

## 7 Application and negotiating for access

### 7.1 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:** requests by the Applicant for information to enable an Access Application to be lodged;
  - (ii) **Access Application:** submission of an Access Application by the Applicant;
  - (iii) **Standard Access Agreements:** procedure where the Applicant wants the Port Terminal Services under the Price and Non-Price Terms Documents; and
  - (iv) **Negotiation:** negotiations where an Access Agreement wants the Port Terminal Services under terms other than the Price and Non-Price Terms Documents.
- (b) For the avoidance of doubt, if a Dispute arises at any time during the processes described in **clauses 7.2, 7.3 and 7.6**, either party may seek to resolve the Dispute in accordance with the process described in **clause 8.4**.

### 7.2 Preliminary inquiry

- (a) An Applicant may request the Port Operator to provide information reasonably required by the Applicant to formulate and lodge its application for access to the Port Terminal Services.
- (b) Within ten Business Days of receiving a request for information under **clause 7.2(a)**, the Port Operator must, subject to **clause 7.2(c)**, use all reasonable endeavours to provide the Applicant with the requested information.
- (c) In responding to a request for information under **clause 7.2(a)**, the Port Operator is not required to disclose any Confidential Information.
- (d) Before submitting an Access Application under **clause 7.3(a)**, an Applicant may give written notice to the Port Operator requesting a preliminary meeting to:
  - (i) seek clarification of the processes described in this **clause 7.2** and **clauses 7.3 and 7.6**, particularly the required form of the proposed Access Application under **schedule 1**; and
  - (ii) discuss the proposed Access Application.
- (e) The Port Operator must be available to meet with Access Applicant within ten Business Days of receiving a notice under **clause 7.2(d)**.

### 7.3 Access Application

- (a) An Applicant's request for access to the Port Terminal Services must be submitted to the Port Operator in the form prescribed in **schedule 1 (Access Application)**.
- (b) Within two Business Days of receiving an Access Application, the Port Operator must provide the Applicant with written notice:
  - (i) acknowledging receipt of the Access Application and confirming that it contains sufficient information to enable the Port Operator to consider the Access Application; or
  - (ii) acknowledging receipt of the Access Application and requiring the Applicant to provide the Port Operator with such:
    - (A) additional information; and
    - (B) clarification of any information provided in the Access Application,as is reasonably necessary for the Port Operator to consider the Access Application.
- (c) Within five Business Days of receiving a notice under **clause 7.3(b)(ii)**, the Applicant must provide the requested additional information or clarification.

### 7.4 Eligibility

- (a) The Port Operator's obligation to:
  - (i) negotiate with an Access Applicant under this Undertaking; and
  - (ii) enter into an Access Agreement,is subject to the Applicant demonstrating, within five Business Days of a written request by the Port Operator and to the Port Operator's reasonable satisfaction, that:
  - (iii) the Applicant is Solvent;
  - (iv) the Applicant and its Related Bodies Corporate are not currently in, and in the previous two years have not been in, Material Default;
  - (v) the Applicant:
    - (A) has a legal ownership structure with a sufficient capital base and assets of value to meet the actual or potential liabilities under an Access Agreement, including the ability to pay access charges and insurance premiums when they fall due; or
    - (B) provides Credit Support;
  - (vi) the Applicant is an Accredited Wheat Exporter; and
  - (vii) the Applicant is not in breach of the WEMA and the WEAS.

- (b) The Port Operator may give a written request to the Applicant to demonstrate that it satisfies the Eligibility Requirements:
  - (i) within five Business Days of the Port Operator receiving the Applicant's Access Application; and
  - (ii) after that time, within five Business Days of the Port Operator becoming aware of any credible grounds which give rise to a reasonable assumption that the Applicant may no longer satisfy the Eligibility Requirements.
- (c) If the Port Operator decides that under this Undertaking it is entitled to refuse or cease to negotiate with the Applicant for any reason, including because the Applicant fails or ceases to satisfy the Eligibility Requirements, within two Business Days of that decision the Port Operator must give written notice of that fact to the Applicant, including the reasons for its decision.
- (d) If after receiving a notice under **clause 7.4(d)** the Applicant disagrees that the Port Operator is entitled under this Undertaking to refuse or cease to negotiate with the Applicant, then that matter will constitute a Dispute and the Applicant may within ten Business Days of receiving the notice refer to arbitration under **clause 8.4**. If the arbitrator determines that the Port Operator is not entitled under this Undertaking to refuse or cease to negotiate with the Applicant:
  - (i) the Port Operator must commence or recommence negotiations immediately; and
  - (ii) where the Negotiation Period had commenced before the Port Operator ceased negotiations, the Negotiation Period will be deemed to have been suspended from the date of cessation until the date of the arbitrator's determination.

## 7.5 Standard Access Agreement

- (a) If the Applicant requires the Port Terminal Services to be provided under the terms offered in the Price and Non-Price Terms Documents, then:
  - (i) at any time after submitting its Access Application the Applicant may give the Port Operator written notice of that fact; and
  - (ii) within five Business Days of the Port Operator receiving a notice under **clause 7.5(a)(i)**, the Port Operator and the Applicant must execute an Access Agreement in the form of the Price and Non-Price Terms Documents.
- (b) If the Applicant requires the Port Terminal Services to be provided under terms other than those offered in the Price and Non-Price Terms Documents, then the Port Operator and the Applicant must comply with the negotiation procedures and arbitration procedures (if required) under **clause 7.6**.

## **7.6 Negotiation of Access Agreement**

- (a) This **clause 7.6** applies only when the Applicant requires the Port Terminal Services to be provided under terms other than those offered in the Price and Non-Price Terms Documents.
- (b) Each of the Port Operator and the Applicant must negotiate for the Applicant's access to the Port Terminal Services in good faith and in accordance with this **clause 7.6**.
- (c) The period during which the Port Operator and the Applicant must negotiate the Applicant's Access Application (**Negotiation Period**):
  - (i) commences on later of the date of:
    - (A) a notice under **clause 7.3(b)(i)**; or
    - (B) the Port Operator's receipt of the Applicant's additional information or clarification in response to a notice under **clause 7.3(b)(ii)**; and
  - (ii) ceases upon any of the following events:
    - (A) execution of an Access Agreement in respect of the Access Application;
    - (B) written notification by the Applicant that it no longer wishes to proceed with its Access Application; or
    - (C) the expiration of three months from the commencement of the Negotiation Period, or if both parties agree to extend the Negotiation Period, then the expiration of the agreed extended period.
- (d) Subject to **clause 7.6(e)**, upon cessation of the Negotiation Period the Port Operator's obligation to negotiate with the Applicant in respect of its Access Application will cease.
- (e) Without limiting the definition of Dispute, if the Applicant has complied with **clause 7.6(b)** throughout the Negotiation Period but the parties do not execute an Access Agreement before the conclusion of the Negotiation Period, that matter will constitute a Dispute which either the Port Operator or the Applicant may refer to arbitration under **clause 8.4**.