

Port Terminal Services Agreement for Standard Port Terminal Services

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Details

Date

2011

Parties

Name **Viterra Operations Limited**
ABN 88 007 556 256
Short form name **Company**
Address Grain House 124 –130 South Terrace, Adelaide, SA 5000

Name [REDACTED]
ABN [REDACTED]
Short form name **Client**
Address [REDACTED]

Background

- A The Company is:
- (i) the operator of the Port Terminal Facilities; and
 - (ii) the provider of Port Terminal Services.
- B The ACCC accepted an Access Undertaking in relation to the provision of the Port Terminal Services by the Company on [REDACTED] 2011.
- C Pursuant to the Access Undertaking:
- (i) access to Port Terminal Services is required to be provided to Accredited Wheat Exporters (or persons who are otherwise entitled to, and apply to the Company to, export Bulk Wheat by means of the Port Terminal Facilities; and
 - (ii) that access is required to be offered on standard terms and conditions (**Standard Terms**).
- D This Agreement is the Standard Terms.
- E The Client wishes to be provided by the Company with Port Terminal Services on the Standard Terms, and the Parties have accordingly entered into this Agreement.

Agreed terms

1. Defined terms & interpretation

1.1 Defined terms

In this Agreement:

ACCC means the Australian Competition and Consumer Commission.

Access Undertaking means the undertaking provided by Viterra Operations Ltd to the ACCC pursuant to the WEMA and Part IIIA of the TPA dated [REDACTED] 2011 and available on the ACCC website at www.accc.gov.au.

Accidental Loss or Damage means loss or damage to the Client's Bulk Wheat caused or occasioned by events not reasonably within the control of the Company.

Accredited Wheat Exporter has the meaning given to that term in the Access Undertaking.

Agreement means this agreement and all schedules, annexures and attachments.

Approved Third Party Store means a grain storage and handling facility owned by a person other than the Company or a Viterra Group Company, which has been approved by the Company for the purposes of this Agreement. Further information in relation to Approved Third Party Stores is available on the Company's website.

AQIS means Australian Quarantine Inspection Service.

Associated Entity has the meaning given to that term by the Corporations Act.

Binned Grade means the Grade of Bulk Wheat stored in a Cell.

Bulk Wheat has the meaning given to that term in the Access Undertaking.

Business Day means a day that is not a Saturday, Sunday or gazetted public holiday in South Australia.

Cell means a single unit of storage of Bulk Wheat.

Client's Bulk Wheat means that quantity of Bulk Wheat held by the Company on behalf of the Client within a Port Terminal Facility, as adjusted for Shrinkage and other matters allowed or required under this Agreement.

Commencement Date has the meaning given to that term in clause 2.1.

Common Stock has the meaning given to that term in clause 6.2.

Company Facility means any facility owned or operated by the Company or any Viterra Group Company for the receipt and storage of grain, and may include a Port Terminal Facility.

Confidential Information means information exchanges between the Company and the Client 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 party prior to being provided by the party; or
- (h) must be disclosed under the Continuous Disclosure Rules (as defined under the WEMA) or in order to comply with other legal requirements; or
- (i) ceases to be confidential in nature by any other lawful means.

Corporations Act means the *Corporations Act 2001* (Cth).

Credit Support has the meaning given in the Access Undertaking.

Damaged Bulk Wheat means Bulk Wheat that has been damaged in an unusual incident or event to such an extent that it can no longer be classified by any Receival (Classification) Standards and is only of salvage value or suitable for disposal.

Dispute means a bona fide dispute between the Client and the Company arising under this Agreement.

Dust means Bulk Wheat dust attributable to the Client's Bulk Wheat extracted from dust collection plants in the Company's Facilities, but excluding Damaged Bulk Wheat. Dust is not included as part of Shrinkage.

Expiry Date has the meaning given to that term in clause 2.1.

Export Standard Receivals means receivals by the Company at a Port Terminal of wheat:

- (a) owned by the Client and transported to the Port Terminal by the Client or its agents or contractors (other than the Company);
- (b) purchased by the Client at a Port Terminal from a grower who has delivered the wheat to the Port Terminal; or
- (c) purchased by the Client by in-store transfer from a trader who has ownership of the wheat at the Port Terminal.

Force Majeure has the meaning given to that term in clause 15.1.

Grade means a grade of grain of a given Service Year specified in the Receival (Classification) Standards and Outturn standards of that same Service Year, or any other grade agreed by the Parties.

Grower means any person involved in the growing of wheat, the contact details for whom have been registered by the Client or the Company or a national grower register.

GST Legislation means *A New Tax System (Goods and Services Tax) Act 1999* (Cth) and any related tax imposition Act (whether imposing tax as a duty of customs excise or otherwise) and includes any legislation which is enacted to validate recapture or recoup the tax imposed by any of such Acts.

Indirect or Consequential Loss means indirect, consequential or remote loss or any loss in the nature of compensation for loss of production, loss of profit, loss of opportunity, loss of markets, loss of use of money, goods or other property or loss of goodwill or business reputation, including any losses that the Client may suffer in the event that the ability to resell Bulk Wheat is adversely affected.

Insolvency Event means, in relation to a Party:

- (a) a receiver, receiver and manager, administrator, trustee or similar official is appointed over the whole or a substantial part of the assets or undertaking of the Party and is not removed within 30 days;
- (b) the Party suspends payment of its debts generally;
- (c) the Party is insolvent within the meaning of the Corporations Act;
- (d) the Party enters into or resolves to enter into any arrangement, composition or compromise with, or assignment for the benefit of, its creditors or any class of them;
- (e) an application (other than a vexatious application) or order is made for the winding up or dissolution of, or the appointment of a provisional liquidator to, the Party or a resolution is passed or steps are taken to pass a resolution for the winding up or dissolution of the Party otherwise than for the purpose of an amalgamation or reconstruction which has the prior written consent of the other Party and, in the case of an application, the application is not withdrawn or dismissed within 60 days; or
- (f) an administrator is appointed under Division 2 of Part 5.3A of the Corporations Act and, except in the case of an appointment by the Party or its directors, is not withdrawn or removed within 14 days.

In-Store Transfer means the transfer of ownership of Bulk Wheat held at a Port Terminal Facility from the Client to another person, or vice versa, as recorded in the Company's stock systems.

Other Client means a person that is provided with a storage service at a Port Terminal Facility (other than the Client or a Grower). For avoidance of doubt, the Company or a Related Body Corporate of the Company may be an Other Client.

Outturn means to cause Bulk Wheat to physically leave the custody of the Company at a Port Terminal Facility, and is taken to occur when the Bulk Wheat exits the delivery spout into a shipping vessel at which point physical custody of the Bulk Wheat passes from the Company to the Client or a third party authorised by the Client.

Outturn Entitlement has the meaning given to that term in clause 7.2.

Party means, depending on the context, the Company or the Client.

Port Loading Protocols means the 'Port Loading Protocols' as defined in the Access Undertaking, as amended from time to time in accordance with the procedures prescribed by the Access Undertaking.

Port Schedules has the meaning given to that term in the Access Undertaking.

Port Terminal means, depending on the context, the Company's seaboard terminals at:

- (a) Port Adelaide, Inner Harbour, Berth 27, South Australia;
- (b) Port Adelaide, Outer Harbor, Berth 8, South Australia;
- (c) Port Giles, South Australia;
- (d) Wallaroo, South Australia;
- (e) Port Lincoln, South Australia; or
- (f) Thevenard, South Australia.

Port Terminal Facility has the meaning given to that term in the Access Undertaking and, in respect of a Port Terminal, means those facilities listed and described in the applicable Port Schedule in the Access Undertaking as being the 'Port Terminal Facilities' for that Port Terminal.

Port Terminal Services has the meaning given to that term in the Access Undertaking and, in relation to a Port Terminal, means those of the Wheat Reveal Services, Wheat Storage Services and Wheat Ship Loading Services that the Company provides by using one or more of the Port Terminal Facilities at that Port Terminal.

[Note: This definition has been deleted because it is not used in the Agreement.]

