4 Confirmation that the exporter will, if it is accumulating grain from a non-approved storage(s), operate under the applicable protocols and procedures, as advised by GrainCorp from time to time for the relevant Port Terminal;
- 2.2.5 Confirmation that the vessel is expected to be ready to load on arrival at the Port Terminal;
- 2.2.6 The destination of nominated cargo, including details of all phytosanitary requirements of the destination country;
- 2.2.7 Details of any special or unusual features of the nominated vessel that may impact in any way vessel loading performance; and
- 2.2.8 Details of the holders of any encumbrances over the commodities and the proposed release of any encumbrances.

### **3 Cargo Nomination Application review and acceptance procedure**

- 3.1 GrainCorp will undertake a risk assessment within 7 business days of the receipt of a completed Cargo Nomination Application form and CAP, in chronological order of receipt, using the information supplied by the exporter in a Cargo Nomination Application and CAP. The risk assessment will take into account all particulars of the exporter's request including the following:
  - 3.1.1 The information provided by the exporter required under clause 2 is complete and correct;
  - 3.1.2 The exporter provides confirmation to GrainCorp that it will have sufficient grain tonnage of the relevant grade (at GrainCorp, approved or non-approved storage facilities) against the CAP for the nominated cargo;
  - 3.1.3 The exporter provides confirmation to GrainCorp that it has contracted sufficient rail and/or road transport to accumulate the grain tonnage against the CAP to the Port Terminal for the nominated cargo prior to nominated arrival laycan;
  - 3.1.4 Phytosanitary and market access risks, including the presence of insects in stored grain and the application of grain protectants and fumigants for grain from approved or non-approved, including on-farm, storage facilities as per the Storage & Handling Agreement;
  - 3.1.5 Whether GrainCorp has available and sufficient intake, grain segregation, storage and shipping capacity at the Port Terminal that will allow loading of the grain onto the nominated cargo, taking into account:
    - (a) Other cargo(s) previously accepted by GrainCorp that appear as accepted cargo nominations on the GrainCorp Shipping Stem (see clause 3.5);

- (b) Sufficient capacity to receive and handle grain under the applicable protocol for accumulation by road of grain into GrainCorp Port Terminals from ex-farm and non-approved storage facilities as advised by GrainCorp from time to time;
  - (c) GrainCorp's right to reserve capacity at the Port Terminal to service its non- grain, domestic bound grain, containerised grain and export non-wheat bulk grain activities; and
- 3.1.6 Any other supporting information or documents in the event that issues arise which may cause any legal, regulatory, reputational or practical concerns, including the compliance with port of destination requirements and any potential event that may be a notifiable matter by GrainCorp to Wheat Exports Australia.
- 3.2 GrainCorp will accept or decline a Cargo Nomination Application based on a risk assessment that takes into account the criteria outlined in clause 3.1.
- 3.3 If GrainCorp accepts a Cargo Nomination Application, GrainCorp:
  - 3.3.1 will assign a load laycan ("**Load Laycan**") and queuing order ("**Queuing Order**"). The exporter must then pay a booking fee (in accordance with clause 6) ("**Booking Fee**"), to confirm the accepted Cargo Nomination Application; and
  - 3.3.2 may impose reasonable conditions in accepting a Cargo Nomination Application including, the mode of transport, port operating arrangements, requirement for overtime, source of grain and if applicable, the application of the relevant protocols and procedures, as advised by GrainCorp from time to time for the relevant Port Terminals from non-approved storage facilities.
- 3.4 If GrainCorp declines a Cargo Nomination Application, GrainCorp must provide to the exporter reason(s) for this decision.
- 3.5 Pursuant to the obligations of grain export Port Terminal service providers under the Bulk Wheat Export Accreditation Scheme established under the *Wheat Export Marketing Act 2008* (Cth) ("**Act**"), GrainCorp will publish 'Shipping Stem' information on its website [www.graincorp.com.au](http://www.graincorp.com.au) in accordance with Section 24(4) of the Act for all accepted Cargo Nomination Applications ("**Shipping Stem**").
- 3.6 In the event that two or more nominations for port access with identical or similar Load Laycans (i.e. within 5 business days), and providing that all prior conditions as identified in this Protocol have been met, GrainCorp will assign a Load Date in accordance with clause 4, in the order in which the Cargo Nomination Applications are received.

