



**CO-OPERATIVE BULK HANDLING LIMITED**  
(ABN 29 256 604 947)

# **PORT TERMINAL SERVICES AGREEMENT**

FOR

**Standard Port Terminal Services**

PROVIDED TO

**XXX**  
(ABN XXX)

**2013/2014**

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**THIS AGREEMENT** dated [                      ]

**BETWEEN:**

**CO-OPERATIVE BULK HANDLING LIMITED**  
(ABN 29 256 604 947)  
of Gayfer House, 30 Delhi Street, West Perth WA 6005  
("**CBH**")

**AND**

**XXX**  
(ABN xxx)  
of 'insert address'  
("**Customer**")

## **RECITALS**

- A. CBH operates Port Terminal Facilities in Western Australia.
- B. CBH provides its Customers with Port Terminal Services for the export of Bulk Wheat under the terms of its Undertaking.
- C. The Customer purchases Bulk Wheat and wishes to utilise the Services.
- D. CBH has agreed to provide the Customer with the Services pursuant to the terms and conditions of this Agreement.
- E. The Customer has agreed to the terms and conditions of this Agreement and will remunerate CBH for its provision of the Services in accordance with the terms of this Agreement.

## **THE PARTIES AGREE AS FOLLOWS:**

### **1 COMMENCEMENT AND TERMINATION**

#### **1.1 Commencement**

- (a) This Agreement will apply to Services provided by CBH in relation to Capacity acquired for the purposes of shipping Bulk Wheat for a period of a year commencing 1 November to 31 October of the following year ("**End Date**"), unless otherwise agreed in writing between CBH and the Customer.
- (b) The terms and conditions set out in this Agreement shall be deemed to be accepted by the Customer if the Customer utilises any of the Services contained in this Agreement notwithstanding the fact that the Customer has not executed this Agreement.

#### **1.2 General Termination**

This Agreement will terminate on the End Date (unless otherwise agreed in writing between CBH and the Customer) and the Customer must ensure that prior arrangements are made to Outturn all Bulk Wheat held by CBH prior to this date.

#### **1.3 Immediate Termination**

- (a) CBH may terminate this Agreement by notice to the Customer with immediate effect if:
  - (i) the Customer commits a Material Breach of this Agreement;
  - (ii) an Insolvency Event occurs; or
  - (iii) the Customer repudiates the Agreement.
- (b) If the Agreement is terminated under clause 1.3(a), CBH may require that all the Customer's Bulk Wheat be Outturned as soon as possible following termination, and the

Customer's obligations under this Agreement will continue until all Bulk Wheat has been Outturned.

#### 1.4 Survival of Terms

Clauses 5.5, 9, 10, 13, 15, 18, 20, 21, 23, 24 and 25 shall survive the termination of this Agreement.

## 2 DEFINITIONS

In this Agreement:

**"ACCC"** means the Australian Competition and Consumer Commission.

**"Accredited Wheat Exporter"** means a person having accreditation as an accredited wheat exporter under the WEAS or, if the requirement to obtain accreditation under the WEMA and WEAS is removed at any time during the term of the Undertaking, means a person otherwise entitled to export Bulk Wheat.

**"Accumulation Plan"** means a plan for the delivery of grain to a Port Terminal Facility in order to accumulate a cargo for shipping.

**"Acquirer"** means a person who has been nominated as the buyer of grain being delivered to a site owned, operated or managed by CBH for the purposes of receiving or storing grain throughout Western Australia, provided that person has entered into a Grain Service Agreement for the current Season.

**"Additional Storage Charges"** mean the charge with that description prescribed in the Fees and Charges Schedule.

**"Adjustment Note"** includes any document or record treated by the Commissioner of Taxation as an adjustment note or as enabling the claiming of an input tax credit for which an entitlement otherwise arises.

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

**"Arrived"** **"Arrives"** and **"Arrival"** means the time at which a vessel arrives at the waiting area designated from time to time by the relevant port authority for the Port Terminal Facility (whether or not it sets anchor), is ready to proceed to berthing and has presented a Notice of Readiness.

**"Auction"** means the sale by auction of Auction Capacity.

**"Auction Capacity"** has the meaning given in the Port Terminal Rules.

**"Auction Premium"** means any additional amount paid by the Customer for Capacity which is in excess of the start price for Capacity within a Lot in the Auction.

**"Auction Premium Rebate"** means the rebate calculated in accordance with Schedule 2.

**"Auction Rules"** means the rules of that name published by CBH from time to time attached as Schedule 1 to the Port Terminal Rules. The current version of these rules can be found on CBH's website, [www.cbh.com.au](http://www.cbh.com.au).

**"BAMA Contributions"** means contributions that CBH, deducts and remits to the Director General of the Department of Agriculture and Food on a per tonne basis pursuant to the *Biosecurity and Agriculture Management Act 2007* (WA).

**"Bulk Handling Act"** means the Bulk Handling Act 1967 (WA).

**"Bulk Handling Regulations"** means the Bulk Handling Act Regulations 1967 (WA).

**"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.

**"Bulk Wheat Entitlement"** means the Customer's entitlement under the Bulk Handling Act or this Agreement to the possession of Bulk Wheat in CBH's custody.

**"Bulk Wheat Reveal Services"** means the Bulk Wheat reveal services provided by CBH pursuant to clause 5.

**"Bulk Wheat Storage Services"** means the storage services provided by CBH pursuant to clause 6.

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

**"Capacity"** means the capacity of a Port Terminal Facility, to put grain on board a vessel at a Port Terminal Facility during a defined period, measured in tonnes.

**"Capacity Reposition Fee"** has the meaning given in the Fees and Charges Schedule.

**"Capacity Transfer Fee"** means the fee with that description prescribed in the Fees and Charges Schedule.

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

**"Charter Party"** means the agreement between the owner of a vessel and the party hiring the vessel for use of the vessel in transporting a cargo.

**"Commencement Date"** means the later of:

- (a) 1 October of the year the agreement was executed; or
- (b) the date of execution of this Agreement.

**"Contaminant"** means a Level 1 Contaminant, a Level 2 Contaminant or a Level 3 Contaminant as the case requires.

**"Corynetoxins Contamination"** means contamination by low molecular weight chemicals that cause annual ryegrass toxicity.

**"Credit Application Form"** means the form available from CBH on which all customers' credit application requests are to be made.

**"Customer's Manager"** means the Customer's representative who is responsible for the Customer's Bulk Wheat as notified in writing to CBH.

**"DAFF"** means the Department of Agriculture, Fisheries and Forestry.

**"DAFF Approved Officer"** means a person approved by DAFF to perform, on behalf of the Australian Government, export inspection, sampling and testing activities under Australia's export legislation.

**"Demurrage"** means the defined level of damages paid to a vessel owner for the delays in loading or discharging the vessel after the Laytime has expired. It is customarily expressed in US dollars per day or portion thereof.

**"Direct to Port Delivery Declaration Form"** means the Port Delivery Form as published by CBH from time to time.

**"Dispatch"** means the money payable by the vessel owner to the charterer if the vessel completes loading within the agreed Laytime. It is customarily expressed in US dollars per day or portion thereof.

**"End Date"** has the meaning given in clause 1.1(a).

**"ETA"** means the estimated time of arrival of the Nominated Vessel.

**"Export Fee"** means the fee with that description prescribed in the Fees and Charges Schedule.

**"Export Outturn Request"** means an export outturn request in relation to Port Outturning Services.

**"Fair Market Price"** means the average value at the relevant time and place (of the requirement to determine the Fair Market Price) to be derived from the average of three independent broker valuations by a broker appointed by Grain Trade Australia, with the valuations to take into account the Grade and variety and taking into account the cost of insurance, levies, taxes, charges, Freight and associated costs.

**"Fees and Charges Schedule"** means the Schedule of fees and charges published by CBH in accordance with the Undertaking setting out the fees and charges that are due and payable under this Agreement as consideration for the Services as amended, from time to time, in accordance with the Undertaking.

**"Force Majeure"** has the meaning given in clause 15.1.

**"Forfeiture Approval Authority"** means an authority issued by the Customer to CBH to forfeit Bulk Wheat in excess of the Acceptable Vehicle Mass (as that term is defined in the HMMS).

**"Freight"** means the independent Customer freight charges for delivery of Bulk Wheat to a Port Terminal Facility payable by a Customer.

**"Fumigation Statement"** means a statement declaring that a particular tonnage of Bulk Wheat has been fumigated, and shall be in the form adopted and prescribed by CBH from time to time.

**"Genetically Modified Organism"** has the meaning given to that term in the *Gene Technology Act 2000* (Cth).

**"Good Operating Practices"** means the practices, methods and acts engaged in or by a party who, in the conduct of its undertaking, exercises that degree of diligence, prudence and foresight reasonably and ordinarily exercised by skilled and experienced Australian operators engaged in the same type of undertaking under the same or similar circumstances and conditions.

**Government Agency** means any applicable Western Australian or Australian Federal Government department, authority, instrumentality or agency having jurisdiction in respect of any matter relating to this Agreement.

**"Grace Period"** means the period of 14 days commencing on the day following the last day of the Shipping Window.

**"Grade"** means, in relation to Bulk Wheat, the grade of the Bulk Wheat actually delivered to the Port Terminal Facility.

**"Grain Service Agreement"** means an agreement between CBH and an Acquirer for the provision of storage and handling and other services.

**"Gross Negligence"** means, if a duty of care is owed, an act or omission done with reckless disregard, whether consciously or not, for the consequences of the act or omission.

**"GST"** means any tax imposed by or through the GST Legislation on a supply (without regard to any input tax credit).

**"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.

**"Harvest Shipping Period"** means the period from 1 November to 15 January of the following year.

**"Heavy Metal Contamination"** means any heavy metal that if it comes into contact with or is contained in Bulk Wheat would present, in CBH's reasonable opinion, a health risk to the environment or humans, irrespective of whether that heavy metal is airborne, solid or contained in solution.

**"HMMS"** is CBH's Harvest Mass Management Scheme.

**"Indirect or Consequential Loss"** means indirect, consequential or remote loss and 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 Customer may suffer in the event that the ability to resell the Bulk Wheat is adversely affected.

**“Insolvency Event”** means where the Customer:

- (a) does not pay its debts as and when they fall due;
- (b) commits an act of bankruptcy;
- (c) enters into a composition or arrangement with its creditors or calls a meeting of creditors with the view to entering into a composition or arrangement;
- (d) has execution levied against it by creditors, debenture holders or trustees under a floating charge;
- (e) takes or has taken or instituted against it any actions or proceedings, whether voluntary or compulsory, which have the object of or which may result in the winding up or bankruptcy of the Customer (except, in the case of a corporation, for the purposes of a solvent reconstruction);
- (f) has a winding up order made against it or (except for the purposes of a solvent reconstruction) passes a resolution for winding up; or
- (g) is a party to the appointment of or has an administrator, official manager, receiver, receiver/manager, provisional liquidator or liquidator appointed to the whole or part of its property or undertaking.

**“Laycan”** means the earliest date on which Laytime can commence and the latest date, after which the charterer can opt to cancel the Charter Party.

**“Laytime”** means the amount of time that a charterer has to load a vessel before the vessel is deemed to be on Demurrage.