Purchase Options means the various alternative products offered or to be offered to Growers by the Client for the purchase of Bulk Wheat as submitted to and displayed by the Company, subject to and in accordance with such procedures and requirements as the Company may, in its sole discretion, produce and publish from time to time.

Reveal (Classification) Standards means standards that either:

- (a) accord with the industry benchmarks established for Bulk Wheat and are published by the Company prior to the reveal of that Bulk Wheat into a Company Facility, or
- (b) are otherwise agreed with the Client.

Reference Prices means the schedule of prices and price structure for access to each Standard Port Terminal Service for each Service Year published on the Company's web site and as varied from time to time in accordance with the Access Undertaking. In this Agreement, "Reference Prices" includes the Explanatory Notes to the Reference Prices as varied from time to time in accordance with the Access Undertaking.

Related Bodies Corporate has the meaning given to that term in the Corporations Act.

Season means the period in which most of the Bulk Wheat is harvested and delivered to Company Facilities, typically commencing in November in one year and going through to the February of the following year.

Segregation means the physical separation of the storage of Bulk Wheat by type, Grade, variety or such other distinguishing quality as may be determined by the Company.

Service Year means each period from 1 October to the following 30 September during the Term.

Shipping Stem has the meaning given to that term in the Access Undertaking.

Shrinkage means loss in the normal storage and handling process, including loss of mass through changes in moisture content, loss in handling, and Waste. Shrinkage does not include Bulk Wheat lost as Dust.

Standard Port Terminal Services are Port Terminal Services provided under this Agreement in respect of Bulk Wheat.

Standard Terms has the meaning given in Recital C of this Agreement

Tax Invoice has the meaning given in the GST Legislation.

Taxable Supply has the meaning given in the GST Legislation.

Term commences on the Commencement Date and ends on the Expiry Date (unless terminated earlier in accordance with clause 17).

TPA means the *Trade Practices Act 1974 (Cth)*.

Unregulated Services has the meaning given to that term in clause 3 of this Agreement.

Up-Country Receival Facility has the meaning given to that term in clause 3.

Viterra means Viterra Ltd (ABN 59 084 962 130).

Viterra Group Companies means Viterra Australia Pty Ltd, and each of its subsidiaries.

Washout Price has the meaning given in clause 7.13(c).

Waste means Bulk Wheat that, as a result of the normal handling process, has been downgraded to Bulk Wheat of no commercial value (for example, mouldy Bulk Wheat or Bulk Wheat mixed with dirt and stones).

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

Wheat Receival Services means the receival of Bulk Wheat for export from Australia at a Port Terminal by using one or more of the Port Terminal Facilities at that Port Terminal, and involves:

- (a) sampling, testing and classification on delivery;
- (b) weighing on delivery;
- (c) tipping and inward elevation;
- (d) Segregation;
- (e) placing into storage; and
- (f) recording of relevant information.

Wheat Ship Loading Services means the Outturn of Bulk Wheat to a shipping vessel at a Port Terminal for export from Australia by using one or more of the Port Terminal Facilities at that Port Terminal and involves:

- (a) monitoring quality against the Outturn standard;
- (b) blending;
- (c) weighing;
- (d) outward elevation to the ship loader; and
- (e) recording of relevant information.

Wheat Storage Services means the storage of Bulk Wheat for export from Australia at a Port Terminal by using one or more of the Port Terminal Facilities at that Port Terminal and involves:

- (a) storage;
- (b) standard grain protection and maintenance;
- (c) dis-infestation; and
- (d) recording of relevant information.

1.2 Interpretation

Headings are for convenience only and do not affect interpretation. The following rules apply unless the context requires otherwise.

- (a) The singular includes the plural, and the converse also applies.
- (b) A gender includes all genders.
- (c) If a word or phrase is defined, its other grammatical forms have a corresponding meaning.

- (d) A reference to a *person* includes a corporation, trust, partnership, unincorporated body or other entity, whether or not it comprises a separate legal entity.
- (e) A reference to a clause is a reference to a clause of this Agreement.
- (f) A reference to an agreement or document (including a reference to this Agreement) is to the agreement or document as amended, supplemented, novated or replaced.
- (g) A reference to writing includes any method of representing or reproducing words, figures, drawings or symbols in a visible and tangible form but excludes a communication by electronic mail.
- (h) A reference to a party to this Agreement or another agreement or document includes the party's successors, permitted substitutes and permitted assigns (and, where applicable, the party's legal personal representatives).
- (i) A reference to legislation or to a provision of legislation includes a modification or re-enactment of it, a legislative provision substituted for it and a regulation or statutory instrument issued under it.
- (j) A reference to conduct includes an omission, statement or undertaking, whether or not in writing.
- (k) A reference to an *agreement* includes any undertaking, deed, agreement and legally enforceable arrangement, whether or not in writing, and a reference to a *document* includes an agreement (as so defined) in writing and any certificate, notice, instrument and document of any kind.
- (l) A reference to *dollars* and \$ is to Australian currency.
- (m) Mentioning anything after *includes, including, for example*, or similar expressions, does not limit what else might be included.
- (n) A reference to time is a reference to the local time in Adelaide, South Australia (unless otherwise stated).
- (o) Where any matter or thing is required to be attended to or done on a day which is not a Business Day, it will be attended to or done on the next Business Day.
- (p) Measurements of physical quantities are in Australian legal units of measurement within the meaning of the *National Measurement Act 1960 (Cth)*.
- (q) Nothing in this Agreement is to be interpreted against a Party solely on the ground that the Party put forward this Agreement or a relevant part of it.

1.3 Discretions and Approvals

- (a) Whenever the Client is required to form an opinion, give approval, exercise a discretion or perform any act under this Agreement, it must be done reasonably in the circumstances and based on reasonable grounds, and not capriciously, or arbitrarily refused or unduly delayed.
- (b) In making any decision pursuant to this Agreement, the Company will have regard to the efficient running of the relevant Port Terminal Facility and the balancing of the interests of all users of that Port Terminal Facility.

2. Term and application of Agreement

2.1 Commencement, duration and application

- (a) This Agreement:

- (i) commences on 1 October 2011 [*or other date within the term of the Access Undertaking*](**Commencement Date**);
 - (ii) unless terminated earlier under clause 17, but subject to clause 2.2, ends on the following 30 September (**Expiry Date**); and
 - (iii) applies to all Port Terminal Services provided, or deemed to have been provided, by the Company under this Agreement.
- (b) If the Client:
- (i) is provided with any Port Terminal Services on or after the Commencement Date; but
 - (ii) has not executed this Agreement,

the Company will provide the Port Terminal Services on the terms and conditions set out in the Standard Terms. Once concluded between the Parties, this Agreement will be effective from the later of the Commencement Date and the date on which the Client submitted its Access Application in accordance with the Access Undertaking.

2.2 Continued provision of Standard Port Terminal Services

- (a) Unless agreed otherwise by the Company, this Agreement will expire on the 30 September immediately following the Commencement Date. On the expiry of this Agreement, the Company will, in accordance with the Access Undertaking, offer to enter into a new agreement with the Client in respect of the provision of Standard Port Terminal Services provided that the Client meets the Prudential Requirements (as defined in the Access Undertaking).

Any such new agreement issued by the Company after the Expiry Date will also apply to Bulk Wheat of a prior Service Year remaining within the Company's Port Terminal Facilities.

- (b) For the avoidance of doubt, if Bulk Wheat delivered to the Port Terminal Facilities prior to the Commencement Date is held in the Company's storage facilities at the relevant Port Terminal as at the Commencement Date, the terms and conditions in this Agreement (including the current Reference Prices after the Commencement Date) will apply to that previously delivered Bulk Wheat.
- (c) This Agreement supersedes any previous agreement between the Company and the Client for the provision of Port Terminal Services.