#### **4 Load Date**

- 4.1 No later than 21 days before the nominated Load Laycan, the exporter will inform GrainCorp of:

- 4.1.1 The estimated time of arrival (ETA) of the vessel, which must be within the Load Laycan; and
- 4.1.2 The name of the vessel, its location and the captain's details or the ship's agent contact details,

GrainCorp will then assign an estimated time of loading ("**Load Date**") and new Queuing Order for the vessel, which will be within the Load Laycan, but on or after the estimated time of arrival of the vessel provided by the exporter.

- 4.2 If the exporter fails to comply with clause 4.1, the exporter forfeits its vessel nomination and the Booking Fee.

## **5 Site accumulation**

- 5.1 No later than 21 days before the assigned Load Date the exporter will provide stock information that will allow GrainCorp to develop a Site Assembly Plan ("**SAP**") for the accumulation of the grain for delivery to the Port Terminal base on details provided in the CAP. The SAP will detail the location of the grain and grade to be accumulated for the nominated vessel from GrainCorp, approved or non-approved or ex-farm storage facilities.
- 5.2 GrainCorp is under no obligation to receive grain at any of its port terminals against an accepted cargo nomination more than 21 days in advance of the assigned Load Date.
- 5.3 Without limitation, GrainCorp is not liable to the exporter or any third party, or any person claiming through or on behalf of the exporter, for any costs, losses or delays, whether direct or indirect, that may arise if grain is not accumulated at the Port Terminal before the assigned Load Date for any reason.

## **6 Booking Fee**

- 6.1 The exporter must pay to GrainCorp a non-refundable booking fee as per the Pricing Schedule of the GrainCorp Port Terminal Services and / or Storage and Handling Agreement of the season relating to the cargo nomination to confirm a Cargo Nomination Application within 24 hours (Monday to Friday) of GrainCorp notifying an exporter that a Load Laycan and Queuing Order has been assigned to an accepted Cargo Nomination Application. This fee is in addition to any other fees that may be applicable to the accumulation of grain and shipping of grain for the nominated cargo. Failure to make payment in cleared funds within 24 hours of such notification will cause the exporter to lose any allocated Load Laycan and Queuing Order.
- 6.2 In a circumstance where an exporter nominates a cargo and pays the Booking Fee but it is subsequently found that the exporter has failed to comply with the requirements of clauses 2.2, 3.1.1-3.1.4, 3.3.2, 4.1, 5.1 or 6.1, the assigned Load Laycan, Load Date and Queuing order can be cancelled by GrainCorp and the exporter will be required to re-nominate another cargo or provide a substitute vessel in accordance with clause 2 and 3.



## **7 Substituting nominated vessels**

- 7.1 Subject to clause 7.2, before 21 days of a Load Date, a vessel nominated by the exporter can be substituted for another vessel at the nominated Port Terminal that is materially similar to the original nominated vessel without the exporter being required to pay a new Booking Fee or having to re-nominate a new vessel under the procedures outlined in clauses 2 and 3, provided that the Load Date is within 5 days of the original Load Date assigned in clause 4.1. This is subject to GrainCorp having the right to alter the Load Date and Queuing Order when a vessel is substituted by the exporter.
- 7.2 The exporter can substitute another vessel at the nominated Port Terminal that is materially similar to the original nomination without the exporter being required to pay a new booking fee or having to re-nominate a new vessel under the procedures outlined in clause 3, provided that the Load Date is the same at the original Load Date assigned in clause 4.1.