**“Level 1 Contaminant”** means a contaminant identified as Level 1 in the CBH contaminant list published by CBH for the current Season as amended from time to time, being contaminants that in CBH’s opinion cannot be removed and constitute a significant food safety or quality risk.

**“Level 2 Contaminant”** means a contaminant identified as Level 2 in the CBH contaminant list published by CBH for the current Season as amended from time to time, being contaminants that in CBH’s opinion pose a food safety or processing hazard and can have a significant impact on the integrity of the supply chain.

**“Level 3 Contaminant”** means a contaminant identified as Level 3 in the CBH contaminant list published by CBH for the current Season as amended from time to time, being contaminants that in CBH’s opinion present a food safety or processing risk and can be managed on-farm.

**“LoadNet® for Marketers™”** means CBH’s grain management interface for Acquirers which is available to registered users (including the Customer) at [www.cbh.com.au](http://www.cbh.com.au)

**“Loss or Damage”** means all losses, costs or damages (including legal costs on a solicitor client basis) arising in connection with any personal injury, death, damage to property or economic loss.

**“Lost Capacity”** has the meaning given in the Port Terminal Rules.

**“Lost Capacity Fee”** has the meaning given in the Fees and Charges Schedule.

**“Lot”** means the Capacity within a Shipping Window at a Port that is offered to Customers at Auction.

**“Material Breach”** means a breach which:

- (a) in the reasonable opinion of CBH, is not capable of being remedied; or
- (b) the Customer has failed to remedy after being given at least 14 days written notice by CBH to do so.

**"Microbial Contamination"** means contamination by pathogenic (disease-causing) micro-organisms including *E. coli*, *Cryptosporidium*, *Giardia*, and *Salmonella*.

**"NCV"** means no commercial value.

**"Natural Toxicant Contamination"** means contamination by toxins that are produced by, or naturally occur in, plants or micro-organisms (including, without limitation, mycotoxins produced by fungi, and poisonous low molecular weight substances of plant and bacterial origin).

**"Nominated Tonnage"** means the tonnage of Bulk Wheat to be shipped in a particular Nominated Vessel and notified to CBH in accordance with this agreement and the Port Terminal Rules.

**"Nominated Vessel"** means a vessel nominated by the Customer and notified to CBH in accordance with the terms of this agreement and the Port Terminal Rules.

**"Notice of Readiness"** means a valid notice of readiness served by the owner of the Nominated Vessel pursuant to the Vessel Charter party stating, amongst other things, that the Nominated Vessel is ready to load in all respects (including physically and legally).

**"Outturn"** means to cause Bulk Wheat to physically leave CBH's custody at a Port Terminal Facility and is deemed to occur when the Bulk Wheat exits the delivery spout into a Bulk Wheat shipping vessel at which point physical possession of the Bulk Wheat passes from CBH to the Customer or a third party authorised by the Customer

**"Pesticide Residue Contamination"** means contamination by any substance in Bulk Wheat resulting from the use of a pesticide. The concept of pesticide residue includes any derivatives of a pesticide, such as conversion products, metabolites, reaction products, and impurities considered to be of potential toxicological significance.

**"Port"** means the ports of:

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

**"Port Grain Holdings"** means the information about quantities of the Customer's grain held at a Port by CBH and as required to be published in accordance with the Undertaking or Port Terminal Rules.

**"Port Outturning Services"** means the services provided by CBH pursuant to clause 7.

**"Port Terminal Facility"** means a ship loader and associated infrastructure that is:

- (a) at a Port;
- (b) capable of handling Bulk Wheat; and
- (c) owned, operated and controlled by CBH,

including:

- (d) an intake/receival facility;
- (e) a grain storage facility;
- (f) a weighing facility; and
- (g) a shipping belt;

that is:

- (h) at the port; and



- (i) associated with the ship loader; and
- (j) capable of dealing with wheat in bulk.

**“Port Terminal Rules”** means the port terminal rules published and amended by CBH from time to time in accordance with the Undertaking.

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

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

**“Pre-Delivery Sample Analysis Form”** means the form available from CBH from time to time.

**“Related Bodies Corporate”** has the meaning given to that term in the *Corporations Act 2001* (Cth).

**“Relevant Surveys”** means all relevant surveys required to be conducted on the Nominated Vessel before it can be loaded with the Bulk Wheat, including, but not limited to a structural survey of the Nominated Vessel and surveys conducted by DAFF.

**“Season”** means the period between 1 October of one year and the next 30 September.

**“Services”** means all of the services provided by CBH to the Customer pursuant to this Agreement.

**“Shipping Window”** means a half month period of between 14 and 16 days within which a Customer may nominate a vessel to arrive at a Port Terminal Facility for loading of a cargo for which the Customer has been allocated Capacity under the Port Terminal Rules.

**“Shrinkage”** means the allowance for loss in weight of Bulk Wheat that occurs during the storage and handling and transport process.

**“Spare Capacity”** has the meaning given in the Port Terminal Rules.

**“Stack”** means a stored quantity of Bulk Wheat delivered to the Port Terminal Facility for export accumulation and loading to a ship.

**"Storage"** means the silo, bin, Stack or other storage area at a Port Terminal Facility in which Bulk Wheat is accumulated for loading to an export Bulk Wheat shipping vessel.

**"Taxable Supply"** has the meaning given in the GST Legislation.

**"Tax Invoice"** or **"Recipient Created Tax Invoice"** includes any document or record treated by the Commissioner of Taxation as a tax invoice or as enabling the claiming of an input tax credit for which an entitlement otherwise arises and/or has the meaning given in the GST Legislation.

**"Term"** means the term of this Agreement which commences on the Commencement Date and ends on the End Date, unless terminated earlier in accordance with the terms of this Agreement.

**"Total Auction Costs"** means the cost of auction implementation, preparation, execution, and completion activities, including invoicing and auction reviews.

**"Undertaking"** means the undertaking provided by CBH to the ACCC under the provisions of the WEMA and Part IIIA of the CCA dated September 2011 and available on the ACCC website.

**"Upfront Marketer Fee"** means the fee with that description prescribed in the Fees and Charges Schedule.

**"Varietal Purity"** refers to the consistency in the genetic make-up of seed Bulk Wheat, and is determined by measuring the percentage of seed in the sample of the declared variety.

**"Vessel Nomination"** means a nomination of a vessel to Outturn Bulk Wheat to the Nominated Tonnage onto a Nominated Vessel within a Shipping Window held by the Customer under this Agreement on the relevant Vessel Nomination Form or online via LoadNet® for Marketers™.

**"Vessel Nomination Form"** means the form available from CBH or online via LoadNet® for Marketers™ on which all Vessel Nominations must be made.

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

**"Wilful Misconduct"** means an intentional and conscious disregard of any material provision of this Agreement, but does not include any error of judgment or mistake made by the person alleged to be culpable or by any director, employee, agent or contractor of that person in the exercise, in good faith, of any function, power, authority or discretion conferred on that person under this Agreement or under any law.

**"Within Tolerance Lost Capacity"** has the meaning given in the Port Terminal Rules.

### 3 INTERPRETATION

In this Agreement:

#### 3.1 Interpretation

- (a) headings, sub-headings, captions and service descriptions do not affect the construction or interpretation of this Agreement;
- (b) a word in the singular includes the plural of that word and vice versa;
- (c) a word of any gender includes the corresponding words of each other gender and a reference to one sex includes a reference to all sexes;
- (d) "including" means "including, but not limited to";
- (e) where any word or phrase is given a defined meaning in this Agreement, any part of speech or other grammatical form of that word or phrase has a corresponding meaning; and
- (f) a reference in this Agreement to a thing (including an amount) is a reference to the whole and each part of it (but nothing in this clause 3.1(f) implies that performance of part of an obligation is the performance of the whole) and a reference to a group of persons is a reference to all of them collectively, to any 2 or more of them collectively and to each of them individually.

### 3.2 Documents and Parts of Documents

- (a) a reference to any law, document, instrument or agreement, including this Agreement, includes a reference to that law, document, instrument or agreement as amended, novated, supplemented, varied or replaced from time to time; and
- (b) a reference to a clause or annexure or attachment is (unless the context requires otherwise) a reference to a clause or annexure or attachment to this Agreement.

### 3.3 Persons and Corporations

- (a) a reference to a person includes a body politic, corporation, partnership, limited partnership, association or joint venture (whether incorporated or not) whatsoever and wheresoever formed and howsoever described and also a government, governmental or semi-governmental agency or local authority; and
- (b) a reference to a person includes that person's successors and permitted assigns and, in the case of a natural person, that person's legal personal representatives.

### 3.4 Time, Money and Measurement

- (a) a reference to an amount of money is a reference to the amount in the lawful currency of Australia;
- (b) a reference to time is a reference to the local time in Perth, Western Australia (unless otherwise stated);
- (c) 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 first day thereafter which is a Business Day; and
- (d) measurements of physical quantities are in Australian legal units of measurement within the meaning of the *National Measurement Act 1960* (Cth).

### 3.5 Discretions and Approvals

- (a) Whenever the Customer 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 CBH shall have regard to the efficient running of the CBH Port Terminal Facility and balancing of the interests of all Customers of the Port Terminal Facility.
- (c) CBH's refusal to accept a request for Service will not be a breach of the Agreement for making a decision where the refusal is made in compliance with the provisions of the Port Terminal Rules.

## 4 PORT TERMINAL RULES

CBH and the Customer:

- (a) agree to comply with the Port Terminal Rules; and
- (b) acknowledge that in case of any inconsistency between the terms of this Agreement and the Port Terminal Rules, the Port Terminal Rules shall apply.

## 5 BULK WHEAT RECEIVAL SERVICES

**Service Description:** This service provides Bulk Wheat receipt, storage assessment, weight measurement and handling at the point of receipt into a Port Terminal Facility.

### 5.1 Service Availability

- (a) Bulk Wheat Receival Services are provided by CBH under this Agreement for the purpose of export accumulation only and will not be available more than 21 days before the ETA.
- (b) CBH agrees to make Bulk Wheat Receival Services available at the Port Terminal Facilities in accordance with the terms and conditions of this Agreement and the Port Terminal Rules.
- (c) Prior to requesting Bulk Wheat Receival Services, the Customer must acquire Capacity.
- (d) If the Customer requires Bulk Wheat Receival Services, the Customer must submit a Vessel Nomination Form to CBH no later than 22 days prior to the ETA.
- (e) At least 22 days prior to the ETA, the Customer must submit a valid Vessel Nomination in accordance with the Port Terminal Rules.

## 5.2 Before Delivery

- (a) CBH requires a representative sample of the Bulk Wheat intended for delivery to minimise the risk of insect or chemical residue contaminated Bulk Wheat being received into the Port Terminal Facility.
- (b) The Customer must complete and provide CBH with a Pre-Delivery Sample Analysis Form, paying particular attention to completing the section marked '*Treatment*'.
- (c) The Customer must provide a one kilogram representative sample from each source of Bulk Wheat that the Customer intends to deliver to the Port Terminal Facility for placement into Storage. If the grain is from more than one storage type, the Storage identification must be clearly marked on each sample.
- (d) The Pre-Delivery Sample Analysis Form with the sample/s for chemical and insect analysis must be couriered direct to: "Australian Grains Centre, 700 Abernethy Road, Forrestfield WA 6058".
- (e) CBH will use all reasonable endeavours to provide the Customer with the sample results within 2 Business Days of the sample being received.
- (f) Each acceptable sample analysis will permit the Customer to deliver the Bulk Wheat to the Port Terminal Facility for up to 28 days from the date when the results are reported to the Customer. If the Customer wishes to deliver Bulk Wheat to the Port Terminal Facility after that 28 day period has expired, then the Customer must comply with the procedures in this clause 5.2 again.
- (g) If the sample contains any manageable Contaminants, the Bulk Wheat must be treated before a new sample is presented for testing. The costs of assessing the new sample will be paid by the Customer ("**Sample Reassessment Fee**").
- (h) The Port Terminal Rules set out the circumstances in which the requirement to provide a pre-delivery sample and conduct chemical residue testing will be waived.