3. Acknowledgement of limited application

Despite anything to the contrary contained in, or which in the absence of this clause 3 may be implied into, this Agreement:

- (a) this Agreement applies only to the provision of Standard Port Terminal Services in respect of Bulk Wheat and to the extent regulated by the Access Undertaking;
- (b) where Bulk Wheat is received by the Company at a Company Facility that is not a Port Terminal Facility (**Up-Country Receival Facility**), the services provided by the Company in respect of that Bulk Wheat before it reaches the Port Terminal Facility will not be governed by this Agreement;
- (c) if, for any Service Year, the Client engages the Company to provide receival, transport, storage or outturn services that are not Standard Port Terminal Services (whether because those services are not provided at a Port Terminal Facility, or because they are provided at

a Port Terminal Facility but in respect of grain that is not Bulk Wheat or otherwise) (**Unregulated Services**), then the Unregulated Services will be provided either:

- (i) under any separate agreement that the Company and the Client make for the provision of the Unregulated Services; or
- (ii) otherwise, under the standard terms and conditions that are published by the Company for the provision of Unregulated Services for that Service Year.

4. Port Terminal Services

4.1 Primary obligation of the Company

The Company will provide such of the Standard Port Terminal Services at those of the Port Terminals as the Client may require, on and subject to:

- (a) the terms and conditions of this Agreement; and
- (b) the Port Loading Protocols which form part of this Agreement.

4.2 Availability

Subject to clause 4.3, the Company's obligation to provide a particular Port Terminal Service at a Port Terminal at a point in time is subject to the availability of the Port Terminal Facility required for that Port Terminal Service at that time.

4.3 Capacity management undertakings

The Client acknowledges that there may be capacity constraints in relation to the provision of Port Terminal Services at particular times and that, in managing demand for and in making operational decisions in the course of providing Port Terminal Services, the Company will comply with the capacity management arrangements set out in clause 9 of the Access Undertaking and in the Port Loading Protocols.

5. Wheat Receival Services

5.1 Application of clause

This clause 5 applies in relation to the provision of Wheat Receival Services.

5.2 Receival standards and classification

All wheat that is to be received at a Port Terminal and stored for export by the Company for the Client must comply with the Receival (Classification) Standards. If such wheat has characteristics for which a receival standard is neither published nor agreed, the Company may refuse to receive that wheat. The Company will make current Commodity Classification Manual available to the Client via www.ezigrain.com.au.

5.3 Acceptance of Bulk Wheat from third parties on behalf of the Client

- (a) Before accepting Bulk Wheat at a Port Terminal Facility from a third party for sale to the Client and subsequent storage at the Port Terminal Facility on the Client's behalf, the Company will assess and classify the Bulk Wheat and require the person who has tendered the Bulk Wheat to sign a receival docket setting out, amongst other things, the origin, weight, variety, quality, payment grade, the Purchase Option selected by the person.
- (b) The Company is entitled to treat Bulk Wheat to which clause 5.3(a) applies, as the property of the person who tendered it and has no obligation to the Client in respect of it until the person who has tendered the Bulk Wheat has signed or otherwise signified acceptance of the receival docket.

5.4 Nomination

- (a) The Client must ensure that, whenever Bulk Wheat is delivered by a third party on behalf of the Client, the third party nominates the Client as the owner of the Bulk Wheat and acknowledges that all the third party's right, title and interest to and in the Bulk Wheat is transferred to the Client. The nomination and acknowledgement must be made in writing at the time of the delivery and, once made, it binds the Client and the third party.
- (b) Thereafter, on production of the original of the weighnotes upon which is entered the name of the Client, the Company will enter the name of the Client in its records as owner of the Bulk Wheat without any enquiry as to the title of the Client and will hold the Bulk Wheat for the Client subject to the terms of this Agreement.

5.5 Weighing

- (a) For receipt from road transport at a Port Terminal Facility, the Client authorises the Company to use Company weighbridges to determine the receipt tonnage.
- (b) For receipt from rail transport at a Port Terminal Facility, the Client authorises the Company to use the Company's or the rail service provider's weighbridges (if available), to determine the receipt tonnage.
- (c) The Company will use the receipt weights of site to site movements on all stock records of the Client.
- (d) The Client is bound by the determinations made under clauses 5.5(a) and 5.5(b), and the records of those determinations, in the absence of manifest error.

5.6 Contaminants

- (a) The Client must ensure that all of its suppliers are advised that Bulk Wheat known or suspected to contain chemical contaminants or residues or both must not be delivered to any Port Terminal Facility.
- (b) If any load of Bulk Wheat is found to be contaminated, the Client will not be permitted to deliver to the Port Terminal Facility until the Client has provided the Company with evidence in the form of independent expert verification that there is no further risk of contamination arising from deliveries by the Client to the Port Terminal Facility. This may involve further sample inspections by an independent expert of grain produced or owned by the Client, or an inspection of the vehicles or wagons used by the Client to deliver grain to the Port Terminal Facility. The independent expert must certify to the Company that the contaminant is manageable and removed prior to the Company accepting new deliveries.
- (c) Where Bulk Wheat of any person other than the Client is affected by a contaminant or residue but is nevertheless delivered to a Port Terminal Facility (**Contaminated Delivery**), the Company will not be liable to the Client or to any other person for any loss (including Indirect or Consequential loss), cost, damage or expense suffered or incurred directly or indirectly as a result of that Contaminated Delivery.

5.7 No capacity

Subject to its obligations under clause 4.3, the Company may decline to receive Bulk Wheat for storage on behalf of the Client at a Port Terminal Facility if:

- (a) the export storage capacity allocated to a particular Binned Grade at that Port Terminal Facility is already full; and

- (b) the Client is unable to make additional space available for that Binned Grade by either movement of the Bulk Wheat to another Company Facility or by Outturn of the Bulk Wheat.

5.8 Reservation of Cell

- (a) The Client may at any time request the Company to reserve a Cell for use by the Client.
- (b) The Company has no obligation to accede to a request by the Client to reserve a Cell for the Client. However, if the Company agrees to reserve a Cell, that agreement may be subject to:
 - (i) the Client agreeing to pay, and paying, the Cell reservation fee specified by the Company; and
 - (ii) any time limits on the Cell reservation specified by the Company.
- (c) If the Company agrees to reserve a Cell (and the Client pays the Cell reservation fee), the Company will not, during the reservation period, move the quantity of Bulk Wheat owned by the Client from the relevant Cell without the Client's consent.

5.9 Required Services

In acquiring Wheat Receival Services, the Client must acquire such Port Terminal storage and handling services as the Company, acting reasonably, requires in order to protect the integrity of wheat to be Common Stocked with the Client's wheat and/or to reduce the risk to the Company of quality, safety, health, environmental or hygiene claims, provided that the costs of such services and their applicability are identified in the Reference Prices.

6. Wheat Storage Services

6.1 Application of clause

This clause 6 applies in relation to the provision of Wheat Storage Services.

6.2 Common stock

Unless specifically agreed otherwise, the Company reserves the right to mix (**Common Stock**) the whole or any part of the Client's Bulk Wheat with wheat of the same specification stored on behalf of any Other Clients or other users in a Port Terminal Facility.

6.3 Title

Where the Client's Bulk Wheat is Common Stocked, title to the Common Stocked wheat is held jointly by the Client and the Other Clients and other users whose wheat forms part of the Common Stocked wheat at the applicable Port Terminal Facility.

6.4 Client's interest

- (a) For the purposes of clause 6.3, at any time the Client's interest in the Common Stocked wheat will be equal to that proportion which the quantity of the Client's Bulk Wheat at the time bears to the quantity of that Common Stocked wheat at that time.
- (b) Subject to clause 9.3, the Client does not have the right to nominate any particular parcel or Cell of wheat that is Common Stocked, as being owned by the Client.

6.5 Right to move Bulk Wheat

- (a) The Company reserves the right to either move or swap Bulk Wheat either within a Port Terminal Facility or to another Company Facility if:

- (i) sufficient evidence exists to indicate the quality of the Bulk Wheat or Port Terminal Facility may be adversely affected if the Bulk Wheat remains in any particular location;
 - (ii) the Port Terminal Facility fills (or is expected to fill during the Service Year or Season);
 - (iii) the Company determines (in the Company's reasonable opinion) that it is operationally efficient to move the Bulk Wheat; or
 - (iv) the Client has not provided the Company with evidence of an intention to ship or otherwise outturn the Bulk Wheat from the Port Terminal Facility.
- (b) Any movements described in clause (a) will be at the expense of the Client. The Company will use the then current freight rates published by the Company.