## **8 Late or Cancelled Vessels**

- 8.1 The exporter or the ship's agent must provide GrainCorp with a notice of readiness ("**Notice of Readiness**") as soon as the vessel is able to proceed to survey.
- 8.2 If a vessel's Notice of Readiness is later than 5 days after the assigned Load Date then:
- 8.2.1 The exporter forfeits any Booking Fee previously paid;
- 8.2.2 The exporter must re-nominate to secure a new Load Laycan or Load Date and Queuing Order as per clauses 2 and 3 and must pay a new Booking Fee; and
- 8.2.3 All grain in the Port Terminal accumulated for that nominated vessel will accrue additional storage charges (in addition to the standard storage charges). These fees are specified in the Pricing Schedule attached to the GrainCorp Port Terminal Services and / or Storage and Handling Agreement of the season relating to the cargo nomination, from the sixth day after the assigned Load Date, until such time as the grain is either loaded to a vessel or removed from the Port Terminal. Any additional fees accrued are payable prior to the outloading of the grain to a vessel or other transport.

## **9 Vessels Failing Regulatory Survey**

- 9.1 The exporter is responsible for the condition and state of readiness of vessels presented to GrainCorp for loading as per relevant Marine, AQIS and any other survey required by regulation relating to the export of grain from Australia.
- 9.2 In the event of an exporter's vessel failing an AQIS or other survey that may be required by regulation, GrainCorp reserves the right to give priority to other vessels on its Shipping Stem and to place the re-presented vessel in a loading period that can accommodate the vessel at the sole discretion of the GrainCorp.

- 9.3 All other items shall be treated in accordance with clause 5 (as amended or relevant in dealing with Port Terminal Operation) of the Storage and Handling Agreement and/ or Port Terminal Services of the season relating to the vessel nomination and clause 8 of this Protocol for late or cancelled vessels.
- 9.4 In the event of an exporter's vessel failing an AQIS or other survey that may be recommended by GrainCorp in connection with clause 3.1.6 or required by regulation and the vessel is not, or cannot, be removed from the berth to allow the presentation of another vessel on the Shipping Stem, all grain in the Port Terminal accumulated for that nominated vessel will immediately accrue additional storage charges (in addition to the standard storage charges). These fees are specified in the Pricing Schedule attached to the GrainCorp Port Terminal Services and / or Storage and Handling Agreement of the season relating to the cargo nomination until such time as the grain is either loaded to a vessel or removed from the Port Terminal. Any additional fees accrued are payable prior to the outloading of the grain to vessel or other transport.

## 10 Dispute Resolution

- 10.1 If an exporter wishes to dispute GrainCorp's rejection of a Cargo Nomination Application for bulk wheat exports, the following procedures will apply:
- 10.1.1 The exporter must notify GrainCorp in writing of the dispute, the reasons for the dispute and the requested resolution ("**Dispute Notice**") by 5 pm on the next business day after the receiving notice of the rejection.
- 10.1.2 GrainCorp must use best endeavours to respond to the exporter within two Business Days of receiving the Dispute Notice ("**Response**"). The Response must set out whether GrainCorp intends to reverse its decision and, if not, must provide an explanation or basis for GrainCorp's decision.
- 10.1.3 If the exporter is not satisfied with the Response or GrainCorp fails to respond within two Business Days, then the exporter may serve an escalation notice on GrainCorp within the later of two Business Days of receipt of the Response or when the Response was due ("**Escalation Notice**").
- 10.1.4 Upon receipt of an Escalation, Notice GrainCorp must use all reasonable endeavours to arrange a meeting within 5 business days of receipt of the Escalation Notice between GrainCorp's Executive General Manager, Ports and New Business, and the exporter to provide an opportunity for the exporter to air its grievances.
- 10.1.5 To avoid doubt, this clause 10 does not apply to a dispute concerning the grade, quality, sampling, testing or classification of grain<sup>1</sup>.

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<sup>1</sup> A dispute of this nature will be referred to BRI Australia Ltd in accordance with the relevant dispute resolution clause in the GrainCorp Port Terminal Services Agreement.

# Port Terminal Services Access Undertaking

## Schedule 4 – Access Application information

Access Applications are to be submitted to GrainCorp in written form and clearly state that the Access Application is made in accordance with this Undertaking and must be accompanied by the following information:

### **Request details:**

- Season
- Customer Application Type
- Business Category

### **Applicant details:**

- Company name
- ABN/ACN
- Website
- Address
- Contact details
- Details of authorised company representative (including authorisation)
- Duration of the Access Agreement sought

# Schedule 5 – Ring fencing rules

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## 1 Financial records

GrainCorp must make the financial records relating to its provision of access to and the provision of the Port Terminal Services available to the independent auditor appointed by the ACCC when requested to do so by notice in writing given by the ACCC.