## 5.3 During Delivery

- (a) Upon arrival of each truck load containing the Customer's Bulk Wheat, CBH staff will assess the VRL of the truck delivering loads to the Port Terminal Facility. Each truck is to have a valid permit to meet the presented combination and the gross weight tendered. Unloading of non-compliant vehicles will be refused and those vehicles will be required to leave the Port Terminal Facility.
- (b) The grade, variety and other characteristics of the Bulk Wheat delivered are to be declared in writing by the Customer by no later than the time of delivery and CBH takes no responsibility for the accuracy, completeness or veracity of the information relating to the Bulk Wheat declared by the Customer. If the load is found to be contaminated with Level 1 or Level 2 Contaminants or showing signs of insect infestation or activity the load will be rejected. CBH shall advise the Customer or nominated representative of the rejection as soon as practicable and in any event before the end of the day following the day of delivery.

- (c) If a load is found to be contaminated with a Level 1 Contaminant, the Customer will not be permitted to deliver that load or any additional load to CBH Port Terminal Facilities until the Customer has provided CBH with evidence in the form of independent expert verification that there is no further risk of Contamination. Alternatively, the Customer may request CBH to arrange at the Customer's cost for independent expert verification that there is no further risk of Contamination.
- (d) Independent expert verification may involve identifying the source site of contamination and the taking of steps by the Customer to ensure that the source site of contamination is not the source site for any future deliveries or that the Customer takes remedial action to ensure that the contaminant has been effectively removed from the source site of contamination.
- (e) If a load is found to be contaminated with a Level 2 Contaminant the Customer will not be permitted to deliver that load or any additional load to CBH Port Terminal Facilities until the Customer has provided CBH with evidence that the Customer has taken remedial action to ensure that the contaminant has been effectively removed.
- (f) Following completion of the steps outlined in clauses 5.3 (c) and (d) above, the Customer must produce a new representative sample from the source site of the contamination and complete the processes specified under clause 5.2 confirming the absence of contamination, prior to recommencing delivery.
- (g) Remedial fumigation following delivery of contaminated grain shall be by means of cylinderised phosphine and the Customer shall pay the Remedial Fumigation charges prescribed in the Fees and Charges Schedule.

#### 5.4 Receival Procedures

Where CBH receives a load of Bulk Wheat at the Port Terminal Facility (whether or not delivered by the Customer), CBH will at the time CBH receives the Bulk Wheat:

- (a) record the running Grade of the Bulk Wheat delivered to the Port Terminal Facility declared by the Customer;
- (b) determine the Storage into which the Bulk Wheat will be placed;
- (c) weigh the Bulk Wheat delivered;
- (d) store the Bulk Wheat in accordance with the Bulk Wheat Storage Services and any specific additional storage and handling requirements as agreed to in writing between the Customer and CBH;
- (e) furnish to the Customer a weighbridge ticket or a statement that specifies Bulk Wheat type, running Grade, weight and any other relevant details or specifications; and
- (f) receive from the person tendering a load of Bulk Wheat to CBH at the Port Terminal Facility, and the Customer shall deliver to CBH, a written statement declaring:
  - (i) the date of delivery;
  - (ii) the place of delivery;
  - (iii) the approximate quantity tendered; and
  - (iv) the type and variety of Bulk Wheat.

#### 5.5 Warranties

The Customer represents and warrants that:

- (a) it owns any Bulk Wheat tendered for delivery by or on behalf of it;
- (b) the full particulars of the variety of the Bulk Wheat disclosed on any form are true and correct;

- (c) it has not manipulated or loaded any delivery in any way to prevent the making of an accurate assessment by CBH of the quality of the Bulk Wheat using CBH's standard sampling procedures;
- (d) Bulk Wheat being tendered for delivery will not:
  - (i) include any Contaminant; or
  - (ii) be in breach of the Bulk Handling Act or the Bulk Handling Regulations;
- (e) unless it has advised CBH in writing prior to delivery, all of the Bulk Wheat was grown between the May and September immediately prior to the current Season;
- (f) all of the Bulk Wheat in a delivery has been or is only contained in equipment, bags, farm implements, farm storages and Bulk Wheat motor bodies that have:
  - (i) not contained any Bulk Wheat product prior to the containing Bulk Wheat of this current Season and are free from insects and vermin; or
  - (ii) previously contained a Bulk Wheat product, but have been freed of all such Bulk Wheat product and is free from insects and vermin;
- (g) any vehicle that has previously transported non-Bulk Wheat or contaminated Bulk Wheat products:
  - (i) is clean, dry and free of any remaining materials and odours from previous loads;
  - (ii) has been washed under high pressure prior to delivering any Bulk Wheat; and
  - (iii) has the details of previous loads disclosed on the relevant form;
- (h) if any of the Bulk Wheat has been treated with substances for the control of insects, details of the substances and the application of those substances has been provided in writing to CBH on the relevant form and the use of any other chemical in the process of planting, growing and storage of Bulk Wheat has been in accordance with the levels prescribed in any relevant legislation and also in accordance with the usage instructions;
- (i) none of the Bulk Wheat in a delivery is a Genetically Modified Organism (unless declared in writing to, and approved in writing by, CBH before the delivery enters the Port Terminal Facility); and
- (j) any information it provides to CBH is true and correct and not misleading or deceptive or likely to mislead or deceive.

#### 5.6 HMMS and road vehicle registration

- (a) Subclauses 5.6(b) to 5.6(e) inclusive apply in relation to any deliveries from a farm by the Customer or its agent to the Port Terminal Facility during the Harvest Shipping Period or such other period as may be published from time to time by Main Roads WA. All road vehicles delivering Bulk Wheat to a Port must be registered with CBH. Outside of the Harvest Shipping Period (or such other period published by Main Roads WA) CBH is not obliged to receive Bulk Wheat from road vehicles in excess of their relevant mass limits.
- (b) The HMMS is incorporated as part of the terms of this Agreement in respect of any deliveries of Bulk Wheat to the Port Terminal Facility by road vehicles that may occur.
- (c) If, as part of CBH's HMMS, the Customer has an option to give CBH a Forfeiture Approval Authority to forfeit Bulk Wheat in excess of the Acceptable Vehicle Mass (as that term is defined in the HMMS), CBH is entitled to deduct, in accordance with the HMMS and the Forfeiture Approval Authority, the relevant tonnage from the delivered Bulk Wheat when calculating the Customer's Bulk Wheat Entitlement in accordance with clause 6.3. Title to any Bulk Wheat deducted under this clause vests in CBH and CBH may donate the Bulk Wheat or the proceeds from its sale to a charity or local government at CBH's discretion.
- (d) A Forfeiture Approval Authority:
  - (i) is valid and binding on the Customer until CBH acknowledges receipt of an instruction to vary it; and

- (ii) may be varied on an individual delivery basis by signing a contrary instruction on the CDF.
- (e) Notwithstanding anything in the HMMS, the Customer agrees:
  - (i) that it is solely responsible for ensuring that it or its carrier/agent comply with all relevant mass limits prescribed by legislation or regulation for the vehicle used;
  - (ii) it will take all necessary steps (including unloading of any mass in excess of those prescribed limits) to ensure compliance; and
  - (iii) to indemnify and keep CBH indemnified against all expenses, Loss or Damage incurred by CBH and all actions, claims and demands which may be made against CBH, that arise in relation to the Customer's non-compliance with any maximum mass limits prescribed by legislation or regulation for the vehicles used by it or its carrier/agent to deliver Bulk Wheat to a CBH Port Terminal Facility.

## 6 BULK WHEAT STORAGE SERVICES

**Service Description:** This service involves storage of Bulk Wheat at Port Terminal Facilities.

### 6.1 Service Availability

- (a) Bulk Wheat Storage Services are provided by CBH under this Agreement for the purpose of export accumulation only.
- (b) The Bulk Wheat Storage Services are provided at a Port Terminal Facility if the relevant Storage is available.

### 6.2 Outturn Specifications

Subject to clauses 6.5 and 6.6, the loads of Bulk Wheat delivered to CBH will be Outturned by CBH upon request from the Customer, subject to the terms of this Agreement.

### 6.3 Bulk Wheat Entitlement

- (a) CBH will maintain a register of the Customer's entitlement to Bulk Wheat stored at Port Terminal Facilities (the "**Bulk Wheat Entitlement**"). A certificate by an officer of CBH as to the Bulk Wheat Entitlement shall be prima facie evidence of the loads of Bulk Wheat that have been delivered to CBH and which the Customer is entitled to have Outturned from the CBH Port Terminal Facility, subject always to the terms and conditions of this Agreement.
- (b) Upon request and subject always to clause 6.3(d), CBH will provide the Customer with information regarding the Bulk Wheat held at the Port Terminal Facility and delivered to the Port Terminal Facility by the Customer.
- (c) The Bulk Wheat Entitlement of the Customer is calculated at any particular point in time by aggregating the weight of the loads of Bulk Wheat received by CBH at the Port Terminal Facility on behalf of the Customer or transferred to the Customer:
  - (i) less the relevant Shrinkage factor specified in clause 6.5;
  - (ii) less the relevant Bulk Wheat Dust Deduction in clause 6.6 where the Bulk Wheat is Outturned via the Port Terminal Facility into the Nominated Vessel;
  - (iii) less the weight of any Bulk Wheat that is damaged or destroyed as a result of a riot, industrial dispute, civil commotion, war, act of God or any unforeseen cause not attributable to the negligence of CBH;
  - (iv) less the weight of any NCV Bulk Wheat or damaged Bulk Wheat in respect of which an insurance claim has been made and paid to the Customer in accordance with clauses 13.1 and 14.1;
  - (v) less the weight of any Outturned Bulk Wheat.
- (d) CBH does not warrant the correctness or completeness of data that has been supplied by the Customer in relation to loads of Bulk Wheat delivered to the terminal by the Customer.