7. Wheat Ship Loading Services

7.1 Application of clause

This clause 7 applies in relation to the provision of Wheat Ship Loading Services.

7.2 Shrinkage, Dust & Outturn Entitlement

- (a) The Client acknowledges and agrees that Bulk Wheat will always suffer Shrinkage and loss from Dust.
- (b) The Company is entitled to deduct from the Client's Bulk Wheat a percentage of wheat on account of Shrinkage and Dust. The net quantity of the Client's Bulk wheat remaining after such deductions is called the Client's Outturn Entitlement ("**Outturn Entitlement**").
- (c) The quantum and method of calculation of the deductions for Shrinkage and Dust is specified in the Reference Prices.
- (d) The Company will own and be at liberty to sell or otherwise deal in the quantity of wheat deducted from the Client's Bulk Wheat for Shrinkage and Dust at any time following receipt of the wheat at a Port Terminal.

7.3 Outturn standards

- (a) Subject to this clause 7.3, Bulk Wheat will be Outturned to the standards prescribed by the Receival (Classification) Standards and in accordance with the Outturn tolerances set out in the Booking Form.
- (b) Without limiting clause 18, the Client indemnifies the Company against all costs, losses, damages and expenses the Company or the Client incurs or sustains as a direct or indirect result of the Company Outturning Bulk Wheat at a standard equal to or exceeding the applicable outturn standard, but which fails to meet any export standards imposed by AQIS or standards imposed by an importing country.
- (c) If, at the request of the Client, the Company undertakes any classification testing at the time of Outturn which is over and above that normally conducted by the Company to ensure Outturned Bulk Wheat meets the minimum standard for the Binned Grade stored, the Company may charge the Client for that classification testing.

7.4 Weighing

- (a) The Client authorises the Company to use batch weighers at the Port Terminal Facility to determine the Outturned tonnage of Bulk Wheat.

- (b) The Client is bound by the determinations made under clause 7.4(a), and the records of those determinations, in the absence of manifest error.

7.5 AQIS sampling

Bulk Wheat will be made available for inspection by AQIS-approved inspectors at the Client's cost prior to Outturning Bulk Wheat onto a nominated shipping vessel.

7.6 Delays

Factors outside the control of the Company (such as variation in vessel arrival times, failure of vessel to pass quarantine, stability and ship worthiness inspections, vessel congestion, variation in cargo requirements, lack of performance of freight providers) mean the Company cannot guarantee all of the Bulk Wheat will be available for loading when the vessel berths and is ready to commence loading. The Company will make reasonable efforts to ensure the Bulk Wheat is available to load without delay and will advise the Client of any potential delays.

7.7 Cleanliness

- (a) The Client is responsible for ensuring that all of its nominated vessels arrive at a Port Terminal Facility in a clean, empty and well maintained state free from any contaminants or residue.
- (b) The Company has no obligation to inspect any vessel for cleanliness, but if it does inspect, then the Company, acting reasonably at all times, is entitled to reject the vessel as unfit for the transportation of Bulk Wheat and to refuse to load the vessel.
- (c) The Company is not liable for any loss, cost, damage or expense (including Indirect or Consequential Loss) caused as a result of a rejection of the vessel (whether by the Company, AQIS or a marine surveyor).
- (d) The Client agrees to pay the Company for any costs incurred by the Company as a result of the rejection of a vessel by the Company, AQIS or a marine surveyor.
- (e) Vessels are not permitted to be cleaned at any Port Terminal Facility without the Company's prior written consent. If a vessel fails inspection, the Company may instruct a vessel to be removed from the berth if it is preventing another vessel from loading at the same berth.

7.8 Port Loading Protocols

- (a) The Port Loading Protocols apply to all nominated (or requested) Outturns of Bulk Wheat, and contain other information in relation to shipping services and requirements in relation to bookings and shipping nominations.
- (b) The Port Loading Protocols are available at www.viterra.com.au and may be varied from time to time in accordance with the Access Undertaking.

7.9 Non-shipment

If Bulk Wheat is not shipped from a Port Terminal Facility as detailed in an accepted nomination (or request) for Outturn due to no fault on the part of the Company, the Client must pay:

- (a) all costs incurred by the Company to reposition Bulk Wheat within the Port Terminal Facility or to remove the Bulk Wheat from the Port Terminal Facility; and
- (b) all vessel variation or cancellation fees and all shipping re-positioning fees.

7.10 Transfers of title

- (a) The Client may elect, by prior written (or electronic) notice to the Company, to effect an In-Store Transfer of all or part of its Outturn Entitlement.

- (b) Subject to clause 7.10(c) the transferee under an In-Store Transfer of an Outturn Entitlement will be entitled to an Outturn without any further reduction for Shrinkage.
- (c) If an In-Store Transfer involves Bulk Wheat being pre-weighed as part of the transfer terms and conditions, an additional Shrinkage amount must be agreed between the parties involved prior to the Company processing the In-Store Transfer. That additional Shrinkage amount will be transferred to the Company's ownership.
- (d) For removal of doubt, the transferor under an In-Store Transfer will remain responsible for payment of all fees and charges in respect of Port Terminal Services provided up until the effective date of transfer.
- (e) The Company may require In-Store Transfers to take place at an individual weighnote level, thus allowing calculations of the value of the Bulk Wheat to be ascertained between the transferor and transferee.
- (f) The Company may refuse to process an In-Store Transfer if the In-Store Transfer results in the transferor's Outturn Entitlement going into a negative position at any particular Company Facility.
- (g) For the purposes of accepting or rejecting an In-Store Transfer, the Company is entitled to rely on orders/instructions:
 - (i) issued by e-mail transmitted from the Client's domain address and purporting to have been sent by an officer of the Client (or such named officers as the Client may from time to time advise the Company in writing); or
 - (ii) executed via the ezigrain™ web site as accessed through entry of the Client's security setting.
- (h) If the Company has acted in accordance with the protocols set out above in this clause 7.10, the Client releases and holds the Company harmless against any claim that a communication was not issued by the Client either at all or without authority and indemnifies the Company against any losses, costs and damages arising therefrom.

7.11 Security interests

- (a) If the Company receives notice from a person claiming to hold a security interest over the Client's wheat, then provided that the person provides reasonable evidence to substantiate the existence of that security interest, the Company is not required to Outturn that wheat until:
 - (i) the person holding the security interest has consented to that Outturn; or
 - (ii) the Company receives a court order requiring it to Outturn that affected wheat.
- (b) The Company reserves the right to charge the Client all reasonable costs which it incurs associated with tracking and maintaining records related to security interests held (or claimed) over wheat.
- (c) The Client will indemnify the Company against all costs, losses, damages and expenses (including without limitation legal costs) the Company incurs or sustains as a result of a claim made against the Company by any person holding a security interest over wheat held by the Company on behalf of the Client relating to that wheat.

7.12 Non-grain commodities

- (a) The Client acknowledges and accepts that the Company may load non-grain commodities at its Port Terminals using the same ship loading facilities as it uses to provide Wheat Ship Loading Services for Bulk Wheat.

- (b) The Company will use reasonable endeavours to ensure that contamination of Bulk Wheat does not occur.

7.13 Reconciliation and adjustment

- (a) This clause 7.13 applies if, after the Outturn of all Bulk Wheat of a Season from all Company Facilities, there is a difference between the Client's Outturn Entitlement and the tonnage actually Outturned to the Client.
- (b) For all Bulk Wheat, unless otherwise agreed, a Season average price will be calculated based on weighted Season average cash prices posted by the Client and all Other Clients over harvest at all Company Facilities. If cash prices are not posted at particular Company Facilities, or are posted with such irregularity that they do not represent the market price (in the opinion of the Company in its sole discretion), then the Company will use the weighted average (major grade and average freight) estimated silo return (ESR) of three pool providers for the Season of delivery as its financial washout value.
- (c) If the actual tonnage Outturned to the Client exceeds the Client's Outturn Entitlement, the Client must pay the Company for the excess at the average price calculated under clause 7.13(b) (**Washout Price**).
- (d) If the actual tonnage Outturned to the Client is less than the Client's Outturn Entitlement, the Company may, at its discretion, either replace the physical Bulk Wheat shortfall in the Client's Outturn Entitlement, or pay the Client for the deficiency in the Outturn Entitlement at the Washout Price.