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## 2 Restricted information

- (a) GrainCorp must not use or disclose Restricted Information other than for the purpose of providing access to Port Terminal Services in compliance with the terms of this Undertaking.
- (b) “**Restricted Information**” means Confidential Information received from a User in respect of:
  - (i) an Intention Notice or a Cargo Nomination Application until the date on which it is accepted by GrainCorp, including information on:
    - (A) the expected date of arrival of the ship at the nominated Port;
    - (B) a Cargo Assembly Plan; and
    - (C) the destination of nominated ships;
  - (ii) an order to load a ship including any amendments to the loading order.

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## 3 Prohibited information flows

Subject to clause 5 of this Schedule, GrainCorp shall not:

- (a) disclose Restricted Information to:
  - (i) its Trading Divisions; or
  - (ii) other entities, including its own Related Bodies Corporate, their agents or employees who are involved in trading Bulk Wheat;
- (b) access or use Restricted Information for the purpose of substantially damaging a competitor or conferring upon it or its Related Bodies Corporate any unfair competitive advantage over a competitor in the marketing of Bulk Wheat; or
- (c) allow its Trading Divisions or other entities, including its own Related Bodies Corporate, their agents or employees who are

involved in trading Bulk Wheat to have access to Restricted Information in GrainCorp's possession or control.

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## 4 Permitted information flows

GrainCorp may disclose:

- (a) to an Applicant or User any Restricted Information that solely relates to the Bulk Wheat owned by that Applicant or User; and
- (b) to any person, information concerning the grade, quality, quantity, location or attributes of Bulk Wheat received by GrainCorp ("**Receival Specific Information**"), provided that the Receival Specific Information is aggregated to such an extent that a third party recipient of that aggregated information without access to the Receival Specific Information would not be capable of identifying information specific to any particular User.

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## 5 Compliance

- (a) GrainCorp's employees will be made aware:
  - (i) that a failure to comply with the obligations under this Schedule may constitute a disciplinary offence and expose both the individual and GrainCorp to penalties for a breach of the TPA or WEMA;
  - (ii) they should contact the legal department if they have any concerns in relation to this policy, adherence to its objects by officers, employees or agents or its application to any particular conduct.
- (b) GrainCorp will provide information and guidance to its officers, employees and agents to ensure so far as is practicable that they are made aware of their obligations under this Undertaking.
- (c) If any GrainCorp officer, employee or agent is responsible for, or knowingly involved in conduct in breach of this clause, or any specific process created to implement this clause then, without prejudice to any other action that GrainCorp may be required by law to take or shall otherwise think appropriate:
  - (i) the conduct of that employee will be taken into account in relation to that person's performance appraisal and remuneration review; and
  - (ii) the relevant person shall receive training as determined by GrainCorp's compliance manager.
- (d) GrainCorp will make employees aware that engaging in deliberate conduct in repeated or serious breach of this Schedule may be grounds for dismissal.

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## 6 Audit

- (a) GrainCorp's compliance with this clause (and its related processes and procedures) must be independently audited by an independent auditor at such times as the ACCC may direct but in event not more than once in any 12 month period.
- (b) The auditor ("**Compliance Auditor**") will be selected by GrainCorp but must be approved by the ACCC.
- (c) The Compliance Auditor shall review:
  - (i) records of any complaints;
  - (ii) GrainCorp's compliance with this clause;
  - (iii) records held by the compliance officer;
  - (iv) any relevant policies or procedures that implement or otherwise relate to this clause; and
  - (v) any other issues relevant to GrainCorp's compliance with the principles and obligations stated in this clause.
- (d) The Compliance Auditor's report, which shall include:
  - (i) recommendations for any improvements in GrainCorp's policies or processes; and
  - (ii) a report on GrainCorp's past compliance with any recommendations previously made by a Compliance Auditor,must be provided to the ACCC.