#### 6.4 Bulk Wheat Fumigation

- (a) CBH will not fumigate Bulk Wheat delivered to the Port Terminal Facility unless insect activity is detected by either or both CBH and DAFF.
- (b) Fumigation services as set out in the the Fees and Charges Schedule will be carried out by CBH on all Bulk Wheat where required in its Port Terminal Facility to protect the Bulk Wheat. The application of remedial fumigation services as set out in clause 5.3(g) will limit availability of the Bulk Wheat in accordance with standard CBH Bulk Wheat protection practices. CBH will consult with the Customer as to the type of fumigant to be used. The Customer must nominate a representative who is available on a 24/7 basis to confirm available fumigation options. If CBH using reasonable endeavours is unable to obtain confirmation from the representative or agreement with the representative as to an alternative fumigant, CBH will determine the type of fumigant to be used. The Customer will be responsible for all charges for fumigation services incurred pursuant to this clause 6.4(b) at the rates prescribed in the Fees and Charges Schedule unless an alternative fumigant and rate is agreed.
- (c) Where the Bulk Wheat delivered by a Customer to a Port Terminal Facility has been fumigated prior to delivery, the Customer shall provide a Fumigation Statement detailing any Bulk Wheat treatment information following a written request from CBH.
- (d) Where Bulk Wheat has been fumigated at the Port Terminal Facility by CBH:
  - (i) CBH shall have no liability for any delays in loading the Customer's Vessel as a result of the unavailability of the Bulk Wheat under fumigation;
  - (ii) CBH shall provide a Fumigation Statement detailing any Bulk Wheat treatment information within 3 Business Days of receiving a written request from the Customer.

#### 6.5 Shrinkage

Notwithstanding any other clause in this Agreement, CBH will apply a Shrinkage factor to all Bulk Wheat delivered by the Customer to the Port Terminal Facility to determine the quantity of Bulk Wheat that CBH is obliged to Outturn on behalf of the Customer.

The Shrinkage factor for Bulk Wheat is 0.50%.

#### 6.6 Bulk Wheat Dust

Dust, chaff or fines removed at any stage of the handling process into a CBH dust extraction system is considered be NCV dust and CBH is entitled to dispose of NCV dust as it sees fit. CBH will apply a Bulk Wheat Dust Deduction of 0.25% from a Customer's Bulk Wheat Entitlement when the relevant Bulk Wheat type is Outturned from a Port Terminal Facility into a vessel.

#### 6.7 Additional Bulk Wheat Storage Charges

CBH will invoice the Customer for Additional Storage Charges at the rates specified in the Fees and Charges Schedule if:

- (a) there is any residual Bulk Wheat Entitlement following the loading of the Customer's vessel; or
- (b) the relevant Shipping Window has passed and the Customer's Nominated Vessel has not commenced loading as a result of:
  - (i) the failure of the Customer to make a Vessel Nomination which has an ETA in the Shipping Window;
  - (ii) delays in the date and time of Arrival of the Customer's Nominated Vessel or delays in the passing of any Relevant Surveys;
  - (iii) the Customer failing to meet the Accumulation Plan agreed with CBH; or
  - (iv) quality issues with the Customer's Bulk Wheat Entitlement, namely:
    - A) the presence of insect activity and live insects in the Bulk Wheat;



- B) Pesticide Residue Contamination, Corynetoxins Contamination, Microbial Contamination, Heavy Metal Contamination or Natural Toxicant Contamination;
- C) the presence, at any level or concentration, of Genetically Modified Organisms; or
- D) any other quality issue that would result in the Bulk Wheat not meeting an export specification requested by the Customer which does not comply with the Customer's Bulk Wheat Entitlement.

#### 6.8 Title to surplus Bulk Wheat

Title in any Bulk Wheat remaining in the CBH system which is surplus to the Customer's Bulk Wheat Entitlement shall transfer to CBH and CBH shall be entitled to sell or dispose of any surplus Bulk Wheat as it sees fit and retain any proceeds.

### 7 PORT OUTTURNING SERVICES

**Service Description:** This service provides bulk Outturning of Bulk Wheat at a Port Terminal Facility into a ship's hold.

#### 7.1 Service Availability

- (a) Port Outturning Services are provided by CBH under this Agreement for the purpose of export accumulation only.
- (b) Port Outturning Services are offered at all Port Terminal Facilities in accordance with the terms and conditions contained in this Agreement.
- (c) Port Outturning Service charges do not include any rail or road transportation costs in moving Bulk Wheat to the relevant Port Terminal Facility.

#### 7.2 Vessel Nominations

The Customer must request any Port Outturning Services required either online through LoadNet® for Marketers™, or on a Vessel Nomination Form.

#### 7.3 Vessel Nomination Form

On receipt of a Vessel Nomination, CBH will determine its ability to meet the request and advise the Customer in accordance with the Port Terminal Rules if CBH has:

- (a) accepted the Vessel Nomination; or
- (b) rejected the Vessel Nomination.

#### 7.4 Operational Decision Making

In making any decision to accept or reject the Vessel Nomination or any amendment to a Vessel Nomination, CBH shall make its determination in accordance with the terms of the Undertaking having regard to the following:

- (a) that in making decisions relating to the provision of access to the Port Terminal Services, CBH must balance conflicts of interests of Customers of the Port Terminal Facilities;
- (b) the application by CBH of objective commercial criteria and practices and policies to promote fair, reasonable and non-discriminatory Operational Decision making;
- (c) giving priority to vessels based on the lead time given between nomination and vessel ETA, and the likely availability of sufficient Bulk Wheat Entitlement at the Port prior to vessel ETA, the likely uncommitted storage capacity at the Port Terminal Facility and the uncommitted inloading capacity necessary to make a Nominated Vessel's Nominated Tonnage;
- (d) the objectives of:

- (i) minimising Demurrage at the Port over a given period; and
- (ii) maximising throughput of Bulk Wheat at the Port over a given period; and
- (e) changes in relevant facts and circumstances including:
  - (i) insufficient Bulk Wheat Entitlement at the Port accumulated by the Customer necessary to make a Customer's Nominated Vessel's Nominated Tonnage;
  - (ii) variations in vessel arrival times;
  - (iii) failure of vessels to pass surveys;
  - (iv) stability and ship worthiness inspections;
  - (v) vessel congestion;
  - (vi) variation in cargo requirements;
  - (vii) lack of performance of freight providers;
  - (viii) equipment failure;
  - (ix) maintenance outages;
  - (x) contamination of accumulated cargoes or contamination of loads; or
  - (xi) a Material Breach;
  - (xii) a Customer not working a vessel or accumulating a cargo on a 24 hour/7 day basis where another Customer is able to do so;
  - (xiii) the Bulk Wheat is unavailable as a result of fumigation activities pursuant to clause 6.4;
  - (xiv) the Vessel Nomination contains inadequate or inaccurate information; or
  - (xv) an event of Force Majeure prevents the scheduling of Port Outturning Services.

#### 7.5 Acceptance of Vessel Nomination

Upon acceptance of a Vessel Nomination, CBH shall Outturn the Bulk Wheat in accordance with the Vessel Nomination Form and all other provisions of this Agreement.

#### 7.6 Outturn Standard

CBH is obliged to Outturn the Bulk Wheat delivered to the Port Terminal Facility by the Customer and held in Storage.

#### 7.7 Weigh

CBH shall weigh all Bulk Wheat Outturned using its certified batch weighers. In the absence of manifest error or fraud the CBH weight measurement will be final.

#### 7.8 DAFF Sampling

CBH will make arrangements for Bulk Wheat to be inspected by DAFF inspectors or a DAFF Approved Officer at the Customer's cost immediately prior to Outturning the Bulk Wheat onto the Nominated Vessel.

#### 7.9 Auction Premium Rebate

CBH will pay the Auction Premium Rebate (if any) to the Customer within 25 Business Days from the End Date. CBH may, in its discretion elect to pay this rebate in one or more instalments prior to the End Date. If payment of the Auction Premium Rebate in instalments results in the Customer receiving more than they would otherwise be entitled to, the Customer agrees to refund any such overpayment within 10 Business Days of CBH sending a written demand for a refund to the Customer.

#### 7.10 Right to Invoice Prior to Outturning

If Bulk Wheat is scheduled to be Outturned into a ship's hold from a Port Terminal Facility, CBH reserves the right to invoice the Customer and receive payment for the Port Outturning Service charges prescribed in the Fees and Charges Schedule prior to the Bulk Wheat being Outturned

onto a ship. Where there are variations in respect of the amount of Bulk Wheat actually Outturned and the costs incurred in Outturning, CBH and the Customer agree that:

- (a) within 30 days of the Bulk Wheat being Outturned onto a ship, CBH will, subject to clause 9.1(c), refund any amounts paid by the Customer under this clause in respect of Port Outturning Service charges invoiced by CBH relating to Bulk Wheat that was not Outturned onto a ship; and
- (b) CBH is entitled to invoice the Customer for any additional charges prescribed in the Fees and Charges Schedule for Bulk Wheat Outturned by CBH as a direct result of the actions of the Customer or the Customer's agent.

#### 7.11 Bulk Wheat Export Licence

The Customer warrants that the appropriate Bulk Wheat export licence or accreditation (if applicable) continues to be held prior to requesting Port Outturning Services and that the request is within the terms of the licence. CBH reserves the right to request details of the Bulk Wheat export licence or accreditation, at any time, and the Customer agrees to provide a copy of the licence to CBH within twenty-four (24) hours of any such request.

#### 7.12 Misrepresentation

- (a) The Customer warrants that the Bulk Wheat and its Grade will not be misrepresented to third parties or incorrectly recorded on commercial or shipping documents.
- (b) The Customer indemnifies CBH against all Loss or Damage incurred in any dispute over Bulk Wheat quality arising from such misrepresentation or incorrect recording of the Grade on commercial or shipping documents.

#### 7.13 Cleanliness

- (a) The Customer is responsible for ensuring that all vessels arrive at a Port Terminal Facility in a clean, empty and well maintained state free from any Contaminants or residue.
- (b) CBH is not obliged to inspect any vessel for cleanliness but if it does inspect then CBH, 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) CBH is not liable for any Loss or Damage caused as a result of a rejection of the vessel.
- (d) The Customer agrees to pay CBH for any costs incurred by CBH as a result of the rejection of a vessel by CBH or DAFF.
- (e) Vessels are not permitted to be cleaned at any Port Terminal Facility without CBH's consent. If CBH consents to cleaning of the vessel, and if a vessel fails inspection, CBH can instruct a vessel to be removed from the berth if it is preventing another vessel from loading at the same berth.

#### 7.14 Stevedoring

If the Customer requests, CBH is willing to arrange stevedoring services for the Customer's vessels when they are loaded at Port Terminal Facilities. Upon request CBH will provide the Customer with the necessary terms and conditions (including charges) for CBH's provision of stevedoring services.

#### 7.15 Demurrage and Dispatch

The parties may enter into Demurrage and Dispatch arrangements by mutual agreement at the time CBH is notified of the Vessel Nomination in accordance with the Port Terminal Rules, subject to the Customer complying with the Port Terminal Rules.

#### 7.16 Non-Shipment of Bulk Wheat

If Bulk Wheat is not shipped from a Port Terminal Facility as detailed in a Vessel Nomination other than as a result of circumstances directly within the control of CBH, then:

- (a) CBH will consult with the Customer about the re-positioning within, or removal from the Port Terminal Facility of the Bulk Wheat; and
- (b) after 14 days have passed since the ETA contained in the Vessel Nomination, CBH may remove or reposition Bulk Wheat at its discretion and the Customer shall pay all reasonable costs incurred by CBH.

## 8 ADDITIONAL INFORMATION AND SERVICES

**Service Description:** CBH may also provide additional information or services over and above the standard information and services that CBH has agreed to provide under this Agreement.