8. Charges and payment

8.1 Charges

The charges of the Company for the provision of Port Terminal Services will be as set out, or as determined in the manner described, in the Reference Prices.

8.2 Invoicing

The Company will invoice the Client for Port Terminal Services at the times specified in the Reference Prices.

8.3 Payment

The Client must pay the Company the full amount of an invoice within such period as specified in the Reference Prices.

8.4 No obligation to extend credit

If in the provision of Port Terminal Services the Company will be exposed to a risk that the Client does not pay for any of those services when due and payable ("**credit risk**") the Company is not obliged to provide those services unless and until the Company, acting reasonably, is satisfied either by requesting Credit Support or by independent credit checks or otherwise that the Client is credit-worthy in respect of the credit risk.

8.5 No set off

The Client is not entitled to withhold payment of any disputed amount the subject of an invoice issued by the Company, or to set off against the amount of an invoice any other claim that it has against the Company.

8.6 Transfer of liability

If the Client purchases Bulk Wheat which is already warehoused or is or has been stored, handled or treated by the Company, and there are unbilled and/or unpaid fees and charges in respect of the Bulk Wheat for any period or for anything done prior to the purchase, then the Client is liable for

these fees and charges and must pay them to the Company, unless otherwise agreed with the Company.

8.7 GST

- (a) If GST is payable by the Company in respect of any Taxable Supply to the Client under this Agreement, the Client must pay any such GST (in addition to any other amounts payable under this Agreement).
- (b) The Company will provide the Client with a tax invoice that complies with the GST Legislation.
- (c) All fees and charges payable under this Agreement are expressed exclusive of GST.

8.8 Default in payment

If the Client fails to make payment of an invoice in accordance with this clause 8, then:

- (a) all existing invoices will become immediately due and payable; and
- (b) the Company may, in its absolute discretion, suspend the provision of any or all Port Terminal Services until such time as all outstanding invoices have been paid.

8.9 Interest on late payments

If default is made by the Client in the due payment of any monies payable under this Agreement, then although no demand for payment may have been made, the amount in respect of which such default is made or so much thereof as may from time to time remain unpaid, will bear simple interest at the rate of interest being 3% higher than the Commonwealth Bank's Corporate Overdraft Reference Rate from time to time, calculated on a daily basis from the due date to the date of actual payment in full.

8.10 Security

- (a) The Client will, if required by the Company, provide Credit Support in respect of its obligations under this Agreement.
- (b) Any Credit Support required by the Company must be established:
 - (i) prior to the Company receiving Bulk Wheat from the Client; and
 - (ii) within 7 days after it has been requested by the Company.
- (c) If the Client defaults, the Company may call up, draw on, use, appropriate and apply the whole or part of the Credit Support as may be necessary in the opinion of the Company to compensate the Company for loss or damage suffered by the Company by reason of the Client's default, and:
 - (i) any use or appropriation of the Credit Support by the Company does not operate to waive the default and does not affect the Company's other rights; and
 - (ii) if the Credit Support or any part of it is used or appropriated by the Company, the Client must within 7 days from receipt of a request by the Company pay to or deposit with the Company new or additional Credit Support in a form and for an amount as specified by the Company.
- (d) On termination of this Agreement and if the Client has complied with this Agreement, the Credit Support less any sums drawn on, used or appropriated by the Company and not reinstated by way of further security, must be refunded, returned or cancelled.

8.11 Additional Costs

- (a) The Company may vary the Reference Prices which apply under this Agreement at any time by providing 30 days notice in writing to the Client if:
 - (i) there is a change to any Commonwealth, State or local laws; or
 - (ii) any new laws come into effect (including, without limitation, in relation to any potential carbon tax, Carbon Pollution Reduction Scheme or any similar emissions trading scheme),

after the date of this Agreement which results in a direct or indirect increase in the Company's costs in providing the Port Terminal Services under this Agreement. The Company will be entitled to increase the Reference Prices payable by the Client for Port Terminal Services provided under this Agreement to recover the full amount of the increased direct or indirect costs referable to the provision of the Port Terminal Services to the Client at the relevant Port Terminal.

- (b) If the Company increases the Reference Prices in accordance with clause 8.11(a), the Company will (if requested) provide the Client with information to demonstrate the increase in costs at the relevant Port Terminal.

9. Title to Wheat

9.1 Bailment

Unless specifically agreed otherwise, the Company acts as a bailee of the Client's Bulk Wheat and does not have any title or ownership in that Bulk Wheat.

9.2 Company's right

Subject to clause 9.3, where the Client's Bulk Wheat is Common Stocked, the Company may nominate and identify any particular quantity of Bulk Wheat within a site comprising the Common Stocked Bulk Wheat as being the Client's Bulk Wheat for the purposes of this Agreement, including, for the purposes of Outturn at the direction of the Client, sale by the Company in exercise of its lien over the Bulk Wheat, allocation of Accidental Loss or Damage between the Client and Other Clients, and the payment of compensation for Accidental Loss or Damage.

9.3 Insolvency

- (a) Where the Company suffers an Insolvent Event the Client will be entitled, upon reasonable notice and subject to the provisions of this Agreement relating to Common Stock, to re-take possession of the Client's Bulk Wheat from the site at which the Client's Bulk Wheat is located.
- (b) Nothing in this clause 9.3 will be taken as limiting the Client's rights to the Outturn of the Client's Bulk Wheat in accordance with this Agreement.

10. Lien

10.1 Company's lien

The Company will have a first and paramount lien on the Client's Bulk Wheat for all monies due and payable (on any account whatsoever) by the Client to the Company under this Agreement or otherwise, or to any other Viterra Group Company.

10.2 Common stock

Where the Client's Bulk Wheat is Common Stocked with other wheat, the Company may nominate and identify any particular quantity of wheat comprising the Common Stocked wheat as being the Client's Bulk Wheat for the purposes of enforcing its lien.

10.3 Retention of possession

Subject to any requirement of law, the Company will be entitled, for the purpose of enforcing such lien, to retain possession of the whole or any part of the Client's Bulk Wheat until all amounts due and payable are paid, or to sell all or any of the Client's Bulk Wheat in such manner as it thinks fit (after giving the Client at least 7 days prior notice) whereupon the proceeds of such sale will be applied in or towards the satisfaction of the moneys due to the Company and the costs of effecting the sale, and the balance (if any) will be paid by the Company to the Client. Where the Company sells all or any of the Client's Bulk Wheat for the purpose of enforcing its lien, the Client irrevocably appoints the Company as its agent and attorney.

10.4 Enforcement against others

In enforcing a lien in respect of any Other Client's Bulk Wheat, the Company will ensure that its actions do not affect the right of the Client to receive the Outturn Entitlement under this Agreement.

11. Compliance with operational protocols

11.1 Obligation of Client

- (a) The Client must comply at all times with all policies, procedures and induction requirements published by the Company from time to time in respect of the operation, management and control of its facilities, including those in relation to:
 - (i) health, safety and environment;
 - (ii) site rules;
 - (iii) labour ordering conditions for shipping;
 - (iv) operating conditions for the Company's rail facilities; and
 - (v) access and operating conditions for road movements at Company facilities, and must comply with all reasonable directions of the Company.
- (b) Whilst on a Company site, the Client (and its agents) must comply with all directions given by the Company's representative, and not create or bring on site any hazard or contamination.

11.2 Publication

For the purpose of clause 11.1, the Company may publish a policy, procedure or induction requirement, or any direction, by placing it on its website.

12. Information

12.1 Company's information

- (a) The Company will keep at its principal place of business proper complete and up to date records, books of account and documents relating to transactions in the Client's Bulk Wheat, and such books of account records and documents will be available for inspection by officers of the Client at any reasonable time upon request in writing. Nothing in this clause 12.1(a) will be taken as requiring the Company to disclose the identity, transactions or ownership interests of Other Clients.