- (a) CBH will provide the Customer with an estimate of its costs and any additional terms and conditions required in order to provide additional information or services. Costs may either be a lump sum or in accordance with normal hourly rates.
- (b) The Customer agrees to pay CBH's costs in providing any additional information or services requested by the Customer.
- (c) The decision of CBH whether to provide any additional information or services requested by the Customer will be at CBH's absolute discretion unless it is required to provide such additional information by any law.

## 9 PAYMENT

### 9.1 Fees and Charges

- (a) In consideration for any Services provided by CBH to the Customer under this Agreement, the Customer agrees to pay CBH for all Services rendered in accordance with the charges set out in the Fees and Charges Schedule.
- (b) In particular, and without limiting the charges that may be levied under this Agreement the Customer agrees to pay:
  - (i) the Upfront Marketer Fee set out in the Fees and Charges Schedule within 5 Business Days of the date of the CBH invoice for each tonne of the Auction Capacity that the Customer acquires;
  - (ii) the relevant Auction Premium within 5 Business Days of the date of the CBH invoice or such other date as stated in the invoice for each tonne of Auction Capacity;
  - (iii) the Export Fee in accordance with the provisions of clauses 7.10, 9.3 and 9.6 for each tonne loaded onto a Nominated Vessel;
  - (iv) the Upfront Marketer Fee for each additional tonne loaded that is in excess of the designated Capacity for a particular shipment, but within the upper limit of CBH's designated loading tolerances;
  - (v) the Lost Capacity Fee for each tonne of Lost Capacity that is not Within Tolerance Lost Capacity;
  - (vi) the Additional Storage Charges in accordance with the provisions of clause 6.7 for each tonne of Capacity to which the Additional Storage Charges relate;
  - (vii) the Capacity Reposition Fee in accordance with the Port Terminal Rules;
  - (viii) the Capacity Transfer Fee each time Capacity is transferred in accordance with the Port Terminal Rules; and
  - (ix) the BAMA Contributions.
- (c) If the Customer has Within Tolerance Lost Capacity, CBH will refund to the Customer a pro rata portion of the Upfront Marketer Fee paid in respect of that Within Tolerance Lost Capacity no later than 25 Business Days after the end of the Term.
- (d) The charges set out in the Fees and Charges Schedule are a realistic assessment of the loss and damage that CBH will suffer as a result of a failure by the Customer to comply with their obligations under the Agreement and the Port Terminal Rules.

- (e) CBH is entitled to retain the fees paid or to levy the charges payable as compensation by way of liquidated damages as a result of a failure by the Customer to comply with their obligations under the Agreement and the Port Terminal Rules.
- (f) CBH is entitled to invoice the Customer for any additional charges prescribed in the Fees and Charges Schedule for Bulk Wheat Outturned by CBH as a direct result of the actions of the Customer or the Customer's agent.

## 9.2 Application for credit terms

- (a) If the Customer does not have an existing credit arrangement with CBH the Customer must provide CBH with a completed Credit Application Form at the same time as it executes this Agreement.
- (b) The Customer agrees that any credit provided by CBH is for business or investment purposes only and not for personal, domestic or household purposes.

## 9.3 Credit terms

- (a) If CBH agrees to provide credit terms to the Customer, then CBH reserves the right, in its absolute discretion, to:
  - (i) place or vary a limit on the amount allowed to be outstanding by the Customer at any time;
  - (ii) vary the credit terms by providing not less than 60 days' written notice of the new or varied credit terms;
  - (iii) refuse to extend further credit terms to the Customer; or
  - (iv) withdraw the Customer's credit terms.
- (b) It is the Customer's responsibility to request a credit limit increase if it is going to exceed the approved credit limit. Any refusal, withdrawal or exceeding of credit terms will result in the Services being provided on a prepaid basis.
- (c) If CBH has agreed to provide credit terms prior to the Commencement Date and has not withdrawn them prior to this Agreement then those credit terms will be deemed to continue on the terms and conditions set out in this clause 9.

## 9.4 Credit information

The Customer authorises CBH to provide information contained in the Credit Application Form and acquired as a result of the Customer's performance of this Agreement to any bank, credit reporting agency, debt collection agency, trade reference and any other person, business or company.

## 9.5 Invoicing and GST

Terms defined in the GST Legislation have the same meaning in this clause 9.5 unless provided otherwise.

- (a) CBH will invoice the Customer for all charges payable in providing Services under this Agreement.
- (b) CBH will endeavour to issue invoices pertaining to bulk vessel shipments within 14 days of the vessel departure.
- (c) CBH will provide the Customer with a tax invoice that complies with the GST Legislation.
- (d) All fees and charges in this Agreement are expressed exclusive of GST.
- (e) If GST is or will be imposed on a supply made under or in connection with this Agreement, the supplier may, to the extent that the consideration otherwise provided for that supply under this Agreement is not stated to include an amount in respect of GST on the supply:
  - (i) increase the consideration otherwise provided for that supply under this Agreement by the amount of that GST; or
  - (ii) otherwise recover from the recipient the amount of that GST.

- (f) The right of the supplier to recover any amount in respect of GST under this Agreement on a supply is subject to the issuing of the relevant Tax Invoice or Adjustment Note to the recipient. Subject to any other provision of this Agreement, the recipient must pay any amount in respect of GST within 14 days of the issuing of the relevant Tax Invoice or Adjustment Note to the recipient.
- (g) Subject to a Recipient Created Tax Invoice (RCTI) Agreement being in place between CBH and the Customer, CBH will issue:
  - (i) If the Customer has provided a valid ABN and is registered for GST: a valid RCTI that states the amount of GST the Customer are liable to pay, at the same time that CBH is obliged to pay the Customer;
  - (ii) If the Customer has provided a valid ABN but is not registered for GST: a payment advice setting out the amount paid to the Customer excluding GST; or
  - (iii) If the Customer has not provided a valid ABN: a payment advice setting out the amount paid to the Customer excluding GST and subject to any withholding tax in accordance with clause 9.5(j).
- (h) If there is an adjustment event in relation to a supply which results in the amount of GST on a supply being different from the amount in respect of GST recovered by the supplier, as appropriate, the supplier:
  - (i) may recover from the recipient the amount by which the amount of GST on the supply exceeds the amount recovered; or
  - (ii) must refund to the recipient the amount by which the amount recovered exceeds the amount of GST on the supply.
- (i) Costs required to be reimbursed or indemnified under this Agreement must exclude any amount in respect of GST included in the costs for which an entitlement arises to claim an input tax credit.
- (j) If the Customer:
  - (i) does not have an ABN or do not provide a valid ABN to CBH; and
  - (ii) does not provide an executed Statement by a Supplier form to CBH,
  - (iii) CBH may be required to withhold 46.5% (or such rate as is prevailing at the time) of the gross supply value by the Australian Taxation Office.

#### 9.6 Payment terms

- (a) If credit terms are made available by CBH at its discretion, then the Customer must pay the amount set out in any invoice provided by CBH within 14 days of the date of the invoice.
- (b) If:
  - (i) credit terms are not made available to the Customer;
  - (ii) the Customer fails to make payment of an invoice in accordance with clause 9.6(a); or
  - (iii) CBH withdraws the provision of the credit terms to the Customer,
 then all existing invoices shall become immediately due and payable and the Customer must tender to CBH the charges for any Service prior to the performance of that Service.
- (c) CBH may, in its absolute discretion, suspend the provision of the Services (including credit) if the Customer fails to pay an invoice in accordance with clauses 7.10 and 9. The suspension of the Services is not a breach by CBH of its obligations under this Agreement and CBH may continue to suspend the Services until such time as the invoice has been paid.

#### 9.7 Certificates

A certificate signed by an authorised representative of CBH stating the amount owing to CBH by the Customer on any account whatsoever and all interest in respect thereof shall be a prima facie evidence of the amount owed to CBH by the Customer at the date of the certificate and shall be deemed correct unless the Customer proves otherwise.

## 9.8 Interest on late payments

- (a) The Customer must pay interest on all amounts owing to CBH on any invoice that remains outstanding upon expiration of the due date expressed in the invoice at a rate 5% above the 90 day Bank bill rate offered by the Commonwealth Bank of Australia as at 31st October each year or as otherwise amended and notified to the Customer if there is a significant rise in this rate.
- (b) Interest will be calculated daily from the due date expressed in the invoice, until all amounts owing on the invoice, including interest, have been paid.
- (c) Payments by the Customer marked specifically for a particular invoice will be applied by CBH firstly in reduction of the interest outstanding and accruing on the invoice and then on any amount outstanding on the invoice.

## 9.9 Cost recoverable

Any Loss or Damage incurred by CBH in recovering any outstanding monies shall be paid in full by the Customer prior to CBH resuming the provision of the Services.

## 9.10 Set off

- (a) Any amounts owing by CBH or any of its Related Bodies Corporate to the Customer whether under this Agreement or otherwise, may, at the election of CBH, be set off (without prior notice) against any amounts owing by the Customer to CBH or any of its Related Bodies Corporate, whether under this Agreement or otherwise.
- (b) CBH holds the benefit of this clause and may exercise the rights under this clause on its own behalf and for and on behalf of each of its Related Bodies Corporate but nothing in this clause obliges such Related Bodies Corporate to perform any of the obligations of CBH under this Agreement.
- (c) CBH will give notice to the Customer of any set off performed under this clause.
- (d) The Customer is not entitled to set off amounts owing to CBH or any of its Related Bodies Corporate.

## 9.11 Security

The Customer shall provide such security to CBH as CBH reasonably requires (including the execution of personal guarantees by the Customer's signatories to this Agreement, directors, shareholders or beneficiaries of the Customer).

# 10 LIEN AND RIGHT TO WITHHOLD BULK WHEAT

## 10.1 Statutory Lien

CBH has, in priority to all other claims, liens or security, a lien over any Bulk Wheat received by it, in respect of any fees and charges payable to CBH in respect of that Bulk Wheat.

## 10.2 Right to withhold Bulk Wheat

Notwithstanding any other term of this Agreement, CBH may, at its sole discretion, refuse to Outturn the Customer's Bulk Wheat if the Customer has not paid any amounts owing to CBH pursuant to clause 9.

# 11 DUE CARE AND DILIGENCE

- (a) CBH will comply with Good Operating Practices in the carrying out of its obligations under this Agreement.
- (b) The Customer will comply with Good Operating Practices in the carrying out of its obligations under this Agreement.

## 12 APPOINTMENT OF AN AGENT

### 12.1 Notice and Obligations

The Customer may appoint an agent to undertake the day to day co-ordination of its operational Service requirements. The Customer must notify CBH immediately in writing upon the appointment of any such agent. Any such appointment will not in any way relieve the Customer of its obligations under this Agreement and accordingly any instruction from the appointed agent is, and will be deemed to be, an instruction of the Customer.

### 12.2 Liability for Agent's Actions

The Customer agrees to accept full responsibility and to indemnify CBH for all actions, decisions and costs incurred or authorised by any agent appointed pursuant to clause 12.1 above when performing Services on behalf of the Customer under this Agreement.

## 13 CBH LIABILITY

### 13.1 Liability for Shortfall at a Port Terminal Facility

- (a) Subject always to clauses 6.4(d), 13.1(b) and 13.8, CBH will be responsible and liable for any shortfall at a Port Terminal Facility if it cannot Outturn the Customer's Bulk Wheat Entitlement from the Port Terminal Facility to which the Customer's Bulk Wheat Entitlement relates.
- (b) CBH's liability for a shortfall in Bulk Wheat Entitlement pursuant to clause 13.1(a) will only extend (in the case of a shortfall in quantity), at the election of CBH, to either the:
  - (i) provision of sufficient grain of a similar type, variety and Grade from any Port Terminal Facility to ensure the Customer's Bulk Wheat Entitlement is not diminished; or
  - (ii) provision of financial compensation for the value of the Bulk Wheat shortfall to be determined at the Fair Market Price for such Bulk Wheat.

For the avoidance of doubt, there is no shortfall in the Customer's Bulk Wheat Entitlement if CBH is able to Outturn the Bulk Wheat Entitlement following any fumigation.

### 13.2 Damage for Gross Negligence or Wilful Misconduct

Other than as set out in clause 13.7 and subject to clauses 13.3, 13.4 and 13.8, CBH will only be liable for loss and/or damage, which is caused by the Gross Negligence or Wilful Misconduct of CBH, its officers, employees or contractors.

### 13.3 Liability Cap

Other than as set out in clauses 13.1 and 13.7, CBH's maximum liability to the Customer howsoever arising shall be limited to \$100,000 for any single event and limited to a maximum in aggregate of \$250,000 for the term of this agreement, however caused including Loss or Damage resulting from:

- (a) the negligence of CBH, its servants or agents; or
- (b) the breach of this Agreement by CBH, its servants or agents.

### 13.4 Limitation of Bulk Wheat Loss and Damage

Except as provided for in clauses 13.1, 13.2 and 13.7, CBH will not be liable or responsible for any Loss or Damage (including Indirect or Consequential Loss) to the Bulk Wheat resulting from any variation in the quality of the Bulk Wheat resulting from:

- (a) the natural deterioration of Bulk Wheat over time; or
- (b) the effects of the normal handling process on the Bulk Wheat held at, or transported within Port Terminal Facility.



### 13.5 Limitation of Loss or Damage for delay

In the event of:

- (a) delays incurred in CBH Outturning the Bulk Wheat that are not caused by the Gross Negligence or Wilful Misconduct of CBH, its officers, employees or contractors;
- (b) delays due to the actions of third parties which are beyond the reasonable control of CBH;
- (c) delays in respect of the provision of information by CBH to the Customer pursuant to clause 6.3(b);
- (d) delays resulting from insect infestation of the Bulk Wheat,

and such delay causes any shortfall in Bulk Wheat Entitlement, then CBH's liability will only extend to the remedies provided in clause 13.1(b). CBH will not be liable for any other Loss or Damage caused by such delay.

### 13.6 Contribution to loss

Where any express or implied term of this Agreement places on any Party (in this clause 13.6 "**Party A**") any duty of care the breach of which would, if the duty of care were imposed by the general law rather than by such express or implied term, constitute an actionable tort against any other Party (in this clause "**Party B**"):

- (a) Party B has an obligation not to commit any negligent act or omission which contributes to any Loss or Damage it suffers or may suffer as a result by any breach by Party A of such express or implied terms; and
- (b) the liability of Party A for any such breach is limited to the direct and proximate Loss or Damage of Party B arising out of such breach, less the proportion of such Loss or Damage attributable to any breach by Party B of its obligations under clause 13.6(a).

The obligations imposed on a Party in this clause 13.6 in relation to any breach by Party A of the kind the subject to this clause are additional to, and not in derogation of, any obligation of Party B to mitigate its Loss or Damage in relation to such breach.

### 13.7 Conditional exclusion of Statutory Liability

This Agreement excludes to the maximum extent permitted by law any warranty or condition implied by common law, practice or statute. However in the case of those warranties under statute which may not be excluded, including the CCA and *Fair Trading Act 2010 (WA)*, CBH's liability for breach of such conditions or warranties shall, to the maximum extent permitted by law, be limited, in the sole discretion of CBH, to the lesser of:

- (a) in the case of Services:
  - (i) the re-supply of the relevant Service; or
  - (ii) the payment of the cost of re-supply of the relevant Service; and
- (b) in the case of goods (including Bulk Wheat provided under clause):
  - (i) the replacement of the goods or the supply of equivalent goods;
  - (ii) the repair of the goods;
  - (iii) the payment of the cost of replacing the goods or of acquiring replacement goods; or
  - (iv) the payment of the cost of having the goods repaired.

For the purposes of this clause 13.7, "relevant Service" shall mean the Service in relation to the quantity of affected Bulk Wheat only and does not mean the aggregate value of the relevant Service provided to the Customer.

### 13.8 No Indirect or Consequential Loss

Notwithstanding anything else in this Agreement, CBH will not be liable to the Customer for any Indirect or Consequential Loss arising out of or in relation to the provision of Services by CBH

pursuant to this Agreement.

### 13.9 Indemnity and Release

The Customer hereby releases and indemnifies CBH in respect of all actions, claims and demands which may be instituted by the Customer against CBH in respect of the matters dealt with under clauses 13.4 and 13.8.

### 13.10 Exclusion of warranties

CBH does not represent, warrant or guarantee that any Bulk Wheat received, acquired or Outturned for the Customer:

- (a) conforms to any specification as to Varietal Purity;
- (b) is free from the presence, at any level or concentration, of Pesticide Residue Contamination, Corynetoxins Contamination, Microbial Contamination, Heavy Metal Contamination or Natural Toxicant Contamination; or
- (c) is free from the presence, at any level or concentration, of Genetically Modified Organisms.

### 13.11 Exclusion Clauses

Notwithstanding anything expressed in or implied by this Agreement, to the extent permitted by law CBH will not be liable to the Customer for any and all Loss or Damage caused by the negligence, breach of contract, breach of statutory duty or any other legal or equitable obligation of CBH, or otherwise howsoever arising in connection with this Agreement from:

- (a) any variance in any specification as to Varietal Purity from the actual Varietal Purity of Bulk Wheat received or Outturned for the Customer;
- (b) the presence, in any Bulk Wheat received or Outturned for the Customer, at any level or concentration, of any Pesticide Residue Contamination, Corynetoxins Contamination, Microbial Contamination, Heavy Metal Contamination or Natural Toxicant Contamination; or
- (c) the presence, in any Bulk Wheat received or Outturned for the Customer, at any level or concentration of any Genetically Modified Organisms.

### 13.12 Indemnity

Notwithstanding anything expressed in or implied by this Agreement, to the extent permitted by law the Customer shall indemnify, keep indemnified and hold harmless CBH from any and all Loss or Damage suffered by or claimed from CBH, whether caused by the negligence, breach of contract, breach of statutory duty or any other legal or equitable obligation of CBH, or otherwise howsoever arising in connection with this Agreement from:

- (a) any variance in any specification as to Varietal Purity from the actual Varietal Purity of Bulk Wheat received or Outturned for the Customer;
- (b) the presence, in any Bulk Wheat received or Outturned for the Customer, at any level or concentration, of any Pesticide Residue Contamination, Corynetoxins Contamination, Microbial Contamination, Heavy Metal Contamination or Natural Toxicant Contamination; or
- (c) the presence, in any Bulk Wheat received or Outturned for the Customer, at any level or concentration of any Genetically Modified Organisms.

## 14 **INSURANCE AND RISK**

### 14.1 Insurance

- (a) CBH will, to the extent that it is reasonably practicable, take out and keep in force an insurance policy in respect to the risk of loss or damage to the Bulk Wheat whilst:
  - (i) it is held in the Port Terminal Facilities; and

- (ii) during transit organised by CBH within the Port Terminal Facility.
- (b) CBH will advise the Customer if it cannot gain insurance coverage as detailed above.

#### 14.2 Transfer of risk

Subject to clause 13, the risk of loss or damage to Bulk Wheat is transferred to the Customer at the point in time when the Bulk Wheat exits the Outturning spout of a Port Terminal Facility into a form of a Bulk Wheat transportation vessel or other transportation vehicle.

### 15 FORCE MAJEURE EVENT

#### 15.1 Definition

An event of "**Force Majeure**" is any event or circumstance not within the reasonable control of the party affected by it (the "**Affected Party**"), including:

- (a) acts of God, including storms or cyclones, action of the elements, epidemics, landslides, earthquakes, floods, fire, road or rail closures due to washouts or impassability and natural disaster;
- (b) strikes, stoppages, restraints of labour, or other industrial disturbances;
- (c) acts of the public enemy, including wars which are declared or undeclared, blockades and insurrections;
- (d) riots, malicious damage, sabotage and civil disturbance;
- (e) accident (including accidental emissions of pollutants or hazardous substances), fire, explosion, radioactive contamination and toxic or dangerous chemical contamination;
- (f) the adverse application of any Australian laws or enforcement actions of any Commonwealth or State court or governmental agency not resulting from any wrongful act or omission of the Affected Party;
- (g) the refusal of or delay in obtaining any necessary consents from any government agency, provided that the Affected Party has acted in a timely manner in endeavouring to secure them;
- (h) the failure of, or the breakdown of or accident to, plant or machinery of any kind other than breakdowns or damage caused by the Gross Negligence of CBH;
- (i) the breach by any third party supplier of its obligations to supply goods or services to the Affected Party, provided that the Affected Party has acted in a timely manner in endeavouring to secure such supply, and provided that the Affected Party itself is not in breach of any relevant obligation; and
- (j) any production shutdown or interruption which is validly required or directed by the Commonwealth or State government or any governmental agency which is not due to the act or default of the Affected Party,

and which the Affected Party is not reasonably able to prevent or overcome, or the effects of which the Affected Party is not reasonably able to predict and take measures to avoid, by the exercise of reasonable technical and commercial diligence and prudence.

#### 15.2 Exemption from Force Majeure

The lack of funds or inability to use any funds will not constitute Force Majeure.

#### 15.3 Relief from performance and liability

Subject to clause 15.6, an Affected Party will be excused from performance of and will not be liable to the other party for any failure in carrying out any of its obligations under this Agreement if and only to the extent and for the time that it is prevented in whole or in part from doing so by Force Majeure.

#### 15.4 Actions during Force Majeure Events

An Affected Party claiming the benefit or protection of Force Majeure will:

- (a) promptly give written notice to the other party of the occurrence and circumstances in respect of which the claim of Force Majeure arises;
- (b) take all reasonable steps to ameliorate and remedy the consequences of that occurrence without delay;
- (c) maintain regular communication with the other party to describe what is being done to remedy the Force Majeure; and
- (d) resume performance in full of its obligations under this Agreement as soon as reasonably practicable,

but the settlement of strikes, lockouts, or other industrial disputes or disturbances which constitute Force Majeure will be entirely within the discretion of the Affected Party and the Affected Party may refrain from settling the strike, lockout or dispute or may settle it at such time and on such terms as it considers to be in its best interests.

#### 15.5 Termination

If the Affected Party is relieved from performance and liability in accordance with clause 15.3 due to Force Majeure for a period exceeding 60 days, either party may terminate this Agreement with immediate effect by written notice to the other party.

#### 15.6 Payments by the Customer

Despite any other provision of this Agreement, the occurrence of Force Majeure affecting the Customer will not relieve the Customer of the obligation to pay any amounts owing under this Agreement in relation to Services performed by CBH prior to notice being given in accordance with clause 15.4(a), including but not limited to the payment of the charges set out in the Fees and Charges Schedule as modified from time to time by CBH.