- (b) All information provided to the Client will be treated as conclusive evidence of the correctness of the details set out in that information unless:
 - (i) the Client notifies the Company in writing within 14 days of receipt of that information that there exists a bona fide dispute concerning the correctness of that information; or
 - (ii) it is demonstrated at any time that there is a clear and manifest error in that information.

A notice served by the Client under paragraph (i) above, must set out in detail the reasons why the Client believes the information is incorrect and the basis for holding that belief.

12.2 Client's information

- (a) The Client must provide the Company with all information that the Company reasonably requires for the Company to properly record the receipt of Bulk Wheat from, or to the account of, the Client, including information relating to:
 - (i) origin, quality, quantity, weight, type and variety; and
 - (ii) anticipated time and place of delivery.
- (b) If required by the Company, the Client must provide the information in writing and in the form (if any) required by the Company.

13. Company's Liability

13.1 Acknowledgement

The Client acknowledges that the only warranties provided by the Company under or in respect of this Agreement are those expressly set out in this Agreement. To the maximum extent permitted by law, all other conditions implied by custom, general law or statute are excluded.

13.2 Non-excludable warranties

To the maximum extent permitted by law, the Company's liability for breach of implied warranties or conditions not permitted at law to be excluded, will be limited to the cost of re-supplying the relevant service again.

13.3 Limitations on Company's liability

The Company's obligation to Outturn the Client's Bulk Wheat is modified by the following provisions of this clause:

- (a) the Company is only liable for damage, destruction or contamination by the Company of the Client's Bulk Wheat if that damage, destruction or contamination is caused by the gross negligence or wilful default of the Company or its employees, contractors or agents;
- (b) the liability of the Company to the Client for any such damage, destruction or contamination of Bulk Wheat, if caused by gross negligence or wilful default will not exceed the sum of \$250,000 (two hundred and fifty thousand dollars) per event or per series of related events;
- (c) the Company is not liable for Accidental Loss or Damage to the Client's Bulk Wheat.
- (d) notwithstanding any other provision of this Agreement, but subject to any extraneous agreement in writing between the Parties to the contrary, the Company will not be liable for any of the following:
 - (i) claims for Indirect or Consequential Loss;

- (ii) defects that:
 - (A) are required to be examined by the responsible authority under the provisions of the *Export Control Act 1982 (Cth)*; or
 - (B) the Client has taken responsibility for testing prior to shipment, and are not discovered until after the departure of the ship;
- (iii) quality or quantity claims in respect of a shipment arising upon outturn at a vessel's destination, if the claims are inconsistent with the records of quantity and quality at the load port and there is no conclusive evidence that such load port records are incorrect or unreliable;
- (iv) failure by the Company to detect toxic residues, other chemical residues, genetically modified Bulk Wheat or any other contamination, the tests for detection of which are not in general use by the Company or have been advised by the Company to be unreliable relative to the required tolerances;
- (v) except to the extent caused or contributed to by the gross negligence or wilful default of the Company or its employees, contractors or agents:
 - (A) quality claims arising in respect of Bulk Wheat transferred into the Company's storage system from another storage system; or
 - (B) downgrading claims in respect of Bulk Wheat blended by the Company at the request of the Client, provided the quality meets the outturn standards of the lowest value grade represented in the blend.

13.4 Multiple caps on liability

If the Company is liable to the Client in relation to an event or a series of related events in respect of which the Company's liability is capped:

- (a) under this Agreement; and
- (b) under one or more other agreements made between the Company and the Client,

then the Company's liability in aggregate under all of the agreements described in paragraphs (a) and (b) above (**Capped Agreements**) is capped at the greatest amount at which liability is capped under any one of the Capped Agreements.

13.5 Mitigation

The Company may, in its discretion, mitigate or satisfy any liability it may have to the Client in respect of downgraded Bulk Wheat (ie Bulk Wheat that does not meet the Outturn standard required under this Agreement) by whatever means the Company considers appropriate, including:

- (a) blending (at the Company's expense) a sufficient quantity of other wheat so as to upgrade the Client's Bulk Wheat to meet the Outturn standard; and/or
- (b) substituting (at the Company's expense) other wheat of the same quality and quantity; and/or
- (c) retaining the downgraded Bulk Wheat and providing for the claim as part of the Outturn adjustment under clause 7.13.

14. Insurance and Risk

14.1 Risk

Consistent with clause 9.1, the risk of Accidental Loss or Damage to the Client's Bulk Wheat will, at all times, be borne by the Client.

14.2 Maintenance of insurance

The Client must during the Term maintain an insurance policy covering the common insurable risks of Accidental Loss or Damage to Bulk Wheat at a Port Terminal.

15. Force Majeure

15.1 Definition

For the purpose of this Agreement, a '**Force Majeure Event**' affecting a Party means anything outside that Party's reasonable control including the following events or circumstances (provided they are beyond the Party's reasonable control):

- (a) accident, fire, adverse weather conditions, flood, tidal conditions, earthquake, explosion, or like natural disasters, blockages of ports, civil commotion, outbreak of hostilities, terrorist act, declaration of war, war, invasion, rebellion, epidemic, or declarations of a state of emergency;
- (b) strikes, stopworks, lockouts, boycotts or any other form of industrial dispute or labour shortage;
- (c) breakdown, accidental or malicious damage or destruction of any of the Company's Port Terminal Facilities or other Company Facilities;
- (d) failure, disruption or delay in transportation;
- (e) executive or administrative order or act of either general or particular application of any Government or any official purporting to act under the authority of that Government, prohibitions or restrictions by domestic or foreign laws, regulations or policies, quarantine or custom restrictions or prohibitions on export; and
- (f) acts or omissions of any third party (including without limitation Governments, Government agencies, subcontractors or customers).

15.2 Suspension of Obligations

If a Party is wholly or partially precluded from complying in the normal manner required by this Agreement with its obligations under this Agreement by a Force Majeure Event (in this clause 15 called the **Affected Party**), then the Affected Party's obligations to perform in accordance with the terms of this Agreement will be suspended for the duration of the Force Majeure Event. (As per clause 15.6, the payment of money is not an obligation that can be suspended by a Force Majeure Event under this Agreement.)

15.3 Notice

As soon as possible after the Force Majeure Event arises, the Affected Party must notify the other Party of:

- (a) the nature of the Force Majeure Event;
- (b) the cause of the Force Majeure Event;
- (c) which obligations the Affected Party believes it is wholly or partially precluded from complying with as a result of the Force Majeure Event (in this clause 15 called the **Affected Obligations**);

- (d) the extent to which the Force Majeure Event precludes the Affected Party from performing the Affected Obligations;
- (e) the expected duration of the delay arising as a result of the Force Majeure Event;
- (f) the steps that are being taken to minimise the impact of the Force Majeure Event; and
- (g) the steps which would be taken (subject to the Parties reaching an agreement as to the payment of any additional costs involved) to minimise the impact of the Force Majeure Event.

15.4 Minimisation of Impact

Upon receiving a notice under clause 15.3 the Parties will meet to discuss and agree:

- (a) what action can be taken to minimise the effect of the Force Majeure Event on the performance by the Affected Party of the Affected Obligation;
- (b) whether the Affected Party is able to work around the Force Majeure Event either to prevent the delay in the performance of the Affected Obligations or to minimise the impact of that delay; and
- (c) what modifications or additions to the terms of this Agreement or any other agreements between the Parties (including without limitation any modifications or additions relating to the appointment of any additional costs) are required to give effect to any proposal to minimise the effect of the Force Majeure Event.

15.5 Obligation to Mitigate

The Affected Party must:

- (a) keep the other Party fully informed of its plans to minimise the effect of the Force Majeure Event; and
- (b) subject to reaching agreement concerning any modifications or additions required to give effect to any proposal to minimise the effect of the Force Majeure Event:
 - (i) comply with all reasonable requests made by the other Party relating to the prevention or minimisation of the impact of the Force Majeure Event; and
 - (ii) use all reasonable endeavours to resolve, and minimise the impact of, the Force Majeure Event.

15.6 Payments

An obligation to pay money is never excused by a Force Majeure Event.