### 16 TITLE TO BULK WHEAT

- (a) Subject to the terms of this Agreement, CBH is a bailee for reward of any Bulk Wheat received from, on behalf of, or for the account of, the Customer, that is within CBH's power, possession, custody or control.
- (b) Subject to clause 10, the proprietary interest in Bulk Wheat is vested in the person who, for the time being, is entitled to obtain it from the stocks held by CBH or under CBH's control.

### 17 PORT TERMINAL FACILITY ACCESS

#### 17.1 Access Procedure

In order to protect the safety of the Customer's employees, agents or contractors and that of CBH's employees, agents, contractors and invitees:

- (a) if the Customer wishes to visit a Port Terminal Facility, then the Customer must give a minimum of 2 Business Days' notice to the CBH Customer Account Manager stating the date the Customer wishes to attend, the identity of the Customer's representative and the purpose of the visit;
- (b) CBH may, in its absolute discretion, refuse or reject any visitation request or propose alternative times and/or places for the visit; and
- (c) subject to clause 17.2, the Customer shall not attend at any CBH Port Terminal Facility without receiving the prior consent of the Customer Account Manager for each visit and shall not enter or stay on the Port Terminal Facility without appropriate CBH supervision.

#### 17.2 Public Reception

If a CBH Port Terminal Facility has a public reception, then clause 17.1(c) is modified to the extent

necessary to allow the Customer to proceed directly following the commonly accepted route to the public reception but does not allow the Customer to proceed to any other part of the Port Terminal Facility without appropriate supervision.

### 17.3 Port Terminal Facility Safety

Whilst on a Port Terminal Facility, the Customer agrees to:

- (a) follow all reasonably necessary directions of CBH personnel, including departure from the Port Terminal Facility;
- (b) not create any hazard, or cause any contamination, on the Port Terminal Facility; and
- (c) procure that its employees, agents or contractors comply with this clause 17.3.

## 18 CONFIDENTIALITY

### 18.1 General obligation

Subject to clauses 18.2 and 18.3, this Agreement and all information exchanged between the parties under this Agreement or during the negotiations preceding the signing of this Agreement is confidential to the party which provided it and may not be disclosed to any person except:

- (a) by a party to the legal and other professional advisers, auditors and other consultants ("**Consultants**") and employees of:
  - (i) that party; or
  - (ii) that party's Related Bodies Corporate;
- (b) to another party with the consent of the party which first supplied the information;
- (c) if the information is at the time lawfully in the possession of the proposed recipient of the information through sources other than a party;
- (d) to the extent required by any law or by the lawful requirement of any governmental agency having jurisdiction over the party or its Related Bodies Corporate;
- (e) to the extent required by a lawful requirement of any stock exchange having jurisdiction over a party or its Related Bodies Corporate;
- (f) if necessary or commercially desirable to be disclosed in any prospectus or information memorandum to investors or proposed or prospective investors:
  - (i) for an issue or disposal of any shares in a party or its Related Bodies Corporate;
  - (ii) for an issue of debt instruments of a party or a party's Related Body Corporate; or
  - (iii) for the purposes of a party obtaining a listing on Australian Stock Exchange Limited of any shares;
- (g) if the information is at the time generally and publicly available other than as a result of breach of confidence by the party wishing to disclose the information or those to whom it proposes to disclose it;
- (h) if necessary or commercially desirable to be disclosed to an existing, or bona fide proposed or bona fide prospective:
  - (i) financier;
  - (ii) financier of a party or of any of its Related Bodies Corporate; or
  - (iii) rating agency in respect of a party or of any of its Related Bodies Corporate;
- (i) if necessary or commercially desirable to be disclosed to any bona fide proposed or prospective:
  - (i) transferee of an interest in any Bulk Wheat; or
  - (ii) financier of such transferee providing or proposing or considering whether to provide

relevant financial accommodation;

- (j) if necessary or commercially desirable to be disclosed to consultants or employees of any of the persons referred to in clause 18.1(h) or 18.1(i); or
- (k) if CBH is required under the Undertaking or under the Port Terminal Rules to publish Port Grain Holdings.

## 18.2 Conditions

- (a) In the case of a disclosure under clause 18.1(a) or 18.1(b) and, where appropriate, under clause 18.1(d), 18.1(e) or 18.1(f), the party wishing to make the disclosure must inform the proposed recipient of the confidentiality of the information and the party must take customary precautions to ensure that the proposed recipient keeps the information confidential.
- (b) In the case of a disclosure under clause 18.1(h), 18.1(i) or 18.1(j) (in the case of consultants only), the party wishing to make the disclosure must not make any disclosure unless:
  - (i) in the case of a disclosure under clause 18.1(h) or 18.1(i), the proposed recipient has first entered into and delivered to the parties a confidentiality undertaking in a form acceptable to all parties; and
  - (ii) in the case of a disclosure under clause 18.1(j), the principal or employer of the proposed recipient has first entered into and delivered to the parties a confidentiality undertaking in a form acceptable to all parties which shall incorporate a warranty by the principal or employer of the proposed recipient that the proposed recipient is under an obligation of confidentiality to the principal or employer and that the principal or employer will enforce that obligation to the fullest extent that the law allows upon being called upon to do so by any of the parties.
- (c) The Customer consents to CBH publishing Port Grain Holdings pursuant to clause 18.1(k). The Customer acknowledges that whilst CBH will only disclose Port Grain Holdings, such disclosure to the public in accordance with this clause 18 may enable third parties to identify the quantities of grain stored by a Customer at a Port using this information in conjunction with other publicly available information including the shipping stem published in accordance with the Port Terminal Rules and the WEMA.

## 18.3 Notice to other Parties

Each party must:

- (a) promptly inform all other parties of any request received by that party from any person described in clause 18.1(d) to disclose information under clause 18.1(d);
- (b) inform all other parties as soon as reasonably practicable after information is disclosed by the party under clause 18.1(d); and
- (c) not disclose any information under clause 18.1(e) unless all other parties have been informed of the proposed disclosure.

## 18.4 Indemnities

Subject to clause 13, each party indemnifies each other party against any costs, losses or damages suffered by that other party arising out of or in connection with any disclosure by the first-mentioned party of information in contravention of this clause 18.

## 18.5 Binding nature of confidentiality obligations

The obligations of confidentiality imposed by this clause 18 survive the termination of this Agreement and any person who ceases to be a party continues to be bound by those obligations.

## 19 DISPUTE RESOLUTION

### 19.1 Disputes

- (a) Save for any dispute arising under:
- (i) the Auction Rules which shall be dealt with in accordance with the provisions of the Auction Rules; or
  - (ii) the Port Terminal Rules which shall be dealt with in accordance with the provisions of the Port Terminal Rules,
- all disputes arising out of or in connection with this Agreement shall be dealt with in accordance with the provisions of this clause 19.
- (b) A dispute shall be referred to the Customer's Manager and the CBH Supply Chain Manager for resolution. The CBH Supply Chain Manager and the Customer's Manager shall meet or confer at least once within 24 hours of the notification of the dispute to discuss the dispute and attempt to resolve the dispute.
- (c) Where the dispute relates to invoiced Services, the Customer is to inform the CBH Supply Chain Manager immediately, and before the due date of that invoice.
- (d) Any dispute relating to a breach of the terms and conditions of this Access Agreement shall not, of itself, amount to a dispute relating to a breach of the Undertaking or the rules forming part of the Undertaking.

### 19.2 Escalation of Dispute – Executive Panel

If no resolution of the dispute can be reached in accordance with clause 19.1, within seven (7) days of the dispute being notified to the other party, each party shall refer the dispute to the General Manager - Operations of CBH and the CEO of the Customer (or such person designated by the Customer as having authority equivalent to that of a CEO) (the "**Executive Panel**"). The Executive Panel:

- (a) will meet at least once at a time mutually convenient no later than 2 Business Days after the dispute has been referred to it; and
- (b) may decide on the methods and procedure by which it will resolve the dispute, which may include the obtaining of expert advice.

### 19.3 Payment of invoices pending resolution of a dispute

Notwithstanding anything in this Agreement, the Customer is not entitled to withhold payment of the undisputed amount of any invoice. If the Customer cannot provide a reasonable estimate of the disputed amount the Customer will not be entitled to withhold any payment.

### 19.4 Arbitration

- (a) Referral to arbitration
- (i) If the Dispute is not resolved within ten Business Days after being referred to the Executive Panel under clause 19.2, either of the parties may give notice to the other party to refer the Dispute to Arbitration in Western Australia by a single arbitrator appointed by agreement of the parties or if they fail to agree within ten Business Days, an arbitrator appointed by the President of the Western Australian Chapter of the Institute of Arbitrators and Mediators of Australia (**IAMA**) acting on the request of either party.
  - (ii) CBH must notify the ACCC of the details of any Dispute which has been referred to arbitration. CBH must provide the arbitrator's final determination to the ACCC.
  - (iii) If the Customer serves notice under clause 19.4(a)(i), that notice will also include an

agreement by that Customer to:

- (A) pay any amounts determined in accordance with clause 19.4 (f); and
  - (B) indemnify the arbitrator from any claims made against the arbitrator arising in connection with the performance by the arbitrator of its duties under this clause 19, such indemnity excluding circumstances where the conduct of the arbitrator constitutes wilful negligence, or is dishonest or unlawful conduct.
- (iv) CBH must pay any amounts determined in accordance with clause 19.4 (f) and will indemnify the arbitrator from any claims made against the arbitrator arising in connection with the performance by the arbitrator of its duties under this clause 19, such indemnity excluding circumstances where the conduct of the arbitrator constitutes wilful negligence, or is dishonest or unlawful conduct.
- (v) The arbitrator will not proceed with the arbitration unless and until the Customer has agreed to pay the arbitrator's costs as determined under clause 19.4(f).
- (b) Arbitration procedure
- (i) Unless CBH and the Customer agree otherwise, the arbitration must be conducted in private.
  - (ii) A party may appoint a person, including a legally qualified person, to represent it or assist it in the arbitration.
  - (iii) The arbitrator will when conducting the arbitration:
    - (A) observe the rules of natural justice but is not required to observe the rules of evidence;
    - (B) proceed as quickly as is possible and consistent with a fair and proper assessment of the matter;
    - (C) 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;
    - (D) call on any party the arbitrator believes necessary to give evidence;
    - (E) decide how to receive evidence and consider the need to keep evidence confidential and the need to protect the confidentiality of the arbitration process;
    - (F) present its determination in a draft form to the parties and hear argument from the parties before making a final determination; and
    - (G) hand down a final determination in writing which includes all its reasons for making the determination and findings on material questions of law and fact, including references to evidence on which the findings of fact were based.
  - (iv) The arbitrator may at any time terminate arbitration (without making an award) if it thinks that:
    - (A) the notification of the Dispute is vexatious;
    - (B) the subject matter of the Dispute is trivial, misconceived or lacking in substance; or
    - (C) the party who notified the Dispute has not engaged in negotiations in good faith.
- (c) Matters which arbitrator must take into account

In deciding a Dispute the arbitrator will take into account the principles, methodologies and provisions set out in the Undertaking, in particular clauses 7.4 and 8.6.

(d) Confidentiality

- (i) The arbitrator must take all reasonable steps to protect the confidentiality of information that a party has identified is confidential or commercially sensitive.
- (ii) The arbitrator may require the parties to comply with rules and orders aimed at protecting the confidentiality of information provided by the parties, including:
  - (A) requiring each party to give confidentiality undertakings to the other party and their external advisers; and



- (B) limiting access to confidential information to specified individuals subject to confidentiality undertakings provided by those individuals.
- (iii) The arbitrator may make confidential and non-confidential versions of its determination and limit access to the confidential versions to specific individuals.
- (iv) For the purpose of clarity, the entire dispute resolution process outlined in this clause 19 remains subject to clause 18.
- (e) Effect of arbitrator's determination
  - (i) The determination of the arbitrator will be final and binding subject to any rights of review by a court of law.
  - (ii) Except where the determination or direction is subject to a review by a court of law, if a Customer does not comply with a determination or direction of the arbitrator, then CBH will no longer be obliged to provide services under this Agreement for that Customer.
  - (iii) Except where the determination or direction is subject to a review by a court of law, CBH will comply with the lawful directions or determinations of the arbitrator.
  - (iv) The arbitrator shall have the discretion to determine that an arbitration determination shall take effect from the date of the determination, the date upon which the dispute was notified or the date of this Agreement.
  - (v) During any dispute process the parties must continue to comply with their obligations and exercise their rights under this Agreement.
- (f) 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.

## 20 ENTIRE AGREEMENT

- (a) This Agreement constitutes the entire Agreement between the parties. 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.
- (b) This Agreement may only be amended or varied:
  - (i) by agreement in writing signed by both parties expressly amending this Agreement;
  - (ii) pursuant to the variation procedure prescribed in the Undertaking; or
  - (iii) by operation of law.
- (c) Unless the context otherwise requires, a reference to this Agreement shall include a reference to this Agreement as amended or varied from time to time.
- (d) Notwithstanding that CBH from time to time produces operational guidelines to assist customers, nothing in those guidelines shall 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 shall prevail.

## 21 NOTICES

### 21.1 Types of Notices

Except as provided in clause 21.2, all notices of any kind and all statements, forecasts, advices, policy statements, procedures manuals, guidelines and the like, and all invoices given or made under this Agreement (each a "**Communication**") shall be:

- (a) in writing in the English language;
- (b) marked for the attention of the appropriate person; and

- (c) delivered by hand to the address of the addressee, or sent by ordinary letter post (airmail if posted to or from a place outside Australia) or hand delivery by a reputable courier service to the address of the addressee, or sent by facsimile to the facsimile number of the addressee.

## 21.2 Operational and Urgent Notices

Where this Agreement expressly so provides, and in those cases or categories of cases where the parties agree in writing, notices of a day to day operational nature or notices given in an operational emergency may be given orally and confirmed in writing. The parties shall also agree upon protocols, contact points and contact telephone numbers for dealing with matters which require urgent action in the administration of this Agreement, and shall ensure that lists of up-to-date contact points and telephone numbers are exchanged as and when required to ensure the currency of those lists.

## 21.3 Notice Takes Effect

Subject to clause 21.4, a Communication takes effect from the later of:

- (a) the time it is actually received; and
- (b) any later time specified in the Communication.

## 21.4 Deemed Receipt

For the purposes of this Agreement:

- (a) a Communication delivered by hand to the address of a party shall be deemed to be received if it is handed (with or without acknowledgment of delivery) to any person at that address who, in the reasonable judgment of the person making the delivery (upon making appropriate enquiries), appears to be and represents himself as a manager or officer of the party to whom the Communication is addressed;
- (b) a Communication which is posted is deemed to be received by the party to whom the Communication is addressed on the second Business Day after the day of posting;
- (c) a Communication sent by facsimile transmission which is transmitted:
  - (i) prior to 4 p.m. on a Business Day shall be deemed to have been received by the party to whom it is addressed on that Business Day; and
  - (ii) after 4 p.m. on a Business Day shall be deemed to have been received by the party to whom it is addressed on the first Business Day following the date of transmission; and
  - (iii) the production of the transmission report or a printout of a transmission log generated by the sender's facsimile machine (or other facsimile transmission device) showing successful uninterrupted facsimile transmission of all pages of the relevant Communication to the facsimile number of the party to whom it is addressed and proof of confirmation by physical delivery or mailing as provided above shall constitute evidence of receipt of that facsimile transmission; and
- (d) a Communication given orally under clause 21.2 shall be deemed to have been received when first given orally.

## 21.5 Change of Address

A party may at any time, by notice given to the other parties to this Agreement, designate a different person, street address, postal address, electronic mail address or facsimile number for the purpose of Communications pursuant to this clause 21.

## 21.6 Electronic Mail

- (a) The parties agree, that in the absence of evidence to the contrary, an electronic mail message sent by a party to the electronic mail addresses notified by the parties shall be deemed to be received on the day after the day that the electronic mail message is recorded as having been sent by the sender's computer server.
- (b) Messages relating to the following subjects will not be valid if sent by electronic mail:

- (i) termination of this Agreement;
- (ii) disputes;
- (iii) change of address, phone number, fax number or electronic mail address.

## 22 ASSIGNMENT

### 22.1 General Prohibition

Neither party may 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 other party.

### 22.2 Deed of Covenant

The assignee must enter into a deed of covenant with the party whose consent is sought, acknowledging that party's rights under this Agreement and undertaking by way of novation to observe and perform all the assignor's obligations under this Agreement. Such deed of covenant shall be prepared by the party whose consent is sought in such reasonable form as that party requires, but at the expense of the assignor. The deed shall be stamped by and at the expense of the assignor.

## 23 WAIVER

- (a) No right under this Agreement shall be deemed to be waived except by notice in writing signed by each party.
- (b) No default or delay on the part of any party exercising any of its rights or obligations under this Agreement shall operate as a waiver of any such right or obligation under this Agreement.

## 24 NO PARTNERSHIP

- (a) Nothing contained in this Agreement will be deemed or construed by the Customer or CBH or by any third party as creating the relationship of partnership, principal and agent, or joint venture.
- (b) No relationship between the Customer and CBH other than that of bailor and bailee upon the conditions and provisions in this Agreement will be created by the payment of any money under this Agreement, any other conditions or provision in this Agreement or any act of the Customer or CBH.

## 25 GOVERNING LAW AND JURISDICTION

### 25.1 Governing law

This Agreement shall be governed by and construed in accordance with the laws of the State of Western Australia.

### 25.2 Jurisdiction

Each Party irrevocably submits to and accepts generally and unconditionally the non-exclusive jurisdiction of the courts and appellate courts of Western Australia.

## 26 ATTORNEYS

Each individual signing this Agreement on behalf of a party warrants that the individual has been duly authorised to execute this Agreement and to bind that party on whose behalf the individual is signing.

## 27 SUB-CONTRACTING

CBH may in its sole and absolute discretion:

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

without notice to the Customer.

## 28 SEVERANCE

If any term or other part of this Agreement is or becomes for any reason invalid or unenforceable at law, the remainder of this Agreement shall continue to be valid and enforceable and such term or other part of this Agreement shall be severed or modified without affecting the remainder of this Agreement.

## 29 RE-NEGOTIATION OF TERMS

### 29.1 Change in Law

- (a) Subject to clauses 29.1(c) and 29.2, if at any time during the Term:
- (i) the costs to CBH of operating and maintaining the Port Terminal Facility for the purposes of supply of the Port Terminal Services under this Agreement and otherwise complying with its obligations under this Agreement are increased to a material extent ("**Increased Costs**"); and
  - (ii) the Increased Costs are a result of the enactment or promulgation of any new Act of Parliament or regulation or the amendment of any existing Act or regulation by a Government Agency relating to the management or protection of the environment or the health and safety of workers, including any tax on the emission of carbon, sulphur or nitrogen compounds (a "**Change in Law**"),
- then CBH shall be entitled to increase the price paid by the Customer under this Agreement for the provision of Port Terminal Services as may be necessary to offset those Increased Costs. In any such case, CBH shall provide the Customer with a statement providing such information as is necessary to demonstrate:
- (iii) the causal relationship between the Change in Law and the Increased Costs referred to;
  - (iv) the reasonableness and necessity of the measures taken by CBH to comply with the Change in Law; and
  - (v) the nature and extent of any increase in the price paid by the Customer under this Agreement for Port Terminal Services necessary to offset the Increased Costs referred to.
- (b) A statement by CBH under clause 29.1(a)(ii) shall be deemed to constitute a request by CBH for a variation of this Agreement and shall be dealt with as a request for a variation under the terms of the Undertaking.
- (c) CBH shall not be entitled to seek any increase under clause 29.1(a) in the price paid by the Customer under this Agreement for Port Terminal Services to the extent that the Increased Costs are a consequence in whole or in part of a failure by CBH to operate and maintain any Port Terminal Facility in accordance with Good Operating Practices.

### 29.2 Income and payroll taxes

Each Party shall be liable for its own income tax and payroll tax levied now or at any time in the future by any Government Agency, whether or not they affect the cost to that Party of complying with its obligations under this Agreement.

**Signed** for and on behalf of **Co-operative Bulk Handling Limited** (ABN 29 256 604 947) in the presence of:

\_\_\_\_\_  
Signature of Witness

\_\_\_\_\_  
Name of Witness in full

**Signed** for and on behalf of **xxx** (ABN xxx in the presence of:

\_\_\_\_\_  
Signature of Witness

\_\_\_\_\_  
Name of Witness in full

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Name

\_\_\_\_\_  
Position

\_\_\_\_\_  
Date CBH's authorised representative signed this Agreement

\_\_\_\_\_  
Signature of authorised representative

\_\_\_\_\_  
Name

\_\_\_\_\_  
Position

\_\_\_\_\_  
Date Customer's authorised representative signed this Agreement

## **SCHEDULE 1**

### **Payment**

All charges payable pursuant to this Agreement are to be paid in accordance with clause 9 of this Agreement. As set out in clause 10, CBH has the discretion not to Outturn Bulk Wheat until all outstanding fees and charges have been paid.

The Fees and Charges Schedule is published consistent with the Undertaking and is available at [www.cbh.com.au](http://www.cbh.com.au). The Fees and Charges Schedule forms part of this Agreement. CBH may vary the Fees and Charges Schedule in accordance with the Undertaking. Any amendment to the Fees and Charges Schedule will take effect under this Agreement at the same time as it takes effect under the Undertaking.

## SCHEDULE 2

### Auction Premium Rebate

#### AUCTION PREMIUM REBATE

The Auction Premium Rebate shall be calculated based on the following formula for each Auction during the Season:

$$APR = \left( \frac{TAP - TAC}{TTSAC} \right) \times TTSC$$

Where:

APR is amount of the Auction Premium Rebate paid to the Customer in respect of an Auction.

TAP is the total Auction Premiums received by CBH for Auction Capacity in respect of an Auction including any interest earned by CBH on those Auction Premiums.

TAC is the Total Auction Costs attributed to that Auction.

TTSAC is the total tonnes of grain shipped from all four Port Terminal Facilities by all CBH Customers using Auction Capacity acquired in that Auction .

TTSC is the total tonnes of Bulk Wheat shipped by CBH on behalf of the Customer from all Port Terminal Facilities using Auction Capacity acquired in that Auction.