15.7 Labour Disputes

The requirement to use all reasonable endeavours to resolve or minimise the impact of the Force Majeure Event will not require either Party to settle any strike, lockout, boycott or other dispute or claim, or any demand by a third party, on the terms contrary to the wishes of that Party.

16. Dispute Resolution

16.1 Disputes

Any Dispute under this Agreement will, unless otherwise expressly agreed to the contrary by both parties, be resolved in accordance with this clause 16 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 16. The Company and Client must act in good faith to seek to resolve any Dispute in accordance with this clause 16.

16.2 Negotiation

Within 5 Business Days of a party giving the other 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.

16.3 Mediation

- (a) If the Dispute is not resolved in accordance with clause 16.2 within 5 Business Days of the date the Dispute Notice is received by the recipient, then:
 - (i) if the parties agree, they will attempt to resolve the Dispute by mediation pursuant to this clause 16.3; 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 without limiting clause 16.4(a)) refer the Dispute to be determined by arbitration under clause 16.4.
- (b) If the parties agree to attempt to resolve the Dispute by mediation, the Dispute will be referred to the chief executive officer of the Client and the Executive Manager Grain Division of the Company (or their respective delegates) who will attempt to resolve the Dispute, including by informal mediation.
- (c) If the Dispute is not resolved within 5 Business Days after being referred to the persons specified in clause 16.3(b) (or such longer period as is agreed between those persons or their delegates), the Dispute will be referred to formal mediation in South Australia.
- (d) A Dispute referred to mediation in accordance with clause 16.3(c) will be mediated by a single mediator appointed by agreement of the parties or, if they fail to agree within 3 Business Days, a mediator appointed by the President of the South Australian Chapter of the Institute of Arbitrators and Mediators of Australia (“**IAMA**”) acting on the request of either party.
- (e) Unless the parties agree otherwise:
 - (i) the mediation, by either a mediator appointed by the parties or a mediator appointed by the President of the South Australian Chapter of IAMA, will be conducted 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;
 - (iv) the costs of the mediator will be borne equally by the parties; and
 - (v) the Company and the Client will use reasonable endeavours to ensure that the mediation is completed within 28 Business Days from the date the mediator is appointed, or such longer period as agreed between the parties.

16.4 Referral to arbitration

- (a) Notwithstanding any other provision of this Agreement, a party may, by notice in writing to the other (“**Arbitration Notice**”), refer a Dispute to arbitration in accordance with this clause 16.4 at any time following the issue of a Dispute Notice. The Arbitration Notice must specify:
 - (i) the nature of the Dispute;
 - (ii) the matters in respect of which the party is seeking arbitration; and

- (iii) the contact details of the person issuing the Dispute Notice.
- (b) If the Dispute referred to in the Arbitration Notice is already the subject of mediation in accordance with clause 16.4, that mediation will cease immediately.
- (c) Any arbitration will be conducted in accordance with clause 16.5.

16.5 Appointment of arbitrator

- (a) The parties must use their best endeavours to agree on an arbitrator within 7 Business Days of the recipient receiving an Arbitration Notice.
- (b) If the parties fail to agree an arbitrator within 7 Business Days of the expiry of the 5 Business Days referred to in clause 16.6(a), or such longer period as may be agreed by the parties, then either party may request the President of IAMA to appoint an arbitrator. The Company will notify the ACCC of the identity of the arbitrator within 2 Business Days of the parties agreeing on the arbitrator or the President of IAMA appointing the arbitrator (as the case requires).

16.6 Arbitration

- (a) Any arbitration will be conducted in Adelaide in accordance with the following procedures:
 - (i) the arbitrator will not be required to proceed with the arbitration unless and until the party that issued the Arbitration Notice has agreed to pay the arbitrator's and other costs as determined in accordance with clause 16.6(d) and provided any indemnity as required in accordance with clause 16.6(e);
 - (ii) unless the parties to the Dispute agree otherwise, the arbitration will be conducted in private;
 - (iii) a party may appoint a person, including a legally qualified person, to represent it or assist in the arbitration;
 - (iv) the arbitrator must observe the rules of natural justice, but is not bound by technicalities, legal forms or rules of evidence;
 - (v) the arbitrator must act as speedily as a proper consideration of the Dispute allows, having regard to the need to carefully and quickly enquire into and investigate the Dispute and all matters affecting the merits, and fair settlement, of the Dispute;
 - (vi) the arbitrator may determine the periods that are reasonably necessary for the fair and adequate presentation of the respective cases of the parties to a Dispute, and may require that the cases be presented within those periods;
 - (vii) the arbitrator may require evidence or argument to be presented in writing, and may decide the matters on which it will hear oral evidence or argument;
 - (viii) the arbitrator will hand down a final determination in writing which includes its reasons for making the determination and findings on material questions of law and fact, including references to evidence on which the findings of fact were based;
 - (ix) unless the parties to the Dispute agree otherwise, any determination by the arbitrator will be confidential; and
 - (x) in deciding a Dispute, the arbitrator must not, without the consent of all parties, make a determination which relates to matters which were not specified in the Arbitration Notice.

- (b) The arbitrator may at any time terminate an arbitration (without making an award) if it thinks that:
 - (i) the notification of the Dispute is vexatious; or
 - (ii) the subject matter of the Dispute is trivial, misconceived or lacking in substance.
- (c) A determination or direction of the arbitrator will be final and binding, subject to any rights of review by a court of law, and will have effect on and from the date specified by the arbitrator.
- (d) 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 the arbitrator's costs determination
- (e) The arbitrator may require the parties to indemnify it from any claims made against the arbitrator arising in connection with the performance by the arbitrator of its duties under this clause 16.6, such indemnity excluding circumstances where the conduct of the arbitrator constitutes negligence (whether wilful or otherwise), dishonest or unlawful conduct.
- (f) The Company will send a copy of any determination made by the arbitrator to the ACCC within 2 Business Days of the determination being made.
- (g) Subject to this clause 16.6, the *Commercial Arbitration and Industrial Referral Agreements Act 1986* (SA) will apply to any arbitration undertaken in accordance with this clause 16.6.

16.7 Status quo

During any Dispute resolution process, the pre-dispute status quo will continue. Accordingly:

- (a) each Party will comply with its obligations, and may exercise its rights under this Agreement; and
- (b) the fact that a Party ceases to do anything in Dispute will not be taken to be an admission by that Party that it had breached, or had been in breach of, this Agreement.

17. Termination

17.1 Right to terminate

This Agreement may be terminated by either Party giving to the other at least 3 months prior written notice (“**Notice**”).

17.2 Effect

- (a) Where a Notice is given by the Client, the Notice will not take effect unless and until the Client has:
 - (i) Outturned all Bulk Wheat stored by the Company on behalf of the Client under this Agreement; and
 - (ii) paid all moneys payable by the Client to the Company under this Agreement.
- (b) Where a Notice is given by the Company and, as at that date the Notice is to take effect, the Client has not Outturned all Bulk Wheat stored by the Company on behalf of the Client under this Agreement, then the Company will be entitled to exercise the rights conferred on it by clause 10 of this Agreement.

- (c) Any termination of this Agreement by the Company in accordance with clause 17.1 does not affect the Company's obligation to negotiate the terms of access to Port Terminal Services in accordance with the Access Undertaking.

17.3 By Company

- (a) The Company may terminate this Agreement immediately upon giving written notice in that regard to the Client if an Insolvency Event occurs in respect of the Client.
- (b) If the Client commits a serious or persistent breach or breaches of any terms of this Agreement, provided the Company presents the Client with a written notice specifying the breach or breaches and requires the Client to remedy it within a period of not less than 30 days, then if the Client does not remedy the breach or breaches within the time period stipulated in this clause, the Company may terminate this Agreement at any time by notice in writing to the Client.

17.4 No prejudice

Termination of this Agreement under this clause 17 is without prejudice to the rights of either Party that have accrued prior to the date of termination.

18. Indemnity

18.1 By Client

The Client will indemnify the Company and keep the Company indemnified from and against all actions, claims, demands, proceedings, losses, costs and expenses suffered or incurred by the Company arising directly or indirectly out of or in relation to:

- (a) any breach, non-observance or non-performance by the Client of any of its obligations under this Agreement;
- (b) any claim by a third party relating to the Bulk Wheat;
- (c) any claim by a third party relating to the operation of the Purchase Options or the involvement of the Company in relation to the Purchase Options, including claims arising out of the failure of the Client to provide information or the inaccuracy of information supplied by the Client in relation to the Purchase Options; or
- (d) any claim in relation to the admixture of Bulk Wheat with small quantities of any other commodity loaded by the Company at any one of its Port Terminals in circumstances where the Client has acknowledged that the Company will load non-grain commodities at its Port Terminals. The Client acknowledges that, in these circumstances, the potential admixture of Bulk Wheat with small quantities of other commodities is a risk inherent in using Port Terminals which are also used to load non-grain commodities.

18.2 Application

Clause 18.1 will not apply where and to the extent that explicit written service guarantees have been given by the Company to the Client, or the losses or damages arose as a direct result of any negligence on the part of the Company or any wilful or deliberate failure by the Company to comply with its obligations under this Agreement.

19. Notices

19.1 How to Give a Notice

A notice, consent or other communication under this Agreement is only effective if it is:

- (a) in writing, signed by or on behalf of the Party giving it;

- (b) addressed to the Party to whom it is to be given; and
- (c) either:
 - (i) delivered or sent by pre-paid mail (by airmail, if the addressee is overseas) to that Party's address;
 - (ii) sent by fax to that Party's fax number and the machine from which it is sent produces a report that states that it was sent in full; or
 - (iii) by e-mail addressed to the person for the time being occupying the position with the receiving Party specified in clause 19.3.

19.2 When a Notice is Given

A notice, consent or other communication that complies with this clause is regarded as given and received:

- (a) if it is sent by mail, on the third Business Day after posting;
- (b) if it is delivered or sent by fax:
 - (i) by 5.00 pm (local time in the place of receipt) on a Business Day, on that day; or
 - (ii) after 5.00 pm (local time in the place of receipt) on a Business Day, or on a day that is not a Business Day, on the next Business Day; and
- (c) if it is sent by e-mail, on the day of receipt by the recipient and, if the recipient is absent from his or her usual place of work for more than one day after the date of transmission, the day that the recipient returns to work.

19.3 Address for Notices

A Party's address and fax number are those set out below, or as amended at any time by notice given in accordance with this clause 19:

Company

Address: Grain House 124 –130 South Terrace, Adelaide, SA 5000

Postal: GPO Box 1169, Adelaide, SA 5001

Fax Number: (08) 8212 1723

Attention: Urgent: General Manager Commercial and Compliance

Client

Address: _____

Postal: _____

Fax Number: _____

Attention: _____

20. Confidentiality

20.1 Treatment of Confidential Information

- (a) subject to clause 20.1(b), if a Party provides Confidential Information to another Party either:
 - (i) during the course of negotiations in relation to this Agreement; or

(ii) for the purpose of resolving any Dispute,

the recipient of that Confidential Information will treat that Confidential Information as confidential, the property of the provider of that information, and will use that information solely for the purpose of negotiating this Agreement or resolving any Dispute in accordance with this Agreement.

(b) A Party is permitted to disclose Confidential Information:

(i) to the extent necessary for the provision of advice from legal advisers, financiers, accountants or other consultants or professional advisers, provided they are under a legal obligation not to disclose the Confidential Information to any third party;

(ii) to any mediator or arbitrator appointed in accordance with clause 16 of this Agreement for the purposes of that mediation or arbitration;

(iii) to the ACCC to the extent necessary for a party to comply with any written request by the ACCC (subject to the ACCC's standard confidentiality protocols and procedures); or

(iv) if and to the extent required by law, provided that it first consults with the party that provided the Confidential Information in relation to the manner and timing of that disclosure.

20.2 Dispute resolution

(a) If Confidential Information is provided to a mediator or arbitrator for the purpose of assisting in the resolution of any Dispute in accordance with clause 16, the mediator or arbitrator must (and the terms of appointment of the mediator or arbitrator must require them to) take all reasonable steps to protect the confidentiality of information that any party to the Dispute has identified as confidential or commercially sensitive;

(b) For the purpose of clause 20.2, any arbitrator appointed in accordance with clause 16 may require the parties to a Dispute to comply with rules and orders aimed at protecting the confidentiality of information provided by the parties, including:

(i) requiring each party and their advisers to give confidentiality undertakings to each other party; and

(ii) limiting access to Confidential Information to specified individuals subject to confidentiality undertakings provided by those individuals.

(c) Any arbitrator appointed in accordance with clause 16 may make confidential and non-confidential versions of its determination and limit access to the confidential versions to specific individuals.

21. No endorsement

21.1 Prohibition

The Client must not, without the prior written consent of the Company:

(a) make any reference, comment or statement either written or oral, that could be construed as an endorsement by the Company of the Client or of the Client's products or services; or

(b) refer to the Company or the services provided by the Company to the Client in any publication, promotional or advertising material.

21.2 Acknowledgements

The Client acknowledges that:

- (a) the Company will treat the obligation of the Client under clause 21.1 as a serious undertaking; and
- (b) it is aware that any breach of this serious undertaking may result in the Company suffering damage.

22. No assignment

The Client may not assign, transfer or otherwise dispose of all or any part of its rights or obligations under this Agreement without the prior written consent of the Company which, if given, may be given on such conditions as the Company considers to be appropriate.

23. Waiver

23.1 No impact

The failure by either Party at any time to exercise or enforce any of its powers, remedies or rights under this Agreement will not constitute a waiver of those powers, remedies or rights or affect that Party's rights to exercise or enforce those powers, remedies or rights at any time.

23.2 Further exercise

Any single or partial exercise of any power, remedy or right does not preclude any other or further exercise or partial exercise of any other power, remedy or right under this Agreement.

24. No Partnership

24.1 Relationship

This Agreement does not create a partnership, agency, fiduciary or any other relationship, except the relationship of contracting parties, between the Parties.

24.2 No liability

No Party is liable for an act or omission of another Party, except to the extent set out in this Agreement.

25. Governing Law and Jurisdiction

25.1 Governing law

This Agreement and the rights and liabilities of the Parties under this Agreement will be governed by the law of South Australia.

25.2 Jurisdiction

The courts of South Australia will possess territorial jurisdiction to hear and determine any cause of action arising under this Agreement.

26. Sub-Contracting

The Company may in its sole and absolute discretion:

- (a) sub-contract the provision of the whole or any part of the Port Terminal Services; or
- (b) otherwise engage any person to undertake the provision of any part of the Port Terminal Services on the Company's behalf,

without notice to the Client.

27. Severance

Any provision of this Agreement which is unenforceable or partly unenforceable is, where possible, to be severed to the extent necessary to make this Agreement enforceable, unless this would materially change the intended effect of this Agreement.

28. Entire agreement, etc

28.1 Entire agreement

This Agreement constitutes the entire Agreement between the Parties.

28.2 No representations, etc

Each Party warrants and covenants to the other that there are no written or oral statements, representations, undertakings, covenants or agreements between the Parties, express or implied, except as provided for in this Agreement.

28.3 Variations

This Agreement may only be amended or varied by agreement in writing signed by both Parties expressly amending this Agreement and unless the context otherwise requires, a reference to this Agreement will include a reference to this Agreement as amended or varied from time to time.

28.4 Guidelines, etc

Notwithstanding that the Company may from time to time produce operational guidelines to assist clients, nothing in those guidelines will be deemed to impliedly or expressly amend anything in this Agreement and if there is any inconsistency between any guidelines and a term of this Agreement, the terms of this Agreement will prevail.

Signing page

EXECUTED as an agreement.

Signed for and on behalf of
Viterra Operations Limited by its authorised
representative in the presence of:

Witness ←

Authorised Representative ←

Name of witness (print)

Name of authorised representative (print)

Executed by **[Client]** ACN **[xxx xxx xxx]**
pursuant to section 127 of the *Corporations Act*
2001

Signature of director ←

Signature of director/company secretary
(Please delete as applicable) ←

Name of director (print)

Name of director/company secretary (print)